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EDITOR'S MESSAGE

Even as we suffer COVID-19, the world of legislation lives on. The House Civil Justice Committee has held hearings on HB 464, the OSBA pending omnibus bill, and has added a number of items to it at the request of other groups; see report by John Furniss below. The OSBA Council of Delegates met July 24, with seven proposals before it from the EPTPL Section that with adoption by the Council are also to be added to the omnibus bill; see the list of them and citations to explanations of them in the Legislative Scorecard

Also live is a proposal to simplify execution of estate planning documents during the COVID-19 emergency. The proposal was not included in HB 197, the emergency bill of this past March, but is now on track for enactment. For further information on it see also the report by John Furniss below.

EMERGENCY LEGISLATION TO FACILITATE EXECUTION OF ESTATE PLANNING DOCUMENTS: EFFORTS ARE ON-GOING

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As many states issued stay-at-home, social distancing, and other orders in response to the COVID-19 pandemic

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in March of this year, estate planning attorneys encountered unique challenges in assisting clients with the preparation and execution of estate planning documents, such as wills, powers of attorney, and medical advance directives. As other articles in this issue of *Probate Law Journal of Ohio* illustrate, attorneys have been forced to be creative in responding to these unprecedented circumstances. Still, there are many clients who have been unable to meet with their attorneys to execute estate planning documents, despite an urgent need to address their plans. This predicament has been most pronounced in the case of clients residing in nursing homes, where visitors are prohibited and staff members are typically not permitted to facilitate the execution of legal documents.

Many states have responded to these challenges by enacting legislation or issuing emergency orders that would ease execution requirements on a temporary basis during the period of emergency. In Ohio, these types of efforts have been led by the Ohio State Bar Association Estate Planning, Trust, and Probate Law Section (the "EPTPL Section").

On Friday, March 20, 2020, the EPTPL Section formed an ad hoc committee to consider and develop proposals to address the challenges to estate planning posed by COVID-19 and the measures that have been put in place to limit its spread. This ad hoc committee was comprised of the current officers of the Section Council, as well as certain past Chairs and current members of the Council. On Monday, March 23, 2020, the ad hoc committee finalized its emergency proposal and, with the assistance of the OSBA, sought to have it enacted as part of a package of emergency legislation related to the pandemic that was expected to be enacted later that week.

On Wednesday, March 25, 2020, that package of emergency legislation, which was contained in H.B. 197, passed both the Senate and the House, and became effective on March 27, 2020. However, it did not include the ad hoc committee's proposal to relax execution requirements for estate planning documents on a temporary basis. In the frenzied environment surrounding the pandemic and the first legislative response to it, potential legislative sponsors required assurance that the ad hoc committee's proposal was not objectionable to the probate judges.

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After H.B. 197 was enacted and the House and Senate were on break, the ad hoc committee and representatives of the Ohio Association of Probate Judges collaborated to discuss the emergency proposal, to address potential opportunities for misuse and abuse of its provisions, and to develop proposals that would strike a reasonable balance between the need to facilitate estate planning in a pandemic while limiting the opportunities for others to take advantage of elderly and vulnerable Ohioans.

The result of this collaboration was a revised proposal that addresses the perspectives and concerns of both attorneys and probate judges. In the short term, it is anticipated that this proposal will be enacted and provide a solution, on a temporary basis, to the challenges presently facing estate planning attorneys and their clients. In the long term, this collaboration has highlighted the benefits that can result when the bench and bar work together to protect the interests of Ohio citizens. As proposals begin to circulate to allow, on a permanent basis, some form of remote execution of wills and other estate planning documents, it is critical that these two groups actively engage and propose measures to protect Ohio citizens, especially our elderly and most vulnerable citizens.

The following is a summary of the emergency proposal in its current form. If enacted, these measures would be temporary law that will be effective immediately and will remain in effect until March 31, 2021.

WILLS

CURRENT LAW

Under R.C. 2107.03, a will must be in writing, signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction, and must be attested and subscribed in the conscious presence of the testator by two or more competent witnesses who saw the testator subscribe, or heard the testator acknowledge the testator's signature. To be in the "conscious presence," the witnesses and a person signing at the direction of the testator must be within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other contemporaneous communication.

EMERGENCY PROPOSAL

The emergency proposal would ease the execution requirements for a will on a temporary basis during the state of emergency. To accomplish this, the emergency legislation would provide that "conscious presence" can be established, on a temporary basis during the period of emergency, by means of live two-way, audio video communication if the testator and the individual can verbally communicate and visually observe one another contemporaneously and if they are all physically present in the State of Ohio at the time the will is executed. This temporary measure would allow wills to be executed as long as the testator has access to a smart phone, computer, tablet, or other audio-video communication device.

The emergency proposal also would require additional measures to admit to probate a will that has been executed pursuant to these temporarily-relaxed execution standards. When the person who created the will dies, the probate court will not admit the will to probate unless it appears, either from a recording of the audio-video communication during which the will was

executed or from the testimony of the witnesses to the will, that the execution of the will complies with Ohio law. This requirement helps to ensure that wills executed pursuant to these temporarily-relaxed execution standards are subject to additional scrutiny by a probate court to confirm that the execution of the will was proper.

FINANCIAL POWERS OF ATTORNEY.

CURRENT LAW

Although financial powers of attorney are often notarized, Ohio law does not require that they be notarized in order for a principal to authorize an agent to take certain financial actions on the principal's behalf. However, under R.C. 1337.25, a signature on a power of attorney is presumed to be genuine if the principal acknowledges his or her signature before a notary public.

EMERGENCY PROPOSAL

The emergency proposal would provide that, on a temporary basis during the state of emergency, in addition to the provisions of current law, a signature on a power of attorney would also be presumed to be genuine if the principal acknowledges his or her signature before two or more competent witnesses who saw the principal subscribe, or heard the principal acknowledge the principal's signature in the "conscious presence" of the principal. For these purposes, "conscious presence" could be established, on a temporary basis, by means of live two-way, audio video communication if the principal and the witnesses can verbally communicate and visually observe one another contemporaneously and if they are all physically present in the State of Ohio at the time the power of attorney is executed. This temporary measure would allow financial powers of attorney to be executed and to enjoy the presumption that the principal's signature is genuine as long as the testator has access to a telephone, smart phone, or other audio-video communication device.

HEALTH CARE POWERS OF ATTORNEY AND LIVING WILLS.

CURRENT LAW

A health care power of attorney allows a principal to designate agents to make most health care decisions for the principal in the event the principal loses the capacity to make informed health care decisions for him or herself. A living will declaration allows a declarant to establish his or her wishes that life-sustaining treatments be withheld or withdrawn if the declarant is unable to make informed medical decisions and is in a terminal condition or a permanently unconscious state.

Under R.C. 1337.12(A)(1)(b) (in the case of health care powers of attorney) and under RC. 2133.02 (in the case of living wills), these documents, commonly known as medical advance directives, must be witnessed or acknowledged before a notary public in order to be valid.

EMERGENCY PROPOSAL

The emergency proposal would provide that, on a temporary basis during the state of emergency, medical advance directives are not subject to the requirement that they be witnessed or acknowledged before a notary public in order to be valid. Thus, with this proposal, an individual could execute a health care power of attorney and a living will even if he or she does not have access to witnesses or a notary public. However,

an individual would not be permitted to nominate a guardian for his or her person, estate, or both under a health care power of attorney that was executed pursuant to these temporary measures.

It was the ad hoc committee's view that, while not free from the potential for abuse, health care powers of attorney and living will declarations are less likely than estate planning documents dealing with financial affairs to be subject to attempts to take advantage of vulnerable individuals. Further, the ad hoc committee concluded that facilitating the appointment of decision makers during this public health crisis would be beneficial to all Ohioans as well as to Ohio's health care system.

ENDNOTES:

*The EPTPL Section has been fortunate to have the engagement and input of so many individuals and groups in developing this emergency proposal: the dedicated members of the ad hoc committee; the staff and leadership of the OSBA; the Ohio Judicial Conference and its representatives; the OSBA Elder Law Section; the OSBA Real Property Section; the Ohio Chapter of the National Academy of Elder Law Attorneys; elected officials in the House and Senate and their staffs; the Governor's Office; and the Legislative Services Commission. It is our hope that these efforts will soon result in some relief for estate planning attorneys and, more importantly, their many clients throughout the State. The OSBA is currently working to secure its introduction and is optimistic that it will move forward soon.

2020 PROBATE OMNIBUS BILL (H.B. 464) ATTRACTS ADDITIONAL PROPOSALS

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Several legislative proposals developed by the Ohio State Bar Association ("OSBA") Estate Planning, Trust, and Probate Law Section were introduced in the Ohio General Assembly on January 9, 2020 as House Bill 464. H.B. 464 was referred to the House Civil Justice Committee, which has held four hearings on the bill, the latest of which was on June 10, 2020.

H.B. 464 includes the following four proposals that are sponsored by the OSBA: (1) A proposal to amend R.C. 2111.50 to allow a guardian to seek probate court approval to utilize certain estate planning techniques, thereby enhancing the guardian's ability to protect, preserve, and efficiently administer the ward's estate for the ward's beneficiaries; (2) A proposal to clarify that the spousal share of the allowance for support is reduced only by the value of the automobile taken under R.C. 2106.18 with the least value; (3) A proposal to repeal R.C. § 5805.06(B)(2), thereby providing that, upon the lapse or termination of a power holder's right of withdrawal, the power holder's interest would no longer be available to the creditors of such beneficiary; and (4) A proposal that would confirm that the change of a future or successor trustee named in a trust agreement, whether by a court order or by a private settlement agreement, is not prohibited. H.B. 464 also includes a proposal on private judging that has been advocated by the Ohio Judicial Conference.

In a positive sign of H.B. 464's prospects for enactment, four amendments were recently added to H.B. 464. While none of these amendments was sponsored by the OSBA, each will be of interest to Ohio estate

planning attorneys and is summarized below.

NONPROFIT CORPORATION AS GUARDIAN

Amendment Number 2411 to H.B. 464 is a proposal supported by the Ohio Judicial Conference, the Ohio Guardianship Association, and Advocacy for Protective Services, Inc. This proposal would amend R.C. 2111.10 to provide that an Ohio non-profit, tax-exempt corporation can be appointed as guardian of both the estate and the person of an incompetent when certified by the probate court to receive such an appointment. The probate court would certify such a nonprofit corporation and any individual working for the corporation upon meeting the requirements for serving as a guardian as prescribed in the Rules of Superintendence and under applicable local rules. This approach is presently utilized for wards with developmental disabilities and non-profit corporations with a contractual relationship with the Department of Developmental Disabilities, but, with this proposal, would be expanded to all incompetents.

Judge Charlotte Eufinger of the Union County Probate & Juvenile Court explained the background of this proposal in proponent testimony on June 2, 2020:

> Some time ago I raised the need to establish a small county alternative to the Guardianship Services Board, per R.C. 2111.52. As a small county, Union County has created a guardianship program that provides experienced, capable guardians to serve as guardians of the person for members of our community who do not have a family member or friend able and willing to serve. Currently the Union County Guardianship Services program has less than 16 wards who are served by four part-time guardians. Most guardians in our county are family members of their ward. We have found that in our county, it is a prospective ward who has mental health and/or developmental disability issues for whom we have difficulty locating a guardian to be appointed. However, if that guardian goes on vacation or takes a different job, another "staff guardian" cannot take over unless he or she applies to be successor guardian which takes court time and the additional expenses for an application to be filed and a hearing to occur. The Court Investigator is also involved as well as appointed counsel.

METHOD FOR MAKING ANATOMICAL GIFTS

Amendment Number 1689X1 to H.B. 464 is a proposal that was developed by organ procurement organizations Lifebanc, Life Center, Life Connection and Lifeline of Ohio. The OSBA also expressed its support for this proposal.

This proposal would narrow the methods by which a donor may make an anatomical gift. It would eliminate the opportunity to express a willingness to make anatomical gifts by last will and testament or by living will declaration. Instead, donors could signify their willingness to make anatomical gifts by authorizing a statement or symbol to be imprinted on the donor's driver's license or identification card[1], by communicating such intent to witnesses during a terminal illness or injury[2], by signing a donor card or other record, or by being included in the donor registry.[3]

The rationale for this change is that it would allow for donors to be more quickly identified and would avoid confusion that sometimes results when there are multiple inconsistent instructions. Making anatomical gifts by will or by living will declaration

can be problematic because often such documents are not discovered until after the death of the donor when it is too late for the gift to be made. Further, there have been instances when the instructions in a will or a living will declaration have been inconsistent with the instructions in the donor registry, thereby leading to confusion about a donor's true intent. By eliminating these more problematic options, donors will be steered toward more efficient and effective methods for expressing their wishes.

The benefits of this change were explained in proponent testimony from Michele Fitzgibbon on June 2, 2020, on behalf of the organ procurement agencies that developed the proposal:

> Ohioans primarily register to become donors through the Ohio Donor Registry, which is maintained at the Ohio Bureau of Motor Vehicles. Organ procurement organizations, tissue banks and eye banks have access to the registry at the time of an individual's death to determine if an individual consented to donation. By removing this provision from the Ohio Revised Code, estate planners will be able to direct Ohioans to the Ohio Donor Registry, which will provide individuals with information to register directly through the Ohio BMV. This will ensure that an Ohioan's intent to register is documented in a location that is easily retrievable. Often, living wills are not known by a decedent's loved one(s), or if known, is not readily available within the time-sensitive process of organ donation to determine if a choice of an anatomical gift had been made. Additionally, by directing individuals to the donor registry, they can obtain information to address any questions they may have about donation and may find that they have already registered.

If this proposal is enacted, the optional anatomical gifts section of the current living will declaration will be eliminated. It is anticipated, though, that the living will declaration form will include information about anatomical gifts and direct potential donors to the donor registry.

UPDATES TO OHIO LEGACY TRUST ACT

The Ohio Legacy Trust Act was codified as Revised Code Chapter 5816 and became effective March 27, 2013. With this Act, Ohio became one of a handful of jurisdictions to authorize domestic asset protection trusts.

Amendment Number 2505 to H.B. 464 would make various revisions to the Ohio Legacy Trust Act, marking the first changes to the Act since it became effective in 2013. Although these proposals did not originate with the OSBA EPTPL Section, the OSBA supports them.

