Cincinnati Bar Association

36th Annual Advanced Estate Planning Institute

Presented by the CBA Estate Planning & Probate Practice Group

Friday, February 8, 2019

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36th Annual Advanced Estate Planning Institute
Friday, February 8, 2019

8:55 a.m. **Welcome & Opening Remarks**

9 a.m. **Evolutionary Estate Planning: 20 Ways to Increase Client Happiness and Value to Your Practice with Planning Techniques (Non-Tax) and Strategic Practice** **TAB A**
Louis Harrison, Esq., *Harrison & Held*

11 a.m. **Break & Exhibitor Fair**

11:15 a.m. **Overview of Omnibus Probate Bill 595 and Other Significant Developments** **TAB B**
Elizabeth Weinewuth, Esq., *Vorys Sater Seymour & Pease LLP*

12:15 a.m. to 1:15 p.m. **Group Luncheon & CLE Presentation**

12:45 to 1 p.m. **Luncheon CLE Presentation: Hamilton County Probate Court Update** **TAB C**
Hon. Ralph E. (Ted) Winkler

1:15 p.m. **The False Panacea of Transfer on Death Registrations and Beneficiary Designations as Will (and Trust) Substitutes – Potential Landmines and Considerations in Relying on Beneficiary Designations as Dispositive Instruments** **TAB D**
Kenneth Coyne, Esq., *Graf Coyne Co. LPA*

2:15 p.m. **Annuity Planning** **TAB E**
Ashley Burke, Esq, *Burke & Pecquet LLP*

3:15 p.m. **Break & Exhibitor Fair**

3:30 p.m. **Ethical Issues for Estate Planners** **TAB F**
Gretchen Koehler Mote, J.D.*, Director of Loss Prevention, OBLIC*

4:30 p.m. **Adjourn**

TAB
A

Louis S. Harrison
Harrison & Held

Louis S. Harrison's practice focuses on sophisticated tax, corporate and estate planning. His emphasis is on solutions to complex problems, including creative structures to inter family disputes and litigation, consideration of trust structures to provide creditor and spousal protection, post-mortem tax planning, income tax planning, charitable dispositions, and gifting strategies. Lou represents a significant number of closely held businesses and business owners, as well as executives of numerous public companies. A frequent speaker and writer on tax and estate planning, Lou has spoken before numerous groups nationwide. Lou has authored more than 200 published articles on a broad range of tax and estate-planning subjects in legal, accounting, tax and estate journals and periodicals, and is co-author of the books, "Sorting Out Life's Complexities: What You Really Need to Know About Taxes, Wills, Trusts, Powers of Attorneys and Health Care Decisions" and "Illinois Estate Planning Forms and Commentary."

Lou has been the Illinois State Chair of the American College of Trusts and Estate Counsel and as a member of the Chicago Bar Association, Lou has chaired the Estate and Gift Tax Committee and served on the Trust Law Committee and Probate Practice Committee.

Before Joining Harrison & Held, LLP, Lou was the partner in charge of the Lord, Bissell & Brook Wealth Preservation Group.

TEACHING EXPERIENCE (former)

- Adjunct Professor of Tax Law, DePaul University Law School, Estate and Gift Taxation and Fiduciary Income Taxation
- Adjunct Professor of Law, Chicago-Kent College of Law, Estate Planning
- Adjunct Professor of Law, Northwestern University School of Law, Estate and Gift Tax Planning

HONORS AND ACHIEVEMENTS

- Fellow, American College of Trust and Estate Counsel (former State Chair, Illinois)
- 2014 Trusts and Estate Lawyer of the Year (Best Lawyers)
- Elected, Best Lawyers in American.com
- Elected, Advisory Committee of Leading Lawyers(<1% of all Illinois attorneys)
- Leading Lawyers.com
- Elected, Illinois Super Lawyers
- Elected, Worth Magazine's 100 Top Estate Planning Lawyers

EDITORIAL BOARDS

- Senior Editor, *Duke-Alaska Law Review* (1983-1984)
- Contributing Editor, *Tax Companion* (Dearborn Publishing 1990-1996)

Evolutionary Planning: 20 or so Ways to Increase Client Happiness and Value to Your Practice with Planning Techniques (Non-Tax) and Strategic Practice Techniques

Louis S. Harrison Nancy C. Hughes

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I. ACTIVATING TRUST PROTECTORS

We used to be frightened with trust protectors to amend irrevocable gifting trusts. These powers are essentially providing a broad limited power of appointment to third parties.

Among the concerns: Is this a 2036 power? Will this create undue IRS scrutiny? Well, the Times They are a Changin.

Guess what? A third party trust protector power, if properly set up, is not a 2036 power. It may be a power the powerholder does not want to have, but time to consider it in all trusts.

At this point in our drafting and estate planning practice, we should be considering safety valves to either allow a return of assets to the grantor, or, alternatively, to modify trusts.

Use of these provisions will often result in grantor trust treatment for income tax purposes, which could be excellent planning and should be considered at the initial stage in the planning.

These can be achieved generally either by special limited powers of appointment, broader trust protector provisions, or express decanting powers. Specifically:

a. Briefest approach: third party has a power of appointment

The goal is to allow a third party a non fiduciary right to distribute property to a limited class of individuals, which may or may not include the grantor; example:

> ***"Power of Appointment by Special Power Holder.*** *During my life, the trustee shall distribute the principal to any one or more of my spouse , my descendants, and the spouses of my descendants as the special power holder from time to time appoints during his or her life. I name as the special power holder the first of the following who is from time to time willing and able to act:*
>
> *(a) my friend and attorney, I. M. Ntrouble*

In the above, to allow the grantor to be among the class of possible appointees, the class could be extended to include "descendants of the grantor's parents."

> (b) *my friend and accountant, Hert M. Eeee."*

b. The more elegant and expansive Trust Protector provision, select provisions

Practitioners often draft longer guidelines as to what the trust protector can and cannot do. The following is a sample, with a caveat from us that drafting these provisions seem like predicting who will win the Super Bowl; a bit luck and a bit analysis.

> *ARTICLE 1*
> *Trust Protector*
>
> (a) *Designation. Dean shall be the initial Trust Protector. During my lifetime, [third party] may appoint any one or more qualified corporations, or any one or more individuals other than Disqualified Person as to me, as the initial Trust Protector, Co-Trust Protector, or successor Trust Protector of this trust or any separate trust created hereunder, to act with or to succeed the then acting Trust Protector consecutively or concurrently, in any stated combination, and on any stated contingency; provided that any such designation may be amended or revoked before the designee accepts office. The powers retained in this paragraph may be exercised by a signed instrument filed with the trust records, and any later instrument shall take precedence over an earlier instrument.*
>
> (b) *Powers of Trust Protector. The Trust Protector may exercise the following powers, at the sole discretion of the Trust Protector:*

(c) *To appoint successor trustees or co-trustees and remove and replace any trustee of such separate trust, in the manner and under the circumstances described in Article 5 hereinabove.*

(d) *To make a determination, upon the request of the trustee, of what constitutes reasonable compensation to the trustee.*

(e) *To change the domicile of the trust.*

(f) *To resign at any time by signed notice to the trustee.*

(g) *Subject to any plan created by me pursuant to the paragraph above, to designate any one or more qualified corporations, or any one or more individuals other than Disqualified Persons, as Co-Trust Protector or successor Trust Protector of this trust or any separate trust created hereunder, to act with or to succeed the Trust Protector consecutively or concurrently, in any stated combination, and on any stated contingency; provided that any such designation may be amended or revoked before the designee accepts office. The powers granted in this subparagraph may be exercised by a signed instrument filed with the trust records, and any later instrument shall take precedence over an earlier instrument. If any plan created under this subparagraph shall conflict with any plan created by me pursuant to the paragraph above, my plan shall prevail, whether it was dated earlier or later than the plan under this subparagraph.*

(h) *To distribute so much of the trust to any one or more of the Beneficiary's descendants, ancestors, siblings, or nephews or nieces in equal or unequal shares, as the Trust Protector shall appoint in writing delivered to the trustee.*

1.2 *Release by Trust Protector. The Trust Protector at any time acting may, by written instrument delivered to the trustee, irrevocably release any of the powers granted to the Trust Protector under this Article. If the Trust Protector irrevocably releases a power, such power shall thereafter no longer be exercisable by the Trust Protector or any successor Trust Protector.*

1.3 *Disqualified Person. The term "Disqualified Person" hereunder shall mean me, any person who has contributed property to such trust, any beneficiary of such trust, the spouse of any beneficiary of such trust, and any individual or entity who would be considered a "related or subordinate party" under Code Section 672(c) as to any of the foregoing such persons, had such person been the grantor of such trust (including without limitation such person's spouse, father, mother, issue, brother, sister, or employee; a corporation in which the stock holdings of such person and the trust are significant from the viewpoint of voting control, and any employee of such corporation; and a subordinate employee of a corporation in which such person is an executive).*

c. Relying on Statutory Provisions to Change Documents

If nothing else, we know how important it is to achieve flexibility IF state statutes allow this. Among the most convenient statutes are the decanting provisions. Documents should be drafted to allow trustees to take advantage of decanting, such as the following:

"Consolidation and Division of Trusts. In addition to the decanting powers granted under Florida Statutes Section 736.04117, the trustee shall have the powers set forth in this paragraph. The trustee may at any time consolidate any trust held under this instrument with any other trust if the beneficiaries of the trusts are the same and the terms of the trusts are substantially similar. Further, the trustee, in the trustee's absolute discretion, may divide a trust (the "initial trust") into two or more separate trusts and may segregate an addition to a trust (the "initial trust") as a separate trust.

Funding. In dividing the initial trust, if the division is to be effective as of my death or as of the death of any other person, the trustee shall fund each separate trust with property having an aggregate fair market value fairly representative of the appreciation or depreciation in value from the date of such death to the date of division of all property subject to the division.

Terms. A trust created pursuant to this paragraph shall have the same terms and conditions as the initial trust, and any reference to the initial trust in this instrument shall refer to that trust. The rights of

beneficiaries shall be determined as if that trust and the initial trust were aggregated, but (1) different tax elections may be made as to the trusts, (2) disproportionate discretionary distributions may be made from the trusts, (3) taxes may be paid disproportionately from the trusts, (4) upon termination the share of a remainder beneficiary (including any recipient trust) may be satisfied with disproportionate distributions from the trusts, and (5) a beneficiary of the trusts may disclaim an interest in one of the trusts without having to disclaim an interest in another trust. In administering, investing, and distributing the assets of the trusts and in making tax elections, the trustee may consider differences in federal tax attributes and all other factors the trustee believes pertinent."

Select the trust protectors carefully. 1. Someone the settlor trusts because of the broad powers the protector holds. 2. Someone who will not end up having a taxable power of appointment over the trust b/c of protector powers.

Example: Client, wife, transferred $10 million in assets to her husband. Husband later made gift to trust for children and named wife as trustee. Husband named his college roommate as trust protector. Once wife filed for divorce, trust protector removed wife as trustee and named a fraternity brother as trustee of a $10 million trust for children. We ended up in litigation.

Happiness Axiom 1: When clients hear the word "irrevocable and unamendable" they will nevertheless ask you in about T years to change their irrevocable trust. Coupled with exponential changes in technology, expected changes in tax laws, cultural changes, investment, wealth, and attitudes towards charities and money-with-children, documents should build in safety valves to change irrevocable trusts.

II. PROTECTING THE FAMILY'S ASSETS FROM NON-FAMILY MEMBERS; THE IMPORTANCE OF (FUTURE) CREDITOR PROTECTIVE TRUSTS

Typical trust structuring in the 1950s through 1980s for adult children focused on spendthrift trusts, as needed, special needs trusts, as needed, and staggered withdrawal rights for most adult children.[1]

Going somewhat unnoticed, the creative expansion of these boundaries in the last 20 years has been well perceived by clients, and operationally effective when administered.

This creative expansion focuses on the need for trusts for adult children to be protected from spousal claims, and protected from other creditor claims.

a. Drafting Creditor "Shield" Trusts

Consider discussing with the client the use of trusts for the children, with the children as their own trustee or better yet, co-trustee, to provide a creditor protection shield for funds left in the trust not needed for the child's consumption, as the child determines from time to time. Note the use of the word "shield," versus "insulation." These trusts are intended to balance flexibility to the child in terms of access to the principal, with some protection against creditors, although not a complete insulation.

b. How to Structure

For planning purposes, assume the client and planner has determined that a flexible creditor protection trust for adult children is desired. Therefore, the question becomes how close to the edge can the trust be pushed. For example, can the child be trustee? If so, must the standard be a narrow one related to health, support or maintenance? Or should the standard be expanded to "best interests?"[2] Each shift in adding more control to the beneficiary – as trustee, and then pursuant to an unascertainable standard—creates some decrease in creditor protection. How much will depend on evolving state law in this regard. And yet, this is the kind of decision that a client cannot be expected to make in an informed way. The practitioner, based on state law and knowledge of the client's family, has to recommend the format that should be used.

[1] For example, 1/3 at age 25, 1/3 at age 30, and 1/3 at age 35.

[2] "Best interests" is a scary standard for trusts controlled by beneficiaries for tax purposes, but perhaps not for creditor protection purposes.

c. Spendthrift Trusts: Much Ado about (Almost) Nothing, or Is It?

In discussing the creditor protection of trusts, practitioners almost always focus on whether the trust has a spendthrift provision and the protections afforded by the spendthrift provision. This is much like focusing on whether your MLB team finishes in 3rd versus 4th place. Instead, the focus should be on what is necessary to get to 1st place, with emphasis (as discussed later) on the discretionary provisions, trustees, and the absence of certain powers of appointment and withdrawal rights.

The spendthrift provision is relevant, ironically, not for the protection provided, but for its implications when a court holds it to be inapplicable—in that instance, creditors can reach in and often obtain assets then available to a beneficiary. For example, a court might hold that a spendthrift provision is rendered ineffective by an unlimited right of withdrawal, *see, e.g.*, *Frisch*, and then by implication allow a creditor access to the trust property by implying that the creditor can attach (in essence force) the beneficiary's exercise of that right of withdrawal in favor of the creditor (as discussed in section b below).

A spendthrift trust is typified by the following provision:

> *"Spendthrift. No interest under this instrument shall be assignable by any beneficiary, voluntarily or involuntarily, or be subject to the claims of his or her creditors, including claims for alimony or separate maintenance. The preceding sentence shall not be construed as restricting in any way the exercise of any right of withdrawal or power of appointment or the ability of any beneficiary to release his or her interest."*

But what does it mean, really? And how is it differentiated from the protection afforded by a discretionary trust?

d. The Genesis of the Spendthrift Trust

There was a time (during the Telephone Booth Dynasty) when mandatory income trusts, with no discretionary principal, were extremely popular. But now, other than functioning in the QTIP context, the mandatory income trust has fallen out of favor.

Instead, modern trusts are established with discretionary income and principal distributions pursuant to a standard, whether that standard is health, support and maintenance (for tax or non-tax purposes), or welfare or best interests, or in the total discretion of the trustee. The practitioner should be prepared to answer the question as to whether there is greater protection afforded a "spendthrift trust" versus a "purely discretionary trust." While the courts may view this differently, the difference from a protective perspective is marginal.

Here's why.

First, we cannot recall the last time we saw a trust drafted without a spendthrift provision. We would venture to say they are always in there, and they are an accompaniment to the protection offered by the discretionary feature.

Second, with a discretionary trust, the creditor protection is sound provided (1) the trustee does not make any distributions, (2) the jurisdiction does not have *Berlinger* – like rules, discussed, *infra*, and (3) the beneficiary (in the eyes of certain state courts) cannot force the trust to make a distribution (e.g., the beneficiary does not have a withdrawal right, or serve as trustee of a trust with an unascertainable distribution standard).

Third, the spendthrift provision merely prevents a third-party creditor from attaching the income or other interest by substituting himself or herself for the beneficiary of that income interest. For example, assume the beneficiary of a $100 spendthrift trust is entitled to all the income on a mandatory basis. A third-party creditor of the beneficiary cannot substitute herself for the beneficiary to satisfy a debt or creditor interest. However, once the trustee makes a distribution to the beneficiary, the funds are in the beneficiary's hands and can then be reached by the creditor.

With a discretionary trust, created by a third party, the general rule is that a creditor cannot force the trustee to make a distribution. [3] Therefore, the creditor cannot effectively substitute in as the beneficiary. Because no mandatory distributions

[3] *See*, *e.g.*, section 504 of the Uniform Trust Code (regardless of whether the trust has a spendthrift clause, a trust with a distribution standard prevents a creditor of the beneficiary from reaching the beneficiary's trust interest). *See also* section 60 of the Restatement of Trusts (Third) (A transferee or creditor of a trust beneficiary cannot compel the trustee to make discretionary distributions if the beneficiary personally could not do so.) While a creditor could argue "abuse of discretion," we would posit that a reasoned decision against making the distribution would not be an abuse of discretion if the standard is

are required to be made, in a purely discretionary trust, a creditor would have no interest absent the trustee making, or being "required to make," a distribution to the beneficiary.

Happiness Axiom 2: **Focus on the discretionary provisions in a trust in determining creditor protection, rather than relying solely on the spendthrift provision for any great creditor protection. For example, as a rule of thumb, a purely discretionary trust, with no mandatory income interest, has in effect more relevant creditor protection than a mandatory income trust coupled with the typical spendthrift provision.**

e. But a Spendthrift Trust Does Allow the Trustee to Play a Game

It boils down then to the following. A spendthrift clause in a discretionary trust provides a practical layer of creditor protection in that creditors "may not reach the …distribution …before its receipt by the beneficiary." *See, e.g.,* section 502 (b) of the Uniform Trust Code. This has two practical results.

First, courts (see all case law discussed here) often allow third-party creditors access to trust funds, ignoring fiduciary constraints on discretionary distributions, whenever they find the spendthrift clause is rendered ineffective. Those same courts may ignore the discretion to the trustee and the trustee's fiduciary obligation in exercising that discretion. For example, where the beneficiary and trustee are the same person, subject to a discretionary standard for distribution, the court may conclude that that degree of control renders the spendthrift clause dysfunctional (ineffective is the actual word), and then imply that a third-party creditor can reach into the trust and obtain the trust property. This condenses what is truly a two-step process into one.

Step two should be: Has the trustee exercised, or must the trustee exercise, its discretionary authority? Focusing on the spendthrift clause often causes a court to conclude that it can override this second step. Therefore, right or wrong, practitioners should try to preserve and argue for the application of the spendthrift clause.

Second, if the spendthrift clause is valid, then trustees may then try to use funds for the beneficiary's benefit by making a distribution to a third party, or may make a distribution to a beneficiary that requires the creditor to go after the distribution after it is in the hands of the beneficiary.

If the trustee then makes distribution to a third party for the use of the beneficiary (e.g., to pay down the mortgage on the personal residence that perhaps has already qualified for the homestead exemption), in most jurisdictions the creditor will not be able to pull back that distribution for the creditor's use. However, evolving case law may give creditors greater rights even here, including obtaining a garnishment order under state law. *See, e.g.,* Florida section 736.0504 and *Berlinger, infra*.

Happiness Axiom 3: **Using the spendthrift provision, in the event that there are creditors, the trustee can undertake two approaches. First, discuss a compromise on the debt with the creditor since the creditor may be waiting a long time for a distribution to the beneficiary; that compromise could be twenty or thirty cents on the dollar. And second, without a compromise, to consider making all distributions "for the benefit of" (to third parties) of the beneficiary while, at the same time, allowing the beneficiary to enroll in the FBI witness protection program for relocation.**

f. How Protective from Tort Creditors are these Trusts?

Generally, English law has provided protection against beneficiaries' creditors in third-party created discretionary trusts.

A recent article by Professor Kent Schenkel, "Trust Law and the Title-Split: The Beneficial Perspective," provides a James Thurber-like stream of consciousness analysis as to why beneficial interests in trusts should not be entitled to the protections afforded under State law. Although his argument has not been accepted by courts, the evolving court attitudes certainly favor eroding the creditor protection afforded by third-party trusts.[4]

"may," not "shall." The Restatement goes so far as to suggest that the existence of a creditor should create a strong argument supporting fiduciary discretion against making distributions. Section 60, Restatement, *infra*, "a trustee's refusal to make distributions might not constitute an abuse as against an assignee or creditor" even when it would constitute an abuse if there had been no creditor.

[4] In this snooze-fest piece, after dragging the reader through a rather dull history on trust law, the author reaches his main argument, that "trusts dodge the intent of the law by shirking legal responsibilities corollary to ownership of property, all to the advantage of the trust beneficiary." Since this argument is directly contrary to what is desired by practitioners and what is

Common law dictates the following. A self-settled trust is entitled to no creditor protection.[5] That is, under common law, one cannot create an irrevocable trust, be the beneficiary, and then argue that the funds are free from that beneficiary's creditors because the trustee has "discretion" whether to make distributions. Evolving state statutes are, in contrast, providing protection to these self-settled trusts, and the level of that protection is discussed in section 6.

Alternatively, a discretionary trust created by a third party ("third-party settled trusts"), such as a parent for the child, is generally entitled to creditor protection as to that (child) beneficiary. Even when the beneficiary is also the trustee, but subject to limited standards as to distribution (such as health and education), that beneficiary's interest may also be protected from the beneficiary's creditors.

The uncertainties develop in that the laws and judicial results are constantly evolving in each of the 50 states, sometimes favoring protecting the beneficiary and sometimes against, as they apply to third-party settled trusts. For example, a jurisdiction may permit a third-party settled trust to have the beneficiary as trustee, allow distribution discretion tied to a health, support, welfare or best interests standard, and still prevent that trust from being attachable by the beneficiaries' creditors.[6]

Consider Illinois law. Illinois law used to be clear that as to a third-party trust, the beneficiary could be trustee and have discretion to make distributions pursuant to an ascertainable standard,[7] while the trust remained free of creditor claims.[8] Illinois law was ambiguous with regard to whether a broad standard, "best interests," with the beneficiary as trustee, protected the beneficiary from creditors.

Demonstrating how state law in this area is rapidly evolving, recently even the limited standard was called into question. In the case of *McCoy v. McCoy* (274 B.R. 751) (2002), a surviving spouse was the beneficiary of a family trust created by the predeceased spouse. The family trust provided, in part:

> *The trustee may in its discretion pay to my spouse, or for his benefit, so much or all of the principal of the Family Trust as the trustee from time to time determines to be required or desirable for his health, maintenance and support. The Trustee need not consider the interests of any other beneficiary in making distributions to my spouse or for his benefit.*

Under Illinois law, the above standard is an ascertainable standard and would facially be considered sufficient to prevent creditor demands that the trustee make a distribution so that the creditor could satisfy its judgment. The court confused the concept of a discretionary trust with that of a spendthrift trust, albeit its error in nomenclature may not be relevant. That is, the court determined that the standard -- whether the discretionary right to principal meant just that -- was whether:

> *"[T]he beneficiary does not have unregulated dominion and control over or right to distribution from trust for the trust to qualify as a valid spendthrift trust."*

The court held that even with an ascertainable standard, the use of the word "desirable" indicated that "the settlor intended Debtor to have complete dominion and control over the corpus." Though the language would be interpreted by most planners as ascertainable, the court held that the standard was not ascertainable. Therefore, the court concluded that a creditor in bankruptcy could obtain the interest in the trust of the beneficiary, and that interest was the entire trust.[9]

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allowed and reflected by State law, by the trust restatements, and by judicial precedent, there should be caution by the practitioner in accepting an argument challenging that conclusion.

[5] In recent years, this common law rule has been eroded with the advent of state laws, such as those of Delaware and Alaska, allowing self-settled trusts to have a certain degree of creditor protection.

[6] By attachable, I mean that a creditor can force the trustee to exercise discretion to make a distribution. Once a distribution is made, a creditor can try to obtain the funds from that distribution.

[7] By analogy to Code section 2041, one related to "health, support, maintenance, and education."

[8] If the Trust had only used the terms "[as] required [for] health, maintenance and support", such a standard limiting discretion would likely be acceptable under Illinois law. Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131 (1933) (intimating that a discretionary provision would have placed sufficient restriction on the beneficiary if it had used "comfort" alone to limit the beneficiary's access).

[9] Because the Debtor "in bankruptcy has the unfettered ability to possess and own [it]," the trust property is "therefore not protected by the exclusionary language of Section 541(c)(2). *In re Rolfe*, 34 B.R. at 161. Accordingly, the Trust property belongs to the bankruptcy estate and the Trustee will be granted Summary Judgment on Count IV of his Complaint on Count

The *McCoy* holding indicates that under Illinois law, even a standard relating to health, support or maintenance can subject a third-party settled trust to the creditors of the beneficiary. But in those Illinois cases, a key fact is that the beneficiary was also the trustee, a bad fact as discussed in more detail below. Though the court focused on the use of the word "desirable,' I do not think the result could have been eliminated by the use of the word, "necessary," rather than "desirable."

Instead, the focus seems to be on whether the beneficiary was also the trustee. For example, in *Hawley v. Simpson* (Bankruptcy Court, CD Illinois, No. 02-83674, 2004), the debtor's ability to access the trust funds, or to control the timing or manner of distribution, such as in the debtor's capacity as trustee, rendered the spendthrift provision ineffective and made the trust funds available/reachable by the creditor.

Other states' courts also reflect this view. In *Dollinger v. Bottom*, 176 B.R. 950 (N.D. FL 1994), the debtor's interest was in trust to be paid to the debtor as the trustee determined to be for the "support, care, comfort and maintenance" of the debtor. In other words, this trust should have been protected until the trustee exercised its discretion to distribute principal. The debtor was the sole trustee. As a result, the court reasoned, incorrectly (because it was ignoring Bottom's fiduciary duty to the remainder beneficiaries) that "the only one that can guard Bottom from his own improvidence is Bottom himself." This dual capacity, beneficiary and trustee, rendered the spendthrift provision obsolete and allowed creditor access to the trust.

As another example of the judicial confusion caused when a beneficiary serves as the trustee, see *Strong v. Page*, 239 B.R. 755 (W.D. Mich 1999), in which the court invalidated the spendthrift clause when the trustee and beneficiary were the same person, reasoning that there is a merger of legal title. In that case the trust by its terms had terminated, so the trustee was merely holding title pending termination. In that context, the court's holding was correct; but if the trustee were not entitled to distribute the principal except according to a standard (HEMS for example), the court's holding would have gone too far.

Even actions by a beneficiary in his capacity as beneficiary can be interpreted to allow a creditor access to the trust. For example, when a beneficiary dictates the figurehead-trustee's actions (even if the beneficiary has no right under state law to control the trust), that may render the spendthrift clause ineffective and the trust corpus susceptible to creditor attachment. For example, in *Richardson v. McCullough,* 259 B.R. 509 (Rhode Island, 2001), the debtor was not the trustee. In what I would regard as dicta (since the beneficiary had an outright interest in the trust, once the third-party trustee wrapped up administration), the court indicated that the trustee took all actions under the beneficiary's "direct, unsupervised control." "[I]t is clear that the Debtor exercised sufficient control and dominion over the Trust funds to invalidate the spendthrift trust provision," and to make the trust subject to his creditors. *Infra* at 25.

The ultimate judicial or statutory result does not matter too much for the planner. The planner cannot draft for evolving laws in this area. Rather, we have to understand the laws in place at this time, and create a situation for the strongest argument that the beneficiary's interest is free of creditors. Further, we should not hesitate to encourage a beneficiary from resigning as trustee, even after creditor issues arise.[10]

This is a win-tie strategy. If the trust is effective for tort purposes, the beneficiary benefits; if not, the beneficiary is in the same position as if no trust existed. The key here for the practitioner is avoiding over-representing what these trusts do and don't do.

Consistent with the argument made by author Schenkel, *infra,* courts have begun to erode the common law creditor protection of third-party created trusts. There have been specific trends where courts or specific state statutes will force the trustees to make (attachable) distributions to the beneficiaries, even in third-party created discretionary trusts.

These include distributions to satisfy support decrees, whether in the form of child or spousal (primarily ex-spouse) support. *See, e.g., Estate of Creamer*, 41 Pa. D. & C. 377 (2014) (support obligations to a beneficiary's child recognized as exception to spendthrift protection by case and statutory law, and in dicta, similar support obligations to a spouse

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I of the Interveners' Cross Complaint, and on Debtor's Cross Motion for Summary Judgment on those Counts." *Cf.* section 60 of Restatements of Trusts (3rd).

[10] A resignation does not mean there is a fraud on creditors. Given that the whole area on trustee/beneficiary/discretionary principal distributions is uncertain, taking an action that makes the result more certain is not a fraud on creditors. Resigning as trustee is in the whole a different genre than a troubled beneficiary transferring assets from the beneficiary to the beneficiary's spouse.

recognized). *See also Ventura County Dept v. Brown*, 11 Cal. Rptr. 3d 489 (2004) (citing both California statutory and case law as allowing exception to spendthrift protection to provide for support Orders to spouse or child).

The UTC in essence voids the spendthrift protection and attaches the beneficiary's interest, but still requires the creditor to overcome a trustee discretionary distribution standard even if the creditor has a court-ordered spousal or child claim (e.g., the creditor must show that the trustee should exercise its discretion to make the distribution; a showing of an abuse of discretion can force the trustee to make that distribution to the creditor).

For an intelligent (in my view) discussion of what it means for spendthrift protection to be unavailable, see Florida Trust Code section 736.0503 and 736.0504, and *Berlinger v. Casselberry* 133 So. 3d 961 (2013). The Florida statute reflects the public policy of most states in indicating that spendthrift protection is not enforceable against a court-ordered child or spousal support determination. But, according to the court's interpretation of the same statute, the creditor (spouse or child) may not "compel a distribution that is subject to the trustee's discretion or attach or otherwise reach that interest." Instead, (somewhat bizarre) a spouse or child can obtain a writ of garnishment against disbursements made by a trustee.

A garnishment in law can mean two results. First, it can embellish the taste of any argument.[11]

Second, a "writ of garnishment" is an order requiring a third-party to withhold some type of property (usually money) of the defendant's (also called the "garnishee" or "judgment debtor") for delivery to a creditor to whom they owe an overdue debt. It means that the creditor can tell the trustee, in effect, "any time you want to make a distribution to or for the benefit of my deadbeat husband, your beneficiary, you have to give it to me first."

Happiness Axiom 4: **Third-party created trusts are intended to preserve separate property as separate property. Those trusts should be effective for those purposes, even under evolving (unfortunately and incorrectly) statutes eroding a certain amount of protection. Judges may look at these trusts in providing equitable reasons for giving the non-moneyed spouse, the other spouse, a greater share of marital property, or increased maintenance amounts. And these trusts may be accessible to pay for unpaid maintenance obligations. To increase protection of these trusts, consider moving the situs and trusteeship of the trust to a jurisdiction that is more protective of these trusts, say Alaska, Delaware or Nevada; and avoid California or Minnesota, for example.**

Not all jurisdictions will support this court involvement, but the trend is to provide those distributions.

Further, distributions for tax purposes, to satisfy federal tax liens and amounts due, have certainly been mandated by courts. [12]

Also, the Restatement of Trusts (Third) provides that third parties who provide necessities to or for the benefit of trust beneficiaries may reach the trust interests of the beneficiaries.[13]

In the continuing downward erosion of creditor protection, the Restatement of Trusts (Third) contemplates that the spendthrift and other protection of these trusts should be voided on certain public policy grounds. These would include consistent tortious conduct[14] and direct harm to the trust which is seeking to be protected.[15]

Nevertheless, when advising clients, these trusts are still effective shields, in the event of divorce or for typical third-party creditors bringing tort or contract cases against the beneficiary. The question is then one of structuring.

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[11] Really bad pun there. Okay, that first meaning is nonsense, as you no doubt realize before you read this footnote.

[12] *See, e.g.*, Restatement (First, Second or Third) of Trusts, section 58. See also UTC, section 503.

[13] Restatement (Third) of Trusts, section 59(c).

[14] I would think one tort would be enough, versus "consistent" tortious behavior.

[15] Restatement (3rd) of Trusts, section 59 ("The nature or a pattern of tortious conduct by a beneficiary ... may on policy grounds justify a court's refusal to allow spendthrift immunity to protect the trust interest."). Under the UTC, *infra*, tortious conduct may not be sufficient to erode the protection. *Cf. United Mine Workers of America v. Boyle*, 567 F.2d 112 (1977) (intentional diversion of pension funds not an act sufficient to abrogate spendthrift provision). *But see Sligh v. First National Bank of Holmes County*, 704 So. 2s 1020 (1997) that reaches into a trust when the beneficiary was convicted of a drunk driving felony and a civil judgment thereafter obtained.

g. Drafting Creditor "Shield" Trusts

Consider discussing with the client the various trustee alternatives to provide a creditor protection shield for funds left in the trust not needed for the child's consumption, as the child determines from time to time. Note the use of the word "shield," versus "insulation." These trusts are intended to balance flexibility for the child in terms of access to the principal, with some protection against creditors, rather than completely insulating.

For planning purposes, assume the client and planner have determined that a flexible creditor protection trust for adult children is desired. Therefore, the question becomes how close to the edge can the trust be pushed. For example, can the child be trustee or a co-trustee? If so, must the standard be a narrow one related to health, support or maintenance? Or should the standard be expanded to "best interests?"[16]

Happiness Axiom 5: **Because powers of withdrawal or general powers of appointment (express) will under case law allow creditors to access that power, see, e.g., Frisch, infra, eliminate lifetime powers in these trusts for a beneficiary.**

The next question is the standard for distribution, as well as the selection of the trustee. The answer is a strange intersection of case law, practitioner bias, and client receptivity.

Case law: do not have the beneficiary as trustee; do not have enforceable beneficiary rights to principal (e.g., avoid the trustee "shall," and favor "may"). The recent Illinois case, *In re Lunkes*, No. 09 B 00583 (Bankruptcy, ND Ill, 2009), highlights this result by holding no spendthrift protection is afforded when the trust instrument has a "shall" direction to the trustee (the trustee "shall" distribute the following amounts to the beneficiary) versus "may."

Practitioner bias: Create absolute creditor protection, versus, the other end of the practitioner bias spectrum; allow the beneficiary essentially unfettered access.

Client receptivity: "I want my children to have access to the funds."

Do you as the practitioner feel like King Solomon? Well, for those of us grey in the temple (hair), we know this is exactly what the clients want-provide them practical advice as to what they should be doing.

Happiness Axiom 6: **In drafting the discretionary standard for distribution, make sure to use the word "may" after trustee, versus "shall." Also, given the Illinois McCoy case, infra, I am not as focused on ascertainable standards as I am on who is the trustee. Therefore, revert to an unascertainable standard in most of these trusts.**

Happiness Axiom 7: **Consider an evolution to a completely discretionary trust. The world of thoughtful trust standards has paradoxically tipped in a toxic direction. In those cases in which the grantors wanted a HEMS standard, a rather limited one related to health, support and maintenance, somehow courts have focused on the "support" aspect of this to achieve rather unintended consequences from the grantor's perspective, especially in the creditor world. Accompany unlimited grantor discretion with careful trustee selection (committee of trustees) and precatory letters of intent.**

The question of trustee is then the remaining conundrum. Ideally, we would like it be someone other than the child, the Generation Two (G2 as has become popular estate planning lexicon. We are a funny group of practitioners).

Most clients want it to be the child.

We know from evolving case law that courts could force a trustee, who is also a beneficiary, to make a discretionary distribution to the beneficiary in order to satisfy a creditor. For example, under the Restatement of Trusts (Third), section 60, paragraph (g), the creditor can reach the "maximum amount the trustee-beneficiary can properly take." In the example under that paragraph, the creditors are able to reach out of the trust, when the beneficiary/debtor is the trustee, "the maximum amount of trust funds that [the debtor] may, without abuse of her discretion, distribute to herself for authorized purposes." The spendthrift provision would not offer a restraint, according to the comment in paragraph (g).

Hmmmm. Creates a bit of a conundrum, maze, inconsistency, and other words that mean the same thing. Discussing the options with clients will be much like discussing portability during the life of husband and wife. Client: "So, the question

[16] "Best interests" is a scary standard for trusts controlled by beneficiaries for tax purposes, but perhaps not for creditor protection purposes.

is whether I should try to get an increase in basis in my assets after I am dead, and before my wife dies, versus perhaps saving more estate taxes, but this depends on the law and changes in the law and investment returns and consumptions. You know Lou, it's Friday afternoon, and I am not that gleeful about discussing my mortality. So on the portability issue, I have an idea. You are fired."

Personally, I like the beneficiary as trustee, with the understanding that the beneficiary could resign as trustee prior to a creditor event occurring, or when the trust is created, the beneficiary (who then has creditor issues or who thinks he or she may) can just decline to act. For those clients with adult G2s, this gives the practitioner the opportunity, if the client consents, to discuss the future planning with those adult children.

But even in this case, a court may look askance at the declination or resignation to act and hold that once that power was available, any actions thereafter taken are ignored. *See, e.g., Bottom, infra* (implying that resigning as trustee would be ignored for purposes of determining the trust's creditor protection).

An alternative would be a co-trustee situation, with the beneficiary having participation rights only as to ascertainable distribution decisions, and the co-trustee having rights as to discretionary distributions for "welfare or best interests." *See, e.g., In re Schwan*, 240 B.R 754 (Minn 1999) (holding trust protected from creditors because of co-trustee and because of fiduciary duties to follow terms of trust and distribution standards). *See also McCauley v. Hersloff*, 147 B.R. 262 (M.D. Fla 1992) (Discretion to make a distribution rested in multiple trustees, of which the beneficiary was only one; therefore, spendthrift protection valid. "Moreover, in exercising that discretion each trustee has a fiduciary obligation to the remaining beneficiaries"); Restatement of Trusts (Third), section 60 (no forcing of distributions if the beneficiary is merely a co-trustee, and the other co-trustee has fiduciary obligations to other beneficiaries, which would almost always be the case).

And the most protective strategy? Not naming the beneficiary as trustee at all. Note that not acting as trustee is a good step, but not sufficient if the beneficiary can indirectly appoint himself as trustee. For example, in *In re Baldwin*, Bankruptcy Court, Ohio, No. 2-88-05792 (1992), the court first acknowledged Ohio law that there was no spendthrift protection (and the trust could be poached by creditors) if the beneficiary is the trustee, or if there are withdrawal/revocation rights (the court used "revocation" but clearly also meant withdrawal), or if "the beneficiary has [other] dominion and control over the trust." In that case, the trust limited the debtor to replacing the third-party trustee with a corporate trustee. But then the court hypothesized that the debtor could theoretically create a corporation that the debtor controlled, remove the trustee, and replace that trustee with the debtor-controlled corporation. And in that way the debtor had the ability "to exercise dominion and control over the trust," rendering the trust susceptible to creditors.

Recognize that the courts are generally offended by debtors, and therefore will do whatever necessary to mess with the computer program so that the spendthrift protection, and inability to access the trust, gets an error message; such that the trust becomes available to the creditor for reimbursement.

I tend to think that co-trustee situations are the best today for most trusts, for a variety of reasons: assisting in the administration, allowing tax planning if the co-trustee is a knowledgeable tax practitioner, allowing accountability, providing a sounding board, creating plausible deniability when someone asks a beneficiary for money, avoiding mistakes, and for a few more (that I will not bore you with).

Happiness Axiom 8: Going forward, try to have the creditor protection trust for a G2 have both the G2 plus another as co-trustees. If not achievable, live with the G2 as sole trustee and recognize that there may not always be complete creditor protection.

h. The Shelf Product

The practitioner, based on state law and knowledge of the client's family, has to recommend the format that should be used.

Drafting Example: (The Adult Creditor Shield Trust)

Child's Separate Trust

Any trust property allocated for a child of mine subject to the Child's Separate Trust withholding provisions shall be added to or used to fund the principal of a Child's Separate Trust for the child. The trustee shall administer each Child's Separate Trust as follows:

Section 1.01 Discretionary Payments of Income and Principal. During the child's lifetime, the trustee may pay to the child so much of the income and principal as the trustee from time to time considers necessary for the health, education, support, maintenance in reasonable comfort, welfare, or best interests of the child. Any income not so paid in each tax year shall be added to principal at the end of each tax year.

Section 1.02 Power of Appointment at Death. On the death of the child, the trustee shall distribute the principal to any one or more persons or organizations (including the child's estate) as the child appoints by Will, specifically referring to this power of appointment.

Section 1.03 Distribution on Termination. On the death of the child, the trustee shall distribute the Child's Separate Trust not otherwise effectively appointed as follows:

(a) Any Descendant Living. If the child has any descendant then living, to the child's then living descendants, per stirpes; or,

(b) No Descendant Living. If the child has no descendant then living but I have any descendant then living, to the trustee to allocate in shares of equal value for my then living children, subject to the Child's Separate Trust withholding provisions hereof; provided that if a child of mine is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the child, if living, per stirpes to the child's then living descendants.

i. Cutting Back the Creditor Protection Trust to a Creditor "Annoyance" Trust

Further, coordinate the trustee provision so that a child at a certain age can get control over this creditor protection trust, in the child's capacity as a co-fiduciary, or even as sole fiduciary.

Drafting Example: Child as Trustee of Creditor Annoyance Trust

Section 1.04 Trustee of Child's Separate Trust. Notwithstanding any other provision, upon attaining age thirty (30), each child of mine shall have the following powers with respect to the Child's Separate Trust established for the child's benefit under this instrument:

(i) Co-Trustee. The child shall have the right to appoint himself or herself as co-trustee.

(ii) Remove and Appoint. The child may remove any trustee at any time by a signed instrument, but only if, on or before the effective date of removal, a successor trustee (other than the child) has been appointed by that child or at least one trustee will continue to act after the removal.

III. SPOUSAL ASSET TRANSFERS

a. Advocacy of Changing Title Between Spouses

Since 1982, planners have had to discuss with spouses the need to shift assets to the non-propertied spouse to allow for that spouse to have assets to fund the credit shelter trust, in the event that spouse predeceased the other. With portability, that shifting of assets is no longer necessitated to protect use of the exemption. Because of concerns over how a shift in title may affect property rights on divorce, this area of discussion becomes more difficult. Perhaps asset transfers to allow credit shelter funding will be ignored by planners.

b. Funding of the Credit Shelter Trust

Percolating out there in estate planning since 1982 has been the concern about retitling assets to allow the funding of the credit shelter trust at the first spouse's passing. With the estate tax exclusion reaching $600,000 in 1984, planning often required a retitling of assets from one spouse to another to ensure that when the first spouse passed away, there would be sufficient assets to fund that spouse's credit shelter trust.

Example: Circa 1984, husband had assets consisting of a $600,000 house, an IRA of $1,000,000 and marketable assets of $800,000. Wife had no assets in her name. During the estate planning discussion, the planner recommended that

either the house or a portion of the marketable assets be titled in the wife's name, to ensure that wife's $600,000 credit shelter trust was funded in the event she was the first spouse to pass away.

The often glossed-over concern was whether the change in title of assets, from husband to wife in the above, affected the separate/marital/non marital/community nature of the property for divorce purposes. Given the importance of avoiding estate taxes and the justification for doing so pre-portability, that marital concern often took a back seat to the actual need to reallocate for estate tax purposes.

c. Portability

Portability – the concept of allowing the surviving spouse to in essence "inherit" the deceased spouse's estate tax exclusion -decreases the necessity of reallocating assets as between spouses to maximize the use of the estate tax exclusion. A determination of whether to rely on portability is itself a sophisticated analysis, but now the marital/non marital concerns related to asset transfers between spouses needs to be considered further because no longer is it a necessity to transfer assets to ensure full use of the estate tax exclusion.

d. Titling

Titling is possession. And possession is nine tenths of the law, but not one hundred percent. And, titling does not in and of itself determine whether property is marital or non-marital.[17]

Example: During marriage, wife is the sole breadwinner, and titles all earnings in her own name. Despite owning all assets, these assets are marital/community because they were earned in the traditional sense (not from separate assets) during marriage.

The issue that needs to be examined, however, is whether a change in titling transmutes the nature of the property from one classification to another.

Example: If husband brings into the marriage $1,000,000 of separate assets, and during the marriage gifts those assets to his wife, has that gift changed the nature of the property from the husband's separate property to the wife's separate property? Yes, if the husband intends to make this distinction via the gift, possibly no, if the intent is merely to change title for estate planning purposes (discussed below).

e. Linked Together by Marriage, but My Assets Remain Mine

States either classify property as either 'marital property' or 'non-marital property,' or as 'community' or 'separate.' Property classified as marital/community is property that both spouses will in essence share in the event of divorce.[18] Property that is classified as separate is awarded to the owner-spouse.[19]

With spouses retitling their assets for planning purposes as between their trusts, or schedules to their trusts (e.g., in a joint trust, separate property of wife being re-scheduled as separate property of husband), the analysis is whether the transfer results in the property losing its character as wife's separate property.

In making the determination as to whether the character has changed, a court may review whether the parties **intended** to make a gift from the one estate to the other, thereby transmuting from one classification to another.

Therefore, a change in title from (i) one spouse to both spouses jointly, from (ii) both spouses to one spouse, from (iii) one spouse to the other spouse, or from (iv) both spouses jointly to one spouse, will at a minimum garner scrutiny on property division in divorce.

The question then, in 2018 (and since 2012) is whether the practitioner wants to get into the potentially aggravating situation of having to defend a transfer of property when title shifts from one spouse (his or her separate property) to another (is this the new spouse's separate property) for purposes of potentially funding the credit shelter amount at the first spouse's passing.

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[17] The title system to determining property in divorce has been changed by state equitable distribution statutes. *See*, *e.g.*, Morgan, "When Title Matters: Transmutation and Joint Title Gift Presumptions" 18 Journal on Matrimonial Lawyers 33 (2003). Title has theoretically become rendered inconsequential.

[18] Timing is not critical here, so that in community property each spouse may already own ½ of the property pre divorce.

[19] The courts often find 'equitable' methodologies as an end around, such as awarding alimony, requiring reimbursement, and applying various equitable doctrines, such as marital energies doctrine; that the effort of one spouse helped enhance the value of the non-marital property of the other spouse. Separate property assets are generally defined as property acquired before the marriage, or by gift or inheritance, or are protected under the terms of a valid agreement between the parties.

Post 2012, the answer may be "no."

<u>Happiness Axiom 9</u>: With portability, the absolute funding requirement for each spouse to have $11 million is reduced. Now the practitioner can focus a bit more on the effects of divorce on a change of titling, and perhaps not shift title as often as we used to have to. We suspect that changing title to assets for future testamentary funding will be occurring less frequently in the future.

IV. <u>I LOVE YOU, BUT AM NOT IN LOVE WITH YOU</u>

a. <u>Darth Vader Calling</u>

Really bad "potential" clients remind me of Fawn Leibowitz from <u>Animal House</u>. We are one kiln accident away from being business-engaged to that client for a long time. Where's the malfunctioning kiln when you need one?[20]

One incident I remember quite vividly. A potential client with substantial net worth had requested I advise him as to how most effectively to use the lifetime credit at year end. With this potential client, I discussed partnerships and discounted gifting to maximize the use of the credit. As December approached, I emphasized to him the need to put a strategy in place (if he was going to before year end) as soon as possible so that we could get it done by year- end. He promised he would be right back to me as to whether to proceed or not.

On December 23, my receptionist frantically tracked me down to indicate that Ted (let's call the potential new client by that name) was on the phone and needed urgently to talk to me.

The conversation went something like the following:

"Lou, this is Ted. I am riding on a chairlift at Snow Valley right now; and chatting about estate planning with the dude in the chair next to me. Just met him on the way up the mountain. He indicated that his estate planner recommended blah, blah, blah strategy for use of the credit. I want to know **why we are not doing that**. You never suggested that. What were you thinking, or not thinking? Explain yourself!"

I had this vision in my mind. What was the name of that movie where the chairlift comes crashing down? In addition to this vision, many verbal responses floated in and out of my mind, like detritus and flotsam washing onto a polluted beach. One response was not going to happen, and that was to mollycoddle or vindicate Ted's need to discuss the strategy. My response, instead, went something like the following:

"Ted, at this point, we are going to have to decline your representation. I enjoyed meeting with you [a prevarication, but probably allowed under the 'politeness allows for mendacity' rule] but we will not be able to handle your matters. Have a nice ski trip. Bye."

In hanging up the phone, my mood could not have been better. We underrate the joy of saying no to Darth Vaders.

b. <u>The 90/10 Rule</u>

The 80/20 rule is well known by estate planners: 80% of our revenue comes from 20% of our clients. We are not as focused on the 90/10 rule, primarily because I just made it up.

That rule indicates that 90% of our aggravation in our practice life comes from 10% of our clients, that is, bad clients or bad projects. And by "bad" I mean something a tad more painful than the pain that comes from jamming a sharp stick in your eye.

Since we control variables, new projects and new clients, understanding of the 90/10 rule can actually increase our happiness. But this means we have to be strong and not select those 10% clients or matters.

[20] For those unfamiliar with the reference, Ms. Leibowitz died in a kiln explosion, while purportedly crafting a bowl for her fiancé, who actually did not exist. Very complicated stuff.

c. Using Common Sense to Avoid the Vortex of Pain

Usually, listening carefully during the initial telephone call, or sending out a questionnaire and reviewing that carefully, will provide clues as to client matters for which a "no" should be immediate.

Examples are common place, such as being the prospective client's third attorney in a representation: "I didn't love them, but in 5 minutes, Lou, I know you are my guy." Hmmm. This was usually the kind of statement heard on a date when I would excuse myself to go to the bathroom, detour and exit through the kitchen, and begin changing my phone number.

Other clues are a bit more subtle, but if we pay attention to the clues, we can do well to avoid certain representations. At the initial meeting, listen carefully to the buzz words and concepts that will make you want to dismiss a potential client. These include the ones on the list below:

i. The prospect has had too many lawyers before you, and may even refuse to name them. Or, worse, wants to consult with you about how and why he should not pay his prior attorney.
ii. The prospect thinks all previous lawyers were "idiots," or makes otherwise derogatory statements about lawyers in general.
iii. The prospect cannot demonstrate he/she can pay for the cost of your services, balks at paying a retainer, and/or asks for a special reduced rate or payment terms up front.
iv. WANTS TO BE NOT JUST A PRIORITY, WHICH ALL CLIENTS ARE, BUT THE SOLE AND PRIMARY PRIORITY. WITH THESE CAPS, DOES IT SOUND LIKE I AM SCREAMING AT YOU? SORT OF LIKE HOW THIS CLIENT MAY SOUND.
v. You do not agree with the prospect's legal position.
vi. You do not believe the prospect is being truthful.
vii. The prospect is VAV (vindictive, angry and vengeful).
viii. The prospect is a family member.
ix. The prospect indicates they know the law and what they want to do, and just wants the attorney to do the front end work for them.

