

## ADOPTION

TOPIC: Adoption affirmed when court properly addressed issues raised by amended pleadings.

TITLE: In re D.D.D., 2012-Ohio-5254. 7<sup>th</sup>. 11/9/2012.

Stepfather filed for adoption of a five-year old alleging father's consent was not required due to the lack of contact between father and son within one year of filing. The mother and father had terminated their relationship when the child was one year old. A supplemental claim was filed two months after the adoption filing adding a claim that father had failed without justifiable cause to provide for the maintenance and support of the child for one year, with the last support payment being received just over one year ago.

The trial court approved the petition for adoption and found adoption was in the child's best interests. The father appealed on procedural grounds only, arguing the supplemental claim was inappropriate.

The appeals court affirmed, after examining the differences between an amended pleading and a supplemental pleading, and noting that no support payment was made within one year of the supplemental filing. "Whereas, a supplemental pleading raises transactions, occurrences, or events which have happened since the original pleading; a supplemental pleading merely continues or adds to that original cause of action such as adding new acts by the defendant that modify the nature or amount of damages."

The appeals court also dismissed an objection that the trial court was required to file findings of fact and conclusions of law, since none were requested.

TOPIC: The adoption consent statute must be strictly construed so as to first protect the right of natural parents to raise and nurture their children.

TITLE: In re BAH, 2012-ohio-4441.

AW was a 15-year old minor when she got pregnant. The father had just turned 18 and AW did not tell her parents or the father at the time. The child was born and AW executed a permanent surrender to an adoption agency. The child was placed with a family. The father had wanted to raise the child, his parents had offered to let her reside with them, and the father had provided maternity and baby clothes prior to her going to a maternity home, which was 2.5 hours away. The father could not visit regularly, as he was still attending high school. He went there once but his other visits were canceled by the maternity home staff. The staff told her that he did not want the adoption to take place. When the staff found out that they were in contact, they confiscated AW's cell phone. She received numerous gifts and baby things from father while at the maternity home.

Father did visit the baby twice after birth. After he refused to sign the adoption consent form, he was not permitted to visit again. He was similarly thwarted by AW's parents. He did, however, file with the Putative Father Registry in a timely manner.

Adoptive parents filed an adoption petition in the Greene County Probate Court, asserting that the father's consent was not required as he had not provided support, and abandoned the

mother during the pregnancy. Following hearing, the probate judge determined that the father had not provided support within the statutory framework and found his consent was not required to proceed with the adoption. Father appealed.

The Greene County Probate Court found that the consent statute must be "strictly construed so as to protect the right of natural parents to raise and nurture their children." This construction must be by clear and convincing evidence. The Court found that, rather than willful abandonment, the father did everything within his power to keep his child and be there for AW. He also supported the child by his family offering a home for AW and the child, for providing numerous maternity items, etc. His consent was therefore required. Reversed.

TOPIC: Natural father had indeed failed to have more than a *de minimis* contact with his child in the year preceding the filing of the petition, but it was justified because the father's efforts were thwarted by the natural mother.

TITLE: In re JDT, 2012-Ohio-4537.

Appellant stepfather filed a petition to adopt his wife's nine year old son in the Harrison County Probate/Juvenile Court. His petition asserted that natural father had failed without justifiable cause to provide support/maintenance or failed to have even *de minimis* contact with the child for the one year period immediately prior to the filing of the adoption petition. The trial court found that the natural father had made one \$44 payment during the preceding year; on that prong, his consent was required. The court also found that the father had attempted numerous phone calls during the same time period but was denied speaking with his son by natural mother. The trial court thereupon dismissed the adoption petition when father refused his consent. Stepfather appealed.

The 7<sup>th</sup> District Court of Appeals reviewed the matter. Stepfather argued that he had demonstrated by clear and convincing evidence under RC § 3107.07(A) that natural father failed to have more than *de minimis* contact as required by Ohio law. The Court found that the natural father had indeed failed to have more than a *de minimis* contact, but it was justified because the father's "efforts were thwarted" by the natural mother. The Court also found that the natural father had been destitute, seeking employment but continued to be unemployed. Notwithstanding his \$17,000+ child support arrearage, he showed he was actively seeking employment; when he was paid, he did make a payment. The Court found that he was justified in his lack of support. The father's consent was required. Affirmed.

TOPIC: In adoption proceeding, putative/biological father's consent not required where he failed to file timely objection, R.C. 3107.07(K), and because he willfully failed to support the mother during pregnancy and the minor after birth, R.C. 3107.07(B)(2).

TITLE: In re T.L.S., 2012-Ohio-3129.

T.L.S. was born on June 28, 2011. His biological parents were unmarried and no father was listed on his birth certificate. The child was placed with appellants on his release from the hospital. An application for court approval of his placement was filed on September 1, 2011, and appellants filed a petition to adopt the child on September 21, 2011.

In the petition to adopt, appellants alleged that the father was a putative father whose consent was not required. The biological father was given notice of the petition to adopt and the date of the adoption hearing. He failed to object in writing to the petition, but appeared at the hearing. The biological mother, the potential adoptive mother and the potential adopted father all testified at the hearing. The biological father was given the opportunity to question witnesses and to present any evidence at the hearing, but failed to do so.

Counsel for the potential adoptive parents argued that the biological father's consent was not required because he failed to object to the adoption petition within 14 days as required under the Revised Code. Counsel further argued that consent was not required because the evidence at the hearing established that the father failed to support the mother during pregnancy and also because the father failed to support the child after birth.

The Fayette County Probate Court found that that the biological father's consent was required. The court made this finding on the basis that the petitioners failed to meet their burden to establish that the father failed to provide support for the mother during her pregnancy. The court dismissed the petition for adoption.

Appellants appealed raising three assignments of error challenging the court's decision. Appellants argued that the court erred in failing to determine that the father's consent was not necessary because he failed to object in writing to the adoption petition. They also argued that the court erred in failing to determine that the father failed to support the child. Finally, appellants argued that the court's determination regarding the father's support and abandonment of the mother during her pregnancy was against the weight of the evidence.

The Court of Appeals held that "Ultimately, the goal of adoption statutes is to protect the best interests of children." Zsach, 75 Ohio St. 3d at 652. In cases where adoption is necessary, this is best accomplished by providing the child with a permanent and stable home, and ensuring that the adoption process is completed in an expeditious manner. *Id.* (Citation omitted.) Ohio's adoption laws were amended in 1996 to "streamline the adoption process." In re Adoption of P.A.C., 126 Ohio St. 3d at 56. Another objective of the amendments was to "prevent children from being forcibly removed from their adoptive families after a biological father belatedly exercised parental rights." *Id.* The right to a legal parent-child relationship carries with it attendant obligations and duties. In re A.N.L., 2005-Ohio-4239. When a putative father's full commitment to the responsibilities of parenthood." Zsach, 75 Ohio St. 3d at 651.

In this case, the biological father failed to support the mother during her pregnancy. While the father filed a request for DNA testing, he failed to do anything displaying a level of commitment to the child after birth. He failed to support the child, and failed to object in writing when given notice of the petition for adoption. The biological father appeared at the hearing and although given the opportunity to question witnesses, failed to do so. The court offered the father an opportunity to present testimony, but he declined, stating, "I mean, I would just like to get custody of my son. I haven't had a chance to see him." He failed to present any evidence, including any testimony or the results of DNA testing. These actions fail to evidence a level of commitment to the child on the part of the biological father.

The Court of Appeals acknowledged that the exceptions to the consent requirements are to be strictly construed to protect the rights of natural parents. The Court of Appeals found that the biological father's consent to the adoption was not required in this case for several reasons. As discussed above, Appellee failed to object to the adoption petition within 14 days as required by R.C. 3107.07(K). In addition, as a putative father, Appellee failed to support both the mother during her pregnancy and the child once born. Therefore, we find appellee's consent to the adoption was not required.

The Court sustained appellants' assignments of error and reversed the trial court's judgment dismissing appellants' petition for adoption.

TOPIC: Judge prohibited from ordering genetic testing in post-adoption case,

TITLE: State ex re. Doe v. Capper, Slip Opinion NO. 2012-Ohio-2686.

After giving birth to a child in Ohio, Rachel Arnold placed the child for adoption. Relators' adoption of the child was finalized in May 2010. In October 2010, Todd Roccaro filed a complaint to establish paternity in the county court of common pleas. Roccaro named only Arnold as a defendant and did not name the child as a party to the case. In November 2011, Judge Thomas Capper ordered the parties to the parentage action, as well as a nonparty, the minor child, to submit to genetic testing. In January 2012, Relators, the child's adoptive parents, filed an action for a writ of prohibition to prohibit Judge Capper from proceeding in the parentage action and to direct him to enter a finding that all orders that had been entered in that case were void.

The Supreme Court granted the writ, holding that Judge Capper patently and unambiguously lacked jurisdiction to proceed in the parentage proceeding since the child was not made a party to the case and good cause was not shown for not making the child a party.

TOPIC: Appellant's motion for intervention was properly denied by probate court. Legal custody is subject to continuing jurisdiction of juvenile court and may be terminated by that court.

TITLE: In re J.F.T., 2012-Ohio-2105.

The movant was awarded legal custody of the ward after the mother failed to comply with custody provisions after she gave birth to her child in prison. After the child was taken from the mother, the juvenile court ordered legal custody to movant. The mother filed petition in probate court to place her child with a couple of her choosing for purposes of adoption. The court granted the petition and subsequently dismissed the movant's intervention motion and claim of permanent custody over the child. The movant then appealed.

The appellate court affirmed the trial court's ruling. First, the court discussed appellant's interest in the subject matter to establish intervention of right under Civ. R. 24(a). The appellant pointed to the juvenile court's granting of legal custody which she argued conferred upon her the

right to consent per children services statutes. The appellate court rejected this distinguishing legal custody from permanent custody. Legal custody is usually intended to be permanent, but is subject to any residual parental rights, privileges, and responsibilities. Since the legal custody was able to be terminated by the juvenile court at any time before the child's eighteenth birthday, the custody was not permanent. Furthermore, state law does not confer a power of consent on a lawful custodian. That right is limited to permanent custodians. Despite any bond that was created between appellant and child, the appellant lacked a legally protectable interest in the child's adoption. Therefore the probate court did not abuse its discretion when it denied appellant's motion to intervene. As for permissive intervention, the appellant had no claim or defense to present in the pending adoption hearing and permissive intervention would only serve to unduly delay the adjudication of the petition for adoption previously filed.

#### ATTORNEY DISCIPLINE

TOPIC: Applicant for the bar examination was so dishonest, unethical, and selfish, that the Supreme Court of Ohio found he lacked the requisite character, fitness and moral qualifications for admission to the practice of law, and he was "forever precluded from reapplying for the privilege of practicing law in this state."

TITLE: In re Application of Poignon, 132 Ohio St.3d 394, 2012-Ohio-2916.

Applicant Poignon applied to take the July 2011 Ohio bar exam. However, the Toledo Bar Association recommended that his application be disapproved based upon his felony convictions for theft of controlled substances, the revocation of his Ohio State Board of Pharmacy license, neglect of his financial obligations and ultimately his failure to take any responsibility for his actions. Applicant had stolen and abused controlled substances and then, before the admissions committee, blamed his supervisor, the pharmacy board and other co-workers, while partially absolving himself from blame and claiming he had received a raw deal. He claimed that he did not know his wife had filed for bankruptcy, though he was named as a party defendant and received a copy of the complaint.

The Board found this "incredible." It also recommended that he was so dishonest, unethical, and selfish, that Poignon should never be allowed to take the bar exam in Ohio. The Supreme Court of Ohio agreed, finding applicant lacked the "requisite character, fitness and moral qualifications for admission to the practice of law." He was "forever precluded from reapplying for the privilege of practicing law in this state."

TOPIC: When an attorney was unable to secure his client's written authorization and forged his client's signature, using his secretary's notarial stamp, and signing with her signature, suspension was warranted for dishonesty and fraud.

TITLE: Disciplinary Counsel v. Koehler, 132 Ohio St.3d 465, 2012-Ohio-3235.

Respondent was admitted to practice in 1993. He was hired by a man in 2011 to probate his wife's estate. However, the money in his wife's account was going to unclaimed funds. Respondent was unable to secure his client's written authorization, so he forged his client's

signature and used his secretary's notarial stamp, signing with her signature. Respondent's secretary filed the grievance with the Office of Disciplinary Counsel.

In 2011, relator disciplinary counsel filed, alleging respondent had engaged in fraud, dishonesty, etc., that was prejudicial to the administration of justice. Respondent stipulated and was suspended by the Supreme Court for six months, with the entire period stayed (due to his lack of prior disciplinary infractions), while still being rebuked for his lack of remorse, fraud, and dishonesty.

TOPIC: When, in light of his ethical violations, the respondent in good faith hired a paralegal and purchased a bankruptcy cases computer tracking program to ensure deadlines are met and kept, a one-year suspension stayed was warranted.

TITLE: Toledo Bar Assn v. Harvey, Slip Opinion No. 2012-Ohio-4545.

Respondent was a Toledo lawyer admitted in 2005. In 2011, the TBA filed a 4-count complaint against him. Almost all of the charges arose from his failure to timely file documents in 14 bankruptcy cases. After hearing, the board found him guilty of almost all violations of *Prof.Cond.Rule* 1.3, requiring a lawyer to act with due diligence in representation of clients and recommended a one-year suspension fully stayed if there was one year probation without further misconduct.

The Board found that in 7 bankruptcy cases, the files were closed without discharge due to his lack of timeliness. In all the violations, respondent admitted that he did not keep track of court deadlines to ensure timeliness; rather, he relied solely on his clients to provide all information, etc., in a timely manner as his only check and balance. He even blamed his clients for his errors as well as his mother's death and his own protracted divorce as a "mitigating mental disability."

The Court found no mitigating mental disability, but also found that, since the time of these incidents, he has hired a paralegal and purchased a bankruptcy cases computer tracking program to ensure deadlines are met and kept. One year suspension stayed with the Board's conditions.

TOPIC: The respondent's repeated misuse of his client trust fund, including allowing his wife to write checks against the account, warranted actual suspension.

TITLE: Disciplinary Counsel v. Alexander, Slip Opinion No. 2012-Ohio-4575.

Respondent was a Cleveland Heights lawyer who used his IOLTA account to pay personal and business expenses, including allowing his wife to write checks drawn on said account. He also divided a client's fee without first obtaining the client's consent and did not keep monthly records reconciling his trust account as required by Ohio Supreme Court disciplinary rules.

The Board found the respondent's repeated misuse of the trust fund "to warrant actual suspension. The Supreme Court of Ohio suspended him for one year with six months stayed on condition that the respondent commit no further infractions, complete a year of probation monitored by an attorney appointed by the Disciplinary Council, and complete six hours of CLE related to office and trust fund management.

Indefinite suspension was just when attorney stole personal injury settlement funds and relocated to Sarasota, Florida.