First, the proposal would allow a licensed or unlicensed family trust company under R.C. 1112.01 to be a qualified trustee of a legacy trust.[4] However, in order to be a qualified trustee, the family trust company would need to satisfy certain requirements, including the following: it must maintain an office in Ohio; it must open and maintain at least one bank or brokerage account in Ohio; it must maintain in Ohio, on an exclusive or nonexclusive basis, electronic or physical records for the legacy trust; it must satisfy certain requirements under R.C. 1112.14. Further, no beneficiary of a legacy trust, when acting for or on behalf of a family trust company or as an officer, manager, director, employee, or other agent or representative of a family trust company, may have any vote or authority regarding any decision to make or withhold any distribution from the legacy trust to or for the benefit of that beneficiary.

Second, the proposal would coordinate the

decanting provisions of R.C. 5808.18 with the Ohio Legacy Trust Act.[5] The transfer (or decanting) of assets from a first legacy trust to a second legacy trust would be considered a qualified disposition under the Ohio Legacy Trust Act, even if the qualified trustee of the first legacy trust is the same as the qualified trustee of the second legacy trust. The proposal also establishes rules for determining the date by which an item of property, or the proceeds thereof or substitutes therefor, are considered to have been transferred to the trustee of the second legacy trust, which is an important detail for legacy trusts.

Third, the proposal provides that a legacy trust may give the transferor of assets a right to substitute assets. It provides that "[a] power held by a transferor allowing the transferor, while acting in a nonfiduciary capacity, to substitute property of equivalent value for any property that is part of the principal of the legacy trust" is not considered a power to revoke a trust or to voluntarily or involuntarily transfer an interest in that trust.[6] This change will ensure that the use of this type of power to trigger grantor trust status under Internal Revenue Code Section 675(4)(c) will not affect the trust's status as a legacy trust.

Fourth, the proposal includes certain provisions that are designed to strengthen the asset protection associated with Ohio legacy trusts. For example, the proposal would add language to R.C. 5816.10(A) to provide that, in the event of any conflict with the Uniform Fraudulent Transfer Act under R.C. Chapter 1336, the provisions of the Ohio Legacy Trust Act shall control and prevail "to the maximum extent permitted by the Ohio Constitution and the United States Constitution. When determining whether a provision of law is similar to any provision of Chapter 1336. of the Revised Code, a court shall be liberal in finding that such similarity exists." Further, proposed R.C. 5816.10(K) would provide that the Ohio Legacy Trust Act and its provisions "reflect and embody the strong public policy of this state."

Fifth, the proposal would make additional clarifying changes and tweaks to various provisions of the Ohio Legacy Trust Act.

ADMINISTRATION OF CEMETERY ENDOWMENT CARE TRUSTS

Amendment Number 2497 to H.B. 464 would update the provisions of Ohio law relating to the investment and use of cemetery endowment care trusts that are required to be maintained by cemeteries under R.C. 1721.21. Under current law, an endowment care trust may use only the dividend and interest income to pay authorized expenses.[7] However, the proposal in Amendment 2497 would allow the cemetery to choose whether the distribution it receives will be all net ordinary income or a unitrust disbursement not exceeding 5% of the three-year average fair market value of the endowment care fund.[8] If the cemetery selects the unitrust disbursement distribution method, the cemetery must deliver to the trustees written instructions, including the disbursement percentage selected, and provide notice of same to the Division of Real Estate of the Department of Commerce.[9] If the trustees do not receive written instructions from the cemetery informing the trustees of the method of calculation and distribution chosen, the trustee will calculate and distribute the net income, as earned, on a monthly basis.[10]

In addition, the trustees of an endowment care trust would be required to ensure that an investment policy is in place "whose goals and objectives are supportive of the growth of the endowment care trust."[11]

The proposal would limit the use of the unitrust method when there is a sudden drop in value. The fair market value of the endowment care trust after the distribution must be greater than 80% of the aggregate fair market value of the trust as of the end of the immediate preceding calendar year. If that is not the case, then only the net ordinary income may be disbursed.[12]

In addition, the proposal would reduce the unitrust disbursement amount to the extent the reasonable operating expenses and taxes of the endowment care trust exceed 2½ percent of the fair market value of the trust as of the preceding calendar-year end.

ADDITIONAL PROPOSALS?

On July 24, 2020, the OSBA Council of Delegates will consider whether to support seven additional proposals from the OSBA Estate Planning, Trust, and Probate Law Section. If these proposals are approved, it is anticipated that some or all of them may be added to H.B. 464 by amendment and, hopefully, enacted by the end of this General Assembly. The end of a General Assembly session typically entails a flurry of enactments, and it is hoped that these improvements to Ohio's estate planning, trust, and probate laws will be among them.

ENDNOTES:

[1]R.C. 2108.05(A)(1).
[2]R.C. 2108.05(A)(4).
[3]R.C. 2108.05(A)(5) & (B).
[4]Proposed R.C. § 5816.02(S).
[5]Proposed R.C. § 5816.10(I).
[6]Proposed R.C. § 5816.05(N).
[7]R.C. 1721.21(I).
[8]Proposed R.C. § 1721.21(K)(1).
[9]Proposed R.C. § 1721.21(K)(2).
[10]Proposed R.C. § 1721.21(K)(3)
[11]Proposed R.C. § 1721.21(K)(2)(b).
[12]Proposed R.C. § 1721.21(K)(4).

CHANGING WITH THE TIMES: REMOTE SIGNINGS AND PANDEMIC NOTARIZATION

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Due to the fear and uncertainty surrounding the COVID-19 pandemic, many clients, existing and prospective, are now quite interested in making sure their estate planning affairs are in order—an undertaking that for many has been delayed for years or even decades. And, thankfully, many estate planning and probate practitioners have been successful at establishing unique solutions in order to manage their clients' anxieties and legal needs while complying with the state imposed stay-at-home orders and social distancing requirements.

From Zoom videoconferences and FaceTime calls to "front-porch" and "parking-lot" signings, we as practitioners have been presented with several challenges surrounding the COVID-19 pandemic that have required

us to substantially modify our practices seemingly overnight. Until now, one could argue that a successful estate planning practice revolved around meeting clients *in person* in order develop relationships and a thorough understanding of clients' desires and needs, not to mention satisfying the physical (and/or conscious) presence and other requirements for executing estate plan documents. Trust and estate attorneys look to provide support to those who have lost a loved one and who must handle their decedent's affairs while dealing with the grieving process.

In addition to the technical and logistical challenges most of us have already experienced, states have started to react to the pandemic and its effects by enacting laws that temporarily authorize remote witnessing of wills or the use of remote notarization.[1] The harmless error doctrine[2] has also been temporarily adopted in several states to allow attorneys to provide justification for failure to comply with legal requirements in emergency situations. While there are benefits to being able to remotely execute estate planning documents and to the protections afforded by the harmless error rule, these temporary (or permanent) solutions are accompanied by some significant risks of which we as estate planning and probate practitioners must be aware.

The challenges involved with managing an estate planning practice during the COVID-19 pandemic were discussed at the 2020 American College of Trust and Estate Counsel ("ACTEC") Virtual Summer Meeting. One particularly interesting topic involved the distinction between remote online notarization ("RON") and remote ink-signed notarization ("RIN"),[3] and the measures various states have implemented surrounding both RON and RIN. Twenty-three states, including Ohio,[4] had, prior to the pandemic, passed laws permitting RON,[5] while others instead, or in addition to, have begun permitting RIN. While many practitioners assume that a notary who is authorized to perform RON also has the power to remotely notarize paper documents that are physically signed (i.e. RIN), that appears not to be the case, as the statutes generally only permit remote notarization of documents that are signed electronically.

Generally, RON involves the use of an approved online platform from a software provider that incorporates audiovisual conferencing and recording, identity verification method(s), and real-time presentation of electronic documents for signatures by the signer and the notary public. In many states, a notary must, at a minimum, register with the state in order to permissibly perform RON.

A RON typically involves the following steps:

- The signer's document is sent to the notary so it can be signed and notarized. Typically, the document is uploaded in an electronic format such as PDF to the online technology platform used to perform the notarization.
- The signer's identity is screened according to the requirements of the notary's commissioning state. The identity verification method may include knowledge-based authentication, which requires the signer to correctly answer a set of personal questions within a certain period of time, credential analysis, which may involve scanning the signer's identification to confirm it is

valid, and/or remote presentation of the signer's identification.[6]

- During the remote online notarization, the notary and the signer communicate online using audiovisual technology.
- Once the signer's identity has been verified and all other requirements for the notarization have been completed, both the signer and the notary electronically sign the document and an electronic version of the notary's seal is attached.
- The notary records any required information for the notary's journal records and must typically retain an audio and video recording of the notarization session.
- The remotely notarized document is returned to the signer.[7]

Conversely, RIN involves the use of real-time audiovisual technology, such as FaceTime, Microsoft Teams, Skype, or Zoom, to satisfy the physical presence requirement for notarial acts and permit what would in other respects be a traditional, in-person signing. Unlike RON, in which electronically signed and notarized documents are produced, RIN typically results in paper documents with ink signatures and notarization.

The following steps are generally included in a RIN:

- The notary and signer appear before each other using a live, real-time audiovisual conference system.[8]
- The notary identifies the signer using the methods allowed under the law or executive order.
- The signer signs the document and faxes or scans and emails the signed document to the notary during the video conference or later that same day.
- The notary prints out the document received from the signer and completes the notarial certificate in pen and ink.
- The notary faxes or transmits electronically the notarized document back to the signer. Some states also authorize the signer to mail the originally signed document to the notary to notarize within a certain number of days of the RIN.[9]

Surely, permitting electronic and virtual signings is a practical, temporary solution to the social distancing and other requirements related to the COVID-19 pandemic. However, we as practitioners must be cognizant of the potentially permanent effects of these temporary solutions. There are significant concerns surrounding the use and process of remote execution and notarization of documents. For example, the potential for data privacy breaches with remote notarization is considerably greater than with traditional notarization. Additionally, in some instances, the notary or witnesses must attest that he or she believes that signer appears to be of sound mind and not under or subject to duress, fraud, or undue influence.[10] It is much more difficult for a remote witness or notary to be aware of who is in the signer's presence and to confirm that no one is unduly influencing the signer. In these situations, practitioners must take steps to protect against any potential challenges that may be raised in the future. These issues are also of critical importance in connection with electronic wills, such as Ohio's currently pending H.B. 692.

We must also be mindful to perform mod-

ified in-person signings in a manner that is consistent with legal requirements for the valid execution of estate planning documents. One example Karen Boxx discussed during her ACTEC presentation, *Where There's a Will: Ethical Concerns for Estate Planners Raised by Remote Lawyering*, involved a will, which was executed at an elderly client's home. In particular, the witnesses to the will signed their names on the self-proving affidavit and subsequently passed the will to the client for the client to sign with the witnesses watching through a window. The witnesses signed first so as to not have to be exposed to the document after the client signed in the event the client was contagious. Although Ohio[11] and several other states contemplate the potential for errors during the execution process, we should not rely on this safe harbor when errors can be avoided, especially in those instances where the practitioner has justified concerns of a potential future contest.

While we are about six months into the COVID-19 pandemic, Ohio has been slow to react to the needs of estate planning practitioners. Fortunately, a bill proposed by the Ohio State Bar Association[12] will dispense with notarization requirements in financial and health care powers of attorney for the next several months. These accommodations may help in the short term, but they could cause problems in the future. For example, while there is no requirement in Ohio that a power of attorney be notarized, one that is notarized is presumed to be valid. Nearly all of us have experienced issues in attempting to get large financial institutions to honor powers of attorney. One can only imagine how much more difficult those conversations might be years in the future regarding the acceptance of witnessed but unnotarized powers of attorney executed during the relatively short emergency window defined in the OSBA proposal. Although the issues of fraud or undue influence appear to be more difficult to detect when documents are executed remotely, our limited experience with these factors during this pandemic is only a preview of coming attractions. While the national move toward the acceptance of electronic wills and other estate planning documents will move these issues to the front burner, it is important to keep our concerns in the proper perspective. Most of our clients go to great lengths to avoid probate using commonly available tools, including beneficiary designations, joint ownership arrangements, TOD designations, and trusts, most of which have no witness or notary requirements. As artificial intelligence continues its rapid development, the real concern in coming years will likely be its use in permitting non-lawyers to prepare entire estate plans without the benefit of legal counsel.

ENDNOTES:

[1]A summary of the changes made by various states to their notary requirements can be found on the website of the National Notary Association here: https://www.nationalnotary.org/knowledge-center/news/law-updates.

[2]The harmless error doctrine was codified in Section 2-503 of the Uniform Probate Code:

> Although a document or writing added upon a document was not executed in compliance with Section 2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:
>
> (1) the decedent's will,

(2) a partial or complete revocation of the will,

(3) an addition to or an alteration of the will, or

(4) a partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will..

[3]This topic was discussed by Andrew J. DeMaio during his presentation, *Where We are and How We got Here* and by Jim Lamm at the Digital Assets committee meeting.

[4]Ohio's remote online notarization legislation, codified in R.C. 147.60 - 147.66, went into effect on September 20, 2019.

[5]Those states are: Arizona, Florida, Idaho, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin. Theodora McCormick, *The Race to Embrace Remote Online Notarization ("RON") in Response to the COVID-19 Pandemic*, The Nat'l L. Rev. (Mar. 31, 2020), https://www.natlawreview.com/article/race-to-embrace-remote-online-notarization-ron-response-to-covid-19-pandemic

A number of these states' RON laws were modeled after the Revised Uniform Law on Notarial Acts ("RULONA"). The RULONA was created by the Uniform Law Commission in 2010 and updated in 2018 to authorize notaries public to conduct remote online notarizations, which is available at: https://www.uniformlaws.org/committees/community-home?CommunityKey=8acec8a5-123b-4724-b131-e5ca8cc6323e. Other states base their RON legislation on the Model Notary Act of 2010, which is available at https://www.nationalnotary.org/file%20library/nna/reference-library/2010_model_notary_act.pdf.

[6]R.C. 147.64(E) provides Ohio's verification process for online notarization:

(E)(1) In performing an online notarization, a notary public shall determine from personal knowledge or satisfactory evidence of identity as described in division (E)(2) of this section that the principal appearing before the notary by means of live audio-video communication is the individual that he or she purports to be.

(2) A notary public has satisfactory evidence of identity if the notary can identify the individual who appears in person before the notary by means of audio-video communication based on either of the following:

(a) All of the following:

(i) Remote presentation by the principal of a government-issued identification credential, including a passport or driver's license, that contains the signature and photograph of the principal;

(ii) Credential analysis of the identification credentials provided;

(iii) Identity proofing of the principal.