Happiness Axiom 10: **Life is short and should be accompanied by smiles, not frowns. We are in control of this emotion and adherence to the 90/10 rule will have a strong influence on getting us to the happy face.**

V. MONETIZE YOUR PRACTICE, NOT YOUR LIFE. UNDERSTANDING CORRECT BILLING PRACTICES.

a. Overview

The section discusses billing methodology and practice styles in an effort to solve the following equation -- Imagine a good you purchased - car, TV, hockey stick, fishing pole, boat, plane -- that was so outstanding that after the purchase, you felt good about buying it, regardless of its cost. If we want a longstanding relationship with a client, we want the client to view payment for our services along these same lines. This segment focuses on how our billing protocols can be improved to achieve this level of satisfaction and appreciation.

We practice law because it is interesting, challenging, we are good at it, and we are professionals. We also practice law because it is our business. As our business, we should rightly expect that fees charged should equal fees collected. And a certain amount of indignancy should accompany those fees that go uncollected. But also a certain amount of blame must remain with the practitioner as to uncollected fees. Did the practitioner follow a Best Practice approach in the fee presentation and collection process?

Little useful information has been written in this area as it pertains to estate planning. This paper is intended to be a starting point as to a Best Practices primer on the fee area as it relates to estate planning.

b. Understanding What is Needed to Improve Billing

Pre mortem estate planning refers to tax planning, Wills, living trusts, GRATs, education trusts, and all other matters that we do for clients while they are living. Bills are sent directly to those individuals who have requested our services, to deal with a topic that is very painful, albeit important -- Where does the Property that I have worked Hard for During My Life go when I Die?

It's not hard to understand why clients are reluctant to engage in estate planning. It is not a fun topic. Re-read the prior underlined sentence and ponder it a bit.

Therefore, even when we add significant value, say, saving $5 million in future estate taxes, a bill currently of $25,000 may seem repugnant. A bill currently for $10 may also seem repugnant. It's the process of what they are doing, not necessarily the value added, that is painful for clients to accept.

With that understanding in mind, what are the best billing practices? To understand the answer, one has to begin thinking out of the box as to practices. We should recognize (or agree) that current billing practices are subpar and done because (of what is known, as will be discussed in great detail below, as a status quo bias) they were done before.

Hypothesis 1: There is nothing rational about consumer behavior. As practitioners, we are often not thinking about our billing practices in the most strategic way.

Hypothesis 2: Practitioners spend about 10 % of the amount they should on billing, and disregard its importance to clients' happiness.

Hypothesis 3: Practitioners delay in billing because they know that clients will often perceive their charges as unpleasant and will be unhappy. Delay hurts further.

Hypothesis 4: The following paradigm is the fault of the practitioner, not the client:

Example: Practitioner does an A-B estate plan for a client, and quotes the client an hourly billing rate of $250. The project is done efficiently and within the client's time expectations. The hours spent are less than the practitioner anticipated. The hourly rate is less than others in the area. And the overall bill seems less than what it has been in the past. The clients are still surprised at the amount and unhappy.

Hypothesis 5: Which billing format, attachment 1 or attachment 2, is preferable from a client happiness perspective. Would it shock you if we said that in the vast majority of cases, attachment 2 would be preferable?

Hypothesis 6: Technology has increased the quality, efficiency, and lowered the cost of producing estate planning work product. But this is not reflected in the billable hour concept, nor accepted by clients as an item to bill for. As practitioners, we have not developed a way to charge for technology.

c. Rationality in Consumer Perception to Our Billing

We fail to understand that consumers are not rational when it comes to hourly billing for estate planning matters. Many of us think that if hours are correctly reported, the hourly rate is reasonable, and the project is done timely, the clients will accept the bill as "reasonable" or as "good value."

But fundamentally we are missing a tenet of finance law: that the rational consumer does not always make rational choices, but is influenced by his or her own mental accounting,[21] which often changes rational consumers into irrational ones.

For example, the following example illustrates this mental accounting concept.

Example: You go to the store to buy your favorite movie on a DVD. It is priced at $14.99. While at the store, your best friend mentions that the same DVD is available for $4.99 at the Walgreen's about 15 minutes away. Will you go to the Walgreen's? Compare this to the situation where you are at the Stereo store and the salesperson says the stereo costs $499. Your best friend says the same stereo is available at $489 at the store 15 minutes away. Will you go to the other store? There's no difference financially, but the results have empirically been shown to be different. The consumer's perceptions are different in both situations, reflecting fairness issues. Conclusion: we cannot assume rationality for our client's economic decisions.

[21] In "Mental Accounting Matters," 12 J. Behav. Dec. Making 183-206 (1999), Richard Thaler, one of the leading behavioral economists in the Country, explores the concept of mental accounting. Unlike financial accounting, which consists of numerous rules and conventions that can be explored in a textbook, mental accounting rules – a description of the ways consumers perceive their economic choices—can only be observed by behavior and inferring the rules.

d. Translation to the Hourly Rate

A client may perceive an hourly rate of $350 to be "way too expensive" for someone spending an hour thinking about something. Is that rational (probably not, *see* below). In contrast, the client may perceive a bill for $5,000 for estate planning documents that achieve estate tax savings, creditor protection trusts, management of assets in the event of disability, and so on, as being reasonable.

Meaning, in estate planning (not estate administration or contested litigation), get away from emphasis on hourly billing, and get into the concept of either doing or demonstrating project/value billing as much as possible.

Example: It's not rational: Attorney X recently spent about an hour coming up with an estate planning wrinkle for a client that saved him about $500,000 on a strategy. If the Attorney quoted him an hourly rate of $2,000, and then sent him a bill for $2,000, the client would be upset. If the Attorney quoted him a flat fee of $5,000 to try to implement a strategy that would save $500,000, he may have been absolutely fine with this, depending on the framing of the project and resolution.

A couple that are relevant to how we bill and charge clients:

e. Fairness: Value, Value, Value

Consumers like to perceive themselves as being treated fairly, even when the end result or product or cost is the exact same whether they are being treated fairly or unfairly. Think about an IRS examiner who has two identical cases, both capable of yielding either $300,000 or $500,000 for the government, depending on the level of effort the examiner puts in.

To the extent one taxpayer is perceived as "trying to pull a fast one" on the agent, and the other taxpayer is acting reasonably and perceived to be a straight up kind of person, the agent is more likely to audit the Fast Eddie-prepared return more ferociously than the other. Why? Perceptions of fairness.

Example: You're sitting on the Beach at La Semana in St. Marteen's, hot as the dickens. And thirsty. You're buddy says he is going to buy a beer at the hotel and asks if you want one. You say yes; he asks if you care how much it costs, even if it costs $15? You say no because you know it will cost a lot. The place you are staying is expensive, and you expect that they will charge a lot for their stuff. Your buddy decides not to go. Instead, a bum on a push cart comes buy and asks if you would like ice cold Heinekan's…you think yes…until the bum says, "$15." Why should that guy make so much money from me?[22]

There are many takeaways for us from the perception of fairness that consumers need to feel. First, the hourly rate at any amount will rarely be perceived as fair. Yet another strike in the hourly rate's coffin. But there are beauty marks that we can add to the hourly rate; some obvious, some not so.

I (Lou talking on this one) am a casual guy, but could never understand (and think lawyers are short sighted when it comes to trends) why our profession would want to be casual. A lawyer in a nice suit connotes value, thereby connoting a certain professionalism that carries with it the expectation that the charge for services will be great. Well groomed, manicured, well spoken; all go hand in hand. *Cf.* La Semana versus the bum example above.

Offices and how they look are another aspect of perceived value. As is the lawyer's professional affiliations, speeches, articles, reputation, other clients as references (careful to preserve confidentiality, very important for estate planners), and the substantial level of a typical client.

And, though price should never be a factor in trying to convince a client to use us – "we're cheaper" sounds bad as a marketing technique (ouch!) – letting a client know that the costs for your services will be in the range of what others at your level costs, will add to the client's perception of fairness.

f. Understanding The Consumer's Value Function: One Big Hurt Is Better Than A Series Of Small Hurts

The loss function is convex, meaning that the marginal pain felt by incremental losses is greater than the pain felt by a larger loss. Specifically, as to the losses, the pain associated with the sum of the parts is greater than the pain associated with the whole. Ponder how this applies to a bill:

[22] Example adapted from *Thaler*, *infra*.

1. Every day entry associated with a time is translated into an hourly charge, a loss.

2. A bill with 20 daily time entries results in 20 losses. "Death by a 1,000 Cuts." It is more painful to review than a bill with one entry.

Example: "Consider the case of the pricing policies of the Club Med resorts. At these vacation spots consumers pay a fixed fee for a vacation that includes meals, lodging and recreation. This plan has two advantages. First, the extra cost of including the meals and reaction in the price will look relatively small when combined with the other cost of the vacation. Second, under the alternative plan each of the small expenditures looks large by itself, and is likely to be accompanied by a substantial dose of negative transaction utility given the prices found at most resorts." Thaler, infra, at 192.

What does this mean for our billing? Flat fees are much more preferable because a consumer may get greater transaction utility out of powers of attorney than out of drafting a complicated trust, but when each are broken out, the consumer evaluates each action separately and determines whether each action translates into value equivalent to the cost.

Further, flat fees avoid the marginal pain associated with each hourly "loss."

Thaler notes, **not** in the context of law billing (interestingly):

"[C]onsumers don't like the experience of 'having the meter running'. This contributes to what has been called the 'flat rate bias' in telecommunications. Most telephone customers elect a flat rate service even though paying the call would cost them less."

g. Decouple Having to Have the Consumer Assign a 'Value' to Each Hourly Charge

A decoupling device noted by Thaler is the credit card:

"We know that credit cards facilitate spending simply by the fact that stores are willing to pay 3 % or more of their revenues to the card companies…A credit card decouples the purchase from the payment in several ways. First, it postpones the payment by a few weeks. This delay creates two distinct effects: (a) the payment is later than the purchase; (b) the payment is separate from the purchase. A second factor contributing to the attractiveness of credit card spending is that once the bill arrives, the purchase is mixed in with many others," Thaler, infra (emphasis added).

Takeaways for us: credit cards can be used for a service business. If we decide to go this route, do we pass the cost along to our clients? If we take credit cards, beware of credit card fraud, of which there is no insurance. So perhaps the trade offs are not as positive as we think.

How else can we decouple our services? To the extent we can get clients on a flat retainer, or an annual charge, and include as many services as possible, this will decouple (as will a "project" fee). As a mental exercise, can you decouple one estate planning project into 20 distinct services provided by the documents?

Transfer Tax planning
Income tax planning
Creditor protection
Funeral plans
Protecting assets if child is a spendthrift
Planning for the children's education
Protecting assets in the event of disability
Planning for a child with a disability
Providing health care alternatives
Organ donation options
Guardians for the children
Planning for long term care
Planning for liquidity at a person's passing.
Doing beneficiary designations correctly
Reallocating assets

Planning for college funding
Preserving tax-free nature of retirement planning
Assessing insurance needs
Assistance in a plan to get rid of household stuff
Preserving peace in the barnyard

h. Give of Yourself

What else can we do? Is "discounting" off the hourly rates or bill effective? We couldn't find a discussion of evidence one way or the other that would have indicated that this is effective. From a fairness perspective, clients would certainly view a discount based on a true statement –e.g., Long Standing Client Who does Not Torment Me – in a positive fashion. All consumers like discounts provided the discount is not because the product is so overpriced to begin with that the discount brings the new price to what it should have been originally.

In addition to discounts, another item that is effective, and a bit more subtle than discounting, is that "luxurious gifts can be better than cash," which according to Thaler, is "well known to those who design sales compensation schemes."

What are we doing for clients above and beyond providing them services?

i. Framing

Because people are loss adverse, ponder whether we can achieve better fees by framing fees in the positive, e.g., contingent fees if there are tax savings. For example, if our billing practices were set up so that clients merely had to pay us if they succeeded in achieving tax savings, that would be easier to bill and many of us would now be retired.

Example: In 1984, for A-B plans, we would describe to clients that if we were able to achieve a tax savings greater than without estate plan, we would be paid 20 % of the tax savings, but only at that point. Most clients would be delighted with this option. Sound bad to you? It should not. Consider the average time to payoff for a client age 65 would be less than 20 years. What's the current value in 1984 of tax savings in 2018? In 2018, the credit was, say, 1.5 million. So the savings with an A-B plan could be $750,000. 20 % of this amount would be $150,000. Ignoring the friction associated with transaction costs to collect this amount, the discounted present value in 1984 of $150,000 to be received in 2018 at a 3 % discount rate is $54,906 ($150,000/(1+.03)^34). Yes, we would all be done at this point in our practice. Not only that, but those of us who are older could have monetized our practices and sold these fee arrangements in 2018, without having to work another day. (Importantly, now we have circular 230 constraints.)

To the extent bills are detailed in their descriptions, or projects summarized in cover letters, we should not be afraid to frame in the positive versus the negative. E.g., which sounds better: "Draft of trusts to address estate tax issues;" or "Incorporation of estate tax savings trusts." Or, "Draft of generation skipping trusts" versus "structure of trusts to prevent the payment of estate tax as assets move from generation to generation."

j. I Need a New Car but Cannot Afford It

Clients that should do sophisticated estate planning, such as GRATs, QPRTs, and other advanced techniques, often hesitate to complete such projects for two primary reasons: first, the clients may feel that their own wealth cannot be jeopardized by a current transfer; or second, clients may not want to incur the costs. There are myriad other reasons, some subtle, some not so, such as not wanting kids to have immediate access to funds, not wanting to deal with one's mortality and focus on such advanced estate planning items, desiring to simplify, not complicate, one's life; or feeling good about one's wealth and defining oneself by it.

Practitioners should certainly docket a client's decision for inaction, that is, the client's decision not to proceed with a strategy. But the practitioner should also realize that inaction can be ameliorated, to an extent, by the principles discussed here with regard to billing.

Consider the following. First, for a client that is on the border as to whether to proceed with an advanced planning strategy, or even basic estate planning, a restructuring of the billing protocol can push that client to action. From the principles discussed in this article, we know that there are two basic principles that make billing more palatable to the client: (1) fairness and (2) one large loss is easier to handle than a series of smaller ones that do not add up the large one. In other words, eliminate the hourly rate in the fee quote, which satisfies neither the fairness equation, nor aggregating losses. Hourly

rates are perceived as unfair, and each hourly entry inflicts pain. Further, a client does not know the extent of his potential losses with an hourly bill concept, and the client's loss aversion tells her not to go ahead. As a result, instead of the hourly quote, quote the client on a flat fee basis.

Second, break the overall estate planning project into smaller projects, and quote a fee for each project, thereby allowing the client to proceed on a landscaping sort of basis, doing the front estate planning yard this year, the side planning yard next year, and so forth.

Third, make sure you demonstrate to the client the tax and non tax value that will be obtained by the client by completing these projects (*e.g.*, dollars potentially saved, spousal protection for kids, family harmony, or philanthropic desires). As an iteration on the fairness concept, a client that perceives value to the end result of the planning will also perceive the bill as fair.

k. Premium Billing – Ethical and Regulatory Considerations in Billing Practices

Generally, the hourly rate is an accepted – albeit not appreciated by the practitioner or client –method for billing by an attorney. Interestingly, hourly rates have not been called into question under ethical rules, but fees are always subject to a reasonableness structure.

MRPC 1.5(a) provides that a lawyer's fee must be reasonable considering an enumerated list of factors.

Reg. §10.27(a) of Circular 230 provides that a practitioner may not charge an unconscionable fee.

In this section, we examine how and when a practitioner can impose a bonus or premium concept because the results obtained are so GOOD in light of expected outcomes due to the practitioner's unique solution to a difficult issue.

Example: The practitioner develops a financial model for pricing a stream of earnings on lottery winnings, to justify a liquidity discount based on lack of marketability and a synthetically arrived at comparable asset. The practitioner develops this methodology based on substantial capital investment into financial instruments over a period of months, and develops a strategy around certain Tax Court cases holding to the contrary. The practitioner indicates that the set fee for the strategy is $X, independent of the hourly effort and independent of the result achieved. The steps to achieve this are as follows:

First, the concept must be agreed to by the client at the beginning of the representation; e.g., merely asking for a bonus at the end because the result obtained was so good is not a prudent approach. The bonus should be in writing, in an engagement letter signed by the client. However, is the language in the letter sufficient to justify the premium while at the same time not sabotaging the strategy if produced in audit on examination? MRPC 1.5(c) provides that all contingent fee arrangements must be agreed to in a writing signed by the client.

Second, the objective must be defined, but more importantly, what unique talent or recommendation is the practitioner bringing to the equation that justifies the bonus fee.

Example: Structuring a 5 year GRAT transaction, for a 75 year old, with a 5 year SCIN hedge, structured along the same economic lines, and assuming reasonable rate of return objectives (are there any these days?) for the GRAT, can result in a risk free estate tax arbitrage. Structuring a SCIN, taking into account both section 2036 and income tax results, is not generic and can be quite difficult. Achieving the arbitrage, and structuring the actuarial risk premium internally, require unique practitioner skills. This kind of transaction is one justifying a bonus fee.

Third, prohibitions in Circular 230 must be avoided.

Fourth, the client needs to be satisfied with the arrangement. Creative structuring of the payment of the bill is one way to achieve client satisfaction. E.g., with the $Z dollar bonus, can it be structured so that the client's children pay it at the time of the filing of the estate tax return? Or from the property transferred during life if the strategy relates to a lifetime transfer?

The above constraints and steps are important, and to the practitioner engaging in bonus billing for the first time, somewhat daunting. On the other hand, as practitioners we do not shy away from engagements just because they are difficult. Likewise, we should provide the same respect to the business side of our practices, and not shy away from the premium billing concept merely because it is difficult to implement.

The premise and answer must remain the same: if a practitioner is providing a unique strategy to solve a difficult legal equation, that practitioner should be rewarded on more than an hourly basis. Keep in mind that the hourly billing method assumes excellent work for every minute committed to a problem. It does not guarantee success, nor does it pay for work that is beyond excellence – that is, the unique solution to a difficult quandary.

Happiness Axiom 11: For Preferable Billing The Best Practice Summation

1. **Discuss fees during the initial meeting**
2. **Time that discussion for the tail end of the meeting**
3. **Determine a fee quote at the first meeting**
4. **Deliver fee quote in a thought out manner and make sure you believe in and deliver the quote in a way conveying fairness**
5. **Have client provide down payment or retainer before engagement begins**
6. **Understand that Fairness matters to clients – clients want to pay for services that they perceive as Fair**
7. **Many estate planning projects will be perceived as Fair if quoted as a Flat Fee**
8. **To demonstrate Fairness, make sure that all the component parts, and accomplishments, with the estate planning project are demonstrated throughout the project; also, deliver excellent service; also, de-cliché clichés**
9. **Divide estate planning BIG PROJECT into sub projects so that value and accomplishments can be more easily understood**
10. **Value added billing can be considered but must be addressed in the engagement letter (see below)**
11. **Send bills frequently and timely**
12. **On a bill, do not exceed a quoted fee unless explained and discussed with the client during the project**
13. **Connote value in the bill itself and descriptions; spend time with each individual bill**
14. **Make sure to consider the format of the bill that will most easily connote value and which will avoid the Client's Loss Aversion function**
15. **Decouple services and bill, when possible**
16. **Discounting is appreciated by clients, in many situations**
17. **Demonstrate client care throughout the process by prompt service, attention, and non work communications**
18. **Know when you are proposing unique solutions to an estate planning or transfer tax issue that justifies a bonus or premium arrangement**
19. **Consider for unique solutions to difficult projects structuring the engagement as a combination hourly, accompanied with a bonus payment because of the uniqueness of the solution**
20. **Make sure the bonus avoids Circular 230 prohibitions**
21. **Determine how to properly discuss and market the bonus structure to a client**

VI. SOMETIMES DELAY IS A GOOD THING

Take a breath, slow down life, and speed kills. Sometimes.

One of the most useful features in digital communications, one in which the authors use for at least 25% of their emails, is the Delay Delivery Option.

Example: I happen to be on the email system and a client asks me a real interesting question about whether the Credit Shelter Trust can be a grantor trust. I like the question and the mental challenge of answering it. I type an answer; it takes me 15 minutes. The client asked me the question at 1 pm; I am ready to send at 1:15 pm. Do I really want to hit send?

Example: I don't want to bug my associates or colleagues over the weekend, but I have a lot of good thought and emails I draft and want to send. Delay deliver on Saturday to arrive on Monday or later next week.

Example: I have an email that I need to work on three days from now. Send it to myself using Delay Delivery to arrive 3 days when I am ready to work on.

Example: I want to slow down the colloquy that goes with immediate responses. You can answer immediately, but your immediate response can be slowed down thereby slowing down the responses.

Happiness Axiom 12: Learn and use the Delay Delivery option.

VII. TO BE OR NOT TO BE A GRANTOR TRUST

The most interesting uses of grantor trusts in today's environment continues to be as a positive means of estate tax reduction, or as a means of exchanging assets with a grantor trust without triggering income tax.

In many situations it is advantageous to draft a trust so that the trust has one or more of the characteristics that create a grantor trust. A trust designed in this fashion is often referred to as a "defective grantor trust."

Specifically, the grantor must be okay with the concept that he or she will pay income tax on assets that may or may not be available for use by the grantor. Planners should pay attention to this concern — even if it is flawed on a cash flow basis — because it is perceived as important to most grantors.

For example, a grantor who has a $30 million taxable estate still may not feel that he or she is able to bear the "burden" of income taxes on income not received by the grantor. This conclusion, if not logically grounded on fact, is nevertheless real to the client, and planners need to plan for this reaction. A discussion of cash flow, perhaps accompanied by spreadsheet analysis as to cash flow (to demonstrate the real impact of the burden of paying the income taxes without the accompanying cash flow), may be enough to convince otherwise reluctant clients that the grantor trust is a viable estate tax reduction strategy.

a. Unified credit, applicable credit amount, gifting trust

In a straight gifting situation in which the grantor gifts property equal to or in excess of the gift tax exemption equivalent ($11,180,000 in 2018), a gift to a grantor trust is preferable to a gift outright. If the gift is of appreciated assets, the donees will realize the capital gain in the future when the assets are sold. However, if the gift is to a grantor trust in which the grantor retains no interest other than that necessary to make it a grantor trust, then future capital gains will be paid by the grantor instead of the trust. In addition, ordinary income and other taxable income incurred annually can be allocable to the grantor of the trust. This has the effect of increasing the estate-tax-free property in the hands of the donees while decreasing the estate-includible property in the hands of the donor.

b. Grantor retained annuity trusts (GRATs)

GRATs are grantor trusts masquerading as pure transfer tax strategies. Since the GRAT permits payment of both income and trust principal to satisfy the annuity payments the grantor has retained, the GRAT will be treated as a grantor trust for income tax purposes. This means the grantor is taxed on income and realized gains on trust assets even if these amounts may be greater than the trust's annuity payments. This further enhances this tool's effectiveness as a family wealth-shifting and estate-tax-saving device. In essence, the grantor is effectively allowed to make tax-free gifts of the income taxes that are attributable to assets backing the remainder beneficiary's interest in the trust. Consider establishing the distribution to the remainder beneficiaries as a distribution to grantor trusts for their benefit.

c. Sale to a grantor trust

The sale is structured by the owner of the asset, which may be a business interest. He or she initially establishes a trust that is effective as a grantor trust for income tax purposes but that is not controlled by the business owner or otherwise subject to an estate tax taint. The heart of the transaction is a sale between the grantor and a third party — *e.g.*, the grantor's family irrevocable trust. This trust will benefit the grantor's beneficiaries. The adult children are often designated as the original trustees of the trust. As a grantor trust for income tax purposes, there will be no recognition of gain on the sale of the asset to the trust. Thus, the difference between the grantor's basis in the asset and the sales price to the trust will not currently be taxed as a capital gain. Further, the grantor will pay income taxes on the income received by the trust because of the assets the trust owns. In this regard, it is as if for income tax purposes the grantor still owns the assets sold to the trust. Importantly, the payment by the grantor of those taxes will not, under current law, constitute a gift to the trust.

d. Grantor powers

Consider then making irrevocable trusts grantor trusts, with the ability to in effect turn off grantor trust status. In grantor trust planning, consider including the power to substitute. The power to substitute assets, a section 675 (4) grantor trust power, becomes especially important as the estate tax exemption increases and income tax planning becomes more

relevant for step up in basis purposes. In many settings, a grantor of a grantor trust may want to substitute high basis assets for low basis assets in a grantor trust, and the substitution power is one way this can be achieved (a purchase agreement is another).

Another grantor trust power that is currently used by practitioners is the power in the trustee or other party (who is a non-adverse party) to add charitable beneficiaries. Consider the value of having the power to name charitable beneficiaries in grantor irrevocable trusts. Having the power to name charitable beneficiaries allows for (1) shifts in property from private to non private to reduce amounts going to beneficiaries[23] and (2) disincentives to beneficiaries to challenge trustee actions. Under section 674(b)(5), the ability of a non-adverse party to expand the class of beneficiaries is a grantor trust power.

We are familiar with disclaiming or renouncing bad powers to turn off grantor trust status; but we may need to have the ability to turn on that status too.

Two possibilities: state decanting statutes, like Illinois, may create the possibility of decanting from a non grantor trust to a grantor trust.

Alternatively, consider having a trust protector with the ability to add grantor trust type powers (power of substitution for example). Query, though, whether the rights of a trust protector are sufficient to constitute a grantor trust kind of power in and of themselves?

VIII. I SELECT DOOR NUMBER 3. CHANGING TRUST SITUS TO MORE FAVORABLE JURISDICTIONS FOR STATE INCOME TAX AND CREDITOR PROTECTION PURPOSES.

This seems to be an easy one, but we should emphasize the importance of this to our clients. Two items: we want to be able to change situs to achieve more favorable administration protection under that state's laws.

And we want to be able to change situs and trustees to take income taxation out of one state and put it in another.

For example, if California imposes trust taxation based, *inter alia*, on trustee residency, we would want our California trustee to have the ability to appoint new, out-of-state, trustees. Sample provisions:

"a. Controlling Law

The validity and effect of each trust and the construction of this instrument and of each trust shall be determined in accordance with the laws of Illinois. The original situs and original place of administration of each trust shall also be Illinois, but the situs and place of administration of any trust may be transferred at any time to any place the trustee determines to be for the best interests of the trust.

b. Individual Trustee Succession

Each acting individual trustee, or the individual trustees acting unanimously if more than one individual trustee is then acting, unless limited in the instrument in which the trustee was designated), may, by signed instrument filed with the trust records, (a) designate one or more individuals or qualified corporations to act with or to succeed the trustee consecutively or concurrently, in any stated combination, and on any stated contingency, and (b) amend or revoke the designation before the designated trustee begins to act. In the event of any conflict or inconsistency between a designation filed pursuant to this paragraph and a designation filed by my spouse pursuant to paragraph 10.4 hereinbelow, the designation filed by my spouse pursuant to paragraph 10.4 hereinbelow shall prevail, and the designation filed pursuant to this paragraph shall lapse to the extent necessary to eliminate the conflict or inconsistency."

Happiness Axiom 13: **Have both change of situs and trustee designation provisions in the documents, and discuss the BENEFITS to clients, at a follow up estate planning meeting.**

[23] "Gee, my kids really don't need all that money."

IX. "I AM A CHILD, I LAST AWHILE," NEIL YOUNG, CIRCA 1968.

The definition of "child" no longer lasts awhile. Genetic manipulation and choice will occur. Birth mothers, perhaps laboratory mothers, may become more prevalent. We will have to tweak what we mean by "child." We may want to expand the definition of "child."

The following provision, regarded as "state of the art" about 10 years ago, is already outdated. Can you spot the anachronisms?[24]

"1.1 Child and Descendant.

(a) *Child. A "child" of a person means only: (1) a child born to or conceived by the natural mother of the child during the lawful marriage or civil union of the person to the natural mother, unless paternity is rebutted by clear and convincing evidence; (2) a child born to a gestational surrogate engaged by that person or, if the person is then lawfully married or a party to a civil union, engaged by that person's spouse or partner by civil union; (3) a child lawfully adopted by the person prior to that child's attaining age 18; and (4) a natural child of the person, if the person's parental rights have not been terminated and either (i) the person is female or (ii) the person is male and the trustee has been provided legally sufficient evidence of the person's paternity or the person has acknowledged paternity in a signed writing.*

(b) *Descendant. A child of a person is a "descendant" of that person and of all ancestors of that person. A person's descendants include all such descendants whenever born. Except when distribution or allocation is directed to descendants per stirpes, the word "descendants" includes descendants of every degree whether or not a parent or more remote ancestor of a descendant is also living.*

(c) *Child in Gestation. A child in gestation on the date any allocation or distribution is to be made shall be deemed to be living on that date if the child is subsequently born alive and lives for at least 90 days."*

X. THERE ARE ALWAYS NEW WORLDS: ALLOW BENEFICIARIES TO MOVE ABROAD

The world is becoming a much smaller place. Will our clients' descendants continue to be U.S. citizens? Is their security in place? What kind of food considerations will be more relevant in the future? All things considered, we in the United States are doing quite well, but what will the United States be like in 50 years? Consider distribution of funds to allow beneficiaries to move to jurisdictions outside of the United States or to allow distributions for security measures for beneficiaries.

Happiness Axiom 14: Trustee guidance could consider distribution of funds to allow beneficiaries to move to jurisdictions outside of the United States, to allow distributions for security measures for beneficiaries, and also to consider distributions needed to modify food/food production. Can we think of any other? I suspect yes.

Happiness Axiom 15: Consider including in the definition of "support" expenses necessary to provide physical security measures, as well as allowing one to domicile outside of the United States.

XI. SIMPLIFIED SOPHISTICATION VERSUS COMPLICATED UNINTELLIGIBILITY

With rapidly evolving tax and state laws, and the precision needed to accurately create an estate plan and convey our clients' goals, drafting has become even more complex and sophisticated. The *status quo* bias provides that individuals irrationally retain current practices; that is, we have a hard time changing.

That bias is especially true in drafting. Rather than trying to simplify concepts, each time there is a law or tax change, our documents often become more complicated.

We may want to take a step back and consider simplifying our drafting, when the situation allows for it. An example are the tax formula and language we have used in our documents since 1982.

[24] E.g., "maternal", "paternal", "natural child", "females", and so on. Are these terms clear enough anymore?

The two trusts, the three trusts, the multi trust solution for tax planning in Wills (living trusts) for spouses may be correct, but is no longer need to be the default drafting choice. With the credit bouncing around from $1,000,000 to $11,180,000, indexed, who knows what tomorrow will bring. And states have, or don't have, inheritance taxes.

Instead of complicated multi trust drafting, as has been done since 1982, the current environment militates in favor of the single-fund QTIP- eligible trust. It allows a practitioner to achieve tax planning for their client, as well as the following flexibilities:

1. For the portability decision to be decided at the surviving spouse's passing. Estates may want to include 100 percent of the property in the surviving spouse's estate to achieve a step-up in income tax basis. The goal will be either to make a partial QTIP election to create a credit shelter trust out of the non-elected portion (the $11.180 million estate tax exclusion amount) or a full QTIP election to put all the property in the surviving spouse's estate for basis step-up reasons.

2. For state inheritance tax to be avoidable at the first spouse's passing if that state has a QTIP marital deduction, even if that state has a credit that's decoupled from the federal credit.

3. Ease in drafting.[25]

4. Ease in client understanding.

5. Ease in administration until multiple trusts are created (post-mortem).

Happiness Axiom 16: **Recognize the status quo bias, but begin introducing the concept of simplification into your drafting thought process. A place to begin is to replace complicated marital deduction formula with a single fund marital trust, drafted to be QTIP eligible.** [26]

XII. MANAGE CLIENT EXPECTATIONS

Don't schedule an "emergency meeting" if it is not a real emergency. Stick to your scheduling discipline. The meeting issue is similar to the delay delivery option for email – don't create a 24-7 expectation of your availability.

Example: I met with clients over a holiday weekend shortly after their father's death because one of them lived out of town and would be in Birmingham only over the holiday weekend. They were hiring me to modify a trust under dad's will (he had been dead 3 days). When I did not have a draft out after 10 days, they fired me for being slow. I believe I set the stage for their expectation of "immediate gratification" by meeting over Thanksgiving weekend.

Give realistic dates for accomplishing work, whether it is drafting, research, an estate planning proposal, whatever. Stay on time and if you are going to be late, let the client know.

Tell the client the truth. Do Not Ever say – "I'm not sure if I sent you this email" when you and the client know if you did or did not.

XIII. BREAK MULTIPLE PROJECTS UP INTO SMALLER COMPONENT PROJECTS

For multiple client projects (e.g., forming 10 LLCs, doing estate planning documents, doing buy-sell agreements, etc.), break them up into smaller components – partly for work flow management, partly for client's ability to review and process, partly for billing.

[25] For those of us who enjoy drafting, we know what the 3 trust plan looks like, with a state exempt, a federal exempt, and a federal QTIP trust all being in place. Throw in there a mismatch of remaining GST exemption from the unified credit, and we have a couple more trusts being called for. The client does not have a chance of recognizing the planning; and the drafter has a strong chance of, ummm, poor drafting if he or she hasn't done a lot of these. All these problems are eliminated with a single fund trust.

[26] If erudition requires greater sophistication, then one can add a so-called *Clayton*-flip onto the single fund marital trust.

XIV. TO GIVE CELL PHONE # OR NOT TO GIVE CELL PHONE #?

General rule for me – I do NOT give clients my cell phone # (partly because I don't want to be "on call" 24/7; partly because my cell phone # is super easy to remember – it is one of the few things my dad remembered after he developed dementia).

I also understand that there is an app for your phone that can make it look like you are calling from your office and therefore would not disclose your cell #.

If I break this rule, I make sure the client knows that he/she is special – that I usually do not do so and that I trust he/she will use sparingly. For the most part, clients have respected my rule/have not abused this privilege.

Happiness Axiom 17: Clients want to know what they can expect. If you intentionally or unintentionally create unreasonable expectations, they will be unhappy when you fail to measure up. Do the client and yourself a favor by creating a *reasonable* framework for your interaction with the client and your generation of the work for the client.

XV. FACILITATING FAMILY MEETINGS FOR YOUNGER GENERATIONS

Client's Goals
To communicate family values.
To teach stewardship.
To introduce the topic of prenuptial agreements.
To educate on the use of trusts.
To instruct on various tax considerations in estate planning.
To encourage estate planning as soon as a child reaches adulthood.
To disclose the senior generation's estate plan to avoid "surprises" when Mom and Dad die.
To promote philanthropy.

Your Goals
To meet the next generation and if no conflict, to become their lawyer.
To become the client's "consigliere."
To assist the client in "raising" his/her children to not be trust fund babies.
How to Accomplish?
Have pre-meetings with client to review proposed agenda and to get buy-in on what will be discussed/disclosed.
Decide, with client, if you (the lawyer) should lead or if you should bring in an outside expert.
Decide whether the meeting should be at your office, the client's office or offsite. Your office may be intimidating. Client's office likely will chill open discussion. Offsite could be best option.
Decide if in-laws are in or out of meeting.
Decide if other advisors (CPA, investment advisor, etc.) should be included in the meeting or in part of the meeting. For example, you might combine an investment review with part of the family meeting.

Happiness Axiom 19: The toughest decision a client faces in estate planning is who to name as guardian to raise the children if both parents die while the children are minors. Family meetings are the lifetime corollary to the guardian appointment – this is the way the client can "raise" the children in the adult world. As a result, facilitating family meetings can be one of the most important things you can do for the client. And, if successful, you can pick up another generation of clients.

XVI. WORKING WITH FOCUS

Set aside a day each week to work "away" (at home, in a conference room, etc.). Leave your phone and email turned off so that you can focus for long periods of time on getting the heavy lifting done. Be disciplined about protecting this day. Get your staff on board so that they also are disciplined about it.

Happiness Axiom 20: Finishing projects requires focus. Finishing projects allows you to feel a sense of accomplishment (and avoids feeling negatively about yourself when you do not finish). Finishing projects allows you to bill the client and get paid. Working with focus is a technique that will help you finish!

XVII. BILL – EARLY AND OFTEN

Billing clients is not fun. Billing clients takes time and fortitude. On the 1st day of the year, calendar time each month, early in the month, to start and finish client billing. Also, send reminder statements for past due amounts EVERY month. Be consistent.

Happiness Axiom 21: Billing is like exercise. It must be done and leads to good results.

XVIII. LIFE IS SHORT - FIRE BAD CLIENTS

We are not indentured servants. Put another way, we do NOT have to continue representing clients if we do not want to do so. We can fire clients who complain about our bills, clients who complain about our timetable, and clients who are rude to our staff. *In a nutshell, we can fire clients we just don't like (bless their hearts).* These materials address firing clients in the planning arena. Firing clients in a litigation context presents a different approach/rule.

ABA Model Rule 1.16(b) is the ethical rule governing the voluntary termination of the attorney/client relationship.

Build exit language into the engagement letter.

Sample language: No Free Lunch. *"Payment is due upon receipt of our invoice. If you fail to pay an outstanding invoice within ___ days, we may withdraw from the representation with written notice to you."*

Sample language: It's Not You, It's Me. ***"****If at any time we desire to withdraw from this engagement, we may do so with written notice to you."*

Even if your engagement letter does not address termination, a lawyer should give written notice of disengagement, preferably after you have had a conversation with the client.

The notice should provide the client sufficient time to engage a new lawyer. For example, you should not fire a client on December 15, 2025 just before the exemption will revert to half its level on 1/1/26 because it is unlikely the client would have sufficient time to engage a new lawyer. Likewise, you should not fire a client who is on hospice care and needs his or her estate planning updated.

The notice should include a refund of any fees paid in advance.

The notice should identify any filing deadlines (e.g., gift tax return; estate tax return) and should disclose the status of any work in process.

The notice should recommend that the client engage a new lawyer.

The notice should include the delivery of the client's file (and you should retain an electronic copy of the file).

Happiness Axiom 22: Life is short. What we do is hard. Let's enjoy it more by working only with the clients with whom we choose to work.

XIX. FOR NEAR DEATH PLANNING

If a client is near death and has a grantor trust in place with the power to substitute assets, consider the following:

To get a step-up in appreciated assets inside the trust. Substitute cash or other high basis assets held outside the trust for low basis assets inside the trust. At death, the estate will obtain a step-up in basis for the low basis asset.

At death, the basis for assets is not always stepped up – SHOCKING TO THINK. If the client owns an asset that has gone down in value, then if the client holds that asset at death, the basis will be stepped down. Consider swapping that asset for assets held inside the trust. The assets inside the trust will retain their original basis and the loss will be preserved.

To transfer life insurance and avoid the 3 year rule. As you know, if a client gratuitously transfers life insurance and die within 3 years, the proceeds of the life insurance will be included the client's estate under IRC Section 2035. However, if

the client transfers the life insurance for full and adequate consideration, Section 2035 does not apply so no inclusion. Additionally, if the transfer is to a grantor trust, the transfer for value rules should not apply. Consequently, the grantor could swap the policy for assets of an equivalent value and get the life insurance proceeds out of the estate even if death occurs within 3 years.

Caution: to make the above techniques work *without* adverse transfer tax consequences, it is imperative that the swap is for assets of *equivalent value*. For this reason, the trustee should take appropriate steps, including getting appraisals, to make sure the swap is Even Steven.

Happiness Axiom 23: We create irrevocable trusts as a way to shift appreciation down to lower generations and to provide an extra gift to the lower generation – the payment of income tax by the grantor. However, we sacrifice the step-up in basis by doing so. Using the swap power as the "defect" gives flexibility to do near death planning for cost basis.

XX. INCLUDE CHARITIES AS PERMISSIBLE APPOINTEES IN LIMITED POWERS OF APPOINTMENT

This topic gets to the "How Much is Enough" question. Clients frequently are worried about making children, grandchildren, great-grandchildren and more remote descendants too wealthy. Only the client can answer the "how much is enough" question but with the use of custom drafted powers of appointment, the drafter can assist the client in giving future generations direction and options.

When drafting limited powers of appointment, resist the temptation to take the easy way out and limit permissible appointees to descendants of the grantor. Rather, include charities as permissible appointees with language that expresses the grantor's goals.

Sample language:

a. Upon the death of Grantor's child, the balance of the Child's Trust shall be transferred and paid over to such charities and to such of Grantor's descendants (permissive beneficiaries collectively referred to as the "child's Beneficiaries"), in such manner and amounts as Grantor's child may have directed in his or her Last Will and Testament, making specific reference to this testamentary limited power of appointment herein granted.

(i) *In exercising this limited power of appointment, Grantor's child may divide the Trust among the child's Beneficiaries upon such conditions and estates, in such manner (in trust or otherwise), with such powers, in such amounts or proportions, at such time or times (but not beyond the period permitted by any applicable rule of law relating to perpetuities), and subject to such terms and conditions as Grantor's child may specify in his or her Last Will and Testament.*

(ii) *In determining whether this testamentary limited power of appointment has been exercised, the Trustee may rely on a Will admitted to probate in any jurisdiction as the Last Will of Grantor's child, or may assume he or she left no Last Will in the absence of actual knowledge of one within six months after Grantor's child's death.*

(iii) *In exercising this limited power of appointment, Grantor requests that Grantor's child consider whether it is in the best interest of Grantor's descendants to limit the amount of wealth passing to such descendants and whether Grantor would prefer that Grantor's child exercise this limited power of appointment in favor of charities, such as* ***the University of Alabama,*** *that Grantor favored during her life.*

Happiness Axiom 24: Effective planning incorporates as many techniques as possible to provide flexibility. By including charities as permissible appointees in limited powers of appointment, the client has the opportunity to say to future generations that transferring wealth to charity instead of family might be the best decision.

Evolutionary Planning: 20 or so Ways to Increase Client Happiness and Value to Your Practice with Planning Techniques (Non-Tax) and Strategic Practice Techniques

Louis S. Harrison Nancy C. Hughes

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I. ACTIVATING TRUST PROTECTORS

We used to be frightened with trust protectors to amend irrevocable gifting trusts. These powers are essentially providing a broad limited power of appointment to third parties.

Among the concerns: Is this a 2036 power? Will this create undue IRS scrutiny? Well, the Times They are a Changin.

Guess what? A third party trust protector power, if properly set up, is not a 2036 power. It may be a power the powerholder does not want to have, but time to consider it in all trusts.

At this point in our drafting and estate planning practice, we should be considering safety valves to either allow a return of assets to the grantor, or, alternatively, to modify trusts.

Use of these provisions will often result in grantor trust treatment for income tax purposes, which could be excellent planning and should be considered at the initial stage in the planning.

These can be achieved generally either by special limited powers of appointment, broader trust protector provisions, or express decanting powers. Specifically:

a. Briefest approach: third party has a power of appointment

The goal is to allow a third party a non fiduciary right to distribute property to a limited class of individuals, which may or may not include the grantor; example:

> ***"Power of Appointment by Special Power Holder.*** *During my life, the trustee shall distribute the principal to any one or more of my spouse , my descendants, and the spouses of my descendants as the special power holder from time to time appoints during his or her life. I name as the special power holder the first of the following who is from time to time willing and able to act:*
>
> *(a) my friend and attorney, I. M. Ntrouble*

In the above, to allow the grantor to be among the class of possible appointees, the class could be extended to include "descendants of the grantor's parents."

> (b) *my friend and accountant, Hert M. Eeee."*

b. The more elegant and expansive Trust Protector provision, select provisions

Practitioners often draft longer guidelines as to what the trust protector can and cannot do. The following is a sample, with a caveat from us that drafting these provisions seem like predicting who will win the Super Bowl; a bit luck and a bit analysis.

> *ARTICLE 1*
> *Trust Protector*
>
> (a) *Designation. Dean shall be the initial Trust Protector. During my lifetime, [third party] may appoint any one or more qualified corporations, or any one or more individuals other than Disqualified Person as to me, as the initial Trust Protector, Co-Trust Protector, or successor Trust Protector of this trust or any separate trust created hereunder, to act with or to succeed the then acting Trust Protector consecutively or concurrently, in any stated combination, and on any stated contingency; provided that any such designation may be amended or revoked before the designee accepts office. The powers retained in this paragraph may be exercised by a signed instrument filed with the trust records, and any later instrument shall take precedence over an earlier instrument.*
>
> (b) *Powers of Trust Protector. The Trust Protector may exercise the following powers, at the sole discretion of the Trust Protector:*

(c) *To appoint successor trustees or co-trustees and remove and replace any trustee of such separate trust, in the manner and under the circumstances described in Article 5 hereinabove.*

(d) *To make a determination, upon the request of the trustee, of what constitutes reasonable compensation to the trustee.*

(e) *To change the domicile of the trust.*

(f) *To resign at any time by signed notice to the trustee.*

(g) *Subject to any plan created by me pursuant to the paragraph above, to designate any one or more qualified corporations, or any one or more individuals other than Disqualified Persons, as Co-Trust Protector or successor Trust Protector of this trust or any separate trust created hereunder, to act with or to succeed the Trust Protector consecutively or concurrently, in any stated combination, and on any stated contingency; provided that any such designation may be amended or revoked before the designee accepts office. The powers granted in this subparagraph may be exercised by a signed instrument filed with the trust records, and any later instrument shall take precedence over an earlier instrument. If any plan created under this subparagraph shall conflict with any plan created by me pursuant to the paragraph above, my plan shall prevail, whether it was dated earlier or later than the plan under this subparagraph.*

(h) *To distribute so much of the trust to any one or more of the Beneficiary's descendants, ancestors, siblings, or nephews or nieces in equal or unequal shares, as the Trust Protector shall appoint in writing delivered to the trustee.*

1.2 *Release by Trust Protector. The Trust Protector at any time acting may, by written instrument delivered to the trustee, irrevocably release any of the powers granted to the Trust Protector under this Article. If the Trust Protector irrevocably releases a power, such power shall thereafter no longer be exercisable by the Trust Protector or any successor Trust Protector.*

1.3 *Disqualified Person. The term "Disqualified Person" hereunder shall mean me, any person who has contributed property to such trust, any beneficiary of such trust, the spouse of any beneficiary of such trust, and any individual or entity who would be considered a "related or subordinate party" under Code Section 672(c) as to any of the foregoing such persons, had such person been the grantor of such trust (including without limitation such person's spouse, father, mother, issue, brother, sister, or employee; a corporation in which the stock holdings of such person and the trust are significant from the viewpoint of voting control, and any employee of such corporation; and a subordinate employee of a corporation in which such person is an executive).*

c. Relying on Statutory Provisions to Change Documents

If nothing else, we know how important it is to achieve flexibility IF state statutes allow this. Among the most convenient statutes are the decanting provisions. Documents should be drafted to allow trustees to take advantage of decanting, such as the following:

"Consolidation and Division of Trusts. In addition to the decanting powers granted under Florida Statutes Section 736.04117, the trustee shall have the powers set forth in this paragraph. The trustee may at any time consolidate any trust held under this instrument with any other trust if the beneficiaries of the trusts are the same and the terms of the trusts are substantially similar. Further, the trustee, in the trustee's absolute discretion, may divide a trust (the "initial trust") into two or more separate trusts and may segregate an addition to a trust (the "initial trust") as a separate trust.

Funding. In dividing the initial trust, if the division is to be effective as of my death or as of the death of any other person, the trustee shall fund each separate trust with property having an aggregate fair market value fairly representative of the appreciation or depreciation in value from the date of such death to the date of division of all property subject to the division.

Terms. A trust created pursuant to this paragraph shall have the same terms and conditions as the initial trust, and any reference to the initial trust in this instrument shall refer to that trust. The rights of

beneficiaries shall be determined as if that trust and the initial trust were aggregated, but (1) different tax elections may be made as to the trusts, (2) disproportionate discretionary distributions may be made from the trusts, (3) taxes may be paid disproportionately from the trusts, (4) upon termination the share of a remainder beneficiary (including any recipient trust) may be satisfied with disproportionate distributions from the trusts, and (5) a beneficiary of the trusts may disclaim an interest in one of the trusts without having to disclaim an interest in another trust. In administering, investing, and distributing the assets of the trusts and in making tax elections, the trustee may consider differences in federal tax attributes and all other factors the trustee believes pertinent."

Select the trust protectors carefully. 1. Someone the settlor trusts because of the broad powers the protector holds. 2. Someone who will not end up having a taxable power of appointment over the trust b/c of protector powers.

Example: Client, wife, transferred $10 million in assets to her husband. Husband later made gift to trust for children and named wife as trustee. Husband named his college roommate as trust protector. Once wife filed for divorce, trust protector removed wife as trustee and named a fraternity brother as trustee of a $10 million trust for children. We ended up in litigation.

Happiness Axiom 1: When clients hear the word "irrevocable and unamendable" they will nevertheless ask you in about T years to change their irrevocable trust. Coupled with exponential changes in technology, expected changes in tax laws, cultural changes, investment, wealth, and attitudes towards charities and money-with-children, documents should build in safety valves to change irrevocable trusts.

II. PROTECTING THE FAMILY'S ASSETS FROM NON-FAMILY MEMBERS; THE IMPORTANCE OF (FUTURE) CREDITOR PROTECTIVE TRUSTS

Typical trust structuring in the 1950s through 1980s for adult children focused on spendthrift trusts, as needed, special needs trusts, as needed, and staggered withdrawal rights for most adult children.[1]

Going somewhat unnoticed, the creative expansion of these boundaries in the last 20 years has been well perceived by clients, and operationally effective when administered.

This creative expansion focuses on the need for trusts for adult children to be protected from spousal claims, and protected from other creditor claims.

a. Drafting Creditor "Shield" Trusts

Consider discussing with the client the use of trusts for the children, with the children as their own trustee or better yet, co-trustee, to provide a creditor protection shield for funds left in the trust not needed for the child's consumption, as the child determines from time to time. Note the use of the word "shield," versus "insulation." These trusts are intended to balance flexibility to the child in terms of access to the principal, with some protection against creditors, although not a complete insulation.

b. How to Structure

For planning purposes, assume the client and planner has determined that a flexible creditor protection trust for adult children is desired. Therefore, the question becomes how close to the edge can the trust be pushed. For example, can the child be trustee? If so, must the standard be a narrow one related to health, support or maintenance? Or should the standard be expanded to "best interests?"[2] Each shift in adding more control to the beneficiary – as trustee, and then pursuant to an unascertainable standard—creates some decrease in creditor protection. How much will depend on evolving state law in this regard. And yet, this is the kind of decision that a client cannot be expected to make in an informed way. The practitioner, based on state law and knowledge of the client's family, has to recommend the format that should be used.

[1] For example, 1/3 at age 25, 1/3 at age 30, and 1/3 at age 35.

[2] "Best interests" is a scary standard for trusts controlled by beneficiaries for tax purposes, but perhaps not for creditor protection purposes.

c. Spendthrift Trusts: Much Ado about (Almost) Nothing, or Is It?

In discussing the creditor protection of trusts, practitioners almost always focus on whether the trust has a spendthrift provision and the protections afforded by the spendthrift provision. This is much like focusing on whether your MLB team finishes in 3rd versus 4th place. Instead, the focus should be on what is necessary to get to 1st place, with emphasis (as discussed later) on the discretionary provisions, trustees, and the absence of certain powers of appointment and withdrawal rights.