Disciplinary Council v. Weiss, Slip Opinion No. 2012-Ohio-4564.

In 2006, Weiss settled a personal injury case for his client for \$98,000 and deposited the funds in his client trust account. Pursuant to a fee agreement, he was entitled to around \$32,000. He only paid the client and two medical service providers \$29,000, pocketing the rest and ignoring his client's phone calls.

The client tried unsuccessfully to contact Weiss for two years and then hired a new lawyer to try and recover the remaining funds owed. Weiss had relocated from Ohio to Sarasota, Florida and ignored the attorney and former client's calls. Nor did he cooperate with any disciplinary proceedings.

Based on the Board's findings of numerous disciplinary violations, the Supreme Court of Ohio suspended Weiss from practice indefinitely and ordered restitution within 30 days.

TOPIC: Cincinnati attorney suspended.

TITLE: Cincinnati Bar Association v. Hartke, 2012-Ohio-2443.

The Supreme Court of Ohio suspended the law license of Cincinnati attorney James R. Hartke for six months for violating the Rules of Professional Conduct in his dealings with a client who reneged on an agreement to pay Hartke's bill for legal services in a divorce case.

Hartke admitted that after the client received a distribution from her former spouse's 401(k) account but failed to make a promised payment to him from the proceeds, then failed to return his phone calls and changed her cell phone to avoid him, Hartke went to the client's apartment to demand payment. In the confrontation that ensued, Hartke admitted that in front of the client's six-year-old daughter he angrily threatened to file criminal charges against her unless she immediately went to her bank and withdrew funds to pay his bill. The client went to the bank but was so visibly upset the bank employees called police. Hartke subsequently agreed to accept payment of a reduced amount.

In a 6-1 per curiam opinion, the court adopted findings by the Board of Commissioners on Grievances and Discipline that Hartke's actions violated the state disciplinary rules that prohibit an attorney from filing or threatening to file criminal charges to gain an advantage in a civil dispute, and from engaging in conduct that adversely reflects on the attorney's fitness to practice law.

In rejecting the disciplinary board's recommendation of a stayed license suspension as the appropriate sanction for Hartke's misconduct, the court found that Hartke's prior suspension for a previous disciplinary infraction, the vulnerability of his client, and the emotional harm she suffered outweighed mitigating factors in the case and merited an actual six-month suspension from practice.

The court's opinion was joined by Chief O'Connor and Pfeifer, O'Donnell, Cupp and McGee Brown. Lanzinger dissented, stating that she would impose a six-month suspension with all six months stayed on conditions.

## ATTORNEY FEES

TOPIC: Attorney fees not tied to fee agreement if court finds them unreasonable.

TITLE: In re Kelch, 2012-Ohio-5214. 2<sup>nd</sup>. 11/9/2012.

Trial court was affirmed in correctly determining reasonable attorney fees. The executor was not bound by a fee agreement with the objecting attorney. In addition, a partial transcript submitted to refute a magistrate's finding of fact was found insufficient to change findings made by the trial court.

Decedent passed with a substantial estate. A surviving spouse and four children survived. A son was executor who was sole beneficiary of an \$800,000.00 life insurance policy, but he sought to fulfill a prior understanding with decedent that these funds were to be used to purchase shares the decedent had in a troubled closely held company group that owed substantial debt.

The attorney helped prepare the estate, an Ohio estate Tax return, and in setting up a trust to provide some financial security for the surviving spouse, utilizing each child's shares of the estate.

The attorney submitted an inventory with share valuation first listed as \$784,015. This was amended to \$664,682 soon thereafter, and eventually revalued at \$19,700 by new counsel with the help of a professional appraiser. New counsel filed an amended estate tax return, and the estate thereafter requested a determination of attorney fees from the probate court, \$25,998 of which had already been paid the first attorney.

A magistrate determined that the first attorney was entitled to a reasonable amount of \$6,874.50 for services related to determining estate assets and filing initial papers. The trial court dismissed objections related to compensation handling related matters and for dealing with insurance policies and trust services, and also overruled an objection that the executor was bound by the fee agreement with the first attorney.

The appeals court noted the trial court specifically said that the partial transcript submitted by the objecting attorney was insufficient to allow it to independently review the factual findings below. The trial court's dismissal of the attorney's objections was reasonable in these circumstances. Further, a probate court is not bound by a fee agreement, so the executor was not estopped from challenging the fee agreement. The magistrate's actions were therefore supportable.

## BIRTH CORRECTION

TOPIC: A true hermaphrodite has both male and female genitalia and should be listed on an Ohio birth certificate as "hermaphrodite" rather than as a male or female. Birth correction was justified.

TITLE: In re Correction of Birth of Diamond Rane Christiana, 8/31/12, Franklin County Probate Court.

Applicant was born a true hermaphrodite with male and female sex organs in 1957. The applicant's sex on the birth certificate reads "male." Applicant was raised as a boy, though

producing testosterone and estrogen, and undergoing a "post-menstrual syndrome" for 10 days every month. In 2006, she had an irreversible orchiectomy, and her legal sex is now female.

The magistrate found that, though the applicant was indeed born with male genitalia, she was also born with female genitalia. This meant that the historical record was inaccurate by only listing applicant as a male. Rather, the birth record should be corrected to read "hermaphrodite."

The Ohio Department of Vital Statistics was then ordered to correct the birth record in accordance with the above.

#### CIVIL PROCEDURE

TOPIC: A request for a writ of procedendo will fail when a court has already done what the petitioner requests as relief.

TITLE: State ex rel. Anderson v. Sheeran, 2012-Ohio-3773.

In 2011, relator-petitioner filed a motion to vacate restitution in the Franklin County General Division because no restitution hearing was held to determine financial losses after a foreclosure. Petitioner filed a *procedendo* action in 2012, asking the 10<sup>th</sup> Appellate District Court to force the respondent court to respond to the 2011 motion. However, respondent court filed a motion for summary judgment with proper notice, asserting that it had ruled on petitioner's motion in September 2011 and dismissed the motion to vacate restitution. Petitioner never responded to the motion for summary judgment.

The matter was referred to a magistrate, who found summary judgment for the respondent. For a *writ of procedendo*, "relator must establish a clear legal right to require a court to proceed and the lack of an adequate remedy in the ordinary course of law," and is appropriate when a court "has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." Respondent court had already done what petitioner was trying to compel. As a result, *procedendo* made no sense. On review, the Franklin County Court of Appeals adopted the magistrate's decision. *Procedendo* denied.

TOPIC: The Court of Appeals found that, under Evid.R. 804(B)(3), a reasonable person would only have made "gift" comments of two paintings worth over one million dollars if he believed he was giving a gift. However, statements by decedent's doctor that the decedent often said he'd "take care of" the plaintiff were general, not evidence of pecuniary intent, and inadmissible as a hearsay exception.

TITLE: Richards v. Wasylyshyn, 2012-Ohio-3733.

Decedent passed away in 2010, his wife and daughter having predeceased him. Appellant defendants are the two surviving sons as well as the co-executors and co-trustees of his estate. Decedent was a huge collector of artwork and paintings.

Decedent and plaintiff had a romantic relationship for over 10 years prior to his demise (long after his wife's death), including traveling to Europe and Asia, wintering in Florida together, and gifts of clothing and jewelry to plaintiff. In 2009, decedent was having heart surgery and allegedly made statements gifting two extremely valuable paintings to the plaintiff. Decedent survived the surgery. Plaintiff believed she was given the paintings and moved them to her house

in 2009, later moving them back to the couple's summer place. Upon his death, plaintiff wrote and asked for the paintings, which was refused.

Plaintiff filed a declaratory judgment, replevin and conversion action in the Wood County General Division, centered on ownership of the two paintings. Plaintiff and defendants filed motions for summary judgment and the lower court granted plaintiff's motion. The lower court found that the two paintings belonged to the plaintiff and were inter vivos gifts to plaintiff. Defendants were ordered to give plaintiff the paintings. Defendants' answer to the complaint had indicated that decedent's will left everything to the trust and the two sons are the sole beneficiaries of said trust.

On appeal, the 6<sup>th</sup> District Court of Appeals had to deal with an admissibility of evidence issue. The lower court allowed certain of decedent's statements in as exceptions to the hearsay rule under Evid.R. 804(B)(3) and 803(3). Appellants disagreed, asserting that Rule 804(B)(5) demonstrates that decedent's statements are not evidence, and if so are excluded under the hearsay exceptions. The Court of Appeals found that, while the decedent's statements were in fact evidence, 804(B)(5) does not allow the evidence in as a hearsay exception, because the rule does "not provide a hearsay exception for evidence offered to support claims adverse to the decedent or his estate."

Appellants asserted that these remarks were expressive of "donative" intent and therefore inadmissible. The Court disagreed, finding expressly that Rule 803(3) allows the admission because they were statements indicative of a then-existing state of mind or intent.

The lower court also saw the statements as admissible under Rule 804(B)(3), finding the statements admissible because the two paintings were worth over one million dollars and therefore the decedent's statements were so against his interest that a reasonable person would not have made them unless he believed them to be true. Appellants argued that the evidence only supported a gift *causa mortis*, which ended when the decedent recovered from his surgery in 2009. The Court of Appeals found that a reasonable person would only have made such "gift" comments if he believed he was giving a gift. The statements were allowed under 804(B)(3). However, statements by decedent's doctor that the decedent often said he'd "take care of" the plaintiff were general, not evidence of pecuniary intent, and inadmissible as a hearsay exception. Nevertheless, the doctor's testimony was admissible under 803(3) to show statement of a plan for current intent and future conduct.

Now the Court turned to the issue of whether the paintings were actually an *inter vivos* gift as plaintiff asserted, or whether it was a gift *causa mortis* when decedent made the statements because of the high risk of his open heart surgery, which intent was extinguished when decedent recovered after his surgery. For *causa mortis*, a gift must be personal property, made in the last illness of a donor where a death risk is imminent and subject to an implied condition that the donor gets the gift back upon recovery. One of the defendant co-executors/cotrustees testified that the decedent had expressed to him a fear that he would not survive the surgery. The defendant also testified that the decedent told him he had given two paintings to the plaintiff to take away in case he didn't survive. Appellants also argued that after the surgery the paintings came back to decedent's house and stayed there until his demise. Plaintiff claimed they were stored there for her convenience but were her property. The Court ruled that this was primarily an issue of fact and that the credibility of witnesses needed to be weighed. As a result, while the decedent's statements were overall admissible into evidence, the lower court should not have granted the plaintiff's motion for summary judgment because there were issues of donative intent, delivery, and ownership and possession rights. Reversed and remanded, with an order that a trial be held.

TOPIC: When the issue is to determine whether a decedent removed all beneficiaries and the POD designation from a bank account, making them estate assets, the nature of a POD contract requires extrinsic evidence as a matter of law. If there is no ambiguity on the contract's face, then the revocation is proper and the account is an estate asset.

TITLE: Olds v. Jones, 2012-Ohio-4941.

In 2011, appellants filed a declaratory judgment action in the Cuyahoga County Probate Court asserting that they are the designated beneficiaries of a decedent's POD account and that the money should be tendered to them. The executrix-defendant answered and counterclaimed, alleging that the account is an asset of the decedent's estate and that the funds should be distributed according to the decedent's last will. The trial court found that the bank documents "unambiguously demonstrated" that the plaintiffs' beneficiary status was deleted and that the decedent had terminated the account's POD status. Hence, it was an estate asset and defendants were granted summary judgment. Plaintiffs appealed.

On review, the 8<sup>th</sup> District Court of Appeals first gave the standard de novo review of summary judgment and that to prevail, the moving party has the burden to show there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. The Court said that the nature of a POD contract requires extrinsic evidence as a matter of law. If there is no ambiguity on the contract's face, then parol evidence cannot be used to show a contrary ambiguity. The POD card had two amendments: the first said "POD removed" and the second said "Delete beneficiaries." The Court concluded that the decedent was quite clear in removing all beneficiaries and revoking the POD status of the account. Hence it was an estate asset subject to the last will. Parol evidence could not be used and summary judgment for the estate/defendants was proper. Affirmed.

TOPIC: When a court's final decree was signed by a magistrate, who signed the judge's signature and initialed with his own initials afterward, such action renders the entry *voidable*, not void ab initio.

TITLE: Blue v. Blue, 2012-Ohio-4777.

In 2005, the parties filed for a divorce in the Delaware County Domestic Relations Court. However, the 2006 final decree was signed by a magistrate, who signed the judge's signature and initialed with his own initials afterward. Husband appealed.

The 5<sup>th</sup> District Court of Appeals reviewed the matter, first noting in its own 2011 case, *Miller v Miller*, 2011-Ohio-2649, such a decree was not a final, appealable order because it was not actually signed by the judge, but only a magistrate under similar circumstances.

The Ohio Supreme Court has now found as of 6/27/12 that such an entry, which does not comport with ministerial duties under Ohio Civil Rule 58 (A), is *voidable*, not void. The appellant's collateral attack based on the magistrate's signature was thus not valid, because he did not appeal the 2006 decision, but only attacked an amended decree from 2009. His appeal was found not well taken.

TOPIC: When the defendant in a foreclosure action had not filed her objections to a magistrate's decision within 14/17 days as required by Civil 53(D)(3)(b), her late objections will be rejected unless she had requested and obtained an extension of time to file said objections.

TITLE: Morgan Stanley Credit Corp v. Fillinger, 2012-Ohio-4295.

Defendant bought a home in 2003. The note was subsequently assigned to plaintiff. She defaulted on her loan. When plaintiff filed a foreclosure action, the matter was assigned to a magistrate, who wrote a decision that incorporated a findings of fact and conclusions of law, even though there was no separate caption indicating the same. Defendant requested by motion that the magistrate should provide findings of fact and conclusions of law. She also filed a notice of appeal.

The 8<sup>th</sup> District Court of Appeals rejected the appeal, because there was no final order of the court and it was not a final, appealable order. Again, defendant requested a findings of fact and conclusion of law. Three weeks later, defendant filed an objection. The lower court denied the objection as untimely, adopting the decision as the order of the court. Defendant appealed.

On review, the Appellate Court found that the defendant had not filed her objections within 14/17 days as required by Civil 53(D)(3)(b). Additionally, no findings of fact and conclusions of law was necessary, as the magistrate had provided it in her initial decision. The foreclosure was proper and defendant's appeal rejected. Affirmed.

TOPIC: When no objections were filed to an appellate magistrate's decision under Ohio Civil Rule 53 (D)(3)(b) regarding a mandamus/procedendo action, the 10<sup>th</sup> District Court of Appeals adopted the findings of fact and conclusions of law in the magistrate's decision and granted summary judgment for the judge in question.

TITLE: State ex rel. Anderson v. Sheeran, 2012-Ohio-3773.

Anderson filed for a writ of mandamus/procedendo to compel a Franklin County general division judge to rule on his motion. The judge later filed a motion for summary judgment. Anderson filed no responsive pleading. The matter was referred to an appellate magistrate, who wrote a magistrate's decision in April 2012 with findings of fact and conclusions of law in the judge's favor.