(b) Verification by one or more credible witnesses who appear in person before the notary and who can be identified by either personal knowledge or all of the following:

(i) Presentation of a government-issued identification credential, including a passport or driver's license, that contains the signature and photograph of the witness;

(ii) Credential analysis of the identification credentials provided;

(iii) Identity proofing of the witness.

[7]David Thun, *How to Perform a Remote Online Notarization*, Nat'l Notary Ass'n (Dec. 16, 2019), https://www.nationalnotary.org/notary-bulletin/blog/2019/12/how-to-perform-a-remote-online-notarization.

[8]Some states require that the videoconference be recorded and retained for a period of time by the notary public. https://www.nationalnotary.org/notary-bulletin/blog/2019/12/how-to-perform-a-remote-online-notarization.

[9]Bill Anderson, *10 Standards of Practice for Remove Ink-Signed Notarizations*, Nat'l Notary Ass'n (Apr. 16, 2020) https://www.nationalnotary.org/notary-bulletin/blog/2020/04/10-standards-video-conference-notarizations.

[10] *See* R.C. 1337.12(B), (C) (Durable power of attorney for health care); R.C. 2133.02(B)(1), (2) (Declaration relating to use of life-sustaining treatment).

[11]R.C. 2107.24 (Treatment of document as will notwithstanding noncompliance with statute) provides:

> (A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:
>
> (1) The decedent prepared the document or caused the document to be prepared.
>
> (2) The decedent signed the document and intended the document to constitute the decedent's will.
>
> (3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.
>
> (B) If the probate court holds a hearing pursuant to division (A) of this section and finds that the proponent of the document as a purported will has established by clear and convincing evidence the requirements under divisions (A)(1), (2), and (3) of this section, the executor may file an action in the probate court to recover court costs and attorney's fees from the attorney, if any, responsible for the execution of the document.

[12]The OSBA proposal is discussed elsewhere in this issue in John F. Furniss III's, Emergency Legislation to Facilities Execution of Estate Planning Documents: Efforts are On-Going.

PRACTICING DURING THE PANDEMIC

By William R. Graf, Esq.

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Our firm includes five lawyers and three legal assistants. We confine our practice to estate and business planning, estate administration, and estate and trust litigation. We all have up-to-date laptops, and our application software and documents are in the cloud.

On March 16th we recognized that we should close the office and work from home. Everyone packed up supplies and files and headed home. From the beginning, practicing from home went far better than I expected. We communicated with each other by phone, Zoom, or Teams and we did the same for clients. Our conference call service was available to us from home or anywhere. The main thing we lacked when working at home was all of our files, but we were able to come to the office and retrieve them as needed. Our recent IT upgrades proved to be a good idea.

Since clients were staying at home as well, many of them had a lot of time on their hands. So, our estate planning practice actually picked up during this period. It went very well except for Will executions. Since a Will signing must be witnessed by two people in the conscious presence of the testator, we needed two live witnesses for each signing. My wife was a willing participant, and we were careful not to enter the clients' homes. Signings were done outside on porches in good weather or in the house with us looking through the window in not-

so-good weather. It was different, but it worked, and we never had to delay a Will signing that needed to be done. But, I do believe a law change on Will executions is in order.

I enjoyed working from home for the first two months-it was actually relaxing. Court appearances and client conferences were replaced with telephone or Zoom conferences. And most litigation time limits were generously extended by the Supreme Court. Our lawyers and staff remained busy, but not quite as busy-I'd say we were operating at about 80%. When I came downtown to get a file, I noticed that our 26-floor office building was virtually empty.

We all returned to the office on May 26th, and we utilize a combination of masks and social distancing to protect everyone. We have sanitizer available all throughout the office. We are very careful to keep our six-foot distance from one another, and I think all of our employees feel that we are acting responsibly. Our building remains fairly empty.

One thing that we all appreciate is the decision to provide lunch in our office every workday. There aren't a lot of places to get lunch, so arranging for in-the-office lunches has turned out to be a great idea. We eat in the conference room at least six feet apart.

We have had a number of live client meetings in our large conference room, and we have all worn masks and kept at least six feet between each person. While live court appearances have been nearly non-existent, we have made progress in settling active cases or moving toward settlement. Some opposing counsel have actually been easier to connect with than before the pandemic.

I hope we can return to the "old normal" because I miss the many functions that I used to attend regularly. I genuinely miss the interaction with clients and colleagues. I think some lawyers will conclude that they do not need an office-and I do not think they will be wrong. But, I think the daily interaction with co-workers is good for the efficient handling of legal matters and also enjoyable.

HOW COVID-19 HAS AFFECTED MY PRACTICE

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I am truly amazed at how much and how quickly our daily lives have changed and how the coronavirus has impacted the way in which we practice our particular area of law. Unlike many practice areas, estate planning requires interpersonal relationships in order to fully understand and develop a client's goals and objectives. Once the President issued his initial guidelines and the Governor issued the initial stay at home order, our ability to interact with clients changed significantly.

I have always cherished meeting clients face to face; it is the most enjoyable part of my practice. While I have no formal training in psychology, I believe at least half of my job is based in psychology to assist clients with challenging conversations and decisions. Truth be told, that part of the practice is much more satisfying than generating documents and implementing advanced planning techniques.

I do not feel the same connection with clients when I cannot meet them in person. Beginning in late March, we were no longer able to meet clients in our office. I am sure

that each reader's experience is similar to mine. We adopted a policy that lasted nearly two months of not having any meetings in the office. We did this to comply with government orders and to maintain the safety of our staff and clients. Over that time period, we had three of six staff self-quarantine based on a concern regarding exposure or symptoms [unfortunately, no tests were available to confirm whether any of them contracted the virus]. We cancelled all in person meetings and offered clients the option to have a conference call, a video conference (we immediately adopted Zoom as our platform) or to postpone their "meeting" until a future date.

The biggest challenge we faced related to the execution of documents. I have discussed this issue with a number of our colleagues who developed creative solutions. While many states relaxed their requirements relative to witnessing and notarizing documents, Ohio has not. I am blessed with a wonderful group of clients. For the most part, they remain mobile and willing to adopt and adapt to technology. If more of my clients were homebound or lived in a long-term care facility (which were effectively locked down to outside visitors), execution of documents would have been much more challenging.

I was adamant with our staff that I wanted to continue to assist our clients with execution of their estate planning documents for two reasons. One, we had a number of clients indicate their concern about personal health and safety during the pandemic and wanted to implement or make changes to their plan as quickly as possible. Two, I already knew this would be a busy year based on the impact of the SECURE Act on the trust planning that we had implemented. I did not want to delay all client signings until some unknown date in the future

For documents which did not require a witness or notary, we offered to mail the documents to clients to be executed and returned by hardcopy or use DocuSign to electronically sign the documents. We have a great staff who were able to explain the DocuSign process to clients. DocuSign has been a success, regardless of the client's age.

For documents which did require a witness and/or notary and if the client is local, we mailed hardcopies of the documents to the client. After the client received the documents, we would then review the documents by phone or Zoom. If any changes were necessary, we would email replacement pages. The client would sign and initial all documents in the comfort of their home. We would then schedule a time for the client to drive to the office where one or two staff would meet the client at the client's car. The client would hand the staff the documents. The staff would review the signature pages and ask the client to acknowledge their signature and initials on each document. The staff would witness any will or codicil and bring the remaining documents to the office.

With the relaxation of the Governor's order beginning the week of May 11th, we offered clients an opportunity to meet in person in the office. Many clients continue to have concerns about virus and have decided to delay taking action or continue to use our "drive-in" option. Others are comfortable meeting in the office. In those cases, we have asked clients in advance whether they want to wear masks and have our staff wear masks. We continue to do our best at sanitizing all surfaces in our office that may have client contact.

Unfortunately, the virus will not disappear any time soon. Time will tell if a vaccine is developed. Until then, we will continue to adapt day by day. I continue to be impressed each day by the strength of our fellow colleagues, clients and every American.

ESTATE PLANNING ADVENTURES DURING COVID-19

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"Often when you think you're at the end of something, you're at the beginning of something else." —Fred Rogers

In the middle of March the coronavirus pandemic dominated the news. Its rapid spread in Italy was startling. Stay-at-home orders were issued in Washington and California. Governor DeWine declared a state of emergency on March 9. My law firm, Vorys, Sater, Seymour, and Pease LLP advised professionals to take home their laptops every day and to be prepared to begin working remotely with little warning. On March 17 the law firm announced that all of its physical offices were closing by the end of the day and work would be done remotely. On the date of the announcement, a number of client appointments were scheduled on my calendar—to execute estate planning documents, which were printed and ready for signature; to execute federal gift tax returns; and to discuss updating estate plans. All these client appointments were cancelled. A Trustees meeting scheduled in New York City in May was cancelled. My focus shifted: how could client work be accomplished without in-person meetings?

For me, one of the most enjoyable aspects of my estate planning practice is the ongoing, deep relationships with individual clients. During our meetings clients often share their philosophies, values, reflections about wealth, family relationships, and concerns. Listening carefully to their words is critical to making recommendations that will work for them and ensure that their legal documents carry out their intentions. The majority of my clients are over the age of 70. A number of them have serious health issues. As much as I prefer in-person meetings, those meetings are not taking place right now. Work-arounds have developed. Typically, the work-around begins with a telephone call with the client to discuss the best process for accomplishing the task at hand. The method chosen is based on client preferences, equipment, and living arrangements.

ADVENTURES WITH DOCUMENT EXECUTION DURING COVID-19

For example, two sets of husband/wife clients had scheduled appointments to come to the office to execute estate planning documents in early April. The documents had been prepared and mailed to the clients for review prior to the coronavirus pandemic.

When it became apparent that the office was likely to be closed for an unknown period of time, one set of husband/wife clients contacted me regarding the best procedure to move forward to execute their estate planning documents while the office was closed. These clients wanted to execute the documents at home. I sent the documents to the clients by email and the clients

printed the documents at their home. We then scheduled a telephone conference during which the clients had the printed documents in front of them. Prior to the conference call, I had sent to the clients detailed, written instructions regarding execution of their Wills and asked the clients to review these instructions carefully prior to the call. During the conference call, we discussed each document separately. We went through in detail the page on which the clients would sign and whether notarization and/or witnesses were needed. The clients took notes. I understood that they were placing post-its on the documents where they or a witness or notary would be signing. With respect to execution of the Wills, I stressed the importance of exactly following the written instructions. I explained that the clients could maintain the recommended six feet of distance between themselves and their witnesses, but that the clients and witnesses needed to be in the same room or outdoor space together where they could hear and see one another as the clients signed and acknowledged the Wills and the witnesses signed. It took about 30 minutes to go through the steps involved in signing the documents, which were Wills, Durable General Powers of Attorney, Health Care Powers of Attorney, and Living Wills. These clients executed their documents at home with their next-door neighbors as witnesses. The clients returned the signed documents to me to be retained on their behalf in the law firm vault. After the clients returned the signed documents, I reviewed each document to confirm that the documents had been executed properly. After confirming that the documents were properly executed, the documents were placed in the law office vault.

A second husband/wife set of clients were signing Wills, First Amendments to Trusts, Durable General Powers of Attorney, Health Care Powers of Attorney, and Living Wills. As with the prior set of clients, I emailed the Instructions for Execution of Wills to the clients prior to scheduling a telephone conference to discuss the execution of the estate planning documents. These clients also had printed copies of the documents in front of them during our conference call. During the call we discussed in detail the method of executing each document. These clients requested that I mail to them documents that contained stickers in each place where they or someone else should sign. So, I affixed "Sign here," "Notarize," or "Sign and date" stickers on the appropriate blanks on a printed set of documents. In some cases, I added a post-it note with an additional explanation, such as "leave this area blank." These documents were then mailed to the clients for execution.

A third client resides in a retirement community that is allowing no visitors whatsoever during the coronavirus pandemic. This client was signing a Codicil and First Amendment to Trust. I sent the documents to the client by email and he printed them at home. I also sent him Instructions for Execution of Codicil. We scheduled a telephone call during which we discussed in detail the procedures required to execute each document. As with the other clients, I stressed the need to follow exactly the Instructions for Execution of Codicil. This client has serious health issues that make it especially important that his documents be kept up-to-date. Shortly after our telephone call, he mailed the signed documents to me for retention in the law office vault. He had signed the Codicil in the presence of husband/wife neighbors, who also reside in the same retirement community. All of the documents were executed correctly.

ADVENTURES WITH PROBATE COURT FILINGS DURING COVID-19

In another instance a widow with serious health issues wanted to commence the estate administration process for the estate of her husband, who died on March 8. I asked her to provide the information that would be needed in order to commence the probate administration process. After receiving and reviewing this information, the initial probate administration papers were prepared. An in-person meeting was scheduled with this client on the back patio at her residence. We wore masks throughout the meeting and our chairs were placed more than six feet apart. I took the originals and copies of each pleading to the meeting, so that I could refer to one copy of each pleading while the widow/surviving spouse was looking at the original pleading that she would be signing. This made it easy to reference the location of particular language on each document that was being discussed while also maintaining six feet of distance between the client and myself. The widow signed and returned to me the original documents at the meeting. A copy of each document was left with the widow for her file.

The Franklin County Probate Court is operating with a skeleton crew. Generally speaking, members of the public, including attorneys, are not permitted inside the Court.[1] In cases that require paper filings, the Court accepts documents submitted via drop box or via mail. If documents are delivered to the drop box, the documents are held for 48 hours after receipt prior to being processed and reviewed. If documents are mailed, the documents are held for 48 hours in the mailroom and then are held for an additional 48 hours in Probate Court.[2] Additionally, the Court has temporarily suspended the provisions of Loc. R. 57.5 and Loc. R. 57.6 requiring original signatures on all filings. Through the end of July the Court is accepting scanned and faxed copies of documents. The order states that attorneys of record are charged with ensuring that non-original signatures obtained are correct and issued by the appropriate person.[3] Obviously, the additional waiting periods involved when original documents are being filed means that it will take additional time to secure the appointment of the fiduciary nominated in a decedent's Will.

ADVENTURES WITH INTERNAL REVENUE SERVICE (IRS) FILINGS DURING COVID-19

Three sets of husband/wife clients had planned to come into the office to sign federal gift tax returns during the first two weeks of April. All of these clients were over the age of 70 and all were being careful to shelter in place in accordance with recommended guidelines. In two instances the clients wanted paper copies of the gift tax returns mailed to them for signature. The returns were marked with stickers that showed the clients where to sign. Post-its were placed next to the line on which the spouse signed to indicate that the husband and wife were consenting to gift splitting. Postage pre-paid and pre-addressed envelopes were sent to the clients to be used to return the signed federal gift tax returns. I normally file gift tax returns using United States mail, certified receipt requested. However, IRS employees have been working remotely and it is not clear whether currently there are IRS employees who are signing certified mail receipts on behalf of the IRS. Consequently, this year I have been delivering all federal gift tax returns to the

IRS using Federal Express, which is an approved IRS private delivery service.[4] This way a Federal Express tracking receipt can be printed to prove timely delivery of the gift tax returns.