The spendthrift provision is relevant, ironically, not for the protection provided, but for its implications when a court holds it to be inapplicable—in that instance, creditors can reach in and often obtain assets then available to a beneficiary. For example, a court might hold that a spendthrift provision is rendered ineffective by an unlimited right of withdrawal, *see, e.g.*, *Frisch*, and then by implication allow a creditor access to the trust property by implying that the creditor can attach (in essence force) the beneficiary's exercise of that right of withdrawal in favor of the creditor (as discussed in section b below).

A spendthrift trust is typified by the following provision:

> *"Spendthrift. No interest under this instrument shall be assignable by any beneficiary, voluntarily or involuntarily, or be subject to the claims of his or her creditors, including claims for alimony or separate maintenance. The preceding sentence shall not be construed as restricting in any way the exercise of any right of withdrawal or power of appointment or the ability of any beneficiary to release his or her interest."*

But what does it mean, really? And how is it differentiated from the protection afforded by a discretionary trust?

d. The Genesis of the Spendthrift Trust

There was a time (during the Telephone Booth Dynasty) when mandatory income trusts, with no discretionary principal, were extremely popular. But now, other than functioning in the QTIP context, the mandatory income trust has fallen out of favor.

Instead, modern trusts are established with discretionary income and principal distributions pursuant to a standard, whether that standard is health, support and maintenance (for tax or non-tax purposes), or welfare or best interests, or in the total discretion of the trustee. The practitioner should be prepared to answer the question as to whether there is greater protection afforded a "spendthrift trust" versus a "purely discretionary trust." While the courts may view this differently, the difference from a protective perspective is marginal.

Here's why.

First, we cannot recall the last time we saw a trust drafted without a spendthrift provision. We would venture to say they are always in there, and they are an accompaniment to the protection offered by the discretionary feature.

Second, with a discretionary trust, the creditor protection is sound provided (1) the trustee does not make any distributions, (2) the jurisdiction does not have *Berlinger* – like rules, discussed, *infra*, and (3) the beneficiary (in the eyes of certain state courts) cannot force the trust to make a distribution (e.g., the beneficiary does not have a withdrawal right, or serve as trustee of a trust with an unascertainable distribution standard).

Third, the spendthrift provision merely prevents a third-party creditor from attaching the income or other interest by substituting himself or herself for the beneficiary of that income interest. For example, assume the beneficiary of a $100 spendthrift trust is entitled to all the income on a mandatory basis. A third-party creditor of the beneficiary cannot substitute herself for the beneficiary to satisfy a debt or creditor interest. However, once the trustee makes a distribution to the beneficiary, the funds are in the beneficiary's hands and can then be reached by the creditor.

With a discretionary trust, created by a third party, the general rule is that a creditor cannot force the trustee to make a distribution. [3] Therefore, the creditor cannot effectively substitute in as the beneficiary. Because no mandatory distributions

[3] *See*, *e.g.*, section 504 of the Uniform Trust Code (regardless of whether the trust has a spendthrift clause, a trust with a distribution standard prevents a creditor of the beneficiary from reaching the beneficiary's trust interest). *See also* section 60 of the Restatement of Trusts (Third) (A transferee or creditor of a trust beneficiary cannot compel the trustee to make discretionary distributions if the beneficiary personally could not do so.) While a creditor could argue "abuse of discretion," we would posit that a reasoned decision against making the distribution would not be an abuse of discretion if the standard is

are required to be made, in a purely discretionary trust, a creditor would have no interest absent the trustee making, or being "required to make," a distribution to the beneficiary.

Happiness Axiom 2: **Focus on the discretionary provisions in a trust in determining creditor protection, rather than relying solely on the spendthrift provision for any great creditor protection. For example, as a rule of thumb, a purely discretionary trust, with no mandatory income interest, has in effect more relevant creditor protection than a mandatory income trust coupled with the typical spendthrift provision.**

e. But a Spendthrift Trust Does Allow the Trustee to Play a Game

It boils down then to the following. A spendthrift clause in a discretionary trust provides a practical layer of creditor protection in that creditors "may not reach the …distribution …before its receipt by the beneficiary." *See, e.g.,* section 502 (b) of the Uniform Trust Code. This has two practical results.

First, courts (see all case law discussed here) often allow third-party creditors access to trust funds, ignoring fiduciary constraints on discretionary distributions, whenever they find the spendthrift clause is rendered ineffective. Those same courts may ignore the discretion to the trustee and the trustee's fiduciary obligation in exercising that discretion. For example, where the beneficiary and trustee are the same person, subject to a discretionary standard for distribution, the court may conclude that that degree of control renders the spendthrift clause dysfunctional (ineffective is the actual word), and then imply that a third-party creditor can reach into the trust and obtain the trust property. This condenses what is truly a two-step process into one.

Step two should be: Has the trustee exercised, or must the trustee exercise, its discretionary authority? Focusing on the spendthrift clause often causes a court to conclude that it can override this second step. Therefore, right or wrong, practitioners should try to preserve and argue for the application of the spendthrift clause.

Second, if the spendthrift clause is valid, then trustees may then try to use funds for the beneficiary's benefit by making a distribution to a third party, or may make a distribution to a beneficiary that requires the creditor to go after the distribution after it is in the hands of the beneficiary.

If the trustee then makes distribution to a third party for the use of the beneficiary (e.g., to pay down the mortgage on the personal residence that perhaps has already qualified for the homestead exemption), in most jurisdictions the creditor will not be able to pull back that distribution for the creditor's use. However, evolving case law may give creditors greater rights even here, including obtaining a garnishment order under state law. *See, e.g.,* Florida section 736.0504 and *Berlinger, infra*.

Happiness Axiom 3: **Using the spendthrift provision, in the event that there are creditors, the trustee can undertake two approaches. First, discuss a compromise on the debt with the creditor since the creditor may be waiting a long time for a distribution to the beneficiary; that compromise could be twenty or thirty cents on the dollar. And second, without a compromise, to consider making all distributions "for the benefit of" (to third parties) of the beneficiary while, at the same time, allowing the beneficiary to enroll in the FBI witness protection program for relocation.**

f. How Protective from Tort Creditors are these Trusts?

Generally, English law has provided protection against beneficiaries' creditors in third-party created discretionary trusts.

A recent article by Professor Kent Schenkel, "Trust Law and the Title-Split: The Beneficial Perspective," provides a James Thurber-like stream of consciousness analysis as to why beneficial interests in trusts should not be entitled to the protections afforded under State law. Although his argument has not been accepted by courts, the evolving court attitudes certainly favor eroding the creditor protection afforded by third-party trusts.[4]

"may," not "shall." The Restatement goes so far as to suggest that the existence of a creditor should create a strong argument supporting fiduciary discretion against making distributions. Section 60, Restatement, *infra*, "a trustee's refusal to make distributions might not constitute an abuse as against an assignee or creditor" even when it would constitute an abuse if there had been no creditor.

[4] In this snooze-fest piece, after dragging the reader through a rather dull history on trust law, the author reaches his main argument, that "trusts dodge the intent of the law by shirking legal responsibilities corollary to ownership of property, all to the advantage of the trust beneficiary." Since this argument is directly contrary to what is desired by practitioners and what is

Common law dictates the following. A self-settled trust is entitled to no creditor protection.[5] That is, under common law, one cannot create an irrevocable trust, be the beneficiary, and then argue that the funds are free from that beneficiary's creditors because the trustee has "discretion" whether to make distributions. Evolving state statutes are, in contrast, providing protection to these self-settled trusts, and the level of that protection is discussed in section 6.

Alternatively, a discretionary trust created by a third party ("third-party settled trusts"), such as a parent for the child, is generally entitled to creditor protection as to that (child) beneficiary. Even when the beneficiary is also the trustee, but subject to limited standards as to distribution (such as health and education), that beneficiary's interest may also be protected from the beneficiary's creditors.

The uncertainties develop in that the laws and judicial results are constantly evolving in each of the 50 states, sometimes favoring protecting the beneficiary and sometimes against, as they apply to third-party settled trusts. For example, a jurisdiction may permit a third-party settled trust to have the beneficiary as trustee, allow distribution discretion tied to a health, support, welfare or best interests standard, and still prevent that trust from being attachable by the beneficiaries' creditors.[6]

Consider Illinois law. Illinois law used to be clear that as to a third-party trust, the beneficiary could be trustee and have discretion to make distributions pursuant to an ascertainable standard,[7] while the trust remained free of creditor claims.[8] Illinois law was ambiguous with regard to whether a broad standard, "best interests," with the beneficiary as trustee, protected the beneficiary from creditors.

Demonstrating how state law in this area is rapidly evolving, recently even the limited standard was called into question. In the case of *McCoy v. McCoy* (274 B.R. 751) (2002), a surviving spouse was the beneficiary of a family trust created by the predeceased spouse. The family trust provided, in part:

> *The trustee may in its discretion pay to my spouse, or for his benefit, so much or all of the principal of the Family Trust as the trustee from time to time determines to be required or desirable for his health, maintenance and support. The Trustee need not consider the interests of any other beneficiary in making distributions to my spouse or for his benefit.*

Under Illinois law, the above standard is an ascertainable standard and would facially be considered sufficient to prevent creditor demands that the trustee make a distribution so that the creditor could satisfy its judgment. The court confused the concept of a discretionary trust with that of a spendthrift trust, albeit its error in nomenclature may not be relevant. That is, the court determined that the standard -- whether the discretionary right to principal meant just that -- was whether:

> *"[T]he beneficiary does not have unregulated dominion and control over or right to distribution from trust for the trust to qualify as a valid spendthrift trust."*

The court held that even with an ascertainable standard, the use of the word "desirable" indicated that "the settlor intended Debtor to have complete dominion and control over the corpus." Though the language would be interpreted by most planners as ascertainable, the court held that the standard was not ascertainable. Therefore, the court concluded that a creditor in bankruptcy could obtain the interest in the trust of the beneficiary, and that interest was the entire trust.[9]

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allowed and reflected by State law, by the trust restatements, and by judicial precedent, there should be caution by the practitioner in accepting an argument challenging that conclusion.

[5] In recent years, this common law rule has been eroded with the advent of state laws, such as those of Delaware and Alaska, allowing self-settled trusts to have a certain degree of creditor protection.

[6] By attachable, I mean that a creditor can force the trustee to exercise discretion to make a distribution. Once a distribution is made, a creditor can try to obtain the funds from that distribution.

[7] By analogy to Code section 2041, one related to "health, support, maintenance, and education."

[8] If the Trust had only used the terms "[as] required [for] health, maintenance and support", such a standard limiting discretion would likely be acceptable under Illinois law. Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131 (1933) (intimating that a discretionary provision would have placed sufficient restriction on the beneficiary if it had used "comfort" alone to limit the beneficiary's access).

[9] Because the Debtor "in bankruptcy has the unfettered ability to possess and own [it]," the trust property is "therefore not protected by the exclusionary language of Section 541(c)(2). *In re Rolfe*, 34 B.R. at 161. Accordingly, the Trust property belongs to the bankruptcy estate and the Trustee will be granted Summary Judgment on Count IV of his Complaint on Count

The *McCoy* holding indicates that under Illinois law, even a standard relating to health, support or maintenance can subject a third-party settled trust to the creditors of the beneficiary. But in those Illinois cases, a key fact is that the beneficiary was also the trustee, a bad fact as discussed in more detail below. Though the court focused on the use of the word "desirable,' I do not think the result could have been eliminated by the use of the word, "necessary," rather than "desirable."

Instead, the focus seems to be on whether the beneficiary was also the trustee. For example, in *Hawley v. Simpson* (Bankruptcy Court, CD Illinois, No. 02-83674, 2004), the debtor's ability to access the trust funds, or to control the timing or manner of distribution, such as in the debtor's capacity as trustee, rendered the spendthrift provision ineffective and made the trust funds available/reachable by the creditor.

Other states' courts also reflect this view. In *Dollinger v. Bottom*, 176 B.R. 950 (N.D. FL 1994), the debtor's interest was in trust to be paid to the debtor as the trustee determined to be for the "support, care, comfort and maintenance" of the debtor. In other words, this trust should have been protected until the trustee exercised its discretion to distribute principal. The debtor was the sole trustee. As a result, the court reasoned, incorrectly (because it was ignoring Bottom's fiduciary duty to the remainder beneficiaries) that "the only one that can guard Bottom from his own improvidence is Bottom himself." This dual capacity, beneficiary and trustee, rendered the spendthrift provision obsolete and allowed creditor access to the trust.

As another example of the judicial confusion caused when a beneficiary serves as the trustee, see *Strong v. Page*, 239 B.R. 755 (W.D. Mich 1999), in which the court invalidated the spendthrift clause when the trustee and beneficiary were the same person, reasoning that there is a merger of legal title. In that case the trust by its terms had terminated, so the trustee was merely holding title pending termination. In that context, the court's holding was correct; but if the trustee were not entitled to distribute the principal except according to a standard (HEMS for example), the court's holding would have gone too far.

Even actions by a beneficiary in his capacity as beneficiary can be interpreted to allow a creditor access to the trust. For example, when a beneficiary dictates the figurehead-trustee's actions (even if the beneficiary has no right under state law to control the trust), that may render the spendthrift clause ineffective and the trust corpus susceptible to creditor attachment. For example, in *Richardson v. McCullough,* 259 B.R. 509 (Rhode Island, 2001), the debtor was not the trustee. In what I would regard as dicta (since the beneficiary had an outright interest in the trust, once the third-party trustee wrapped up administration), the court indicated that the trustee took all actions under the beneficiary's "direct, unsupervised control." "[I]t is clear that the Debtor exercised sufficient control and dominion over the Trust funds to invalidate the spendthrift trust provision," and to make the trust subject to his creditors. *Infra* at 25.

The ultimate judicial or statutory result does not matter too much for the planner. The planner cannot draft for evolving laws in this area. Rather, we have to understand the laws in place at this time, and create a situation for the strongest argument that the beneficiary's interest is free of creditors. Further, we should not hesitate to encourage a beneficiary from resigning as trustee, even after creditor issues arise.[10]

This is a win-tie strategy. If the trust is effective for tort purposes, the beneficiary benefits; if not, the beneficiary is in the same position as if no trust existed. The key here for the practitioner is avoiding over-representing what these trusts do and don't do.

Consistent with the argument made by author Schenkel, *infra,* courts have begun to erode the common law creditor protection of third-party created trusts. There have been specific trends where courts or specific state statutes will force the trustees to make (attachable) distributions to the beneficiaries, even in third-party created discretionary trusts.

These include distributions to satisfy support decrees, whether in the form of child or spousal (primarily ex-spouse) support. *See, e.g., Estate of Creamer*, 41 Pa. D. & C. 377 (2014) (support obligations to a beneficiary's child recognized as exception to spendthrift protection by case and statutory law, and in dicta, similar support obligations to a spouse

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I of the Interveners' Cross Complaint, and on Debtor's Cross Motion for Summary Judgment on those Counts." *Cf.* section 60 of Restatements of Trusts (3rd).

[10] A resignation does not mean there is a fraud on creditors. Given that the whole area on trustee/beneficiary/discretionary principal distributions is uncertain, taking an action that makes the result more certain is not a fraud on creditors. Resigning as trustee is in the whole a different genre than a troubled beneficiary transferring assets from the beneficiary to the beneficiary's spouse.

recognized). *See also Ventura County Dept v. Brown*, 11 Cal. Rptr. 3d 489 (2004) (citing both California statutory and case law as allowing exception to spendthrift protection to provide for support Orders to spouse or child).

The UTC in essence voids the spendthrift protection and attaches the beneficiary's interest, but still requires the creditor to overcome a trustee discretionary distribution standard even if the creditor has a court-ordered spousal or child claim (e.g., the creditor must show that the trustee should exercise its discretion to make the distribution; a showing of an abuse of discretion can force the trustee to make that distribution to the creditor).

For an intelligent (in my view) discussion of what it means for spendthrift protection to be unavailable, see Florida Trust Code section 736.0503 and 736.0504, and *Berlinger v. Casselberry* 133 So. 3d 961 (2013). The Florida statute reflects the public policy of most states in indicating that spendthrift protection is not enforceable against a court-ordered child or spousal support determination. But, according to the court's interpretation of the same statute, the creditor (spouse or child) may not "compel a distribution that is subject to the trustee's discretion or attach or otherwise reach that interest." Instead, (somewhat bizarre) a spouse or child can obtain a writ of garnishment against disbursements made by a trustee.

A garnishment in law can mean two results. First, it can embellish the taste of any argument.[11]

Second, a "writ of garnishment" is an order requiring a third-party to withhold some type of property (usually money) of the defendant's (also called the "garnishee" or "judgment debtor") for delivery to a creditor to whom they owe an overdue debt. It means that the creditor can tell the trustee, in effect, "any time you want to make a distribution to or for the benefit of my deadbeat husband, your beneficiary, you have to give it to me first."

Happiness Axiom 4: **Third-party created trusts are intended to preserve separate property as separate property. Those trusts should be effective for those purposes, even under evolving (unfortunately and incorrectly) statutes eroding a certain amount of protection. Judges may look at these trusts in providing equitable reasons for giving the non-moneyed spouse, the other spouse, a greater share of marital property, or increased maintenance amounts. And these trusts may be accessible to pay for unpaid maintenance obligations. To increase protection of these trusts, consider moving the situs and trusteeship of the trust to a jurisdiction that is more protective of these trusts, say Alaska, Delaware or Nevada; and avoid California or Minnesota, for example.**

Not all jurisdictions will support this court involvement, but the trend is to provide those distributions.

Further, distributions for tax purposes, to satisfy federal tax liens and amounts due, have certainly been mandated by courts. [12]

Also, the Restatement of Trusts (Third) provides that third parties who provide necessities to or for the benefit of trust beneficiaries may reach the trust interests of the beneficiaries.[13]

In the continuing downward erosion of creditor protection, the Restatement of Trusts (Third) contemplates that the spendthrift and other protection of these trusts should be voided on certain public policy grounds. These would include consistent tortious conduct[14] and direct harm to the trust which is seeking to be protected.[15]

Nevertheless, when advising clients, these trusts are still effective shields, in the event of divorce or for typical third-party creditors bringing tort or contract cases against the beneficiary. The question is then one of structuring.

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[11] Really bad pun there. Okay, that first meaning is nonsense, as you no doubt realize before you read this footnote.

[12] *See, e.g.*, Restatement (First, Second or Third) of Trusts, section 58. See also UTC, section 503.

[13] Restatement (Third) of Trusts, section 59(c).

[14] I would think one tort would be enough, versus "consistent" tortious behavior.

[15] Restatement (3rd) of Trusts, section 59 ("The nature or a pattern of tortious conduct by a beneficiary ... may on policy grounds justify a court's refusal to allow spendthrift immunity to protect the trust interest."). Under the UTC, *infra*, tortious conduct may not be sufficient to erode the protection. *Cf. United Mine Workers of America v. Boyle*, 567 F.2d 112 (1977) (intentional diversion of pension funds not an act sufficient to abrogate spendthrift provision). *But see Sligh v. First National Bank of Holmes County*, 704 So. 2s 1020 (1997) that reaches into a trust when the beneficiary was convicted of a drunk driving felony and a civil judgment thereafter obtained.

g. Drafting Creditor "Shield" Trusts

Consider discussing with the client the various trustee alternatives to provide a creditor protection shield for funds left in the trust not needed for the child's consumption, as the child determines from time to time. Note the use of the word "shield," versus "insulation." These trusts are intended to balance flexibility for the child in terms of access to the principal, with some protection against creditors, rather than completely insulating.

For planning purposes, assume the client and planner have determined that a flexible creditor protection trust for adult children is desired. Therefore, the question becomes how close to the edge can the trust be pushed. For example, can the child be trustee or a co-trustee? If so, must the standard be a narrow one related to health, support or maintenance? Or should the standard be expanded to "best interests?"[16]

Happiness Axiom 5: **Because powers of withdrawal or general powers of appointment (express) will under case law allow creditors to access that power, see, e.g., Frisch, infra, eliminate lifetime powers in these trusts for a beneficiary.**

The next question is the standard for distribution, as well as the selection of the trustee. The answer is a strange intersection of case law, practitioner bias, and client receptivity.

Case law: do not have the beneficiary as trustee; do not have enforceable beneficiary rights to principal (e.g., avoid the trustee "shall," and favor "may"). The recent Illinois case, *In re Lunkes*, No. 09 B 00583 (Bankruptcy, ND Ill, 2009), highlights this result by holding no spendthrift protection is afforded when the trust instrument has a "shall" direction to the trustee (the trustee "shall" distribute the following amounts to the beneficiary) versus "may."

Practitioner bias: Create absolute creditor protection, versus, the other end of the practitioner bias spectrum; allow the beneficiary essentially unfettered access.

Client receptivity: "I want my children to have access to the funds."

Do you as the practitioner feel like King Solomon? Well, for those of us grey in the temple (hair), we know this is exactly what the clients want-provide them practical advice as to what they should be doing.

Happiness Axiom 6: **In drafting the discretionary standard for distribution, make sure to use the word "may" after trustee, versus "shall." Also, given the Illinois McCoy case, infra, I am not as focused on ascertainable standards as I am on who is the trustee. Therefore, revert to an unascertainable standard in most of these trusts.**

Happiness Axiom 7: **Consider an evolution to a completely discretionary trust. The world of thoughtful trust standards has paradoxically tipped in a toxic direction. In those cases in which the grantors wanted a HEMS standard, a rather limited one related to health, support and maintenance, somehow courts have focused on the "support" aspect of this to achieve rather unintended consequences from the grantor's perspective, especially in the creditor world. Accompany unlimited grantor discretion with careful trustee selection (committee of trustees) and precatory letters of intent.**

The question of trustee is then the remaining conundrum. Ideally, we would like it be someone other than the child, the Generation Two (G2 as has become popular estate planning lexicon. We are a funny group of practitioners).

Most clients want it to be the child.

We know from evolving case law that courts could force a trustee, who is also a beneficiary, to make a discretionary distribution to the beneficiary in order to satisfy a creditor. For example, under the Restatement of Trusts (Third), section 60, paragraph (g), the creditor can reach the "maximum amount the trustee-beneficiary can properly take." In the example under that paragraph, the creditors are able to reach out of the trust, when the beneficiary/debtor is the trustee, "the maximum amount of trust funds that [the debtor] may, without abuse of her discretion, distribute to herself for authorized purposes." The spendthrift provision would not offer a restraint, according to the comment in paragraph (g).

Hmmmm. Creates a bit of a conundrum, maze, inconsistency, and other words that mean the same thing. Discussing the options with clients will be much like discussing portability during the life of husband and wife. Client: "So, the question

[16] "Best interests" is a scary standard for trusts controlled by beneficiaries for tax purposes, but perhaps not for creditor protection purposes.

is whether I should try to get an increase in basis in my assets after I am dead, and before my wife dies, versus perhaps saving more estate taxes, but this depends on the law and changes in the law and investment returns and consumptions. You know Lou, it's Friday afternoon, and I am not that gleeful about discussing my mortality. So on the portability issue, I have an idea. You are fired."

Personally, I like the beneficiary as trustee, with the understanding that the beneficiary could resign as trustee prior to a creditor event occurring, or when the trust is created, the beneficiary (who then has creditor issues or who thinks he or she may) can just decline to act. For those clients with adult G2s, this gives the practitioner the opportunity, if the client consents, to discuss the future planning with those adult children.

But even in this case, a court may look askance at the declination or resignation to act and hold that once that power was available, any actions thereafter taken are ignored. *See, e.g., Bottom, infra* (implying that resigning as trustee would be ignored for purposes of determining the trust's creditor protection).

An alternative would be a co-trustee situation, with the beneficiary having participation rights only as to ascertainable distribution decisions, and the co-trustee having rights as to discretionary distributions for "welfare or best interests." *See, e.g., In re Schwan*, 240 B.R 754 (Minn 1999) (holding trust protected from creditors because of co-trustee and because of fiduciary duties to follow terms of trust and distribution standards). *See also McCauley v. Hersloff*, 147 B.R. 262 (M.D. Fla 1992) (Discretion to make a distribution rested in multiple trustees, of which the beneficiary was only one; therefore, spendthrift protection valid. "Moreover, in exercising that discretion each trustee has a fiduciary obligation to the remaining beneficiaries"); Restatement of Trusts (Third), section 60 (no forcing of distributions if the beneficiary is merely a co-trustee, and the other co-trustee has fiduciary obligations to other beneficiaries, which would almost always be the case).

And the most protective strategy? Not naming the beneficiary as trustee at all. Note that not acting as trustee is a good step, but not sufficient if the beneficiary can indirectly appoint himself as trustee. For example, in *In re Baldwin*, Bankruptcy Court, Ohio, No. 2-88-05792 (1992), the court first acknowledged Ohio law that there was no spendthrift protection (and the trust could be poached by creditors) if the beneficiary is the trustee, or if there are withdrawal/revocation rights (the court used "revocation" but clearly also meant withdrawal), or if "the beneficiary has [other] dominion and control over the trust." In that case, the trust limited the debtor to replacing the third-party trustee with a corporate trustee. But then the court hypothesized that the debtor could theoretically create a corporation that the debtor controlled, remove the trustee, and replace that trustee with the debtor-controlled corporation. And in that way the debtor had the ability "to exercise dominion and control over the trust," rendering the trust susceptible to creditors.

Recognize that the courts are generally offended by debtors, and therefore will do whatever necessary to mess with the computer program so that the spendthrift protection, and inability to access the trust, gets an error message; such that the trust becomes available to the creditor for reimbursement.

I tend to think that co-trustee situations are the best today for most trusts, for a variety of reasons: assisting in the administration, allowing tax planning if the co-trustee is a knowledgeable tax practitioner, allowing accountability, providing a sounding board, creating plausible deniability when someone asks a beneficiary for money, avoiding mistakes, and for a few more (that I will not bore you with).

Happiness Axiom 8: Going forward, try to have the creditor protection trust for a G2 have both the G2 plus another as co-trustees. If not achievable, live with the G2 as sole trustee and recognize that there may not always be complete creditor protection.

h. The Shelf Product

The practitioner, based on state law and knowledge of the client's family, has to recommend the format that should be used.

Drafting Example: (The Adult Creditor Shield Trust)

Child's Separate Trust

Any trust property allocated for a child of mine subject to the Child's Separate Trust withholding provisions shall be added to or used to fund the principal of a Child's Separate Trust for the child. The trustee shall administer each Child's Separate Trust as follows:

Section 1.01 Discretionary Payments of Income and Principal. During the child's lifetime, the trustee may pay to the child so much of the income and principal as the trustee from time to time considers necessary for the health, education, support, maintenance in reasonable comfort, welfare, or best interests of the child. Any income not so paid in each tax year shall be added to principal at the end of each tax year.

Section 1.02 Power of Appointment at Death. On the death of the child, the trustee shall distribute the principal to any one or more persons or organizations (including the child's estate) as the child appoints by Will, specifically referring to this power of appointment.

Section 1.03 Distribution on Termination. On the death of the child, the trustee shall distribute the Child's Separate Trust not otherwise effectively appointed as follows:

(a) Any Descendant Living. If the child has any descendant then living, to the child's then living descendants, per stirpes; or,

(b) No Descendant Living. If the child has no descendant then living but I have any descendant then living, to the trustee to allocate in shares of equal value for my then living children, subject to the Child's Separate Trust withholding provisions hereof; provided that if a child of mine is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the child, if living, per stirpes to the child's then living descendants.

i. Cutting Back the Creditor Protection Trust to a Creditor "Annoyance" Trust

Further, coordinate the trustee provision so that a child at a certain age can get control over this creditor protection trust, in the child's capacity as a co-fiduciary, or even as sole fiduciary.

Drafting Example: Child as Trustee of Creditor Annoyance Trust

Section 1.04 Trustee of Child's Separate Trust. Notwithstanding any other provision, upon attaining age thirty (30), each child of mine shall have the following powers with respect to the Child's Separate Trust established for the child's benefit under this instrument:

(i) Co-Trustee. The child shall have the right to appoint himself or herself as co-trustee.

(ii) Remove and Appoint. The child may remove any trustee at any time by a signed instrument, but only if, on or before the effective date of removal, a successor trustee (other than the child) has been appointed by that child or at least one trustee will continue to act after the removal.

III. SPOUSAL ASSET TRANSFERS

a. Advocacy of Changing Title Between Spouses

Since 1982, planners have had to discuss with spouses the need to shift assets to the non-propertied spouse to allow for that spouse to have assets to fund the credit shelter trust, in the event that spouse predeceased the other. With portability, that shifting of assets is no longer necessitated to protect use of the exemption. Because of concerns over how a shift in title may affect property rights on divorce, this area of discussion becomes more difficult. Perhaps asset transfers to allow credit shelter funding will be ignored by planners.

b. Funding of the Credit Shelter Trust

Percolating out there in estate planning since 1982 has been the concern about retitling assets to allow the funding of the credit shelter trust at the first spouse's passing. With the estate tax exclusion reaching $600,000 in 1984, planning often required a retitling of assets from one spouse to another to ensure that when the first spouse passed away, there would be sufficient assets to fund that spouse's credit shelter trust.

Example: Circa 1984, husband had assets consisting of a $600,000 house, an IRA of $1,000,000 and marketable assets of $800,000. Wife had no assets in her name. During the estate planning discussion, the planner recommended that

either the house or a portion of the marketable assets be titled in the wife's name, to ensure that wife's $600,000 credit shelter trust was funded in the event she was the first spouse to pass away.

The often glossed-over concern was whether the change in title of assets, from husband to wife in the above, affected the separate/marital/non marital/community nature of the property for divorce purposes. Given the importance of avoiding estate taxes and the justification for doing so pre-portability, that marital concern often took a back seat to the actual need to reallocate for estate tax purposes.

c. Portability

Portability – the concept of allowing the surviving spouse to in essence "inherit" the deceased spouse's estate tax exclusion -decreases the necessity of reallocating assets as between spouses to maximize the use of the estate tax exclusion. A determination of whether to rely on portability is itself a sophisticated analysis, but now the marital/non marital concerns related to asset transfers between spouses needs to be considered further because no longer is it a necessity to transfer assets to ensure full use of the estate tax exclusion.

d. Titling

Titling is possession. And possession is nine tenths of the law, but not one hundred percent. And, titling does not in and of itself determine whether property is marital or non-marital.[17]

Example: During marriage, wife is the sole breadwinner, and titles all earnings in her own name. Despite owning all assets, these assets are marital/community because they were earned in the traditional sense (not from separate assets) during marriage.

The issue that needs to be examined, however, is whether a change in titling transmutes the nature of the property from one classification to another.

Example: If husband brings into the marriage $1,000,000 of separate assets, and during the marriage gifts those assets to his wife, has that gift changed the nature of the property from the husband's separate property to the wife's separate property? Yes, if the husband intends to make this distinction via the gift, possibly no, if the intent is merely to change title for estate planning purposes (discussed below).

e. Linked Together by Marriage, but My Assets Remain Mine

States either classify property as either 'marital property' or 'non-marital property,' or as 'community' or 'separate.' Property classified as marital/community is property that both spouses will in essence share in the event of divorce.[18] Property that is classified as separate is awarded to the owner-spouse.[19]

With spouses retitling their assets for planning purposes as between their trusts, or schedules to their trusts (e.g., in a joint trust, separate property of wife being re-scheduled as separate property of husband), the analysis is whether the transfer results in the property losing its character as wife's separate property.

In making the determination as to whether the character has changed, a court may review whether the parties **intended** to make a gift from the one estate to the other, thereby transmuting from one classification to another.

Therefore, a change in title from (i) one spouse to both spouses jointly, from (ii) both spouses to one spouse, from (iii) one spouse to the other spouse, or from (iv) both spouses jointly to one spouse, will at a minimum garner scrutiny on property division in divorce.

The question then, in 2018 (and since 2012) is whether the practitioner wants to get into the potentially aggravating situation of having to defend a transfer of property when title shifts from one spouse (his or her separate property) to another (is this the new spouse's separate property) for purposes of potentially funding the credit shelter amount at the first spouse's passing.

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[17] The title system to determining property in divorce has been changed by state equitable distribution statutes. *See*, *e.g.*, Morgan, "When Title Matters: Transmutation and Joint Title Gift Presumptions" 18 Journal on Matrimonial Lawyers 33 (2003). Title has theoretically become rendered inconsequential.

[18] Timing is not critical here, so that in community property each spouse may already own ½ of the property pre divorce.

[19] The courts often find 'equitable' methodologies as an end around, such as awarding alimony, requiring reimbursement, and applying various equitable doctrines, such as marital energies doctrine; that the effort of one spouse helped enhance the value of the non-marital property of the other spouse. Separate property assets are generally defined as property acquired before the marriage, or by gift or inheritance, or are protected under the terms of a valid agreement between the parties.

Post 2012, the answer may be "no."

<u>Happiness Axiom 9</u>: With portability, the absolute funding requirement for each spouse to have $11 million is reduced. Now the practitioner can focus a bit more on the effects of divorce on a change of titling, and perhaps not shift title as often as we used to have to. We suspect that changing title to assets for future testamentary funding will be occurring less frequently in the future.

IV. <u>I LOVE YOU, BUT AM NOT IN LOVE WITH YOU</u>

a. <u>Darth Vader Calling</u>

Really bad "potential" clients remind me of Fawn Leibowitz from <u>Animal House</u>. We are one kiln accident away from being business-engaged to that client for a long time. Where's the malfunctioning kiln when you need one?[20]

One incident I remember quite vividly. A potential client with substantial net worth had requested I advise him as to how most effectively to use the lifetime credit at year end. With this potential client, I discussed partnerships and discounted gifting to maximize the use of the credit. As December approached, I emphasized to him the need to put a strategy in place (if he was going to before year end) as soon as possible so that we could get it done by year- end. He promised he would be right back to me as to whether to proceed or not.

On December 23, my receptionist frantically tracked me down to indicate that Ted (let's call the potential new client by that name) was on the phone and needed urgently to talk to me.

The conversation went something like the following:

"Lou, this is Ted. I am riding on a chairlift at Snow Valley right now; and chatting about estate planning with the dude in the chair next to me. Just met him on the way up the mountain. He indicated that his estate planner recommended blah, blah, blah strategy for use of the credit. I want to know **why we are not doing that**. You never suggested that. What were you thinking, or not thinking? Explain yourself!"

I had this vision in my mind. What was the name of that movie where the chairlift comes crashing down? In addition to this vision, many verbal responses floated in and out of my mind, like detritus and flotsam washing onto a polluted beach. One response was not going to happen, and that was to mollycoddle or vindicate Ted's need to discuss the strategy. My response, instead, went something like the following:

"Ted, at this point, we are going to have to decline your representation. I enjoyed meeting with you [a prevarication, but probably allowed under the 'politeness allows for mendacity' rule] but we will not be able to handle your matters. Have a nice ski trip. Bye."

In hanging up the phone, my mood could not have been better. We underrate the joy of saying no to Darth Vaders.

b. <u>The 90/10 Rule</u>

The 80/20 rule is well known by estate planners: 80% of our revenue comes from 20% of our clients. We are not as focused on the 90/10 rule, primarily because I just made it up.

That rule indicates that 90% of our aggravation in our practice life comes from 10% of our clients, that is, bad clients or bad projects. And by "bad" I mean something a tad more painful than the pain that comes from jamming a sharp stick in your eye.

Since we control variables, new projects and new clients, understanding of the 90/10 rule can actually increase our happiness. But this means we have to be strong and not select those 10% clients or matters.

[20] For those unfamiliar with the reference, Ms. Leibowitz died in a kiln explosion, while purportedly crafting a bowl for her fiancé, who actually did not exist. Very complicated stuff.

c. Using Common Sense to Avoid the Vortex of Pain

Usually, listening carefully during the initial telephone call, or sending out a questionnaire and reviewing that carefully, will provide clues as to client matters for which a "no" should be immediate.

Examples are common place, such as being the prospective client's third attorney in a representation: "I didn't love them, but in 5 minutes, Lou, I know you are my guy." Hmmm. This was usually the kind of statement heard on a date when I would excuse myself to go to the bathroom, detour and exit through the kitchen, and begin changing my phone number.

Other clues are a bit more subtle, but if we pay attention to the clues, we can do well to avoid certain representations. At the initial meeting, listen carefully to the buzz words and concepts that will make you want to dismiss a potential client. These include the ones on the list below:

i. The prospect has had too many lawyers before you, and may even refuse to name them. Or, worse, wants to consult with you about how and why he should not pay his prior attorney.
ii. The prospect thinks all previous lawyers were "idiots," or makes otherwise derogatory statements about lawyers in general.
iii. The prospect cannot demonstrate he/she can pay for the cost of your services, balks at paying a retainer, and/or asks for a special reduced rate or payment terms up front.
iv. WANTS TO BE NOT JUST A PRIORITY, WHICH ALL CLIENTS ARE, BUT THE SOLE AND PRIMARY PRIORITY. WITH THESE CAPS, DOES IT SOUND LIKE I AM SCREAMING AT YOU? SORT OF LIKE HOW THIS CLIENT MAY SOUND.
v. You do not agree with the prospect's legal position.
vi. You do not believe the prospect is being truthful.
vii. The prospect is VAV (vindictive, angry and vengeful).
viii. The prospect is a family member.
ix. The prospect indicates they know the law and what they want to do, and just wants the attorney to do the front end work for them.

Happiness Axiom 10: **Life is short and should be accompanied by smiles, not frowns. We are in control of this emotion and adherence to the 90/10 rule will have a strong influence on getting us to the happy face.**

V. MONETIZE YOUR PRACTICE, NOT YOUR LIFE. UNDERSTANDING CORRECT BILLING PRACTICES.

a. Overview

The section discusses billing methodology and practice styles in an effort to solve the following equation -- Imagine a good you purchased - car, TV, hockey stick, fishing pole, boat, plane -- that was so outstanding that after the purchase, you felt good about buying it, regardless of its cost. If we want a longstanding relationship with a client, we want the client to view payment for our services along these same lines. This segment focuses on how our billing protocols can be improved to achieve this level of satisfaction and appreciation.

We practice law because it is interesting, challenging, we are good at it, and we are professionals. We also practice law because it is our business. As our business, we should rightly expect that fees charged should equal fees collected. And a certain amount of indignancy should accompany those fees that go uncollected. But also a certain amount of blame must remain with the practitioner as to uncollected fees. Did the practitioner follow a Best Practice approach in the fee presentation and collection process?

Little useful information has been written in this area as it pertains to estate planning. This paper is intended to be a starting point as to a Best Practices primer on the fee area as it relates to estate planning.

b. Understanding What is Needed to Improve Billing

Pre mortem estate planning refers to tax planning, Wills, living trusts, GRATs, education trusts, and all other matters that we do for clients while they are living. Bills are sent directly to those individuals who have requested our services, to deal with a topic that is very painful, albeit important -- Where does the Property that I have worked Hard for During My Life go when I Die?

It's not hard to understand why clients are reluctant to engage in estate planning. It is not a fun topic. Re-read the prior underlined sentence and ponder it a bit.

Therefore, even when we add significant value, say, saving $5 million in future estate taxes, a bill currently of $25,000 may seem repugnant. A bill currently for $10 may also seem repugnant. It's the process of what they are doing, not necessarily the value added, that is painful for clients to accept.

With that understanding in mind, what are the best billing practices? To understand the answer, one has to begin thinking out of the box as to practices. We should recognize (or agree) that current billing practices are subpar and done because (of what is known, as will be discussed in great detail below, as a status quo bias) they were done before.

Hypothesis 1: There is nothing rational about consumer behavior. As practitioners, we are often not thinking about our billing practices in the most strategic way.

Hypothesis 2: Practitioners spend about 10 % of the amount they should on billing, and disregard its importance to clients' happiness.

Hypothesis 3: Practitioners delay in billing because they know that clients will often perceive their charges as unpleasant and will be unhappy. Delay hurts further.

Hypothesis 4: The following paradigm is the fault of the practitioner, not the client:

Example: Practitioner does an A-B estate plan for a client, and quotes the client an hourly billing rate of $250. The project is done efficiently and within the client's time expectations. The hours spent are less than the practitioner anticipated. The hourly rate is less than others in the area. And the overall bill seems less than what it has been in the past. The clients are still surprised at the amount and unhappy.

Hypothesis 5: Which billing format, attachment 1 or attachment 2, is preferable from a client happiness perspective. Would it shock you if we said that in the vast majority of cases, attachment 2 would be preferable?

Hypothesis 6: Technology has increased the quality, efficiency, and lowered the cost of producing estate planning work product. But this is not reflected in the billable hour concept, nor accepted by clients as an item to bill for. As practitioners, we have not developed a way to charge for technology.

c. Rationality in Consumer Perception to Our Billing

We fail to understand that consumers are not rational when it comes to hourly billing for estate planning matters. Many of us think that if hours are correctly reported, the hourly rate is reasonable, and the project is done timely, the clients will accept the bill as "reasonable" or as "good value."

But fundamentally we are missing a tenet of finance law: that the rational consumer does not always make rational choices, but is influenced by his or her own mental accounting,[21] which often changes rational consumers into irrational ones.

For example, the following example illustrates this mental accounting concept.

Example: You go to the store to buy your favorite movie on a DVD. It is priced at $14.99. While at the store, your best friend mentions that the same DVD is available for $4.99 at the Walgreen's about 15 minutes away. Will you go to the Walgreen's? Compare this to the situation where you are at the Stereo store and the salesperson says the stereo costs $499. Your best friend says the same stereo is available at $489 at the store 15 minutes away. Will you go to the other store? There's no difference financially, but the results have empirically been shown to be different. The consumer's perceptions are different in both situations, reflecting fairness issues. Conclusion: we cannot assume rationality for our client's economic decisions.

[21] In "Mental Accounting Matters," 12 J. Behav. Dec. Making 183-206 (1999), Richard Thaler, one of the leading behavioral economists in the Country, explores the concept of mental accounting. Unlike financial accounting, which consists of numerous rules and conventions that can be explored in a textbook, mental accounting rules – a description of the ways consumers perceive their economic choices—can only be observed by behavior and inferring the rules.

d. Translation to the Hourly Rate

A client may perceive an hourly rate of $350 to be "way too expensive" for someone spending an hour thinking about something. Is that rational (probably not, *see* below). In contrast, the client may perceive a bill for $5,000 for estate planning documents that achieve estate tax savings, creditor protection trusts, management of assets in the event of disability, and so on, as being reasonable.

Meaning, in estate planning (not estate administration or contested litigation), get away from emphasis on hourly billing, and get into the concept of either doing or demonstrating project/value billing as much as possible.

Example: It's not rational: Attorney X recently spent about an hour coming up with an estate planning wrinkle for a client that saved him about $500,000 on a strategy. If the Attorney quoted him an hourly rate of $2,000, and then sent him a bill for $2,000, the client would be upset. If the Attorney quoted him a flat fee of $5,000 to try to implement a strategy that would save $500,000, he may have been absolutely fine with this, depending on the framing of the project and resolution.

A couple that are relevant to how we bill and charge clients:

e. Fairness: Value, Value, Value

Consumers like to perceive themselves as being treated fairly, even when the end result or product or cost is the exact same whether they are being treated fairly or unfairly. Think about an IRS examiner who has two identical cases, both capable of yielding either $300,000 or $500,000 for the government, depending on the level of effort the examiner puts in.

To the extent one taxpayer is perceived as "trying to pull a fast one" on the agent, and the other taxpayer is acting reasonably and perceived to be a straight up kind of person, the agent is more likely to audit the Fast Eddie-prepared return more ferociously than the other. Why? Perceptions of fairness.

Example: You're sitting on the Beach at La Semana in St. Marteen's, hot as the dickens. And thirsty. You're buddy says he is going to buy a beer at the hotel and asks if you want one. You say yes; he asks if you care how much it costs, even if it costs $15? You say no because you know it will cost a lot. The place you are staying is expensive, and you expect that they will charge a lot for their stuff. Your buddy decides not to go. Instead, a bum on a push cart comes buy and asks if you would like ice cold Heinekan's…you think yes…until the bum says, "$15." Why should that guy make so much money from me?[22]

There are many takeaways for us from the perception of fairness that consumers need to feel. First, the hourly rate at any amount will rarely be perceived as fair. Yet another strike in the hourly rate's coffin. But there are beauty marks that we can add to the hourly rate; some obvious, some not so.

I (Lou talking on this one) am a casual guy, but could never understand (and think lawyers are short sighted when it comes to trends) why our profession would want to be casual. A lawyer in a nice suit connotes value, thereby connoting a certain professionalism that carries with it the expectation that the charge for services will be great. Well groomed, manicured, well spoken; all go hand in hand. *Cf.* La Semana versus the bum example above.

Offices and how they look are another aspect of perceived value. As is the lawyer's professional affiliations, speeches, articles, reputation, other clients as references (careful to preserve confidentiality, very important for estate planners), and the substantial level of a typical client.

And, though price should never be a factor in trying to convince a client to use us – "we're cheaper" sounds bad as a marketing technique (ouch!) – letting a client know that the costs for your services will be in the range of what others at your level costs, will add to the client's perception of fairness.

f. Understanding The Consumer's Value Function: One Big Hurt Is Better Than A Series Of Small Hurts

The loss function is convex, meaning that the marginal pain felt by incremental losses is greater than the pain felt by a larger loss. Specifically, as to the losses, the pain associated with the sum of the parts is greater than the pain associated with the whole. Ponder how this applies to a bill:

[22] Example adapted from *Thaler*, *infra*.

1. Every day entry associated with a time is translated into an hourly charge, a loss.

2. A bill with 20 daily time entries results in 20 losses. "Death by a 1,000 Cuts." It is more painful to review than a bill with one entry.

Example: "Consider the case of the pricing policies of the Club Med resorts. At these vacation spots consumers pay a fixed fee for a vacation that includes meals, lodging and recreation. This plan has two advantages. First, the extra cost of including the meals and reaction in the price will look relatively small when combined with the other cost of the vacation. Second, under the alternative plan each of the small expenditures looks large by itself, and is likely to be accompanied by a substantial dose of negative transaction utility given the prices found at most resorts." Thaler, infra, at 192.

What does this mean for our billing? Flat fees are much more preferable because a consumer may get greater transaction utility out of powers of attorney than out of drafting a complicated trust, but when each are broken out, the consumer evaluates each action separately and determines whether each action translates into value equivalent to the cost.

Further, flat fees avoid the marginal pain associated with each hourly "loss."

Thaler notes, **not** in the context of law billing (interestingly):

"[C]onsumers don't like the experience of 'having the meter running'. This contributes to what has been called the 'flat rate bias' in telecommunications. Most telephone customers elect a flat rate service even though paying the call would cost them less."

g. Decouple Having to Have the Consumer Assign a 'Value' to Each Hourly Charge

A decoupling device noted by Thaler is the credit card:

"We know that credit cards facilitate spending simply by the fact that stores are willing to pay 3 % or more of their revenues to the card companies…A credit card decouples the purchase from the payment in several ways. First, it postpones the payment by a few weeks. This delay creates two distinct effects: (a) the payment is later than the purchase; (b) the payment is separate from the purchase. A second factor contributing to the attractiveness of credit card spending is that once the bill arrives, the purchase is mixed in with many others," Thaler, infra (emphasis added).

Takeaways for us: credit cards can be used for a service business. If we decide to go this route, do we pass the cost along to our clients? If we take credit cards, beware of credit card fraud, of which there is no insurance. So perhaps the trade offs are not as positive as we think.

How else can we decouple our services? To the extent we can get clients on a flat retainer, or an annual charge, and include as many services as possible, this will decouple (as will a "project" fee). As a mental exercise, can you decouple one estate planning project into 20 distinct services provided by the documents?

Transfer Tax planning
Income tax planning
Creditor protection
Funeral plans
Protecting assets if child is a spendthrift
Planning for the children's education
Protecting assets in the event of disability
Planning for a child with a disability
Providing health care alternatives
Organ donation options
Guardians for the children
Planning for long term care
Planning for liquidity at a person's passing.
Doing beneficiary designations correctly
Reallocating assets

Planning for college funding
Preserving tax-free nature of retirement planning
Assessing insurance needs
Assistance in a plan to get rid of household stuff
Preserving peace in the barnyard

h. Give of Yourself

What else can we do? Is "discounting" off the hourly rates or bill effective? We couldn't find a discussion of evidence one way or the other that would have indicated that this is effective. From a fairness perspective, clients would certainly view a discount based on a true statement –e.g., Long Standing Client Who does Not Torment Me – in a positive fashion. All consumers like discounts provided the discount is not because the product is so overpriced to begin with that the discount brings the new price to what it should have been originally.

In addition to discounts, another item that is effective, and a bit more subtle than discounting, is that "luxurious gifts can be better than cash," which according to Thaler, is "well known to those who design sales compensation schemes."

What are we doing for clients above and beyond providing them services?

i. Framing

Because people are loss adverse, ponder whether we can achieve better fees by framing fees in the positive, e.g., contingent fees if there are tax savings. For example, if our billing practices were set up so that clients merely had to pay us if they succeeded in achieving tax savings, that would be easier to bill and many of us would now be retired.

Example: In 1984, for A-B plans, we would describe to clients that if we were able to achieve a tax savings greater than without estate plan, we would be paid 20 % of the tax savings, but only at that point. Most clients would be delighted with this option. Sound bad to you? It should not. Consider the average time to payoff for a client age 65 would be less than 20 years. What's the current value in 1984 of tax savings in 2018? In 2018, the credit was, say, 1.5 million. So the savings with an A-B plan could be $750,000. 20 % of this amount would be $150,000. Ignoring the friction associated with transaction costs to collect this amount, the discounted present value in 1984 of $150,000 to be received in 2018 at a 3 % discount rate is $54,906 ($150,000/(1+.03)^34). Yes, we would all be done at this point in our practice. Not only that, but those of us who are older could have monetized our practices and sold these fee arrangements in 2018, without having to work another day. (Importantly, now we have circular 230 constraints.)

To the extent bills are detailed in their descriptions, or projects summarized in cover letters, we should not be afraid to frame in the positive versus the negative. E.g., which sounds better: "Draft of trusts to address estate tax issues;" or "Incorporation of estate tax savings trusts." Or, "Draft of generation skipping trusts" versus "structure of trusts to prevent the payment of estate tax as assets move from generation to generation."

j. I Need a New Car but Cannot Afford It

Clients that should do sophisticated estate planning, such as GRATs, QPRTs, and other advanced techniques, often hesitate to complete such projects for two primary reasons: first, the clients may feel that their own wealth cannot be jeopardized by a current transfer; or second, clients may not want to incur the costs. There are myriad other reasons, some subtle, some not so, such as not wanting kids to have immediate access to funds, not wanting to deal with one's mortality and focus on such advanced estate planning items, desiring to simplify, not complicate, one's life; or feeling good about one's wealth and defining oneself by it.

Practitioners should certainly docket a client's decision for inaction, that is, the client's decision not to proceed with a strategy. But the practitioner should also realize that inaction can be ameliorated, to an extent, by the principles discussed here with regard to billing.

