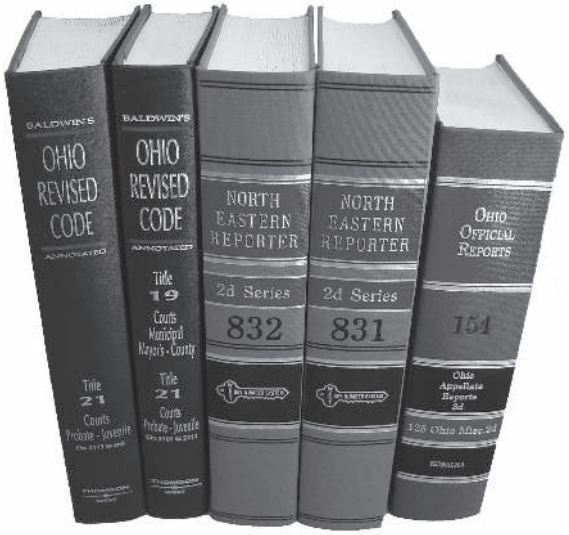

Probate Law Journal of Ohio

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EDITOR'S MESSAGE

The recently circulated West 2008 Ohio Probate Code, a separate volume distributed by banks, has a closing date preceding enactment of HB 499, the act that amended many sections of the Ohio Trust Code. Thus, users of that volume must be aware that for the current OTC they must access HB 499 rather than the version of OTC printed in that volume.

Options for Keeping Information Private under the New Rules of Superintendence

By Marilyn J. Maag, Esq.
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The Ohio Supreme Court has adopted Rules 44 to 47 to the Rules of Superintendence of the Courts of Ohio. The Rules apply to the Supreme Court, as well as to all courts of appeal, courts of common pleas, municipal courts, and county courts in Ohio.

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I. Rule 44

Rule 44 includes several key definitions. The Rules refer to "documents" rather than "records," because the Rules address the availability of one document at a time, rather than the availability of an entire file.

A. A "case file" refers to all of the case documents filed in a judicial action or proceeding.

B. A "court record" means either a case document or an administrative document. Court records include documents that are stored in the file at the courthouse and documents that are available on the internet.

C.

1. A "case document" is a document and information in a document filed with a court in a judicial action or proceeding. Pleadings, motions, orders, and judgments, as well as court-prepared documents such as journals, dockets, and indices are case documents.

2. The term "case document" does not include:

(a) A document or information in a document that is exempt from disclosure under state, federal or the common law;

(b) Personal identifiers, as defined in Rule 44(H);

(c) A document or information in a document to which public access has been restricted pursuant to the Rules of Superintendence;

(d) Certain information about a juvenile, except as relevant to the juvenile's prosecution later as an adult;

(e) Notes, drafts, recommendations, advice and research of judicial officers and court staff;

(f) Separate filings containing personal identifiers (filed under Sup. R. 45(D)(2));

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source unless it is exempt from public access.

D. An "administrative document" is a document and information in a document created, received, or maintained by a court for administrative, fiscal, personnel, or management functions or other operational purposes of the court. Rule 44(G)(2) excludes certain types of information from administrative documents.

E. The term "personal identifiers" means:

1. Social Security numbers, except for the last four digits;

2. Financial account numbers, including debit card, charge card, and credit card numbers;

3. Employer and employee identification numbers; and

4. A juvenile's name in an abuse, neglect, or dependency case. The child's initials or a generic reference such as "CV" for child victim may be included.

II. Rule 45

Rule 45 governs public access to court records. It clearly states that court records are presumed open to public access. Rule 45 explains the procedure for providing direct access and the procedure for providing remote access. It also describes the procedure for restricting public access to a case document, and the procedure for obtaining access to a case document that previously was not available to the public.

A. Direct access.

1. Subject to the special provisions in Sup. R. 46, a court shall permit a requestor to have a court record duplicated upon paper, upon the medium upon which the court keeps the record, or upon any other medium that reasonably can be utilized.

2. A court may charge its actual costs for providing court records to a person requesting them.

3. The court must provide the records within a reasonable time from the request.

B. Remote access.

1. A court *may* offer remote access to a court record.

2. If a court chooses to make a record available through remote access, the record available by remote access must be identical to the record available by direct access, except that the court may exclude from remote access an exhibit or attachment that is part of the record if the court includes notice that the exhibit or attachment exists and is available by direct access.

3. If a court chooses to make a particular case document available through remote access, the court does not have to make other case documents in that case file available through remote access.

4. A court also has the option of creating certain documents that are available only in electronic form, such as an online list of filings.

5. The parties to a judicial action or proceeding must omit personal identifiers from the case documents they file. When personal identifiers are omitted from a case document, the parties shall file the omitted information on a separate form. A court or clerk may provide a standard form for parties to use. A party to a judicial action or proceeding will be able to obtain personal identifiers by making a motion to the court.

C. The procedure for restricting public access to a case document.

1. Who may restrict access to information. Any party, or an individual who is the subject of information in a case document, may request that the court restrict public access to the information. A court may restrict public access to information upon its own order.

2. Motion to the court. The party requesting restricted public access must make a motion to the court. The court will give notice of the motion or order to all parties, and may schedule a hearing on the motion.

3. Factors the court considers. A court shall restrict public access to information, if the court finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest. The court considers the following factors:

(a) Whether public policy is served by restricting public access;

(b) Whether any state, federal, or common law exempts the document or information from public access;

(c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

4. Least restrictive alternative. If a court decides to restrict public access to a case document, or information in a case document, the court shall use the least restrictive alternative for restricting public access.

5. Filing of redacted information. If a court decides that certain information will be redacted, then a redacted version of the document shall be filed in the case file along with a copy of the court's order. Case documents that are withheld from the public, or information that is ordered redacted, will be maintained separately by the court.

D. Obtaining access to a case document with restricted public access.

1. Motion to the court. Any person may request access to a case document or information in a case document that has been granted restricted public access by filing a written motion with the court.

2. Circumstances under which court will grant access. The court may permit access to a case document or information

in a case document that previously was withheld from the public if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest.

III. Rules 46 and 47

Rule 46 includes the procedures for bulk distribution of information.

Rule 47 states that the provisions of the proposed Rules requiring redaction of information from, or restricting access to, case documents will apply to case documents filed in actions commencing on or after the effective date of the Rules, which is May 1, 2009. With regard to administrative documents, however, the Rules requiring omission of information apply to all documents regardless of when created.

IV. Options for Keeping Information Private

The newly-adopted Rules of Superintendence specifically state that court records are presumed open to public access. This presumption arises from one of the core policies of our court system: Our judges and courts do not operate in secret; rather, their decisions are subjected to public scrutiny. The Rules also acknowledge, however, categories of information that we must keep private and instances when the reasons for keeping certain information private outweigh the presumption of disclosure.

In the probate courts in particular, where personal financial and medical information are involved, we will have to utilize the options for keeping information private. The Rules actually demand that we file certain information separately for the purpose of protecting privacy. Beyond that requirement, we may choose to take advantage of some of the options that are available to us.

The Rules allow the courts to decide which court records the court will make available through remote access. The courts have the flexibility to protect sensitive information. The courts have the authority to block remote access to *categories* of documents, such as all inventories and accounts filed in estates. Even when the public is given direct access to inventories and accounts, there are important public policy reasons for denying remote access. The argument certainly could be made that documents such as inventories and accounts, that contain personal financial information, should not be readily available on the internet. The same argument also could be made about documents containing medical or psychological information. In at least some cases, the public's fundamental right to observe decision-making by courts can be protected without taking the step of posting financial and medical information on the internet.

If a court chooses not to categorically deny remote access to some documents, then the Rules contemplate a document-by-document analysis of whether the court should grant remote access to the information. In those cases where particularly sensitive, important, or personal information is involved, a court should not hesitate to block remote access, knowing that the public has the opportunity to view the information at the courthouse.