ADVENTURES WITH VIRTUAL MEETINGS DURING COVID-19

In my opinion, some meetings that have been cancelled due to Covid-19 simply cannot be replicated through technology. For example, I serve as one of five Co-Trustees of various long-term trusts created for the benefit of a particular family. There are four branches of the family, each of which is represented by a family-member Trustee. I serve as the non-family member Trustee. The Trustees meet in person in New York City twice each year for a day and 1/2. Additionally, two 1 and 1/2 hour conference calls are scheduled in between meetings. The regular 1 and 1/2 day meeting scheduled in New York City in mid-May was cancelled. A two hour Microsoft Teams meeting was scheduled instead. All of the Trustees agreed that a day-long Microsoft Teams virtual meeting wouldn't be feasible-it simply is harder to sustain attention during a lengthy meeting being conducted using computers than it is to sustain attention during an in-person meeting. We Trustees have attempted to make up for the inability to meet face-to-face by scheduling more frequent conference calls that last 1 to 1 and 1/2 hours. When the stock market dropped sharply in March, we scheduled conference calls with the Trusts' chief investment officer approximately every two weeks.

Much non-verbal communication takes place in face-to-face meetings. I learn from facial expressions, body language, tone, and observable interactions between participants. Conversations occur naturally and can veer in different directions that provide background and insight. In-person meetings help ensure engagement—interruptions from family members or outsiders and technology glitches are less likely to be present. I can see whether a client is looking at the correct paragraph on the correct page of a document—or even has the correct document in hand! I can quickly sketch a diagram to explain a concept that is not coming through clearly. For these reasons, in-person meetings continue to be my preferred method of practicing law.

Another interesting new Covid-19 experience was a virtual meeting of The American College of Trust and Estate Counsel (ACTEC). ACTEC holds three national meetings each year, at different locations throughout the country. ACTEC planned to hold its 2020 summer meeting in Asheville, North Carolina in June and I was scheduled to attend. Typically approximately 900 persons attend the summer meeting, which is comprised of committee meetings, continuing legal education, and evening social events. Attendees include members (called Fellows), spouses/significant others, and sponsor representatives. The in-person summer meeting was cancelled; instead, ACTEC organized a virtual meeting using Zoom. It was thought that more Fellows would be familiar with Zoom than with other meeting technologies that were available. The virtual meeting was pulled off without a hitch. Interestingly, the highest number of Fellows ever attended this virtual summer meeting. That said, typically there are several hundred spouses/significant others and sponsor representatives who also attend a national meeting. No spouses attended the virtual meeting. There were only a small number of sponsors. Social interaction at

meals and cocktail parties didn't occur. But the continuing legal education was excellent. The committee meetings worked reasonably well. That said, there was less discussion among committee members during the meeting. Why did more Fellows than ever participate in this first-ever virtual meeting? Several reasons, perhaps. Costs were lower—Fellows incurred neither travel nor hotel costs. Fellows were able to participate while taking less time away from the office and home. The typical summer meeting would take place over three days, two of which were Saturday and Sunday. However, a day of travel to and from the meeting site usually would be involved. The virtual meeting format spread committee meetings over a four day period during week #1 and spread the continuing legal education sessions over a four day period during week #2. All CLE was scheduled from 1:00 p.m.–2:30 p.m., in order to accommodate numerous different time zones across the country, including Hawaii.

AND SOME TAKE-AWAYS . . . .

What take-aways can I share as of the end of June about practicing law during Covid-19? (1) Plan ahead. Find out client preferences for receiving, reviewing, and executing documents and accommodate these preferences to the extent possible. (2) Allow extra time to accomplish any given task. Additional time may be involved in order to deliver documents to clients, allow the clients to return signed documents, and then to file the documents with the appropriate court or agency. (3) Communicate. Call clients to advise them of changes in procedures or anticipated delays. Call them just to see how they are doing—particularly those clients who reside in retirement communities and who are not allowed to have visitors. They appreciate the calls. (4) Learn new skills, particularly technology skills. (5) Be patient. Recognize that Covid-19 creates stress and problems not just for practicing attorneys, but for clients, court personnel, non-attorney staff, and just about everyone. And I try to remember Henry Ford's wise words: *Whether you think you can or you can't, you're probably right.*

ENDNOTES:

[1]*Court Operations During the COVID-19 Pandemic: Frequently Asked Questions*, Franklin P.C., https://probate.franklincountyohio.gov/getmedia/31d65756-a140-4f0f-8c29-51cb93e35bd2/COVID-19-FAQ.aspx

[2]*In the Matter of COVID-19 Public Health Emergency and Court Operations*, Franklin P.C. No. 603535, Journal Entry and Court Order Setting Forty-Eight Hour Holding Period for Paper Filings (Mar. 30, 2020), https://probate.franklincountyohio.gov/getmedia/55d7a287-624d-4cf0-9d7c-25ee12c0b46f/March-30-2020-Covid-19-Court-Order.aspx.

[3]*In the Matter of COVID-19 Public Health Emergency and Court Operations*, Franklin P.C. No. 603535, Journal Entry and Court Order Temporarily Waiving Original Signature Requirements Under Loc. R. 57.5 and Loc. R. 57.6 (Mar. 25, 2020), https://probate.franklincountyohio.gov/getmedia/8f395527-841b-4cf5-839f-aff0b2d1798e/March-25-2020-Covid-19-Court-Order.aspx

[4]A full list of IRS private delivery services may be found at IRS.gov/PDS.

DILEMMA FOR EXECUTORS AND SURVIVORS: SHOULD CARES ACT ECONOMIC IMPACT PAYMENTS TO DECEDENTS BE RETURNED?

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The passage of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") on March 27, 2020 provided over $2 trillion in economic relief to American workers, families and businesses.[1] One of the major provisions of the CARES Act included a Recovery Rebate Credit of up to $1,200 per eligible individual, or up to $2,400 for a couple filing a joint return, for use on their income taxes filed in tax year 2020. The CARES Act called for an immediate advance payment of this credit to taxpayers in the form of an economic impact payment, more commonly referred to as a stimulus check.

The amount of this payment is based upon an eligible individual or couple's adjusted gross income ("AGI") as reflected on their 2019 income tax return, or if not yet filed, their 2018 income tax return. The amount of the credit is phased out by 5% of the eligible individual's AGI that exceeds $75,000 (maxing out completely at income of $99,000) if filing single or married filing separately, or $150,000 (maxing out completely at income of $198,000) for those married filing jointly.[2]

In early June, 2020, the U.S. Department of Treasury and the IRS announced that 159 million of these payments, worth approximately $267 billion, had already been distributed.[3] As of the time of the writing of this article, 5,828,477 of those payments had been issued to Ohio taxpayers.[4] The dilemma arises because some of the stimulus payments were issued to taxpayers who have died. Actually, a lot of them were. According to multiple reports, a recent audit by the Government Accountability Office shows that nearly $1.4 **billion** (yes, **billion)** of the payments issued were sent to over 1.1 million individuals who passed away since filing their 2018- and 2019-income tax returns.[5] For those receiving these payments on a decedent's behalf, what should be done with a payment? Does it matter if the individual died in 2018, 2019 or 2020? Does it matter whether the payment came in the form of a paper check, a debit card, or a direct deposit to the decedent's bank account?

These questions and others immediately sparked a lively debate amongst practitioners across Ohio and the country as to whether the funds should be returned to the IRS, and whether the IRS would be actively looking to "claw back" payments issued to and kept by heirs and fiduciaries. Unfortunately, IRS guidance on the issue has been limited and somewhat arbitrary, leaving practitioners guessing on how to advise clients as to what should be done with these payments.

The IRS has issued some statements, which we will cover below, which say that payments issued to decedents **should** be returned. But while it is still not entirely clear at the time of the writing of this article whether all economic impact payments issued to decedents **must** be returned to the IRS, this article will explore the differing perspectives on the issue to assist practitioners in engaging in meaningful discussions with their clients.

A. WHAT WE DO KNOW: ECONOMIC IMPACT PAYMENTS ARE REFUNDABLE INCOME TAX CREDITS FOR ELIGIBLE INDIVIDUALS

As mentioned above, economic impact

payments are advance refunds on a Recovery Rebate Credit for "eligible individuals" for tax year 2020. But who qualifies as an eligible individual under the CARES Act?

Section 6428(d) of Subchapter B of Chapter 65 of Subtitle F of the Internal Revenue Code of 1986, as amended by Section 2201 of the CARES Act, defines an "eligible individual":

> (d) Eligible Individuals.—For purposes of this section, the term 'eligible individual' means any individual *other than*—
>
> (1) any nonresident alien individual,
> (2) any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, and
> (3) *an estate or trust.*[6]

If one views this issue purely from an income tax perspective, this definition would exclude an individual who died in 2018 or 2019, as their estate would not qualify as an eligible individual to receive the credit.

Generally speaking, a personal representative of an individual who passed away in 2018 would have filed the decedent's final Form 1040 in calendar year 2019, and a personal representative of an individual who passed away in 2019 would have filed the decedent's final Form 1040 by April 15, 2020 (but for the July 15, 2015 extended deadline for the filing of 2019 tax returns).[7] If income were received on behalf of a decedent after the date of death, their estate would report that income on the estate's income tax return, Form 1041. Clearly, under Section 6428(d) (3), an estate is not entitled to this payment.

However, this would not be so clear for a 2020 decedent. For a 2020 decedent, the personal representative would file the final income tax return by April 15, 2021. So, does it matter whether the individual died in 2020 before or after the payment was received? If an eligible individual were to pass away at any point in 2020, their personal representative would file their final income tax return by filing Form 1040. According to IRS Publication 559, which provides guidance to the personal representative in filing a decedent's final tax return, the personal representative may claim any tax credits that applied to the decedent before their death.[8] This includes refundable tax credits, regardless if the taxpayer lived for the entire year or for a portion of it. Other refundable tax credits, such as the Earned Income Tax Credit, are able to be taken by the personal representative on the decedent's final Form 1040, and any refunds paid become probate property for distribution in accordance with the terms of the decedent's Last Will and Testament, or in accordance with Ohio's intestate succession rules. Following that same logic, there is no reason that the Recovery Rebate Credit should be any different if the decedent were an eligible individual during tax year 2020.

B. *RECEIPT* OF PAYMENT

While many practitioners thought that the income tax approach was appropriate, this was complicated by the IRS' update to their Coronavirus FAQ's page on May 26, 2020. Question 12 of the page stated, "Does someone who has died qualify for the payment?."[9] The answer, according to the IRS, was the following:

> No. A payment made to someone who died before the receipt of the Payment should be returned to the IRS by following the instructions in the Q&A about repayments. Return the entire Payment unless the Payment was

> made to joint filers and one spouse had not died before receipt of the Payment, in which case, you only need to return the portion of the Payment made on account of the decedent.[10]

On June 26, 2020, the IRS added Question 13 (question number may vary based upon IRS updates) which stated, "Why did the IRS send Economic Impact Payments (EIPs) to deceased individuals?."[11] In their response, the IRS states:

> Upon enactment of the CARES Act, the IRS worked with unprecedented speed to issue Economic Impact Payments to individuals. The IRS initially implemented the legislation consistent with processes and requirements used with the 2008 stimulus payments, which resulted in EIPs being issued to certain deceased individuals. After further review, it was determined that such persons are ineligible, and the IRS has taken action to prevent future payments to deceased individuals.
>
> An EIP made to someone who died before receipt of the EIP should be returned to the IRS by following the instructions in FAQs 69 and 70.[12] The entire EIP should be returned unless the EIP was made to joint filers and one spouse had not died before receipt of the EIP, in which case, only the portion of the EIP made to the decedent should be returned. This amount will be $1,200 unless the decedent's adjusted gross income exceeded $150,000. If a taxpayer cannot deposit the EIP because it was issued to both spouses and one spouse is deceased, the taxpayer should return the check as described in question 69. Once the IRS receives and processes the returned payment, an EIP will be reissued to the living spouse.

From this limited guidance, the date of death of the individual might come into play in a different way than some practitioners initially anticipated. From the guidance offered, it appears as though the IRS is making the date of *receipt of the payment* the determining factor as to whether the decedent's payment should be returned. If that is the case, it would seem as though the IRS would need to offer more guidance as to what the term *receipt* means relative to the payment.

Further complicating the issue of receipt is that the IRS issues refunds by paper check, direct deposit and by debit card. Since the government began issuing economic impact payments in April 2020, payments have been issued in the same manner as the taxpayer elected to receive their 2018 or 2019 income tax refund, if one was due to them. Differing methods of payment raise even more questions about what the term receipt really means. Should the date of receipt be different for each method of payment? Is the date of receipt the date the check is issued by the IRS in the case of paper checks? Is the date of receipt the date that funds are deposited into the now deceased taxpayer's bank account in the case of direct deposit? Is it the date that the now deceased individual (or his or her personal representative) opened the paper check or the correspondence containing the debit card?

This response by the IRS seems to have caused more questions than answers. Say for example that Decedent A and Decedent B both die on May 6, 2020. Decedent A receives an economic impact payment as a direct deposit into her account at 2:00 p.m. and passes away at 3:00 p.m. Decedent B passes away at the same time as Decedent A, but his economic impact payment is not direct deposited into his account until 3:05 p.m. Assuming the term receipt for direct deposits means the time in which the payment is delivered to the taxpayer's account, is it appropriate that Decedent A's personal

representative can keep the payment and distribute it to the decedent's heirs while Decedent B's personal representative must return the payment because Decedent B was not alive at the time of receipt?

Many would argue that something as arbitrary as one being alive at the time of the receipt of payment, *without any further guidance from the IRS*, is not equitable. If following the IRS' limited guidance, this would mean that all 2018 and 2019 decedents, as well as 2020 decedents who died before the payment's *receipt*, however defined, would be disqualified from being able to keep the economic impact payment. For 2020 decedents, this approach seems contrary to the language of the CARES Act, which states that an eligible individual is entitled to an advance on the Recovery Rebate Credit for tax year 2020. For any 2020 decedent, the personal representative of that decedent has to file a final Form 1040 for that portion of 2020 during which the decedent was alive. Unless clarifying guidance were issued indicating otherwise, there does not seem to be a legal reason as to why the personal representative should not be allowed to claim the credit on the 2020 decedent's final return in the same manner that other refundable tax credits may be reflected on the final Form 1040.