Consider the following. First, for a client that is on the border as to whether to proceed with an advanced planning strategy, or even basic estate planning, a restructuring of the billing protocol can push that client to action. From the principles discussed in this article, we know that there are two basic principles that make billing more palatable to the client: (1) fairness and (2) one large loss is easier to handle than a series of smaller ones that do not add up the large one. In other words, eliminate the hourly rate in the fee quote, which satisfies neither the fairness equation, nor aggregating losses. Hourly

rates are perceived as unfair, and each hourly entry inflicts pain. Further, a client does not know the extent of his potential losses with an hourly bill concept, and the client's loss aversion tells her not to go ahead. As a result, instead of the hourly quote, quote the client on a flat fee basis.

Second, break the overall estate planning project into smaller projects, and quote a fee for each project, thereby allowing the client to proceed on a landscaping sort of basis, doing the front estate planning yard this year, the side planning yard next year, and so forth.

Third, make sure you demonstrate to the client the tax and non tax value that will be obtained by the client by completing these projects (*e.g.*, dollars potentially saved, spousal protection for kids, family harmony, or philanthropic desires). As an iteration on the fairness concept, a client that perceives value to the end result of the planning will also perceive the bill as fair.

k. Premium Billing – Ethical and Regulatory Considerations in Billing Practices

Generally, the hourly rate is an accepted – albeit not appreciated by the practitioner or client –method for billing by an attorney. Interestingly, hourly rates have not been called into question under ethical rules, but fees are always subject to a reasonableness structure.

MRPC 1.5(a) provides that a lawyer's fee must be reasonable considering an enumerated list of factors.

Reg. §10.27(a) of Circular 230 provides that a practitioner may not charge an unconscionable fee.

In this section, we examine how and when a practitioner can impose a bonus or premium concept because the results obtained are so GOOD in light of expected outcomes due to the practitioner's unique solution to a difficult issue.

Example: The practitioner develops a financial model for pricing a stream of earnings on lottery winnings, to justify a liquidity discount based on lack of marketability and a synthetically arrived at comparable asset. The practitioner develops this methodology based on substantial capital investment into financial instruments over a period of months, and develops a strategy around certain Tax Court cases holding to the contrary. The practitioner indicates that the set fee for the strategy is $X, independent of the hourly effort and independent of the result achieved. The steps to achieve this are as follows:

First, the concept must be agreed to by the client at the beginning of the representation; e.g., merely asking for a bonus at the end because the result obtained was so good is not a prudent approach. The bonus should be in writing, in an engagement letter signed by the client. However, is the language in the letter sufficient to justify the premium while at the same time not sabotaging the strategy if produced in audit on examination? MRPC 1.5(c) provides that all contingent fee arrangements must be agreed to in a writing signed by the client.

Second, the objective must be defined, but more importantly, what unique talent or recommendation is the practitioner bringing to the equation that justifies the bonus fee.

Example: Structuring a 5 year GRAT transaction, for a 75 year old, with a 5 year SCIN hedge, structured along the same economic lines, and assuming reasonable rate of return objectives (are there any these days?) for the GRAT, can result in a risk free estate tax arbitrage. Structuring a SCIN, taking into account both section 2036 and income tax results, is not generic and can be quite difficult. Achieving the arbitrage, and structuring the actuarial risk premium internally, require unique practitioner skills. This kind of transaction is one justifying a bonus fee.

Third, prohibitions in Circular 230 must be avoided.

Fourth, the client needs to be satisfied with the arrangement. Creative structuring of the payment of the bill is one way to achieve client satisfaction. E.g., with the $Z dollar bonus, can it be structured so that the client's children pay it at the time of the filing of the estate tax return? Or from the property transferred during life if the strategy relates to a lifetime transfer?

The above constraints and steps are important, and to the practitioner engaging in bonus billing for the first time, somewhat daunting. On the other hand, as practitioners we do not shy away from engagements just because they are difficult. Likewise, we should provide the same respect to the business side of our practices, and not shy away from the premium billing concept merely because it is difficult to implement.

The premise and answer must remain the same: if a practitioner is providing a unique strategy to solve a difficult legal equation, that practitioner should be rewarded on more than an hourly basis. Keep in mind that the hourly billing method assumes excellent work for every minute committed to a problem. It does not guarantee success, nor does it pay for work that is beyond excellence – that is, the unique solution to a difficult quandary.

Happiness Axiom 11: For Preferable Billing The Best Practice Summation

1. **Discuss fees during the initial meeting**
2. **Time that discussion for the tail end of the meeting**
3. **Determine a fee quote at the first meeting**
4. **Deliver fee quote in a thought out manner and make sure you believe in and deliver the quote in a way conveying fairness**
5. **Have client provide down payment or retainer before engagement begins**
6. **Understand that Fairness matters to clients – clients want to pay for services that they perceive as Fair**
7. **Many estate planning projects will be perceived as Fair if quoted as a Flat Fee**
8. **To demonstrate Fairness, make sure that all the component parts, and accomplishments, with the estate planning project are demonstrated throughout the project; also, deliver excellent service; also, de-cliché clichés**
9. **Divide estate planning BIG PROJECT into sub projects so that value and accomplishments can be more easily understood**
10. **Value added billing can be considered but must be addressed in the engagement letter (see below)**
11. **Send bills frequently and timely**
12. **On a bill, do not exceed a quoted fee unless explained and discussed with the client during the project**
13. **Connote value in the bill itself and descriptions; spend time with each individual bill**
14. **Make sure to consider the format of the bill that will most easily connote value and which will avoid the Client's Loss Aversion function**
15. **Decouple services and bill, when possible**
16. **Discounting is appreciated by clients, in many situations**
17. **Demonstrate client care throughout the process by prompt service, attention, and non work communications**
18. **Know when you are proposing unique solutions to an estate planning or transfer tax issue that justifies a bonus or premium arrangement**
19. **Consider for unique solutions to difficult projects structuring the engagement as a combination hourly, accompanied with a bonus payment because of the uniqueness of the solution**
20. **Make sure the bonus avoids Circular 230 prohibitions**
21. **Determine how to properly discuss and market the bonus structure to a client**

VI. SOMETIMES DELAY IS A GOOD THING

Take a breath, slow down life, and speed kills. Sometimes.

One of the most useful features in digital communications, one in which the authors use for at least 25% of their emails, is the Delay Delivery Option.

Example: I happen to be on the email system and a client asks me a real interesting question about whether the Credit Shelter Trust can be a grantor trust. I like the question and the mental challenge of answering it. I type an answer; it takes me 15 minutes. The client asked me the question at 1 pm; I am ready to send at 1:15 pm. Do I really want to hit send?

Example: I don't want to bug my associates or colleagues over the weekend, but I have a lot of good thought and emails I draft and want to send. Delay deliver on Saturday to arrive on Monday or later next week.

Example: I have an email that I need to work on three days from now. Send it to myself using Delay Delivery to arrive 3 days when I am ready to work on.

Example: I want to slow down the colloquy that goes with immediate responses. You can answer immediately, but your immediate response can be slowed down thereby slowing down the responses.

Happiness Axiom 12: Learn and use the Delay Delivery option.

VII. TO BE OR NOT TO BE A GRANTOR TRUST

The most interesting uses of grantor trusts in today's environment continues to be as a positive means of estate tax reduction, or as a means of exchanging assets with a grantor trust without triggering income tax.

In many situations it is advantageous to draft a trust so that the trust has one or more of the characteristics that create a grantor trust. A trust designed in this fashion is often referred to as a "defective grantor trust."

Specifically, the grantor must be okay with the concept that he or she will pay income tax on assets that may or may not be available for use by the grantor. Planners should pay attention to this concern — even if it is flawed on a cash flow basis — because it is perceived as important to most grantors.

For example, a grantor who has a $30 million taxable estate still may not feel that he or she is able to bear the "burden" of income taxes on income not received by the grantor. This conclusion, if not logically grounded on fact, is nevertheless real to the client, and planners need to plan for this reaction. A discussion of cash flow, perhaps accompanied by spreadsheet analysis as to cash flow (to demonstrate the real impact of the burden of paying the income taxes without the accompanying cash flow), may be enough to convince otherwise reluctant clients that the grantor trust is a viable estate tax reduction strategy.

a. Unified credit, applicable credit amount, gifting trust

In a straight gifting situation in which the grantor gifts property equal to or in excess of the gift tax exemption equivalent ($11,180,000 in 2018), a gift to a grantor trust is preferable to a gift outright. If the gift is of appreciated assets, the donees will realize the capital gain in the future when the assets are sold. However, if the gift is to a grantor trust in which the grantor retains no interest other than that necessary to make it a grantor trust, then future capital gains will be paid by the grantor instead of the trust. In addition, ordinary income and other taxable income incurred annually can be allocable to the grantor of the trust. This has the effect of increasing the estate-tax-free property in the hands of the donees while decreasing the estate-includible property in the hands of the donor.

b. Grantor retained annuity trusts (GRATs)

GRATs are grantor trusts masquerading as pure transfer tax strategies. Since the GRAT permits payment of both income and trust principal to satisfy the annuity payments the grantor has retained, the GRAT will be treated as a grantor trust for income tax purposes. This means the grantor is taxed on income and realized gains on trust assets even if these amounts may be greater than the trust's annuity payments. This further enhances this tool's effectiveness as a family wealth-shifting and estate-tax-saving device. In essence, the grantor is effectively allowed to make tax-free gifts of the income taxes that are attributable to assets backing the remainder beneficiary's interest in the trust. Consider establishing the distribution to the remainder beneficiaries as a distribution to grantor trusts for their benefit.

c. Sale to a grantor trust

The sale is structured by the owner of the asset, which may be a business interest. He or she initially establishes a trust that is effective as a grantor trust for income tax purposes but that is not controlled by the business owner or otherwise subject to an estate tax taint. The heart of the transaction is a sale between the grantor and a third party — *e.g.*, the grantor's family irrevocable trust. This trust will benefit the grantor's beneficiaries. The adult children are often designated as the original trustees of the trust. As a grantor trust for income tax purposes, there will be no recognition of gain on the sale of the asset to the trust. Thus, the difference between the grantor's basis in the asset and the sales price to the trust will not currently be taxed as a capital gain. Further, the grantor will pay income taxes on the income received by the trust because of the assets the trust owns. In this regard, it is as if for income tax purposes the grantor still owns the assets sold to the trust. Importantly, the payment by the grantor of those taxes will not, under current law, constitute a gift to the trust.

d. Grantor powers

Consider then making irrevocable trusts grantor trusts, with the ability to in effect turn off grantor trust status. In grantor trust planning, consider including the power to substitute. The power to substitute assets, a section 675 (4) grantor trust power, becomes especially important as the estate tax exemption increases and income tax planning becomes more

relevant for step up in basis purposes. In many settings, a grantor of a grantor trust may want to substitute high basis assets for low basis assets in a grantor trust, and the substitution power is one way this can be achieved (a purchase agreement is another).

Another grantor trust power that is currently used by practitioners is the power in the trustee or other party (who is a non-adverse party) to add charitable beneficiaries. Consider the value of having the power to name charitable beneficiaries in grantor irrevocable trusts. Having the power to name charitable beneficiaries allows for (1) shifts in property from private to non private to reduce amounts going to beneficiaries[23] and (2) disincentives to beneficiaries to challenge trustee actions. Under section 674(b)(5), the ability of a non-adverse party to expand the class of beneficiaries is a grantor trust power.

We are familiar with disclaiming or renouncing bad powers to turn off grantor trust status; but we may need to have the ability to turn on that status too.

Two possibilities: state decanting statutes, like Illinois, may create the possibility of decanting from a non grantor trust to a grantor trust.

Alternatively, consider having a trust protector with the ability to add grantor trust type powers (power of substitution for example). Query, though, whether the rights of a trust protector are sufficient to constitute a grantor trust kind of power in and of themselves?

VIII. I SELECT DOOR NUMBER 3. CHANGING TRUST SITUS TO MORE FAVORABLE JURISDICTIONS FOR STATE INCOME TAX AND CREDITOR PROTECTION PURPOSES.

This seems to be an easy one, but we should emphasize the importance of this to our clients. Two items: we want to be able to change situs to achieve more favorable administration protection under that state's laws.

And we want to be able to change situs and trustees to take income taxation out of one state and put it in another.

For example, if California imposes trust taxation based, *inter alia*, on trustee residency, we would want our California trustee to have the ability to appoint new, out-of-state, trustees. Sample provisions:

"a. Controlling Law

The validity and effect of each trust and the construction of this instrument and of each trust shall be determined in accordance with the laws of Illinois. The original situs and original place of administration of each trust shall also be Illinois, but the situs and place of administration of any trust may be transferred at any time to any place the trustee determines to be for the best interests of the trust.

b. Individual Trustee Succession

Each acting individual trustee, or the individual trustees acting unanimously if more than one individual trustee is then acting, unless limited in the instrument in which the trustee was designated), may, by signed instrument filed with the trust records, (a) designate one or more individuals or qualified corporations to act with or to succeed the trustee consecutively or concurrently, in any stated combination, and on any stated contingency, and (b) amend or revoke the designation before the designated trustee begins to act. In the event of any conflict or inconsistency between a designation filed pursuant to this paragraph and a designation filed by my spouse pursuant to paragraph 10.4 hereinbelow, the designation filed by my spouse pursuant to paragraph 10.4 hereinbelow shall prevail, and the designation filed pursuant to this paragraph shall lapse to the extent necessary to eliminate the conflict or inconsistency."

Happiness Axiom 13: **Have both change of situs and trustee designation provisions in the documents, and discuss the BENEFITS to clients, at a follow up estate planning meeting.**

[23] "Gee, my kids really don't need all that money."

IX. "I AM A CHILD, I LAST AWHILE," NEIL YOUNG, CIRCA 1968.

The definition of "child" no longer lasts awhile. Genetic manipulation and choice will occur. Birth mothers, perhaps laboratory mothers, may become more prevalent. We will have to tweak what we mean by "child." We may want to expand the definition of "child."

The following provision, regarded as "state of the art" about 10 years ago, is already outdated. Can you spot the anachronisms?[24]

"1.1 Child and Descendant.

(a) *Child. A "child" of a person means only: (1) a child born to or conceived by the natural mother of the child during the lawful marriage or civil union of the person to the natural mother, unless paternity is rebutted by clear and convincing evidence; (2) a child born to a gestational surrogate engaged by that person or, if the person is then lawfully married or a party to a civil union, engaged by that person's spouse or partner by civil union; (3) a child lawfully adopted by the person prior to that child's attaining age 18; and (4) a natural child of the person, if the person's parental rights have not been terminated and either (i) the person is female or (ii) the person is male and the trustee has been provided legally sufficient evidence of the person's paternity or the person has acknowledged paternity in a signed writing.*

(b) *Descendant. A child of a person is a "descendant" of that person and of all ancestors of that person. A person's descendants include all such descendants whenever born. Except when distribution or allocation is directed to descendants per stirpes, the word "descendants" includes descendants of every degree whether or not a parent or more remote ancestor of a descendant is also living.*

(c) *Child in Gestation. A child in gestation on the date any allocation or distribution is to be made shall be deemed to be living on that date if the child is subsequently born alive and lives for at least 90 days."*

X. THERE ARE ALWAYS NEW WORLDS: ALLOW BENEFICIARIES TO MOVE ABROAD

The world is becoming a much smaller place. Will our clients' descendants continue to be U.S. citizens? Is their security in place? What kind of food considerations will be more relevant in the future? All things considered, we in the United States are doing quite well, but what will the United States be like in 50 years? Consider distribution of funds to allow beneficiaries to move to jurisdictions outside of the United States or to allow distributions for security measures for beneficiaries.

Happiness Axiom 14: Trustee guidance could consider distribution of funds to allow beneficiaries to move to jurisdictions outside of the United States, to allow distributions for security measures for beneficiaries, and also to consider distributions needed to modify food/food production. Can we think of any other? I suspect yes.

Happiness Axiom 15: Consider including in the definition of "support" expenses necessary to provide physical security measures, as well as allowing one to domicile outside of the United States.

XI. SIMPLIFIED SOPHISTICATION VERSUS COMPLICATED UNINTELLIGIBILITY

With rapidly evolving tax and state laws, and the precision needed to accurately create an estate plan and convey our clients' goals, drafting has become even more complex and sophisticated. The *status quo* bias provides that individuals irrationally retain current practices; that is, we have a hard time changing.

That bias is especially true in drafting. Rather than trying to simplify concepts, each time there is a law or tax change, our documents often become more complicated.

We may want to take a step back and consider simplifying our drafting, when the situation allows for it. An example are the tax formula and language we have used in our documents since 1982.

[24] E.g., "maternal", "paternal", "natural child", "females", and so on. Are these terms clear enough anymore?

The two trusts, the three trusts, the multi trust solution for tax planning in Wills (living trusts) for spouses may be correct, but is no longer need to be the default drafting choice. With the credit bouncing around from $1,000,000 to $11,180,000, indexed, who knows what tomorrow will bring. And states have, or don't have, inheritance taxes.

Instead of complicated multi trust drafting, as has been done since 1982, the current environment militates in favor of the single-fund QTIP- eligible trust. It allows a practitioner to achieve tax planning for their client, as well as the following flexibilities:

1. For the portability decision to be decided at the surviving spouse's passing. Estates may want to include 100 percent of the property in the surviving spouse's estate to achieve a step-up in income tax basis. The goal will be either to make a partial QTIP election to create a credit shelter trust out of the non-elected portion (the $11.180 million estate tax exclusion amount) or a full QTIP election to put all the property in the surviving spouse's estate for basis step-up reasons.

2. For state inheritance tax to be avoidable at the first spouse's passing if that state has a QTIP marital deduction, even if that state has a credit that's decoupled from the federal credit.

3. Ease in drafting.[25]

4. Ease in client understanding.

5. Ease in administration until multiple trusts are created (post-mortem).

Happiness Axiom 16: **Recognize the status quo bias, but begin introducing the concept of simplification into your drafting thought process. A place to begin is to replace complicated marital deduction formula with a single fund marital trust, drafted to be QTIP eligible.** [26]

XII. MANAGE CLIENT EXPECTATIONS

Don't schedule an "emergency meeting" if it is not a real emergency. Stick to your scheduling discipline. The meeting issue is similar to the delay delivery option for email – don't create a 24-7 expectation of your availability.

Example: I met with clients over a holiday weekend shortly after their father's death because one of them lived out of town and would be in Birmingham only over the holiday weekend. They were hiring me to modify a trust under dad's will (he had been dead 3 days). When I did not have a draft out after 10 days, they fired me for being slow. I believe I set the stage for their expectation of "immediate gratification" by meeting over Thanksgiving weekend.

Give realistic dates for accomplishing work, whether it is drafting, research, an estate planning proposal, whatever. Stay on time and if you are going to be late, let the client know.

Tell the client the truth. Do Not Ever say – "I'm not sure if I sent you this email" when you and the client know if you did or did not.

XIII. BREAK MULTIPLE PROJECTS UP INTO SMALLER COMPONENT PROJECTS

For multiple client projects (e.g., forming 10 LLCs, doing estate planning documents, doing buy-sell agreements, etc.), break them up into smaller components – partly for work flow management, partly for client's ability to review and process, partly for billing.

[25] For those of us who enjoy drafting, we know what the 3 trust plan looks like, with a state exempt, a federal exempt, and a federal QTIP trust all being in place. Throw in there a mismatch of remaining GST exemption from the unified credit, and we have a couple more trusts being called for. The client does not have a chance of recognizing the planning; and the drafter has a strong chance of, ummm, poor drafting if he or she hasn't done a lot of these. All these problems are eliminated with a single fund trust.

[26] If erudition requires greater sophistication, then one can add a so-called *Clayton*-flip onto the single fund marital trust.

XIV. TO GIVE CELL PHONE # OR NOT TO GIVE CELL PHONE #?

General rule for me – I do NOT give clients my cell phone # (partly because I don't want to be "on call" 24/7; partly because my cell phone # is super easy to remember – it is one of the few things my dad remembered after he developed dementia).

I also understand that there is an app for your phone that can make it look like you are calling from your office and therefore would not disclose your cell #.

If I break this rule, I make sure the client knows that he/she is special – that I usually do not do so and that I trust he/she will use sparingly. For the most part, clients have respected my rule/have not abused this privilege.

Happiness Axiom 17: Clients want to know what they can expect. If you intentionally or unintentionally create unreasonable expectations, they will be unhappy when you fail to measure up. Do the client and yourself a favor by creating a *reasonable* framework for your interaction with the client and your generation of the work for the client.

XV. FACILITATING FAMILY MEETINGS FOR YOUNGER GENERATIONS

Client's Goals
To communicate family values.
To teach stewardship.
To introduce the topic of prenuptial agreements.
To educate on the use of trusts.
To instruct on various tax considerations in estate planning.
To encourage estate planning as soon as a child reaches adulthood.
To disclose the senior generation's estate plan to avoid "surprises" when Mom and Dad die.
To promote philanthropy.

Your Goals
To meet the next generation and if no conflict, to become their lawyer.
To become the client's "consigliere."
To assist the client in "raising" his/her children to not be trust fund babies.
How to Accomplish?
Have pre-meetings with client to review proposed agenda and to get buy-in on what will be discussed/disclosed.
Decide, with client, if you (the lawyer) should lead or if you should bring in an outside expert.
Decide whether the meeting should be at your office, the client's office or offsite. Your office may be intimidating. Client's office likely will chill open discussion. Offsite could be best option.
Decide if in-laws are in or out of meeting.
Decide if other advisors (CPA, investment advisor, etc.) should be included in the meeting or in part of the meeting. For example, you might combine an investment review with part of the family meeting.

Happiness Axiom 19: The toughest decision a client faces in estate planning is who to name as guardian to raise the children if both parents die while the children are minors. Family meetings are the lifetime corollary to the guardian appointment – this is the way the client can "raise" the children in the adult world. As a result, facilitating family meetings can be one of the most important things you can do for the client. And, if successful, you can pick up another generation of clients.

XVI. WORKING WITH FOCUS

Set aside a day each week to work "away" (at home, in a conference room, etc.). Leave your phone and email turned off so that you can focus for long periods of time on getting the heavy lifting done. Be disciplined about protecting this day. Get your staff on board so that they also are disciplined about it.

Happiness Axiom 20: Finishing projects requires focus. Finishing projects allows you to feel a sense of accomplishment (and avoids feeling negatively about yourself when you do not finish). Finishing projects allows you to bill the client and get paid. Working with focus is a technique that will help you finish!

XVII. BILL – EARLY AND OFTEN

Billing clients is not fun. Billing clients takes time and fortitude. On the 1st day of the year, calendar time each month, early in the month, to start and finish client billing. Also, send reminder statements for past due amounts EVERY month. Be consistent.

Happiness Axiom 21: Billing is like exercise. It must be done and leads to good results.

XVIII. LIFE IS SHORT - FIRE BAD CLIENTS

We are not indentured servants. Put another way, we do NOT have to continue representing clients if we do not want to do so. We can fire clients who complain about our bills, clients who complain about our timetable, and clients who are rude to our staff. *In a nutshell, we can fire clients we just don't like (bless their hearts).* These materials address firing clients in the planning arena. Firing clients in a litigation context presents a different approach/rule.

ABA Model Rule 1.16(b) is the ethical rule governing the voluntary termination of the attorney/client relationship.

Build exit language into the engagement letter.

Sample language: No Free Lunch. *"Payment is due upon receipt of our invoice. If you fail to pay an outstanding invoice within ___ days, we may withdraw from the representation with written notice to you."*

Sample language: It's Not You, It's Me. ***"****If at any time we desire to withdraw from this engagement, we may do so with written notice to you."*

Even if your engagement letter does not address termination, a lawyer should give written notice of disengagement, preferably after you have had a conversation with the client.

The notice should provide the client sufficient time to engage a new lawyer. For example, you should not fire a client on December 15, 2025 just before the exemption will revert to half its level on 1/1/26 because it is unlikely the client would have sufficient time to engage a new lawyer. Likewise, you should not fire a client who is on hospice care and needs his or her estate planning updated.

The notice should include a refund of any fees paid in advance.

The notice should identify any filing deadlines (e.g., gift tax return; estate tax return) and should disclose the status of any work in process.

The notice should recommend that the client engage a new lawyer.

The notice should include the delivery of the client's file (and you should retain an electronic copy of the file).

Happiness Axiom 22: Life is short. What we do is hard. Let's enjoy it more by working only with the clients with whom we choose to work.

XIX. FOR NEAR DEATH PLANNING

If a client is near death and has a grantor trust in place with the power to substitute assets, consider the following:

To get a step-up in appreciated assets inside the trust. Substitute cash or other high basis assets held outside the trust for low basis assets inside the trust. At death, the estate will obtain a step-up in basis for the low basis asset.

At death, the basis for assets is not always stepped up – SHOCKING TO THINK. If the client owns an asset that has gone down in value, then if the client holds that asset at death, the basis will be stepped down. Consider swapping that asset for assets held inside the trust. The assets inside the trust will retain their original basis and the loss will be preserved.

To transfer life insurance and avoid the 3 year rule. As you know, if a client gratuitously transfers life insurance and die within 3 years, the proceeds of the life insurance will be included the client's estate under IRC Section 2035. However, if

the client transfers the life insurance for full and adequate consideration, Section 2035 does not apply so no inclusion. Additionally, if the transfer is to a grantor trust, the transfer for value rules should not apply. Consequently, the grantor could swap the policy for assets of an equivalent value and get the life insurance proceeds out of the estate even if death occurs within 3 years.

Caution: to make the above techniques work *without* adverse transfer tax consequences, it is imperative that the swap is for assets of *equivalent value*. For this reason, the trustee should take appropriate steps, including getting appraisals, to make sure the swap is Even Steven.

Happiness Axiom 23: We create irrevocable trusts as a way to shift appreciation down to lower generations and to provide an extra gift to the lower generation – the payment of income tax by the grantor. However, we sacrifice the step-up in basis by doing so. Using the swap power as the "defect" gives flexibility to do near death planning for cost basis.

XX. INCLUDE CHARITIES AS PERMISSIBLE APPOINTEES IN LIMITED POWERS OF APPOINTMENT

This topic gets to the "How Much is Enough" question. Clients frequently are worried about making children, grandchildren, great-grandchildren and more remote descendants too wealthy. Only the client can answer the "how much is enough" question but with the use of custom drafted powers of appointment, the drafter can assist the client in giving future generations direction and options.

When drafting limited powers of appointment, resist the temptation to take the easy way out and limit permissible appointees to descendants of the grantor. Rather, include charities as permissible appointees with language that expresses the grantor's goals.

Sample language:

a. Upon the death of Grantor's child, the balance of the Child's Trust shall be transferred and paid over to such charities and to such of Grantor's descendants (permissive beneficiaries collectively referred to as the "child's Beneficiaries"), in such manner and amounts as Grantor's child may have directed in his or her Last Will and Testament, making specific reference to this testamentary limited power of appointment herein granted.

(i) *In exercising this limited power of appointment, Grantor's child may divide the Trust among the child's Beneficiaries upon such conditions and estates, in such manner (in trust or otherwise), with such powers, in such amounts or proportions, at such time or times (but not beyond the period permitted by any applicable rule of law relating to perpetuities), and subject to such terms and conditions as Grantor's child may specify in his or her Last Will and Testament.*

(ii) *In determining whether this testamentary limited power of appointment has been exercised, the Trustee may rely on a Will admitted to probate in any jurisdiction as the Last Will of Grantor's child, or may assume he or she left no Last Will in the absence of actual knowledge of one within six months after Grantor's child's death.*

(iii) *In exercising this limited power of appointment, Grantor requests that Grantor's child consider whether it is in the best interest of Grantor's descendants to limit the amount of wealth passing to such descendants and whether Grantor would prefer that Grantor's child exercise this limited power of appointment in favor of charities, such as* ***the University of Alabama,*** *that Grantor favored during her life.*

Happiness Axiom 24: Effective planning incorporates as many techniques as possible to provide flexibility. By including charities as permissible appointees in limited powers of appointment, the client has the opportunity to say to future generations that transferring wealth to charity instead of family might be the best decision.

48th ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING

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Orlando, Florida

HOW TO PRACTICE LAW, ABIDE BY THE RULES OF PROFESSIONAL CONDUCT, AND HAVE A LIFE THAT RULES

"I"

Louis S. Harrison, Harrison Held, Chicago, Illinois
Nancy C. Hughes, Hughes & Scalise, Birmingham, Alabama

Part One: Our Representation: If We Save You Time, We Can Get You Home in Time for Fun

We sell knowledge, good judgment and advice. We use hours either directly to sell our services, or as a benchmark.

Hence, our quality of life can be improved by providing the same (or better) result to our clients, using lower hours.

You are giving up 90 minutes this Wednesday afternoon. Our trade with you is to demonstrate to you that if you follow practices that we discuss, you will save at a minimum 8 hours/year, and up to 200 to 300 hours a year. At 200 hours saved, assuming you don't replace that with MORE WORK (200 hours to be exact), we will have provided you with 5 new vacation weeks.

Not yet believin?

Here's one for those that use email a lot. This will get you to a minimum of 8 hours saved per year. Ready? Turn off your email alert icons (we will show you how a bit later). You lose nothing other than being disturbed, by turning these off.

	In seconds
Email notice of incoming email (a distraction)	
Each one: stop and start what you are doing, don't even go to the email (most of us do if the email is interesting)	5 seconds
25 of these a day: that's low	125
5 days a week (some would say 6 or 7)	625
48 weeks a year	30000
60 seconds per minute	500
60 minutes per hour	8.333333333
Day equivalent for one tiny action	1 day

To accomplish time savings, we need to be mindful of a protocol on using technology efficiently, managing our daily practices, creating and taking vacation time, taking in clients who are good prospects, and dismissing evil clients, that will minimize effort and maximize output. Many of us may need to look at these areas with a certain degree of focus that in the past we have dismissed.

We start with the New Vast Wasteland, Emails.

The mantra for practitioners with Emails, ABA Model Rule 1.6, preserve the confidentiality of information:

Rule 1.6 (c): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Ever sent an email to the wrong person?

Part Two: Manage Email Correctly

Email, used incorrectly is the 2013 version of a Faustian challenge.

A. The Problem:

As a backdrop, studies are now showing that receipts and transmittals of emails have an endorphin like response in our bodies, meaning we "feel good." This may be the reason why, when we get to work, our first effort is to open up and read our emails.[1] We need to get beyond that and recognize that email is a tool to our quality of life, not the intellectual equivalent of a good workout.[2]

Maybe you are not prey to this dilemma.

Unlike the rest of us, do you not jump to your inbox every time you hear a chime or see a note about a new email?

You don't feel nervous or that you are giving bad service if you fail to respond to emails immediately?

You can go a full day without once looking at emails.

At the end of the day, you don't lean back and say, "Gee, not many billable hours here, have been responding to emails all day."

Perhaps your inbox is not a collection of work, junk, unanswered client communiques, and to- do items.[3]

If you find that the above traits do not accurately describe your day to day existence, perhaps the email monster is out of control. The road to email addiction recovery is first to acknowledge that you have a problem.[4]

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[1] If you do not do this, congratulations. You are mentally-email healthy. Don't change. We love you the way you are.

[2] Another activity that releases endorphins that make us feel good, and make the ills of the day more tolerable.

[3] Your focus each day is on the tough, substantive work, and real client meetings, not on the use of email to achieve the metaphorical equivalent of a mental hike up a challenging mountain of intellectual conundrums and humorous quips.

B. Goal in the Use of Email: Be FIRM

As a lawyer, we want to achieve something FIRM with email. Not amorphous, abstract, obtuse, or obscure; something concrete. We should strive for email to enhance the quality of our life. For a lawyer, quality of life requires the efficient management of work time. To the extent that email efficiently manages your business life, that enhances QOL. To the extent of inefficiency, that subtracts from QOL.

Specifically, we want to (F)OCUS on when to use it.

We want the (I)NTELLIGENT use of email using shortcut keys for those activities that occur daily, and most importantly, the efficient storage of emails.

We need to be diligent to (R)EVIEW and (R) EMOVE absurd, irrelevant, non-repeating, and non-action item emails.

We should not ignore the importance of (M)ANAGING client expectations as to when responses will be made, and MANAGING (and setting) our expectations by defining boundaries of use for emails.

[4] Here's a deception: our practices, even with the inefficient use of email, are still more efficient than our practices used to be. That is not the test, though. With proper use of email, our practices can be even more efficient.

C. FOCUS on When to Use Email[5]

1. Benefits

Used effectively,[6] it can achieve the following:

1. Increase speed in communications and efficiently conveying ideas (organizing a football game among a group of people, for example; setting up a conference call). *Leads to getting projects done faster, making clients happier, and decreasing malpractice exposure*.

2. Efficiency in communication: no pregnant pauses, or stops to say "how you doing?" *Encourages follow up to clients*.

3. Comfort—easy to use, type and send. *Encourages legal work.*

4. Time shifting-you can communicate whenever and at weird hours. *Allows you to work on client projects more often*. Be conversant with the Delay Delivery Option (discussed below)

5. Facilitate projects by give and take and immediate answers to significant and insignificant questions. *Allows projects to be completed quicker*.

6. Overall, increase client happiness.

2. Detriments

Used ineffectively, email can be a TSA (time sucking abyss) that constantly annoys. Do we really need to get texts and emails during dinner? Do we have enough focus during the day on substantive projects? Are we being interrupted during our drafting, telephone conferences, in person meetings, in office meetings, by the email?

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[5] Not for this conversation, but we want to make a controversial statement—immediate reachability, like through blackberrys and I-phones, for lawyers, is inefficient and hurts revenue, quality of the practice, and a lawyer's quality of life. I know that 99 % of people who use these devices disagree with me. All I request is an honest assessment by all those individuals as to whether Blackberry truly adds to quality of life, or is indeed the Crackberry of our mental existence.

[6] Work Objective: Profitability. Ask yourself, how is email making me more profitable? If email could allow us to (1) communicate better, (2) get projects done quicker, (3) get answers easier, (4) manage projects, or (5) manage colleagues, these are all good objectives.

Too many emails can actually confuse a project – who is doing what, what stage the project is in, or create a substantive confusion.

Assume you charge by the hour. Your first foray into the analysis is to be honest about how much email costs you per day. Example, if you do not charge for email, and you spend 2 hours on it, isn't it costing you 2 hours?

3. Heuristic as to Proper Email Use

1. Email cannot be on all day, in front of you. You do not have the discipline NOT to be distracted.[7]

Example: Texting and driving. Try the following experiment. We know that texting and driving is incredibly dangerous. Discuss that topic with your spouse. Have your spouse agree to that conclusion -- not to text and drive. Then, set up a short 15 minute trip with your spouse. Have one of your kid's text your spouse, every 3 or 4 minutes, during the drive. Make sure your spouse's phone is on, so that your spouse hears the text coming in. There is no way your spouse does not pick up the phone at some point to see who the text is from. We are all Pavlovian email (text) Dogs, which is really bad when it comes to email communiqués. Since we will not have the discipline or desire to turn on and off your email system in a given day, try some of these techniques:

a. Turn off the chimes, icons, beeps, pop ups, and other interruptions that inform you about new incoming emails. Really now, why are these here? <u>If you do nothing else from this presentation, do that</u>.

   i. To do that, try going to Home, then Options, then Mail.

   ii. You will see the boxes to uncheck about notification of new emails.

b. Another technique, not for the faint of heart: change the default view in Outlook to Calendar instead of Inbox. To shift to your inbox, all you have to do is hit Control+Shift+I, or Control +1. To shift to your calendar, hit Control+2. Default view in calendar will

[7] Email is more fun than any other project. In your in box, there will be some "good news," some funny stuff, some happy stuff. Hence, it is by its nature distracting. Also, if it truly does release endorphins, email becomes an addictive behavior.

make sure you don't miss any meetings, as well as not distract you with incoming emails. Lou try.

c. Understand that answering emails does not have to be immediate. Life threatening crises are rarely communicated by email.

    i. Try the following: every Wednesday, for a month, set a rule that says, "I will be unable to answer emails until the end of the day." Dedicate 3 pm to 5 pm to answering emails each Wednesday. Try a few times—was your practice truly polluted by your non-responsiveness from 7 am to 3 pm?

    ii. Also, learn the Delay Delivery option. Example: I happen to be on the email system and a client asks me a real interesting question about whether the Credit Shelter Trust can be a grantor trust. I like the question and the mental challenge of answering it. I type an answer; it takes me 15 minutes. The client asked me the question at 1 pm; I am ready to send at 1:15 pm. Do I really want to hit send?

d. It is extremely difficult to do substantive concentration with the Devil that is Your Computer right in front of you. Accordingly, you must have in your office a desk, stand up or sit down, where you can lay out papers and do work. Get there as much as possible.

e. Can you do email "batching?" This is where you look at your emails only a certain intervals during the day, say 9 to 10 am, 1 to 2 pm, and 5 to 6 pm.

2. You need to charge for emails. Figure out what works for you.

3. You need to have an empty in box. Wow. Spam filters work. Junk mail (more on that below) works. Rules (more on that below) work. But, "you are powerless to stop the never ending onslaught of emails." Like a developing cancer, it consumes more and more of your (mental) energy resources. It's not going in the other direction.

D. INTELLIGENT Use of Quick Keys

Memorize these quick keys:

1. F1—Displays the Help Pane.
2. F6—To Toggle between tech Help Pane and the active application.
3. Control+Shift+I to switch to IN box, or Control 1, when in calendar mode. Control 2, to shift to calendar when in In box.
4. Control+N to compose a new message
5. Control+Shift+S to post an email to a folder
6. Control+Shift +G to display an email in the task pane for follow up.
7. Control + B to add bold
8. Control+Shift+L to add bullets
9. Control+ I to add italics
10. Control+T to increase indent. Do not hit tab bar.
11. Control+shift + T to decrease indent.
12. Control x to cut
13. Control C to copy
14. Control v to paste
15. Control +Shift + Z to clear formatting
16. Control U to underline
17. Control +f2 to open print preview
18. Alt+P to print
19. Control+Shift+f to find prior emails.
20. Control+Shift+D, NEVER USE.

E. Review Only Once and Remove

Your goal is to understand that 100 emails, per day, with half of them viewed twice (because we don't want to deal with them the first time), results in 150 emails a day. Multiplied by 300 working days, that means that 15,000 emails are viewed a second time. If each email view is 10 seconds, not very long, that is 150,000 seconds. That is equivalent to 41 hours. 41 hours to do NOTHING PRODUCTIVE OTHER THAN TO VIEW FOR A SECOND TIME EMAILS. We cannot do this. We have to train ourselves not to do this.

Here then are our considerations on managing email to remove crap, and remove a "second look":

1. NOME—work towards NO Messages in your in box.

2. Each email needs to be dealt with. The 4 D's, delete, do, delegate, or defer should be replaced with the 3Ds, delete, do, or delegate.[8] Not easy in a day of difficulties

    a. Example: You return to your office. There are 30 unopened emails from 15 minutes before. One is an emergency, and you open and deal with it. It was 28 emails after the other ones. The other 28 are now buried. Was it really an emergency?

    b. Delete all non critical emails.

    c. If an email can be done in 1 minute or less, respond to it and get it done. See h, below.

    d. If you have time to deal with slightly longer emails, do them. Aside: do not use LOL, funny pictures, abbreviations, or the like. You are not an employee at a technology company.

    e. If an email looks too long to read now, or respond to, many of us turn it into a task or appointment. Here's how: If you hit Control + Shift + G, you can put it in the Task List. The problem of course is that your task list becomes in and of itself unmanageable unless you attend to it often.

[8] Please regard Defer as a 4 letter word.

i. As a solution, I offer the offload as a possibility—send the email to a colleague to work on; and

ii. Concurrently, calendar follow up for a week. By right clicking the email, you can drag it into your calendar for follow up. And it's out of your in box (yeah).

f. Delegate to the extent possible all emails.

g. Start including verbs instead of nouns in the subject line for emails --- that way the reader has a hint of what is required.

h. Ponder the B approach as to all, or non critical emails, those not rendering legal advice.

i. Silence is a Beautiful Event.

3. If you need an email for future reference, file it away in a folder. To do so, you need to set up a file and then hit Control+Shift+S when you are reading a message to send it to that file. Personally, I shy away from folders, and try more global systems, like a link to an Imanage system. Folders complicate my life.

    a. Example of folder

    b. Example of Imanage

4. Use rules.

    a. Do alpha tests first to make sure you don't do something you will regret. We sort of like the Junk Mail system.

5. Out of Office Assistant. It is effective <u>not</u> <u>only</u> when you are on vacation, but when you have day trips out of the office, when you may be tied up for the day, when you may be tied up for half the day, or are you feeling like it will just be a nasty day of meetings. You have two options: You can be human and just not respond for 24 or more hours. Or you can try one of these. "I have really important meetings that will keep me from responding to your banal requests for information, now or in the future." Or, "I will be out of the office and not responding to emails until …For any emergency, please email my assistant, .., or call me at 847 254 1170" don't insert your real number; here, for fun, insert one of those phone numbers that charges $4.99 per minute:

i. "Sorry, I am out of the office and unable to respond until to your email. Please contact my assistant, Glenda, at gmuskie@harrisonheld.com, for immediate assistance.

ii. Often, I get replies like, "I know you are there and monitoring emails."

iii. The system is simple, so it takes about 5 seconds to implement this.

iv. Copy out your reply, and put in Word; do a spell-check to make sure the auto reply that is being sent doesn't have typos.

v. Check the button that says, "Out of Office Assistant," On.

b. I am not making the following up. Once, when opposing counsel was so ridiculously over the top, sending me nasty emails every 2 seconds, I put a rule for it that auto replied to his emails with the following "Please note that I died about a week ago. Like Generalissimo Francisco Franco, I am likely to remain dead. Please direct future emails to____." After receiving this 4 times, the same message, he realized it was an auto reply. What I got back was something like "blah, blah, blah, Attorney Registration disciplinary action, "blah, blah, malpractice, blah, blah, I am going to kick your…" So it sort of didn't work.

c. Reply to all. It is nice to avoid the problem of Replying to All when you intended to Reply only to the Sender because your reply was critical of a few other people on the list. Ooops. You can install a pop up message that will ask if you really want to do this before it is sent—www.sperrysoftware.com—avoids the "oops, I didn't mean to do that" problem. I recommend this.

6. Don't invite replies. Example, "Lou, I can meet 10 am on Tuesday. Name it." Reply: "How about 11 am then?" Instead, "I'll see you at 11 am."

7. My colleague once tried to implement the following to cut down on emails: "Please never reply to me with a "thanks" or "you're welcome." Do you think it worked?

F. Manage Client Expectations

Client: "I have been emailing you all day, where are you?"

Answer: "Sorry, I was reviewing the site, www.adulttopics.com, all morning. What's up?"

Well, maybe not. Managing client email expectations can be done expressly and indirectly. Expressly, we have discussed, with rules about where you are and when you will get back to them.

Indirectly by implementing a few self discipline structures:

1. Do not get in the habit of immediate replies, even when you can. This is tough. But a reply within 3 hours is quite good; a reply in 2 minutes implies a level of responsiveness/precedent that will cost you quality of life. See discussion on Delay Delivery options.

2. Charge for emails. For substantive emails, this has to be a no exception policy. You are liable for the advice, you are giving advice, why in the world would you not charge? And for shorter emails, emails are still a disruption; be judicious and charge more often than you think if it is substantive discourse that is occurring. At a minimum, this should discourage the proliferation of emails.

3. Do you have your own rules on emails? No emails on holidays?

4. Do you control your co-workers?

5. Do not apologize for slowness in responding. I was so infuriated by a Bank that sent me 3 emails within 48 hours, to sign a letter of authorization that was non critical, not preceded by a client call, not time sensitive, with the 3rd email inquiring as to whether I was involved in an accident, that I sent the following response:

   "Hi Charlie,

   I am generally tied up most days with meetings and planning; and non-urgent emails often take 2-5 business days for me to review and respond to. I will do a global search for this right now; sounds like an emergency. I am sure it must be on my email system. Stay tuned; if I find, I will fax before I leave tonight.

Regards,

Lou”

MANAGING EMAILS IS THE MOUNT EVEREST OF ADMINISTRATIVE MOUNTAINS TO CLIMB, BUT YOU STILL HAVE TO MAKE THE REST OF THE DAY MORE PRODUCTIVE

Part Three: Managing the Day to Day Practice in a Way that Achieves the Twin Objectives of Client Satisfaction and Practitioner Happiness[9]

Lawyers are problem solvers. However, we may not be the best at the business of practicing law. The business requires that we get quality work out the door timely, that we are responsive to clients, that we bill and get paid, and that we enjoy practicing. Those are the minimal requirements. How can we accomplish these requirements? The following are practical suggestions to produce more work in less time and thus have more free time.

A. **Set Boundaries.** Lawyers are service oriented. However, to practice law efficiently, lawyers need to set boundaries.

1. **With Clients.** *Set reasonable parameters for the engagement.* Do not agree to meet on Saturday morning unless it really is an emergency. Train your client to call you on your cell phone or home phone only in an emergency. Do not apologize for responding to an email within ____ time of receiving it.

2. **With Staff.** *Set reasonable parameters for work interaction.* Encourage your staff to schedule short meetings with you for you to answer questions. Encourage your staff to do the heavy lifting. They should email you/provide you with bullet point questions and possible answers not open-ended questions ("I'll respond to the client if you tell me what to say."). Train your staff to compile information so that interruptions in your day are minimal --- once a day is much more efficient that 6 times a day.

3. **With Colleagues.** *Set reasonable parameters for water cooler talk.* We generally are friends with our law partners. We love rehashing the football game, baseball game, Oscars, Grammies, whatever. These interactions are important for esprit de corps. However, too much of a good thing is a bad thing and

[9]For an excellent in-depth discussion of this topic, see *Time Management for Attorneys: A Lawyer's Guide to Decreasing Stress, Eliminating Interruptions & Getting Home on Time.* Mark Powers and Shawn McNalis (2008).

interspersed throughout the day is detrimental to focus and efficiency. Consider telling your colleague, "I am trying to use my morning productive time to get documents out. Can we do lunch and catch up?"

4. **With Myself.** *Be disciplined in scheduling/work/focus.* I am my own worst enemy. I schedule too many meetings without preparation/decompression time in between. I allow myself to be distracted with email. I am the colleague interrupting my partners with another BCS National Championship review (Roll Tide!). I must practice what I preach and set boundaries and be disciplined.

B. **Maximize Productivity.** Lawyers sell expertise, advice, documents: widgets. If we can produce more quality widgets in the same amount of time, we will make more money or we could make the same amount of money in less time – more free time.

1. **Identify and Utilize Peak Brain Time.** Each person has "peak" time during the day when he or she is at her best intellectually – some are morning people/some are evening people. Identify when you are at your best and reserve that time for your hardest work.

2. **Identify and Utilize Low Energy Time.** Each person has low energy time during the day. Identify that time and schedule what requires less brain power or what might pick you up during that time – phone conferences? Meetings? Staff meetings?

3. **Set Reasonable Goals Each Morning.** We need to accomplish tasks and feel a sense of accomplishment. If every morning, we list 10 things to accomplish that day and never achieve the goals, we will feel overwhelmed and may have a sense of failure. Rather, each day, we should list no more than 3 things to accomplish that day. We are more likely to be successful and the feeling of success will help carry us forward.

4. **Set Regular "No Client Meeting" Days.** Instead of working every weekend to catch up because your week was full of client meetings, set one day a week for no client meetings. Use that day to get administrative work done. Use that day to catch up on

drafting or reviews. Allow the staff to be casual that day (even jeans) because no clients will see them.

5. **Set Regular Drafting/Review Days.** Practicing law requires intensive blocks of time to get documents/PLRs/briefs/whatever done. Consider working in a conference room or at home periodically (once per week?). Wherever you work, do not connect to email or phone during your drafting/review time. Utilize that time to focus and complete projects.

6. **Set Regular Time to Do Client Bills.** Pick one day early each month and block out sufficient time to get client bills reviewed and out.

7. **Keep Time Contemporaneously.** Do not leave for the day if your time is not entered. It takes longer to recreate and inevitably, time (and money) is lost if you enter your time after the fact.

8. **Get the Staff on Board.** Let the staff know what you are trying to accomplish and enlist their assistance.

9. **Be Disciplined.** The above will work only if you are disciplined and follow through.

C. **Delegate.** The best and perhaps the hardest way to have more time, is to delegate.

1. **Identify What Really Requires Your Attention.** Identify and attend to those projects that require your attention. Delegate all other projects or parts of projects to associates and staff.

2. **Delegation = Leverage = Higher Profitability.** Enough said.

3. **Mentor/Train Associates and Staff.** How often do we think, "I can do this faster than handing it off?" That is a true statement but is short-sighted. You can never delegate if you have not invested in mentoring and training. Set regular "tutorials" and put the associates in charge of the topics. Schedule one-on-one time with associates and staff to explain mark-ups to documents.

4. **Include Associate/Paralegal in Client Meetings.** Bring a junior person in meetings to take notes, to follow up with clients on action items, and to summarize work to be done after the meeting.

5. **Assign File Preparation to Staff.** Implement a system whereby a staff member is responsible for reviewing your calendar for client meetings and then locating the file, making sure all associated files and documents are there, and having them ready for the client meeting.

6. **Have Regular Work Status Meetings.** Periodically (once a month?), have a meeting with your lawyers and staff to review the status of projects, to check workload (Who is overloaded? Who has capacity?), and to make sure all client matters are being handled (malpractice protection).

D. **Use Technology.**

1. **Take Advantage of Software.** Look into your client management software --- does it have capability to efficiently create and manage To Do lists and follow up?

2. **You Do Not Have to Be Paperless --- Set a Goal to Have Less Paper.** Regardless of your position on *paper*, if clients' executed documents are scanned in, you will be more efficient in responding to client inquiries. Example, client calls and asks "Who do I name as guardian for my children?" If the Will is scanned in, you can pull up and answer while on the phone. If the Will is not scanned in, you must physically pull the file (or have someone else pull the file), look at the Will and call the client back.

NOW THAT YOU USING TECHNOLOGY EFFICIENTLY HAS SAVED YOU TIME [(VERSUS TECHNOLOGY USING YOU)], AND YOU HAVE DAY TO DAY PRACTICE TIPS THAT WILL HAVE ALSO SAVED YOU TIME, YOU WILL HAVE TIME FOR VACATION. TAKE IT.

Part Four: Vacation Planning

A. Exactly When Did Being on Vacations Become so Complex

Going back to c. 1980, being on vacation meant one work connection: "I will be at 312-332-1111," if you need me. Please call and leave a message with my secretary.

There were no cell phones. There were no faxes. Federal express was a luxury; no computers, emails, smart phones, or other means of what I like to call PAIN (Painful Annoying Instant Noise).

A vacation meant you were away with others handling your matters.

B. 2013, a vacation could mean that you are working, albeit less and albeit in a nice venue with good weather. Unfortunately, a vacation could mean an experience that is actually more painful than just work, as the responsibilities to family, work, and yourself are all scrambling on top of one another at the same time.

Although the way to take a vacation remains myriad and subject to debate, one item we can agree on is that the Etymology of the word "Vacation" is no longer applicable to our view of the word.