If a party wants to take the matter into his or her own hands, in an effort to make certain that members of the public are not permitted to review, either at the courthouse or on the internet, information contained in a case document, then the party may make a motion to the court, requesting restricted access. The procedure for making such a motion is described in detail in Rule 45. The new Rules of Superintendence contemplate restricted access to a particular case document, rather than the entire case file. In other words, the court does not have to seal the entire file to protect certain information; rather, the court may decide simply to deny access to one document or even information included within one document. Thus, for example, a probate court could decide that the inventory filed on behalf of a decedent's estate contains information about the decedent's closely-held business that should be kept confidential. The court may conclude that some information should be redacted from the inventory, meaning that the probate court will maintain the redacted information separately.

In conclusion, while the new Rules of Superintendence are dedicated to keeping information available to the public, the Rules also are flexible enough to provide several different alternatives to attorneys and parties who want to keep private information out of public view.

For further discussion of this topic, see Maag, *The Debate Over Public Access to Probate Court Files Continues*, 19 PLJO 61 (Nov./Dec. 2008); Maag, *Proposed Rules Relating to Public Access to Probate Court Files*, 18 PLJO 165 (Mar./Apr. 2008); Maag, *A Status Report on the Debate Over Internet Access to Court Files*, 16 PLJO 107 (Mar./Apr. 2006); and Eilers, *Probate Prevents Privacy*, 14 PLJO 141 (July/Aug. 2004).

Talking Sense to the County Recorders: The Revision of House Bill 525

By C. Terry Johnson, Esq.
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Member, PLJO Editorial Advisory Board

At the end of last year, a Broadway play entitled *Dividing the Estate*[1] examined the feelings of the members of a small-town Texas family who on the surface discussed the passing of the family's patriarch, but who really were wondering how much money they would make once the family's rather grand homestead was sold. At the beginning of the first act, the family's matriarch, Stella, and one of her two daughters launch into a meandering conversation of their family's misadventures. It seems that for many years members of the family have been drawing money from the family estate. Now they're wondering if it isn't time to carve it up in a permanent fashion, even though Stella is still alive. When a character exclaims to the family's long-time maid that the patriarch's will is in probate, she explains, before wheeling around to head back into the kitchen, "Good Lord, probate! It's always something!"

Estate planning, trust and probate lawyers all over the state of Ohio can relate to the feelings of the family members. After all, we deal with these problems every day, but it might be a bit more difficult for us to recognize a second level of this discussion. For several decades in Ohio, there has been a discernable tension in probate law between simplifying the probate process and ensuring that everyone involved has been protected. The former emphasizes less supervision in the probate process, and the latter, more.

This tension was illustrated recently with the introduction by the Association of County Recorders of House Bill 525, which dealt with the standard format requirement that an instrument must meet to be eligible for recording by a county recorder. Not surprisingly given its source, the bill as introduced contained a plethora of requirements: print size not smaller than a font size of 10; minimum paper size of 8½" by 11"; maximum paper size of 8½" by 14"; black or blue ink only; no use of highlighting; margins of 1" width on each page; margins of 1" width on each page across the bottom of each page; a 3" margin across the top of the first page of each instrument; and a 1½" margin across the top of each of the other pages of the instrument. Recording would have been denied to nonconforming documents.

This sort of thing surprised no one. Those of us of a certain age remember when many county recorders in Ohio attempted to refuse to allow the filing of durable powers of attorney in connection with the sale of real estate or the filing of a certificate of a trust's existence.

Because House Bill 525 would have denied recording to nonconforming items, the Ohio State Bar Association and other organizations opposed it. Fortunately, wiser, grayer heads prevailed and the original bill was amended to permit nonconforming items to be recorded as well, but with a penalty of $20.00 per instrument. Most of us felt that this was a small and reasonable price to pay for continuing to simplify the probate process in Ohio. After all, think of the chaos that might have resulted under the bill as originally introduced if a tired, overworked secretary mistakenly included a margin of 1½" on one side of one of the pages of a document submitted for recordation, rather than the 1" margin required by the bill.

The revised House Bill 525 was passed in the lame duck session late last year, and was scheduled to become effective on April 7, 2009.

ENDNOTE

1. *Dividing the Estate*, by Horton Foote, Booth Theatre, New York City.

Shoemaker v. Gindlesberger Revisited

By Alan Newman, Esq.
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Member, PLJO Editorial Advisory Board

This note is a follow-up to my article, Shoemaker v. Gindlesberger*: The Lack of Privity Defense Survives, but*

Just Barely, that was published in the July/August 2008 issue of this Journal.[1] In *Shoemaker*,[2] the Ohio Supreme Court approved and followed its decision in *Simon v. Zipperstein*,[3] under which an attorney who prepares a will for a client cannot be liable in negligence to a third person the client intended to benefit under the will unless (i) the third person was in privity with the client or (ii) there are special circumstances present, such as fraud, bad faith, collusion or other malicious conduct.

The Supreme Court's opinion in *Shoemaker* noted that courts from other jurisdictions have suggested that the personal representative of a decedent's estate might be able to pursue a malpractice claim against the decedent's lawyer without running afoul of the privity rule.[4] My article on the case pointed out that one of the decedent's children who was a beneficiary under the will apparently was a party in the litigation against the decedent's attorney as executor of the estate, as well as individually. I then noted that it was not clear from the Court of Appeals decision whether the Court of Appeals had affirmed a trial court grant of summary judgment against the estate as well as against the children individually.

There were actually two Court of Appeals decisions in the litigation that followed the decedent's death. The decedent had three children, each of whom was a beneficiary under her will. Prior to her death, she gave a farm to one of them, Roy, and retained a life estate. The retained life estate resulted in state and federal estate tax liabilities, and estate assets were sold to raise funds to pay the taxes.[5] The other two children sued the decedent's attorney, Gindlesberger, alleging negligence. They also sued their brother, Roy, under an unjust enrichment theory. Roy filed a cross-claim against Gindlesberger for negligence. Relying on *Zipperstein*, the trial court granted Gindlesberger summary judgment in both cases, after which Roy and the other two children each filed separate appeals. In noting that it was not clear from the Court of Appeals decision that was appealed to the Supreme Court in *Shoemaker* whether the Court of Appeals had affirmed a trial court grant of summary judgment against the estate as well as against the children, individually, my article (in footnote 17) mistakenly cited the Court of Appeals decision from the appeal by Roy, instead of its decision from the appeal by the other two children. The cite should have been to *Schlegel v. Gindlesberger*, 2006 WL 3783544 (rather than to *Schlegel v. Gindlesberger*, 2006 WL 3783537).

More important, while it is not clear from either Court of Appeals decision whether the Court of Appeals affirmed a trial court grant of summary judgment against the estate as well as against the other two children individually, the issue of whether a claim could have been successfully asserted against Gindlesberger by the estate apparently was not presented to the Supreme Court in *Shoemaker*. In the other two children's Merit Brief in the case, the only proposition of law presented to the Court was: "An intended beneficiary of a decedent's estate plan may maintain an action against an attorney who is negligent in the creation of such a plan even though the beneficiary is not in direct privity with that attorney."[6]

ENDNOTES

1. Thanks to Wayne Dabb of Cleveland, Ohio, for the information that is included in this update.
2. 118 Ohio St.3d 226, 887 N.E.2d 1167 (2008).
3. 32 Ohio St.3d 74, 512 N.E.2d 636 (1987).
4. In 2000, an Ohio Court of Appeals decision allowed a claim by the personal representative of a decedent's estate to proceed against the decedent's estate planning attorney for the attorney's alleged negligence that resulted in the payment of federal estate taxes that arguably could have been avoided. *Hosfelt v. Miller*, 2000 WL 1741909 (Ohio App. 7 Dist. 2000). By contrast, in that same year, a different Court of Appeals, relying on *Zipperstein*, affirmed the dismissal of a negligence claim brought by the administrator of a decedent's estate against the decedent's attorney who had failed to obtain the required signature of one of the two attesting witnesses to the decedent's will. *Dykes v. Gayton*, 139 Ohio App.3d 395, 744 N.E.2d 199 (Ohio App. 10 Dist. 2000).
5. The opinion does not mention the possibility of the estate recovering the estate taxes attributable to the gifted farm from its recipient, Roy, under § 2207B of the Internal Revenue Code.
6. See http://www.sconet.state.oh.us/tempx/601007.pdf (last visited Jan. 14, 2009).