As no objections were filed to said decision under Ohio Civil Rule 53 (D)(3)(b), the 10<sup>th</sup> District Court of Appeals adopted the findings of fact and conclusions of law in the magistrate's decision and granted summary judgment for the judge. Writ denied.

#### CLAIMS

TOPIC: Executor properly disallowed son's claim and dismissed son's notice.

TITLE: In re Piesciuk, 2012-Ohio-2481.

Edmund Piesciuk executed a will in 2008 in which he named his two children, Stephen ("Executor") and Janet, as the sole beneficiaries of his estate. The will specifically indicated that Edmund chose not to provide for Son due to the fact that he provided Son with gifts during his lifetime. After Edmund died, Executor filed an application to probate his will.

On November 30, 2011, Son filed a "notice of tacit approval" of a claim against his father's estate. The notice provided that Son presented a claim against the estate to Executor, Executor filed a response, and a magistrate issued a decision dismissing Son's notice. Son filed an objection to the magistrate's decision, and the trial court overruled his objection. The trial court held that Executor properly disallowed Son's claim and dismissed Son's notice.

Son appealed from the trial court's judgment and raised one assignment of error for review. The estate did not validly reject plaintiff's claim when it failed to follow statutory requirements of sending notice of the rejected claim by certified mail. The probate court abused its discretion when it subverted the rules of statutory construction.

The Court of Appeals for Summit County held that R.C. 2117.06 does not contain any command with regard to how an executor must notify a claimant of a claim's disallowance. And while Civ. R. 73(E) governs the service of "any type of notice" in probate proceedings, the subsection of R.C. 2117.06 that directs an executor to allow or reject claims does not reference "notice" to the claimant at all. It merely provides that an executor "shall allow or reject all claims." R.C. 2117.06(D). Executor notified Son of the disallowance of his claim. Executor was required to notify him of the disallowance by certified mail. See App. R. 16(A)(7). In the absence of a reasoned argument on the part of Son, the Court of Appeals noted that it would not conclude that the trial court erred by dismissing Son's "notice of tacit approval" and disallowing his claim. It therefore overruled Son's sole assignment of error and affirmed the order of the Summit County Probate Court.

#### CONCEALMENT OF ASSETS

TOPIC: Because the issue of concealment of assets relates to the cash proceeds of life annuities, rather than the annuities themselves, the probate court has jurisdiction in a concealment action over assets under RC § 2109.50.

TITLE: Neuman v. Trice, 2012-Ohio-4206.

Martha died in 2011 with a pour over Will and a 2001 Trust. The trust specified that the funds were for her daughter and many grandchildren. She had three annuities specifically designated the trust as the sole beneficiary. Her son was specifically excluded as a Will and trust beneficiary. In 2008, Martha grew ill and had her excluded son's defendant wife named as financial POA. The POA did not allow gifting.

Martha resided with defendant and her son. Defendant liquidated the annuities, putting them into a POA account. She used Martha's funds to pay for her family expenses and frivolities, paying off defendant's family credit card, and refinishing their driveway. Defendant also withdrew \$28,000 in cash during that time.

In 2010, an attorney filed an application for guardian in the Trumbull County Probate Court. Defendant's POA was revoked and she was ordered to file an accounting, which she never did. The Guardian filed a concealment action against defendant and her husband. When Martha died in 2011, her administrator WWA continued the suit. A special court investigator was appointed to report on defendants' financial transactions while she served as POA. Defendants argued that pre-death liquidation of assets did not convert them into probate assets. Therefore, the court lacked

subject matter jurisdiction over the suit. When defendants could not document proof for their financial transactions, the probate judge found for the estate in the amount of \$190,000+. Defendants appealed.

On review, the 11th District Court of Appeals first noted that because the issue of concealment of assets related to the cash proceeds of life annuities, rather than the annuities themselves, the probate court has jurisdiction in a concealment action over assets. Under RC § 2109.50, the lower court had jurisdiction over the assets under the guardianship and the subsequent estate. Affirmed.

TOPIC: To prevail on *res judicata*, (1) there must be a valid, final decision on the merits (2) there is a 2<sup>nd</sup> action that involves the same litigants (3) the 2<sup>nd</sup> action contains the same claims that were or could have been brought in the 1<sup>st</sup> action and (4) that the 2<sup>nd</sup> action arises out of a transaction or occurrence that was the subject matter of the 1<sup>st</sup> action.

TITLE: Lanzalacao v. Lanzalaco, 2012-Ohio-453.

Divito died testate in 2008. Her Will was admitted to probate and her estate opened in the Cuyahoga County Probate Court. Her will named her daughter as executrix, and her estate was divided equally between two daughters.

Daniel filed a concealment action in the probate court, alleging that executrix had misappropriated the funds in the estate. Plaintiff asserted that Divito had a \$50,000 POD account that left everything to Daniel's two minor children. The complaint for concealment alleged that the executrix fraudulently converted said funds prior to death by using a POA allegedly executed by decedent. There was a settlement that stated the executrix would pay each minor child \$25,000.

In 2010, the plaintiffs filed a virtually identical lawsuit in the General Division. Defendant executrix objected, indicating that this case had already been litigated; she argued that if the case must be heard, it should be sent back to the probate court, which was the court most familiar with the parties and issues. Defendant also asserted that under Civil Rule 73(B) and RC Chapters 2101 through 2131, the probate court is the proper venue for concealment of estate assets. Her motion to change venue was denied and the case went to a bench trial.

Executrix also argued *res judicata*, indicating these issues had already been resolved in the Cuyahoga County Probate Court. The court found for the plaintiffs on conversion but indicated that their right to restitution was offset by the \$50,000 payment to the children. It also found no fraud or breach of fiduciary duty. Executrix appealed.

The 8<sup>th</sup> District Court of Appeals found that to prevail on *res judicata*, four conditions must be met: (1) there must be a valid, final decision on the merits (2) there is a 2<sup>nd</sup> action that involves the same litigants (3) the 2<sup>nd</sup> action contains the same claims that were or could have been brought in the first action and (4) that the 2<sup>nd</sup> action arises out of a transaction or occurrence that was the subject matter of the first action. The Court found that in the probate action, all parties had agreed to a full and final settlement. Since the probate division has exclusive jurisdiction over actions involving the conversion of estate assets, it had plenary power at law and equity in the instant case. Bringing a new case in the General Division was barred by *res judicata*. Reversed.

#### ESTATES

TOPIC: Heirship determination supported by the evidence.

TITLE: In re Collins, 2012-Ohio-5234.

Decedent passed in 2001 with a surviving spouse and three children. Heirship determination was required because the surviving spouse respectively filed for relief from administration, full administration, and for approval of wrongful death claims that were eventually converted to survival claims. In each of these filings no mention was made of the children. In fact, the only notice attempted was to two possible nephews whose whereabouts were unknown. The surviving spouse eventually died with assets remaining in the estate due to the asbestos claims.

The trial court finally determined that the heirs of decedent were his surviving spouse and the three children from a prior common law marriage. The surviving spouse's executor presented no evidence that decedent was not the father of the three children or that anyone ever questioned their parentage.

The appeals court affirmed, after reviewing the proceedings below and the heirship complaint filed by the surviving spouse's administrator and the subsequent appeal of that administrator on a number of assignments of error, all denied. "The evidence established that Jonathon, Eddis, and William were all born to Mary and Collins as set forth in their birth certificates. No question of paternity was ever raised by anyone and no one, including Collins (the decedent), objected to the designation of Collins as their father. Mary and Collins cohabitated for many years. At some point in time, Mary started going by the name Mary Collins. She signed Eddis' birth certificate using the last name Collins. The reputation of the couple in the community was that they were husband and wife and that they introduced each other in that manner. Upon Mary's death in 1977 from a car accident, Collins provided information for the death certificate indicating that Mary's last name was Collins. Mary's obituary listed her last name as Collins and listed William (the decedent) as her husband. After her death, Collins continued to raise the children as his own and signed all school papers as the parent of the children."

The appeals court noted further evidence that another prior spouse of decedent believed the two were married. Also, the surviving spouse included the children in his obituary and had decedent listed as "Sr." on decedent's death certificate.

TOPIC: When accounts were "joint and survivor", but were opened by estate fiduciary using a power of attorney she had over her father's assets prior to death, the burden was on her by a preponderance of the evidence to demonstrate that was her father's intent. In the absence of said proof, there is a presumption of fraud or undue influence.

TITLE: In re McCauley, 2012-Ohio-4709.

Decedent passed away in 2008, and his estate was opened in the Stark County Probate Court. His daughter was appointed as executrix. Prior to death, the decedent and his wife created a special needs trust for their son, who also had a legal guardianship. Their daughter became successor trustee.

The legal guardian of the estate filed exceptions to the trust inventory, asserting that daughter-trustee did not list 7 joint and survivor accounts held by two banks. The daughter ended up being removed as executrix of her father's estate as well as trustee. A neutral lawyer was named as successor trustee and administrator WWA. After hearing on exceptions, the probate

judge found that three accounts were estate assets and that daughter had withdrawn \$10,000 from another account the day before her father died. She appealed.

The 5<sup>th</sup> District Court of Appeals reviewed the matter using the Ohio Supreme Court's leading case of *Wright v. Bloom*, 1994-Ohio-53 as the yardstick for joint and survivorship cases. The Court pointed out that while the three accounts were "joint and survivor", they were opened by her using a power of attorney she had over her father's assets. The burden was on her by a preponderance of the evidence to demonstrate that was her father's intent, which daughter-appellant could not do. In the absence of said proof, there is a presumption of fraud or undue influence. This particular POA, while, broad, had no gifting provision. However, as to the \$10,000, appellant was in her rights to take the money: Her father was the one who went to the bank (no POA), ordered and signed to change the other four accounts to joint and survivor with his daughter, as his wife had predeceased him. It passed the *Wright* presumption test. Affirmed.

TOPIC: Though the same judge presides over both the probate and general division in a particular county, the action was filed in the general division and therefore jurisdiction must be maintained there; the judge could not simply invoke his probate jurisdiction and deny a jury trial.

TITLE: Demery v. Baluk, 2012-Ohio-4486.

The Baluks owned a building since 1950: the family slept on the second floor and operated a 1<sup>st</sup> floor pharmacy. In 1983, the family operated the business as a bookstore until 1998; in 2001, they renovated the upstairs and let the fat out to a family. Mary and George Baluk created a living trust that consisted of the building, shares of their stock, and an Ameritrade account. When Mary died in 2005, her husband got the shares as well as the Ameritrust account; the building interest was divided equally among the five children. George was the initial fiduciary.

George died in 2007; the executor of Mary's estate filed a civil action against the executor of George's estate in the Erie County Common Pleas Court, asserting inter alia that there was breach of fiduciary duty, misappropriation of assets, fraud and conversion of assets. The trial court found that certain savings and checking accounts were not survivorship accounts and belonged to Mary's estate. The court found that due to the surviving spouse's breach of fiduciary duty, the trust suffered over \$314,000 in losses due to improper trust distributions and other mismanagement. The Court also denied the appellants a jury trial. They appealed.

The 6<sup>th</sup> District Court of Appeals found that, in this instance, No transfer was filed to move the case to the probate division, and Civil Rule 73(B) did not allow a transfer to the probate division: it only allows transfer for improper venue, as both divisions have concurrent jurisdiction. The trial court never journalized its transfer order to the probate division, and the court speaks through its journal entries. The judge erred by invoking his probate authority. The trial court therefore erred by denying a jury trial as allowed by Civil Rules 38(B) and 39(A). Reversed.

TOPIC: Because an executor had obtained an annuity and changed a beneficiary designation on another prior to decedent's demise through exercise of a POA, the probate court did have authority under RC § 2101.24(B)(1)(b) to determine whether it was a proper exercise of that authority.

TITLE: Schiavoni v. Roy, 2012-Ohio-4435.

Jean executed a will in 2000 naming her son Roy as executor and Schiavoni her daughter as successor executor. She also executed a POA that had Roy as her attorney in fact. When Jean got dementia, she moved to assisted living near Roy, who handled her finances. Schiavoni also visited her mother regularly but spent half the year out of state. Jean died in 2008.

Jean owned two annuities at death, bought by Roy as POA and allegedly at Jean's direction, naming him as sole beneficiary on one and changing the other beneficiary designation from Roy and Schiavoni to just Roy. Schiavoni sued Roy for breach of fiduciary duty, conversion, unjust enrichment and fraud in the Medina County Probate Court.

After hearing, the probate court found that Jean lacked the mental capacity to change the beneficiary designation on the one annuity; as for the other, the court found that the change of beneficiary was undue influence by clear and convincing evidence and that Roy failed to rebut the presumption by credible evidence. Roy appealed, arguing that because the annuities were not probate assets, the probate court lacked jurisdiction to hear the matter.

On review, the 9<sup>th</sup> District Court of Appeals found that, because Roy had obtained the annuity through exercise of a POA, the probate court did have authority under RC § 2101.24(B)(1)(b) to determine whether it was a proper exercise of that authority. See also *Niemi v. Niemi*, 2009-Ohio-2090. Since the lower court had jurisdiction, it properly concluded the change of beneficiary designations were invalid and also had jurisdiction to decide how those funds should be distributed. Schiavoni was entitled to half of the first annuity.

As to the second annuity, the Ohio Supreme Court stated that the "test to determine mental capacity is the ability of the principal to understand the nature, scope, and extent of the business she is about to transact." The lower court found by clear and convincing evidence that she had depression, anxiety and Alzheimer's disease and was incompetent legally to make any financial decisions or give her property to anyone else. Roy failed to rebut the presumption of undue influence and fraud. The second annuity belonged to the estate and should have been divided equally under the will. Affirmed.

TOPIC: Appellate court overruled the appellant's many assertions of error by the probate court which ruled in favor of an executor who elected to exercise his option to purchase property from the estate of the decedent whose will explicitly provided for an option for executor to purchase land.

TITLE: In re Estate of Stevens, 2012-Ohio-1860.

Appellant asserted several assignments of error regarding probate court's ruling. Probate court ruled that exercising an intention to purchase land, an interest provided in the last will and testament of the decedent, is acceptable within a reasonable period of time. The probate court ruled the fact the purchaser/beneficiary did not actually purchase the property within the stated period of time, but rather only provided written notice of intention to buy, is not a reason to bar purchaser.

Appellant argued the court erred in allowing the purchase of the estate's real estate property because he lacked authority to purchase as executor citing a statute that prevents fiduciaries from purchasing for themselves. The appellate court overruled this argument stating the decedent's wishes were clearly set forth in the will; the executor acted in accordance with the language therein. Secondly, appellant argued that the trial court erred when it did not require

completion of sale within 45 days, per language of the will. The court cited the prevailing de novo standard of review and ultimately said the will set forth the manner of the sale, but made no mention of the time for closing, only for tender. The appellate court also rejected the appellant's assertion that the executor did not comply with the requirements of the will because it did not satisfy the Statute of Frauds by failing to provide an option.