B. Vacation Etymology

Late 14c., "Freedom from obligations, leisure, release" (from some activity or occupation), from Old French vacation, from Latin vacationem (nominative vacatio) "leisure, a being free from duty," noun of state from past participle stem of vacare "be empty, free, or at leisure" (see vain).

Meanings "state of being unoccupied; process of vacating" are early 15c. Meaning "formal suspension of activity" (in reference to schools, courts, etc.) is recorded from mid-15c. As the U.S. equivalent of what in Britain is called a holiday, it is attested from 1878.

C. The Starting Point for the Protocol

"Vacation has become a murky concept for me. I'm working remotely most of the time now, and I can do it from anywhere with a good Internet connection. Unrestricted access to my work is great in lots of ways. However, it does allow work to intrude even when I'm trying not to work. It's a mental game, and it's trickier now than it has ever been."

The consensus was that it is important for every one of us to define what we want to achieve from the vacation, and how we are viewing it, before we take it. Honesty, thought, and then action, are precursor variables that will allow each of us to incorporate the following protocol into our vacation planning.

D. Why We Take Vacation

The following are examples of different categories. All of them intersect, and can be viewed differently by each of us. But let's use them as templates for why do a vacation:

1. Refresh and regenerate from a cruel work environment the past X months.
2. Spend time more time with the family.
3. To spend less time with the family (solo vacation).
4. To pursue hobbies that make one feel like a fuller person.
5. To travel and learn new cultures and facts and history.
6. To avoid friends and relatives.
7. To visit friends and relatives.
8. To get in better shape (the hiking/biking vacation, for example).
9. To get in worse shape (the drinking trip to the Rose Bowl for example).
10. To find a spouse.
11. To vacate from a spouse.
12. To do a daring and scary act (other than work), like say skydiving, or being Alone and Naked in the wilderness.[10]
13. To find oneself.[11]

[10] No TV at our abode, but I did see this weirdo and scary show when visiting my in-laws

[11] No matter where I am, clients find me, so probably not easy to hide from myself either.

14. To let clients know that we actually do have a life other than responding within a nanosecond to their questions.

Once you get to the point of your vacation, then you need to structure the actual vacation behind the goal. Based on the intent, your vacation will fall within one of the following structures:

a. Staycation [a/k/a too scared to go out of town because of work.]
b. Workation[12] [Out of office, minimize work, but still be attentive.]
c. Relackation[13] [I am on vacation, but working most of the time so that when I return, it's not stressful; instead, I commit X hours per day to stressing me out during vacation to lower my stress when I return.]
d. Graduacation [The process of using the vacation to develop into a new person.]
e. Vacation c. 1980 [Contact me by phone at the resort if there is an emergency. And I hope not to hear from you.]

E. The Art of Taking a Vacation

You have identified the type of vacation you want. There are now two categories that you have to get over. The status quo bias, namely, not taking a vacation is easier than taking one, and then how to plan correctly for the type of vacation you will choose.[14]

F. Status Quo Bias: Fear of Taking a Vacation

Identify the reason that is preventing you from taking one, they are all unreasonable:

1. Self-worth: "If I go, people will perhaps not regard me as invaluable." [Face it, you are not invaluable.]
2. Status: "I like the fact that I can boast that I don't take vacation." [Find something better to demonstrate your self worth.]

[12] Trademark, LSH. If you use it, you must cite me.

[13] Trademark, LSH. If you use it, you must cite me.

[14] You can do exactly what you have been doing, but hopefully the materials that follow offer one or two useful tips that are worth trying.

3. Hassle: "Hassle to plan, hassle to leave, hassle to come back." [Do a better job planning and create a soft re-entry.]
4. Afraid of client loss, ego tied up in work that you don't feel like a human being. [So what.]
5. Puritanical worth effort. [You'll be deceased too soon and your puritanical work ethics will accompany you. Be self-indulgent.]
6. You will miss an important event during your vacation:
    a. New business: Important, but, is 1 less client, even the BEST client ever, worth this. If yes, do a probability analysis. E.g., you have 500 clients. Let's assume you obtain 2 referrals per week, or 104 per year. Out of these, you take 50 of the referrals. Out of the 50, 2 are your best clients that should not be missed. You therefore have a chance to have one of your best clients the week you are gone as 2/52 *2 (weeks of vacation), or 4%. At most, you have a 1 out of 25 chance of not being there to get the call.
    b. Death of a client
    c. Client complaint
    d. Summonses against you for legal malpractice
7. The real reason not to take a vacation is [the Cost of a vacation.] Taking time off of the office is expensive in terms of opportunity costs. A two week vacation, a real one, will cost you 4% of your annual next income.
    a. Quantify it: if your gross income is $300,000, a 2 week vacation will cost you approximately $12,000 in out of the office time. If your gross income is $500,000, this cost is $20,000.
    b. $20,000, wow, that's too expensive?
    c. Nah, but, your life is easier if you recognize it, accept it, and do it.

G. <u>Vacation planning: Do it by blocking off time, carve out days before and after</u>

1. Define the type of vacation and plan early:
    a. If a vacation that you are doing emails, determine what system of internet the venues have (don't assume).
    b. Determine when during the day you will be returning emails.
    c. Make sure you set Out of Office Assistant to say you are out of the office and not returning emails. [No one believes you anyways]
    d. As of January 1 each year, segregate your calendar so that you have 2 weeks blocked off every quarter. You can override this, but nice to start with blocks of free time.
    e. Iphone: can you turn emails off?

f. Emergency contact information for phone calls
g. If a no email vacation, then, calendar one week before you go to take care of the following
    i. Define what projects have to be done
    ii. Define who your go to person is while you are gone
    iii. Provide numbers to that person before you go.

2. Eliminate excuses that prevent you from taking a vacation:
    i. There is never a good time to go
    ii. Partners do not take holidays
    iii. Need to get caught up first
    iv. Take a day off and call that a holiday
    v. There's no time
    vi. Work is fun
    vii. Planning for trips is too stressful

3. 1 day rule
    a. Before vacation, make sure the last work day HAS NO MEETINGS, NO EXCEPTIONS. Block it off.

4. Who is your back-up and what is expected
    a. Handling matters
    b. Calling clients
    c. Reviewing emails (probably not)
        i. C: on emails (rule to forward emails-do alpha test)
        ii. Out of office assistant has contact info for admin assistant and lawyer

5. The Do Not Catch on Fire on Reentry Rule
    a. 2 day rule:
        i. No meetings. Cannot violate this.
        ii. No conference calls

6. The Voicemail Misstatement Rule
    a. Let the message say you are back 2 days after you are physically back.

7. Do Not Rest on Sunday:

a. Ideally, return on a Saturday; allocate Sunday for the immersion back to emails.

8. Have your staff sort you mail into categories:
    a. office mail that needs attention: have someone else in the office review it to make sure it gets taken care of.
    b. other personal mail.
    c. all the junk mail. Throw it all out.

9. When you are having lots of fun on your vacation, write down how you feel, what it's like, so the week you get back, you can remember why you went and how much fun you had. When you are back and stressed out, for a moment, remember a great moment during the vacation and how it felt.

10. While you are on vacation, tell yourself that you are going to pretend, for the vacation, that you don't have to work for a living. That you are a person of independent means enjoying life. It's a great attitude adjustment for a vacation.

H. <u>Incentives to Take More Vacation Time</u>

1. Alternative billing reduces "An hour of vacation costs me $X" from the mental equation.

2. Ponder if your clients (the post mortem administration ones) would have preferred more vacation versus how hard they worked?

3. Plan the vacation carefully and well in advance.

4. Make sure the descent back is not ugly

5. Ask yourself if you know anyone who at the end of their life said they regretted not spending more time at the office.

6. Think of the couple who retired, one of them died, the other married down a generation and spent all the time traveling with the new spouse. Do you want some other person spending the money you worked so hard to get?

YOU'RE ROCKING AND ROLLING EFFICIENTLY DURING THE DAY, AND WITH EMAILS, BUT THEN THE DARTH VADER OF CLIENTS SHOOTS YOU AN ACCUSATORY, DEBILITATING, AD HOMINEM ATTACK OF A NOTE. YOU'RE SLOWED DOWN. AGAIN. DON'T LET DARTH VADERS INTO YOUR PRACTICE.

ONCE IN YOUR PRACTICE, BE MINDFUL OF ABA RULES 1.2 AND 1.3

ABA RULE 1.3: "A LAWYER SHOULD PURSUE A MATTER ON BEHALF OF A CLIENT DESPITE OPPOSITION, OBSTRUCTION OR PERSONAL INCONVENIENCE TO THE LAWYER, AND TAKE WHATEVER LAWFUL AND ETHICAL MEASURES ARE REQUIRED TO VINDICATE A CLIENT'S CAUSE OR ENDEAVOR."

ABA RULE 1.2: "[A] LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION AND ...SHALL CONSULT WITH THE CLIENT AS TO THE MEANS BY WHICH THEY ARE TO BE PURSUED."

UGH.

Part Five: Client Selection

A. Protocol

We practice law with an informal protocol of which clients to serve and which ones not to. I often get asked, "Do you have minimums?" Rarely is there a more irrelevant question to an estate planning practice.

> Example 1: Client with $100 million calls you for a new engagement. The engagement is to "review" drafts of the planning documents that his current lawyer, who is in Idaho, is finishing up. The new client is in Illinois and would like you to make sure that the Idaho lawyer drafted documents to comply with Illinois law. (Do not take this case.) Contrast with: Daughter of Decedent D calls to inquire whether you can handle an undue influence case for her. D, her dad, was married for 3 months before his death. He had an estate of $1.4 million and left it all to his 4th wife. As an aside, and not really relevant, D was 92 when he died; his new wife, 43. (Take this case.)

The real question is an opportunity cost question. If I represent this new client, how does that affect what I could be doing:

1. Am I busy? If not, is it okay NOT to be busy?
2. Will the new client expect service that pollutes my other clients?
3. Will there be an emotional toll on me that pollutes my other clients?
4. Is there a reputational risk here?
5. What is my peace of mind worth?

The reality is that few of us have a protocol, formal or informal, as to how we want to approach new clients.

This topic is intended to provide that protocol.

The protocol can be divided into the following segments:

1. The initial referral and responsivity

2. The science of conducting that initial call

3. Due diligence and marketing after the initial call

4. Dismissal prior to meeting

5. The meeting

6. Dismissal post meeting

7. Rewarding good clients

We go through eleven heuristics as to how to achieve a winning protocol.

1. Reaction to Initial Referral

Our initial contact may be direct from the potential client or indirect from a referring source (an accountant, CPA, current client, insurance professional). We need to be diligent here.

Hence, we pivot off of the initial phone call. We receive a voice mail. Our day is packed. We don't have time YET for another drawn out story, or to discuss the background on an estate planning matter. We'll deal with it LATER.

RULE NUMBER ONE: EAT YOUR ICE CREAM CONE BEFORE IT MELTS

Think of the time between an initial referral and client contact as an Ice Cream Cone left out on the counter. The best time to eat it is now; as time goes on, it starts melting. At some point, it's a mess (or doesn't exist anymore) and not edible.

To be the master of the obvious:

1. The matter is important to whoever referred it to you. Your immediate call back demonstrates that the referral and matter is important to you.

2. The matter may have been referred to a few people. First person that calls back is in the lead. In business, they refer to this as First Mover Advantage. It's true.

3. The longer you wait, the more likely you will forget to even call back.

4. The longer you wait, the more likely you will forget why the person called in the first place.

That's the easy part, knowing that you have to call back ASAP.

RULE NUMBER TWO: LESS THAN 10

The practical issue—we could be in a meeting, may have emergencies, definitely have more interesting and work essential projects to complete now, we may be groggy, tired, or burned out from client communications, we just don't feel like yet another call, or perhaps our schedule really only has 15 minutes and we know that clients are long winded and boring.

We need a protocol. Possibilities:

1. Train your legal assistant, if appropriate, to call back a referral source and schedule for you 30 minutes with the prospect. This is either doable or not doable. If doable, start the protocol and implement. If not doable, need different protocol.

2. Call back immediately but have script in your mind.

3. If you have email address, send email with a suggested time to talk.

2. <u>Call Back:</u>

RULE NUMBER THREE: INVOKE THE 5 MINUTE LIMITATION

The 5-Minute Rule: before the scheduled meeting, and before the Soap Opera story, you can glean disaster or importance in the first 5 minutes. Be prepared to allocate:

1. If a disaster client for you and the firm, be prepared to ship off immediately to a referral outside of the firm. You should have contact information handy, and be ready with state of mind to do so.

2. If a disaster for you, but you want to keep in firm, same state of mind and contact information for referral to a colleague inside of the firm.

If the client survives the 5 minute rule, the call may be short or long.

For example, the potential merely wants to schedule a meeting, what is a good time for you?

Or the potential starts interviewing you on the phone. Not the best, but you have to keep re-directing it to what the Potential wants.

Or, the potential tells you about their estate plan and asks for advice. If it is really bad, you may be able to re-allocate the client immediately to someone else.

RULE NUMBER FOUR: STAY CONNECTED

The goal with any variety is to get background information, quickly, and set up a meeting. It is easier to sell in person than on the phone. And setting up a meeting allows you to do further due diligence. Whether you charge for the initial meeting is irrelevant. We all do it one way or the other. But getting them in, and scheduled, is critical. And get their email address.

a. "Prelim to initial meeting, how about if I send you an initial questionnaire to fill out and background on the firm and me, and background on estate planning. Let's set a meeting for _____. At that meeting, we can talk about the project and costs."

   i. Do not quote cost on phone if you can avoid it. (No charge for initial meeting unless you are hired.)

   ii. THIS IS KEY; SOME ARE SO BAD ON PAPER, THAT NO FOLLOW UP IS REQUIRED. When questionnaire comes in, may not be the kind of client you are looking for. Have assistant re-direct them to someone else.

3. Call Back: Long call

On the call back, be prepared to start your due diligence, your marketing and be diligent. Calls will either be of the short variety or the longer variety. You need to be prepared for both. We start with the easier of the two, the short call.

Five minutes into the call, you know it is going longer. The client survives the 5 minute rule, but there is no way to schedule the meeting; you are committed to a longer call.

> Example 2: "I have been wronged, dad left me nothing under the Will. I don't understand why my siblings hate me. I am currently unemployed, estranged from my family, living in my Buick Corvaire, and need some money from dad's estate. Let me tell you my life story." They will want to tell you the whole story. Phone call is a good place to ferret out if they are a few fries short of a McDonald's Happy Meal. Within 30 minutes, should be able to tell. If lucid, bring them in for a consultation.

RULE NUMBER FIVE: MTP (minimize the pain)

Preparation for the longer phone call is important. In a perfect world, a good client will be a 30 minute call prior to the actual in-office meeting, and a bad one 5 minutes prior to dismissal. Your preparation is to cover two contingencies:

A. Good client: You need to be ready to either allocate time or have time, in short order, to allocate. If client matter sounds good, phone call is key to begin marketing. Be careful not to exit call without having prospective client buy in as to next steps.

B. Bad client: You want to be done in 5 minutes. I am always ready with the mute button, and work in front of me, if the answer is "no" after 5 minutes but the client feels a need to burn 30 to 60 minutes of my time.

To minimize the pain, the protocol is to listen, segue, and schedule.

4. **Due Diligence and Marketing: Post Referral and Initial Contact**

We had mentioned getting their email address. After the phone call and before the initial meeting, consider a bit of marketing, through email and social media. Ponder whether any of the following could work for you:

1. Send emails. "Billy Bob, it was nice talking to you. Look forward to seeing you on the 29th. Attached is a questionnaire that I would appreciate you filling out and returning to me prior to the meeting."

2. In addition, as you are doing the conflicts check, make sure you ask your colleagues if anyone knows of Billy Bob or his business.

3. Then, social media:

    a. Go to Facebook or Linkedin; you can get background information without becoming a friend or linked in. Social media allows you to find out if your potential new client is Attila the Hun clothed as Mother Theresa; but also allows you to be intelligent at your first meeting. What is important to the new client, demonstrate that you are interested in his business, focus your business meeting on what is important to him or her.

    b. Do a Google search, smart search. To do a smart search, type in name in QUOTES.

4. Secretary of state information on businesses:

    a. Other searches pre-meeting.

    b. Westlaw searches have not been productive; but ARDC, case law, and other clever areas (trade associations for example).

5. Consider sending client other materials pre-meeting, by email:

    a. Attached is a fascinating article on how to avoid the implications of the reciprocal trust doctrine.

b. I thought you would find my CV of interest, as it lists many articles on planning I have authored that you may want to read.

5. <u>Dismissal Prior to Meeting</u>

RULE NUMBER SIX: JUST SAY NO.

Cancelling the meeting: Burning a referral source is scary, bad, and easy to do. Rejection = burns. Hence, approach the rejection area subtlety. Possibilities include:

1. <u>Preferred.</u> I think my rates will be too high for this matter, and I have a great solo guy who can do it cheaper.

2. <u>Possible.</u>

<u>Example 3:</u> "My schedule is really bad for the next month? I have to drill down and focus on my current clients and give them perfect service. Now that we have talked, I can tell that your matter needs immediate attention. Hence, let me suggest that you use:"

a. Person in firm; or

b. Another person. If you can wait until April, I will be ready to give it great attention, but unlikely.

3. <u>Legitimate.</u> This is not an area of strength. Let me direct you to _____.

4. <u>Reasonable.</u> Your matter is important. However, because I think you can get it done in a straightforward fashion, I am not the best person. Most of my matters have complication and hair, and for better or worse, I get dragged into the real messy situations. Yours can be attended to by _____.

5. <u>If You Have to, Only.</u> What I call the "I neither Love you, nor am in Love With You." A soft but firm approach is an email or letter as follows:

<u>Example 4</u>: Since our discussion last Tuesday, John and I have taken on new matters that will now prevent us from accepting your current representation. We endeavor to provide excellent service to

all clients, and our plates do get full and we must decline work that we would otherwise have enjoyed.

6. The Date/Meeting

RULE NUMBER SEVEN: REMEMBER CONFUSCIOUS' VIEW OF ESTATE PLANNING

One Axiom of Truth: Keep this meeting at one hour or less.[15] You don't need more time:

1. The goal is to figure out if you want this client. Personality wise, you should be able to tell in 5 minutes. Substance wise, you should be able to tell in 15 minutes. Note: client may appreciate having 2 to 3 hours of your time for you to be their therapist. Judgment call if you want to do this.

2. Keep the recommendations contained and understandable. For quite a few behavioral finance reasons, clients will be more receptive to accomplishing one step at a time. LTs, Wills, and POAs are good for the initial meeting; perhaps, with a dose of how you can save estate taxes.

3. Have your SSM ready and handy, for the client review pre or post meeting.

RULE NUMBER EIGHT: DO NOT IGNORE THE BUZZ WORDS THAT RESULT IN A BUZZ KILL

4. At meeting, listen carefully to the buzz words and concepts that will make you want to engage or dismiss client. These include the ones on the list below. The Trigger signs for a bad client (and test your colleagues on these), illustrated:

[15] To the client before the meeting. "I like to always have at least two senior planners on the team, in case you cannot reach me. Therefore, at the initial meeting, I will have my partner, Druzilla, sit in."

a. The prospect has had too many lawyers before you, and may even refuse to name them –Or, worse, wants to consult with you about how and why he should not pay his prior attorney.

b. The prospect thinks all previous lawyers were “idiots,” or makes otherwise derogatory statements about lawyers in general.

c. The prospect cannot demonstrate he/she can pay for the cost of your services, balks at paying a retainer, and/or asks for a special reduced rate or payment terms up front.

d. WANTS TO BE NOT JUST A PRIORITY, WHICH ALL CLIENTS ARE, BUT THE SOLE AND PRIMARY PRIORITY. The prospect is too demanding and expects their work will be handled before all other client work – usually recognized by a demand that the suit or action happen TODAY when there is no justification for the rush, or they are leaving on vacation tomorrow.

e. You really dislike the prospect personally. Determined within about 30 seconds. BTW, sometimes that intense early dislike is later proved to be wrong.

f. You do not agree with the prospect’s legal position.

g. You do not believe the prospect is being truthful.

h. VAV

i. Client hires you to sue his prior attorney. And you are an estate planning attorney engaged in trusts and estates. *See, e.g.*, the case of _____, a prominent San Francisco legal malpractice attorney. He claims a former client defamed him with posts on complaintsboard.com. In the posts, his client accused him of a "horrific fraud" that ruined his life during the course of a legal malpractice action against his client’s previous attorney. Important that you conduct searches on social media, periodically, to see what is being said about you.

j. The prospect is a family member.

k. The prospect indicates they know the law and what they want to do, and just wants the attorney to do the front end work for them.

7. <u>Dismissal Post Meeting</u>

Both you and the client are partially vested. The client likes you and wants you to proceed. You have invested perhaps three or more hours into the preliminaries. What a shame to waste this good billable hour time.

RULE NUMBER NINE: JIM MORRISON SAYS, "WHEN THE MUSIC'S OVER TURN OFF THE LIGHTS"

A mindset that is willing to give away a few hours to prospective clients, or non clients, is a good one to have. Losing 3 to 5 hours per week on prospects is not as economically inefficient as one may suppose.

<u>Example 5</u>: Assume a real BAD prospect year. Each week, you commit 3 hours to clients for whom you do not proceed. On a discrete basis, you have lost a lot of money that year, correct? 3 *52 hours, is 156 hours, times say 400/hour, is $60,000. Yikes. I could have had a Lexus 460. Be real though: if 20 % of your clients are bad ones, you will be in the negotiation business, or lost-hour business, as you fight with these clients for collections, or waste non-billable time on mental anguish of unreasonableness and explaining positions, bills, non-ESP actions, non-rapid enough responses. Let's look at the 20 % scenario. You bill 1,800 hours. 20 % of these people, are AYMs, Angry Young Men. Assume this correlates linearly to billable dollars. 360 hours are unpleasant, and say your write off non-billable time on average for these hours is 50 %. When you honestly factor in the anguish, whether it is lost sleep, fighting with nasty letters, or the worst case, fending off an ethical or legal challenge, that 50 % figure is probably low. That is 180 hours *400/hour, or $72,000 per year. In addition, bad clients cause us to do lesser jobs on good matters, such as making mistakes, slowing the completion of projects and creating bad will with good clients, mental wasted time, opportunity costs, and negative marketing.

Need standard form Declination letter. You want to be able to send your assistant a note: "Please prepare 'Declination' letter or email to Sam the Sham client." E.g., you want no further mental commitment,

and you want to be able to get it done right now. Consider the following:

Example 6: "Dear Theo,

What a pleasure it was to meet with you and Abigail last week. Thank you so much for the time, and for the opportunity to get to know you better.

After the meeting, I reviewed my current work list and calendar over the next few months, and regret that I will not be able to represent you in the many matters that we discussed. I would agree with your high energy assessment. You are a professional that comes with many good thoughts and in need of good attention. Unfortunately, or fortunately, my practice has grown to an extent where, to be fair to my current clients, I must decline representation in certain new matters, and, specifically, for your matters.

I am returning, under separate cover, the materials (unopened), that you sent me."

1. Litigator brethren would contend that we add standard language about "non reliance" and "having provided no legal opinion" and statute of limitations. It would be as follows:

    a. You should be aware that the passage of time may bar you from pursuing whatever, if any, claim you may have against X. You need to immediately contact another firm for assistance.

    b. In declining to undertake this matter, the Firm is not expressing an opinion on whether you will prevail if a complaint is filed. None of our discussions should be taken as providing legal advice at any level and you are not authorized to rely on any discussions we had.

8. Let us Not Forget Our Good Clients—90 %

BONUS RULE NUMBER TEN: REMEMBER VALENTINE'S DAY

AND PLEASE PAY THE APPRECIATE CLIENT THE HOMAGE THEY DESERVE. BEST SERVICE, DISCOUNT ON FEES, AND STEP IN FRONT

OF A BUS FOR THEM. Client Breed #5: The Appreciative Client, quoted from Jack Breed, “Dealing with Clients” (2007, web)

The Appreciative Client

How To Spot One:
The appreciative client will shower you with praise and make you feel special – gosh I love an appreciative client!

The Highs:
The appreciative client will make your life very easy as they’ll often pick the first version of the first draft and declare it perfect. They’re very enthusiastic and generally a delight to work with.

Even when the appreciative client does not like something they often word things in ways that make you happy to continue work on the project to get it pitch perfect.

The Lows:
They’ll make the rest of your clients look bad.

How To Work With One:
Sit back and enjoy the glory. Make sure you get them a very nice Christmas gift and throw in a freebie every now and then. An appreciative client is like gold to a freelancer, so do your best work and make them feel like a VIP.

OOPS, DARTH VADER IS MY CLIENT. CAN WE GET RID OF HIM/HER/IT ETHICALLY AND WITHOUT BEING SUED? REMEMBER THE JIM MORRISON RULE NUMBER 9, ABOVE: WHEN THE MUSIC'S OVER, TURN OFF THE LIGHTS.

IN ADDITION TO PRACTICAL CONCERNS, WE DO HAVE THE ETHICAL BOUNDARIES:

ABA Model Rule 1.16(d):

(D) UPON TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A CLIENT'S INTERESTS, SUCH AS GIVING REASONABLE NOTICE TO THE CLIENT, ALLOWING TIME FOR EMPLOYMENT OF OTHER COUNSEL, SURRENDERING PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED AND REFUNDING ANY ADVANCE PAYMENT OF FEE OR EXPENSE THAT HAS NOT BEEN EARNED OF INCURRED. THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY OTHER LAW.

So, all is going right. But then it begins to go wrong. In walking to work, you have an epiphany. "I don't like this client being a client. He needs to be an X client."

Part Five: Termination Of The Attorney-Client Relationship

Obligations of Attorney When Fired or Upon Withdrawal.

ABA Model Rule 1.16(d):

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned of incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

1. Lawyer's Duty: Protect the Client's Interests.

How???? Surrender "papers and property to which client is entitled;" refund any unearned fees.

What papers and property is the client entitled to receive? Has the client paid his or her fees? If yes, is client entitled to the whole file, including notes, research, documents?

- Generally, a lawyer has a lien on the file if the client has not paid fees.

- Practical issue – if the client is firing the lawyer, the client likely would be willing to pay outstanding fees. If the lawyer insists on payment, is there a greater chance the client will file a malpractice suit or ethical grievance?

- Even if the client has paid fees, should the lawyer be able to charge the client for copies of the file?

- If the lawyer has been scanning documents, notes, and research, then no copies are needed because the lawyer already has an electronic copy of the file. So, does the client get the whole paper or electronic file?

- Should the lawyer spend resources or charge the client to scan file?

2. <u>Recommended Approach to Turning Over the File</u> –

- Cull the file to eliminate printed copies of internal emails, file opening information, *misfiled documents that belong to other clients*, and any other items that do not benefit client (the standard is protecting client's interests).

- If items are not scanned, scan them.

- If the entire file is scanned, cull the file and retrieve misfiled or other non-beneficial documents and give the client an electronic copy of the culled file.

- Give all "work product" (not in the litigation sense, but in the practical sense) – memos, research, documents – after all, if the client paid, it is the widget we sold them. If the client did not pay, there is a conflict between the ethical rules (protecting the client's interests) and common law (lien on the file). For lawyer protection, err on the side of turning over the file.

- Always scan in research memos to avoid reinventing the wheel the next time this or a similar legal issue comes up.

- If the file is too voluminous to spend the time scanning and if the file is being turned over to another lawyer, consider following Congress' MO by kicking the can down the road with the following label on the file:

> We are providing this file based on the understanding that Hughes & Scalise, P.C. will be granted access to it in the future, if necessary, for review or photocopying on reasonable notice during normal business hours. DO NOT DESTROY without first notifying Hughes & Scalise, P.C.

This label approach may or may not work but if the lawyer makes a business decision not to copy or scan the file, it may give him/her another bite at the apple if access to the file is needed later.

3. Termination letter.

The lawyer should write the client a termination letter (whether the client fired the lawyer or the lawyer withdrew). The letter should:

- Include a refund of any fees paid in advance;

- Address any pending/unfinished steps to effectuate the plan (filing gift tax return; Crummey notices; transfers of property to FLP, GRAT, QPRT, etc.; signing Wills, etc.);

- Identify any filing deadlines (litigation, tax, year-end, etc.);

- Recommend that the client engage a new lawyer.

4. Litigation Matters.

A lawyer may not withdraw from a matter, even if the client has fired him/her, until the court approves.

Recommended Approach in Litigation.

Assuming the client has hired a new lawyer, have the new lawyer sign his/her Notice of Appearance at the same time the fired lawyer turns over the file.

Keep copies of enough of the file to continue in the case until the court approves the lawyer's departure.

Can a lawyer bill for the time he/she is still in the case? If may depend on lawyer's engagement letter but even if it is not addressed, it seems likely the lawyer could.

5. **Receipt for File and Original Documents.**

Upon delivery, the lawyer should get a receipt for the file and original documents (from the client or from the new lawyer).

AUTHORITIES

OPINIONS

Connecticut:

Op. 03-06 (2003). Pursuant to MRPC 1.16(d) a law firm in possession of original will should furnish that will to new lawyer on written request of testator's attorney-in-fact, noting that testator through her attorney-in-fact could retain new counsel and authorize transfer of all papers to new counsel.

Iowa:

Op. No. 87-21 (1988). A lawyer must provide a former client with the contents of his file, and may not insist that the request be routed through the successor counsel. "The file belongs to the client and he has the right to direct where they shall be sent."

Minnesota:

Opinion 13 (June 15, 1989). Lawyer may not condition the return of files or property on payment of copying costs, but excluded from the definition of "client files, papers and property" are unfiled, unsent and unexecuted materials for which the client has not paid a fee.

Rhode Island:

Op. No. 2000-6 (2000). Lawyer must turn over copy of joint file of clients A and B to client B as required under MRPC 1.16(d).

Utah:

Op. 06-02 (2006). Under Utah Rule 1.16, at the end of the representation the lawyer must return the client's "file" and there is no exception conferring a retaining lien against the client's file in the event of nonpayment. The Committee here concludes that an unexecuted trust and will prepared by the lawyers, for which the client has not paid, are not part of the client's "file" which must be returned to the client at the end of the representation.

CASES

Federal:

In re Grand Jury Proceedings, 727 F.2d 941 (10th Cir. 1984) – Files belong to the client and are held by attorney in representative capacity, therefore attorney cannot invoke Fifth Amendment privilege.

Clark v. Milam, 847 F. Supp. 424, 426 (D. W.Va. 1994) - The Commissioner claimed that he was entitled to the attorney's work product, which she created during her representation of the company in various cases. The attorney claimed that the documents were immune from

discovery. The court held that the magistrate's denial of the Commissioner's request for the attorney's work product was contrary to law. The attorney could not invoke work product immunity against her own client in regard to work product created during the course of representing that client. The magistrate's decision to the contrary was therefore reversible under Fed. R. Civ. P. 72(a). The court reversed the magistrate's decision insofar as it prohibited discovery of work product created during the attorney's representation of the company. In all other respects, the court adopted and affirmed the magistrate's holding.

Martin v. Valley Nat. Bank of Arizona, 140 F.R.D. 291 (S.D.N.Y. 1991) - As a general matter, the work-product rule applies only to documents prepared principally or exclusively to assist in anticipated or ongoing litigation. It follows, then, that if a party prepares a document in the ordinary course of its business, it will not be protected even if the party is aware that the document may also be useful in the event of litigation.

Resolution Trust Corp v. H---, P.C., 128 F.R.D. 647 (N.D. Tex. 1989) – Law firm was required to turn over to Plaintiff the entire contents, including previously withheld attorneys' notes and legal memoranda, of all filed maintained for client by the law firm.

Arizona:

In the Matter of Van Baalen, 123 Ariz. 82, 597 P.2d 985 (1979) – Attorney publicly censured for refusing client access to file until a $30 fee for copying was paid.

Nevada:

Morse v. District Court, 195 P.2d 199 (1948) - The court granted to petitioner attorneys a writ of certiorari against respondent trial court, directing respondent to modify its previous order so as to require plaintiffs in litigation pending before respondent to provide to petitioners a bond or other form of security for payment of their fees before requiring petitioners to turn over papers and documents in their possession to substituted counsel retained by plaintiffs.

Matter of Kaufman, 567 P.2d 957 (1977) - In Nevada, an attorney has the right to retain clients' papers, documents, and files as a passive lien for the payment of fees owing as of the attorney's withdrawal. The question of whether or not the lien in question is a retaining lien or a "special or charging" lien, as well as the fact of a lawyer's voluntary withdrawal from a case, greatly affects the ability of a lawyer to keep property belonging to the client. A "special or charging" lien is defined as the right to be paid out of a fund or judgment which he has been instrumental in recovering for his client.

Figliuzzi v. District Court, 890 P.2d 798 (1995) - In Nevada, there are two types of liens an attorney may hold to ensure that clients pay their attorney's fees: (1) a special or charging lien on the judgment or settlement the attorney has obtained for the client; and (2) a general or retaining lien that entitles an attorney, if discharged by the client, to retain the client's papers, property or money until a court, at the request of the client, requires the attorney to

deliver the retained items upon the client's furnishing of payment or security for the attorney's fees.

Ohio:

Smith v. Conley, 109 Ohio St. 3rd 141, 846 N.E.2d 509 (Ohio 2006) - The issue presented was whether the attorney-client relationship ended upon the client's firing of the attorney or upon the date which the attorney withdrew from the case. The majority opinion determined that the date the client fired the attorney was the date that the attorney-client relationship ended. A dissent argued that the date the court granted the motion to withdraw was the end of the relationship.

Texas:

Goggin v. Grimes, 969 S.W.2d 135, 137 (Tex. App. – Houston [14th Dist.] 1998) - The attorney-client relationship ends when the attorney withdraws.

Smith v. State, 490 S.W.2d 902 – Attorney was disciplined for retaining client papers as a possessory lien, when the attorney failed to make a demand for the debt owned by client.

1. Visualize every client referral call as an ice cream cone melting on a 90 degree summer day. Eat it (take action) before it melts.
    a. The outline suggests protocols.

2. Post referral and pre client hiring: DDD. Do due diligence.
    a. Questionnaire
    b. Interview referral source
    c. Use social media.
    d. Be honest—is this a client that will enhance my practice?

3. Understand that you will make more money each year by NOT TAKING BAD CLIENTS.
    a. See Example 5. To assist in the process, have rote protocol for dismissal:
    b. Example 3: "My schedule is really bad for the next month? I have to drill down and focus on my current clients and give them perfect service. Now that we have talked, I can tell that your matter needs immediate attention. Hence, let me suggest that you use _____."

4. Reward Great Clients
    a. See page 13

5. Set aside a day each week to work "away" (at home, in a conference room, etc.) and leave your phone and email turned off so that you can focus on getting the drafting/review work done.

6. Set aside time early in the month to start and finish client billing.

7. Designate a person in the office responsible for checking the calendar for appointments and pulling client files *before* the client meeting.

8. Consider taking an associate into client meetings so that:
    a. you are actively training the associate;

b. the client has another contact in the firm if you are not available; and
c. The associate (instead of you) opens the file and summarizes meeting notes.

9. Turn off email notification.
    a. To do that, try going to Home, then Options, then Mail.
    b. You will see the boxes to uncheck about notification of new emails.

10. Learn the Delay Delivery Option to teach clients that responses are not immediate.

11. Have dual desk and non-computer work station.

12. Save 41 hours per year by never opening an email, looking at it, closing it, and opening it later. That's a week-long vacation folk.

13. Plan for the client "divorce" in the engagement letter.

14. Life is short. Fire bad clients early so that their interests are not materially affected and to enhance the quality of your life.

15. Plan for, Value, Take, and Understand that a Protocol (Mental and Actual) is needed for your vacation time.

And, for another day, diet and exercise during the day will make your mood quite better. Stay tuned for this next year.

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Opening Pandora's Box on Trust Income Tax Planning

Part One

By: Louis S. Harrison (Journal of Passthrough Entities, February, 2019)

In January, 2019, the Supreme Court granted certiorari to decide one of the most important income tax issues facing trusts going forward: what is required of a State[1] to allow it to tax a trust? [2] The decision will consider the North Carolina's Supreme Court decision in *Kaestner v. North Carolina Department of Revenue*, in which the Court held that mere residency by a beneficiary in the State, was not sufficient nexus, by itself, to allow North Carolina to tax the trust. [3]

This initial discussion of the importance of the case focuses on planning background and considerations, with reference to planning implications during the interim period while we wait for the Court to review the case and issue its holding.

Part two of the article will focus on the legal theories and predict the result at the Supreme Court level.

The Stakes are Significant

State taxation of trusts is a confused area, sort of like understanding all of the computer applications in your new car. Trusts can be subject to State taxation in situations in which a State has minimal contacts with those trusts. Simply put, the Court likely will address both fair and unfair applications of State income tax approaches to trusts.

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[1] In this article, I have capitalized State wherever it appears, even if not referencing a specific state. I have used to convention because it is easier on the reader's eyes.

[2] 18-457 NORTH CAROLINA DEPT. OF REVENUE V. KAESTNER FAMILY TRUST
DECISION BELOW: 814 SE.2d 43
CERT. GRANTED 1/11/2019 QUESTION PRESENTED:
"More than $120 billion of our nation's income flows through trusts. That income is a vital source of tax revenue for the states. Eleven states, including North Carolina, tax trust income when a trust's beneficiaries are state residents. For the last ninety years, however, this Court has been silent on whether these taxes comport with due process. The Court's last words on the subject come from the *Pennoye*r era of due-process analysis. *Pennoyer v. Neff*, 95 U.S. 714 (1878). As a result, lower courts and state taxing authorities have been searching in vain for modern guidance. There is now a direct split spanning nine states. Four state courts have held that the Due Process Clause allows states to tax trusts based on trust beneficiaries' in-state residency. Five state courts, including two state supreme courts this year, have concluded that the Due Process Clause forbids these taxes. The Due Process Clause should not have different meanings in different states particularly when billions of dollars of state-tax revenue hang in the balance. The question presented to this Court is: Does the Due Process Clause prohibit states from taxing trusts based on trust beneficiaries' in-state residency."

[3] Supreme Court of North Carolina, No. 307 PA 15-2 (June 8, 2018).

For example, let's examine the trust's metaphorical equivalent in the business area, the corporation. Imagine a corporation doing business only in a fictional State called the State of Nirvana. In the State of Nirvana, let's suppose that there is no state income tax, on individuals or businesses. The corporation, taxed as a C corp, does well and earns $500,000 in year 5 of its operation. It makes no distributions to its shareholders. Shareholder Lou lives in Illinois. Shareholder Lou pays no State of Illinois tax on the dividends earned (but not distributed) in year 5. Nor does the corporation pay State income tax in Illinois.

Why, then, should the result be different for a trust? If a trust is operated in State of Nirvana, generates income in year 5 but makes no distributions to its Illinois beneficiary Lou, should it be subject to tax in Illinois?

The reason the answer could be "yes" is two-fold: one based on ignorance, and one based on greed. As we will explore in part two, I strongly suspect that United States Supreme Court will put some reason into this area and not allow the i*gnorance* or *greed* rationale to control the day at State levels anymore.

A Trust is Not an Exotic Species like the Snail Darter

In the world of partnerships, corporations, LLCs and other holding vehicles of assets, the most misunderstood entity continues to be a trust. Ask someone what a trust is, and you are likely to get the Ralph Cramden erudition: "homina, homina, homina."

Perhaps former Justice Potter Stewart would chime in to give his definition of a trust: "I shall not today attempt further to define [it] [b]ut I know it when I see it."

Ask a tax lawyer the same question, and the tax lawyer may cite Subchapter J of the Code as defining a trust. That would be the most ignored and incorrectly applied subchapter of the Code. IRS personnel are wise in trying to avoid knowing that subchapter too well.

Broken down to its bare essentials, not quoting Bogert on Trusts or 18th century English common law, a trust is essentially another form of business ownership, dealing with either passive or business assets. Its shareholders are essentially beneficiaries. The trust is a flowthrough for tax purposes if the creator retains retain too much control (in this sense, then, like an LLC or general partnership), or a separate taxable entity if the beneficiaries were not really instrumental in setting it up and do not contain the right to get funds from there whenever they want.

And hence the ability of a State to tax trusts should be no different than a State's ability to tax business entities. That would be too simple though. Because all parties still have a hard time accepting this reality of trusts, all sorts of different rules have come to be as to when trusts are subject to State taxation.

The Sands of Shifting Trust Nexus Applications

Trusts have various components: the grantor, who creates the trust, the trustee, who manages the trust and is like the general partner in a partnership or the board of directors of a corporation; the beneficiaries, which can be likened to shareholders or partners; and the administration location, where the actions of the trust take place, similar to the place of manufacturing in a manufacturing company.[4]

Because of the duality of ignorance and greed, States vary in how they tax trusts based on one of the above-enumerated components-trusteeship, beneficiaries, or administration, grantor, or beneficiaries.

For example, a trust created in Illinois, whose beneficiary is located in North Carolina, with a trustee residing in California, who uses an investment advisor and custodian in Colorado to administer the trust, could (ignoring credits and offsets) be subject to State taxation in (1) Illinois (which taxes irrevocable trusts created by a grantor in Illinois), (2) North Carolina (because the beneficiary resides there), (3) California (taxing a trust in which the trustee is resident of California, and (4) Colorado (taxing the place of administration).

There is no need to discuss the rationality of these 4 approaches since, as the Supreme Court no doubt will opine on, the 14th Amendment due process clause will be applied to dictate which approach(es) will comply and be permissible under due process.

Game On, Rationality

For now, though, as we await the Supreme Court's pronouncement, and direction, one has to determine how to minimize State income taxation of trusts. Here are the guiding principles:

1. Understand Subchapter J, including grantor trust treatment.
    a. Simply stated, with a grantor trust, the jurisdiction of the trust for State taxing purposes should be irrelevant. All income will flow back to the grantor and no federal or State income tax should be paid.[5]
    b. If there has been a distribution, then ordinary income may be carried out to the beneficiaries (likely not capital gains though), so this ordinary income will be taxed to the beneficiary, per the beneficiary's State of residence, not the trust.

[4] The simple answer is that the trust should be taxed in that jurisdiction in which its principal administration is occurring. Too simple though and not the way most States tax trusts.

[5] Is it possible that a State has an idiosyncratic taxation structure for grantor trusts? Possible, so please check; but I am not aware of any such State.

2. Review State law to determine if an irrevocable trust is taxed to the State if the grantor was resident of that State at the time of creation.
    a. If so, perhaps decant trust to a new state to change grantor, if possible. *See Linn v. Department of Revenue*, 2 N.E. 3d 1203 (Ill. App. Ct. 2013).
    b. Determine who really is the "grantor:" is it the creator or nominal grantor named in the trust, or the funder of the trust (really the latter for federal tax purposes[6])?
3. Does the residence of the trustee subject it to taxation in that State too?
    a. If so, consider changing trustee; or
    b. Changing title of that trustee to Distribution Advisor, Investment Advisor, or one other than trustee.
4. Where is the place of administration (investment and distribution committees, for example); if not in the State where the trustee is located, could that subject it to taxation in that jurisdiction? If yes, move administration to another jurisdiction.
5. Is the beneficiary in a State that taxes trust based on location of the beneficiary? If yes, tell the beneficiary to move. Just kidding. Consider arguing and applying the *Kaestner* case as not requiring taxation.

Recommendations: Wind Up to take that Slap Shot and Deliver

And most importantly, the decisions in 1-5 above should be done from trust inception onward. Although practitioners do not want to see the name of their trust as a party in litigation, aggressive planning on state taxation is a prudent approach, as we will explore in more detail in part two to the article. There we will delve into the reasons why the Supreme Court will, in my view, both uphold *Kaestner* and impose reasonableness guidelines for States before they use trusts to arbitrarily and capriciously raise revenue for that State.

[6] And should be the same for state purposes, but I view it as a cloudy area.

Avoiding the Dark Side: Darth Vader and the 90-10 Rule

By: Louis S. Harrison (from *Trusts and Estates*, 2018)

Chairlift to Freedom

Back at the end of 2012, estate planners were busy as tax planning beavers. The expiration of the gifting credit---surprise, it didn't expire after all!—caused clients to put in place lifetime trusts before the then $5.120 million gifting credit expired. That December was a time where planners could be selective as to projects and new clients. Interestingly, that time period provided good lessons on how we all could manage our practice, even in less busy beaver times.

Darth Vader Calling

Really bad "potential" clients remind me of Fawn Leibowitz from Animal House. We are one kiln accident away from being business-engaged to that client for a long time. Where's the malfunctioning kiln when you need one?[1]

One incident I remember quite vividly. A potential client with substantial net worth had requested I advise him as to how most effectively to use the lifetime credit at year end. With this potential client, I discussed partnerships and discounted gifting to maximize the use of the credit. As December approached, I emphasized to him the need to put a strategy in place (if he was going to before year end) as soon as possible so that we could get it done by year- end. He promised he would be right back to me as to whether to proceed or not.

On December 23, my receptionist frantically tracked me down to indicate that Ted (let's call the potential new client by that name) was on the phone and needed urgently to talk to me.

The conversation went something like the following:

> "Lou, this is Ted. I am riding on a chairlift at Snow Valley right now; and chatting about estate planning with the dude in the chair next to me. Just met him on the way up the mountain. He indicated that his estate planner recommended blah, blah, blah strategy for use of the credit. I want to know **why we are not doing that**. You never suggested that. What were you thinking, or not thinking? Explain yourself!"

I had this vision in my mind. What was the name of that movie where the chairlift comes crashing down? In addition to this vision, many verbal responses floated in and out of my mind, like detritus and flotsam washing onto a polluted beach. One response was not going to happen,

[1] For those unfamiliar with the reference, Ms. Leibowitz died in a kiln explosion, while purportedly crafting a bowl for her fiancé, who actually did not exist. Very complicated stuff.

and that was to mollycoddle or vindicate Ted's need to discuss the strategy. My response, instead, went something like the following:

> "Ted, at this point, we are going to have to decline your representation. I enjoyed meeting with you [a prevarication, but probably allowed under the 'politeness allows for mendacity' rule] but we will not be able to handle your matters. Have a nice ski trip. Bye."

In hanging up the phone, my mood could not have been better. We underrate the joy of saying no to Darth Vaders.

The 90/10 Rule

The 80/20 rule is well known by estate planners: 80% of our revenue comes from 20% of our clients. We are not as focused on the 90/10 rule, primarily because I just made it up.

That rule indicates that 90% of our aggravation in our practice life comes from 10 % of our clients, that is, bad clients or bad projects. And by "bad" I mean something a tad more painful than the pain that comes from jamming a sharp stick in your eye.

Since we control variables, new projects and new clients, understanding of the 90/10 rule can actually increase our happiness. But this means we have to be strong and not select those 10% clients or matters.

In a recent column, we discussed the need to avoid lifetime taxable gifts in the current environment given the possible repeal of the estate tax. We now revisit other examples of how properly to comply with the 90/10 rule.

Using Common Sense to Avoid the Vortex of Pain

Usually, listening carefully during the initial telephone call, or sending out a questionnaire and reviewing that carefully, will provide clues as to client matters for which a "no" should be immediate.

Examples are common place, such as being the prospective client's third attorney in a representation: "I didn't love them, but in 5 minutes, Lou, I know you are my guy." Hmmm. This was usually the kind of statement heard on a date when I would excuse myself to go to the bathroom, detour and exit through the kitchen, and begin changing my phone number.

Other clues are a bit more subtle, but if we pay attention to the clues, we can do well to avoid certain representations. At the initial meeting, listen carefully to the buzz words and concepts that will make you want to dismiss a potential client. These include the ones on the list below:

a. The prospect has had too many lawyers before you, and may even refuse to name them. Or, worse, wants to consult with you about how and why he should not pay his prior attorney.

b. The prospect thinks all previous lawyers were "idiots," or makes otherwise derogatory statements about lawyers in general.

c. The prospect cannot demonstrate he/she can pay for the cost of your services, balks at paying a retainer, and/or asks for a special reduced rate or payment terms up front.

d. WANTS TO BE NOT JUST A PRIORITY, WHICH ALL CLIENTS ARE, BUT THE SOLE AND PRIMARY PRIORITY. WITH THESE CAPS, DOES IT SOUND LIKE I AM SCREAMING AT YOU? SORT OF LIKE HOW THIS CLIENT MAY SOUND.

e. You do not agree with the prospect's legal position.

f. You do not believe the prospect is being truthful.

g. The prospect is VAV (vindictive, angry and vengeful).

h. The prospect is a family member.

i. The prospect indicates they know the law and what they want to do, and just wants the attorney to do the front end work for them.

Avoid Opening Pandora's Client-Selection Box

Oh to be the oracle and identify the one characteristic that allows planners to say "no" to those projects that create the wrong ratio of risk to reward.[2] One important variable that we do not pay enough attention to is risk. But that is just one variable.

But ignoring the other variables is like Congress saying, "If we repeal the estate tax in 2017, that will completely throw the budget out of whack."

There also needs to be a consideration of the fee charged, temperament of the client, tax environment in which the planning is done, conjecture as to future tax environments, steps necessary to effectively implement the strategy, required monitoring, and anticipated client behavior or ability to follow through.

On an objective plane, with all those variables in mind, we can identify the Year 2017 "less favored" project list.

[2] See the attached chart for one example of a reference chart to consider.

First, with the repeal of the estate tax, one project to avoid is one that requires the actual payment of gift tax this year, until we are clear where the estate tax system is going. We discussed that concept in a recent column.

A second strategy that has fallen in disfavor in 2017 is discount partnerships. This is not because of proposed regulations under 2704. Instead, we can go back to the genesis of discount partnerships for a clue as to why they may not be an appropriate strategy for many clients who think they would like to use them.

Back in the 90s, occasionally a client would call asking me to set up a discount partnership for them. They would be confused when I asked them the question, "Are your other estate planning documents, such as your will and trust, in place?" This seemed to me then, and now, that prospective clients who did not have their estate planning in place were not ones that were likely to follow the road map for the proper implementation and administration of the family partnership. Since then, we have learned that proper administration of the family partnership as well as proper construction is essential for sustaining its credibility.

The other item that has occurred in this area the increase income tax rates, accompanied by the decrease of estate tax rates. The differential between federal estate tax rates (40%) and all- in income tax rates (with the additional health care tax)(loss of basis costs say 30%) is only 10%. This translates into a potential tax savings of the discount times 10%; for example, a 40% discount times 10%, or 4 % total tax savings.

In many ways the discount partnership may not be worth the effort and the audit exposure.