Proposal to Fix a Glitch in the Ohio Trust Income Tax Residency Rules

By Kevin G. Robertson, Esq.
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At its meetings in January 2009, the Council of the Ohio State Bar Association's Estate Planning, Trust and

Probate Law (EPTPL) Section approved a proposal to fix a glitch in the residency rules that apply under Ohio's income tax on trusts.

The glitch involves the Trust residency rules that apply in the case of a pour-over from a decedent's will to an *inter vivos* irrevocable trust upon the death of an individual domiciled *outside of the State of Ohio*. In this context, it is common practice for a decedent's will to contain pour-over provisions directing the residuary probate assets into decedent's formerly-revocable *inter vivos* trust which becomes irrevocable due to the decedent/settlor's death.

Under ORC § 5747.01(I)(3)(e)(i) (and ORC § 5747.01(I)(3)(a)(i)), a *testamentary* trust established by a decedent is treated as an Ohio-resident trust only if the decedent was domiciled in the state of Ohio at decedent's death.

Under ORC § 5747.01(I)(3)(e)(ii) (and ORC § 5747.01(I)(3)(a)(i)), an *inter vivos* trust is treated as an Ohio-resident trust if (a) such trust receives a "qualifying transfer" on account of the death of a decedent, and (b) at least one of the qualifying beneficiaries of the trust is domiciled in Ohio for at least part of the taxable year in question. Further, and here is the technical concern, ORC § 5747.01(I)(f)(v) includes in the definition of "qualifying transfer" any transfer "made to a trust on account of the will of the testator."

Unlike ORC § 5747.01(I)(3)(e)(i), which includes an Ohio-domicile requirement with respect to the testator as to a *testamentary* trust, ORC § 5747.01(I)(3)(f)(v) fails to include an express Ohio-domicile requirement in that particular branch of the "qualifying transfer" definition, which addresses pour-overs into an *inter vivos* trust. Every other clause of § 5747.01(I)(3)(f) includes an Ohio-domicile/nexus requirement, and there does not appear to be any rationale for having excluded such an Ohio-domicile requirement from § 5747.01(I)(3)(f)(v) in the first place. Test #8 in the Ohio Department of Taxation's Information Release Trust 2003-02 (Trust Residency; February 2003) includes a "Note" regarding this anomaly ("The statute does not require that the testator be domiciled in Ohio at any time"), although the facts in the Example for Test #8 involve a decedent who *was* domiciled in Ohio at his death.

Since it is clear that a *testamentary* trust established under the will of a decedent who was domiciled outside of Ohio is *not* a resident trust, it stands to reason that the same "nonresident trust" treatment should be accorded to amounts transferred to an *inter vivos* trust under the pour-over provisions of the will of a non-Ohio-domiciled decedent.

Accordingly, to eliminate this conceptual glitch, the EPTPL Section Council has proposed that ORC § 5747.01(I)(3)(f)(v) be amended to read as follows (proposed new language underlined; *i.e.*, adding an explicit Ohio-domicile requirement, so that such pour-over transfers under a will would result in "Ohio-resident trust" status only if the decedent/transferor was domiciled in Ohio at death):

"(v) The transfer is made to a trust on account of the will of a testator <u>who was domiciled in this state at the time of testator's death for purposes of the taxes levied under Chapter 5731 of the Revised Code.</u>"

This nascent proposal next must be submitted for consideration by the Screening Committee of the OSBA Council of Delegates. If and when the proposal is approved by the Screening Committee and by the Council of Delegates (hopefully, within the next few months), it would be submitted as an OSBA-approved legislative proposal for consideration by the General Assembly.

OSBA Seminar Notice

By Christina D. Evans, Esq.
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Chair, EPTPL Section Committee on
the 2009 Convention Seminar

The Estate Planning, Trust, and Probate Law Section of the Ohio State Bar Association will present its annual CLE program in conjunction with the annual Ohio State Bar Association Convention on Friday, May 15, 2009, from 1:00 p.m. to 4:15 p.m. at the Renaissance Cleveland Hotel in Cleveland. All attorneys are welcome, and special discounts are available for Ohio State Bar Association members. The program is as follows:

- *Selected Issues in Life and Death Planning for Retirement Benefits*, presented by Roy A. Krall, Esq., Weston Hurd LLP, Cleveland, Ohio.
- *Estate Planning for the Possibility of Di-*

vorce, presented by Jennifer A. Savage, Esq., Thompson Hine LLP, Cleveland, Ohio, and Deanna L. DiPetta, Esq., Zashin & Rich Co., L.P.A., Cleveland, Ohio.

- *Elder Law and Medicaid Planning Update—A Review of What's New and Important*, presented by Janet L. Lowder, Esq., Hickman & Lowder Co., LPA, Cleveland, Ohio.
- *"My Client has become a Florida Resident": Selected Issues of Florida Law and Traps for the Unwary for the Ohio Lawyer to Be Aware of When a Client Becomes a Florida Resident*, presented by Juan D. Bendeck, Esq., Hahn Loeser & Parks LLP, Naples, Florida.

Additional information and registration materials for this seminar will be disseminated to all OSBA members this spring. Attorneys also can register online at www.ohiobar.org or by calling the OSBA Member Service Center at (800) 232-7124 or (614) 487-8585.

Avoiding Probate—More Important Than Ever

By Mohammed J. Bidar, Esq.
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Avoiding probate has been a staple of estate planning for decades. Whether or not a plan involves estate tax planning, probate avoidance is a cornerstone of most plans. In fact, a cottage industry has developed around the concept, with written materials and seminars prolific about the costs of not planning properly. The deluge of propaganda on the subject makes it almost certain that a client is at least aware of the issue.

To avoid probate, of course, means to avoid the court process associated with transferring a decedent's property to his intended beneficiaries. Only those properties, or those assets, titled solely in the name of the decedent which do not pass by operation of law, or by beneficiary designation, will be subject to the probate process. Certain assets, like the death benefit proceeds of a life insurance policy or the benefits of deferred annuities, individual retirement accounts, and other retirement plans, pass by beneficiary designation and so are not subject to probate. Similarly, property, whether bank or investment accounts, or real estate, titled as joint tenancy with rights of survivorship (JTWROS) will automatically pass by the contract terms to the surviving joint tenant or tenants when one of the owners passes away, thereby avoiding probate.[1]

As a consequence of the groundswell for probate aversion, state legislatures have in recent years made it easier and easier to avoid probate. Accounts and properties may now, in most states (including Ohio), be titled as owned solely by an individual owner during his lifetime, transfer on death (T.O.D.)[2] or payable on death (P.O.D.)[3] to a named beneficiary or beneficiaries. The T.O.D. or P.O.D. designation serves as a beneficiary designation identical to that historically associated with life insurance or retirement plan benefits, thereby transforming an asset from one subject to probate to one passing outside probate.

The historical reasons for avoiding probate are very much relevant today. Probate is a court process, therefore avoiding it will save court costs, including the lawyer's time and the statutorily higher commissions allowed to the administrator or executor for dealing with probate property.[4] In addition, making out-of-state real property not subject to probate by placing it into a living trust during lifetime can generate substantial savings to the estate by avoiding the need for an ancillary administration in that other jurisdiction. Probate court filings and matters, including the administration of a decedent's estate, are part of the public record, meaning that nosy friends, neighbors, co-workers, and distant family members are welcome to peruse a decedent's affairs. Lack of privacy is often enough reason for a client to plan to avoid probate. Though the probate courts in Northeast Ohio operate efficiently, horror stories and experiences generally from other parts of the country and other courts locally often prompt clients to seek to avoid the delays and frustrations associated with court processes. Moreover, for those clients who own closely-held business interests where estate tax valuation will be a significant issue, avoiding probate by funding a living trust with the ownership interest in the business during lifetime allows the trustee to control the selection of the valuation expert without the inconvenience and potential interference of an appraiser appointed by the

probate court, which will be required for those interests owned personally by the decedent at death.