TOPIC: In dispute about lost will, no error in magistrate's conduct of hearing where appellant given opportunity to present evidence and both parties waived appearance of court reporter, Civ. R. 53(D)(7).

TITLE: In re Yeckley, 2012-Ohio-2504.

Lena M. Yeckley passed away on April 13, 2006. An application for authority to administer estate was filed with the Court of Common Pleas, Cuyahoga County, Probate Division, on December 20, 2010, by Linda L. Scott, daughter of Lena Yeckley. A last will and testament of Lena Yeckley, dated May 11, 2001, was admitted to probate on that date.

On May 25, 2011, Thomas Yeckley, son of Lena Yeckley, filed an application to probate a lost or spoiled will, attaching a last will and testament of Lena Yeckley that was signed and dated March 24, 2003. A hearing on that application was conducted on July 12, 2011, before a magistrate wherein appellant, also a son of Lena Yeckley, opposed the application of Thomas Yeckley. The magistrate's decision issued on July 28, 2011 recommended that the prior will that was admitted to probate on December 20, 2012 be vacated and set aside and that Thomas Yeckley's application and lost will, dated March 24, 2003, be admitted to probate.

Appellant filed objections to the magistrate's decision on August 8, 2011, wherein he objected to the trial court's failure to provide a court reporter to record the magistrate's hearing and the testimony of certain witnesses at the hearing. Appellant attached to his objections an affidavit asserting that he had requested a court reporter but was "denied". The trial court denied and dismissed appellants's objections and adopted the magistrate's decision as an order of the court on September 21, 2011.

Appellant appealed from the trial court's order asserting the following sole assignment of error: "[T]rial court abused its discretion by compelling and denying Dennis G. Yeckley appellant to proceed at hearing without court reporter, continuance, and witnesses."

As an initial matter the Court of Appeals noted that there was no evidence that appellant was denied an opportunity to present evidence at the magistrate's hearing and he in fact testified himself as to the recording the court looked at Civ. R. 53(D)(7) and Loc. R. 11.1 of the Cuyahoga County Probate Division. It noted that the magistrate's decision specifically noted "[n]o transcript of hearing was taken. The parties waived the appearance of a court report."

The court found no support that the appellant arranged for a court reporter, or requested a continuance to do so, or that the magistrate should have construed his objection to the lack of a court reporter as a motion to continue. No objection was raised as to this issue before the trial court and therefore need not be considered as an error by the court of appeals.

The court of appeals therefore affirmed the probate court.

TOPIC: Notice to Surviving Spouse and next of kin is required on application for appointment of administrator.

TITLE: In re Estate of Tullos, 2012-Ohio-1114.

Days before the six month claim bar would run, a lawyer from American Postal Workers' Union filed an application as a creditor for appointment as administrator of the estate. The court granted it, without notice to any heirs (the wife and son), and presumably the union then presented its claim to the administrator. The wife and son applied to set aside the appointment, the probate court denied their motion, they appealed, and the appellate court reversed. The appointment was in error because notice of hearing on the application for appointment to the wife and son was first required so they could assert their statutory priority to appointment.

TOPIC: Case involving forgiveness of loans affirmed in part and reversed in part.

TITLE: Sims v. Wooding, 2012-Ohio-3670.

In action by executor of estate to recover decedent's loans, it was error to find that one of the loans was forgiven since it was made by the decedent's trust and, under the terms of the trust document, decedent did not have authority to forgive loan.

After Alice Wooding died, her daughter, Linda Sims, who was executor of her estate, sued Clifford Wooding to recover on two loans that Ms. Wooding had made to him. Ms. Sims also sued to recover \$10,000 that she had herself lent Mr. Wooding. Following a trial to the bench, the trial court found that Ms. Wooding had forgiven her two loans to Mr. Wooding. It concluded, however, that Ms. Sims could recover the \$10,000 she had lent him. Ms. Sims has appealed, arguing that the trial court incorrectly admitted hearsay evidence and incorrectly concluded that her mother's estate could not recover on the loans Ms. Wooding made.

The Court of Appeals for Summit County held that the trial court correctly concluded that Ms. Wooding's hearsay statements could be admitted under R.C. 804(B)(3) of the Ohio Rules of Evidence. It did not lose its way when it found that Ms. Wooding had forgiven a \$41,000 loan that she made to Mr. Wooding. The Court of Appeals however held that the court incorrectly concluded that Ms. Wooding had authority to forgive a \$30,000 loan that she made to Mr. Wooding as trustee of the marital trust. The judgment of the Summit County Common Pleas Court was therefore affirmed in part and reversed in part, and this matter was remanded to the trial court to enter judgment consistent with the decision of the Court of Appeals.

TOPIC: In a decedent's estate when one heir fraudulently transferred real estate to himself although it was specifically devised to his brother, as the trier of fact in a bench trial, the probate judge was in the best position to determine and weigh credibility of the evidence and the witnesses as to whether there was a "confidential relationship," and whether there was fraud, undue influence, and forgery.

TITLE: Grimes v. Grimes, 2012-Ohio-3562.

Decedent died testate in 2002, leaving two sons. Prior to his demise, appellant son transferred some real estate parcels from decedent to himself and recorded said deeds on the date of his father's death. Decedent's last will and testament left everything to his sons. However, it left these same parcels to the Executor son, not the appellant. An estate was filed in the Washington County Probate Court.

In 2006, the executor filed an action against appellant, asking that the real estate transfers be set aside. After several litigated matters that went to the 4<sup>th</sup> District Court of Appeals, the matter was heard before the probate judge. Decedent's attorney (who had drafted the will) testified, as did another witness, that decedent had left the properties to the executor son to "even things out", as deceased mother of the sons left most of her property to the appellant son. The executor and his cousin testified that some deeds did not even match the decedent's signature. Moreover, the appellant was extremely uncooperative at trial, refusing to answer some questions and ignoring subpoenas to bring the original deeds to the trial. However, he denied undue influence and claimed his father asked him to prepare the deeds to save money, and that the division of property was fair and just. The probate court set aside the real estate transfers for fraud, undue influence, and forgery of the decedent's signatures. Appellant son appealed.

On review, the 4<sup>th</sup> District Court of Appeals found a "confidential relationship" between dying father and the appellant, that appellant took advantage of. It found forgery, undue influence, and fraud. Since there was no jury trial, as the trier of fact the probate judge was in the best position to determine and weigh credibility of the evidence and the witnesses. The probate court's ruling was affirmed.

TOPIC: When an estate attorney failed to disclose that he was a creditor of the estate (taking \$50,000 directly from escrow after a land sale), did not investigate the status of a child of the deceased, and failed to disclose his lack of professional liability insurance, the appellate court found him acting in "bad faith", implying conscious doing of wrong, with motive of dishonesty and ill will.

TITLE: Ivanci v. Enos, 2012-Ohio-3639.

Decedent died intestate, leaving two daughters. One daughter was by his ex-wife, and the other was born to a woman he had never married. When an estate was filed in the Lake County Probate Court, the daughter with his former spouse never listed her half-sister on the Form 1.0 (next of kin). She did, however, tell her attorney, Mr. Davies, who never did an investigation to find whether the half-sister had been adopted. Attorney Davies told the Administrator not to worry about it and not to include her on the form.

Attorney Davies had been decedent's attorney prior to death; in lieu of a fee, he claimed he had a contingency fee contract with the decedent and took a 1/3 interest in the decedent's \$200,000 home by recording a \$50,000 mortgage lien; later, he was unable to produce the contract. During the administration, the home was sold and the title company gave attorney Davies

\$50,000 directly from escrow; he never submitted his claim for fees to the Administrator or applied to the court for approval.

Two years after the estate was opened, the half-sister learned of her father's death; she inquired about the estate and sued the administrator and her lawyer for breach of fiduciary duty and conversion: she was not listed as a next of kin, she was given no portion of the intestate estate, and attorney Davies had taken \$50,000 without disclosing his "creditor" conflict to the court or the administrator. The administrator filed a cross-claim against attorney Davies for breach of duty, fraud and conversion: Davies failed to disclose that he was a creditor of the estate, did not investigate the half-sister's status, did not instruct her as to disposition of assets, and for Davies' failure to disclose his lack of professional liability insurance.

An independent third-party administrator dbn was appointed. Despite attorney Davies' claims that his pre-death work justified the fee, the court found that it was unjustified. The two sisters, now reconciled and settling all claims between them, consolidated their claims against attorney Davies. A magistrate heard the matter. The magistrate found that Davies must return the \$50,000, any fees he took during the original administration, and account for distribution of a further \$9000 from the estate. Davies filed objections to the magistrate's decision under Civil Rule 53. The trial court held a hearing based on the objections, overruling them and adopting the decision as the order of the court. Davies appealed.

On review, the 11<sup>th</sup> District Court of Appeals found that the probate court has exclusive jurisdiction over administrators, executors and accounting in decedents estates [RC § 2101.24(A)(1)(c)], as well as plenary power to hear "monetary claims arising out of subject matter within the court's statutory jurisdiction." The Court did find that the trial court should have dismissed the half-sister's claim for Davies' breach of fiduciary duty since he owed her none: he only owed such a duty to the administrator, not the other beneficiary. The Court found that Davies failed to investigate the half-sister's status as an heir, failed to disclose his alleged creditor status and conflict of interest, failed to seek approval for fees from the court or present a claim under Chapter 2117. The Court also found that RC § 2117.10 did not apply, as it covers *valid* mortgage liens; Davies' was invalid due to his conflict and failure to disclose. This breach of duty was tantamount to acting in "bad faith", which implies conscious doing of wrong, with motive of dishonesty and ill will. The decision of the lower court was affirmed.

#### FINAL APPEALABLE ORDER

TOPIC: In estate dispute where trial court did not rule on party's cross-claim, all claims were not disposed of and there was no final appealable order, Civ. R. 54(B) and R.C. 2505.02.

TITLE: Scanlon v. Scanlon, 2012-Ohio-2514.

Thomas P. Scanlon established the Thomas P. Scanlon Family Trust on October 25, 1990. Thomas P. Scanlon died on February 19, 2005 and his wife, Gertrude Scanlon, became trustee pursuant to the terms of the trust. The trust named several remainder beneficiaries and specified a percentage of the remaining trust assets they should receive upon Gertrude's death. Gertrude had

withdrawn the entire trust principal by the time of her death on September 25, 2007, and the assets formerly held by the trust were allegedly divided as specified by her estate documents.

On May 15, 2008, John J. Scanlon and Cecile O'Donnell filed a complaint in the Cuyahoga County Court of Common Pleas against Patti C. Scanlon ("Patti") in her capacity as executrix of the estate of Gertrude. The complaint further named a number of defendants who may have an interest in the litigation as remainder beneficiaries under the trust. The complaint alleged that Gertrude breached her fiduciary duties as trustee by removing the trust's principal and distributing it to herself prior to her death. The complaint further alleged that Gertrude's last will and testament left Gertrude's entire probate estate to Patti and Brian T. Scanlon. The complaint sought an accounting of the trust transactions during the period in which Gertrude was the trustee and the return by Patti of all property distributed to Gertrude in violation of her fiduciary duties.

Patti answered and filed a motion for summary judgment on November 12, 2008. On January 23, 2009, appellant and his brother, Michael T. Scanlon Jr., the sons of now deceased Michael T. Scanlon, sought leave to file a cross-claim against Patti in her capacity as executrix. The trial court granted leave and accepted appellant's cross-claim, which asserted a breach of fiduciary duty and sought a return of trust property by Patti. Patti did not respond to appellant's cross-claim in a timely manner and filed a late answer with a request for leave to file an answer on February 18, 2010. This request for leave was granted on November 21, 2011, the same day the court granted Patti's motion for summary judgment against the plaintiffs. After giving reasons for its decision, the trial court's journal entry states, "Defendant Patti C. Scanlon's, as executrix of the estate of Gertrude I. Scanlon, deceased, motion for summary judgment granted."

The Court of Appeals for Cuyahoga County held that the journal entry disposing of the case did not address appellant's cross-claim and the order appealed from did not dispose of all claims in the case or otherwise note why there should be no just reason for delay. Therefore, the Court of Appeals held that the court lacked a final, appealable order and dismissed the appeal.

#### GUARDIANSHIP

TOPIC: The probate court determines suitability of guardians, and absent an abuse of discretion, the lower court's choice will not be overturned.

TITLE: In re Money, 2012-Ohio-4450.

Matt was appointed guardian over his mother Pauline's person and estate by the Montgomery County Probate Court, which rejected the application by Pauline's former attorney. He appealed, asserting that Matt was unsuitable for taking large sums of money from his mother over the years.

The Court of Appeals reviewed the case and found that "the underlying dispute in the present [Money] case is appropriately about money." The Court found that for many years Matt, as the Ward's only son, obtained money from his money that he used for himself, his wife and children, with money transfers increasing over the past few years to about \$75,000. The Ward depleted her own savings to meet her needs. Matt then was appointed POA prior to the guardianship and transferred thousands of dollars, claiming that it was to stop his mother getting cheated on phone scams.

The probate magistrate's decision, later made the order of the court, indicated while there was evidence of the transactions, Matt was the only son and presented evidence that she bestowed many inter vivos gifts on the family with no expectation of repayment. Additionally, Matt was found to be a suitable guardian. Pauline's former attorney appealed.

The Montgomery County Court of Appeals found that the probate court determines suitability of guardians and, absent an abuse of discretion, the lower court's choice will not be overturned. Here, the lower court had found the last minute transfers dubious and that they "raised a cloud" over Matt's suitability"; however, the lower court found that Matt was the only son and sole heir as well as the caregiver, who she had given many monetary gifts long before the guardianship. There was no suspicious motive in the instant case. Affirmed.

TOPIC: Relatives of deceased had no standing to appeal decision in guardianship proceedings in which none were a party, R.C. Chapter 2111.

TITLE: In re Setzer, 2012-Ohio-2246.

Appellants, Robert Setzer and Irmgard Victor, son and daughter of Katharina Setzer, appealed from a judgment of the Lake County Court of Common Pleas, Probate Division, denying their motion for relief from judgment. The court found no excusable neglect or newly discovered evidence; determined that many of the issues were not within its jurisdiction; and indicated that the ward was deceased and the guardianship had terminated.

Appellee, Irmgard Heckelmann, guardian of the deceased, filed a motion to dismiss with the Court of Appeals asserting that appellants had no standing to appeal the trial court's judgment. Appellants filed a pro se brief in opposition.

The Court of Appeals noted that the Ohio Supreme Court has held that pursuant to R.C. Chapter 2111, "[a] person who has not filed an application to be appointed guardian, or who otherwise has not been made a party to the guardianship proceedings, has no standing to appeal." In re Santrucek, 120 Ohio St. 3d 67, 2008-Ohio-4915, syllabus.

The Court of Appeals found that in this case, appellants neither filed an application to be appointed guardians nor were otherwise made parties to the proceedings. Thus, appellants have no standing to appeal. In re Santrucek, supra, at syllabus.