To date, the IRS has not issued further guidance on the interpretation of the term *receipt* or provided a clear answer for recipients of a deceased individual's payment, other than to say they should be returned because an individual deceased at the time of receipt is ineligible. While there have been rumblings that the government may try to claw back the payments direct deposited into a decedent's bank account, many practitioners have taken the wait and see approach with the hope that guidance will be issued soon. But what is the likelihood the government would claw back the payment? What if the decedent's bank account is closed after the deposit is made? Could the IRS seek reimbursement from the decedent's probate estate or heirs?

In late June, National Taxpayer Advocate, Erin Collins, discussed the unlikelihood of the IRS clawing back these payments and pursuing those who received them. Collins notes that the IRS failed to exclude decedents from its and that they were aware that at least 837,000 of the payments made were being paid to decedents.[13] She further noted it is unlikely recipients of a decedent's payments will be pursued due to the resources required in order to do so. Former United States Taxpayer Advocate, Nina Olson also mentions the unlikelihood of the IRS pursuing the checks, bringing up the fact that they would likely be pursuing grieving family members, including those who may have lost their loved ones due to COVID-19.[14] Olson notes that this is a situation the IRS would likely want to avoid.

While anything is possible, this is not the first time that the IRS has issued economic impact payments to decedents. But does the past provide us any guidance?

C. PAST ECONOMIC IMPACT PAYMENTS AND THE PURPOSE OF THE PAYMENT

During the economic downswing of 2007, the IRS similarly issued economic impact payments to eligible individuals as an advance credit on the individual's 2008 income tax return. The issuance of these payments, much like the 2020 CARES Act stimulus payments, were made for the purpose of stimulating the economy. Payments were made to decedents during this

time, and in March of 2008, the IRS' FAQs section was updated to include the following answer regarding the issuance of the economic impact payment to a decedent:

> Stimulus payments are issued in the name of the individual eligible for payment on a filed 2007 income tax return or to the account designated by the individual on that return. This includes situations where a person has died after filing a return or where the final 2007 income tax return was filed by a personal representative or surviving spouse. Any issues or concerns involving a decedent's filed return or the related stimulus payment should be addressed by the legal representative of the decedent's estate.[15]

This response seems to be in stark contrast with the response currently listed by the IRS. In her own exploration of the issues associated with stimulus checks to decedents, Former United States Taxpayer Advocate Nina Olson notes this inconsistency and points out that the statutory language in the 2008 and 2020 Acts are identical with regard to who is considered an eligible individual. Ms. Olson states that while the government is entitled to change its mind regarding the return of these payments, due process requires that an explanation be provided as to *why* they have changed their mind.[16] Without such an explanation, personal representatives, heirs, and practitioners are forced to guess what they should do with the payments, potentially opening themselves up to the risk of being pursued by the IRS. For some, that risk alone may be enough to make them send the money back.

Others have taken the stance that the checks should be returned simply because of the nature of what the payment is-a stimulus check meant to stimulate the economy. If a decedent has passed away before the issuance of the check, it certainly becomes difficult for them to use these funds for their intended purpose. With so many differing viewpoints on what the solution is, how should we be advising clients who are a personal representative or an heir of a decedent?

D. PRACTICAL THOUGHTS—WHAT SHOULD WE TELL THE CLIENT?

While practitioners are still awaiting formal guidance on this issue from the IRS, the authors believe that it is important for practitioners to remember that economic impact payments are an advance on the Recovery Rebate Credit allowed for eligible individuals in 2020. From an income tax perspective, those passing away in 2020 would be considered eligible individuals under the text of the CARES Act if they fit within the income limitations, thus making them eligible for the advance refund. The authors find it difficult to imagine a circumstance in which a 2018 or 2019 decedent would be eligible for the refundable credit or the advance on the credit under the text of the CARES Act. The authors also believe that erroneously issued checks are unlikely to be pursued for recovery by the IRS, especially given the administrative difficulty that would arise for such a task.

Practitioners should remember to inform their clients that, even though the IRS website has called for the return of these payments, the FAQs page of the IRS website is not the law. However, it may be worth mentioning to the client that the call for return of the payments may be an indication of formal guidance to be issued in the future, and that the IRS may formally request the return of the payment. As with

all gray areas in the law, it is the lawyer's role to discuss all the potential outcomes with the client, and then allow the client to make the decision based on his or her own risk assessment. If your client would like to return the economic impact payment, the IRS has offered guidance on how to return the payment.

E. HOW DO PAYMENTS GET RETURNED?

If your decedent received a paper check and carefully examine the back of the envelope, you will discover a box on the envelope, next to which it says, "If the person is deceased, check the box, and place the letter in the mail." If the check was already opened, according to the IRS website,[17] a personal representative of a decedent who received a paper check should write "Void" in the endorsement section of the back of the check, include a brief explanation as to why the return is being made, and then drop it in the mail to the locations listed on the IRS website. For Ohio taxpayers, the check should be mailed to the following address:

Kansas City Internal Revenue Service
333 W Pershing Rd.
Kansas City, MO 64108

For a decedent who received a direct deposit or whose personal representative has already cashed the check, the IRS has requested that a personal check be made payable to the "U.S. Treasury," with the words 2020 EIP and the taxpayer identification number (social security number, or individual taxpayer identification number) of the recipient on the check. For Ohio taxpayers, this payment can be sent to the same address listed above, with a brief explanation of why the payment is being returned.

Lastly, for decedents who received the economic impact payment in the form of a debit card, the card and an explanation of why the card is being returned should be sent to the following address:

Money Network Cardholder Services
5565 Glenridge Connector NE
Mail Stop, GH-52
Atlanta, GA 30342

F. CONCLUSION

In conclusion, we hope that our comments and this overview of economic impact payments to decedents can be used at the very least as a helpful tool to assist practitioners in conducting meaningful conversations with personal representatives and heirs while we await further IRS guidance on these issues. It is our hope that the controversy surrounding these payments will push the IRS to implement information sharing systems that prevent the issuance of payments to ineligible decedents, or in the alternative, that the IRS will implement a thorough set of guidelines for the issuance of economic impact payments that can be used in the event of a future global pandemic or economic crisis.

ENDNOTES:

[1] https://home.treasury.gov/policy-issues/cares

[2]Coronavirus (COVID-19) Tax Relief: Law Explanation & Analysis (Wolters Kluwer Editorial Staff, 2020).

[3] https://home.treasury.gov/news/press-releases/sm1025

[4] https://www.irs.gov/newsroom/treasury-irs-release-latest-state-by-state-economic-impact-payment-figures-for-may-22-2020

[5]Rubin, Richard, https://www.wsj.com/articles/irs-paid-1-4-billion-in-stimulus-payments-to-dead-people-gao-report-says-11593101080

[6]I.R.C. § 6428 (2020).

[7] https://www.irs.gov/newsroom/payment-deadline-extended-to-july-15-2020#:~:text=The%20filing%20deadline%20for%20tax%20returns%20has%20been,to%20request%20an%20extension%20to%20file%20their%20return.

[8]U.S. Department of Treasury. Internal Revenue Service (2019) *Publication 559: Survivors, Executors and Administrators*, Washington D.C., U.S. Government Publishing Office.

[9] https://www.irs.gov/coronavirus/economic-impact-payment-information-center

[10] https://www.irs.gov/coronavirus/economic-impact-payment-information-center

[11] https://www.irs.gov/coronavirus/economic-impact-payment-information-center

[12] FAQ 69 provides instructions on how to return an Economic Impact Payment that was received as a direct deposit or a paper check. FAQ 70 provides instruction on how to return an Economic Impact Payment received as an EIP card (debit card) if the taxpayer does not want the payment reissued.

[13]DeLea, Brittany, *IRS knew stimulus checks were being sent to dead people, shouldn't pursue collections: Watchdog*, Fox Business (June 30, 2020) https://www.foxbusiness.com/lifestyle/irs-stimulus-checks-dead-people-should-not-collect

[14]Olson, Nina, The Uncertainty of Death and Taxes: Economic Stimulus Payments to Decedents, Procedurally Taxing (May 11, 2020) https://proceduralltaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/

[15] Olson, Nina, *The Uncertainty of Death and Taxes: Economic Stimulus Payments to Decedents*, Procedurally Taxing (May 11, 2020) https://proceduralltaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/

[16]Olson, Nina, The Uncertainty of Death and Taxes: Economic Stimulus Payments to Decedents, Procedurally Taxing (May 11, 2020) https://proceduralltaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/

[17] https://www.irs.gov/coronavirus/economic-impact-payment-information-center

BACK TO BASICS: HOW YOUR CLIENT HOLDS TITLE TO REAL ESTATE MAKES A DIFFERENCE

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Estate planning attorneys have the benefit and the challenge of learning related areas of law on a regular basis. Although there will be a number of issues an estate planning attorney encounters only a handful of times over the course of their practice, real estate questions frequently recur.

A significant number of Ohio clients own one or more parcels of real estate. Consequently, understanding the basics of real estate law is an integral part of an estate planning practice. Clients articulate a variety of goals when discussing their real estate with their estate planning attorney, such as probate avoidance, gifting for the benefit of children or grandchildren, planning for the succession of the family vacation home, liability protection for rental properties, and minimization of property taxes.

The primary forms of real estate ownership encountered and utilized by estate planning attorneys include: (1) individual ownership; (2) survivorship tenancy; (3) individual or joint ownership with a transfer on death beneficiary designation; (4) revocable trusts; and (5) limited liability companies. The primary objectives, benefits, and limitations of each method of ownership are outlined below, with a focus on how the property may be disposed of both dur-

ing life and upon the death of an owner.[1] This article also provides an overview of relevant documents required or recommended under Ohio law in connection with transfers of title. Given that many Ohio clients own real estate in Florida, this article also discusses key nuances related to Florida real estate.

INDIVIDUAL OWNERSHIP

Individual ownership is the most basic form of real estate title. An unmarried individual owner has the sole authority to transfer the real estate during life. However, because Ohio maintains dower rights,[2] a married individual's spouse must relinquish the spouse's dower rights by consenting to the transfer and signing the deed. Florida law imposes a similar requirement with respect to homestead property (i.e., the couple's principal residence).[3]

At death, individually owned real estate is a probate asset. The transfer of title at death is evidenced in documents filed in probate court. An individual owner can designate the person(s) who will inherit the real estate in such individual's Will.[4] If the individual owner does not leave a Will, then the real estate will pass under the applicable state intestacy laws.[5]

JOINT TENANCY

In Ohio, joint tenancy is the favored form of ownership for many married couples. During life, each owner is deemed to own an undivided one-half interest in the real estate. One tenant may transfer their one-half interest at any time and thereby sever the joint tenancy. Both owners may jointly transfer the entire property. Upon the death of the first survivorship tenant, the survivor becomes the fee simple owner of the entire property.

To evidence the vesting of title in the sole surviving tenant when one survivorship tenant passes away, the survivor (frequently the surviving spouse) has two options: (1) record a certificate of transfer following an order by the probate court or (2) record an Affidavit certifying that the owner of a survivorship tenancy interest has died ("Affidavit of Survivorship").[6]

The information that must be included in an Affidavit of Survivorship is generally straightforward. When recording the Affidavit, it must be accompanied by a certified copy of the decedent's death certificate.

Individuals may also take title in joint tenancy under Florida law. However, in Florida, a married couple may also own real estate as tenants by the entirety. This type of joint ownership is similar to a joint tenancy, but each spouse is deemed to own an undivided interest in the whole property. A tenancy by the entirety provides strong creditor protection because a creditor may not attach a lien against the property if the debt to be collected belongs only to one spouse. Accordingly, this enhanced creditor protection should be evaluated when considering alternative forms of ownership with respect to Florida real estate.

INDIVIDUAL/JOINT OWNERSHIP WITH A TRANSFER ON DEATH BENEFICIARY

An individual owner or joint owners of Ohio real estate may designate one or more primary and/or contingent transfer on death beneficiaries. The individual or individuals maintain title in their sole or joint names during life. However, upon the death of the

individual owner or the last surviving joint owner, title to the real estate will automatically vest in the named beneficiary or beneficiaries without any need to complete the court probate process. The continuity of ownership during life allows the owner to avoid the hassle of updating or confirming sufficient protection with respect to homeowner's insurance, title insurance, and/or mortgage loans, which may be necessary if the owner transfers title to a trust or limited liability company.[7]

To name one or more transfer on death beneficiaries, an individual (or individuals) who owns Ohio real property must record a Transfer on Death Designation Affidavit ("TODDA") in the county where the real property is located.[8]

One limitation of the TODDA is that the beneficiary or beneficiaries must be "identified by name."[9] Thus, designating a class of individuals such as "my children" or "my grandchildren" is not permitted. Consequently, a new TODDA should be prepared if, for example, a beneficiary passes away before the property owner.[10]

For clients who intend to leave their real estate to a trust, the Ohio Revised Code offers a practical, efficient, and effective solution for avoiding probate. A trustee can be named as the transfer on death beneficiary.[11] If the trustee dies or is otherwise replaced as trustee before the real estate owner's death, the Ohio Revised Code specifically provides that the successor trustee will be considered the transfer on death beneficiary.[12]

Note that Florida does not offer an option for designating a transfer on death beneficiary with respect to real estate.

REVOCABLE TRUST

When real estate is transferred to a trust, the trustee, who may or may not be the settlor, will administer and manage the property. The trust terms may direct how the real estate is used and/or which beneficiaries are entitled to maintain a residence at the property. If one trustee becomes unwilling or unable to serve, the successor trustee will administer and manage the property under the same trust terms. Accordingly, trust ownership can offer a variety of benefits depending on the terms of the trust and the trust beneficiaries.

A revocable trust can be an efficient way to avoid probate, to protect assets for the benefit of a beneficiary, and to offer a smooth transition in administration and maintenance of the real estate in the event an individual becomes incompetent.[13] Additionally, by creating a trust in Ohio, an individual can bypass the spousal election, which allows them to dispose of the property as desired.[14]

Because Florida does not recognize transfer on death designations with respect to real estate, an individual must transfer Florida real estate to a trust or a business entity (such as an LLC) to avoid probate. Of course, transferring real estate to a trust (or to a business entity) is also always an option in Ohio.

An estate planning attorney who is assisting a client with the transfer of Ohio real estate to a trust should be familiar with two documents, described below.