But perhaps even more important today for Ohio residents, avoiding probate for a decedent's property offers two additional valuable benefits in our difficult economic times and society where divorce is commonplace. First of all, Ohio law has not permitted for many years a decedent's creditor, following a decedent's death, to satisfy a claim against property which the decedent placed into his living trust during his lifetime.[5] Recently, because of its apparent dislike for the existing Ohio law, according to questionable, tortured reasoning, one Ohio court has muddied that protective wellspring.[6] The mud will remain for the time being as the Ohio Supreme Court has refused to review the recent decision.[7] This same protection from creditors following the death of the account owner is apparently not true for payable on death accounts[8] and may not be the case for transfer on death deeds[9] and security registrations.[10] However, under the present state of the law in Ohio, financial accounts titled jointly, with rights of survivorship, do offer protection from a deceased tenant's creditors. [11]Though the state of the law concerning creditor access to nonprobate property is far from clear, it is still likely the case that funded living trusts do provide protection from a decedent's creditors.

Additionally, for those with troubled marriages in Ohio, a dated, but nevertheless binding, precedent permits Ohio residents to disinherit a surviving spouse by placing property into a revocable trust during lifetime, because the § 2106.01 right of election by the surviving spouse to take against the terms of a will applies only to probate property.[12] The Ohio legislature has for many years now debated the adoption of the "augmented estate" which, if adopted, would in all likelihood take away this advantage by treating both probate and nonprobate property of a decedent identically for purposes of the spousal right of election. There is presently, however, no serious legislative momentum for the adoption of the "augmented estate."

Another reason to use a revocable living trust, specifically, to avoid probate is the "secret" federal estate tax.[13] The lien is imposed on all of a decedent's property included in the federal gross estate.[14] Accordingly, the lien attaches to both probate and nonprobate property alike. This lien is quite onerous, applies even though no assessment has been made, and generally continues for a period of ten years from the date of death. Bona fide purchasers of unrecorded lien property are not protected and any such purchaser takes the property subject to the lien, making it very difficult for a fiduciary to sell such property. The statute does, however, provide an exception for purchasers of nonprobate property such as property placed into a trust by a decedent during his lifetime, divesting such property of the lien upon sale.[15] All remaining trust assets become subject to the lien following any such sale by a trustee, and the trustee is personally liable for unpaid estate taxes, but the exception allows some flexibility to a fiduciary to liquidate assets to pay expenses and liabilities by permitting purchasers to acquire property free of the lien.

Planners often take for granted the advantages of avoiding probate. When they do consider it, they often focus on the more common, historical reasons for doing so. But, in recent years, in Ohio, other, less well-publicized reasons to avoid the process have become just as important. In addition, care must be exercised in selecting the manner in which probate is avoided. Though there are a variety of ways to accomplish probate avoidance, employing a living trust arrangement offers certain advantages not available from using other methods. Planners would be wise to discuss a client's particular circumstances during a review of the estate plan to determine whether there may be previously overlooked reasons to recommend that a client consider arranging his property interests to avoid the process of probate administration.

ENDNOTES

1. Ohio Rev. Code § 5302.20.
2. Ohio Rev. Code § 5302.22; § 1709.01 et seq.
3. Ohio Rev. Code § 2131.10.
4. Ohio Rev. Code § 2113.35.
5. *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328 (1939).
6. *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 2008-Ohio-1486 (2008). See also Ogline, Sowers v. Luginbill: *A Chink in the* Schofield *Armor?* 19 PLJO 15 (Sept./Oct. 2008).
7. *Sowers v. Luginbill*, 119 Ohio St. 3d 1446, 2008-Ohio-4487 (2008) (appeal not accepted for review).
8. *Jamison v. Society National Bank*, 66 Ohio St. 3d 201 (1993).
9. Ohio Rev. Code § 5302.23(B)(7).
10. Ohio Rev. Code § 1709.09(13).
11. *In re Certificates of Deposit Issued by Hocking Valley Bank of Athens Co.*, 58 Ohio St. 3d 172 (1991).
12. *Smythe v. Cleveland Trust Co*., 170 Ohio St. 489 (1961).
13. Manigult, Edward M., "When Worlds Collide—T&E vs. M&A" (ACTEC 2008 Fall Meeting).
14. Internal Rev. Code § 6324.
15. Internal Rev. Manual 5.5.7.6.1.

Overview of the OSBA Estate Planning, Trust and Probate Law Section

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Have you ever wondered how the Ohio State Bar Association (OSBA) Estate Planning, Trust and Probate Law Section operates and what it does? OSBA President Gary J. Leppla invited me to report on the activities of the Section to the OSBA Board of Governors on January 25, 2009. A summary of my comments appears below.

I. Governance

The Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association has approximately 2,800 members. The Section is governed by a Council comprised of approximately 60 members. Its four officers are Chair, Vice Chair, Secretary and Treasurer. The following persons currently serve as officers: Karen M. Moore, Columbus, Chair; William J. McGraw III, Piqua, Vice Chair; Kevin G. Robertson, Cleveland, Secretary; and J. Michael Cooney, Cincinnati, Treasurer. The Executive Committee of the EPTPL Council is comprised of the current officers and all past Chairs. The Executive Committee also serves as the Nominating Committee for the Section.

II. Meetings

Council holds its meetings three times each year in September, January and May. The May meeting is held in conjunction with the OSBA Annual Meeting. Meetings begin Friday evening at 8:00 p.m. They reconvene the following Saturday morning at 9:00 a.m. The Executive Committee meets from 6:00 p.m. to 8:00 p.m. immediately prior to the Friday meeting. In between meetings communication occurs by email and occasionally by telephone.

III. Specialization

The Specialization and Certification Committee of the EPTPL Section prepares tests for the OSBA Board to certify attorneys in trust and probate law. Donald G. Schweller of Dayton chairs this committee. Twelve Section members serve on the committee.

IV. CLE Programs

The Section plans and presents two CLE programs each year. A three-hour CLE program is offered in conjunction with the OSBA Annual Meeting. This program typically takes place Friday afternoon at the Annual Meeting. John F. Furniss III of Columbus chaired the CLE program at the OSBA 2008 Annual Meeting, which was held in Columbus. Christina D. Evans of Cleveland will chair the CLE program at the OSBA 2009 Annual Meeting, which will be held in Cleveland.

The Marvin R. Pliskin Advanced Probate and Estate Planning Seminar is an all-day seminar held in September in conjunction with the EPTPL Council Fall Meeting. Patricia Dillon Laub of Cincinnati chaired the 2008 Marvin R. Pliskin Advanced Probate & Estate Planning Seminar, which was attended by approximately 300 persons. In 2008 the net revenue from the Pliskin Seminar was $69,154; this amount was distributed to the OSBA. Ellen K. Meehan of Cleveland will chair the 2009 Marvin Pliskin Advanced Probate and Estate Planning Seminar.

V. Legislation

EPTPL Section By-laws provide that one of the Section's purposes is "improving the law of Ohio by proposing, sponsoring, opposing and reporting on legislation affecting estate planning, trusts and estates." Legislation is the primary focus of Council members during their meetings. Generally speaking, the EPTPL Council conducts its legislative work through its committees. At the present time there are 55 active committees. The majority of the committees are appointed to draft or amend a specific piece of legislation and are then disbanded when the legislative project is complete. However, there are eleven standing committees. The standing committees and the Chair of each are: Joint Trusts, Jeffry L. Weiler; Unauthorized Practice, David F. Allen; Ohio's Uniform Principal and Income Act, William F. Bates; Ohio Trust Income Tax, Kevin G. Robertson; Guardianship, Nirakar C. Thakur; Ohio Estate Tax, Robert M. Brucken; Uniform Management of Institutional Funds Act, Kevin G. Robertson; State Medicaid Recovery Program, Kraig E. Noble; Insurable Interests Committee,

Robert B. Barnett, Jr.; Business Entities Committee, William J. McGraw III; Website Committee, William J. McGraw III; Uniform Power of Attorney Act, Richard E. Davis II; and Uniform Conservation Easement Act, Richard E. Davis, II.