The Court of Appeals for Lake County therefore granted appellee's motion to dismiss for lack of jurisdiction.

TOPIC: Guardianship determination affirmed; appellate court determined that a probate court's decision regarding appointing a guardian will not be reversed absent an abuse of discretion.

TITLE: In re Guardianship of J.B.J., 2012-Ohio-1873.

Appellant had been diagnosed with schizophrenia, paranoid type, and dementia. Appellant had resided in several forensic hospitals for nearly twenty years after pleading not guilty by reason of insanity to a criminal charge. The Mental Health & Recovery Board agreed to conditionally release appellant to nursing home, to which appellant objected, upon appointment of a guardian. Submitted with the subsequent guardianship application were two expert evaluations recommending guardianship. Both doctors confirmed poor mental health of appellant and described appellant's lack of judgment and inability to medicate himself to manage his dementia. The investigator confirmed guardianship was necessary despite an independent doctor evaluation which contended the appellant's judgment was necessary despite an independent doctor evaluation which contended the appellant's judgment was intact and explained the appellant's desire for a group home over a nursing home. At the hearing the forensic monitor doctor testified on behalf of the Appellee hospital. The doctor confirmed the original diagnoses of appellant and determined the dementia would only worsen as it was highly unlikely the appellant would continue to take prescribed medication.

The appellant's main argument was that the evidence presented did not prove he had dementia and therefore he did not need a guardian because of incompetence. However, the appellate court explained that dementia is just one factor in determining an "incompetent" standard by which to assign guardianship, per the Ohio Revised Code. Because of the two testimonies from the court investigator, and the forensic monitor's testimony at the hearing, along with the independent evaluation which conceded appellant may not take medication upon release, the appellate court found the probate court did not abuse its discretion in appointing a guardian for the limited purpose of medical and mental health placement and treatment decisions.

TOPIC: Guardianship of minors properly terminated by probate court.

TITLE: B.I.C., 2012-Ohio-3519.

Craig C. moved to terminate the guardianship of Harry and Mary B. over his minor child, B.I.C. The probate court granted his motion because it determined that the guardianship was temporary and that the conditions that necessitated it no longer existed. Harry and Mary appealed, assigning error that the probate court applied the incorrect test for deciding whether to terminate the guardianship and that its factual findings were against the manifest weight of the evidence.

The Court of Appeals for Wayne County affirmed because the probate court properly analyzed whether there was good cause to terminate the guardianship and its findings that the guardianship was temporary and that there was good cause to terminate it were not against the manifest weight of the evidence.

#### MAGISTRATE'S DECISION

TOPIC: In a child support dispute, trial court erred in summarily overruling wife's objections to magistrate's decision without notifying her about sanctions for not filing a praecipe for preparation of the transcript and for not paying a deposit.

TITLE: Lakota v. Lakota, 2012-Ohio-2555.

Anthony and Monica Lakota each moved to modify Mr. Lakota's child support obligation. A magistrate issued a decision concluding that both motions should be denied because, despite some changes in the parties' financial positions, a deviation from the child support guidelines to \$0 was warranted in light of their shared parenting plan. The trial court entered judgment the same day. Ms. Lakota filed timely objections to the magistrate's decision and moved for leave to supplement her objections upon review of the transcript of proceedings before the magistrate. Eight days later, the trial court summarily "denied" her objections, concluding that because Ms. Lakota had not filed a praecipe for preparation of the transcript or paid the deposit against costs for its preparation, it was with the court's prerogative to "presume that the Magistrate conducted the proceedings with regularity and adopt her findings of fact."

Ms. Lakota moved the trial court to reconsider its decision. She supported her motion with the affidavit of her attorney, which set forth the efforts that she had made toward securing a transcript after the official court reporter told her—before the objections were filed—that she could not prepare it. According to counsel's affidavit, the court reporter told her that she would have to obtain a CD of the hearing from the bailiff, who was on vacation at the time. In addition, the court reporter informed counsel that it would normally take 3 to 4 days for the bailiff to burn the CD. The trial court denied Ms. Lakota's motion for reconsideration, concluding that it had properly applied its own local rule and that, regardless, there was no way that Ms. Lakota could then obtain the transcript with the time required by Civ. R. 53(D)(3)(b)(iii). Ms. Lakota filed a timely notice of appeal from the trial court's order that "denied" her objections and from the order denying her motion for reconsideration.

The Court of Appeals for Medina County indicated that it could not say that just because the trial court adopted the magistrate's decision and entered judgment prior to the filing of objections, that the trial court necessarily conducted an independent review of the magistrate's decision sufficient to meet the requirements of Civ. R. 53(D)(4)(d).

The Court further agreed with Ms. Lakota that the trial court erred by summarily overruling her objections without affording her a meaningful opportunity to object to the magistrate's decision and preserve issues for appeal and without conducting the independent review required by Civ. R. 53. The Court sustained Ms. Lakota's first assignment of error, but held that her remaining assignments of error, which challenge the trial court's judgment with reference to the transcript of proceedings, were premature. The Court therefore reversed the judgment of the Medina County Court of Common Pleas and remanded the matter to the trial court so that Ms. Lakota could have the opportunity to proceed from the point that her objections were timely filed.

TOPIC: In mandamus action where appellant did not object to magistrate's decision, he waived any claims of error by court of appeals in adopting the magistrate's decision in denying the writ, Civ. R. 53(D)(3)(b)(iv).

TITLE: State ex rel. Maroon v. Ohio State Hwy. Patrol Retirement System, 2012-Ohio-2679.

The Supreme Court affirmed the judgment of the court of appeals denying the request of appellant, Anthony Maroon, for a writ of mandamus. Maroon sought the writ to compel Appellee, Ohio State Highway Patrol Retirement Systems, to find that he is a member of the State Highway

Patrol fund and is eligible to apply for disability-retirement benefits and to receive a hearing on his claim. The court of appeals adopted the decision of its magistrate, including her findings of fact and conclusions of law.

Because Maroon failed to object to the magistrate's decision and his proposition of law challenges the conclusions of law in that decision as adopted by the court of appeals, he waived any error made by the court of appeals in adopting the magistrate's conclusions and denying the writ. See Civ.R. 53(D)(3)(b)(iv) ("Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(iii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b), Loc. R. 12(M)(1) of the Tenth District Court of Appeals ("the proceedings and decision of the magistrate and objections thereto shall be governed by Civ. R. 53"); State ex rel. Schmidt v. School Emps. Retirement Sys., 100 Ohio St. 3d 317, 2003-Ohio-6086, 798 N.E. 2d 1088, 6; State ex rel. Johnson v. Ryan, 127 Ohio St. 3d 267, 2010-Ohio-5676, 939 N.E. 2d 146, 3. Nor does Maroon raise any viable claim of plain error.

MISC.

TOPIC: Breach of fiduciary duty action against title agency, arising from power of attorney it drafted for plaintiff in favor of his wife prior to purchase of real property, properly dismissed for failure to state a claim where no fiduciary duty arises from drafting power of attorney and statute of limitations expired.

TITLE: Marks v. Reliable Title Agency, 2012-Ohio-3006.

Appellant Kenneth C. Marks appeals the dismissal of his complaint against Appellee Reliable Title Agency, Inc. ("Reliable"). Appellant filed the lawsuit in 2010, alleging breach of fiduciary duty. Appellant claimed that Reliable drafted a power of attorney for Appellant in 2004 in favor of his wife Susan Marks ("Susan"), along with a warranty deed for property they were purchasing in Warren, Ohio. The warranty deed conveyed the property to Susan individually. The mortgage to the property, though, was signed by Susan individually and by her as power of attorney for Appellant. The parties later divorced and the property was allegedly awarded to Susan in its entirety as separate property.

Reliable filed a Civ. R. 12(B) motion to dismiss for failure to state a claim and the motion was granted. The trial court granted the motion for two reasons: 1) there is no general fiduciary duty arising from the act of drafting of a power of attorney; and 2) the four-year statute of limitations for a breach of fiduciary duty had expired.

The Court of Appeals for Mahoning County affirmed indicating that both reasons stated in the trial court's decision were correct.

TOPIC: Supreme Court clarifies standard of review when appeals courts review declaratory judgment actions.

TITLE: Arnott v. Arnott, Slip Opinion No. 2012-Ohio-3208.

The Supreme Court of Ohio ruled that an appellate court reviewing a declaratory judgment matter should apply a deferential "abuse of discretion" standard in reviewing the trial court's determination of whether the case is appropriate for declaratory judgment, but should apply a non-deferential "de novo" standard in reviewing the trial court's determinations of legal issues in the case.

Applying that analysis to a Highland County Case, the court voted 7-0 to affirm the Fourth District Court of Appeals' application of a "de novo" standard when it reviewed a trial court's ruling in a declaratory judgment action interpreting the language of a trust agreement.

Writing for the court, Justice Pfeifer indicated that the Court's ruling offered the justices an opportunity to clarify a 2007 Supreme Court decision, Mid American Fire and Casualty v. Heasley, that has been interpreted by some of the state's appellate courts as requiring them to apply an "abuse of discretion" standard in reviewing all issues in declaratory judgment cases.

Justice Pfeifer explained that, while R.C. Chapter 2721 authorizes Ohio's common pleas court to issue declaratory judgments, it limits that authority to cases in which there is an actual, justiciable dispute between the parties. He wrote: "(I)n keeping with the long-standing tradition that a court does not render advisory opinions, (the laws) allow the filing of a declaratory judgment only to decide 'an actual controversy, the resolution of which will confer certain rights or status upon the litigants.' ...Not every conceivable controversy is an actual one. As the First District aptly noted (in League for Preservation of Civil Rights v. Cincinnati, 1940), in order for a justiciable question to exist, '[t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events ...and the threat to his position must be actual and genuine and not merely possible or remote.'"

While the syllabus of the Supreme Court's decision in Mid-American held that "(d)ismissal of a declaratory judgment action is reviewed under an abuse-of-discretion standard," Justice Pfeifer noted that the only issue before the court in Mid-American was whether the dispute between the parties met the threshold test of presenting a justiciable question.

"(T)he procedural posture of Mid-American, (and) its syllabus language ...make clear that the abuse-of-discretion standard applies to dismissals of declaratory judgment actions as not justiciable; the case does not suggest that legal issues in a declaratory judgment action should be reviewed by an abuse-of-discretion standard," wrote Justice Pfeifer. "Still, some courts have interpreted Mid-American as establishing an abuse-of-discretion standard to all aspects of a declaratory judgment action. ...Today, we reiterate that the abuse-of-discretion standard applies to the review of a trial court's holding regarding justiciability: once a trial court determines that a matter is appropriate for declaratory judgment, its holding regarding questions of law are reviewed on a de novo basis."

"(T)he de novo standard of review is the proper standard for appellate review of purely legal issues that must be resolved after the trial court has decided that a complaint for declaratory

judgment presents a justiciable question under R.C. Chapter 2721. Accordingly, the Supreme Court affirmed the judgment of the Fourth District Court of Appeals."

TOPIC: Protection order valid even without the clerk of court's time stamp.

TITLE: State v. McElrath, 2012-Ohio-1927.

The Grand Jury indicted Darion McElrath for domestic violence after Juanita Carr, the mother of his child, alleged that he hit her. A day after the alleged attack, a municipal court judge issued a criminal temporary protection order prohibiting Mr. McElrath from contacting Ms. Carr or coming within 300 feet of her. Several months later, the Grand Jury indicted Mr. McElrath for violating the protection order after it learned that he had called Ms. Carr from jail. A jury found Mr. McElrath guilty of violating the protection order but not guilty of domestic violence. The court sentenced him to one year in prison. Mr. McElrath appealed, arguing that there was no evidence to establish that he recklessly violated the protective order.

The Court of Appeals for Summit County affirmed holding that the protection order was valid even without the clerk of courts' time stamp and the jury could have reasonably inferred that Mr. McElrath knew that a protection order existed.

TOPIC: In father's action against daughter with power of attorney to recover title to his land that daughter transferred to herself, error in granting summary judgment to father since the action was for breach of fiduciary duty, limited to four years, R.C. 2305.09(D).

TITLE: Potter v. Cottrill, 2012-Ohio-2417.

Janice and Ramon Cottrill appealed the trial court's decision to grant John Potter summary judgment on two of his claims against them. Potter alleged that after he and his now-deceased wife gave their daughter Janice power of attorney, Janice improperly conveyed five tracts of the couple's property to herself and husband, Ramon. Potter sought to recover this real estate. The court granted Potter summary judgment on his claim for "Invalid Transfer of Real Estate," which was premised on an allegation that Janice exceeded the scope of her authority, and his claim for "Conflict of Interest – Real Property," which was premised on an allegation that Janice had a conflict of interest in the transactions.

The Cottrills contended that these claims are untimely. Potter responded that his claims constitute actions to recover the title to real property and are subject to R.C. 2305.04's twenty-one year statute of limitations. The Cottrills urged the Court of Appeals to apply R.C. 2305.09(D)'s four-year statute of limitations because regardless of how Potter framed the claims in the complaint, they actually constituted claims for breach of fiduciary duty.

The Court of Appeals for Vinton County held that the trial court could not set aside the conveyances unless Potter proved that Janice exceeded the scope of her authority or had conflict of interest, i.e., that she breached her fiduciary duty. Because Potter filed his lawsuit outside the four-year statute of limitations for such claims, the trial court erred when it granted his summary

judgment and denied the Cottrills a summary judgment on "Invalid Transfer of Real Estate" and "Conflict of Interest – Real Property" claims.

Accordingly, the Court reserved that portion of the trial court's judgment. The decision rendered moot the Cottrills' additional arguments on the impropriety of the trial court's decision to grant Potter a partial summary judgment.

#### NAME CHANGE

TOPIC: A legal name change confers no special rights or change of legal status; therefore, same sex couple could legally change last names as adult applicants to a common hyphenated name without violating the federal Defense of Marriage Act (DOMA) or of Ohio Constitution, Article XV, § 11, which expressly forbids same sex marriages in this State.

TITLE: In re Name Change of Stephen and Joshua to Stephen and Joshua Snyder-Hill, 6/29/2012, Franklin County Probate Court.

Stephen and Joshua are two adult males who are Franklin County residents. They were "married" in a legal, same-sex civil service in Washington, DC, in April 2012. They applied separately to have their legal surnames changed to one hyphenated surname to reflect their union. They acknowledged in their respective applications that same sex marriages are not recognized as legal marriages in Ohio.

The magistrate who heard the matter noted the couple has no fraudulent or criminal intent, and that their actions do not contravene the public policy of this State. Thus the name changes were proper under In re Bicknell, 96 Ohio St.3d 76 (2002), which dealt with an unmarried, cohabitating same sex couple's request for a legal surname change.