MEMORANDUM OF TRUST

The purpose of a Memorandum of Trust is to provide record of a trustee's authority to acquire, sell, encumber, or otherwise convey

real property owned by a trust. A Memorandum of Trust is signed by the trustee and sets forth certain facts concerning both the trustee and the trust.[15] A Memorandum of Trust is recorded in the county where the real estate is located.

If a trustee plans to sell or mortgage real property, title companies will usually request a Memorandum of Trust.[16] If the property is transferred from the trust to another person as a gift or inheritance, a Memorandum of Trust is generally not required. Nonetheless, recording a Memorandum of Trust in such circumstances serves as a preventative measure in the event a title company-or anyone else-questions or contests the trustee's authority to complete the transfer when the property becomes subject to a subsequent sale.

AFFIDVAIT OF SUCCESSOR TRUSTEED

Unlike the Memorandum of Trust, an Affidavit of Successor Trustee *must* be filed in the county where the real property is located when the trustee holding title to real property ceases to serve and a successor trustee is appointed.[17] The information that must be contained in an Affidavit of Successor Trustee is similar to the information required to be included in a Memorandum of Trust.

LIMITED LIABILITY COMPANIES

A single-member limited liability company ("LLC") or family LLC may be utilized for a variety of reasons. Major advantages to LLC ownership include enhanced liability protection (particularly useful for rental property),[18] privacy,[19] and, in some states, transferability without incurring conveyance fees.[20]

An LLC may be member-managed or manager-managed, but the member retains the right to appoint the manager (who will usually be the member during the member's lifetime). The member (or manager) will at all times have the authority to sell the property. Absent restrictions contained in the company agreement, the member may also sell, gift, or otherwise transfer the member's membership interest at any time.

Like any business entity, an LLC's duration is typically indefinite. Upon a member's death, the LLC continues. A membership interest titled in the member's individual name will pass to the beneficiaries named in the member's Will or under the laws of intestacy, as applicable.

However, to avoid probate with respect to an individual's membership interest in an LLC, the member may register the membership interest into transfer on death beneficiary form,[21] designating one or more beneficiaries (including the individual's revocable trust, if desired) who will receive the member's interest upon the member's death. Alternatively, the membership interest may be titled in the member's trust prior to the member's death. This also achieves probate avoidance.

Understanding the applicable transfer tax exemption becomes particularly important when transferring property to an LLC. The conveyance fee is assessed by the county Auditor as a percentage of the value of the real estate, and is usually measured by the sale price. In Ohio, most estate planning transfers will be exempt from the conveyance fee.[22] However, an Affidavit of Facts in support of the reason for exemption from the conveyance fee is usually required when transferring real estate between an individual member and an LLC.[23] In Florida, there is no specific exemption from the documen-

tary stamp tax for documents that convey title for estate planning purposes. However, transfers without consideration are not subject to such tax.[24]

ADDITIONAL CONSIDERATIONS

Another practical document estate planning attorneys may want to utilize is the Affidavit Relating to Title, which serves to evidence or correct facts that may affect title.[25] The Affidavit Relating to Title can prove particularly useful in correcting scrivener's errors in a party's name. The Affidavit must be made by a person having knowledge of the facts or who is competent to testify to such facts in open court. Accordingly, it is often advisable to prepare an Affidavit Relating to Title while a person with knowledge of the facts is living. The Affidavit Relating to Title may ameliorate errors in title that could become a problem when an heir or beneficiary inherits the property and wishes to sell.

Note that the county Auditor or county Recorder will return documents that aren't completed correctly and will not accept documents for transfer or recording if any associated forms or fees are missing.[26] Estate planning attorneys should familiarize themselves with the conveyance and recording fees collected by the county Auditor and county Recorder, respectively, as well as the eligibility requirements for property tax deductions and the forms required to obtain an exemption or to otherwise comply with the law.[27]

Not all state statutes or county websites provide the extensive guidance offered in Ohio. When dealing with non-Ohio real estate, it is best to consult with an active practitioner in that state.

ENDNOTES:

[1]Including both an individual legal owner and/or the beneficial owner, as applicable.

[2]R.C. 2103.02. A spouse who has not relinquished or been barred from exercising the spouse's dower rights is entitled to a life estate in one third of the real property owned by such individual's spouse.

[3]Fla. Const. Art X, § 4(c). Before transferring a principal residence located in Florida, practitioners must consider the creditor protection offered by the homestead exemption and whether such creditor protection can be maintained following the transfer.

[4]However note that a surviving spouse may elect to receive a portion of the individual's probate estate. R.C. 2106.01.

[5]For the Ohio statute of descent and distribution, see R.C. 2105.06; for Florida intestate succession, see Fla. Stat. §§ 732.102 and 732.103.

[6]R.C. 5309.081 and 5302.17.

[7]Unfortunately, there may be a lapse in insurance coverage upon the death of the owner. Whereas homeowner's insurance policies often cover the fiduciary of the estate, as well as the period between the decedent's date of death and the date on which the estate is opened, a transfer on death beneficiary is generally not covered unless the beneficiary is an insured under the policy, which the policy may or may not allow. *See, e.g., Walker on behalf of Estate of Walker v. Albers Insurance Agency*, 2019-Ohio-1316, 134 N.E.3d 896 (Ohio Ct. App. 1st Dist. Hamilton County 2019).

[8]R.C. 5302.22 and 5302.23. These sections govern the requirements for making such a beneficiary designation and provide additional information regarding the operation of the transfer upon the owner's (or owners') death.

[9]R.C. 5302.22(D)(4).

[10]Additionally, note that the TODDA must describe the real estate and include a prior instrument reference. A TODDA cannot be made prospectively effective with respect to all real estate acquired. For this reason, clients must remember to contact

their estate planning attorney if they purchase new real estate.

[11]*See* R.C. 5302.22(G).

[12]R.C. 5302.22(G)

[13]Irrevocable trusts can also serve as a vehicle for making a gift of real estate.

[14]In Ohio, an individual can disinherit their spouse entirely by creating a trust because the spousal election applies only to probate assets. *See* R.C. 2105.06 and 2106.01; *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 18 Ohio Op. 2d 42, 179 N.E.2d 60 (1961).

[15]Such facts include the name and address of the trustee, the date of the trust, and the powers and limitations related to real property set forth in the trust agreement. The specific information that must be included in an Ohio Memorandum of Trust is described in R.C. 5301.255.

[16]A Memorandum of Trust should not be required when the property is transferred to or from a "naked trust," wherein the owner is designated as the "trustee" but the trust itself is undisclosed. "[T]his designation does not put any person dealing with the land on notice that a trust exists or that there are any limitations on the power of the grantee to convey or mortgage such land." *Insurance Co. of North America v. First Nat. Bank of Cincinnati*, 3 Ohio App. 3d 226, 444 N.E.2d 456 (1st Dist. Hamilton County 1981) citing R.C. 5301.03 (grantee as trustee or agent).

[17]R.C. 5202.17 sets forth a list of information about the successor trustee that must be included in the Affidavit of Successor Trustee.

[18]In the event the owner becomes subject to litigation related to the property or if a creditor obtains an interest in the property, only the asset(s) owned by the LLC can be recovered, and the assets of the individual member(s) cannot be reached. However, see *Stewart v. R.A. Eberts Co., Inc.*, 2009-Ohio-4418, 2009 WL 2684497 (Ohio Ct. App. 4th Dist. Jackson County 2009), which summarizes the limited circumstances under which a member may be held personally liable for the debts of the company. Note also that a creditor of a member of the limited liability company may attach a charging order against the member's interest. R.C. 1705.19.

[19]The name and mailing address of the owner of real estate is public information. Taking title to real estate in the name of a business entity can be beneficial for individuals who do not want their name and associated home address available to the public.

[20]In Ohio, a transfer of a membership interest in an LLC that owns real estate is not subject to the conveyance fee. In Florida, a transfer of a membership interest in an LLC will be subject to the documentary stamp tax if (1) the membership interest is transferred within three years of the initial transfer of the real estate to the LLC and (2) the transfer is not a gift. Fla. Stat. § 201.02(2) and (4).

[21]See R.C. 1709.02 (tenancy in common precluded); Fla. Stat. § 711.502 (registration in beneficiary form; sole or joint tenancy ownership).

[22]*E.g.,* R.C. 319.54(G)(3)(d), (m), (s), (t), (u), and (v).

[23]This Affidavit should contain a basic recitation of the facts indicating that the individual is the sole owner of the LLC and "no money or other valuable and tangible consideration readily convertible into money is paid or to be paid for the real estate, and the transaction is not a gift." R.C. 319.54(G)(3) provides the full list of transfers exempt from conveyance fees.

[24]*See* Fla. Stat. 201.02(1). However, note that consideration specifically includes "the amount of any mortgage . . . whether or not the underlying indebtedness is assumed." Fla. Stat. 201.02(1)(a). Florida Administrative Code Rule 12B-4.014(4) specifically provides that a personal representative's deed transferring title in accordance with the terms of a will is not taxable. When nominal consideration is paid, the minimum tax is due. Fla. Admin. Code Rule 12B-4.014(2)(b) (the minimum tax is $0.70 in all counties other than Miami-Dade).

[25]R.C. 5301.252.

[26]Recorded real estate documents gener-

ally must include a notarized signature and indicate the name of the preparer. R.C. 317.114 lays out the formatting requirements for recording. Failure to comply with these requirements may result in rejection of the document for recording or additional fees.

[27]For example, if the real estate is leased or rented for residential purposes and is located in a county having a population of over 200,000, the owner of the property may need to file a Residential Rental Property Registration form with the County Auditor pursuant to R.C. 5323.02.

PERPETUAL CONFUSION: A MODEST PROPOSAL TO CLEAR UP A BAD RAP

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THE PROBLEM

In the September/October 2019 issue of this publication, Maryann Fremion Thomas outlined and lamented the apparent confusion among trust and estate practitioners over the effective dates of the various changes to R.C. 2131.09 that enabled trust settlors to opt out of Ohio's rule against perpetuities codified by R.C. 2131.08.[1] The original enactment of R.C. 2131.09(B), effective March 22, 1999, referred to in this article as the "RAP opt out," provided trust settlors and drafters the ability to opt out of the application of the rule against perpetuities to interests in property resulting from trusts created after that date. R.C. 2131.09(B), as enacted, had a number of ambiguous provisions and was overly restrictive in ways that limited the utility and flexibility of trusts that were intended to use the ability to "opt out" of the limitation on the duration of trusts, thereby allowing settlors to take advantage of the ability to shelter property from federal estate tax at each generation and the benefits of holding property in trust for multiple generations.[2] In December 2012, the Ohio General Assembly passed and the governor signed amendments to R.C. 2131.09, to clarify the ambiguities and to modify certain provisions to allow for more flexibility in the terms of trusts that take advantage of the RAP opt out. The bill enacting the changes took effect on March 27, 2013.

OSBA ESTATE PLANNING, TRUST AND PROBATE SECTION COUNCIL ACTIONS

Partly in response to Ms. Thomas' September/October 2019 PLJO article, the OSBA Estate Planning, Trust and Probate Section Council (the "EPTPL Council") decided to propose a simple and straightforward solution that could be enacted sooner rather than later. The EPTPL Council recommended to the OSBA certain clarifying changes to R.C. 2131.09. The proposed changes were submitted to the OSBA Council of Delegates for approval and were approved at its meeting on July 24, 2020, authorizing the OSBA legislative staff to work with members of the 133rd Ohio General Assembly to include the proposed changes in the omnibus probate bill that has been introduced in the Ohio House as House Bill 464.

SPECIFIC PROPOSED CHANGES

R.C. 2131.09(B)(3)(d) would be modified by deleting the phrase "the effective date of this section" and replacing it with "March 27, 2013."

R.C. 2131.09(c) would be modified by deleting the phrase "the effective date of this section" and replacing it with "March 27, 2013."

R.C. 2131.09(E) would be modified to read as follows:

> "The amendment of division (B)(1) of this section and divisions (D) and (F) of this section are intended to clarify the provisions of divisions (B) and (C) of this section as originally enacted and apply to trust instruments that are in existence prior to, on, or after March 22, 1999."

RATIONALE FOR PROPOSAL

The following rationale is directly excerpted from the report of the EPTPL Council to the OSBA Council of Delegates prepared by the Dynasty Trust Committee regarding the proposed changes.

It is apparent that there is confusion among practitioners who draft trust instruments as to the effective date of certain provisions of R.C. 2131.09 as it was enacted effective March 22, 1999 and as it was amended effective March 27, 2013. Some of the 2013 amendments were clarifying and therefore intended to be effective retroactive to March 22, 1999 and others were substantive changes that were to be applied prospectively only.

R.C. 2131.09(B), as enacted effective March 22, 1999, allowed the settlor of a trust to opt-out of the application of R.C. 2131.08 (Ohio's codification of the rule against perpetuities or "RAP"), to interests in property created under the terms of the trust agreement, provided certain conditions set forth in the statute were met. Effective as of March 27, 2013, R.C. 2131.09 was amended to clarify provisions of R.C. 2131.09(B) as originally enacted (on March 22, 1999) and to limit the restriction on the exercise of non-general powers of appointment granted in a trust agreement that opts out of the RAP. In the 2013 amendment, division (B)(4) of R.C. 2131.09 was eliminated and division (B)(3)(d) and division (C) were added to allow the opt-out to apply to the exercise of such powers, but requiring vesting of interests created pursuant to such exercise to vest within 1000 years of the creation of the power. The removal of the total restriction and the addition of the 1000 year vesting period were effective as of the date of the amendment—March 27, 2013.

In 2012, the Legislative Services Commission mark-up of the changes to R.C. 2131.09 made reference in three places to "the effective date of this Section." According to LSC personnel who marked up the proposed statutory change at that time, that reference meant the effective date of the amendment. At the time legislation is passed amending a statute, it is impossible to state specifically its effective date, thus the non-specific reference to the effective date.

Unfortunately, this has created confusion over the interpretation of the reference to "effective date of this section," some lawyers incorrectly interpreting it as meaning it is retroactively effective to the original enactment of R.C. 2131.09(B) and (C) on March 22, 1999.[3] The amended provisions relating to interests created by exercises of non-general powers of appointment, were intended to apply only prospectively because a retroactive effect date for those provisions would raise constitutionality concerns. The references in divisions (B)(3)(d) and (C) to the effective date apply to the provisions intended to apply only prospectively and thus should be changed by deleting "effec-

tive date of this section" and replacing it with "March 27, 2013." On the other hand, the other changes made to division (B) and the addition of divisions (D) and (F) were clarifying provisions, not intended to change existing law, and were intended to be effective as of March 22, 1999. Division (E) of R.C. 2131.09 should be amended as indicated to make this clarifying change.