Recently a joint committee of EPTPL Council and the Ohio Banker's League ("Joint Committee") introduced legislation that resulted in the enactment of the Ohio Trust Code. This added chapters 5801 through 5811 to the Ohio Revised Code. Generally speaking, prior to the enactment of the Ohio Trust Code trust law was primarily found in the common law of Ohio. The Ohio Trust Code was primarily a codification of the existing trust law. EPTPL Council voted to use funds from its treasury to produce and mail copies of a book containing the new Ohio Trust Code and comments thereto to approximately 2,800 members of the EPTPL Section and to the 89 Ohio Probate Judges. In addition, the Joint Committee sponsored five seminars in various cities across the state to explain the new Ohio Trust Code. The Ohio Trust Code books were also distributed to each person who attended one of the five seminars. A total of 5,000 copies of The Ohio Trust Code books were distributed.

VI. Other Work Product

A Report on Section Activities is mailed to all members of the Section three times each year. This report contains the minutes, which are prepared by the Council Secretary and the legislative report, which contains new and proposed rules and legislation affecting Section members. The Council Treasurer prepares the legislative report.

Council also assists in updating brochures for the OSBA in the area of wills, trusts and estates. These brochures cover topics such as, "Wills", "Living Trusts", "Probate", Administering an Estate Without a Will", "Financial Powers of Attorney", "Living Wills", "Health Care Powers of Attorney", and "Guardianships". William J. McGraw III chairs the committee that assists in this endeavor.

The Council devotes significant time to studying laws promulgated by the Uniform Law Commission, formerly known as the National Conference of Commissioners on Uniform State Laws. For example, the Ohio Trust Code was modeled on the Uniform Trust Code, which was promulgated by the Uniform Law Commission. Recently the Ohio General Assembly adopted the Uniform Prudent Management of Institutional Funds Act, which was. signed by Governor Strickland on January 6, 2009 and becomes effective June 1, 2009. This law applies to endowment funds under the control of charitable institutions and was promulgated by the Uniform Law Commission.

It has been an honor and a privilege to chair the EPTPL Section. The dedication, industriousness, and selfless commitment of Council members is inspiring. These attorneys are the leading practitioners in the state; their contributions are scholarly and comprehensive.

Frequently visitors attend Council meetings. Most visitors are astounded by the number of projects, the quality of the work product and the dynamic discussions. More than one visitor has commented, "These meetings are better than CLE."

All Section members are invited to attend any meeting of the EPTPL Council. The next meeting will be on Friday, May 15 and Saturday, May 16 in Cleveland. The Council would welcome you and cordially invites you to attend.

Three Pets Named "Peeve": Ohio's Annual Exclusion Parts 1 and 2, and TODs for Stuff

By James J. Lanham, Esq.
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"When you think things are bad, when you feel sour and blue, when you start to get mad … you should do what I do!"[2] Submit your lamentations to the *Probate Law Journal of Ohio*! If George Foreman can name his five sons "George,"[3] there is no shame in naming all of my pets "Peeve." I confess that my pets are nuisances of little consequence, but they repeatedly nip at my ankles.

Peeve One is Ohio's annual exclusion limit. The $10,000 Ohio annual exclusion for gifts within three years of death is frozen in antiquity.[4] In contrast, the federal annual exclusion amount is indexed for inflation,[5] resulting in the current $13,000 amount.[6] I am delighted that Ohio only taxes gifts within three years of death. I am rankled, however, every time I have to report three

years worth of excess gifts over the Ohio limit where the gifts were permitted under the federal limit. This pesky Ohio statute references the Internal Revenue Code three times.[7] The Ohio legislature should put Peeve One down like a George Foreman knockout punch on Joe Frazier! By simply coupling the Ohio annual exclusion amount to the federal annual exclusion amount as determined under § 2503(b)(2) of the Internal Revenue Code, this sorry pet Peeve can be put out of its misery.

Peeve Two is that this same Ohio annual exclusion gift limit does not include split gifts under § 2513 of the Internal Revenue Code.[8] As with Peeve One, this second Peeve results in treating gifts one way on the Ohio estate tax return (adding back $12,000 or $13,000 per year for three years of split gifts) while excluding the split gifts on the federal return. The objectionable sentence in Ohio Revised Code § 5731.05(C)(3) states, "The exclusion provided by division (C)(3) of this section does not apply to any portion of a transfer that is treated as being made by the spouse of the decedent under § 2513 of the Internal Revenue Code." By simply removing the word "not" from the doggone sentence, this "dog" would be gone.

Peeve Three is unrelated, but I don't know when to quit, much like "I'm speechless" at an awards banquet puts the speaker two words over her limit.[9] With transfer on death/payable on death designations, our clients can transfer real property,[10] bank accounts,[11] securities,[12] boats,[13] cars,[14] etc. without probate. Since non-testamentary dispositions are in vogue, why not include provisions for transferring untitled tangible personal property? The new transfer on death affidavit advanced in proposed Ohio Revised Code § 5302.24[15] could simply include the ability to transfer specifically scheduled tangible personal property (and/or "all of my untitled tangible personal property") along with, or in lieu of, real estate. Disputes over a decedent's "stuff" are often much ado about nothing but can result in protracted litigation.[16] This addition to the transfer on death affidavit might facilitate second spouses retaining household goods without being forced to purchase them from a spouse's estate,[17] or enable the children from a first marriage to have specifically identified family heirlooms pass to them free from the stepparent's spousal allowance.

I tease our lovable miniature schnauzer that he'll get the "pink sauce" if he scrounges in the trash again. This euthanasia euphemism (or some simple legislation) should be applied as well to eliminate my three pets Peeve!

ENDNOTES

1. Jim Lanham is certified by the Ohio State Bar Association as a Specialist in Estate Planning, Trust and Probate Law.
2. Dr. Seuss, *Did I Ever Tell You How Lucky You Are?* (Random House 1973).
3. Jenson, Elizabeth, "TV Land Aims to Tap into the George Foreman in Everyone," *New York Times* (www.nyt.com, Nov. 13, 2006).
4. Ohio Revised Code § 5731.05(C)(3).
5. The 1997 Taxpayer Relief Act, § 501(c), amended § 2503(b) to provide an automatic inflation adjustment for the $10,000 annual exclusion. See Internal Revenue Code § 2503(b)(2).
6. I.R.S. Rev. Proc. 2008-66, Section 3.30 which immediately precedes the section taxing arrow shafts.
7. Sections 2503(b), 2503(c) and 2513 of the Internal Revenue Code; see Ohio Revised Code § 5731.05(C)(3).
8. Ohio Revised Code § 5731.05(C)(3).
9. "I'm speechless" concept attributed to comedian Brett Leake, "Laughing Matters with Brett Leake" (PBS 2003).
10. Ohio Revised Code §§ 5302.22, 5302.23. See also Meredith, *Proposed Legislation for New Transfer on Death Affidavit,* 19 PLJO 118 (Jan./Feb. 2009).
11. Ohio Revised Code § 2131.10.
12. Ohio Revised Code Chapter 1709, Uniform Transfer-on-Death Security Registration Act.
13. Ohio Revised Code § 2131.13.
14. Ohio Revised Code § 2131.13.
15. Meredith, *Proposed Legislation for New Transfer on Death Affidavit,* 19 PLJO 118 (Jan./Feb. 2009).
16. See, *e.g.*, *Estate of Woodruff v. Istanich,* 2008 WL 1930932, 2008-Ohio-2103 (Ohio App. 9 Dist. May 5, 2008), where the surviving spouse dueled the decedent's girlfriend over jewelry and other property.
17. See Ohio Revised Code § 2106.16(B).

Probate Litigation Issues and Trends

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This article is based on the presentation by the authors at the Cleveland Metropolitan Bar Association Estate Planning Institute on October 23, 2008.