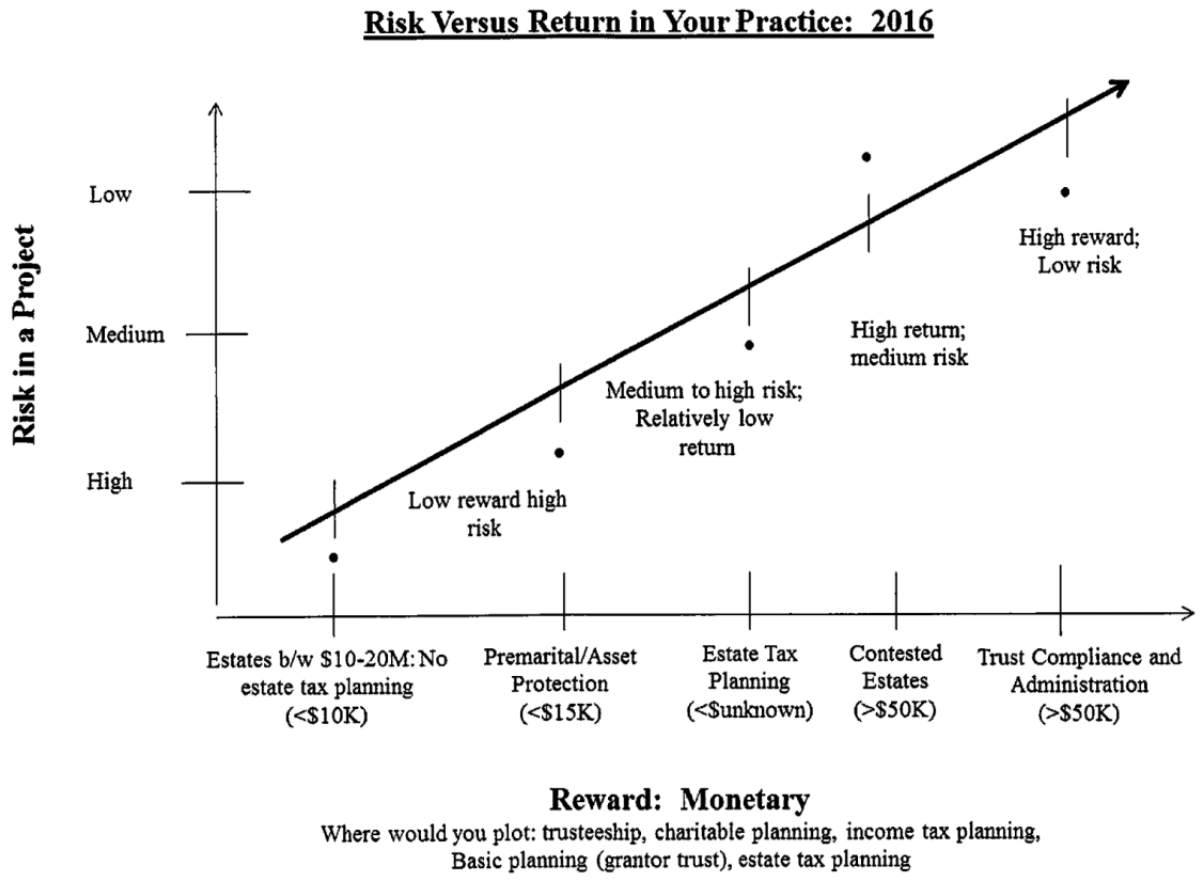
A third area of caution in 2017 is with notes. Practitioners have to now be alerted to possible Service scrutiny when a self-cancelling installment note is used. At least one high profile case indicates the heightened level of scrutiny and Service antipathy towards this strategy.

Fourth, drafting in this age of uncertainty also needs a revisit. We may want to simplify drafting as we wait to see where the estate tax system ends up. That simplified drafting could be through a single-fund QTIP trust, which essentially has been further validated for portability and estate tax planning through the recent IRS pronouncement, Rev.Proc 2016-49, allowing a QTIP election even if not necessary to avoid an estate tax.

And the fifth and final planning strategy to be concerned with in 2017 is not a strategy at all. It is avoiding what behavioral economists often refer to as the "status quo bias," in which a client feels comfortable doing nothing in the face of tax-law uncertainty. Tax laws may have an uncertain future but, ironically, one item that is certain is eventual mortality. Therefore, planners should be cautious not to delay completion of drafting projects beyond a few months as we decipher the tax planning that will rule the day.

Conclusion: The Right Emoji

Life is short and should be accompanied by smiles, not frowns. We are in control of this emotion and adherence to the 90/10 rule will have a strong influence on getting us to the happy face.



Tips From the Pros (Trusts and Estates, February, 2019)

It's Not You, It's Me: Saying Good-bye to Departing Clients

By Louis S. Harrison, partner at Harrison & Held LLP in Chicago

In the past, I've discussed the 90/10 rule, evidencing that 90 percent of pain in your practice is caused by 10 percent of your clients. The gist of the article is for all of us to be judicious in not accepting assignments from that 10 percent category.[1]

In this month's column, I'll explore from a practical side how to say "goodbye" (not "good riddance") to clients who've become ex-clients. This topic has been explored elsewhere from a legal ethics standpoint: What are an attorney's ethical duties to withdrawing clients in terms of sending documents, confidentiality and coordinating with new counsel.[2] Here, I explore it from a best practice standpoint, that is, what protocol should an attorney follow.

Here's my 5-step program:

Step 1: Plug Your Nose

What's that odiferous, noxious spirit in the air? It's the knowledge that you have to commit priority to a project that you will neither get paid for nor that you'll appreciate or enjoy.

Rather than package up and send my withdrawing client his file, let's see what else is on my agenda. I could stay home with the stomach flu? Or get that achy tooth pulled? Maybe I'll view my old girlfriend's Facebook page, where she talks about how successful her five children are and discusses her husband's recent invention of a new antibiotic? Hmmmm, all of those seem better than boxing up the file and doing other endgame activities for my former client. Unfortunately, those other activities must be relegated to second place while I deal with client matters.

Step 2: Maintain a Good Reputation

Lawyers too can come up with silly, yet clever, double entendres. And "reputation matters" is nowhere more relevant than when it comes to former clients and ending a relationship.

My personal bias is that as much as I strive to be the best lawyer I can possibly be, and always do or strive to do great work for my clients, in the end, the most important action I can take is to preserve and enhance my reputation as someone who cares about clients, has integrity and is trying my best. And in these pursuits, I'm the same as my attorney brethren. We're all trying to achieve and maintain that standard.

As we do that, we have to realize that, at times, third parties may not perceive these actions the same way we intend. And those third parties have the ability to damage one's reputation. We know this

is the case with opposing counsel in contested matters, and hey, why not treat those folk with respect while still strongly advocating for our clients?

A more subtle instance in which reputation is on the line is with departing clients. They aren't departing because they "love" you. Have you not responded promptly? Were the documents too complicated or the fees too high? Did you make a quip that was offensive? As my dad once said about a prospective employee he didn't hire, "I didn't like his tie." Sometimes, we don't know what caused the offense. But an offense was done.

We need to not so much fix the offense, as not enhance it.

For example, if a client wants out, and it takes three weeks for her to get the files, she's going to dislike you a little more.

Therefore, recognize that actions on departure by you are intended to prevent further ill will, and to the extent possible, maybe get back some of that good reputation that we all strive for.

Step 3: Organize and Focus

You know that file on the floor in the corner of your office that looks like the Leaning Document Tower of Pisa, the one with about two feet of loose papers stacked on it? You were going to organize it shortly, as in the year 2013, but that year has come and gone, and the tower has grown larger. Well, now that client has morphed into a former client who wants the file.

Here's a suggestion; organize it now. And subject to ethical requirements that a client's file belongs to a client, take some time to figure out what should be sent to the client and organize that file in a way that will allow the client, and the next attorney reviewing the file, to understand that you approached the file, the documents and the client matter in an organized way.

Step 4: Follow the Mies Van der Rohe Approach

In my approach to life, I try to discard annoying friends (is that last phrase an oxymoron?) and want them to become ex-friends. As to my quality of life, I view this discarding as addition by subtraction.

I tend to think files should work in the same way. Too many files can be a bad thing. Twenty years ago, contrary to the teachings of my elders, I started throwing away drafts. Why keep them? There really isn't a reason. A final, signed document speaks for itself. Paul McCartney doesn't like bootlegs of *Hey Jude*, showing how the song was created. And I don't need drafts showing how the document was created.

Do we need drafts that were sent to clients? I'm okay either way. I like to save cover letters, but in terms of the drafts, I don't really care if they are or aren't in the files.

I'm not too keen on notes either. Notes get translated into the documents; therefore, why do I need them in the file?

Correspondence? Much harder discussion because I routinely have over 1,000 pieces of email data per significant client. It's a burden to get these printed out for a file transmission.

Conversely, putting them all on a disk is dangerous. Have I reviewed the emails to make sure they're truly about that client? Is an email internal and not really the province of the client? Are there derogatory remarks on an email. (I certainly hope not by me, but I can't control remarks from others I work with.)

Accordingly, my correspondence file on transmission may not represent every piece of correspondence, consistent with ethical responsibilities.

And then there are the originals. These need to be carefully listed out, and a signed receipt needs to be signed by your former client that he or she received the originals (or the new attorney received them)

Step 5: Send Blueprint for Future Action

The file has been reviewed, the documents organized and you're ready to transmit. Stop. One more action to take. In your review of the file, are there pending matters that need to be attended to, lost documents, planning strategies that you discussed that need follow up? Politely detail those in the cover letter. Set forth a blueprint for what the client should do going forward.

Why not? You won't get paid for it, but again, reputation is king, and your goal on the exit is to preserve and enhance that reputation. Not a problem to provide a freebie here. You've done the work, and you should get credit for it.

And say a few nice things on the exit. All relationships, even the 10 percent ones, have had moments of happiness and glory. Note those, wish your former client well (and mean it) and be a kind individual. There's enough meanness in the world, and especially in the practice of law. Let's spread a bit of love if we can.

The Attrition Method

This final comment—also known in dating parlance as the "attrition method"[3—s] seeks to bring to an end a relationship that's soured, by making the other party the one to terminate it. Here, the trick is to achieve the exit without having the other side really dislike you.

For example, in dating (easy metaphor since we have all been there), the trite aphorisms on exit such as, "It's not you, it's me,"[3] or "I love you but am not in love with you,"[4] provoke anger and possibly a dead cat on the pillow next to you one morning. The attrition method"[5] is a much kindler and gentler way to deal with it. "Oh, I haven't called in a couple of weeks, months, really? Well, been sort of busy. Sorry." Using this method, you slowly and gently fade into the background of importance, and the relationship disintegrates on its own inertia.

Alluding to a more erudite reference, *Crime and Punishment*, the goal is to have the guilty party admit guilt. A client that feels that he's just not the right fit for you is quite a bit better than having to terminate him or having him get angry because you give him low priority. Be creative in how to get the client to acknowledge that he's a bad fit. Typically, all you have to do is be a good practitioner; for example, have you sent out bills timely, without excuse for the time incurred in a matter, and without discount? That may do the trick. Or making sure a client knows how sophisticated your practice is, assuming it is that, may lead him to realize he's not for you.

And be kind and considerate to all clients, especially those that are in transition to becoming former clients. After all, the work done here with departing clients will have better long term results than a visit to your ex-girlfriend's Facebook Page.

Endnotes

1. Louis S. Harrison, "Tips From the Pros: Avoiding the Dark side: Darth Vader and the 90/10 Rule *Trusts & Estates* (June 2017).
2. See, e.g., Nancy Hughes, Heckerling, 2014.It's known as that only by me.
3. Wrong. It's always You.
4. Meaning I find you physically and spiritually unattractive.

TAB
B

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Beth is a partner in the Vorys Cincinnati office and a member of the litigation practice. Her practice focuses on controversies related to wealth transfer, including estate, trust, real estate, and closely-held business disputes, and the exercise of fiduciary duties by trustees, executors, administrators, guardians, and powers of attorney. She represents both corporate and individual trustees and beneficiaries, guardians and other individuals in both probate courts and common pleas courts throughout Ohio. Beth also has experience handling ERISA litigation and FINRA arbitration proceedings. Beth is an efficient, practical, and passionate advocate for her clients.

Career highlights include:

- Successful trial defense of bank trustee against multi-million dollar breach of fiduciary duty claims regarding trust administration and investments.
- Successful defense and summary judgment for bank trustee against multi-million dollar breach of fiduciary duty claim involving an Irrevocable Life Insurance Trust (ILIT).
- Defense, mediation, and successful settlement of intense family dispute regarding use of funds from multi-million dollar generation-skipping trust.
- Defense, mediation, and successful settlement of claims against an individual trustee and Power of Attorney against claims of self-dealing.
- Successful representation of Florida resident in partition of family farm located in Butler County, Ohio.
- Successful trial defense and settlement of claims regarding family farm in Fayette County, Ohio, including defense against co-parceners' claims and prosecution of partition action; obtained rare physical partition of farm land, which allowed client to maintain home farm.
- Representing clients in counties across Ohio including: Hamilton, Montgomery, Butler, Warren, Clinton, Fayette, Delaware, and Coshocton counties.

Beth is a frequent speaker at bar associations and professional programs at the national, state and local level regarding estate, trust and fiduciary litigation. She is also an active member of the firm's trust and estate litigation subgroup.

Beth is a member of the American Bar Association, the Ohio State Bar Association and the Cincinnati Bar Association. Beth is also an appointed member of the Ohio State Bar Association's Estate Planning, Trust & Probate Section Council. The Council evaluates the current state of Ohio law relevant to estate, probate, and trust practitioners and their clients and develops, writes, and lobbies for relevant legislative change.

Beth has been named an *Ohio Super Lawyers Rising Star* in estate and trust litigation, the only Ohio attorney in this class, each year since 2014.

PRACTICE AREAS

Litigation

Trusts, Estates, and Wealth Transfer

EDUCATION

University of Cincinnati College of Law, J.D., 2004
University of Cincinnati Law Review, Associate Member, 2002; Student Articles Editor, 2003

Kenyon College, B.A., 2001, *magna cum laude*, Phi Beta Kappa

BAR AND COURT ADMISSIONS

Ohio

U.S. District Court for the Southern District of Ohio

Admitted to practice law only in the states listed above.

VORYS

Overview of Omnibus Probate Bill 595 and Other Significant Developments

Cincinnati Bar Association - Advanced Estate Planning Institute

February 8, 2018

Presented by: Beth Weinewuth, Esq.

VORYS

House Bill 595

- “Omnibus Probate and Trust Bill”
- Enacted December 13, 2018
- Effective March 2019

Senate Bill 263

- Enacted December 2018
- Effective March 2019, with certain provisions not effective until September 2019

TOP 10

OHIO ESTATE, TRUST, AND PROBATE LAW CHANGES

COMING IN 2019

VORYS

10. IOLTA Account Usage (R.C. 2109.41 and 4705.09)

- Clarifies law enacted in March 2018
    - Lawyers representing estate and trust fiduciaries may hold nominal, short term assets in IOLTA accounts

10. IOLTA Account Usage (R.C. 2109.41 and 4705.09) (cont'd)

Old Law: Required that the name of the IOLTA account "contain additional identifying features to distinguish it from other trust accounts . . ."

Required that no funds of a fiduciary be deposited in IOLTA account "unless the deposit had been approved by the probate court . . ."

10. IOLTA Account Usage (R.C. 2109.41 and 4705.09) (cont'd)

New Law:

- Attorneys can still hold nominal funds of fiduciary clients in IOLTA accounts short term
- No separate IOLTA accounts required
- No court approval required

9. Anti-Lapse Statute (R.C. 2107.52)

Ohio's Anti-Lapse Statute prevents certain gifts from lapsing when an intended beneficiary does not survive.

Castillo v. Ott, 6th Dist. Lucas No. L-14-1248, 2015-Ohio-905: Anti-lapse statute does not apply to certain class gifts, and, in this case, does not apply to a gift to testator's "children."

9. Anti-Lapse Statute (R.C. 2107.52) (cont'd)

Old Law: Anti-lapse statute applies where all three of the following elements are satisfied:

1. Gift to a particular person or to a class of people, but not a class described as "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relative," or "family" or a class described by language of similar import.
2. Intended recipient of the gift dies before testator.

9. Anti-Lapse Statute (R.C. 2107.52) (cont'd)

3. Intended recipient is a family member of the testator:
    - Grandparent of testator
    - Descendant of grandparent of testator
    - Stepchild of testator

9. Anti-Lapse Statute (R.C. 2107.52) (cont'd)

New Law: Class gift definition in statute no longer excludes classes of people as long as they are in one generation—such as "my children" or "my siblings"

(b) If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import that includes more than one generation, a substitute gift is created in the surviving descendants of any deceased devisee.

9. Anti-Lapse Statute (R.C. 2107.52) (cont'd)

- Overturns *Castillo v. Ott*
- If class gift to "my children" or "my siblings" and one child or sibling is deceased, her share goes to her descendants per stirpes; does not lapse
- March 22, 2012 effective date

8. Slayer Statute Broadened (R.C. 2105.19)

Old Law: statute prevents murderers from benefiting from victim's death (estate, life insurance, trust, etc.)

New Law: broadens to include involuntary manslaughter as well as murder

- Exception for felony vehicular manslaughter

7. Electronic Wills (R.C. 2107.18, 2107.20, & 2129.05)

Nevada revised its electronic wills law in 2017.

Ohio's response to Nevada's law:

X X X

7. Electronic Wills (R.C. 2107.18, 2107.20, & 2129.05) (cont'd)

Old Law: A will shall be admitted to probate in Ohio if, at the time of execution, it complies with the law in the jurisdiction in which it was executed.

New Law: A will shall be admitted to probate in Ohio if, at the time of execution, it complies with the law in the jurisdiction in which **the testator was physically present when** it was executed.

6. Notary Public Modernization (R.C. Chapter 147)

S.B. 263 (aka the Notary Public Modernization Act) makes various changes to R.C. Chapter 147 governing notaries public.

- Centralized oversight by Ohio Secretary of State.
- New qualification requirements for traditional notaries.
- Guidance for notarial acts.
- Electronic notarizations in Ohio.

5. Medical Records Access (R.C. 2113.032)

- New statutory procedure
- Anyone “eligible to be appointed as a personal representative” may file an application for release of decedent’s medical records WITHOUT OPENING AN ESTATE
- To evaluate wrongful death, personal injury
- Notice to next of kin required
- Court may order with or without a hearing

4. Incorporation by Reference Fix (R.C. 2107.05)

- Statute of Limitations Trap
- "Intended to abrogate the holdings of the Ohio Supreme Court in *Hageman v. Cleveland Trust Company*, 45 Ohio St.2d 178 (1976) and the Ohio Second District Court of Appeals in *Gehrke v. Senkiw*, 2016 Ohio 2657 (2016)."

4. Incorporation by Reference Fix (R.C. 2107.05) (cont'd)

- *Gehrke* held validity of a trust could not be challenged without challenging the settlor's will if "incorporated by reference."
- Citing *Hageman*, *Gehrke* found that language pouring estate assets into a trust "incorporated by reference."
- Trust contest filed after the 3-month will-contest period—claim barred.

4. Incorporation by Reference Fix (R.C. 2107.05) (cont'd)

Old Law: Any contest to an intervivos trust that was named in a will as a beneficiary must be filed within the 3-month period to contest the will.

- Even if the validity of the will not in dispute.
- Even though there is a 2-year statute of limitations to contest intervivos trusts found at 5806.04.

4. Incorporation by Reference Fix (R.C. 2107.05) (cont'd)

New Law: "Any language in a testator's will that only identifies a trust shall not be sufficient to manifest an intent to incorporate that trust instrument by reference in the will."

Statute of limitations for contesting validity of intervivos trust remains 2 years under R.C. 5806.04.

4. Incorporation by Reference Fix (R.C. 2107.05) (cont'd)

NOT RETROACTIVE

Only applies to "the wills of testators who die on or after the effective date of this amendment."

3. Pre-Death Trust Validation (R.C. Chapter 5817)

Old Law: A testator may initiate an action during his or her lifetime for a judgment declaring the validity of the testator's **will.** [R.C. 2107.081.]

- Did not apply to trusts.
- Required same procedure in order to modify or revoke the will. [R.C. 2107.084(C).]

3. Pre-Death Trust Validation (R.C. Chapter 5817) (cont'd)

New Law: A testator (for a will) and/or a settlor (for a trust) may initiate an action during his or her lifetime for a judgment declaring the validity of the testator's will and/or the validity of the settlor's trust and the enforceability of its terms.
[R.C. Chapter 5817]

- Improves the validation process.
- Makes the validation process available for both wills and trusts.

2. Trust Arbitration (R.C. 5802.05)

Old Law: Under Ohio law, it was, at the very least, debatable whether a clause in a trust that requires arbitration to resolve disputes is enforceable.

New Law: HB 595 enacts new R.C. 5802.05, which provides that arbitration may be required under a trust instrument, with two exceptions.

- Exception 1: N/A to testamentary trusts.
- Exception 2: N/A to disputes of the validity of all or a part of a trust.

2. Trust Arbitration (R.C. 5802.05) (cont'd)

Drafting an arbitration clause:

- Types of Disputes
- Selection of Arbitrators
- Costs
- Representation of Minor, Unborn and Unascertained Beneficiaries
- Confidentiality
- Choice of Law
- Procedural Rules

1. Fiduciary Attorney-Client Privilege Protection (R.C. 5815.16)

Old Law: **“**(A) Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.”

1. Fiduciary Attorney-Client Privilege Protection (R.C. 5815.16) (cont'd)

- Before 2017, majority of Ohio courts did not apply a fiduciary exception to attorney-client privilege.
- Trustees not forced to disclose privileged communications in litigation with beneficiaries.

1. Fiduciary Attorney-Client Privilege Protection (R.C. 5815.16) (cont'd)

Dueck v. The Clifton Colony Club, 8th Dist., 2017-Ohio-7161.

- Applied a fiduciary exception to the attorney-client privilege.
- Ordered privileged documents to be provided to beneficiaries in litigation with trustee, citing duty to inform and report under R.C. 5808.13.

1. Fiduciary Attorney-Client Privilege Protection (R.C. 5815.16) (cont'd)

New Law: "(B) Any communication between an attorney and a client who is acting as a fiduciary is privileged and protected from disclosure to third parties to whom the fiduciary owes fiduciary duties to the same extent as if the client was not acting as a fiduciary."

References:

House Bill 595

https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-595

Senate Bill 263

https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-SB-263

References: (cont'd)

- *Proposed Legislation Requires Testator's Intent to Incorporate a Document into the Will*, Ralph Lehman, PLJO July/Aug. 2017.
- *Can You Contest Both a Will and a Trust?* Robert Brucken, PLJO Nov./Dec. 2016.
- *A Primer on Ohio's Wills and Trusts Antilapse Statute*, Alan Newman, PLJO Mar./Apr. 2017.
- *Electronic Wills, an Emergency*, John G. Cobey, PLJO May/June 2018.
- *Ohio's Anti-Lapse Statute and the Proposed Statutory Response to Castillo v. Ott*, Layman, PLJO May/June 2016.
- *Summary of Gehrke v. Senkiw, 2016-Ohio-2657*, Richard Kolb, Esq., PLJO May/June 2016.
- *In Terrorem and Arbitration Clauses*, Robert M. Kincaid Jr., PLJO Sept./Oct. 2016.
- *Arbitration Proposal Aims to Resolve Uncertainty and Improve Ohio Trust Law*, John F. Furniss, PLJO March/April 2018.
- *Representing Fiduciaries: Does Cincinnati Bar Association v. Robertson Portend a Dueck Dynasty?* Patricia Laub and Audra E. Loomis, PLJO May/June 2018.

Statutory and Legislative References

Topic	Statute	Legislative Page Number
IOLTA Accounts	R.C. 2109.41, 4705.09	HB 595 p. 20, 31
Anti-Lapse Statute	R.C. 2107.52	HB 595 p. 18
Slayer Statute	R.C. 2105.19	HB 595 p. 11
Electronic Wills	R.C. 2107.18	HB 595 p. 15
Notary Public Modernization	R.C. 147.01, *et seq.*	SB 263 p. 9
Medical Records	R.C. 2113.032	HB 595 p. 22
Incorp. By Reference	R.C. 2107.05	HB 595 p. 13
Pre-Death Trust Validation	R.C. 5817.01, *et seq.*	HB 595 p. 44
Trust Arbitration	R.C. 5802.05	HB 595 p. 40
Atty-Client Privilege	R.C. 5815.16	HB 595 p. 44

Recent Case Notes:

***Mackay v. Thomas*, 5th Dist. Tuscarawas No. 2018 AP 03 0012, 2018-Ohio-4154.**

- Appellants alleged intentional interference with expectancy of inheritance.
- Decedent's wife acknowledged that she had destroyed a draft Will.
- Even if the decedent had executed the Will, the decedent's wife would have inherited the decedent's entire estate because the trust referenced in the Will was never drafted.
- Holding: interference with an incomplete estate plan that, on its own, would not effectively result in the claimant's anticipated inheritance was insufficient to maintain a successful claim.

Recent Case Notes:

***Murphy v. Hall*, 11th Dist. Trumbull No. 2017-T-0114, 2019-Ohio-188.**

- Applied the clearly expressed intent test to determine whether the decedent had intended that all of her siblings should be the beneficiaries of her investment account.
- Reversed the trial court's decision, finding in favor of the decedent's siblings.
- Focused on testimony from the decedent's friend (who had completed the beneficiary designation form) that she had completed the designation form in accordance with the decedent's wishes and that the decedent had a "clear" mental state.
- Holding: the decedent did not intend to leave the account to her estate and, instead, intended to leave her account in equal shares to her siblings.

Recent Case Notes:

***Embassy Healthcare v. Bell*, 2018-Ohio-4912, reconsideration denied, 2018-Ohio-5290, 2018 Ohio LEXIS 3118 (Ohio, Dec. 31, 2018).**

- Supreme Court of Ohio considered a creditor's claim seeking reimbursement from a surviving spouse for the decedent's unpaid medical bills.
- Creditor did not present claim to the decedent's estate; sought reimbursement from the surviving spouse under the Ohio necessaries doctrine.
- Court concluded that the surviving spouse was not liable for the decedent's debt because creditor failed to present a claim to the decedent's estate; did not to show that the decedent could not pay.
- Holding: Creditor must first demonstrate the debtor spouse's estate's inability to pay a debt before pursuing the surviving spouse for recourse.

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(132nd General Assembly)
(Substitute Senate Bill Number 263)

AN ACT

To amend sections 109.572, 147.01, 147.03, 147.04, 147.05, 147.06, 147.07, 147.08, 147.13, 147.14, 147.37, 147.371, 147.51, 147.55, 2303.20, 4505.11, 4735.01, and 4738.021, to enact sections 147.011, 147.021, 147.022, 147.031, 147.032, 147.041, 147.051, 147.141, 147.142, 147.542, 147.551, 147.59, 147.591, 147.60, 147.61, 147.62, 147.63, 147.631, 147.64, 147.65, 147.66, and 4735.023 and to repeal sections 147.02 and 147.09 of the Revised Code to enact the Notary Public Modernization Act, to create the National Motor Vehicle Title Information System Utilization Study Committee, to limit the circumstances under which a clerk of court may issue salvage certificates of title until January 1, 2021, to make changes to the law related to motor vehicle salvage data collection, and to revise Ohio law regarding oil and gas land professionals.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 109.572, 147.01, 147.03, 147.04, 147.05, 147.06, 147.07, 147.08, 147.13, 147.14, 147.37, 147.371, 147.51, 147.55, 2303.20, 4505.11, 4735.01, and 4738.021 be amended and sections 147.011, 147.021, 147.022, 147.031, 147.032, 147.041, 147.051, 147.141, 147.142, 147.542, 147.551, 147.59, 147.591, 147.60, 147.61, 147.62, 147.63, 147.631, 147.64, 147.65, 147.66, and 4735.023 of the Revised Code be enacted to read as follows:

Sec. 109.572. (A)(1) Upon receipt of a request pursuant to section 121.08, 3301.32, 3301.541, or 3319.39 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code, felonious sexual penetration in violation of former section 2907.12 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, or a violation of section 2925.11 of the Revised Code that is not a minor drug possession

offense;

(b) A violation of an existing or former law of this state, any other state, or the United States that is substantially equivalent to any of the offenses listed in division (A)(1)(a) of this section;

(c) If the request is made pursuant to section 3319.39 of the Revised Code for an applicant who is a teacher, any offense specified in section 3319.31 of the Revised Code.

(2) On receipt of a request pursuant to section 3712.09 or 3721.121 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check with respect to any person who has applied for employment in a position for which a criminal records check is required by those sections. The superintendent shall conduct the criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.11, 2905.12, 2907.02, 2907.03, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.12, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21, 2913.31, 2913.40, 2913.43, 2913.47, 2913.51, 2919.25, 2921.36, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.11, 2925.13, 2925.22, 2925.23, or 3716.11 of the Revised Code;

(b) An existing or former law of this state, any other state, or the United States that is substantially equivalent to any of the offenses listed in division (A)(2)(a) of this section.

(3) On receipt of a request pursuant to section 173.27, 173.38, 173.381, 3701.881, 5164.34, 5164.341, 5164.342, 5123.081, or 5123.169 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check of the person for whom the request is made. The superintendent shall conduct the criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of, has pleaded guilty to, or (except in the case of a request pursuant to section 5164.34, 5164.341, or 5164.342 of the Revised Code) has been found eligible for intervention in lieu of conviction for any of the following, regardless of the date of the conviction, the date of entry of the guilty plea, or (except in the case of a request pursuant to section 5164.34, 5164.341, or 5164.342 of the Revised Code) the date the person was found eligible for intervention in lieu of conviction:

(a) A violation of section 959.13, 959.131, 2903.01, 2903.02, 2903.03, 2903.04, 2903.041, 2903.11, 2903.12, 2903.13, 2903.15, 2903.16, 2903.21, 2903.211, 2903.22, 2903.34, 2903.341, 2905.01, 2905.02, 2905.05, 2905.11, 2905.12, 2905.32, 2905.33, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.24, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2907.33, 2909.02, 2909.03, 2909.04, 2909.22, 2909.23, 2909.24, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2913.02, 2913.03, 2913.04, 2913.05, 2913.11, 2913.21, 2913.31, 2913.32, 2913.40, 2913.41, 2913.42, 2913.43, 2913.44,

2913.441, 2913.45, 2913.46, 2913.47, 2913.48, 2913.49, 2913.51, 2917.01, 2917.02, 2917.03, 2917.31, 2919.12, 2919.121, 2919.123, 2919.22, 2919.23, 2919.24, 2919.25, 2921.03, 2921.11, 2921.12, 2921.13, 2921.21, 2921.24, 2921.32, 2921.321, 2921.34, 2921.35, 2921.36, 2921.51, 2923.12, 2923.122, 2923.123, 2923.13, 2923.161, 2923.162, 2923.21, 2923.32, 2923.42, 2925.02, 2925.03, 2925.04, 2925.041, 2925.05, 2925.06, 2925.09, 2925.11, 2925.13, 2925.14, 2925.141, 2925.22, 2925.23, 2925.24, 2925.36, 2925.55, 2925.56, 2927.12, or 3716.11 of the Revised Code;

(b) Felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(c) A violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996;

(d) A violation of section 2923.01, 2923.02, or 2923.03 of the Revised Code when the underlying offense that is the object of the conspiracy, attempt, or complicity is one of the offenses listed in divisions (A)(3)(a) to (c) of this section;

(e) A violation of an existing or former municipal ordinance or law of this state, any other state, or the United States that is substantially equivalent to any of the offenses listed in divisions (A)(3)(a) to (d) of this section.

(4) On receipt of a request pursuant to section 2151.86 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 959.13, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.16, 2903.21, 2903.211, 2903.22, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.22, 2909.23, 2909.24, 2911.01, 2911.02, 2911.11, 2911.12, 2913.49, 2917.01, 2917.02, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, 2927.12, or 3716.11 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, a violation of section 2925.11 of the Revised Code that is not a minor drug possession offense, two or more OVI or OVUAC violations committed within the three years immediately preceding the submission of the application or petition that is the basis of the request, or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former law of this state, any other state, or the United States that is substantially equivalent to any of the offenses listed in division (A)(4)(a) of this section.

(5) Upon receipt of a request pursuant to section 5104.013 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates

that the person who is the subject of the request has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2151.421, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.22, 2903.34, 2905.01, 2905.02, 2905.05, 2905.11, 2905.32, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.19, 2907.21, 2907.22, 2907.23, 2907.24, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.04, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2913.02, 2913.03, 2913.04, 2913.041, 2913.05, 2913.06, 2913.11, 2913.21, 2913.31, 2913.32, 2913.33, 2913.34, 2913.40, 2913.41, 2913.42, 2913.43, 2913.44, 2913.441, 2913.45, 2913.46, 2913.47, 2913.48, 2913.49, 2917.01, 2917.02, 2917.03, 2917.31, 2919.12, 2919.22, 2919.224, 2919.225, 2919.24, 2919.25, 2921.03, 2921.11, 2921.13, 2921.14, 2921.34, 2921.35, 2923.01, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code, felonious sexual penetration in violation of former section 2907.12 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, a violation of section 2925.11 of the Revised Code that is not a minor drug possession offense, a violation of section 2923.02 or 2923.03 of the Revised Code that relates to a crime specified in this division, or a second violation of section 4511.19 of the Revised Code within five years of the date of application for licensure or certification.

(b) A violation of an existing or former law of this state, any other state, or the United States that is substantially equivalent to any of the offenses or violations described in division (A)(5)(a) of this section.

(6) Upon receipt of a request pursuant to section 5153.111 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.05, 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2911.01, 2911.02, 2911.11, 2911.12, 2919.12, 2919.22, 2919.24, 2919.25, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.04, 2925.05, 2925.06, or 3716.11 of the Revised Code, felonious sexual penetration in violation of former section 2907.12 of the Revised Code, a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, a violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had the violation been committed prior to that date, or a violation of section 2925.11 of the Revised Code that is not a minor drug possession offense;

(b) A violation of an existing or former law of this state, any other state, or the United States

that is substantially equivalent to any of the offenses listed in division (A)(6)(a) of this section.

(7) On receipt of a request for a criminal records check from an individual pursuant to section 4749.03 or 4749.06 of the Revised Code, accompanied by a completed copy of the form prescribed in division (C)(1) of this section and a set of fingerprint impressions obtained in a manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists indicating that the person who is the subject of the request has been convicted of or pleaded guilty to a felony in this state or in any other state. If the individual indicates that a firearm will be carried in the course of business, the superintendent shall require information from the federal bureau of investigation as described in division (B)(2) of this section. Subject to division (F) of this section, the superintendent shall report the findings of the criminal records check and any information the federal bureau of investigation provides to the director of public safety.

(8) On receipt of a request pursuant to section 1321.37, 1321.53, or 4763.05 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check with respect to any person who has applied for a license, permit, or certification from the department of commerce or a division in the department. The superintendent shall conduct the criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any of the following: a violation of section 2913.02, 2913.11, 2913.31, 2913.51, or 2925.03 of the Revised Code; any other criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities, as set forth in Chapters 2909., 2911., 2913., 2915., 2921., 2923., and 2925. of the Revised Code; or any existing or former law of this state, any other state, or the United States that is substantially equivalent to those offenses.

(9) On receipt of a request for a criminal records check from the treasurer of state under section 113.041 of the Revised Code or from an individual under section 4701.08, 4715.101, 4717.061, 4725.121, 4725.501, 4729.071, 4730.101, 4730.14, 4730.28, 4731.081, 4731.15, 4731.171, 4731.222, 4731.281, 4731.296, 4731.531, 4732.091, 4734.202, 4740.061, 4741.10, 4747.051, 4753.061, 4755.70, 4757.101, 4759.061, 4760.032, 4760.06, 4761.051, 4762.031, 4762.06, 4774.031, 4774.06, 4776.021, 4778.04, 4778.07, 4779.091, or 4783.04 of the Revised Code, accompanied by a completed form prescribed under division (C)(1) of this section and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request has been convicted of or pleaded guilty to any criminal offense in this state or any other state. Subject to division (F) of this section, the superintendent shall send the results of a check requested under section 113.041 of the Revised Code to the treasurer of state and shall send the results of a check requested under any of the other listed sections to the licensing board specified by the individual in the request.

(10) On receipt of a request pursuant to section 1121.23, 1315.141, 1733.47, or 1761.26 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any criminal offense under any existing or former law of this state, any other state, or the United States.

(11) On receipt of a request for a criminal records check from an appointing or licensing authority under section 3772.07 of the Revised Code, a completed form prescribed under division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner prescribed in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty or no contest to any offense under any existing or former law of this state, any other state, or the United States that is a disqualifying offense as defined in section 3772.07 of the Revised Code or substantially equivalent to such an offense.

(12) On receipt of a request pursuant to section 2151.33 or 2151.412 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check with respect to any person for whom a criminal records check is required under that section. The superintendent shall conduct the criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.16, 2903.21, 2903.34, 2905.01, 2905.02, 2905.11, 2905.12, 2907.02, 2907.03, 2907.05, 2907.06, 2907.07, 2907.08, 2907.09, 2907.12, 2907.25, 2907.31, 2907.32, 2907.321, 2907.322, 2907.323, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2913.02, 2913.03, 2913.04, 2913.11, 2913.21, 2913.31, 2913.40, 2913.43, 2913.47, 2913.51, 2919.25, 2921.36, 2923.12, 2923.13, 2923.161, 2925.02, 2925.03, 2925.11, 2925.13, 2925.22, 2925.23, or 3716.11 of the Revised Code;

(b) An existing or former law of this state, any other state, or the United States that is substantially equivalent to any of the offenses listed in division (A)(12)(a) of this section.

(13) On receipt of a request pursuant to section 3796.12 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in a manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to the following:

(a) A disqualifying offense as specified in rules adopted under division (B)(2)(b) of section 3796.03 of the Revised Code if the person who is the subject of the request is an administrator or

other person responsible for the daily operation of, or an owner or prospective owner, officer or prospective officer, or board member or prospective board member of, an entity seeking a license from the department of commerce under Chapter 3796. of the Revised Code;

(b) A disqualifying offense as specified in rules adopted under division (B)(2)(b) of section 3796.04 of the Revised Code if the person who is the subject of the request is an administrator or other person responsible for the daily operation of, or an owner or prospective owner, officer or prospective officer, or board member or prospective board member of, an entity seeking a license from the state board of pharmacy under Chapter 3796. of the Revised Code.

(14) On receipt of a request required by section 3796.13 of the Revised Code, a completed form prescribed pursuant to division (C)(1) of this section, and a set of fingerprint impressions obtained in a manner described in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty to the following:

(a) A disqualifying offense as specified in rules adopted under division (B)(8)(a) of section 3796.03 of the Revised Code if the person who is the subject of the request is seeking employment with an entity licensed by the department of commerce under Chapter 3796. of the Revised Code;

(b) A disqualifying offense as specified in rules adopted under division (B)(14)(a) of section 3796.04 of the Revised Code if the person who is the subject of the request is seeking employment with an entity licensed by the state board of pharmacy under Chapter 3796. of the Revised Code.

(15) On receipt of a request for a criminal records check under section 147.022 of the Revised Code, a completed form prescribed under division (C)(1) of this section, and a set of fingerprint impressions obtained in the manner prescribed in division (C)(2) of this section, the superintendent of the bureau of criminal identification and investigation shall conduct a criminal records check in the manner described in division (B) of this section to determine whether any information exists that indicates that the person who is the subject of the request previously has been convicted of or pleaded guilty or no contest to any disqualifying offense, as defined in section 147.011 of the Revised Code, or to any offense under any existing or former law of this state, any other state, or the United States that is substantially equivalent to such a disqualifying offense.

(B) Subject to division (F) of this section, the superintendent shall conduct any criminal records check to be conducted under this section as follows:

(1) The superintendent shall review or cause to be reviewed any relevant information gathered and compiled by the bureau under division (A) of section 109.57 of the Revised Code that relates to the person who is the subject of the criminal records check, including, if the criminal records check was requested under section 113.041, 121.08, 173.27, 173.38, 173.381, 1121.23, 1315.141, 1321.37, 1321.53, 1733.47, 1761.26, 2151.86, 3301.32, 3301.541, 3319.39, 3701.881, 3712.09, 3721.121, 3772.07, 3796.12, 3796.13, 4749.03, 4749.06, 4763.05, 5104.013, 5164.34, 5164.341, 5164.342, 5123.081, 5123.169, or 5153.111 of the Revised Code, any relevant information contained in records that have been sealed under section 2953.32 of the Revised Code;

(2) If the request received by the superintendent asks for information from the federal bureau of investigation, the superintendent shall request from the federal bureau of investigation any

information it has with respect to the person who is the subject of the criminal records check, including fingerprint-based checks of national crime information databases as described in 42 U.S.C. 671 if the request is made pursuant to section 2151.86 or 5104.013 of the Revised Code or if any other Revised Code section requires fingerprint-based checks of that nature, and shall review or cause to be reviewed any information the superintendent receives from that bureau. If a request under section 3319.39 of the Revised Code asks only for information from the federal bureau of investigation, the superintendent shall not conduct the review prescribed by division (B)(1) of this section.

(3) The superintendent or the superintendent's designee may request criminal history records from other states or the federal government pursuant to the national crime prevention and privacy compact set forth in section 109.571 of the Revised Code.

(4) The superintendent shall include in the results of the criminal records check a list or description of the offenses listed or described in division (A)(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), ~~or~~ (14), or (15) of this section, whichever division requires the superintendent to conduct the criminal records check. The superintendent shall exclude from the results any information the dissemination of which is prohibited by federal law.

(5) The superintendent shall send the results of the criminal records check to the person to whom it is to be sent not later than the following number of days after the date the superintendent receives the request for the criminal records check, the completed form prescribed under division (C)(1) of this section, and the set of fingerprint impressions obtained in the manner described in division (C)(2) of this section:

(a) If the superintendent is required by division (A) of this section (other than division (A)(3) of this section) to conduct the criminal records check, thirty;

(b) If the superintendent is required by division (A)(3) of this section to conduct the criminal records check, sixty.

(C)(1) The superintendent shall prescribe a form to obtain the information necessary to conduct a criminal records check from any person for whom a criminal records check is to be conducted under this section. The form that the superintendent prescribes pursuant to this division may be in a tangible format, in an electronic format, or in both tangible and electronic formats.

(2) The superintendent shall prescribe standard impression sheets to obtain the fingerprint impressions of any person for whom a criminal records check is to be conducted under this section. Any person for whom a records check is to be conducted under this section shall obtain the fingerprint impressions at a county sheriff's office, municipal police department, or any other entity with the ability to make fingerprint impressions on the standard impression sheets prescribed by the superintendent. The office, department, or entity may charge the person a reasonable fee for making the impressions. The standard impression sheets the superintendent prescribes pursuant to this division may be in a tangible format, in an electronic format, or in both tangible and electronic formats.

(3) Subject to division (D) of this section, the superintendent shall prescribe and charge a reasonable fee for providing a criminal records check under this section. The person requesting the criminal records check shall pay the fee prescribed pursuant to this division. In the case of a request under section 1121.23, 1155.03, 1163.05, 1315.141, 1733.47, 1761.26, 2151.33, 2151.412, or

5164.34 of the Revised Code, the fee shall be paid in the manner specified in that section.

(4) The superintendent of the bureau of criminal identification and investigation may prescribe methods of forwarding fingerprint impressions and information necessary to conduct a criminal records check, which methods shall include, but not be limited to, an electronic method.

(D) The results of a criminal records check conducted under this section, other than a criminal records check specified in division (A)(7) of this section, are valid for the person who is the subject of the criminal records check for a period of one year from the date upon which the superintendent completes the criminal records check. If during that period the superintendent receives another request for a criminal records check to be conducted under this section for that person, the superintendent shall provide the results from the previous criminal records check of the person at a lower fee than the fee prescribed for the initial criminal records check.

(E) When the superintendent receives a request for information from a registered private provider, the superintendent shall proceed as if the request was received from a school district board of education under section 3319.39 of the Revised Code. The superintendent shall apply division (A)(1)(c) of this section to any such request for an applicant who is a teacher.

(F)(1) Subject to division (F)(2) of this section, all information regarding the results of a criminal records check conducted under this section that the superintendent reports or sends under division (A)(7) or (9) of this section to the director of public safety, the treasurer of state, or the person, board, or entity that made the request for the criminal records check shall relate to the conviction of the subject person, or the subject person's plea of guilty to, a criminal offense.

(2) Division (F)(1) of this section does not limit, restrict, or preclude the superintendent's release of information that relates to the arrest of a person who is eighteen years of age or older, to an adjudication of a child as a delinquent child, or to a criminal conviction of a person under eighteen years of age in circumstances in which a release of that nature is authorized under division (E)(2), (3), or (4) of section 109.57 of the Revised Code pursuant to a rule adopted under division (E)(1) of that section.

(G) As used in this section:

(1) "Criminal records check" means any criminal records check conducted by the superintendent of the bureau of criminal identification and investigation in accordance with division (B) of this section.

(2) "Minor drug possession offense" has the same meaning as in section 2925.01 of the Revised Code.

(3) "OVI or OVUAC violation" means a violation of section 4511.19 of the Revised Code or a violation of an existing or former law of this state, any other state, or the United States that is substantially equivalent to section 4511.19 of the Revised Code.

(4) "Registered private provider" means a nonpublic school or entity registered with the superintendent of public instruction under section 3310.41 of the Revised Code to participate in the autism scholarship program or section 3310.58 of the Revised Code to participate in the Jon Peterson special needs scholarship program.

Sec. 147.01. (A) The secretary of state may appoint and commission as notaries public as many persons who meet the qualifications of division (B) of this section as the secretary of state considers necessary.

(B) In order for a person to qualify to be appointed and commissioned as a notary public, the person ~~must satisfy both~~ shall demonstrate to the secretary of state that the person satisfies all of the following:

(1) The person has attained the age of eighteen years.

(2) ~~One of the following applies:~~

(a) ~~The~~ Except as provided in division (B)(2)(b) of this section, the person is a legal resident of this state ~~who is not an attorney admitted to the practice of law in this state by the Ohio supreme court~~.

(b) ~~The person is a legal resident of this state who is an attorney admitted to the practice of law in this state by the Ohio supreme court.~~

~~(c)~~ The person is not a legal resident of this state, but is an attorney admitted to the practice of law in this state by the Ohio supreme court, and has the person's principal place of business or the person's primary practice in this state.

(3)(a) Except as provided in division (B)(3)(b) of this section, the person has submitted a criminal records check report completed within the preceding six months in accordance with section 147.022 of the Revised Code demonstrating that the applicant has not been convicted of or pleaded guilty or no contest to a disqualifying offense, or any offense under an existing or former law of this state, any other state, or the United States that is substantially equivalent to such a disqualifying offense.

(b) An attorney admitted to the practice of law in this state shall not be required to submit a criminal records check when applying to be appointed a notary public.

(4)(a) Except as provided in divisions (B)(4)(b) and (c) of this section, the person has successfully completed an educational program and passed a test administered by the entities authorized by the secretary of state as required under section 147.021 of the Revised Code.

(b) An attorney who is commissioned as a notary public in this state prior to the effective date of this amendment shall not be required to complete an education program or pass a test as required in division (B)(4)(a) of this section.

(c) Any attorney who applies to become commissioned as a notary public in this state after the effective date of this amendment shall not be required to pass a test as required in division (B)(4)(a) of this section, but shall be required to complete an education program required by that division.

(C) A notary public shall be appointed and commissioned as a notary public for the state. The secretary of state may revoke a commission issued to a notary public upon presentation of satisfactory evidence of official misconduct or incapacity.

(D) The secretary of state shall oversee the processing of notary public applications and shall issue all notary public commissions. The secretary of state shall oversee the creation and maintenance of the online database of notaries public commissioned in this state pursuant to section 147.051 of the Revised Code. The secretary of state may perform all other duties as required by this section. The entities authorized by the secretary of state pursuant to section 147.021 or 147.63 of the Revised Code shall administer the educational program and required test or course of instruction and examination, as applicable.

(E) All submissions to the secretary of state for receiving and renewing commissions, or notifications made under section 147.05 of the Revised Code, shall be done electronically.

Sec. 147.011. As used in this chapter:

(A) "Acknowledgment" means a notarial act in which the signer of the notarized document acknowledges all of the following:

(1) That the signer has signed the document;

(2) That the signer understands the document;

(3) That the signer is aware of the consequences of executing the document by signing it.

(B) "Criminal records check" has the same meaning as in section 109.572 of the Revised Code.

(C) "Disqualifying offense" means a crime of moral turpitude as defined in section 4776.10 of the Revised Code and a violation of a provision of Chapter 2913. of the Revised Code.

(D) "Jurat" means a notarial act in which both of the following are met:

(1) The signer of the notarized document is required to give an oath or affirmation that the statement in the notarized document is true and correct;

(2) The signer signs the notarized document in the presence of a notary public.

(E) "Notarial certificate" means the part of, or attachment to, a document that is completed by the notary public and upon which the notary public places the notary public's signature and seal.

Sec. 147.021. (A)(1) Except as provided in division (B)(4) of section 147.01 of the Revised Code, no person shall be appointed as a notary public unless that person has completed an educational program related to the requirements of this chapter and passed a test demonstrating knowledge of such requirements.

(2) The secretary of state may authorize that such a program be completed online.

(B) The secretary of state shall adopt, in rules under Chapter 119. of the Revised Code, standards and curricula for the educational program required under this section. The rules shall address all of the following:

(1) The entities authorized to administer the educational program and the required test, which shall include the following entities that meet the minimum requirements established by the secretary of state:

(a) Those entities providing notary public educational programming and testing services prior to the effective date of this section;

(b) Another entity that has a business relationship with an entity described in division (B)(1)(a) of this section.

(2) The standards and curricula of the program, which shall be established in coordination with the entities authorized to administer the program and the required test and shall include all of the following:

(a) The terms of notary commission;

(b) How to renew a commission;

(c) The conditions under which a commission may be revoked;

(d) What constitutes a legal notarial act;

(e) The manner of taking depositions;

(f) The taking of an acknowledgment;

(g) The administration of a jurat.

(3) The provisions and content of the required test, which shall be established in coordination

with the entities authorized to administer the educational program and required test.

Sec. 147.022. (A)(1) The secretary of state shall require each applicant for a notary commission, other than an attorney licensed to practice law in this state, to complete a criminal records check.

(2) The secretary shall not accept an application for a notary commission that includes the report of a criminal records check that is more than six months old.

(B) The secretary of state shall provide to each person applying for a notary commission, other than an attorney admitted to the practice of law in this state, information about accessing, completing, and forwarding to the superintendent of the bureau of criminal identification and investigation the form prescribed pursuant to division (C)(1) of section 109.572 of the Revised Code and the standard impression sheet to obtain fingerprint impressions prescribed pursuant to division (C)(2) of that section.

(C) Each person requesting a criminal records check under this section shall pay to the bureau of criminal identification and investigation the fee prescribed pursuant to division (C)(3) of section 109.572 of the Revised Code.

(D) The report of any criminal records check conducted by the bureau of criminal identification and investigation in accordance with section 109.572 of the Revised Code and pursuant to a request made under this section is not a public record for the purposes of section 149.43 of the Revised Code and shall not be made available to any person other than the following:

(1) The person who is the subject of the criminal records check or the person's representative;

(2) The secretary of state and the staff of the secretary of state;

(3) A court, hearing officer, or other necessary individual involved in a case dealing with a commission denial resulting from the criminal records check.