ENDNOTES:

[1]See Maryann Fremion Thomas, Will the Ghost of the Ohio Rule Against Perpetuities Forever Haunt Us?, 30 No. 1 Ohio Prob. L.J. NL 6 (Sept./Oct. 2019).

[2]See M. Patricia Culler and Craig F. Frederickson, Opting Out of the Rule Against Perpetuities: Nine Years Later, 18 Ohio Prob. L.J. 145 (Jan./Feb. 2008), and other articles cited in the Thomas article cited in endnote 1 above.

[3]Note that such an interpretation cannot be correct because the portion of § 2131.09 that is now Division (A) was enacted long before 1999 and thus the "section" has an effective date long before the amendments to it in 1999 and 2013.

LEGAL UNCERTAINTY WITH RESPECT TO CREDITOR CLAIMS AGAINST NON-PROBATE ASSETS (REVISITED)

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Whether a creditor may reach the non-probate property of a deceased Ohio debtor leaving an inadequate probate estate was last addressed by this publication in 2014.[1]. A recent appellate decision captioned *Kingston of Miamisburg LLC v. Jeffery*,[2] and the ongoing case on remand prompt an update.

The 2014 article, which focused on funded trusts made irrevocable by the debtor's death, had two components. The first component examined whether *Schofield v. Cleveland Trust Company*,[3] still represented Ohio law. The second component considered whether the Ohio Uniform Fraudulent Transfer Act (R.C. 1336.01 *et seq.*) might apply at the death of the deceased trust settlor to create a four-year statute of limitations for his or her creditor to claim the trust property.

Schofield held that the property of a funded *inter vivos* trust made irrevocable by the settlor's death was beyond the reach of the creditor of the deceased settlor. In reaching its decision, the Ohio Supreme Court relied heavily (but not exclusively) on General Code § 8617, which stated that a creditor "*may compel the exercise of a power to the same extent and under the same conditions that the creator could have exercised the power.*" Since the creator/settlor was deceased and could no longer withdraw trust property, the Court held that a creditor of the settlor could not compel a withdrawal of trust property to satisfy the creditor's claim.

Concerns over *Schofield*'s continued viability arise because:

- 1335.01(A), which replaced General Code § 8617 verbatim upon adoption of the Ohio Revised Code effective October 1, 1953, was repealed effective January 1, 2007, prompting a deeper jurisprudential issue: If a holding is based on a statute that is later repealed, is the holding still precedential?
- Two appellate cases, *Sowers v. Luginbill*,[4] and *Watterson v. Burnard*,[5] while possibly distinguishable from *Schofield*,

> nevertheless allowed a creditor access to trust property of the deceased creator.

Regardless of whether the reader believes *Schofield* is still precedential authority in Ohio, it, *Sowers*, and *Watterson* all involved creditor claims against the trustee of a deceased debtor's funded trust. Until *Jeffery*, there was no authority on the rights of a decedent's creditors against beneficiaries of other forms of non-probate transfers.

In *Jeffery*, Marian Smith ("Marian"), age 95, was admitted to Kingston of Miamisburg ("Kingston"), a long-term care facility on August 10, 2017. Her granddaughter and agent under her Durable Power of Attorney for Health Care, Amy Jeffery ("Jeffery"), executed an admission agreement and "Benefit Determination Worksheet," the latter disclosing $40,000 in assets. Marian died on September 30, 2017 with an unpaid balance to Kingston of $15,598.46. While the Benefit Determination Worksheet disclosed that most of her assets consisted of a securities account, the Benefits Determination Worksheet apparently did not disclose that the account had been on October 21, 2013 made transfer-on-death to her son, Frederic Smith ("Frederic"). The record was (and I am told remains) unclear as to whether Marian's probate estate had sufficient wealth to satisfy Kingston's claim.

Kingston sued Frederic in the General Division of the Court of Common Pleas, alleging unjust enrichment, constructive trust and that the account had been transferred to Frederic fraudulently under R.C. 1336.04 and R.C. 1336.05. Kingston and Frederic both moved for summary judgment. The trial court found in favor of Frederic on the claims for unjust enrichment, constructive trust and the claim under R.C. 1336.04. It failed to consider the claim under R.C. 1336.05.

Without addressing the lower court's holding with respect to R.C. 1336.04, the appellate court remanded the case for an analysis under R.C. 1336.05(A) and determinations of whether the transfer of the account made Marian's estate insolvent, whether Jeffery had the authority to enter into the contract on Marian's behalf, and if not, whether Marian can still be treated as the "debtor" (defined in R.C. 1336.01(F) as a "person who is liable on a claim"), possibly on the basis of an implied-in-fact contract or unjust enrichment. The appellate court also remanded on the issue of constructive trust because under R.C. 1336.07(A)(3)(c) it found a constructive trust to be a possible remedy for a fraudulent transfer within the meaning of R.C. 1336.05.

On remand, both parties have again moved for summary judgment, and both motions were denied. Ultimately, Kingston's case could fail if Marian was not contractually bound to pay Kingston or if as a matter of law Kingston was required to, but did not, make an effective claim against Marian's probate estate under Ohio Revised Code Chapter 2117. Either of those outcomes would leave for another day a judicial resolution of the applicability of the Ohio Uniform Fraudulent Transfer Act to non-probate transfers. But whether or not an analysis of the applicability of the Ohio Uniform Fraudulent Transfer Act is pivotal to the outcome of *Jeffery*, the fact that it has been argued in *Jeffery* and the foreseeability of its relevance in a future matter make a current discussion of it worthwhile.

Let us first consider that of the Ohio Uniform Fraudulent Transfer Act which the

lower court did address. R.C. 1336.04(A) provides:

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before, or within a reasonable time not to exceed four years after, the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:
>
> (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
>
> (b) The debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

The statute makes it clear that there are two types of fraud to which the statute can apply: actual fraud, which requires a finding of intent to hinder, delay or defraud, and constructive fraud, which does not. At the lower court level, Kingston argued that it can maintain a claim under R.C. 1336.04(A)(2) (constructive fraud) and that neither Marian nor her estate are necessary parties because after her death neither she nor her estate had an interest in the account. Continuing, Kingston argued that neither Marian nor her estate received an equivalent value and that the remaining estate assets are unreasonably small compared to the amount of indebtedness.

Frederic argued that the claim is governed by the Ohio Probate Code not the Ohio Uniform Fraudulent Transfer Act, but that even if the latter applied, the claim should still fail because he is not the debtor. He argued that non-probate assets are not part of the probate estate and are therefore not recoverable for the estate's indebtedness.

Reserving judgment on whether the Ohio Uniform Fraudulent Transfer Act applies at all, the lower court held that even if it did apply, Kingston cannot recover under it. The court could simply find no evidence that Marian had an actual or constructive intent to defraud creditors. When she executed the transfer-on-death registration, (1) she was not at that time engaged or about to engage in a business transaction for which her remaining assets were unreasonably small in relation and (2) she did not believe that she would incur debts beyond her ability to pay them timely. Noting that Marian still had possession of the account after the transfer-on-death designation, the court distinguished the authority cited by Kingston which all involved transfers of wealth within a short time after entry into a nursing facility. It therefore granted Frederic's motion for summary judgment.

The appellate court recited the content of R.C.1336.04 and R.C. 1336.05 and indicated that the latter applies only to a claim that existed when the debtor made a transfer but that the former applies irrespective of when the debt arose. Citing *Esteco, Inc. v. Kimpel*,[6] the appellate court also asserted that "[i]f a transfer is fraudulent, then a creditor has the right to sue the original transferee and any subsequent transferee for the value of the transferred property."

The appellate court then concluded that the lower court intended to grant summary judgment to Frederic as to all claims relating to the Ohio Uniform Fraudulent Transfer Act, but that this was error because it

failed to consider R.C. 1336.05, and that the two statutes "involve entirely different theories of recovery."[7]

As mentioned, the appellate court did not evaluate the lower court's ruling as to R.C. 1336.04, and neither court considered R.C. 1336.05.

Turning first to the lower court's ruling on R.C. 1336.04, it seems clear that transfer-on-death registration is clearly a two-part transfer-the first part being on October 21, 2013—when Marian established the account's non-probate succession—and the second part being on September 30, 2017, when she died. The lower court focused on Marian's state of mind and her affairs when she executed the transfer-on-death registration on October 21, 2013. However, the court also acknowledged that she continued to retain control of the account until her death (and that therefore she had not made a transfer until her death). The burning question, then, is when did the transfer occur for purposes of the Ohio Uniform Fraudulent Transfer Act? If it occurred at Marian's death on September 30, 2017, does Marian's state of mind or financial affairs on October 21, 2013 have any relevance?

There are strong indications that the transfer, for purposes of the Ohio Uniform Fraudulent Transfer Act, occurred at Marian's death. As R.C. 1709.06 indicates, "A registration in beneficiary form of a security may be canceled or changed at any time by the sole owner . . . of the security, without the consent of the beneficiary." Also, as the lower court put it, "[t]he TOD beneficiary could have been changed by [Marian] prior to her death." The retained power to change or revoke the beneficiary undermines the construction of a transfer before that time.

Further, the Ohio Uniform Fraudulent Transfer Act contains some guidance on the time of a transfer. R.C. 1336.01(L) provides a definition:

> "Transfer" means every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

Did Marian dispose of or part with the account when she established the transfer-on-death designation on October 21, 2013? R.C. 1336.06(A) is also instructive:

> For the purposes of this chapter:
>
> (A)(1) A transfer is made if either of the following applies:
>
> * * *
>
> (b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee.
>
> (2)(a) If applicable law permits the transfer to be perfected as provided in division (A) of this section and the transfer is not so perfected before the commencement of an action for relief arising out of a transfer that is fraudulent under section 1336.04 or 1336.05 of the Revised Code, the transfer is deemed made immediately before the commencement of the action.
>
> (b) If applicable law does not permit the transfer to be perfected as provided in division (A) of this section, the transfer is made when it becomes effective between the debtor and the transferee.

Under R.C. 1336.06(A)(1)(b), if the transfer can be said to be perfected at all, only at Marian's death would the transfer be "so far perfected that a creditor on a simple

contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee." And if the transfer cannot be said to be perfected, then under R.C. 1336.06(A)(2)(b), "the transfer is made when it becomes effective between the debtor and the transferee," which, under R.C. 1709.06, does not occur until the owner's death.

Because she could change the designation during her life, the above considerations indicate that the relevant time of the transfer, and thus the relevant time to examine Marian's circumstances, appears to be not when she registered the account in transfer-on-death format, but rather when she died. It was then that her gratuitous transfer-on-death designation left her with assets unreasonably small in relation to her obligation, and it was then that her gratuitous transfer-on-death designation caused her to incur debts beyond her ability to pay.

Hinting to the contrary, however, is one of the statutory factors expressed in deciding if there was an actual intent to defraud. While it is clear that Marian did not have this actual intent either when she executed the transfer-on-death registration (she did not even contemplate entering a retirement home at that time) or when she died (decedents cannot form intent), one of the factors that one might have used to show actual intent might lead one to conclude that the transfer occurred upon the transfer-on-death registration. R.C. 1336.04(B)(2) provides:

> (B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:
>
> * * *
>
> (2) Whether the debtor retained possession or control of the property transferred after the transfer;

If the time of a transfer of the transfer-on-death securities account is the time of death, then the inclusion of R.C. 1336.04(B)(2) makes no sense. Therefore, giving full effect to the entire Ohio Uniform Fraudulent Transfer Act, it can be argued that the mere existence of this factor implies that the transfer occurred when Marian established the transfer-on-death registration and that her state of mind and affairs was relevant at that time.

As mentioned, neither the lower court nor the appellate court has as yet even considered R.C. 1336.05(A), which focuses only on constructive fraud and provides:

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

R.C. 1336.05(A) would appear to apply if Marian was in fact a debtor, Kingston had a claim which arose before Marian's transfer and Marian did not receive a reasonably equivalent value in exchange for the transfer.

On remand, as mentioned, both parties have moved for summary judgment and both motions have been denied. The lower court is believed to be waiting for the probate court to make a determination of the estate's insolvency.

In its motion for summary judgment, citing *In re Youngstown Osteopathic Hospital*

Association,[8] for the principle that "a transfer is fraudulent when a debtor transfers assets, without receiving a reasonably equivalent value in exchange for the transfer, while the debtor is insolvent," Kingston argues that R.C. 1336.05(A) applies because:

- Marian made a transfer, citing R.C.1336.01(L), quoted above.
- The transfer was at death, citing the lower court's earlier holding that "the account . . . remained [Marian's] property until her death, at which time [it] was transferred by the TOD" and R.C. 1336.06(A)(1)(b) and R.C. 1709.06, both quoted above.
- Marian was in fact a debtor because under R.C. 1336.01(F) she was liable on a claim (that is, under R.C. 1336.01(c), a right to payment, whether or not reduced to judgment), regardless of whether the claim is legal or equitable. This conclusion is reached because:
    - Jeffery was authorized under the Durable Power of Attorney for Health Care to contract with nursing homes on behalf of Marian.
    - Alternatively, "an express contract is not essential to the recovery of the reasonable value of service as performed by one person or another."[9]
    - Alternatively, under a theory of quantum meruit, "persons not competent to contract may be held responsible for necessaries furnished by a guardian as well as by other persons."[10]
- The claim arose before the transfer.
- Marian did not receive any value in exchange for the transfer from Frederic, applying R.C. 1336.03.
- Marian became insolvent as a result of the transfer.
    - It is believed that the estate will not have sufficient assets to satisfy the claim.
    - Also, under R.C. 1336.02(A)(1), the sum of Marian's debts is greater than all of her assets at fair valuation, which assets do not include, under R.C. 1336.02(C)(1), assets that have been transferred, concealed or removed with intent to hinder, delay or defraud creditors, or transferred in a way considered fraudulent under R.C. 1336.04 or R.C. 1336.05.
- As a bonus, Kingston points out that Marian's will directed Frederic to "discharge such obligations as remain at the time of my death from financial receipts he receives from me at the time of my death." It is not clear that one's will may obligate a third party as to non-probate property, but the argument certainly is not detrimental to Kingston's case as it provides evidence of Marian's intent.
- Regardless of whether Kingston made a claim against Marian or her estate, an independent cause of action arises against Frederic under various cases, largely *Brown Bark II, L.P. v. Coakley*.[11]
- Because there was a fraudulent transfer, Kingston is entitled to a constructive trust against the account (the appellate court found this to be an

appropriate remedy if a fraudulent transfer is found by reason of R.C. 1336.07(A)(3)(c)).