"Death is not the end. There remains the litigation over the estate."

— Ambrose Bierce

I. Equitable Estoppel—or Do Not Sue Your Mother

In *Borrello v. Chisholm*, No. CV 598719 (Ct. Com. Pl. Cuyahoga Cty. 2008), the Cuyahoga County Court of Common Pleas considered a trust that was established in 1936 for the benefit of Spencer, the son of the settlor. Upon Spencer's death, the remaining assets were to be distributed to the son's *lineal descendents*. The son had three adopted children including the plaintiff, Pallyanna Borrello. Spencer died in October 2003 and the children inherited large sums of money—most of which was held in the trust.

Pallyanna then sued her adoptive mother, as well as the trustees of the trust, in two states on several legal theories, essentially saying that her mother had received too much money from Spencer's estate and was spending too much. During discovery, it was learned that Pallyanna had been adopted as an adult.

Summary judgment was granted by the Cuyahoga County Court of Common Pleas in favor of the trustees. The court first applied O.R.C. § 3107.15(A)(3), which provides that a person adopted as an adult in Ohio is not a "lineal descendant" under a trust unless the trust has an express provision including that person. There was no express provision in the trust and therefore Pallyanna was deemed not to be a beneficiary of the trust and had no standing to assert her claims.

The court also addressed Pallyanna's argument that she could not be denied beneficiary status because she had been treated as a beneficiary before the trustees learned she was adopted as an adult. She argued that the trust was equitably estopped from denying her beneficiary status because she had relied on her right to receive the money. The court rejected the argument and found that for equitable estoppel to apply there had to have been a factual misrepresentation that was misleading by the trustees. The court found that because the trustees were in good faith not aware of the adult adoption, they did not mislead and therefore the attempt to evoke estoppel to avoid the statute failed.

II. The Nature of Revocable Trusts

The Ohio Trust Code (OTC), which includes many significant modifications from the Uniform Trust Code (UTC), was enacted in Ohio in June 2006, with an effective date of January 1, 2007. The OTC recognizes revocable trusts and contains a major policy change by presuming revocability of trusts. Cases decided under the new OTC are beginning to trickle in. In *Sowers v. Luginbill*, 175 Ohio App. 3d 745, 2008-Ohio-1486, 889 N.E.2d 172 (Ohio App. 3 Dist. 2008), the Third Appellate District considered a case where the motorist died after the alleged injured party sued him for negligence for causing the car accident. The estate of the motorist sought to have the injured party declared a subsequent creditor who could not invade the trust's assets after the death of the motorist. O.R.C. § 5805.06(A)(1) provides that the property of a revocable trust is subject to the claims of a settlor's creditors. The court held that the death of the settlor is the relevant date for determining a creditor's status when he or she is attempting to subject revocable trust assets to his or her claim. The court reasoned that death properly decided her status because it (1) was a time certain giving settlors an expectation as to their rights and duties and enabling counsel to give clear advice on creditor rights, (2) promoted the vesting of property rights after a settlor's death, and (3) promoted judicial economy, as it was a definite time upon which to make a decision. The trust's language showed it was a discretionary and spendthrift trust, so O.R.C. § 5805.06(A)(1) let the injured party access trust assets. This was consistent with O.R.C. § 5805.06's language and purpose to protect creditors.

III. Shared Account Agreements

In *Kelly v. Wachter*, 2007 WL 1765486, 2007-Ohio-3061 (Ohio App. 9 Dist. 2007), the decedent and her nephew executed a Shared Account Card Agreement (SACA) form with her credit union on July 5, 2005. The form contained three boxes under a section titled "Account Ownership." Those boxes permitted a member to designate an account as Individual, Joint with Rights of Survivorship, or Joint without Rights of Survivorship, but none of the boxes was selected. Directly above the signature lines, there was a disclaimer that noted that by signing the document the parties agreed to the Share Account Agreement.

Following the decedent's death, the nephew removed all of the funds from the accounts and specifically asserted that he was entitled to the funds because they were survivorship accounts and he had a survivorship interest in the accounts. The decedent's daughter then filed a Concealment of Assets Action against the nephew and ultimately modified her complaint and the matter proceeded as a Declaratory Judgment Action. Both parties moved for summary judgment and the trial court granted the daughter's summary judgment motion and ordered that the bank account funds be returned to the estate.

The assignment of error asserted by the nephew was that the trial court improperly determined that the accounts at issue were not survivorship accounts. The Shared Account Agreement specifically stated that "un-

less otherwise stated on the account card, a multiple party account is an account with rights of survivorship." Thus, the nephew argued that he was entitled to the full amount contained in the accounts.

The daughter argued that the Shared Account Agreement was not physically attached to the Account Signature Card when the decedent signed the form. The appellate court determined that it was presumed that the decedent had read and understood the terms of the Shared Account Agreement even though it was not attached to the Signature Card. Unless there was testimony given that her signature was made against her will, it was presumed that she had read and understood the terms of that agreement. Therefore, she would have understood that by signing the signature card she was creating a joint and survivorship account.

The court concluded that the survivorship language existed, but without evidence in the record of the credit union's rules and regulations, the court could not determine to which account the survivorship language applied. Therefore, the appellate court determined that summary judgment was improperly ordered and remanded the case. On remand, the nephew presented testimony from Credit Union employees that one SACA governed a member's "heading account," and that any subaccounts created hereunder were subject to the same ownership provisions that governed the heading account. Additionally, the account holder names listed on Credit Union account statements aligned with the decedent's corresponding SACAs that were in effect at the time each statement was issued, and were also consistent with the manager's testimony as to how the heading accounts and subaccounts were treated internally. The trial court held that there was ample evidence that ownership of the decedent's member account and its subaccounts were governed by the designations made on the single SACA. On a second appeal, the trial court's decision was affirmed. *Kelly v. Wachter*, 2008 WL 4791472, 2008-Ohio-5702 (Ohio App. 9 Dist. 2008).

IV. Standing in Guardianship Cases

In *In re Guardianship of Santrucek*, 120 Ohio St. 3d 67, 2008-Ohio-4915, 896 N.E.2d 683 (2008), the appellant daughter, an Arizona resident, sought review of a decision of the Fifth District Court of Appeals, which held that she lacked standing to appeal a trial court's decision in a guardianship proceeding involving appellant's 96-year-old mother. The ward was currently residing in an assisted living facility in Ohio. The appellant could not apply to be named her mother's guardian because she was a nonresident. Instead, the appellant filed a motion with the trial court challenging the court's subject matter jurisdiction on the basis that the mother's move from Michigan to Ohio was involuntary. That motion was denied by the trial court and the Fifth District Court of Appeals affirmed.

In a 4-3 decision, the Ohio Supreme Court held that a person seeking to appeal the decision of a probate court in a guardianship proceeding must have been a party to those proceedings to have standing to appeal the probate court's decision. Being related to the alleged incompetent is not enough to confer party status upon a person, nor is being served with notice of the proceedings. Additional action is required to become a party with the right to appeal. Filing an application to be appointed guardian is one avenue to becoming a party, but a person may also file a motion to intervene.

In a stinging dissent, Justice Pfeifer wrote:

> The very nature of the proceedings in this case militates for a liberal construction of the rules governing appeal. This case does not involve one party battling with another party. In that situation, it makes good sense to tightly restrict the ability of nonparties to appeal a judgment. This case involves only one party, a ward who has been adjudged incapable of managing her own affairs.
>
> * * *
>
> It is unjust and inequitable to prevent [appellant] from challenging the lower court proceedings. She is concerned that her 96-year-old mother was removed from her home in Michigan and is being forced to live out the rest of her days in a strange location. Anyone with an elderly parent can imagine the pain of seeing that parent held against her will; I consider [appellant] to be aggrieved by the lower court decision.