The magistrate also noted that a name change does not change one's legal status or create new rights. Thus, the couple in the instant case has no right to file a joint Ohio tax return. The magistrate found that the name changes do not create the appearance of a state-sanctioned marriage in violation of the federal Defense of Marriage Act (DOMA) or of Ohio Constitution, Article XV, § 11, which expressly forbids same sex marriages in this State. Rather, because an adult name change is simply the changing of an adult's name, as long as there is no fraud or criminal intent, the name changes were allowable.

TOPIC: Based on RC § 2717.01 and *In re Wilhite*, which sets the standard for whether a change is in a child's "best interests," natural father's failure to demonstrate support or relationship with the child was enough to support a change to the mother's surname.

TITLE: In re Change of Name of CCM, 2012-Ohio-5037.

Minor child was born in 2005 to unmarried parents. Child was given father's surname. In 2007, the parents broke up, and in 2010, mother filed for change of name to her last name, as well as changing the child's middle name. The magistrate recommended that the surname not be changed, but that the middle name change be allowed. Mother objected, and the Franklin County

Probate Court found her objections well taken, changing both middle and surname as the mother requested. Father appealed.

The 10<sup>th</sup> District Court of Appeals reviewed the lower court's decision based on RC 2717.01 and *In re Wilhite*, which sets the standard for name changes in Ohio. The Court found that, notwithstanding the father's protests, he did not have a "real" relationship with the child and only had supervised visitation due to a history of drug and alcohol abuse as well as domestic violence. There is in fact a CPO against him until 2013 with respect to the mother of the child. Further, the child was demonstrated to clearly identify with the maternal side of the family, who all share the same surname. Affirmed.

TOPIC: When an incarcerated appellant was asked if he could hear everything in a minor name change hearing done via teleconference, and he responded in the affirmative, declined to cross examine witnesses, and never expressed an alleged inability to hear the proceedings, his appeal will be denied.

TITLE: In re KPS, 2012-Ohio-4868.

Two minors share the same parents. One child has the father's surname and the other has a hyphenated surname. Grandmother and legal guardian for the hyphenated name minor filed a name change application in the Huron County Probate Court. Natural mother of the children works and lives near grandmother and consented; the incarcerated natural father was present for the hearing via teleconference. When the name change was granted, father wanted a rehearing of the matter and to be physically present in the courtroom. When his request was denied, he appealed.

On review, the 6<sup>th</sup> District Court of Appeals found that, during the teleconference, appellant was asked if he could hear everything and he responded in the affirmative. He also declined to cross examine witnesses and never expressed an alleged inability to hear the proceedings. The Court then reviewed the lower court's decision based on RC 2717.01 and *In re Wilhite*, and found the name change to a hyphenated name for the child in the child's best interests, as the mother and the child's sibling already shared such a name. Affirmed.

#### POWER OF ATTORNEY

TOPIC: A defendant could not remove himself as a person's POA for healthcare at the insistence of the plaintiffs: RC § 1337.12(A)(1) only allows the grantor to do so, which she did not. In like manner, the defendants could not remove themselves from the individual's Will under RC § 2107.02 at the insistence of relatives, as that decision lay with the testator alone.

Title: Kitchen v. Teeters, 2012-Ohio-4343.

Betty went to the Church of the Nazarene as a parishioner and died in 2009. Defendant Teeters was the pastor. Plaintiff nieces and nephews were concerned prior to death with the Teeters personal involvement in Betty's health care and other decisions. Pastor Teeter was named as executor of her estate and health care POA. After a family meeting with the pastor in 2008, the Teeters agreed to remove themselves as legal representatives from the estate and POA documents. Plaintiffs claimed that the Teeters retained all Betty's legal documents including

the Will and POA, delaying her funeral and having it not according to her wishes. As a result, the plaintiffs also suffered.

Plaintiffs filed a suit against the Teeters in the Clermont County Common Pleas Court asserting negligence and emotional distress caused by the defendants' interference in Betty's health care and personal and financial life. Defendants moved for summary judgment, which was granted, and the nieces and nephews appealed.

On review, the 12<sup>th</sup> District Court of Appeals, after reviewing the grounds for summary judgment, found that to prevail on a negligence claim, plaintiffs must demonstrate the existence of a duty, a breach of said duty, and a proximate injury, where the defendant was under a duty to exercise proper care toward a plaintiff. Here, plaintiffs asserted the defendant(s) owed them a duty as Betty's minister and spiritual advisors to be forthright about her financial and health care initiatives. The Court concluded that there was no duty owed to plaintiffs by defendants. If there was any duty, it was between Betty and her pastor; that duty does not transfer to the plaintiffs just because they are next of kin. Furthermore, the plaintiffs were not members of that church and the Teeters were not their pastors and never provided them any spiritual guidance.

The Court also found that the defendant Teeter could not remove himself as Betty's POA for healthcare at the insistence of the plaintiffs: RC § 1337.12(A)(1) only allows Betty to do so, which she did not. In like manner, the defendants could not remove themselves from Betty's Will under RC § 2107.02, as that decision lay with Betty alone. Finally, plaintiffs' argument that the denomination of the Church of the Nazarene was liable under the doctrine of *respondeat superior* failed: if there was any liability it was between the principal and the agency, which was Betty and the Church; since there was no duty owed to the plaintiffs who were not church members, there was no liability to the church. Summary judgment was proper. Affirmed.

## PUBLIC RECORDS

TOPIC: Supreme Court orders Judge to unseal records in Youngstown corruption case.

TITLE: State ex rel. Vindicator Printing Co. v. Wolff, Slip Opinion No. 2012-Ohio-3328.

The Supreme Court of Ohio granted writs of mandamus and prohibition ordering a visiting judge to unseal documents that the judge allowed to be filed under seal in a 2010 Mahoning County public corruption case. The case, which has since been dismissed by prosecutors but is subject to refiling, alleged among other charges that multiple county officials accepted bribes from members of the Cafaro family, owners of the Ohio Valley Mall Company, in return for the county's continued rental of property owned by Ohio Valley Mall to house the Mahoning County Department of Job and Family Services.

In a 7-0 per curiam decision, the court held that retired Ohio Court of Appeals Judge William H. Wolff, sitting by assignment on the Mahoning County Court of Common Pleas, acted contrary to the Supreme Court's Rules of Superintendence when he established a protocol under which multiple filings in the cluster of cases identified as State v. Cafaro were presumptively allowed to be made under seal without giving the public prior notice and an opportunity to be heard on the necessity of sealing each filing. The court also found that the judge erred in denying requests by the Youngstown Vindicator newspaper to obtain copies of the bills of particulars returned by a grand jury against the defendants, and part of another document filed under seal,

based on the court's finding that media reporting of the content of those documents could make it difficult or impossible to impanel an impartial jury to hear the case.

The underlying criminal case was dismissed by the state without prejudice in July 2011. However, the Vindicator continued to seek access to all documents that had been filed under seal. Judge Wolff unsealed most of sealed filings in August 2011, but granted a motion by the Cafaro defendant to deny public access to the bills of particulars returned by the grand jury in the case or to a six page portion of a document that had been filed by the state in opposition to a motion to dismiss in which prosecutors enumerated "relevant non-vindictive facts" that it claimed supported the charges against the defendants. The Vindicator filed an original action in mandamus and prohibition asking the Supreme Court to order Judge Wolff to disclose the disputed documents, and to prohibit him from any future application of the protocol under which filings in the case were presumptively sealed.

In the same decision, the court found that it was not necessary to rule on claims asserted by the Vindicator under Ohio Public Records Act, the U.S. and Ohio Constitutions and prior court decisions, because the newspaper had established its claim to the disputed records under the Ohio Rules of Superintendence, rendering its other legal arguments moot.

The court wrote: "Under Sup. R. 45(A), '[c]ourt records are presumed open to public access.' ...Relators assert that the requested records that remain sealed here—bills of particulars and a statement of facts in the state's memorandum in opposition to the Cafaro defendants' motion to dismiss the indictment—are entitled to the presumption of public access in Sup. R. 45(A) because they constitute case documents." In his December 21, 2010 decision sealing the bills of particulars and his August 24, 2011 decision sealing the factual portion of the state's memorandum in response to the Cafaro defendants' motion to dismiss, the judge determined that filed documents were not entitled to presumptive public access, because they were not used by him to render a decision in the cases...There is no requirement under the Superintendence Rules that a record or document must be used by the court in a decision to be entitled to the presumption of public access specified in Sup. R. 45(A). Instead, to qualify as a case document that is afforded the presumption of openness for court records, the document or information contained in a document must merely be 'submitted to a court or filed with a clerk in a judicial action or proceeding' and not be subject to the specified exclusions. ...The bills of particulars and the factual portion of the state's memorandum in response to the Cafaro defendants' motion to dismiss were manifestly submitted to the common pleas court and filed with the clerk of court in criminal cases, and there is no exception in Sup. R. 44(C) for records not used by a court to render a decision. Therefore, we cannot read this exception into the plain language of the Superintendence Rules."

"Respondents also claim that these sealed records are not entitled to the Sup. R. 45(A) presumption of public access because they are exempt from disclosure as discovery materials or work product, citing our decision in State ex rel. WHIO-TV-7 v. Lowe (1997), to support their claim. Our holding in Lowe, however, was limited: 'Information that criminal prosecutor had disclosed to the defendant for discovery purposes pursuant to Crim. R. 16 is not thereby subject to release as a "public record" pursuant to R.C. 149.43.' ...Neither the bills of particulars nor the facts recited in the state's memorandum in response to the Cafaro defendants' motion to dismiss were 'disclosed to the defendant[s] for discovery purposes pursuant to Crim.R. 16 is not thereby subject to release as a "public record" pursuant to R.C. 149.43.' ...Neither the bills of particular nor the facts recited in

the state's memorandum in response to the Cafaro defendants' motion to dismiss were 'disclosed to the defendant[s] for discovery purposes pursuant to Crim. R. 16.' ...Notwithstanding assertions, in Ohio, a 'bill of particulars has a limited purpose --to elucidate or particularize the conduct of the accused alleged to constitute the offense.' Its express purpose is not 'to serve as a substitute for discovery.' ...Therefore, the sealed bills of particulars are not exempt from disclosure under the state law as either discovery or work product. Therefore, the sealed records are entitled to the presumption of access accorded case documents under Sup. R. 45(A).

"Respondents claim that any presumptive right of access to the sealed bills of particulars and the statement of facts in the state's response to the motion to dismiss the indictment was outweighed under Sup.R. 45(E)(2)(c) by clear and convincing evidence that the 'fairness of the adjudicatory process' would be compromised by public access to these records, i.e., unsealing these records would substantially prejudice the defendants' right to a fair trial. Respondent's claim lacks merit. There was not clear and convincing evidence to establish that the prejudicial effect of pretrial publicity generated by public access to the bills of particulars and the recitation of facts in the state's memorandum in response to the Cafaro defendants' motion to dismiss the indictment would prevent them from receiving a fair trial. The Cafaro defendants' lone witness at the December 6, 2010 hearing, Ohio University journalism professor Martin, admitted that he had 'no idea' whether relators' coverage of the criminal cases would prevent the impaneling of an impartial jury."

"In effect, in the absence of clear and convincing evidence establishing that the defendants' right to a fair trial would be violated, the judge erroneously relied on conclusory, speculative assertions. ...Moreover, the constitutional right of the defendants to a fair trial can be protected by the traditional methods of voir dire, continuances, changes of venue, jury instructions, or sequestration of the jury. Consequently, the sealing orders were improper. ... (R)elators have established that the presumption of public access has not been overcome by the requisite clear and convincing evidence of a higher interest, and that the public is entitled to access to the sealed records under the Superintendence Rules."

"Based on the previous discussion concerning relators' mandamus claim, they have also established their entitlement to the requested writ of prohibition. The Cafaro defendants did not submit clear and convincing evidence to support the court's sealing orders and sealing a protocol presumptively sealing records, including motions to seal and memorandum in opposition, based on a claimed infringement on the defendants' constitutional right to a fair trial. Therefore, relators' prohibition claim has merit."

Relators requested an award of attorney fees, but the Supreme Court held that Sup. R. 44 through 47 do not authorize an award of attorney fees to a successful litigant contesting a court's denial of access to court records. ...Thus, it denied relators' request for attorney fees.

TOPIC: Writ of Mandamus issued in public records case.

TITLE: State ex rel. Petranek v. Cleveland, 2012-Ohio-2396.

On November 13, 2011, Maryanne Petranek emailed the city of Cleveland (City) through its public records administrator, Kim Roberson. Petranek requested copies of records pertaining to

use of the area around Shaker Square by the Greater Cleveland Regional Transit Authority and the farmer's market. Receipt of the request was acknowledged, but three months passed without production of the documents.

Petranek commenced a public records mandamus action against the City and Roberson in February 2012. Petranek also sought an award of statutory damages and attorney fees. The City responded by providing Petranek with some records related to her request. According to Petranek, these records were not satisfactory. There were no records that related to agreements between the Greater Cleveland Transit Authority and the City for use of Shaker Square. A permit application was provided, but not the permit itself. Furthermore, the City only released 'Page 1 of 7' of the permit application to Petranek.

The Eighth District issued the writ of mandamus and ruled that the City and Roberson did not fully comply with the requirements of R.C. 149.43(B). The Ohio Public Records Act "requires that upon request all public records responsive to the request shall be promptly prepared and made available for any person at all reasonable times." If the request is denied, an explanation with legal support must be provided. The court held that the City and Roberson did not meet their burden because no explanations were provided regarding missing pages and records.

The Eighth District also noted that an award of attorney fees and statutory damages was "dependent upon showing the release of records is more for the public benefit than for the requestor's benefit." Petranek asserted that the request would expose the City to review and criticism while promoting compliance with the Ohio Public Records Act. The court did not award damages for three reasons: 1) every public record request promotes compliance; 2) "A statutory award must be based on more than minimal benefits;" and 3) a request that is hand-delivered or sent through certified mail is a statutory prerequisite to an award of damages. Petranek originally sent her request by email. Petitioner had first emailed the request then sent the request via certified mail. The court determined that this was insufficient.

TOPIC: Supreme Court ruled most OSU records sought by ESPN in Tressel case protected by FERPA, Attorney-Client Privilege.

TITLE: State ex rel. ESPN v. Ohio State Univ., 2012-Ohio-2690.

The Supreme Court of Ohio issued a limited writ of mandamus ordering Ohio State University to provide ESPN with several documents related to the 2011 NCAA investigation of football coach Jim Tressel that the university had previously refused to provide to the network in response to public records requests.

However, the court declined to order disclosure of most of the records sought by ESPN, finding that the requested documents fell within exceptions to the state Public Records Act for documents covered by attorney-client privilege and documents that may not be disclosed under the federal Family Educational Rights and Privacy Act (FERPA).

In a 7-0 per curiam opinion, the court also found that OSU officials had committed "per se" violations of the Public Records Act by failing to explain how ESPN could modify some of its record requests after the university had rejected them as "overboard," and by erroneously stating that the university was not required to disclose records related to an ongoing NCAA investigation. Because ESPN's complaint did not ask the court to award statutory damages or order other remedial action based on those alleged violations, the court limited its ruling on those issues to making official findings that violations had occurred.