(E) The secretary of state shall deny a notary commission application if, after receiving the information and notification required by this section, a person subject the criminal records check requirement fails to do either of the following:

(1) Access, complete, or forward to the superintendent of the bureau of criminal identification and investigation the form prescribed pursuant to division (C)(1) of section 109.572 of the Revised Code or the standard impression sheet prescribed pursuant to division (C)(2) of that section;

(2) Submit the completed report of the criminal records check to the secretary of state.

Sec. 147.03. Each notary public, except an attorney admitted to the practice of law in this state by the Ohio supreme court, shall hold office for the term of five years unless the commission is revoked. An attorney admitted to the practice of law in this state by the Ohio supreme court shall hold office as a notary public as long as the attorney is a resident of this state or has the attorney's principal place of business or primary practice in this state, the attorney is in good standing before the Ohio supreme court, and the commission is not revoked. Before entering upon the duties of office, a notary public shall take and subscribe an oath to be endorsed on the notary public's commission.

A notary public who violates the oath of office required by this section shall be removed from office by the ~~court of common pleas of the county in which the notary public resides~~ secretary of state, upon complaint filed and substantiated ~~in the court, and the court, upon removing a notary public from office, shall certify the removal to~~ by the secretary of state. The person so removed shall

be ineligible for reappointment to the office of notary public.

Sec. 147.031. (A)(1) Except as provided in division (A)(2) of this section, a commission for a notary public appointed prior to the effective date of this section shall remain valid until that commission's expiration date.

(2) A commission issued to an attorney shall be governed by section 147.03 of the Revised Code.

(B) A commission that is set to expire as described in section 147.03 of the Revised Code or as in division (A) of this section shall not be renewed unless the notary submits to the secretary of state through the entities authorized in section 147.021 of the Revised Code all of the following:

(1) A new criminal records check report as required under division (B)(3) of section 147.01 of the Revised Code;

(2) A fee of not more than sixty dollars, set by the secretary of state in a rule adopted under Chapter 119. of the Revised Code;

(3) An application for renewal on a form prescribed by the secretary.

(C) A notary public may apply to renew the notary's commission beginning three months prior to the expiration date of the commission.

(D) If the notary public's commission expires before the notary submits the application for renewal, the secretary of state shall not renew that expired commission but shall permit the person to apply for a new notary commission.

Sec. 147.032. (A)(1) If the secretary of state believes that a violation of this chapter has occurred, the secretary of state may investigate such violations.

(2) The secretary of state may investigate possible violations of this chapter upon a signed complaint from any person.

(B) The secretary of state may hold a disciplinary hearing if the secretary of state determines a hearing to be appropriate after an investigation conducted under division (A) of this section.

(C) After holding an administrative hearing and concluding that a violation of this chapter has occurred, the secretary of state may do any of the following:

(1) Revoke the notary public's commission;

(2) Suspend the notary public's commission for a specified period of time or until fulfillment of a condition, such as retraining, or both.

(3) Issue a letter of admonition that shall be placed in the notary public's record.

(D) A person whose notary commission has been revoked may not apply for a subsequent notary commission.

(E) The secretary of state may adopt rules under Chapter 119. of the Revised Code to set forth procedures for investigations and hearings regarding violations of this chapter and disciplinary actions taken.

(F) The secretary of state may establish an advisory board to meet as the secretary of state considers necessary to discuss matters related to notary law and procedures.

Sec. 147.04. Before entering upon the discharge of ~~his~~ official duties, a notary public shall ~~provide himself with~~ obtain the seal of a notary public. The seal shall consist of the coat of arms of the state within a circle that is at least three-quarters of an inch, but not larger than one inch, in diameter and shall be surrounded by the words "notary public," "notarial seal," or words to that

effect, the name of the notary public, and the words "State of Ohio." The seal may be of either a type that will stamp ink onto a document or one that will emboss it. The name of the notary public may, instead of appearing on the seal, be printed, typewritten, or stamped in legible, printed letters near ~~his~~ the notary public's signature on each document signed by ~~him~~ the notary public. ~~A notary public shall also provide himself with an official register in which shall be recorded a copy of every certificate of protest and copy of note, which seal and record shall be exempt from execution. Upon the death, expiration of term without reappointment, or removal from office of any notary public, his official register shall be deposited in the office of the county recorder of the county in which he resides.~~

Sec. 147.041. A person commissioned as a notary public prior to the effective date of this section may continue to use a seal that met the requirements of section 147.04 of the Revised Code and that was in that person's possession before that date.

Sec. 147.05. (A) ~~Before entering upon the duties of the office of notary public, a notary public shall leave the notary public's commission with the oath endorsed on the commission with the clerk of the court of common pleas of the county in which the notary public resides. The clerk shall record the commission in a book kept for that purpose. The clerk shall endorse on the margin of the record and on the back of the commission the time that the clerk received the commission for record and make a proper index to all commissions so recorded. For recording and indexing a commission, the fee of the clerk shall be as provided in division (R) of section 2303.20 of the Revised Code.~~

~~(B)~~ The secretary of state shall maintain a record of the commissions of each notary public appointed and commissioned by the secretary of state under this chapter and make a proper index to that record.

The governor's office shall transfer to the secretary of state's office, on or after June 6, 2001, the record of notaries public formerly kept by the governor's office under section 107.10 of the Revised Code. The secretary of state's office shall maintain that record together with the record and index of commissions of notaries public required by this division.

~~(C)~~ (B) If a notary public legally changes the notary public's name or address after having been commissioned as a notary public, the notary public shall notify the secretary of state ~~and the appropriate clerk of courts~~ within thirty days after the name or address change. ~~Notification to the secretary of state~~ Such a notification shall be on a form prescribed by the secretary of state.

~~(D)~~ (C) A notary~~, other than an attorney,~~ who resigns the person's commission shall deliver to the secretary of state, on a form prescribed by the secretary of state, a written notice indicating the effective date of resignation.

(D)(1) A notary shall inform the secretary of state of being convicted of or pleading guilty or no contest to any disqualifying offense, as defined in section 147.011 of the Revised Code, or any offense under an existing or former law of this state, any other state, or the United States that is substantially equivalent to such a disqualifying offense during the term of the notary's commission.

(2) The secretary of state shall revoke the commission of any person who is convicted of or pleads guilty or no contest to a disqualifying offense, including an attorney licensed to practice law in this state.

Sec. 147.051. The secretary of state shall maintain a database of notaries public on a publicly accessible web site. The web site shall provide all of the following information in relation to each notary public:

(A) A verification of the authority and good standing of the individual to perform notarial acts;

(B) Whether the notary is registered to perform online notarizations, as defined in section 147.60 of the Revised Code;

(C) A description of any administrative or disciplinary action taken against the notary.

Sec. 147.06. Upon application, the ~~clerk of the court of common pleas~~ secretary of state shall make a certified copy of a notary public commission and the endorsements on the commission~~, under the seal of the court~~. The certified copy shall be prima-facie evidence of the matters and facts contained in it. For each certified copy of a notary public commission, the ~~clerk~~ secretary of state shall be entitled to receive a fee of ~~two~~ five dollars.

Sec. 147.07. A notary public may, throughout the state, administer oaths required or authorized by law, take and certify depositions, and take and certify acknowledgments of deeds, mortgages, liens, powers of attorney, and other instruments of writing~~, and receive, make, and record notarial protests~~. In taking depositions, ~~he~~ a notary public shall have the power that is by law vested in judges of county courts to compel the attendance of witnesses and punish them for refusing to testify. Sheriffs and constables are required to serve and return all process issued by notaries public in the taking of depositions.

Sec. 147.08. (A) A notary public is entitled to the following fees:

~~(A) For the protest of a bill of exchange or promissory note, one dollar and actual necessary expenses in going beyond the corporate limits of a municipal corporation to make presentment or demand;~~

~~(B) For recording an instrument required to be recorded by a notary public, ten cents for each one hundred words;~~

~~(C) For taking and certifying acknowledgments of deeds, mortgages, liens, powers of attorney, and other instruments of writing, and for taking and certifying depositions, administering oaths, and other official services, the same fees as are allowed by section 2319.27 of the Revised Code or by law to clerks of the courts of common pleas for like services;~~

~~(D) For taking and certifying an affidavit, one dollar and fifty cents.~~

(1) Up to five dollars for any notarial act that is not an online notarization;

(2) For an online notarization, up to twenty-five dollars.

(B) A notary charging the fee authorized under division (A)(2) of this section shall not also charge the fee authorized under division (A)(1) of this section.

(C) The fees charged under division (A) of this section shall not be calculated on a per signature basis.

(D) In addition to the fees authorized under division (A) of this section, a notary may charge a reasonable travel fee, as agreed to by the notary and the principal prior to the notarial act.

(E) The secretary of state may adopt rules under Chapter 119. of the Revised Code to increase the fees authorized under this section.

Sec. 147.13. A notary public who charges or receives for an act or service done or rendered by the notary public a fee greater than the amount prescribed by law, or who dishonestly or unfaithfully discharges any official duties as notary public, shall be removed from office by the ~~court of common pleas of the county in which the notary public resides~~ secretary of state, upon complaint

filed and substantiated ~~in the court. The court shall certify the removal to~~ by the secretary of state. The person so removed shall be ineligible for reappointment to the office of notary public.

Sec. 147.14. No notary public shall certify to the affidavit of a person without administering the appropriate oath or affirmation to the person. A notary public who violates this section shall be removed from office by the ~~court of common pleas of the county in which a conviction for a violation of this section is had. The court shall certify the removal to the~~ secretary of state. The person so removed shall be ineligible to reappointment for a period of three years.

Sec. 147.141. (A) A notary public shall not do any of the following:

(1) Perform a notarial act with regard to a record or document executed by the notary;

(2) Notarize the notary's own signature;

(3) Take the notary's own deposition;

(4) Perform a notarial act if the notary has a conflict of interest with regard to the transaction in question;

(5) Certify that a document is either of the following:

(a) An original document;

(b) A true copy of another record.

(6) Use a name or initial in signing certificates other than that by which the notary public is commissioned;

(7) Sign notarial certificates using a facsimile signature stamp unless the notary public has a physical disability that limits or prohibits the notary's ability to make a written signature and unless the notary has first submitted written notice to the secretary of state with an example of the facsimile signature stamp;

(8) Affix the notary's signature to a blank form of an affidavit or certificate of acknowledgment and deliver that form to another person with the intent that it be used as an affidavit or acknowledgment;

(9) Take the acknowledgment of, or administer an oath or affirmation to, a person who the notary public knows to have been adjudicated mentally incompetent by a court of competent jurisdiction, if the acknowledgment or oath or affirmation necessitates the exercise of a right that has been removed;

(10) Notarize a signature on a document if it appears that the person is mentally incapable of understanding the nature and effect of the document at the time of notarization;

(11) Alter anything in a written instrument after it has been signed by anyone;

(12) Amend or alter a notarial certificate after the notarization is complete;

(13) Notarize a signature on a document if the document is incomplete or blank;

(14) Notarize a signature on a document if it appears that the signer may be unduly influenced or coerced so as to be restricted from or compromised in exercising the person's own free will when signing the document;

(15) Take an acknowledgment of execution in lieu of an oath or affirmation if an oath or affirmation is required;

(16) Determine the validity of a power of attorney document or any other form designating a representative capacity, such as trustee, authorized officer, agent, personal representative, or guardian, unless that notary is an attorney licensed to practice law in this state.

(B) Division (A)(5) of this section shall not be construed as prohibiting a notary from notarizing the signature of a holder of a document on a written statement certifying that the document is a true copy of an original document.

(C) As used in this section, "conflict of interest" means either of the following:

(1) The notary has a direct financial or other interest in the transaction in question, excluding the fees authorized under this chapter.

(2) The notary is named, individually or as a grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, lessor, or lessee, or as a party in some other capacity to the transaction.

Sec. 147.142. (A) A notary public who is not a licensed attorney in this state shall not represent or advertise himself or herself as an immigration consultant or an expert in immigration matters.

(B) A notary public who is not a licensed attorney in this state shall not do any of the following:

(1) Provide any service that constitutes the unauthorized practice of law in violation of section 4705.07 of the Revised Code;

(2) State or imply that the notary is an attorney licensed to practice law in this state;

(3) Solicit or accept compensation to prepare documents for or otherwise represent the interest of another person in a judicial or administrative proceeding, including a proceeding relating to immigration to the United States, United States citizenship, or related matters;

(4) Solicit or accept compensation to obtain relief of any kind on behalf of another from any officer, agency, or employee of this state or of the United States;

(5) Use the phrase "notario" or "notario publico" to advertise the services of a notary public, whether by sign, pamphlet, stationery, or other written communication, or by radio, television, or other non-written communication.

Sec. 147.37. ~~Each person receiving a commission as notary public, including an attorney admitted to the practice of law in this state by the Ohio supreme court, shall pay~~ (A) The secretary of state shall establish a fee of ~~fifteen~~ not more than one hundred fifty dollars to ~~the secretary of state~~ be paid by each person receiving a commission as notary public.

(B) The notary public shall remit the fee to the authorized entity that administered the educational program and test required by section 147.021 of the Revised Code. The notary public shall remit to the secretary of state the portion of that fee specified pursuant to division (C)(2) of this section.

(C) The secretary of state shall adopt rules in accordance with Chapter 119. of the Revised Code to do all of the following:

(1) Establish the amount of the fee authorized by division (A) of this section;

(2) Establish the portion of the fee, not to exceed fifteen dollars, that the notary public is required to remit to the secretary of state;

(3) Establish the portion of the fee that a notary who is an attorney shall remit to the entity that administered the educational program.

Sec. 147.371. (A) Upon receipt of a fee of two dollars and an affidavit that the original commission of a notary public has been lost or destroyed, a duplicate commission as notary public shall be issued by the secretary of state.

(B) Upon receipt of a fee of two dollars and the properly completed, prescribed form for a name and address change under division ~~(C)~~ (B) of section 147.05 of the Revised Code, the secretary of state shall issue a duplicate commission as a notary public.

Sec. 147.51. For the purposes of sections 147.51 to 147.58 of the Revised Code, "notarial acts" means acts which the laws and regulations of this state authorize notaries public of this state to perform, including the administration of oaths and affirmations, taking proof of execution and acknowledgment of instruments, ~~and~~ attesting documents, and executing a jurat.

Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons authorized pursuant to the laws and regulations of other governments, in addition to any other persons authorized by the laws and regulations of this state:

(A) A notary public authorized to perform notarial acts in the place in which the act is performed;

(B) A judge, clerk, or deputy clerk of any court of record in the place in which the notarial act is performed;

(C) An officer of the foreign service of the United States, a consular agent, or any other person authorized by regulation of the United States department of state to perform notarial acts in the place in which the act is performed;

(D) A commissioned officer in active service with the armed forces of the United States and any other person authorized by regulation of the armed forces to perform notarial acts if the notarial act is performed for one of the following or ~~his dependents~~ for a dependent of one of the following:

(1) A member of the merchant ~~seaman~~ marines of the United States;

(2) A member of the armed forces of the United States;

(3) Any other person serving with or accompanying the armed forces of the United States~~;~~.

(E) Any other person authorized to perform notarial acts in the place in which the act is performed.

Sec. 147.542. (A) A notary public shall provide a completed notarial certificate for every notarial act the notary public performs.

(B) For an acknowledgment and a jurat, the corresponding notarial certificate shall indicate the type of notarization being performed.

(C) If a notarial certificate incorrectly indicates the type of notarization performed, the notary public shall provide a correct certificate at no charge to the person signing in question.

(D)(1) An acknowledgment certificate shall clearly state that no oath or affirmation was administered to the signer with regard to the notarial act.

(2) A jurat certificate shall clearly state that an oath or affirmation was administered to the signer with regard to the notarial act.

(E)(1) A notary public shall not use an acknowledgment certificate with regard to a notarial act in which an oath or affirmation has been administered.

(2) A notary public shall not use a jurat certificate with regard to a notarial act in which an oath or affirmation has not been administered.

(F) A certificate required under this section may be provided through any of the following means:

(1) Preprinting on a notarial document;

(2) Ink stamp;

(3) Handwritten note;

(4) A separate, attached document.

(G) A notarial certificate shall show all of the following information:

(1) The state and county venue where the notarization is being performed;

(2) The wording of the acknowledgment or jurat in question;

(3) The date on which the notarial act was performed;

(4) The signature of the notary, exactly as shown on the notary's commission;

(5) The notary's printed name, displayed below the notary's signature or inked stamp;

(6) The notary's notarial seal and commission expiration date;

(7) If an electronic document was signed in the physical presence of a notary and notarized pursuant to section 147.591 of the Revised Code, or if an online notarization was performed pursuant to sections 147.60 to 147.66 of the Revised Code, the certificate shall include a statement to that effect.

(H) A notary public may explain to a signer the difference between an acknowledgment and a jurat, but shall not, unless that notary is an attorney, advise the person on the type of notarial act that best suits a situation.

Sec. 147.55. ~~The~~ Notwithstanding section 147.542 of the Revised Code, the forms of acknowledgment set forth in this section may be used and are sufficient for their respective purposes under any section of the Revised Code. The forms shall be known as "statutory short forms of acknowledgment" and may be referred to by that name. The authorization of the forms in this section does not preclude the use of other forms.

"(A) For an individual acting in ~~his~~ the individual's own right:

"State of .....

County of .....

The foregoing instrument was acknowledged before me this (date) by (name of person ~~acknowledged.~~ acknowledging).

(Signature of person taking acknowledgment)

(Title or rank)

~~(Serial number, if any)~~"

(B) "For a corporation:

"State of .....

County of .....

The foregoing instrument was acknowledged before me this (date) by (name of officer or agent, title of officer or agent) of (name of corporation acknowledging), a (state or place of incorporation) corporation, on behalf of the corporation.

(Signature of person taking acknowledgment)

(Title or rank)

~~(Serial number, if any)~~"

(C) "For a partnership:

"State of .....

County of .....

The foregoing instrument was acknowledged before me this (date) by (name of acknowledging partner or agent), partner (or agent) on behalf of (name of partnership), a partnership.

(Signature of person taking acknowledgment)

(Title or rank)

~~(Serial number, if any)~~"

(D) "For an individual acting as principal by an attorney in fact:

"State of .....

County of .....

The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal).

(Signature of person taking acknowledgment)

(Title or rank)

~~(Serial number, if any)~~"

(E) "By any public officer, trustee, or personal representative:

"State of .....

County of .....

The foregoing instrument was acknowledged before me this (date) by (name and title of position).

(Signature of person taking acknowledgment)

(Title or rank)

~~(Serial number, if any)~~"

Sec. 147.551. Notwithstanding section 147.542 of the Revised Code, a jurat may take the following form:

"State of Ohio

County of .....

Sworn to or affirmed and subscribed before me by (signature of person making jurat) this date of (date).

(Signature of notary public administering jurat)

(Affix seal here)

(Title of rank)

(Commission expiration date)"

Sec. 147.59. (A) An individual whose physical characteristics limit the individual's ability to

sign a document presented for notarization may direct a designated alternative signer to sign on the individual's behalf, if all of the following are met:

(1) The individual clearly indicates, through oral, verbal, physical, electronic, or mechanical means, to the notary public the individual's intent for the designated alternative signer to sign the individual's name on the notarial document.

(2) Both the individual and the designated alternative signer provide satisfactory identification to the notary public.

(3) The designated alternative signer signs the document in the presence of the notary public.

(4) The designated alternative signer is not named in the document.

(5) The notarial certificate provided to the individual gives the name of the designated alternative signer and states that the document was signed under this section at the direction of the individual.

(B) An individual may use a designated alternative signer to perform an online notarial act if all of the requirements of division (A) of this section are met.

Sec. 147.591. (A) As used in this section, "electronic document," "electronic seal," "electronic signature," and "online notarization" have the same meanings as in section 147.60 of the Revised Code.

(B)(1) An electronic document that is signed in the physical presence of the notary public with an electronic signature and notarized with an electronic seal shall be considered an original document.

(2) Notwithstanding any other provision of the Revised Code to the contrary, a printed copy of a document executed electronically by the parties and acknowledged or sworn before a notary acting pursuant to this section shall be accepted by county auditors, engineers, and recorders for purposes of approval, transfer, and recording to the same extent as any other document that is submitted by an electronic recording method and shall not be rejected solely by reason of containing electronic signatures or an electronic notarization, including an online notarization, if that document contains the certificate required under division (G) of section 147.542 of the Revised Code, including the notification required under division (G)(7) of that section.

(C) Any notary public may obtain an electronic seal and an electronic signature for the purposes of notarizing documents under this section.

(D) A notary public shall comply with the provisions of section 147.66 of the Revised Code pertaining to the electronic seal and electronic signature.

Sec. 147.60. As used in this section and sections 147.61 to 147.66 of the Revised Code:

(A) "Appear in person" means being in the same physical location as another person and being close enough to hear, communicate with, and exchange tangible identification credentials with that individual. "Appear in person" also means being in a different location as another person and interacting with that individual by means of live two-way, audio-video communication.

(B) "Credential analysis" means a process or service operating according to standards adopted by the secretary of state under section 147.62 of the Revised Code through which a third person affirms the validity of a government-issued identification credential through review of public and proprietary data sources.

(C) "Electronic" means relating to technology having electrical, digital, magnetic, wireless,

optical, electromagnetic, or similar capabilities.

(D) "Electronic document" means information that is created, generated, sent, communicated, received, or stored in an electronic medium and is retrievable in perceivable form.

(E) "Electronic seal" means information within a notarized electronic document to which all of the following apply:

(1) The information confirms the notary public's name, jurisdiction, and commission expiration date.

(2) The information generally corresponds to the contents, layout, and format of the notary public's seal for use on paper documents, as required under section 147.04 of the Revised Code.

(F) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with an electronic document and executed or adopted by a natural person with the intent to sign the electronic document.

(G) "Identity proofing" means a process or service operating according to standards adopted by the secretary of state under section 147.62 of the Revised Code through which a third person affirms the identity of a natural person through the review of personal information from public and proprietary data sources.

(H) "Notarial act" means the performance of a function authorized under sections 147.07 and 147.51 of the Revised Code. "Notarial act" does not include the taking or certifying of depositions.

(I) "Online notarization" means a notarial act performed by means of live two-way video and audio conference technology that conforms to the standards adopted by the secretary of state under section 147.62 of the Revised Code.

(J) "Online notary public" means a notary public who has been duly appointed and commissioned under section 147.01 of the Revised Code and has received authorization by the secretary of state under section 147.63 of the Revised Code to perform online notarizations.

(K) "Principal" means a natural person whose electronic signature is notarized in an online notarization, or the natural person taking an oath or affirmation from the online notary public. "Principal" does not include a natural person taking an oath or giving an affirmation in the capacity of a witness for the online notarization.

(L) "Remote presentation" means transmission to an online notary public through live two-way video and audio conference technology of an image of a government-issued identification credential that is of sufficient quality to enable the online notary public to identify the principal seeking the online notary public's services and to perform credential analysis.

(M) "Territory of the United States" means the United States, Puerto Rico, the United States Virgin Islands, and any territory, insular possession, or other location subject to the jurisdiction of the United States.

Sec. 147.61. Sections 147.60 to 147.66 of the Revised Code apply to online notarizations and online notaries public. To the extent that a provision of sections 147.60 to 147.66 of the Revised Code conflicts with another provision of this chapter or other applicable law, sections 147.60 to 147.66 of the Revised Code supersede the provision.

Sec. 147.62. (A) The secretary of state shall adopt rules under Chapter 119. of the Revised Code necessary to implement, set, and maintain standards for online notarizations and online notaries public. Such rules shall address, at a minimum, all of the following:

(1) The standards, procedures, application forms, and fees for the authorization of a notary public to act as an online notary public;

(2) The means of performing online notarizations;

(3) Standards for the technology to be used in online notarizations;

(4) Standards for remote presentation, credential analysis, and identity proofing;

(5) Standards for the retention of records relating to online notarizations;

(6) The modification of forms of notarial certificates for any notarial act that is an online notarization;

(7) Standards and requirements for the termination of a notary public's authorization to perform online notarizations.

(B) The office of information technology in the department of administrative services shall provide assistance to the secretary of state relating to the equipment, security, and technological aspects of the standards established under this section.

Sec. 147.63. (A) A notary public who has been duly appointed and commissioned under section 147.01 of the Revised Code, and who is a resident of this state, may apply to the secretary of state to be authorized to act as an online notary public during the term of that notary public's commission. A state resident commissioned as a notary public qualifies to be an online notary public by paying the fee described in section 147.631 of the Revised Code and submitting to the secretary of state an application in the form prescribed by the secretary that demonstrates to the satisfaction of the secretary that the applicant will comply with the standards adopted in rules under section 147.62 of the Revised Code and that the applicant is otherwise qualified to be an online notary.

(B)(1) Before an individual may be authorized to act as an online notary public, that individual shall successfully complete a course of instruction approved by the secretary of state and pass an examination based on the course. The content of the course shall include notarial rules, procedures, and ethical obligations pertaining to online notarization contained in sections 147.60 to 147.66 of the Revised Code or in any other law or rules of this state. The course may be taken in conjunction with the educational program required under section 147.021 of the Revised Code for a notary public commission.

(2) The secretary of state shall approve one business entity comprised of bar associations with statewide scope and regional presence that have expertise and experience in notary laws and processes to provide the course and administer the examination to become an online notary.

(C) The application required under division (A) of this section shall be transmitted electronically to the secretary of state and shall include all of the following information:

(1) The applicant's full legal name and official notary public name to be used in acting as an online notary public;

(2) A description of the technology the applicant intends to use in performing online notarizations;

(3) A certification that the applicant will comply with the rules adopted under section 147.62 of the Revised Code;

(4) An electronic mail address of the applicant;

(5) Any decrypting instructions, keys, codes, or software necessary to enable the application to be read;

(6) Proof of successful completion of the course and passage of the examination required under division (B) of this section;

(7) A disclosure of any and all license or commission revocations or other professional disciplinary actions taken against the applicant;

(8) Any other information that the secretary of state may require.

(D)(1) If the secretary of state is satisfied that an applicant meets the standards adopted in rules under section 147.62 of the Revised Code, and that the applicant is otherwise qualified to be an online notary public, then the secretary shall issue to the applicant a written authorization to perform online notarizations.

(2) Except as provided in division (D)(4) of this section, the authorization shall expire when the notary public's commission expires or is revoked under section 147.03, 147.031, or 147.032 of the Revised Code.

(3)(a) Except as provided in division (D)(5) of this section, the authorization shall be renewed when the notary public's commission is renewed.

(b) An authorization to perform online notarizations that is set to expire shall not be renewed unless the notary submits to the secretary of state through the entity authorized in this section all of the following:

(i) A fee, set by the secretary of state, of not more than four times the fee prescribed in division (B)(2) of section 147.031 of the Revised Code;

(ii) An application for renewal on a form prescribed by the secretary;

(iii) Evidence of having completed continuing education, as required under division (G) of this section.

(c) If a notary public's online notarization authorization expires before the notary submits the application for renewal, the secretary of state shall not renew that expired authorization but shall permit that person to apply for a new online notarization authorization.

(4) An authorization to perform online notarizations granted to an attorney admitted to the practice of law in this state by the Ohio supreme court shall expire on the earlier of five years after the date the authorization is granted or when the attorney's term of office as a notary public ends.

(5) An attorney authorized to perform online notarizations may apply to renew the attorney's authorization three months prior to the authorization's expiration date.

(6)(a) The secretary may deny an application for an online notary public if any of the required information is missing or incorrect on the application form.

(b) The secretary may also deny an application if the technology the applicant identifies pursuant to division (C)(2) of this section does not conform to the standards developed by the secretary pursuant to section 147.62 of the Revised Code.

(E) Nothing in this section shall be construed as prohibiting an online notary public from receiving, installing, and utilizing a software update to the technology that the online notary public disclosed pursuant to division (C)(2) of this section if that software update does not result in a technology that is materially different from the technology that the online notary public disclosed pursuant to division (C)(2) of this section.

(F)(1) If a notary public changes either the hardware or the software that the notary intends to use to carry out online notarizations, then the notary shall inform the secretary of this intent on a

form prescribed by the secretary.

(2) If the secretary determines that the new hardware or software does not meet the standards prescribed in rules under section 147.62 of the Revised Code, then the secretary may suspend or revoke the notary's authority to perform online notarizations.

(G)(1) The secretary of state shall not renew an online notarization authorization unless the applicant has completed continuing education as required under rules adopted pursuant to division (G)(2) of this section.

(2) The secretary shall adopt rules in accordance with Chapter 119. of the Revised Code related to continuing education requirements for an online notarization authorization. The rules shall specify the number of hours of continuing education a notary must complete over the duration of the notary's license and may specify content to be included in the continuing education.

Sec. 147.631. (A)(1) The secretary of state may charge a fee for the online notary course of instruction and examination to each person who is registering to be an online notary.

(2) The secretary shall not charge a fee to a notary obtaining an electronic seal and signature solely for the purpose of conducting notarizations as described in section 147.591 of the Revised Code.

(B) The notary public taking the online notary course of instruction and the examination shall remit the fee to the authorized entity that administered the online notary course of instruction and examination required by division (B) of section 147.63 of the Revised Code. The notary public shall remit to the secretary of state the portion of that fee specified pursuant to division (C)(2) of this section.

(C) The secretary of state shall adopt rules in accordance with Chapter 119. of the Revised Code to do both of the following:

(1) Establish the amount of the fee authorized by division (A) of this section, which shall not exceed four times the amount of the fee established pursuant to division (C)(1) of section 147.37 of the Revised Code;

(2) Establish the portion of the fee, not to exceed twenty dollars, that the notary public is required to remit to the secretary of state.

Sec. 147.64. (A)(1) Except as provided in division (A)(3) of this section, an online notary public has the authority to perform any notarial act as an online notarization.

(2) An electronic document notarized through an online notarization shall be considered an original document.

(3) An online notary public shall not take or certify a deposition as an online notarization.

(B) A notary public of this state who has been authorized by the secretary of state to perform online notarizations may perform online notarizations only if both of the following conditions are met:

(1) The online notary public is a resident of this state.

(2) The online notary public is located within the geographical boundaries of this state at the time of the online notarization.

(C)(1) A notary public may perform an online notarization by means of audio-video communication in compliance with this act and any other rules adopted by the secretary of state for any principal who is located within the territory of the United States.

(2) A notary public may perform an online notarization for a principal located outside the territory of the United States only if both of the following conditions are met:

(a) The act is not known by the notary public to be prohibited in the jurisdiction in which the principal is physically located at the time of the act.

(b) The record meets any of the following:

(i) Is part of, or pertains to, a matter that is to be filed with or is before a court, governmental entity, or other entity located in the territorial jurisdiction of the United States;

(ii) Involves real or personal property located in the territorial jurisdiction of the United States;

(iii) Is part of, or pertains to, a transaction substantially connected with the United States.

(D) If an online notarization requires a principal to appear before an online notary public, the principal shall appear in person before the notary public and the principal and the notary public shall each sign the record with an electronic signature.

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

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

(a) All of the following:

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

(ii) Credential analysis of the identification credentials provided;

(iii) Identity proofing of the principal.

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

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

(ii) Credential analysis of the identification credentials provided;

(iii) Identity proofing of the witness.

(F) The secretary of state shall include in rules adopted under section 147.62 of the Revised Code modified forms of notarial certificates for any notarial act that is an online notarization.

Sec. 147.65. (A) An online notary public shall maintain one or more electronic journals in which the online notary public records, in chronological order, all online notarizations that the online notary public performs. The electronic journal shall enable access by a password or other secure means of authentication and be in a tamper-evident electronic format complying with the rules of the secretary of state adopted under section 147.62 of the Revised Code.

(B) For every online notarization, the online notary public shall record the following information in the electronic journal:

(1) The date and time of the notarial act;

(2) The type of notarial act;

(3) The title or a description of the record being notarized, if any;

(4) The electronic signature of each principal;

(5) The printed full name and address of each principal;

(6) If identification of the principal is based on personal knowledge, a statement to that effect;

(7) If identification of the principal is based on satisfactory evidence of identity pursuant to division (E)(2) of section 147.64 of the Revised Code, a description of the evidence relied upon, including the date of issuance or expiration of any identification credential presented;

(8) If identification of the principal is based on a credible witness or witnesses, the name of the witness or witnesses;

(9) If the notarization was not performed at the online notary public's business address, the address where the notarization was performed;

(10) A description of the online notarization system used;

(11) The fee, if any, charged by the notary;

(12) The name of the jurisdiction in which the principal was located at the time of the online notarization;

(13) The recording upon which the identification of the principal is based, as required under division (D)(3) of this section;

(14) Any other information required by the secretary of state.

(C) An online notary public shall not record a social security number in the electronic journal.

(D) An online notary public shall do all of the following:

(1) Take reasonable steps to ensure the integrity, security, and authenticity of online notarizations;

(2) Take reasonable steps to ensure that the two-way, audio-video communication used in an online notarization is secure from unauthorized interception;

(3) Create and maintain pursuant to this section a complete recording of the audio-video communication that is the basis for identification of a principal for each online notarization;

(4) Maintain a backup for the electronic journal required by division (A) of this section and the audio-video recordings required by division (D)(3) of this section;

(5)(a) Safeguard the electronic journal and all other notarial records by doing all of the following:

(i) Not allowing the electronic journal to be used by another notary;

(ii) Creating the audio-video recording required under division (D)(3) of this section in a tamper-evident electronic format complying with the rules of the secretary of state adopted under section 147.62 of the Revised Code;

(iii) Protecting the electronic journal and audio-video recordings from unauthorized use.

(b) An online notary public may use a third party to keep and store the electronic journal. The secretary of state shall adopt, in rules under Chapter 119. of the Revised Code, standards pertaining to the use of such a third party.

(6) Surrender or destroy the electronic journal and all other notarial records only by rule of law, by court order, or at the direction of the secretary of state;

(7) Not surrender the electronic journal to an employer upon termination of employment.

(E)(1) An employer shall not retain the electronic journal of an employee who is an online notary public when the notary's employment ceases.

(2) Notwithstanding division (E)(1) of this section, an online notary public may make an agreement with a current or former employer pursuant to division (D)(5)(b) of this section.

(3) An online notary public may use any current or former employer approved as a repository by the secretary of state to meet all applicable repository requirements of this section or section 147.66 of the Revised Code and any associated rules.

(F)(1) Except as provided in division (E) of section 147.66 of the Revised Code, an electronic journal required under division (A) of this section and the audio-video recordings required by division (D)(3) of this section shall be maintained by the online notary public during the term of the online notary public's authorization to perform online notarizations.

(2) Upon the expiration, pursuant to division (D) of section 147.63 of the Revised Code, of the notary public's authorization to conduct online notarizations, the online notary public shall transmit the electronic journal to the secretary of state or to a repository approved by the secretary of state. The secretary of state or repository shall maintain the electronic journal for a period of ten years. If the electronic journal is transmitted to a repository, the online notary public shall inform the secretary of state where the journal is located during this period.

(3) If the notary public renews the notary public's authorization to conduct online notarizations pursuant to division (D) of section 147.63 of the Revised Code, the notary public shall, beginning on the date the renewal is effective, maintain a new electronic journal in accordance with this section.

(G)(1) Except as provided in divisions (G)(2) and (3) of this section, any person may inspect or request a copy of an entry or entries in the online notary public's journal, provided that all of the following are met:

(a) The person specifies the month, year, type of record, and name of the principal for the notarial act, in a signed tangible or electronic request.

(b) The notary does not surrender possession or control of the journal.

(c) The person is shown or given a copy of only the entry or entries specified.

(d) A separate new entry is made in the journal, explaining the circumstances of the request and noting any related act of copy certification by the online notary public.

(2) Notwithstanding division (A)(5) of section 147.141 of the Revised Code, an online notary public may certify copies made from the online notary public's electronic journal.

(3) An online notary public who has a reasonable and explainable belief that a person requesting information from the notary's journal has a criminal or other inappropriate purpose may deny access to any entry or entries.

(4) An attorney authorized to conduct online notarizations shall only allow inspection, or provide copies, of an entry or entries in the attorney's journal if the requesting party was a principal in the transaction or transactions to which the journal entry or entries apply or if the requesting party is acting on a principal's behalf. An attorney may deny a request to inspect or receive copies of a journal entry based on attorney-client privilege.

(5) The secretary of state, or a repository approved by the secretary of state, shall only allow inspection, or provide copies of, an entry or entries in a journal deposited with the secretary or the

repository by an attorney authorized to conduct online notarizations if the requesting party was a principal in the transaction or transactions to which the journal entry or entries apply or if the requesting party is acting on a principal's behalf.

(H)(1) The journal may be examined and copied without restriction by a law enforcement officer, as defined in section 2901.01 of the Revised Code, in the course of an official investigation, subpoenaed by court order, or surrendered at the direction of the secretary of state.

(2) Notwithstanding division (H)(1) of this section, an attorney authorized to conduct online notarizations may object to the examination, or copying, of the attorney's journal pursuant to division (H)(1) of this section based on attorney-client privilege.

Sec. 147.66. (A) An online notary public shall take reasonable steps to ensure that any device or software used to create an official electronic signature is current and has not been recalled or declared vulnerable by the device or software's manufacturer, seller, or developer.

(B)(1) An online notary public shall do both of the following:

(a) Except as provided in division (D)(5)(b) of section 147.65 of the Revised Code, keep the online notary public's electronic journal, official electronic signature, and electronic seal secure and under the online notary public's exclusive control;

(b) Use the online notary public's official electronic signature and electronic seal only for performing online notarizations or notarizations pursuant to section 147.591 of the Revised Code.

(2) An online notary public shall not allow another person to use the online notary public's electronic journal, official electronic signature, or electronic seal.

(C)(1) A third party keeping and storing electronic journals for online notaries public pursuant to division (D)(5)(b) of section 147.65 of the Revised Code shall immediately, upon discovery, notify the secretary of state, an appropriate law enforcement agency, and any affected online notaries public of the unauthorized access, modification, transfer, duplication, or use of any electronic journals in the third party's possession or control.

(2) If notice has not already been given pursuant to division (C)(1) of this section, a third party keeping and storing electronic journals for online notaries public pursuant to division (D)(5)(b) of section 147.65 of the Revised Code shall immediately, upon discovery, notify the secretary of state and any affected online notaries public of the loss of any electronic journals in the third party's possession or control.

(3) If notice has not already been given pursuant to division (C)(1) or (2) of this section, an online notary public shall immediately, upon discovery, notify an appropriate law enforcement agency and the secretary of state of the unauthorized access, modification, transfer, duplication, or use of the online notary public's electronic journal, official electronic signature, or electronic seal.

(4) If notice has not already been given pursuant to division (C)(1), (2), or (3) of this section, an online notary public shall immediately notify the secretary of state of the loss of the online notary public's electronic journal, official electronic signature, or electronic seal.

(D) An online notary public shall attach the online notary public's electronic signature and electronic seal to the notarial certificate of an electronic document in a manner that is capable of independent verification and renders any subsequent change or modification to the electronic document evident.

(E)(1)(a) Upon resignation, revocation, or expiration without renewal of an online notary

public commission, the online notary public shall transmit the electronic journal to the secretary of state or to a repository approved by the secretary of state. This requirement does not apply to electronic journals that, as of the date of the resignation or expiration, were no longer kept in accordance with division (F) of section 147.65 of the Revised Code. If the electronic journal is transmitted to a repository, the online notary public shall inform the secretary of state where the journal is located during this period.

(b) Upon death or adjudicated incompetence of a current or former notary public, the executor or administrator of the online notary public's estate, the notary's guardian, or any other person knowingly in possession of the online notary public's electronic journal, shall transmit the journal to the secretary of state or to a repository approved by the secretary of state.

(2) The online notary public, the notary's personal representative or guardian, or the administrator or the executor of the notary's estate shall provide access instructions to the secretary of state for any electronic journal maintained or stored by the online notary public, upon commission resignation, revocation, or expiration without renewal, or upon the death or adjudicated incompetence of the online notary public, if that person is in possession of such instructions.

(3) The secretary of state or repository receiving a journal transmitted under division (E)(1) of this section shall maintain the journal for a period of ten years.

Sec. 2303.20. Under the circumstances described in sections 2969.21 to 2969.27 of the Revised Code, the clerk of the court of common pleas shall charge the fees and perform the other duties specified in those sections. In all other cases, the clerk shall charge the following fees and no more:

(A) Twenty-five dollars for each cause of action which shall include the following:

(1) Docketing in all dockets;

(2) Filing necessary documents, noting the filing of the documents, except subpoena, on the dockets;

(3) Issuing certificate of deposit in foreign writs;

(4) Indexing pending suits and living judgments;

(5) Noting on appearance docket all papers mailed;

(6) Certificate for attorney's fee;

(7) Certificate for stenographer's fee;

(8) Preparing cost bill;

(9) Entering on indictment any plea;

(10) Entering costs on docket and cash book.

(B) Two dollars for taking each undertaking, bond, or recognizance;

(C) Two dollars for issuing each writ, order, or notice, except subpoena;

(D) Two dollars for each name for issuing subpoena, swearing witness, entering attendance, and certifying fees;

(E) Twenty-five dollars for calling a jury in each cause;

(F) Two dollars for each page, for entering on journal, indexing, and posting on any docket;

(G) Three dollars for each execution or transcript of judgment, including indexing;

(H) One dollar for each page, for making complete record, including indexing;

(I) Five dollars for certifying a plat recorded in the county recorder's office;

(J) Five dollars for issuing certificate to receiver or order of reference with oath;

(K) Five dollars for entering satisfaction or partial satisfaction of each lien on record in the county recorder's office, and the clerk of courts' office;

(L) One dollar for each certificate of fact under seal of the court, to be paid by the party demanding it;

(M) One dollar for taking each affidavit, including certificate and seal;

(N) Two dollars for acknowledging all instruments in writing;

(O) Five dollars for making certificate of judgment;

(P) Ten dollars for filing, docketing, and endorsing a certificate of judgment, including the indexing and noting the return of the certificate;

(Q) Twenty-five dollars for each cause of action for each judgment by confession, including all docketing, indexing, and entries on the journal;

(R) Five dollars for recording commission of mayor ~~or notary public~~;

(S) One dollar for issuing any license except the licenses issued pursuant to sections 1533.101, 1533.11, 1533.13, and 1533.32 of the Revised Code;

(T) Fifteen dollars for docketing and indexing each aid in execution or petition to vacate, revive, or modify judgment, including the filing and noting of all necessary documents;

(U) Twenty-five dollars for docketing and indexing each appeal, including the filing and noting of all necessary documents;

(V) A commission of two per cent on the first ten thousand dollars and one per cent on all exceeding ten thousand dollars for receiving and disbursing money, other than costs and fees, paid to or deposited with the clerk of courts in pursuance of an order of court or on judgments, including moneys invested by order of the court and interest earned on them;

(W) Five dollars for numbering, docketing, indexing, and filing each authenticated or certified copy of the record, or any portion of an authenticated or certified copy of the record, of an extra county action or proceeding;

(X) Two dollars for each certificate of divorce, annulment, or dissolution of marriage to the bureau of vital statistics;

(Y) Two dollars for each electronic transmission of a document, plus one dollar for each page of that document. These fees are to be paid by the party requesting the electronic transmission.

(Z) One dollar for each page, for copies of pleadings, process, record, or files, including certificate and seal.

Sec. 4505.11. This section shall also apply to all-purpose vehicles and off-highway motorcycles as defined in section 4519.01 of the Revised Code.

(A) Each owner of a motor vehicle and each person mentioned as owner in the last certificate of title, when the motor vehicle is dismantled, destroyed, or changed in such manner that it loses its character as a motor vehicle, or changed in such manner that it is not the motor vehicle described in the certificate of title, shall surrender the certificate of title to that motor vehicle to a clerk of a court of common pleas, and the clerk, with the consent of any holders of any liens noted on the certificate of title, then shall enter a cancellation upon the clerk's records and shall notify the registrar of motor vehicles of the cancellation.

Upon the cancellation of a certificate of title in the manner prescribed by this section, any

clerk and the registrar of motor vehicles may cancel and destroy all certificates and all memorandum certificates in that chain of title.

(B)(1) If an Ohio certificate of title or salvage certificate of title to a motor vehicle is assigned to a salvage dealer, the dealer is not required to obtain an Ohio certificate of title or a salvage certificate of title to the motor vehicle in the dealer's own name if the dealer dismantles or destroys the motor vehicle, indicates the number of the dealer's motor vehicle salvage dealer's license on it, marks "FOR DESTRUCTION" across the face of the certificate of title or salvage certificate of title, and surrenders the certificate of title or salvage certificate of title to a clerk of a court of common pleas as provided in division (A) of this section. If the salvage dealer retains the motor vehicle for resale, the dealer shall make application for a salvage certificate of title to the motor vehicle in the dealer's own name as provided in division (C)(1) of this section.

(2) At the time any salvage motor vehicle is sold at auction or through a pool, the salvage motor vehicle auction or salvage motor vehicle pool shall give a copy of the salvage certificate of title or a copy of the certificate of title marked "FOR DESTRUCTION" to the purchaser.

(C)(1) When an insurance company declares it economically impractical to repair such a motor vehicle and has paid an agreed price for the purchase of the motor vehicle to any insured or claimant owner, the insurance company shall proceed as follows:

(a) If an insurance company receives the certificate of title and the motor vehicle, within thirty business days, the insurance company shall deliver the certificate of title to a clerk of a court of common pleas and shall make application for a salvage certificate of title. This certificate of title, any supporting power of attorney, or application for a salvage certificate of title shall be exempt from the requirements of notarization and verification as described in this chapter and in section 1337.25 of the Revised Code.

(b) If an insurance company obtains possession of the motor vehicle and a physical certificate of title was issued for the vehicle but the insurance company is unable to obtain the properly endorsed certificate of title for the motor vehicle within thirty business days following the vehicle's owner or lienholder's acceptance of the insurance company's payment for the vehicle, the insurance company may apply to the clerk of a court of common pleas for a salvage certificate of title without delivering the certificate of title for the motor vehicle. The application shall be accompanied by evidence that the insurance company has paid a total loss claim on the vehicle, a copy of the written request for the certificate of title from the insurance company or its designee, and proof that the request was delivered by a nationally recognized courier service to the last known address of the owner of the vehicle and any known lienholder, to obtain the certificate of title.

(c) If an insurance company obtains possession of the motor vehicle and a physical certificate of title was not issued for the vehicle, the insurance company may apply to the clerk of a court of common pleas for a salvage certificate of title without delivering a certificate of title for the motor vehicle. The application shall be accompanied by the electronic certificate of title control number and a properly executed power of attorney, or other appropriate document, from the owner of the motor vehicle authorizing the insurance company to apply for a salvage certificate of title. The application for a salvage certificate of title shall be exempt from the requirements of notarization and verification as described in this chapter and in section 1337.25 of the Revised Code.

(d) Upon receipt of a properly completed application for a salvage certificate of title as

described in division (C)(1)(a), (b), or (c) or (C)(2) of this section, the clerk shall issue the salvage certificate of title on a form, prescribed by the registrar, that shall be easily distinguishable from the original certificate of title and shall bear the same information as the original certificate of title except that it may bear a different number than that of the original certificate of title. The salvage certificate of title shall include the following notice in bold lettering:

"SALVAGE MOTOR VEHICLE - PURSUANT TO R.C. 4738.01."

Except as provided in division (C)(3) of this section, the salvage certificate of title shall be assigned by the insurance company to a salvage dealer or any other person for use as evidence of ownership upon the sale or other disposition of the motor vehicle, and the salvage certificate of title shall be transferable to any other person. The clerk shall charge a fee of four dollars for the cost of processing each salvage certificate of title.

(2) If an insurance company requests that a salvage motor vehicle auction take possession of a motor vehicle that is the subject of an insurance claim, and subsequently the insurance company denies coverage with respect to the motor vehicle or does not otherwise take ownership of the motor vehicle, the salvage motor vehicle auction may proceed as follows. After the salvage motor vehicle auction has possession of the motor vehicle for forty-five days, it may apply to the clerk of a court of common pleas for a salvage certificate of title without delivering the certificate of title for the motor vehicle. The application shall be accompanied by a copy of the written request that the vehicle be removed from the facility on the salvage motor vehicle auction's letterhead, and proof that the request was delivered by a nationally recognized courier service to the last known address of the owner of the vehicle and any known lienholder, requesting that the vehicle be removed from the facility of the salvage motor vehicle auction. Upon receipt of a properly completed application, the clerk shall follow the process as described in division (C)(1)(d) of this section. The salvage certificate of title so issued shall be free and clear of all liens.

(3) If an insurance company considers a motor vehicle as described in division (C)(1)(a), (b), or (c) of this section to be impossible to restore for highway operation, the insurance company may assign the certificate of title to the motor vehicle to a salvage dealer or scrap metal processing facility and send the assigned certificate of title to the clerk of the court of common pleas of any county. The insurance company shall mark the face of the certificate of title "FOR DESTRUCTION" and shall deliver a photocopy of the certificate of title to the salvage dealer or scrap metal processing facility for its records.

(4) If an insurance company declares it economically impractical to repair a motor vehicle, agrees to pay to the insured or claimant owner an amount in settlement of a claim against a policy of motor vehicle insurance covering the motor vehicle, and agrees to permit the insured or claimant owner to retain possession of the motor vehicle, the insurance company shall not pay the insured or claimant owner any amount in settlement of the insurance claim until the owner obtains a salvage certificate of title to the vehicle and furnishes a copy of the salvage certificate of title to the insurance company.

(D) When a self-insured organization, rental or leasing company, or secured creditor becomes the owner of a motor vehicle that is burned, damaged, or dismantled and is determined to be economically impractical to repair, the self-insured organization, rental or leasing company, or secured creditor shall do one of the following:

(1) Mark the face of the certificate of title to the motor vehicle "FOR DESTRUCTION" and surrender the certificate of title to a clerk of a court of common pleas for cancellation as described in division (A) of this section. The self-insured organization, rental or leasing company, or secured creditor then shall deliver the motor vehicle, together with a photocopy of the certificate of title, to a salvage dealer or scrap metal processing facility and shall cause the motor vehicle to be dismantled, flattened, crushed, or destroyed.

(2) Obtain a salvage certificate of title to the motor vehicle in the name of the self-insured organization, rental or leasing company, or secured creditor, as provided in division (C)(1) of this section, and then sell or otherwise dispose of the motor vehicle. If the motor vehicle is sold, the self-insured organization, rental or leasing company, or secured creditor shall obtain a salvage certificate of title to the motor vehicle in the name of the purchaser from a clerk of a court of common pleas.