896 N.E.2d at 689.

In a similarly divided and contentious decision, the Eleventh District Court of Appeals in *In re Guardianship of John Spangler*, 2008 WL 5428262, 2008-Ohio-6978 (Ohio App. 11 Dist. 2008), considered a case wherein the County Board of Mental Retardation (Board) had petitioned the trial court to remove the guardians of a mentally challenged ward. The guardians were the ward's parents. After a hearing, the trial court found that the guardians were not fulfilling their duties and ordered their removal. On appeal, the Eleventh District Court of Appeals held that the Board had no power to request the removal of a guardian because such power was not expressly granted by statute. In finding that the Board lacked standing to petition for removal, the court stated,

> In this case, [the Board] has no claim to make; it has no right or duty requiring judicial enforcement. It has no "personal stake" in the controversy, as its duties revolve around providing and funding treatment for developmentally disabled persons such as [the ward]. Statutorily, it has the power, in proper case and following proper procedure, to override a guardian's wishes in a particular instance—but not to petition for a guardian's removal.

2008 WL 5428262, 2008-Ohio-6978, at ¶ 61.

In his dissent, Judge Cannon said,

> By adopting the majority rule, we are telling the probate court, with wide and plenary powers over guardianship matters, to whom it can and cannot listen. As the trial court noted, R.C. 5126.15 imposes obligations and duties upon the board. These duties are owed to John Spangler, not his parents.

2008 WL 5428262, 2008-Ohio-6978, at ¶ 97.

V. Record Land Interests Every 40 Years

The Ohio Marketable Titles Act (MTA) is a statutory scheme enacted by the Ohio legislature in 1961. O.R.C. §§ 5301.47-5301.53 (2008). The MTA pertains to preservation of real property interests. The purpose of the MTA is to simplify land title transactions by allowing reliance on the record chain of title. The MTA requires that any person claiming a reversionary interest must file a notice of interest with the county recorder's office every forty years in order to preserve the interest. If such a notice is not timely filed, the reversionary interest is extinguished in favor of the property's title holder and the title holder alone has a compensable property interest.

The MTA states "any person who has an unbroken chain of title of record to any interest in land for forty years or more has a marketable record title to such interest." O.R.C. § 5301.48. The MTA is applicable to reversionary interests:

> Such record marketable title shall be subject to: All interests and defects which are inherent in the muniments of which such chain of record title is formed … provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest; and provided that possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent, which interests are inherent in the muniments of which such chain of record title is formed and which have existed for forty years or more, shall be preserved and kept effective only in the manner provided in § 5301.51 of the Revised Code.

O.R.C. § 5301.49. The MTA further requires any person claiming an interest in land to preserve and keep the interest effective by filing a notice for record during the forty year period immediately following the effective date of the root of title. O.R.C. § 5301.51. The notice must meet the requirements set forth in the MTA and be filed with the county recorder's office. If notice is not filed in accordance with the MTA, the reversionary rights are lost.

The MTA determines "root of title" when the transfer of property conveys the title to a new party. A property's "root of title" is its most recent transfer prior to the time when marketability is being determined. O.R.C. § 5301.47(E).

In *Verona United Methodist Church v. Shock,* 1978 WL 216179 (Ohio App. 2 Dist. Oct. 13, 1978), the court found that where the heirs and assigns of the original grantor who retained a reversionary interest did not comply with the notice requirements of the MTA, the heirs lost their rights to the reversion even though their interest was indicated in the root of title. In *Verona*, a family deeded real estate to a church in 1883 and provided the property would revert to the heirs of the family if the premises ceased to be used as a place of divine worship. In 1971, the church stopped using the property and the heirs sued to enforce their reversionary interest. The court concluded that the condition of forfeiture had occurred. However, because the church owned the property by an unbroken chain of title lasting more than forty years and the heirs had not filed periodic notices the church had marketable title. The grantee in *Verona* was found to have good marketable title.

The Eighth District Court of Appeals reviewed the purpose of the MTA in *Semachko v. Hopko*, 35 Ohio App. 2d 205, 209, 301 N.E.2d 560, 563 (Ohio App. 8 Dist. 1973). The court found the purpose of the MTA was to "simplify and facilitate land title transactions by allowing persons to rely on a record chain of title." The *Semachko* court further noted that an "interest which has been extinguished cannot be revived by recording such interest."

More recently, the court in *Yoder v. West Holmes School District Board of Education*, 2001 WL 1474787

(Ohio App. 5 Dist. Nov. 20, 2001), cited *Verona* and reaffirmed the same principle, stating "[a]ny person holding an unbroken chain of title lasting more than forty years has a record marketable title. Possibilities of reverter and rights of entry may be preserved against a record marketable title only as allowed by O.R.C. § 5301.51. To preserve a reversionary interest against a person whose title would otherwise be marketable, § 5301.51(A) requires the person holding the reversionary interest to file periodic forty year notices of its claim of interest." Any person having legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest.

To preserve reversionary interests in land granted in the property's root of title, the MTA requires holders of the interest to file a notice of preservation or take some other action giving notice of their interest. Once a forty-year period passes without filing a notice of preservation in accordance with the MTA, the reversionary interests are extinguished.

An Allegory

The following item is reprinted from 6 PLJO 36 (Jan./Feb. 1996). It stemmed from comments then that we need courts to supervise observance by lawyers and their clients of probate laws for the same reasons that we need police to supervise observance by motorists of traffic signals. It may be relevant to current concerns that inventories and accountings that are required to be filed in court may be posted on the internet for all the world to access. The OSBA is on record as supporting legislation permitting parties to circulate inventories and accountings among themselves and waive filing them in court; see Ohio BAR of Oct. 17, 1994, and Johnson, *Probate Reform: An Apologia for Voluntary Inventories and Accounts*, 8 PLJO 6 (Sept./Oct. 1997). What the court does not receive, it cannot post on the internet.

Who has the highest crime rate in the world? In these days of political concern over crime, readers may be interested in the answer.

The source of the answer is found in argument over probate reform. An analogy to the traffic light suggests that citizens need supervision of administration by a probate court to ensure enforcement of laws against theft and procrastination, just as we need traffic police to enforce laws against running red lights. This analogy suggests our allegory.

Come with us to the Commonwealth of Bureaucracy, somewhere near Liechtenstein, we think. Its size and importance to civilization explain the fact that it has only one traffic intersection.

In the interest of modernization, several years ago the Commonwealth installed a traffic light at that intersection. Activation of the light introduced the issue of its effectiveness, since the Commonwealth had only one policeman, who could not be expected to watch for motorists (or bicyclists) running the red light twenty-four hours a day.

The Commonwealth justified its name. Its legislature enacted the Affidavit Act, patterned after the American income tax law, requiring each citizen to file annually (by April 15 of each year) an affidavit, swearing that he or she had not run the red light at any time within the past calendar year.

Certain citizens of the Commonwealth were dilatory in filing their affidavits, and soon, the practice began of obtaining extensions of time (granted *seriatum* one month at a time) for the filing of the affidavit. However, there were still other citizens who did not file either the affidavit or an extension request; for example, parents did not always file for their infant children, or adult children for their forgetful parents, and not all disabled citizens had family or guardian to file for them. A few citizens even claimed the act to be unconstitutional and refused to obey it by filing anything, even an excuse from their doctor.

See that imposing building at *the* intersection? It is the Affidavit Bureau of the Commonwealth of Bureaucracy. It houses all the clerks who receive, file, and index the affidavits, and who receive, grant and file the extension requests. They carefully compare the affidavits filed with the official census data, and alert the sheriffs to all nonfilers. The sheriffs summon the nonfilers to court, where the judges pronounce sentences on them and order their confinement by the jailors. Finally their families or friends appear before the cashiers to pay the fines for their release from jail. This monumental building is the very soul of Bureaucracy.

Now, to the crime statistics. With so many nonfilers and late filers, almost everyone is branded a criminal eventually. The annual crime rate approaches 500 per thousand citizens.

A thoughtful clerk of Bureaucracy (yes, a Bureaucrat) came to America on vacation, to visit a distant relative (a probate clerk), and discovered that we

have no similar Affidavit Act, and that we generally obey traffic lights even without the annual filing of an affidavit of compliance. The world opened to him with an original thought; the Affidavit Act was not curbing crime, it was creating it, or at least the statistics of it. Perhaps the answer to his country's high crime rate was not more clerks, sheriffs, judges, jailors, and cashiers, and a larger building to house them all; the answer was to repeal the Affidavit Act.