Frederic argues that:

- As a prerequisite to the case for fraudulent transfer, Kingston would have had to first file a valid claim against Marian's estate.
- In *Vancrest Mgmt. Corp v. Mullenhour*,[12] on similar facts, the Third District Court of Appeals ruled in favor of the beneficiary of an annuity because the nursing home failed to pursue the resident or her estate and could not make a claim that the beneficiary was the debtor.
- There is a lack of privity with Frederic.
- There was no binding contract.
    - Kingston would not have a valid claim against Marian or her estate due to Marian's incapacity and her unlawful admission to Kingston.
    - Jeffery executed the admission agreement in her personal capacity and without any authority under a guardianship or power of attorney.
- Unlike the nursing home resident in *Vancrest*, Marian was incompetent and admitted to Kingston involuntarily.
- The appellate court in *Jeffrey* misapplied the law: The Third District Court of Appeals in *Vancrest* held that the annuity transferred to the named beneficiary by operation of law "by reason of the contract regarding the registration between the owner of the security and the registering entity" under R.C. 1709.09, and that therefore there is no need to examine the Ohio Uniform Fraudulent Transfer Act.
- In the appellate court's own language,[13] no constructive trust should be imposed unless the transferee has done something unconscionable.
- No constructive trust should apply in this case because Kingston, having not entered into a valid contract, has unclean hands.

Whether *Jeffery* can be decided on fraudulent transfer or other grounds remains to be seen. However, the fact that the Ohio Uniform Fraudulent Transfer Act has been argued vigorously in brief and not totally discounted by the Second District Court of Appeals in *Jeffery* should lead the reader to question whether it as written can (or should, as a policy matter) apply at all to void non-probate gratuitous transfers in certain circumstances. If not, is an amendment needed to the Ohio Uniform Fraudulent Transfer Act to clarify that death itself cannot be a fraudulent transfer? If the Ohio Uniform Fraudulent Transfer Act should apply as a policy matter, then several follow-up questions arise:

- Should a valid claim against a decedent's estate serve as a prerequisite to arguing fraudulent transfer?
- Is the estate a necessary party if there is a suit for fraudulent transfer against a transferee?
- Should estate assets be primarily responsible for the debt before the assets subject to a non-probate transfer?
- What about priority as to the different forms of non-probate transfers?
- If one's death can be considered a

transfer under the Ohio Uniform Fraudulent Transfer Act, should there be what appears to be a four year statute of limitations under R.C. 1336.04?

- If one's death can be considered a transfer under the Ohio Uniform Fraudulent Transfer Act, should surviving spouses have rights to assets transferred by non-probate transfer under Ohio Revised Code Chapter 2106?

ENDNOTES:

[1]Krall/Mesnard, *Legal Uncertainty with Respect to Creditor Claims Against Non-Probate Assets*, 24 No. 5 Ohio Prob. L.J. NL 4 (May/ June 2014).

[2]*Kingston of Miamisburg LLC v. Jeffery*, 2019-Ohio-1905, 2019 WL 2156450 (Ohio Ct. App. 2d Dist. Montgomery County 2019).

[3]*Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 14 Ohio Op. 224, 21 N.E.2d 119 (1939).

[4]*Sowers v. Luginbill*, 175 Ohio App. 3d 745, 2008-Ohio-1486, 889 N.E.2d 172 (3d Dist. Van Wert County 2008).

[5]*Watterson v. Burnard*, 2013-Ohio-316, 986 N.E.2d 604 (Ohio Ct. App. 6th Dist. Lucas County 2013).

[6]*Esteco, Inc. v. Kimpel*, 2007-Ohio-7201, ¶ 8, 2007 WL 4696855, at *2 (Ohio Ct. App. 7th Dist. Columbiana County 2007).

[7]*Kingston of Miamisburg LLC v. Jeffery*, 2019-Ohio-1905, ¶ 23, 2019 WL 2156450, at *4 (Ohio Ct. App. 2d Dist. Montgomery County 2019).

[8]*In re Youngstown Osteopathic Hosp. Ass'n*, 280 B.R. 400 (Bankr. N.D. Ohio 2002).

[9]*Outland v. Huffman*, 1982 WL 3774 (Ohio Ct. App. 2d Dist. Miami County 1982).

[10]*Dearth Management, Inc. v. Nentwich*, 1990 WL 16029 (Ohio Ct. App. 5th Dist. Knox County 1990).

[11]*Brown Bark II, L.P. v. Coakley*, 188 Ohio App. 3d 179, 2010-Ohio-3023, 934 N.E.2d 991 (10th Dist. Franklin County 2010).

[12]*Vancrest Management Corp. v. Mullenhour*, 2019-Ohio-2958, 140 N.E.3d 1051 (Ohio Ct. App. 3d Dist. Allen County 2019).

[13]*Kingston of Miamisburg LLC v. Jeffery*, 2019-Ohio-1905, ¶ 27, 2019 WL 2156450, at *5 (Ohio Ct. App. 2d Dist. Montgomery County 2019).

CASE SUMMARIES

Estate of Armatas v. Cleveland Clinic Foundation

Headnote: Notary Public

Citation: 2020-Ohio-3338, 2020 WL 3251170 (Ohio Ct. App. 5th Dist. Stark County 2020)

Plaintiff son sued hospital on contract for services to his father, the contract being made by the son as agent under a power of attorney. The trial court granted summary judgement to the hospital because the son (named as the agent in the POA) also was the notary on it. Affirmed on appeal. The son had no standing to sue as the POA was invalid so the contract was not effective. The POA would have been invalid under R.C. 147.141, the new POA statute; the statute did not apply because the POA was made before its effective date, but the statute only codified preexisting common law. An agent named in a POA cannot himself be the notary on it.

This decision applies of course to all documents and all notaries, not just POAs. Do not do this.

Goddard v. Goddard

Headnote: Trust administration and termination

Citation: 2020-Ohio-3372, 2020 WL 3283596 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

Son as trust beneficiary sued father as trustee of three trusts, with various claims for surcharge and removal. The trial court granted summary judgment to the trustee, affirmed on appeal. Two of the trusts had terminated over four years before suit, and claims with respect to them were barred by the R.C. 5810.05 statute of limitations. Claims with respect to the other trust were not supported by any evidence.

Crown Hill Cemetery Association v. Maxfield

Headnote: Principal and Income Act

Citation: 2020-Ohio-3433, 2020 WL 3428088 (Ohio Ct. App. 10th Dist. Franklin County 2020)

Cemetery incurred capital gains taxes on sales of investments in its endowment trust. R.C. 1721.21 of the cemetery association law requires that capital gains be retained intact in the principal of such cemetery trusts. However, R.C. 5812.46(B) of the Principal and Income Act requires that capital gains taxes on asset sales of any trust be paid from the principal of the trust. On summary judgment, the trial court held that the Principal and Income Act applied and as the later and more specific statute; affirmed on appeal. This is a rare reported discussion of the Income and Principal Act.

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Graf, Proposed Rewrite of Limited Liability Company Act, Sept/Oct 2019

Medicaid

Wiesenmayer v. Vaspory, 2019-Ohio-1805, July/Aug 2019

Browning, Estate Recovery Case Upends Probate Insolvency Procedures, May/June 2020

Notary Public

Weinewuth, Ohio Notaries Take Note: Your Notarial Certificate Might Not Pass Muster, Nov/Dec 2019

Weinewuth, Update on Notarial Certificate Requirements: Statutory Revision Forthcoming, Jan/Feb 2020

Trust Administration and Termination

Malemud, Hey Fiduciaries, the Ohio Trust Code is Still Your Friend, Nov/Dec 2019

Matter of Roudebush, 2019-Ohio-3955, Nov/Dec 2019

Ramer, "Exit in an Orderly Fashion" Revisited: A Proposed Statutory Solution for Ohio Irrevocable Trusts, March/April 2020

Catley v. Boles, 2020-Ohio-240, March/ April 2020

Trust Contest

Foelsch v. Farson, 2020-Ohio-1259, May/ June 2020

Trust income tax

Brucken and Robertson, Is the Ohio Trust Income Tax Constitutional? Sept/Oct 2019

North Carolina Dept. of Revenue v. Kaestner Family Trust, 139 S. Ct. 2213 (2019), July/Aug 2019

Wills and Contests

McGee, Revisiting Ohio's Harmless Error Statute—Saving Grace or Unintended Loophole? July/Aug 2019

Gee, The New Uniform Electronic Wills Act, Nov/Dec 2019

In re LMW, 2019-Ohio-3873, Nov/Dec 2019

Bills v. Babington, 2019-Ohio-3924, Nov/ Dec 2019

In re Estate of Lodwick, 2019-Ohio-4559, Nov/Dec 2019

Brucken, Probate and Contest of Wills, Jan/Feb 2020

Holden v. Holden, 2019-Ohio-5031, Jan/ Feb 2020

Millonig, Should Ohio Adopt the Uniform Electronic Wills Act? March/April 2020

Hochstetler, Where There's a Will There's a Way: The Harmless-Error Rule, Interested-Witness Rule, and In re Estate of Shaffer, May/June 2020

Hoffheimer, Lawyer Who Cannot Locate Testators May Not Discard Wills, May/June 2020

LEGISLATIVE SCORECARD

Keep this Scorecard as a supplement to your 2018 Ohio Probate Code (complete to October 1, 2018) for up-to-date information on probate and trust legislation.

Pending legislation

Authorize benefit corporations See Vannatta, *Ohio Benefit Corporations: Beneficial or Not?* 27 PLJO 210 (May/June 2017) Stautberg and Speivack, More Than the Money: Ohio's Proposed Business Benefit Corporation, 30 PLJO 211 (May/June 2020)	SB 21	Passed Senate 3-6-19
Abolish dower See Brigham, *The Death of Dower*, 28 PLJO 221 (July/Aug 2018); Brinkman, *The Argument to Keep Dower in Ohio*, 28 PLJO 223 (July/Aug 2019)	HB 209	Passed House 10-24-19
Simplify collection of unclaimed funds	HB 270	Intro. 5-30-19
Apply real estate transfer fee to transfer of controlling entity interests See Laymen, Proposal to Close Conveyance Fee Loophole for Indirect Transfers of Real Property, 28 PLJO 189 (May/June 2018)	HB 449	Intro. 12-17-19
Omnibus probate and trust law bill	HB 464	Intro. 1-9-20

Contains the following subjects: Guardianship estate planning authority Spousal vehicle transfer clarification Creditor rights after lapse of power Changing nomination of future trustees For details of each see the OSBA proposals below		
Update LLC act See Graf, Proposed Rewrite of Limited Liability Company Act, 30 PLJO 7 (Sept/Oct 2019)	SB 276	Intro. 2-11-20
Authorize electronic wills	HB 692	Intro. 6-8-20
Enacted Legislation		
Omnibus probate and trust act Contains the following subjects: Arbitration of trust disputes Clarification of antilapse statute to class gifts Predeath validation of wills and trusts Disposition of body by Coroner Incorporation of trust instrument into will Evidence privilege of fiduciaries Validity of foreign electronic wills Use of IOLTA accounts for fiduciary funds	HB 595	Eff. 3-22-19
Emergency act, statutes of limitations tolled	HB 197	Eff. 3-27-20
Permit remote notaries	SB 263	Eff. 3-20-19

See PLJO of Jan/Feb 2019 for material on each of the acts above.

Proposed legislation sponsored by the Ohio State Bar Assn. Estate Planning, Trust and Probate Law Section

Permit waivers of inventories and accounts See EPTPL Section Report, *Waiver of Filing of Inventory and Accounts OSBA Reform Proposal*, 28 No. 2 Ohio Prob. L.J. NL 1 (Nov/Dec 2017)	Ohio BAR of 10-17-94
Guardianship estate planning authority See Thakur, *Proposal: Authorizing "Estate Planning" For a Ward by a Guardian*, 29 PLJO 141 (May/June 2019)	Spring 2019*
Spousal vehicle transfer See Lanham, *EPTPL Section Proposes to Amend RC 2106.13(A)*, 29 PLJO 152 (May/June 2019)	Spring 2019*
Creditor rights after lapse of power to withdraw See Davis, *Asset Protection Opportunities expanded by the repeal of Ohio Revised Code Section 5805.06(B)(2)*, 29 PLJO 147 (May/June 2019); Brucken, *Ohio Trust Code Amendments*, 29 PLJO 139 (May/June 2019)	Spring 2019*
Changing nomination of future trustees See Brucken, *Ohio Trust Code Amendments*, 29 PLJO 139 (May/June 2019)	Spring 2019*
Facilitating electronic wills See Brucken and Gee, Ohio Electronic Wills, 29 PLJO 99 (March/April 2019)	Spring 2020
TOD for tangible personal property	Spring 2020

See Harris, Transferring Tangible Personal Property by Beneficiary Designation, 29 PLJO 144 (May/June 2019)	
Clarifying claims presentment procedure	Spring 2020
See Weinewuth, Presentment of Claims against Estates: A Practical Proposal for Improvement after Wilson v. Lawrence, 29 PLJO 153 (May/June 2019)	
Authorizing postnuptial agreements	Spring 2020
See Racey and Ferraro, The Postnuptial Agreement Renaissance-Can Ohio Emerge from the Dark Ages? 29 PLJO 195 (July/Aug 2019)	
Simplifying procedure on trust termination	Spring 2020
See Ramer, Exit in an Orderly Fashion Revisited: A Proposed Statutory Solution for Ohio Irrevocable Trusts, 30 PLJO 149 (March/April 2020)	
Correcting disinterment statute	Spring 2020
See Millonig, Disinterment vs. Right of Disposition Statute, 30 PLJO 214 (May/June 2020)	
Clarifying perpetuities statute	Spring 2020
See Culler, Perpetual Confusion: A Modest Proposal to Clear up a Bad RAP, 30 PLJO 266 (July/Aug 2020)	

*Full text and explanation given in EPTPL Section Report to OSBA Council of Delegates, posted on OSBA website under "About the OSBA/OSBA Leadership/Council of Delegates/ Council of Delegates Reports."

For the full text of pending bills and enacted laws, and for bill analyses and fiscal notes of the Legislative Service Commission, see the website of the Ohio General Assembly (legislature.state.oh.us). Information may also be obtained from the West Ohio Legislative Service, and from Thomson Reuters Customer Service Dept. at 1-800-328-9352.