The court denied ESPN's request for an award of attorney fees (because Ohio State complied with the vast majority of its obligations under R.C. 149.43 in responding to ESPN's records requests, and ESPN's claim are largely without merit."

The court noted that, in the weeks following a March 8, 2011 news conference at which Tressel admitted that he had failed to inform his superiors after learning about possible NCAA rule violations by OSU players, the university received 21 separate public records requests from ESPN and provided more than 700 pages of documents in response to those request. The university declined to provide certain additional documents, including some communications between athletic department officials and the NCAA addressing the investigation of Tressel, documents identifying persons officially barred from access to student athlete pass lists, and communications to or from university officials that mentioned the name of Ted Sarniak, a Pennsylvania man who had been a friend and advisor to Terrell Pryor, one of the football players implicated in the alleged rule violations.

Following its own in camera inspection of records that OSU had withheld as not disclosable under FERPA, the court determined that a few of those documents should have been provided to ESPN after personal student information had been redacted.

The court wrote: "An email chain between Tressel, the Ohio State athletics department official in charge of compliance, attorneys, and other officials scheduling a meeting includes no personally identifiable information concerning any student-athlete and a person who agreed to attend the meeting, no personally identifiable information is included. Another document refers to one person's request to obtain a disability-insurance policy on behalf of a student-athlete, and with whose names redacted, the document would not contain personally identifiable information. There were also two letters from Ohio State's athletics department compliance director to the parents of a student-athlete concerning preferential treatment. With the personally identifiable information concerning the names of the student-athlete, parents, parents' addresses, and the other person involved redacted, FERPA would not protect the remainder of these records. ...Therefore, although the majority of the requested records were properly redacted before being provided to ESPN, ESPN is entitled to access to redacted copies of these records that were completely withheld from it based on FERPA."

"Ohio State properly withheld the remaining requested records based on attorney-client privilege. ...These records include requests from Ohio State official for legal advice and interpretation, communications from or between the attorneys providing legal advice or information to Ohio State, and investigatory fact-finding related to the legal advice. ...ESPN's contention that Ohio State cannot rely on attorney-client privilege to shield these records is unfounded because 'an attorney does not become any less of an attorney by virtue of state agency employment.'

...(T)here is no requirement in public-records mandamus cases that public offices or officials must 'conclusively establish' the privilege by producing agreements retaining agents or joint-defense agreements with attorneys representing other clients. Therefore, Ohio State properly withheld the remaining requested records based on the attorney-client privilege.

## TRUSTS

TOPIC: RC § 5807.06(A) permits the probate court to remove a trustee *sua sponte* for a serious breach of trust. Therefore, under RC § 5810.01, a defendant trustee was properly removed and his actions were justly voided. Also, even if the trust were a "wholly discretionary trust"), the probate court has the authority to remove a trustee who acts in bad faith, dishonestly, or with an improper motive.

TITLE: Tomazic v. Rapoport, 2012-Ohio-4402.

In 2009, decedent executed his Last Will while suffering from terminal lung cancer. He also executed a trust agreement with defendant attorney as trustee, with the primary beneficiary being his daughter, the plaintiff. Six days later, when decedent went to the VA hospital (with the trustee present), decedent executed a new Will and a modification to the trust agreement, naming his ex-wife (who was the trustee's client) as primary beneficiary. Decedent died and trustee was the executor of his estate, which poured over into the trust. In 2011, trustee send plaintiff a letter offering her some of the trust real estate as a full and final distribution in exchange for a signed release relieving trustee from any personal or fiduciary liability related to his handling of the trust. When she refused, he threatened her with eviction from said property if she didn't sign.

Plaintiff daughter filed a suit in the Cuyahoga County Probate Court to set aside the trust modification, for construction of the original trust, and for removal of trustee. Plaintiff found that the trustee's decisions had cost the trust a lot of money due to bad choices. Defendant had also paid himself \$30,000 in fees. Plaintiff also filed a TRO and injunction to prevent eviction while the matter was pending.

When plaintiff issued subpoenas, defendant trustee accused her of being of unsound mind and character and terminated her interest in the trust. He then moved to dismiss her as a party for lack of standing. The probate judge found defendant had committed a "serious breach of trust...to protect his own interests and not in furtherance of the terms of the trust." The court removed him as trustee, set aside his orders and granted the TRO. Defendant appealed.

On review, the 8<sup>th</sup> District Court of Appeals found the trustee's argument without merit. RC § 5807.06(A) permits the probate court to remove a trustee *sua sponte* if he has committed a serious breach of trust. Therefore, under RC § 5810.01, the defendant trustee was properly removed and his actions were justly voided. The Court also found that even if the trust were a "wholly discretionary trust" (which this was not), the lower court has the authority to remove a trustee who "acts in bad faith, dishonestly, or with an improper motive." Here, defendant's attempted disqualification of the plaintiff was self-serving and in bad faith, not to further the trust. Affirmed.

In an intentional interference in expectation of inheritance suit, plaintiff must prove (1) an expectation of inheritance (2) intentional interference in that expectation by defendant trustee (3) defendant's tortuous interference such as fraud, undue influence or duress (4) but for said

interference, a reasonable expectation of said inheritance (5) and damage resulting from the interference. There is also a four-year statute of limitations under RC § 2305.09(C).

McDougal v. Vecchio, 2012-Ohio-4287.

Plaintiff's aunt died in 1992 in Ohio. He thought he was a beneficiary of her trust, as his aunt expressed to him. He learned from his mother by phone in 1992 (he was now a Florida resident) that he would not get anything under the trust, as she had created a charitable foundation as beneficiary. Aunt had several wills over time, duly attested to and proper. Over time, she also made trust modifications and codicils to her Will. In 1985, the plaintiff was eliminated as a beneficiary, with aunt's money now going to defendant charitable foundation. Prior to that, he was to get \$600 per month after his mother died under the trust.

When cleaning out his mother's house in 2003, he found his aunt's estate plan in the attic making the change and became convinced that her signature creating the foundation was a forgery after going through the box of documents in 2009. He filed suit in the Cuyahoga County Probate Court in 2011, alleging the Foundation prepared the trust agreement, exerted undue influence and forced her to sign the trust and other documents, thus isolating her from family and friends and taking advantage of her deteriorating condition, in addition to the forgery claim. After the probate court granted summary judgment due to the statute of limitations having run, plaintiff nephew appealed.

On review, the 8<sup>th</sup> District Court of Appeals found that plaintiff had argued that the foundation was guilty of intentional interference in expectation of inheritance. To prevail, plaintiff had to prove (1) an expectation of inheritance (2) intentional interference in that expectation by defendant (3) defendant's tortious interference such as fraud, undue influence or duress (4) but for said interference, a reasonable expectation of said inheritance (5) and damage resulting from the interference. The Court found that plaintiff had known of the Foundation since 1992 and that, under RC § 2305.09(C), the four-year statute of limitations began to run since 2003, when he removed the box from his mother's attic. Since he did not file until 2011, he was out of time and summary judgment was proper. If he truly had an expectation of inheritance, and exercised due diligence plaintiff should have reviewed the documents when he took possession in 2003. He was time-barred from filing his suit. Affirmed.

TOPIC: Ohio Trust Code requires annual reports by trustees and furnishing other trust information on requested of beneficiaries.

TITLE: In re Marjorie A. Fearn Trust, 2012-Ohio-1029.

Decedent left her revocable trust equally to her three children. One daughter's share was continued in trust, with son as trustee; daughter and son did not get along. Son made trust payments to daughter but did not provide much information to her, so daughter sued for accounting. Son furnished some summary information, which the trial court found to be adequate. The appellate court reversed and ordered a proper accounting, relying on R.C. 5808.13 of the Ohio Trust Code and its requirements of annual reports and other necessary trust information. It also reversed award of attorney fees of the son-trustee against the daughter, as the suit was precipitated by the son's failure to account.

## VEXATIOUS LITIGATOR

TOPIC: Vexatious litigator must file leave to proceed to file or continue litigation.

TITLE: Marin v. Trumbull County, 2012-Ohio-2008.

On December 20, 2011, plaintiff-appellant, Mel M. Marin, filed a notice of appeal from two judgment entries filed in the Trumbull County Court of Common Pleas, Case Number 2011 CV 01936, both dated November 23, 2011. These judgment entries dismissed certain parties from Mr. Marin's civil action. Subsequently, on February 21, 2012, the trial court entered judgment declaring appellant to be a vexatious litigator pursuant to R.C. 2323.52.

The Court of Appeals indicated that upon review of the record, Mr. Marin had failed to comply with R.C. 2323.52, which requires, in pertinent part, that the vexatious litigator file an application for leave to proceed.

Here, while the instant appeal was pending, the trial court entered judgment declaring Mr. Marin to be a vexatious litigator. At no time after the trial court entered such finding did Mr. Marin file an application in this court for leave to proceed with the instant appeal. Accordingly, the court of appeals held that it was required to dismiss the appeal pursuant to R.C. 2323.52(l). State ex rel. Sapp v. Franklin County Court of Appeals, 2008-Ohio-2637.

TOPIC: Person declared to be a vexatious litigator cannot appeal the decision of vexatious litigator status without first seeking leave to proceed in appellate court.

TITLE: Marin v. Trumbull County Probate Court, 2012-Ohio-2012.

On March 13, 2012, plaintiff-appellant, Mel M. Marin, filed a notice of appeal from a judgment entry filed in the Trumbull County Court of Common Pleas, Case Number 2011 CV 1936, dated February 21, 2012. The judgment entry, which was not attached to the notice of appeal, as required by Local Appellate Rule 3(D)(3) declared Mr. Marin to be a vexatious litigator pursuant to R.C. 2323.52.

Upon review of the record, The Court of Appeals for Trumbull County held that Mr. Marin failed to comply with R.C. 2323.52.

The Supreme Court of Ohio has held that the requirement of R.C. 2323.52(D)(3) applies to "an appeal instituted from an initial declaration of vexatious-litigator status." State ex rel. Sapp v. Franklin County of Court of Appeals, 118 Ohio St. 3d 368, 2008-Ohio-2637, 26.

Here, subsequent to the judgment entry of the trial court declaring Mr. Marin to be a vexatious litigator, he filed the instant appeal without first seeking leave to proceed in court. Accordingly, the Court of Appeals indicated it was required to dismiss the appeal pursuant to R.C. 2323.52.

## WILLS

TOPIC: An *in terrorem* clause serves as a broad testamentary provision that exists to stop will contests as well as costly estate challenges by litigation, which drain resources, etc., but such a clause cannot put an executor's conduct beyond the oversight of the probate court, because every request by a beneficiary for the court's involvement does not constitute a challenge to a will.

TITLE: In re Stevens, 2012-Ohio-4754.

Decedent passed away in 2010, and her will was admitted to probate in the Champaign County Probate Court. All debts, taxes and expenses were to be paid from her estate. Her best friend was named the executrix and given an option under the will to purchase the decedent's real estate that had been used for agriculture within 45 days of the probate of will. Decedent's granddaughter was to get all personally. The fiduciary put any residuary estate into an unnamed trust created by decedent prior to her demise.

The will also had an *in terrorem* provision, causing the bequest of anyone who challenged her will to lapse and said person to be disinherited.

The executor filed a notice with the court intending to sell the agriculture real estate as per the will. He was opposed by the granddaughter who objected on three grounds: it was over 45 days, his notice to purchase did not satisfy the statute of frauds, and he did not obtain prior court approval as required by RC § 2109.44, which prohibited self-dealing unless authorized by the court. She also stated that she was objecting based on strict compliance, thus not violating the *in terrorem* clause of the will. The probate judge found that the will requires that the notice, not the sale, be filed with 45 days. The fiduciary was therefore compliant, and the sale was proper. Granddaughter appealed and lost.

While the appeal was pending, she filed to receive the decedent's personally. The executor denied her request, citing the *in terrorem* clause. The trial court upheld the executor's decision, finding that filing of objections did violate the clause and granddaughter's bequest was void, effectively disinheriting her. Granddaughter appealed again.

The Champaign County Court of Appeals found that an *in terrorem* clause serves in America as a broad will provision that exists to stop will contests as well as estate challenges by litigation, which drain resources, etc. The seminal issue is whether she challenged the "validity" of the will, even though granddaughter never filed an actual will contest. The Court first found that such a clause cannot put an executor's conduct "beyond the oversight of the probate court and that every request by a beneficiary for involvement of the probate court does not constitute a challenge to a will."

The Court went on to find that the granddaughter's request that the trial court determine whether the executor had complied with the will provisions was no different than clarifications sought by certain exceptions to inventories, which cases have found not to violate in *terrorem* provisions. The granddaughter's appeal was found well taken. Reversed and remanded.

TOPIC: Statutory provisions related to revocations of bequests in a will as a result of divorce, separation agreements, etc., demonstrate that where a husband and wife are legally separated and have a legal separation agreement covering marital assets, the surviving spouse's right to elect against the will is revoked, unless the separation agreement provides to the contrary.

TITLE: Dragovich v. Dragovich, 2012-Ohio4114.

RC § 2106.01 allows a decedent's surviving spouse to take against the will even if specifically excluded by said will. The parties here were in the midst of a divorce and had a formalized separation agreement in the Mahoning County Domestic Relations Court. The wife then drew up a will, specifically excluding her husband and leaving her estate to her mother and two sisters. The wife died two weeks later,

Wife's will was probated in the Mahoning County Probate Court and the estate was opened. Husband filed a claim in her estate as surviving spouse; the court denied said claim, citing the separation agreement as his relinquishment of a right to any of her assets. Husband appealed, arguing that the separation agreement did not cover his right to take against the will as allowed by RC § 2106.01.

The 7<sup>th</sup> District Court of Appeals reviewed the matter. The lower court found that the separation agreement was a contract to fully and finally settle all issues of marital property between wife and husband because of their then marital relationship. In like manner, the election against a will is due to the "benefits and privileges of" the marital relationship. In a 3-0 decision, the Court found that analogous provisions related to revocations of bequests in a will as a result of divorce, separation agreements, etc., demonstrate that where a husband and wife are legally separated and have a legal separation agreement covering marital assets, the surviving spouse's right to elect against the will is revoked, unless the separation agreement provides to the contrary. Affirmed.

TOPIC: Probate court erred in adopting the magistrate's decision that the decedent did not mean for her residuary estate in Ohio to pass to the persons specifically named in her will.

TITLE: Radziszewski v. Szymanczak, 2012-Ohio-2639.

This is an appeal from a judgment of the Cuyahoga County Court of Common Pleas, Probate Division, in an action to construe the will of decedent Zofia Sulek. Defendants-appellants family members and friends of Sulek who still live in Sulek's native country of Poland, appealed from the order that adopted the magistrate's decision that, because the will contained no "rest and remainder" clause, Sulek's residuary estate went to her next-of-kin, defendant-appellee Zuzanna Szymanczak ("Zuzanna").