Could this allegory have any relevance to the requirement in Ohio (but not generally elsewhere in the world) of filing inventories and accounts with the probate court?

Summaries of Recent Cases

In re Estate of Deems

Citation: 2008 WL 5104841, 2008-Ohio-6316 (Ohio App. 10 Dist. 2008)

Summary: Decedent's will left to her husband her half interest in their home, "subject to any mortgage or other lien thereon at my death." Decedent's half interest in the home was appraised at $240,000, and it was subject to a mortgage of $203,000. The issue was the amount of Ohio estate tax marital deduction to be allowed for the devise. The estate claimed the gross appraised value unreduced by the mortgage; the Ohio Department of Taxation assessed a deficiency based on allowance of the marital deduction for the net value only; the estate filed exceptions to the assessment; the trial court overruled the exceptions; and the appellate court affirmed. The appellate court stated that the statute allowed the deduction for only the net value received by the husband; but even if it were ambiguous, that was its only sensible construction.

IRC § 2056(b)(4)(B) specifically provides that the federal deduction is reduced by encumbrances, but the shorter Ohio version of IRC § 2056 enacted in RC § 5731.15 lacks that language. Perhaps similar litigation could be avoided if the General Assembly were to adopt all of RC § 2056, not just selected portions of it. This and other portions were omitted when the Ohio statute was revised in 1989.

Black v. Aristech Chemical Co.

Citation: 2008 WL 5456383, 2008-Ohio-7038 (Ohio App. 4 Dist. 2008)

Summary: Plaintiff filed a wrongful death action in Ohio for the death of her husband. She first filed improperly individually, then dismissed that action; obtained appointment by an Ohio court as administrator of his estate; and refiled the action as administrator. The problem was that the husband was not domiciled in Ohio. The trial court granted summary judgment for defendant, holding that plaintiff had no standing to sue because the probate order appointing the administrator was void, and that RC § 2113.01 requires the decedent to be an Ohio resident. The appellate court affirmed.

Apparently, plaintiff wanted to sue in Ohio. Perhaps that was the only state in which defendant could be served, or Ohio's wrongful death law was more favorable to her. She might succeed on a third try by obtaining appointment as administrator at the domicile; she may then sue in Ohio in that capacity, RC § 2113.75. However, if there was no administration of the estate at the domicile, RC § 2129.11 authorizes the Ohio probate court to grant administration. Why was it not invoked here?

Busa v. Levin

Citation: 2009 WL 94754, 2009-Ohio-114 (Ohio App. 8 Dist. 2009)

Summary: Perhaps this is the last Ohio income tax ESBT case. Taxpayers had created grantor trusts for which they made federal ESBT elections; that was all before the Ohio income tax was extended to trusts, so the trusts did not pay Ohio income tax, and taxpayers' position was that the ESBT elections trumped grantor trust treatment that would have included the trust income in their individual incomes. They argued that, because their trusts had been terminated before December 29, 2000, the new federal regulation (Treas. Reg. § 1.641(c)-1) applying after that date and expressly taxing them individually did not apply; and that Ohio should extend the same treatment to them. Taxpayers lost both in the trial court and on appeal.

One would have thought this was settled. See Wasacz, *The Electing Small Business Trust Controversy in Ohio*, 11 PLJO 20 (Nov./Dec. 2000); Nechemias, Knust *Provides Some Answers on Ohio Income Taxation of Trusts*, 17 PLJO 141 (Mar./Apr. 2007). Extension of the Ohio income tax to trusts in 2002 has generally mooted such matters since.

Legislative Scorecard

Keep this Scorecard as a supplement to your 2008 Ohio Probate Code (complete to April 15, 2008) for up-to-date information on probate and trust legislation.

Recently Enacted

Technical amendments to Ohio Trust Code See Newman, *The Ohio Trust Code: The Joint Committee's Proposal for Its First Amendment*, 18 PLJO 69 (Nov./Dec. 2007)	H.B. 499	Eff. 9-12-08	Oelslager (R-51)
Simplification of will execution See Weiler, *So How Contagious Is the Testator?*, 18 PLJO 115 (Nov./Dec. 2007)	S.B. 302	Eff. 9-11-08	Goodman (R-3)
Regulation of life insurance viatical settlements See Barnett and Marx, *Amended Substitute House Bill 404: Ohio's Definition of "Insurable Interest" Unfortunately Remains Largely Uncodified*, 19 PLJO 4 (Sept./Oct. 2008)	H.B. 404	Eff. 9-11-08	Hottinger (R-71) Barrett (D-58)
Conforms Ohio income tax to federal income tax See Robertson, *HB 699 Updates References to Federal Law*, 17 PLJO 89 (Jan./Feb. 2007)	H.B. 458	Eff. 12-30-08	Uecker (R-66)
Adopts the Uniform Prudent Management of Institutional Funds Act See Robertson, *Ohio Enacts the Uniform Prudent Management of Institutional Funds Act ("UPMIFA")*, 19 PLJO 102 (Jan./Feb. 2009)	H.B. 522	Eff. 6-1-09	Oelslager (R-51)
Provides standard format for recorded documents See Johnson, *Talking Sense to the County Recorders: The Revision of House Bill 525*, 19 PLJO 153 (Mar./Apr. 2009)	H.B. 525	Eff. 7-1-09	Combs (R-54)
Adopts Revised Uniform Anatomical Gift Act of 2006 See Acker, *To Die, To Sleep, Perchance to Make an Anatomical Gift: House Bill 529 and the Revised Uniform Anatomical Gift Act*, 19 PLJO 104 (Jan./Feb. 2009)	H.B. 529	Eff. 4-7-09	Wachtman (R-75)

Pending

None

Proposed legislation sponsored by the Ohio State Bar Ass'n, Estate Planning, Trust and Probate Law Section

Repeal tax releases and other Ohio estate tax changes See Frederickson, *Miscellaneous Estate Tax Proposals in Need of a Legislative Sponsor*, 14 PLJO 39 (Nov./Dec. 2003).	4-16-01*
Extension of estate tax pension exclusion to rollover IRAs See McNeil, *Ohio Estate Tax: Retirement Plans Exclusion—Final Decision*, 12 PLJO 99 (July/Aug. 2002).	4-7-03*
Strengthen estate tax apportionment act See Harris, *Estate Planning Trust and Probate Law Section Committee Supports Change to Apportionment of Estate Tax*, 16 PLJO 50 (Nov./Dec. 2005).	10-17-05*

Ohio estate tax exemption increase 4-23-07*

See Brucken, *Reforming the Ohio Estate Tax*, 17 PLJO 161 (May/June 2007).

Revocation on divorce of trust interests to spouse 4-21-08*

See Brucken, *Divorce and Revocable Trusts*, 18 PLJO 196 (July/Aug. 2008).

Making savings statute inapplicable to probate litigation 10-13-08*

See Meehan, *Proposed Legislation for Non-Applicability of Savings Statute to Probate and Trust Litigation*, 19 PLJO 13 (Sept./Oct. 2008).

Increase limits on termination of small guardianships and minor's injury settlements 10-13-08*

See Thakur, *Increases to Amounts for Small Settlements and Termination of Small Guardianships,* 19 PLJO 120 (Jan./Feb. 2009)

Recast TOD real estate as recorded affidavit naming beneficiaries 10-13-08*

See Meredith, *Proposed Legislation for New Transfer on Death Affidavit,* 19 PLJO 118 (Jan./Feb. 2009)

* Full text and explanation in cited issue of Ohio State Bar Association 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 General Assembly: http://www.legislature.state.oh.us/search.cfm. Information may also be obtained from the West *Ohio Legislative Service*, and from our Customer Service Department at 800-362-4500. Copies of legislation prior to publication in OLS are available from Customer Service at nominal cost.❖

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