The Court of Appeals for Cuyahoga County noted that the basic law guiding will interpretation is that, the sole purpose of the court should be to ascertain and carry out the intention of the testator and that this intent is to be gleaned from the words used.

In this case, the magistrate's decision indicated that extrinsic evidence was considered. Michelsen-Caldwell v. Croy, 6<sup>th</sup> Dist. No. WD-08-001, 2008-Ohio-4281. The magistrate, therefore, clearly believed the language Sulek used in the will "created doubt as to the meaning" of her will, i.e., that a latent ambiguity existed.

In this case, Sulek provided in her will that her funeral expenses should be paid out of her "residuary estate," however, she specifically bequeathed only her Ohio property. Thus, Sulek disposed of the "rest and remainder" of her Ohio property at the same time when she specifically named in her will no other persons but appellees. Moreover, she bequeathed her property in Ohio "in fee simple," which are words that commonly refer to real property rather than only to personal property,

According to the evidence supplied at the hearing, an additional will handwritten by Sulek in Polish existed, but Sulek died before she submitted it to a Polish court. The handwritten will, like her Ohio will, disposed of all of her property in Poland to the same persons named in her Ohio will.

The magistrate nevertheless decided this evidence, even in light of the affidavit of the attorney who drafted Sulek's Ohio will, was somehow "inconsistent" with the language Sulek used in her Ohio will. In this, the court of appeals held the magistrate erred.

Because the magistrate failed to correctly apply the law to the facts adduced at the hearing, the probate court improperly adopted the magistrate's decision. Appellants' "issues for review," accordingly, were resolved in their favor by the Court of Appeals.

The probate court order was reversed and the case remanded for further proceedings.

TOPIC: In will contest by plaintiffs, who had been included as beneficiaries in previous will, summary judgment proper for defendants where there was no evidence they exerted undue influence over decedent.

TITLE: Golub v. Golub, 2012-Ohio-2509.

In November 2006, after her husband passed away, decedent revised her will to bequeath her estate equally between her three sons, Joel, Mark and Robert Golub. On May 15, 2007, Robert died, survived by plaintiffs, who are his children Drew, and Drew's mother, who was estranged from the Golub family.

Approximately three weeks later, on June 4, 2007, decedent drafted a new will through her attorney James Spitz, leaving one third of her estate to Mark, one third to Joel, and one third to plaintiffs. A copy of this will was sent to Mark and Joel, per decedent's instructions. However, the will was never signed.

Approximately five weeks later, on July 10, 2007, Spitz received a call from decedent instructing him to draft another will, which left half of her estate to Mark and half to Joel. Plaintiffs were expressly disinherited in this will, which reads in pertinent part as follows: "I have intentionally left nothing to my grandchildren, Drew Jordan Golub and E. Samantha Jillian Golub." Decedent executed this will on July 20, 2007, and a copy was sent to Mark and Joel, per decedent's instructions.

On June 15, 2009, decedent died. Her will was probated, and on September 3, 2009, plaintiffs contested the will alleging that defendants unduly influenced decedent. On November 16,

2011, the court granted defendant's summary judgment motion, finding that plaintiffs' undue influence claim failed, because "[n]o evidence has been presented to support a finding that Decedent lacked testamentary capacity and was susceptible to undue influence by Defendants."

Plaintiffs appealed and raised two assignments of error for the Court's review. 1. "The Cuyahoga County Court of Common Pleas, Probate Division, erred in granting Appellees' Motion for Summary Judgment as genuine issues of material fact are present."

The Court of Appeals for Cuyahoga County found no factual issues for trial concerning plaintiffs' claim of undue influence. Although the opportunity was arguably there, plaintiffs failed to produce evidence that defendants improperly influenced decedent, therefore overruling the first assignment of error. [T]he testator \*\*\* has the sole right, if of sound mind and under no undue restraint, to dispose of [his or her property] in any way he [or she] sees fit, provided such disposition is not repugnant to law; and \*\*\* neither the court nor the beneficiaries in a will can amend or change the will simply because they might think another disposition more desirable, equitable or just. Feiler v. Feiler, 149 Ohio St. 17, 24, 77 N.E. 2d 237 (1948).

As to the second assignment of error, that the court applied the undue influence standard the Court of Appeals also disagreed.

Specifically, plaintiffs argued that the court applied the incorrect standard by determining that they failed to present evidence that decedent lacked testamentary capacity, in addition to determining that they failed to present evidence that she was a susceptible testator. As indicated, the correct standard concerns whether decedent was a susceptible testator. Adding an unnecessary element to its analysis does not render the court's proper analysis deficient, and plaintiffs point to no legal authority to show otherwise.

Finally, although not raised at the trial court level, plaintiffs also argued on appeal that there was a question for the trier of fact as to whether there was a confidential relationship between defendants and decedent, giving rise to a presumption of undue influence. "A confidential relationship exists whenever trust and confidence are placed in the integrity and fidelity of another." Ament v. Reassure Am. Life Ins. Co., 180 Ohio App. 3d 440, 2009-Ohio-36, 905 N.E. 2d 1246, 39.

Plaintiffs alleged that a confidential relationship could be inferred from the following facts: Defendants received copies of the drafts of decedent's will, and defendants and decedent spoke on the phone on a daily basis. However, under Ohio case law, these facts do not give rise to an inference of a confidential relationship. Compare Guardianship of Blumetti, 2d Dist. No. 92-T-4752 (Jan. 14, 1994) (holding that a confidential and "fiduciary" relationship arose between mother and daughter when daughter was mother's attorney in fact, assisted mother in paying her bills and writing checks, and established "gift" to the family).

While decedent and defendants are obviously family members, nothing in the record suggested that a fiduciary relationship existed between decedent and her sons. Decedent spoke on the phone everyday with Joel, who resides in Cincinnati, and Mark, who lives in Phoenix, AZ. Decedent was in charge of her own finances until her death. According to Joel, he and decedent never "discussed" her will, other than informing him of any changes after the fact. Therefore, the

Court of Appeals found that no confidential relationship existed between the decedent and defendants.

The Court of Appeals therefore affirmed the judgment of the probate court.

TOPIC: Appellate court affirmed trial court's ruling that appellees did not exercise undue influence over appellant's mother during the modification of mother's will because mother did not meet standard of susceptible testator. Furthermore, appellate court determined appellant lacked standing.

TITLE: Kryder v. Kryder, 2012-Ohio-2280.

Decedent executed a codicil to her will to make appellant sole fiduciary of the estate. After the death of decedent, the appellant's sibling met with appellant's parents to write appellant out of the will. Years later the appellants' parents passed away. While Appellee siblings claimed to be unaware of the changes to the will, appellant claimed she was deliberately removed by undue influence exercised over the now deceased parents. The trial court ultimately found appellant lacked standing to assert her claims for modification or reformation and that she failed to demonstrate a genuine issue of material fact on her claims of undue influence. Appellant appealed these rulings.

Appellate court affirmed the rulings of the trial court. As for the first assignment of error, regarding standing, the court said appellant was not a trustee or beneficiary of either of her parents' trusts and therefore lacked standing to pursue claims for modifications. Therefore the court did not err in granting summary to appellees. As for the second assignment of error, alleged undue influence exercised by her sibling appellees, the appellate court found that she did not meet the necessary elements laid out in past rulings. Primarily, the testator, the appellant's mother in this case, was not considered a "susceptible testator." The appellant did not demonstrate existence of a material dispute of fact that there was a limitation on her mother's ability to exercise her own wishes regarding the disposition of her property. The appellate court agreed with the findings of the trial court that the appellant's mother showed evidence of a "strong, independent person" capable of making competent decisions. Ultimately, because of these findings the burden of proof for a motion for summary judgment shifted to appellant. Appellant then failed to counter the evidence presented by her siblings or even to suggest the mother was susceptible to undue influence.

TOPIC: Trial court properly revoked its order admitting will to probate because witnesses were not in the "conscious presence" of testator where they subscribed and attested from another floor of testator's house, R.C. 2107.03.

TITLE: Whitacre v. Crowe, 2012-Ohio-2981.

Kay Whitacre had five adult children at the time of her death. Her will was admitted to probate. Her daughter Victoria was named as the sole beneficiary, while her son Michael was named as executor. Kay's three remaining children, Shawn, Angie and Nick filed a complaint to contest the will. They later moved for summary judgment. Victoria and Michael responded in

opposition. The trial court granted the plaintiffs' motion for summary judgment, concluded that Kay's will was not executed pursuant to the formalities required by R.C. 2107.03, and revoked an earlier order admitting the will to probate.

Based on the court's review of the evidence submitted by Shawn, Angie and Nick in support of their motion for summary judgment, the Court of Appeals for Medina County concluded that they met their initial burden of presenting evidence to demonstrate that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. The plaintiffs presented evidence that the witnesses were not in Kay's range of vision when they subscribed and attested the will and further that she could not hear what they were doing and, therefore, had no understanding that the witnesses were signing the will.

In support of her reciprocal burden, Victoria appended her affidavit in which she averred that "the voices of the witnesses and sounds they were making moving around in the living room were clearly audible and within the sound of my mother's ears, being only several yards away and directly below her in the living room[.]" She further averred that Michael took the will from Kay downstairs to the witnesses and that "they had a discussion that could be heard in my in my mother's upstairs bedroom while they were signing as witness[.]" Victoria also appended the affidavit of Ms. White who averred that "[d]ue to our close proximity, Kay Whitacre could hear me talking with her son and daughter, as well as the other witness, Joseph Reich, and I believe she could hear our movements about the living room, so she was fully aware of our presence[.]"

Based on the Court's review of evidence, it concluded that Victoria did not meet her reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. Tompkins, 75 Ohio St. 3d 447 at 449. Although she presented evidence that Kay could hear conversations and movements in the downstairs living room, she presented no evidence regarding the substance of any of those conversations or that Kay was aware that the witnesses were subscribing and attesting her will at the time they were doing so. Accordingly, it held that the trial court did not err when it found that the will was not executed in compliance with the requirements of R.C. 2107.03, and when it therefore revoked its prior order admitting the will to probate. The Court of Appeals therefore overruled and affirmed the judgment of the Medina County Probate Court.

The issue of what satisfies the requirement of conscience presence "was one of first impression in Ohio, The Court analysis therefore presented an interesting review of the law in various states."

#### WRONGFUL DEATH

TOPIC: In a wrongful death settlement where attorney was not employed by administrator of estate, no error in calculation of attorney fee on basis of quantum meruit, pursuant to consent order.

TITLE: In re Dye, 2012-Ohio-2570.

On July 15, 2007, decedent Sally Ann Dye, was killed in a car accident, along with her boyfriend, Robert Connell. Although Dye was dating Connell at the time, she was actually married to appellant/cross-appellee, Joel Medrano.

One week after Dye's death, Attorney Segreti filed an application on behalf of O'Connors to administer Dye's estate in the Fayette County Probate Court. Attorney Wertz filed a competing application on behalf of Medrano to administer the estate in Franklin County. In an effort to resolve their administrative dispute, Medrano's and O'Connors entered a consent order dated August 14, 2008. O'Connors agreed to withdraw her application to administer Dye's estate, at which time Medrano and Wertz would be co-administrators. The parties then agreed that the co-administrators would apply for approval of a one-third contingency fee contract for the payment of attorney fees in regard to pursuing the wrongful death claim. Additionally, in the event that Segreti and the co-administrators could not agree on Segreti's compensation, they established that he could seek payment on a quantum meruit basis.

On April 28, 2010, roughly two years after finalizing the consent order, Wertz filed an application to approve a contingency fee contract between the co-administrators and the Virginia Shenkan Law Center ("Shenkan"). The next day, the court accepted Wertz's application, and ordered the approval of a one-third contingency fee contract. Segreti immediately moved to vacate the contract, arguing it was not pre-approved by the court in violation of Rules of Superintendence. Segreti further argued that Shenkan did not deserve attorney fees, where she failed to pursue an additional liability claim against Robert Connell's insurer, State Farm Insurance Company (hereinafter referenced as the "State Farm Insurance claim"). A hearing on Segreti's motion was scheduled for July 28, 2010. However, prior to the hearing, Shenkan proposed a \$250,000 settlement agreement. The court approved the settlement, and subsequently held a hearing to distribute the proceeds.

During the hearing, the court set aside \$83,250 for attorney fees and expenses. However, the court immediately subtracted \$30,000 to reflect the loss of the State Farm Insurance claim. The court then divided the remaining \$53,250 between Segreti, Shenkan and Wertz. Following the distributions, Segreti asked the court to reconsider Shenkan's fee award, claiming the \$30,000 loss of insurance money was entirely Shenkan's fault. The court noted Segreti's objection and concluded the hearing.

On March 16, 2011, the court issued its final order of distribution. However, the distributions therein differed considerably from those proposed during the hearing. The redistribution was the result of the court's decision not to reduce Shenkan's attorney fees by \$30,000 for the loss of the alleged State Farm Insurance claim. The court stated the claim was "speculative at best."

Prior to awarding the distributions, the court determined that the co-administrators had failed to proffer a new contingency fee contract in accordance with the consent order. The court further found that there was no agreement as to Segreti's fee, and therefore recognized his application for fees on a quantum meruit basis.

The Court of Appeals after determining who had standing to appeal affirmed the judgment of the Fayette County Probate Court.

TOPIC: The appellate court found abuse of discretion when the probate court affirmed the magistrate's wrongful death award distribution after it awarded third degree relatives (nieces and nephews) simultaneous to second degree relatives (surviving siblings).

TITLE: In re Estate of Harrison, 2012-Ohio-2169.

The survivors of decedent (the appellants) appealed a judgment regarding the estate of decedent Jorene Harrison, who passed away from injuries sustained in an auto accident. A wrongful death suit was brought against the driver of the vehicle transporting the decedent and against the driver's employer. The siblings of the decedent objected to the magistrate's award which was primary distributed to decedent's twin sister, which left the remainder to surviving siblings and nieces and nephews, the main point of contention. The probate court subsequently overruled appellants' objections and affirmed the magistrate's decision.

The appellate court agreed with appellants who argued that the probate court erred in overruling their objections to distribution from the wrongful death award to third degree relatives when second degree relatives survived. At issue is whether surviving siblings would qualify as beneficiaries as a damaged group through Jorene Harrison's wrongful death. The appellate court ruled the probate court abused its discretion in overruling the objection by misreading the Ohio Revised Code, stating that the appellant siblings do fall within the defined "other next of kin" and are presumed damaged. A plain reading of the statute would suggest surviving siblings are nearer surviving relatives and are entitled to recover to the exclusion of the nieces and nephews. The appellate court refused to adopt other trial and appellate court rulings which allowed nieces and nephews to benefit as third degree relatives. The rule of law is that third degree relatives are not beneficiaries of a wrongful death award under R.C. 2125.02 when second degree relatives have survived the decedent. As for the distribution to the surviving siblings as a result, since they did not adjust their shares of the award among themselves, the case was remanded for redistribution.