(E) If a motor vehicle titled with a salvage certificate of title is restored for operation upon the highways, application shall be made to a clerk of a court of common pleas for a certificate of title. Upon inspection by the state highway patrol, which shall include establishing proof of ownership and an inspection of the motor number and vehicle identification number of the motor vehicle and of documentation or receipts for the materials used in restoration by the owner of the motor vehicle being inspected, which documentation or receipts shall be presented at the time of inspection, the clerk, upon surrender of the salvage certificate of title, shall issue a certificate of title for a fee prescribed by the registrar. The certificate of title shall be in the same form as the original certificate of title and shall bear the words "REBUILT SALVAGE" in black boldface letters on its face. Every subsequent certificate of title, memorandum certificate of title, or duplicate certificate of title issued for the motor vehicle also shall bear the words "REBUILT SALVAGE" in black boldface letters on its face. The exact location on the face of the certificate of title of the words "REBUILT SALVAGE" shall be determined by the registrar, who shall develop an automated procedure within the automated title processing system to comply with this division. The clerk shall use reasonable care in performing the duties imposed on the clerk by this division in issuing a certificate of title pursuant to this division, but the clerk is not liable for any of the clerk's errors or omissions or those of the clerk's deputies, or the automated title processing system in the performance of those duties. A fee of fifty dollars shall be assessed by the state highway patrol for each inspection made pursuant to this division and shall be deposited into the public safety - highway purposes fund established by section 4501.06 of the Revised Code.

(F) No person shall operate upon the highways in this state a motor vehicle, title to which is evidenced by a salvage certificate of title, except to deliver the motor vehicle pursuant to an appointment for an inspection under this section.

(G) No motor vehicle the certificate of title to which has been marked "FOR DESTRUCTION" and surrendered to a clerk of a court of common pleas shall be used for anything except parts and scrap metal.

(H)(1) Except as otherwise provided in this division, an owner of a manufactured or mobile home that will be taxed as real property pursuant to division (B) of section 4503.06 of the Revised Code shall surrender the certificate of title to the auditor of the county containing the taxing district in which the home is located. An owner whose home qualifies for real property taxation under divisions (B)(1)(a) and (b) of section 4503.06 of the Revised Code shall surrender the certificate

within fifteen days after the home meets the conditions specified in those divisions. The auditor shall deliver the certificate of title to the clerk of the court of common pleas who issued it.

(2) If the certificate of title for a manufactured or mobile home that is to be taxed as real property is held by a lienholder, the lienholder shall surrender the certificate of title to the auditor of the county containing the taxing district in which the home is located, and the auditor shall deliver the certificate of title to the clerk of the court of common pleas who issued it. The lienholder shall surrender the certificate within thirty days after both of the following have occurred:

(a) The homeowner has provided written notice to the lienholder requesting that the certificate of title be surrendered to the auditor of the county containing the taxing district in which the home is located.

(b) The homeowner has either paid the lienholder the remaining balance owed to the lienholder, or, with the lienholder's consent, executed and delivered to the lienholder a mortgage on the home and land on which the home is sited in the amount of the remaining balance owed to the lienholder.

(3) Upon the delivery of a certificate of title by the county auditor to the clerk, the clerk shall inactivate it and maintain it in the automated title processing system for a period of thirty years.

(4) Upon application by the owner of a manufactured or mobile home that is taxed as real property pursuant to division (B) of section 4503.06 of the Revised Code and that no longer satisfies divisions (B)(1)(a) and (b) or divisions (B)(2)(a) and (b) of that section, the clerk shall reactivate the record of the certificate of title that was inactivated under division (H)(3) of this section and shall issue a new certificate of title, but only if the application contains or has attached to it all of the following:

(a) An endorsement of the county treasurer that all real property taxes charged against the home under Title LVII of the Revised Code and division (B) of section 4503.06 of the Revised Code for all preceding tax years have been paid;

(b) An endorsement of the county auditor that the home will be removed from the real property tax list;

(c) Proof that there are no outstanding mortgages or other liens on the home or, if there are such mortgages or other liens, that the mortgagee or lienholder has consented to the reactivation of the certificate of title.

(I)(1) Whoever violates division (F) of this section shall be fined not more than two thousand dollars, imprisoned not more than one year, or both.

(2) Whoever violates division (G) of this section shall be fined not more than one thousand dollars, imprisoned not more than six months, or both.

Sec. 4735.01. As used in this chapter:

(A) "Real estate broker" includes any person, partnership, association, limited liability company, limited liability partnership, or corporation, foreign or domestic, who for another, whether pursuant to a power of attorney or otherwise, and who for a fee, commission, or other valuable consideration, or with the intention, or in the expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration does any of the following:

(1) Sells, exchanges, purchases, rents, or leases, or negotiates the sale, exchange, purchase, rental, or leasing of any real estate;

(2) Offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of any real estate;

(3) Lists, or offers, attempts, or agrees to list, or auctions, or offers, attempts, or agrees to auction, any real estate;

(4) Buys or offers to buy, sells or offers to sell, or otherwise deals in options on real estate;

(5) Operates, manages, or rents, or offers or attempts to operate, manage, or rent, other than as custodian, caretaker, or janitor, any building or portions of buildings to the public as tenants;

(6) Advertises or holds self out as engaged in the business of selling, exchanging, purchasing, renting, or leasing real estate;

(7) Directs or assists in the procuring of prospects or the negotiation of any transaction, other than mortgage financing, which does or is calculated to result in the sale, exchange, leasing, or renting of any real estate;

(8) Is engaged in the business of charging an advance fee or contracting for collection of a fee in connection with any contract whereby the broker undertakes primarily to promote the sale, exchange, purchase, rental, or leasing of real estate through its listing in a publication issued primarily for such purpose, or for referral of information concerning such real estate to brokers, or both, except that this division does not apply to a publisher of listings or compilations of sales of real estate by their owners;

(9) Collects rental information for purposes of referring prospective tenants to rental units or locations of such units and charges the prospective tenants a fee.

(B) "Real estate" includes leaseholds as well as any and every interest or estate in land situated in this state, whether corporeal or incorporeal, whether freehold or nonfreehold, and the improvements on the land, but does not include cemetery interment rights.

(C) "Real estate salesperson" means any person associated with a licensed real estate broker to do or to deal in any acts or transactions set out or comprehended by the definition of a real estate broker, for compensation or otherwise.

(D) "Institution of higher education" includes all of the following:

(1) A state institution of higher education, as defined in section 3345.011 of the Revised Code;

(2) A nonprofit institution issued a certificate of authorization under Chapter 1713. of the Revised Code;

(3) A private institution exempt from regulation under Chapter 3332. of the Revised Code, as prescribed in section 3333.046 of the Revised Code.

(4) An institution with a certificate of registration from the state board of career colleges and schools under Chapter 3332. of the Revised Code that is approved to offer degree programs in accordance with section 3332.05 of the Revised Code.

(E) "Foreign real estate" means real estate not situated in this state and any interest in real estate not situated in this state.

(F) "Foreign real estate dealer" includes any person, partnership, association, limited liability company, limited liability partnership, or corporation, foreign or domestic, who for another, whether pursuant to a power of attorney or otherwise, and who for a fee, commission, or other valuable consideration, or with the intention, or in the expectation, or upon the promise of receiving or

collecting a fee, commission, or other valuable consideration, does or deals in any act or transaction specified or comprehended in division (A) of this section with respect to foreign real estate.

(G) "Foreign real estate salesperson" means any person associated with a licensed foreign real estate dealer to do or deal in any act or transaction specified or comprehended in division (A) of this section with respect to foreign real estate, for compensation or otherwise.

(H) Any person, partnership, association, limited liability company, limited liability partnership, or corporation, who, for another, in consideration of compensation, by fee, commission, salary, or otherwise, or with the intention, in the expectation, or upon the promise of receiving or collecting a fee, does, or offers, attempts, or agrees to engage in, any single act or transaction contained in the definition of a real estate broker, whether an act is an incidental part of a transaction, or the entire transaction, shall be constituted a real estate broker or real estate salesperson under this chapter.

(I)(1) The terms "real estate broker," "real estate salesperson," "foreign real estate dealer," and "foreign real estate salesperson" do not include a person, partnership, association, limited liability company, limited liability partnership, or corporation, or the regular employees thereof, who perform any of the acts or transactions specified or comprehended in division (A) of this section, whether or not for, or with the intention, in expectation, or upon the promise of receiving or collecting a fee, commission, or other valuable consideration:

(a) With reference to real estate situated in this state owned by such person, partnership, association, limited liability company, limited liability partnership, or corporation, or acquired on its own account in the regular course of, or as an incident to the management of the property and the investment in it;

(b) As receiver or trustee in bankruptcy, as guardian, executor, administrator, trustee, assignee, commissioner, or any person doing the things mentioned in this section, under authority or appointment of, or incident to a proceeding in, any court, or as a bona fide public officer, or as executor, trustee, or other bona fide fiduciary under any trust agreement, deed of trust, will, or other instrument that has been executed in good faith creating a like bona fide fiduciary obligation;

(c) As a public officer while performing the officer's official duties;

(d) As an attorney at law in the performance of the attorney's duties;

(e) As a person who engages in the brokering of the sale of business assets, not including the sale, lease, exchange, or assignment of any interest in real estate;

(f) As a person who engages in the sale of manufactured homes as defined in division (C)(4) of section 3781.06 of the Revised Code, or of mobile homes as defined in division (O) of section 4501.01 of the Revised Code, provided the sale does not include the negotiation, sale, lease, exchange, or assignment of any interest in real estate;

(g) As a person who engages in the sale of commercial real estate pursuant to the requirements of section 4735.022 of the Revised Code;

(h) As an oil and gas land professional in the performance of the oil and gas land professional's duties, provided the oil and gas land professional is not engaged in the purchase or sale of a fee simple absolute interest in oil and gas or other real estate and the oil and gas land professional complies with division (A) of section 4735.023 of the Revised Code;

(i) As an oil and gas land professional employed by the person, partnership, association,

limited liability company, limited liability partnership, or corporation for which the oil and gas land professional is performing the oil and gas land professional's duties.

(2) A person, partnership, association, limited liability company, limited liability partnership, or corporation exempt under division (I)(1)(a) of this section shall be limited by the legal interest in the real estate held by that person or entity to performing any of the acts or transactions specified in or comprehended by division (A) of this section.

(J) "Disabled licensee" means a person licensed pursuant to this chapter who is under a severe disability which is of such a nature as to prevent the person from being able to attend any instruction lasting at least three hours in duration.

(K) "Division of real estate" may be used interchangeably with, and for all purposes has the same meaning as, "division of real estate and professional licensing."

(L) "Superintendent" or "superintendent of real estate" means the superintendent of the division of real estate and professional licensing of this state. Whenever the division or superintendent of real estate is referred to or designated in any statute, rule, contract, or other document, the reference or designation shall be deemed to refer to the division or superintendent of real estate and professional licensing, as the case may be.

(M) "Inactive license" means the license status in which a salesperson's license is in the possession of the division, renewed as required under this chapter or rules adopted under this chapter, and not associated with a real estate broker.

(N) "Broker's license on deposit" means the license status in which a broker's license is in the possession of the division of real estate and professional licensing and renewed as required under this chapter or rules adopted under this chapter.

(O) "Suspended license" means the license status that prohibits a licensee from providing services that require a license under this chapter for a specified interval of time.

(P) "Reactivate" means the process prescribed by the superintendent of real estate and professional licensing to remove a license from an inactive, suspended, or broker's license on deposit status to allow a licensee to provide services that require a license under this chapter.

(Q) "Revoked" means the license status in which the license is void and not eligible for reactivation.

(R) "Commercial real estate" means any parcel of real estate in this state other than real estate containing one to four residential units. "Commercial real estate" does not include single-family residential units such as condominiums, townhouses, manufactured homes, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis, even when those units are a part of a larger building or parcel of real estate containing more than four residential units.

(S) "Out-of-state commercial broker" includes any person, partnership, association, limited liability company, limited liability partnership, or corporation that is licensed to do business as a real estate broker in a jurisdiction other than Ohio.

(T) "Out-of-state commercial salesperson" includes any person affiliated with an out-of-state commercial broker who is not licensed as a real estate salesperson in Ohio.

(U) "Exclusive right to sell or lease listing agreement" means an agency agreement between a seller and broker that meets the requirements of section 4735.55 of the Revised Code and does both of the following:

(1) Grants the broker the exclusive right to represent the seller in the sale or lease of the seller's property;

(2) Provides the broker will be compensated if the broker, the seller, or any other person or entity produces a purchaser or tenant in accordance with the terms specified in the listing agreement or if the property is sold or leased during the term of the listing agreement to anyone other than to specifically exempted persons or entities.

(V) "Exclusive agency agreement" means an agency agreement between a seller and broker that meets the requirements of section 4735.55 of the Revised Code and does both of the following:

(1) Grants the broker the exclusive right to represent the seller in the sale or lease of the seller's property;

(2) Provides the broker will be compensated if the broker or any other person or entity produces a purchaser or tenant in accordance with the terms specified in the listing agreement or if the property is sold or leased during the term of the listing agreement, unless the property is sold or leased solely through the efforts of the seller or to the specifically exempted persons or entities.

(W) "Exclusive purchaser agency agreement" means an agency agreement between a purchaser and broker that meets the requirements of section 4735.55 of the Revised Code and does both of the following:

(1) Grants the broker the exclusive right to represent the purchaser in the purchase or lease of property;

(2) Provides the broker will be compensated in accordance with the terms specified in the exclusive agency agreement or if a property is purchased or leased by the purchaser during the term of the agency agreement unless the property is specifically exempted in the agency agreement.

The agreement may authorize the broker to receive compensation from the seller or the seller's agent and may provide that the purchaser is not obligated to compensate the broker if the property is purchased or leased solely through the efforts of the purchaser.

(X) "Seller" means a party in a real estate transaction who is the potential transferor of property. "Seller" includes an owner of property who is seeking to sell the property and a landlord who is seeking to rent or lease property to another person.

(Y) "Resigned" means the license status in which a license has been voluntarily and permanently surrendered to or is otherwise in the possession of the division of real estate and professional licensing, may not be renewed or reactivated in accordance with the requirements specified in this chapter or the rules adopted pursuant to it, and is not associated with a real estate broker.

(Z) "Bona fide" means made in good faith or without purpose of circumventing license law.

(AA) "Associate broker" means an individual licensed as a real estate broker under this chapter who does not function as the principal broker or a management level licensee.

(BB) "Brokerage" means a corporation, partnership, limited partnership, association, limited liability company, limited liability partnership, or sole proprietorship, foreign or domestic, that has been issued a broker's license. "Brokerage" includes the affiliated licensees who have been assigned management duties that include supervision of licensees whose duties may conflict with those of other affiliated licensees.

(CC) "Credit-eligible course" means a credit or noncredit-bearing course that is both of the

following:

(1) The course is offered by an institution of higher education.

(2) The course is eligible for academic credit that may be applied toward the requirements for a degree at the institution of higher education.

(DD) "Distance education" means courses required by divisions (B)(6) and (G) of section 4735.07, divisions (F)(6) and (J) of section 4735.09, and division (A) of section 4735.141 of the Revised Code in which instruction is accomplished through use of interactive, electronic media and where the teacher and student are separated by distance or time, or both.

(EE) "Licensee" means any individual licensed as a real estate broker or salesperson by the Ohio real estate commission pursuant to this chapter.

(FF) "Management level licensee" means a licensee who is employed by or affiliated with a real estate broker and who has supervisory responsibility over other licensees employed by or affiliated with that real estate broker.

(GG) "Oil and gas land professional" means a person regularly engaged in the preparation and negotiation of agreements for the purpose of exploring for, transporting, producing, or developing oil and gas mineral interests, including, but not limited to, oil and gas leases and pipeline easements.

(HH) "Principal broker" means an individual licensed as a real estate broker under this chapter who oversees and directs the operations of the brokerage.

Sec. 4735.023. (A) An oil and gas land professional who is not otherwise permitted to engage in the activities described in division (A) of section 4735.01 of the Revised Code may perform such activities, if the oil and gas land professional does all of the following:

(1)(a) Registers on an annual basis as an oil and gas land professional with the superintendent of real estate by such date specified and on a form approved by the superintendent, which form includes both of the following:

(i) The name and address of the oil and gas land professional;

(ii) Evidence of the oil and gas land professional's membership in good standing in a national, state, or local professional organization that has been in existence for at least three years and has, as part of its mission, developed a set of standards of performance and ethics for oil and gas land professionals.

(b) Pays an annual fee, established by the superintendent in an amount not to exceed one hundred dollars, which shall accompany the registration.

(2) At or prior to first contacting any landowner or other person with an interest in real estate for the purpose of engaging in the activities of an oil and gas land professional, and on a form approved by the superintendent, discloses to the landowner or other person all of the following:

(a) The oil and gas land professional's name and address as registered with the superintendent;

(b) That the oil and gas land professional is registered as such with the superintendent and is a member in good standing in a national, state, or local professional organization that has been in existence for at least three years and has, as part of its mission, developed a set of standards of performance and ethics for oil and gas land professionals;

(c) That the oil and gas land professional is not a licensed real estate broker or real estate

salesperson under Chapter 4735. of the Revised Code;

(d) That the landowner or other person with an interest in real estate may seek legal counsel in connection with any transaction with the oil and gas land professional;

(e) That the oil and gas land professional is not representing the landowner or other person with an interest in real estate.

(3) At or prior to entering into any agreements for the purpose of exploring for, transporting, producing, or developing oil and gas mineral interests including, but not limited to, oil and gas leases and pipeline easements with any landowner or other person with an interest in real estate, and on a form approved by the superintendent, discloses to the landowner or other person with an interest in real estate all of the following:

(a) The oil and gas land professional's name and address as registered with the superintendent;

(b) That the oil and gas land professional is registered as such with the superintendent and a member in good standing in a national, state, or local professional organization that has been in existence for at least three years and has, as part of its mission, developed a set of standards of performance and ethics for oil and gas land professionals;

(c) That the oil and gas land professional is not a licensed real estate broker or real estate salesperson under Chapter 4735. of the Revised Code;

(d) That the landowner or other person may seek legal counsel in connection with any transaction with the oil and gas land professional;

(e) That the oil and gas land professional is not representing the landowner or other person with an interest in real estate.

(B) Any oil and gas land professional who must be registered as such with the superintendent pursuant to this section who ceases to be a member in good standing of an organization described in division (A)(1)(a)(ii) of this section shall report the change in membership status to the superintendent within thirty days of that change. Failure to report such change in membership status shall result in the automatic suspension of registration status and subject the registrant to the penalties for unlicensed activity as found in section 4735.02 of the Revised Code.

(C) Any oil and gas land professional who fails to register with the superintendent pursuant to this section is subject to the penalties for unlicensed activity as found in section 4735.02 of the Revised Code.

Sec. 4738.021. (A) Every salvage motor vehicle auction and salvage motor vehicle pool shall do all of the following:

(1) Keep an electronic record of all sales of salvage motor vehicles and shall include in the record the make, model, year, vehicle identification number, and the names and addresses of the purchaser and seller of the salvage motor vehicle.

(2) Obtain from any authorized purchaser of an Ohio salvage motor vehicle a copy of a driver's license, passport, or other government-issued identification. Every salvage motor vehicle auction and salvage motor vehicle pool shall maintain a copy of this identification for a period of two years.

(3) Obtain from any person who is an authorized purchaser as defined in division (G)(1) of section 4738.01 of the Revised Code documented proof of any required license or other authorization

to do business pursuant to this chapter or, for any person residing in a state, jurisdiction, or country that does not issue a motor vehicle salvage dealer, junk yard, scrap metal processing facility, used motor vehicle dealer, salvage dismantler, or automotive recycler license, a declaration under penalty of perjury that the authorized purchaser is authorized to purchase salvage vehicles in that person's state, jurisdiction, or country. The declaration may be submitted by the authorized purchaser in electronic or written format. Every salvage motor vehicle auction and salvage motor vehicle pool shall maintain a copy of this documentation for a period of two years.

(4) Obtain from any person who is an authorized purchaser as defined in division (G)(2) of section 4738.01 of the Revised Code a declaration under penalty of perjury that the authorized purchaser is not making a purchase in excess of the applicable limit identified in that division. The salvage motor vehicle auction or salvage motor vehicle pool shall maintain that declaration for a period of two years. The declaration may be submitted by the authorized purchaser in electronic or written format.

(5) For any sale of a salvage motor vehicle to a person residing in another country, stamp the words "FOR EXPORT ONLY" on both of the following:

(a) The face of the vehicle title so as not to obscure the name, date, or mileage statement;

(b) In each unused reassignment space on the back of the title.

The words "FOR EXPORT ONLY" shall be in all capital, black letters, be at least two inches wide, and be clearly legible.

(B) Every salvage motor vehicle auction and salvage motor vehicle pool shall submit the information collected pursuant to division (A)(1) of this section on a monthly basis to ~~a third-party consolidator selected by the registrar of motor vehicles~~ the department of public safety or a third-party provider pursuant to a contract with the department and pursuant to the rules adopted by the ~~registrar~~ department in division (C) of this section.

(C)(1) ~~Within twelve months after March 23, 2015, the registrar shall contract with an entity approved as a third party data consolidator to the national motor vehicle title information system for the development of~~ The department of public safety or a third-party provider pursuant to a contract with the department shall establish a statewide database for the submission of the information collected pursuant to division (A)(1) of this section. The system shall be used to maintain an accurate record of all sales conducted by a salvage motor vehicle auction or salvage motor vehicle pool. ~~All expenses of this contract shall be paid from the public safety - highway purposes fund created in section 4501.06 of the Revised Code.~~

(2) The ~~registrar~~ department may adopt any rules pursuant to Chapter 119. of the Revised Code as necessary to facilitate the timely submission of the information required pursuant to this section.

The ~~registrar~~ department shall make the information the ~~registrar~~ department receives under this section available to any state or local law enforcement agency upon request.

SECTION 2. That existing sections 109.572, 147.01, 147.03, 147.04, 147.05, 147.06, 147.07, 147.08, 147.13, 147.14, 147.37, 147.371, 147.51, 147.55, 2303.20, 4505.11, 4735.01, and 4738.021 and sections 147.02 and 147.09 of the Revised Code are hereby repealed.

SECTION 3. (A) The amendments to sections 109.572, 147.01, 147.03, 147.04, 147.05, 147.06, 147.07, 147.08, 147.13, 147.14, 147.37, 147.371, 147.51, 147.55, and 2303.20, the enactment of sections 147.011, 147.021, 147.022, 147.031, 147.032, 147.041, 147.051, 147.141, 147.142, 147.542, 147.551, 147.59, 147.591, 147.60, 147.61, 147.62, 147.63, 147.631, 147.64, 147.65, and 147.66, and the repeal of sections 147.02 and 147.09 of the Revised Code in this act, other than provisions authorizing the secretary of state to adopt rules under this act, shall take effect six months after this act's effective date.

(B) The amendments to section 4738.021 of the Revised Code in this act shall take effect July 1, 2019.

(C) The amendments to sections 4505.11 and 4735.01 of the Revised Code made in Sections 1 and 2 of this act and the enactment of section 4735.023 of the Revised Code made in Section 1 of this act shall take effect at the earliest time permitted by law.

SECTION 4. Beginning on the effective date of this section and until January 1, 2021, a clerk of court shall not issue a salvage certificate of title for a motor vehicle under sections 4505.08 and 4505.11 of the Revised Code, or enter any notation on a certificate of title under those sections, based solely on information reported by an entity pursuant to 49 U.S.C. 30504 and regulations promulgated under it unless one of the following applies:

(A) The clerk receives information from the automated title processing system indicating that a previously issued certificate of title in this state was a salvage certificate of title.

(B) The vehicle was previously titled in another state and the previous certificate of title indicated that the vehicle was considered or categorized as salvage.

(C) An entity that is authorized under section 4505.11 of the Revised Code to apply for a salvage certificate of title applies for a salvage title pursuant to that section.

SECTION 5. (A) There is hereby created the National Motor Vehicle Title Information System Utilization Study Committee.

(B) The Committee shall consist of the Director of Public Safety or the Director's designee who is not the Registrar of Motor Vehicles and the following members appointed by the Director:

(1) A representative of the Attorney General's Office;

(2) A representative of the Ohio Automobile Dealers Association;

(3) A representative of the Ohio Insurance Institute;

(4) A representative of the salvage automobile auction industry;

(5) A representative of the Ohio Clerks of Court Association;

(6) A representative of the auto finance industry;

(7) A representative of AAA Ohio Auto Club;

(8) A representative of the National Auto Auction Association;

(9) A representative of the Ohio Independent Automobile Dealers Association;

(10) A representative from the salvage dealer industry; and

(11) Up to two additional stakeholders from organizations or industries not specified in divisions (B)(1) to (10) of this section.

(C) The Director shall make all appointments to the Committee not later than thirty days after the effective date of this section. Members shall serve without compensation or reimbursement.

(D) The Director or the Director's designee, who is not the Registrar of Motor Vehicles, shall serve as chairperson of the Committee and the Department of Public Safety shall provide the Committee with any support services as determined necessary by the Committee.

(E) The Committee shall study the following:

(1) The advantages and disadvantages of utilizing information reported pursuant to 49 U.S.C. 30504 that is included within the National Motor Vehicle Title Information System for making decisions on the issuance of salvage certificates of title in Ohio;

(2) The accuracy of that information; and

(3) Allowing the public to access this information in the same manner as motor vehicle title information is accessed under section 4505.141 of the Revised Code.

As part of the study, the Committee shall evaluate how other states utilize this information.

(F) Not later than January 31, 2020, the Committee shall complete its study and submit a report of its findings and any recommendations to the Governor and the General Assembly in accordance with section 101.68 of the Revised Code.

(G) Upon submission of its report, the Committee shall cease to exist.

Speaker _____ of the House of Representatives.

President _____ of the Senate.

Passed _____, 20____

Approved _____, 20____

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

_____

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ____ day of _____, A. D. 20____.

_____

Secretary of State.

File No. _____ Effective Date _____

(132nd General Assembly)
(Substitute House Bill Number 595)

AN ACT

To amend sections 313.14, 1901.26, 1907.24, 2101.24, 2105.19, 2107.01, 2107.05, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.52, 2107.71, 2109.41, 2129.05, 2137.01, 2323.30, 2323.31, 2323.33, 2701.09, 2721.03, 3105.011, 3109.06, 4705.09, 5163.21, 5802.03, 5806.04, 5808.19, and 5815.16, to enact sections 2111.182, 2111.52, 2113.032, 2151.233, 2151.234, 2151.235, 2151.236, 2323.311, 2746.10, 3109.061, 5802.05, 5817.01, 5817.02, 5817.03, 5817.04, 5817.05, 5817.06, 5817.07, 5817.08, 5817.09, 5817.10, 5817.11, 5817.12, 5817.13, and 5817.14, and to repeal sections 2107.081, 2107.082, 2107.083, 2107.084, and 2107.085 of the Revised Code to permit nonelderly, disabled applicants or recipients of Medicaid benefits or their spouses to establish their own special needs trust on or after December 13, 2016, to specify domestic relations and juvenile court jurisdiction in certain matters, and relative to procedures for the waiver of certain fees for indigent litigants in civil actions, procedures for a testator to file a declaratory judgment action to declare the validity of a will prior to death and the settlor of a trust to file such an action to declare its validity, exceptions to antilapse provisions in class gifts in wills and trusts, admission of authenticated copies of wills of persons not domiciled in Ohio, incorporation of a written trust into a will, testimony of witnesses in admission of will to probate, trusts for a minor, arbitration of trust disputes, the creation of county and multicounty guardianship services boards, the coroner's disposition of person dying of suspicious or unusual death, an application for the release of medical records and medical billing records, adding involuntary manslaughter not resulting from a felony vehicular homicide offense to the list of offenses excluding an individual from inheriting from a decedent, attorney-client privilege when the client is acting as a fiduciary, and the placement of fiduciary funds in interest on lawyer's trust accounts.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 313.14, 1901.26, 1907.24, 2101.24, 2105.19, 2107.01, 2107.05, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.52, 2107.71, 2109.41, 2129.05, 2137.01, 2323.30, 2323.31, 2323.33, 2701.09, 2721.03, 3105.011, 3109.06, 4705.09, 5163.21, 5802.03, 5806.04, 5808.19, and 5815.16 be amended

and sections 2111.182, 2111.52, 2113.032, 2151.233, 2151.234, 2151.235, 2151.236, 2323.311, 2746.10, 3109.061, 5802.05, 5817.01, 5817.02, 5817.03, 5817.04, 5817.05, 5817.06, 5817.07, 5817.08, 5817.09, 5817.10, 5817.11, 5817.12, 5817.13, and 5817.14 of the Revised Code be enacted to read as follows:

Sec. 313.14. (A)(1) The coroner shall make a reasonable effort to notify any known relatives of a deceased person who meets death in the manner described by section 313.12 of the Revised Code by letter or otherwise. The ~~next of kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person. If relatives of the deceased are unknown, the coroner shall make a diligent effort to ascertain the next of kin, other relatives, or friends of the deceased person~~ coroner shall also make a reasonable effort to determine the identity of the person who has been assigned the rights of disposition for the deceased person under sections 2108.70 to 2108.90 of the Revised Code and shall notify that person. After the coroner has completed the performance of the coroner's legal duties with respect to the body of the deceased person, the coroner shall return the body to that person.

(2) The coroner shall take charge and possession of all moneys, clothing, and other valuable personal effects of ~~such~~ the deceased person, found in connection with or pertaining to ~~such~~ the body, and shall store ~~such~~ the possessions in the county coroner's office or such other suitable place as is provided for ~~such~~ that storage by the board of county commissioners. If the coroner considers it advisable, the coroner may, after taking adequate precautions for the security of ~~such~~ those possessions, store the possessions where the coroner finds them until other storage space becomes available. The person who has been assigned the rights of disposition for the deceased person under sections 2108.70 to 2108.90 of the Revised Code may request the coroner to give those possessions to that person. After the person who has been assigned the rights of disposition for the deceased person under sections 2108.70 to 2108.90 of the Revised Code, upon the person's request under this division, receives the possessions of the deceased person from the coroner, that person shall deliver the possessions to the executor or administrator of the estate of the deceased person or to any other person who is legally entitled to any of those possessions.

(B) In cases in which the cost of the burial is paid by the county, after using such of the clothing as is necessary in the burial of the body, the coroner shall sell at public auction the valuable personal effects of ~~such~~ the deceased persons, found in connection with or pertaining to the unclaimed dead body, except firearms, which shall be disposed of as provided in division (C) of this section. The coroner shall make a verified inventory of ~~such~~ the effects and they shall be sold within eighteen months after burial, or after delivery of ~~such~~ the body in accordance with section 1713.34 of the Revised Code. All moneys derived from ~~such~~ the sale shall be deposited in the county treasury. A notice of ~~such~~ the sale shall be given in one newspaper of general circulation in the county, for five days in succession, and the sale shall be held immediately thereafter. The cost of such advertisement and notices shall be paid by the board upon the submission of a verified statement ~~therefor~~ for that cost, certified to the coroner.

(C) If a firearm is included in the personal effects of a deceased person who meets death in the manner described by section 313.12 of the Revised Code, the coroner shall deliver the firearm to the chief of police of the municipal corporation within which the body is found, or to the sheriff of the county if the body is not found within a municipal corporation. Upon delivery of the firearm to

the chief of police or the sheriff, the chief of police or sheriff shall give the coroner a receipt for the firearm that states the date of delivery and an accurate description of the firearm. The firearm shall be used for evidentiary purposes only.

The person who has been assigned the rights of disposition for the deceased ~~person's next of kin or other relative~~ person under sections 2108.70 to 2108.90 of the Revised Code may request that the firearm be given to ~~the next of kin or other relative~~ that person once the firearm is no longer needed for evidentiary purposes. The chief of police or the sheriff shall give the firearm to ~~the next of kin or other relative~~ that person who requested the firearm only if the ~~next of kin or other relative~~ person may lawfully possess the firearm under applicable law of this state or the United States. The chief of police or the sheriff shall keep a record identifying the ~~next of kin or other relative~~ person to whom the firearm is given, the date the firearm was given to ~~the next of kin or other relative~~ that person, and an accurate description of the firearm. The person to whom the firearm is given upon the person's request under this division shall deliver the firearm to the executor or administrator of the estate of the deceased person or to any other person who is legally entitled to the firearm.

If ~~a next of kin or other relative~~ the person who has been assigned the rights of disposition for the deceased person under sections 2108.70 to 2108.90 of the Revised Code does not request the firearm or is not entitled to possess the firearm, the firearm shall be used at the discretion of the chief of police or the sheriff.

(D) This section does not invalidate section 1713.34 of the Revised Code.

Sec. 1901.26. (A) Subject to division (E) of this section, costs in a municipal court shall be fixed and taxed as follows:

(1)(a) The municipal court shall require an advance deposit for the filing of any new civil action or proceeding when required by division (C) of this section, subject to its waiver pursuant to that division, and in all other cases, by rule, shall establish a schedule of fees and costs to be taxed in any civil or criminal action or proceeding.

(b)(i) The legislative authority of a municipal corporation may by ordinance establish a schedule of fees to be taxed as costs in any civil, criminal, or traffic action or proceeding in a municipal court for the performance by officers or other employees of the municipal corporation's police department or marshal's office of any of the services specified in sections 311.17 and 509.15 of the Revised Code. No fee in the schedule shall be higher than the fee specified in section 311.17 of the Revised Code for the performance of the same service by the sheriff. If a fee established in the schedule conflicts with a fee for the same service established in another section of the Revised Code or a rule of court, the fee established in the other section of the Revised Code or the rule of court shall apply.

(ii) When an officer or employee of a municipal police department or marshal's office performs in a civil, criminal, or traffic action or proceeding in a municipal court a service specified in section 311.17 or 509.15 of the Revised Code for which a taxable fee has been established under this or any other section of the Revised Code, the applicable legal fees and any other extraordinary expenses, including overtime, provided for the service shall be taxed as costs in the case. The clerk of the court shall pay those legal fees and other expenses, when collected, into the general fund of the municipal corporation that employs the officer or employee.

(iii) If a bailiff of a municipal court performs in a civil, criminal, or traffic action or

proceeding in that court a service specified in section 311.17 or 509.15 of the Revised Code for which a taxable fee has been established under this section or any other section of the Revised Code, the fee for the service is the same and is taxable to the same extent as if the service had been performed by an officer or employee of the police department or marshal's office of the municipal corporation in which the court is located. The clerk of that court shall pay the fee, when collected, into the general fund of the entity or entities that fund the bailiff's salary, in the same prorated amount as the salary is funded.

(iv) Division (A)(1)(b) of this section does not authorize or require any officer or employee of a police department or marshal's office of a municipal corporation or any bailiff of a municipal court to perform any service not otherwise authorized by law.

(2) The municipal court, by rule, may require an advance deposit for the filing of any civil action or proceeding and publication fees as provided in section 2701.09 of the Revised Code. The court ~~may~~ shall waive the requirement for advance deposit ~~upon affidavit or other evidence that a party is unable to make the required deposit~~ for a party that the court determines qualifies as an indigent litigant as set forth in section 2323.311 of the Revised Code.

(3) When a jury trial is demanded in any civil action or proceeding, the party making the demand may be required to make an advance deposit as fixed by rule of court, unless~~, upon affidavit or other evidence,~~ the court ~~concludes that the party is unable to make the required deposit~~ determines that the party qualifies as an indigent litigant as set forth in section 2323.311 of the Revised Code. If a jury is called, the fees of a jury shall be taxed as costs.

(4) In any civil or criminal action or proceeding, each witness shall receive twelve dollars for each full day's attendance and six dollars for each half day's attendance. Each witness in a municipal court that is not a county-operated municipal court also shall receive fifty and one-half cents for each mile necessarily traveled to and from the witness's place of residence to the action or proceeding.

(5) A reasonable charge for driving, towing, carting, storing, keeping, and preserving motor vehicles and other personal property recovered or seized in any proceeding may be taxed as part of the costs in a trial of the cause, in an amount that shall be fixed by rule of court.

(6) Chattel property seized under any writ or process issued by the court shall be preserved pending final disposition for the benefit of all persons interested and may be placed in storage when necessary or proper for that preservation. The custodian of any chattel property so stored shall not be required to part with the possession of the property until a reasonable charge, to be fixed by the court, is paid.

(7) The municipal court, as it determines, may refund all deposits and advance payments of fees and costs, including those for jurors and summoning jurors, when they have been paid by the losing party.

(8) Charges for the publication of legal notices required by statute or order of court may be taxed as part of the costs, as provided by section 7.13 of the Revised Code.

(B)(1)(a) The municipal court may determine that, for the efficient operation of the court, additional funds are necessary to acquire and pay for special projects of the court including, but not limited to, the acquisition of additional facilities or the rehabilitation of existing facilities, the acquisition of equipment, the hiring and training of staff, community service programs, mediation or dispute resolution services, the employment of magistrates, the training and education of judges,

acting judges, and magistrates, and other related services. Upon that determination, the court by rule may charge a fee, in addition to all other court costs, on the filing of each criminal cause, civil action or proceeding, or judgment by confession.

(b) If the municipal court offers a special program or service in cases of a specific type, the municipal court by rule may assess an additional charge in a case of that type, over and above court costs, to cover the special program or service. The municipal court shall adjust the special assessment periodically, but not retroactively, so that the amount assessed in those cases does not exceed the actual cost of providing the service or program.

(c) Any fee or charge assessed under division (B)(1)(a) or (b) of this section on the filing of a civil action or proceeding shall be waived if the court determines that the person on whom the fee or charge is assessed qualifies as an indigent litigant as set forth in section 2323.311 of the Revised Code.

(d) All moneys collected under division (B) of this section shall be paid to the county treasurer if the court is a county-operated municipal court or to the city treasurer if the court is not a county-operated municipal court for deposit into either a general special projects fund or a fund established for a specific special project. Moneys from a fund of that nature shall be disbursed upon an order of the court in an amount no greater than the actual cost to the court of a project. If a specific fund is terminated because of the discontinuance of a program or service established under division (B) of this section, the municipal court may order that moneys remaining in the fund be transferred to an account established under this division for a similar purpose.

(2) As used in division (B) of this section:

(a) "Criminal cause" means a charge alleging the violation of a statute or ordinance, or subsection of a statute or ordinance, that requires a separate finding of fact or a separate plea before disposition and of which the defendant may be found guilty, whether filed as part of a multiple charge on a single summons, citation, or complaint or as a separate charge on a single summons, citation, or complaint. "Criminal cause" does not include separate violations of the same statute or ordinance, or subsection of the same statute or ordinance, unless each charge is filed on a separate summons, citation, or complaint.

(b) "Civil action or proceeding" means any civil litigation that must be determined by judgment entry.

(C) The municipal court shall collect in all its divisions except the small claims division the sum of twenty-six dollars as additional filing fees in each new civil action or proceeding for the charitable public purpose of providing financial assistance to legal aid societies that operate within the state and to support the office of the state public defender. The municipal court shall collect in its small claims division the sum of eleven dollars as additional filing fees in each new civil action or proceeding for the charitable public purpose of providing financial assistance to legal aid societies that operate within the state and to support the office of the state public defender. This division does not apply to any execution on a judgment, proceeding in aid of execution, or other post-judgment proceeding arising out of a civil action. The filing fees required to be collected under this division shall be in addition to any other court costs imposed in the action or proceeding and shall be collected at the time of the filing of the action or proceeding. The court shall not waive the payment of the additional filing fees in a new civil action or proceeding unless the court waives the advanced

payment of all filing fees in the action or proceeding for the party that the court determines is qualified as an indigent litigant as set forth in section 2323.311 of the Revised Code. All such moneys collected during a month except for an amount equal to up to one per cent of those moneys retained to cover administrative costs shall be transmitted on or before the twentieth day of the following month by the clerk of the court to the treasurer of state in a manner prescribed by the treasurer of state or by the Ohio legal assistance foundation. The treasurer of state shall deposit four per cent of the funds collected under this division to the credit of the civil case filing fee fund established under section 120.07 of the Revised Code and ninety-six per cent of the funds collected under this division to the credit of the legal aid fund established under section 120.52 of the Revised Code.

The court may retain up to one per cent of the moneys it collects under this division to cover administrative costs, including the hiring of any additional personnel necessary to implement this division. If the court fails to transmit to the treasurer of state the moneys the court collects under this division in a manner prescribed by the treasurer of state or by the Ohio legal assistance foundation, the court shall forfeit the moneys the court retains under this division to cover administrative costs, including the hiring of any additional personnel necessary to implement this division, and shall transmit to the treasurer of state all moneys collected under this division, including the forfeited amount retained for administrative costs, for deposit in the legal aid fund.

(D) In the Cleveland municipal court, reasonable charges for investigating titles of real estate to be sold or disposed of under any writ or process of the court may be taxed as part of the costs.

(E) Under the circumstances described in sections 2969.21 to 2969.27 of the Revised Code, the clerk of the municipal court shall charge the fees and perform the other duties specified in those sections.

(F) As used in this section:

(1) "Full day's attendance" means a day on which a witness is required or requested to be present at an action or proceeding before and after twelve noon, regardless of whether the witness actually testifies.

(2) "Half day's attendance" means a day on which a witness is required or requested to be present at an action or proceeding either before or after twelve noon, but not both, regardless of whether the witness actually testifies.

Sec. 1907.24. (A) Subject to division (C) of this section, a county court shall fix and tax fees and costs as follows:

(1) The county court shall require an advance deposit for the filing of any new civil action or proceeding when required by division (C) of this section, subject to its waiver pursuant to that division, and, in all other cases, shall establish a schedule of fees and costs to be taxed in any civil or criminal action or proceeding.

(2) The county court by rule may require an advance deposit for the filing of a civil action or proceeding and publication fees as provided in section 2701.09 of the Revised Code. The court ~~may~~ shall waive an advance deposit requirement ~~upon the presentation of an affidavit or other evidence that establishes that a party is unable to make the requisite deposit~~ for a party that the court determines qualifies as an indigent litigant as set forth in section 2323.311 of the Revised Code.

(3) When a party demands a jury trial in a civil action or proceeding, the county court may

require the party to make an advance deposit as fixed by rule of court, unless the court ~~concludes, on the basis of an affidavit or other evidence presented by the party, that the party is unable to make the requisite deposit~~ determines that the party qualifies as an indigent litigant as set forth in section 2323.311 of the Revised Code. If a jury is called, the county court shall tax the fees of a jury as costs.

(4) In a civil or criminal action or proceeding, the county court shall fix the fees of witnesses in accordance with sections 2335.06 and 2335.08 of the Revised Code.

(5) A county court may tax as part of the costs in a trial of the cause, in an amount fixed by rule of court, a reasonable charge for driving, towing, carting, storing, keeping, and preserving motor vehicles and other personal property recovered or seized in a proceeding.

(6) The court shall preserve chattel property seized under a writ or process issued by the court pending final disposition for the benefit of all interested persons. The court may place the chattel property in storage when necessary or proper for its preservation. The custodian of chattel property so stored shall not be required to part with the possession of the property until a reasonable charge, to be fixed by the court, is paid.

(7) The county court, as it determines, may refund all deposits and advance payments of fees and costs, including those for jurors and summoning jurors, when they have been paid by the losing party.

(8) The court may tax as part of costs charges for the publication of legal notices required by statute or order of court, as provided by section 7.13 of the Revised Code.

(B)(1)(a) The county court may determine that, for the efficient operation of the court, additional funds are necessary to acquire and pay for special projects of the court including, but not limited to, the acquisition of additional facilities or the rehabilitation of existing facilities, the acquisition of equipment, the hiring and training of staff, community service programs, mediation or dispute resolution services, the employment of magistrates, the training and education of judges, acting judges, and magistrates, and other related services. Upon that determination, the court by rule may charge a fee, in addition to all other court costs, on the filing of each criminal cause, civil action or proceeding, or judgment by confession.

(b) If the county court offers a special program or service in cases of a specific type, the county court by rule may assess an additional charge in a case of that type, over and above court costs, to cover the special program or service. The county court shall adjust the special assessment periodically, but not retroactively, so that the amount assessed in those cases does not exceed the actual cost of providing the service or program.

(c) Any fee or charge assessed under division (B)(1)(a) or (b) of this section on the filing of a civil action or proceeding shall be waived if the court determines that the person on whom the fee or charge is assessed qualifies as an indigent litigant as set forth in section 2323.311 of the Revised Code.

(d) All moneys collected under division (B) of this section shall be paid to the county treasurer for deposit into either a general special projects fund or a fund established for a specific special project. Moneys from a fund of that nature shall be disbursed upon an order of the court in an amount no greater than the actual cost to the court of a project. If a specific fund is terminated because of the discontinuance of a program or service established under division (B) of this section, the county court may order that moneys remaining in the fund be transferred to an account

established under this division for a similar purpose.

(2) As used in division (B) of this section:

(a) "Criminal cause" means a charge alleging the violation of a statute or ordinance, or subsection of a statute or ordinance, that requires a separate finding of fact or a separate plea before disposition and of which the defendant may be found guilty, whether filed as part of a multiple charge on a single summons, citation, or complaint or as a separate charge on a single summons, citation, or complaint. "Criminal cause" does not include separate violations of the same statute or ordinance, or subsection of the same statute or ordinance, unless each charge is filed on a separate summons, citation, or complaint.

(b) "Civil action or proceeding" means any civil litigation that must be determined by judgment entry.

(C) Subject to division (E) of this section, the county court shall collect in all its divisions except the small claims division the sum of twenty-six dollars as additional filing fees in each new civil action or proceeding for the charitable public purpose of providing financial assistance to legal aid societies that operate within the state and to support the office of the state public defender. Subject to division (E) of this section, the county court shall collect in its small claims division the sum of eleven dollars as additional filing fees in each new civil action or proceeding for the charitable public purpose of providing financial assistance to legal aid societies that operate within the state and to support the office of the state public defender. This division does not apply to any execution on a judgment, proceeding in aid of execution, or other post-judgment proceeding arising out of a civil action. The filing fees required to be collected under this division shall be in addition to any other court costs imposed in the action or proceeding and shall be collected at the time of the filing of the action or proceeding. The court shall not waive the payment of the additional filing fees in a new civil action or proceeding unless the court waives the advanced payment of all filing fees in the action or proceeding for the party that the court determines is qualified as an indigent litigant as set forth in section 2323.311 of the Revised Code. All such moneys collected during a month except for an amount equal to up to one per cent of those moneys retained to cover administrative costs shall be transmitted on or before the twentieth day of the following month by the clerk of the court to the treasurer of state in a manner prescribed by the treasurer of state or by the Ohio legal assistance foundation. The treasurer of state shall deposit four per cent of the funds collected under this division to the credit of the civil case filing fee fund established under section 120.07 of the Revised Code and ninety-six per cent of the funds collected under this division to the credit of the legal aid fund established under section 120.52 of the Revised Code.

The court may retain up to one per cent of the moneys it collects under this division to cover administrative costs, including the hiring of any additional personnel necessary to implement this division. If the court fails to transmit to the treasurer of state the moneys the court collects under this division in a manner prescribed by the treasurer of state or by the Ohio legal assistance foundation, the court shall forfeit the moneys the court retains under this division to cover administrative costs, including the hiring of any additional personnel necessary to implement this division, and shall transmit to the treasurer of state all moneys collected under this division, including the forfeited amount retained for administrative costs, for deposit in the legal aid fund.

(D) The county court shall establish by rule a schedule of fees for miscellaneous services

performed by the county court or any of its judges in accordance with law. If judges of the court of common pleas perform similar services, the fees prescribed in the schedule shall not exceed the fees for those services prescribed by the court of common pleas.

(E) Under the circumstances described in sections 2969.21 to 2969.27 of the Revised Code, the clerk of the county court shall charge the fees and perform the other duties specified in those sections.

Sec. 2101.24. (A)(1) Except as otherwise provided by law, the probate court has exclusive jurisdiction:

(a) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country. If the probate judge is unavoidably absent, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of these acts shall be preserved in the usual records of the probate court.

(b) To grant and revoke letters testamentary and of administration;

(c) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(d) To appoint the attorney general to serve as the administrator of an estate pursuant to section 2113.06 of the Revised Code;

(e) To appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts;

(f) To grant marriage licenses;

(g) To make inquests respecting persons who are so mentally impaired as a result of a mental or physical illness or disability, as a result of intellectual disability, or as a result of chronic substance abuse, that they are unable to manage their property and affairs effectively, subject to guardianship;

(h) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(i) To authorize the sale of lands, equitable estates, or interests in lands or equitable estates, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(j) To authorize the completion of real property contracts on petition of executors and administrators;

(k) To construe wills;

(l) To render declaratory judgments, including, but not limited to, those rendered pursuant to ~~section 2107.084~~ Chapter 5817. of the Revised Code;

(m) To direct and control the conduct of fiduciaries and settle their accounts;

(n) To authorize the sale or lease of any estate created by will if the estate is held in trust, on petition by the trustee;

(o) To terminate a testamentary trust in any case in which a court of equity may do so;

(p) To hear and determine actions to contest the validity of wills;

(q) To make a determination of the presumption of death of missing persons and to adjudicate the property rights and obligations of all parties affected by the presumption;

(r) To act for and issue orders regarding wards pursuant to section 2111.50 of the Revised

Code;

(s) To hear and determine actions against sureties on the bonds of fiduciaries appointed by the probate court;

(t) To hear and determine actions involving informed consent for medication of persons hospitalized pursuant to section 5122.141 or 5122.15 of the Revised Code;

(u) To hear and determine actions relating to durable powers of attorney for health care as described in division (D) of section 1337.16 of the Revised Code;

(v) To hear and determine actions commenced by objecting individuals, in accordance with section 2133.05 of the Revised Code;

(w) To hear and determine complaints that pertain to the use or continuation, or the withholding or withdrawal, of life-sustaining treatment in connection with certain patients allegedly in a terminal condition or in a permanently unconscious state pursuant to division (E) of section 2133.08 of the Revised Code, in accordance with that division;

(x) To hear and determine applications that pertain to the withholding or withdrawal of nutrition and hydration from certain patients allegedly in a permanently unconscious state pursuant to section 2133.09 of the Revised Code, in accordance with that section;

(y) To hear and determine applications of attending physicians in accordance with division (B) of section 2133.15 of the Revised Code;

(z) To hear and determine actions relative to the use or continuation of comfort care in connection with certain principals under durable powers of attorney for health care, declarants under declarations, or patients in accordance with division (E) of either section 1337.16 or 2133.12 of the Revised Code;

(aa) To hear and determine applications for an order relieving an estate from administration under section 2113.03 of the Revised Code;

(bb) To hear and determine applications for an order granting a summary release from administration under section 2113.031 of the Revised Code;

(cc) To hear and determine actions relating to the exercise of the right of disposition, in accordance with section 2108.90 of the Revised Code;

(dd) To hear and determine actions relating to the disinterment and reinterment of human remains under section 517.23 of the Revised Code;

(ee) To hear and determine petitions for an order for treatment of a person suffering from alcohol and other drug abuse filed under section 5119.93 of the Revised Code and to order treatment of that nature in accordance with, and take other actions afforded to the court under, sections 5119.90 to 5119.98 of the Revised Code.

(2) In addition to the exclusive jurisdiction conferred upon the probate court by division (A)(1) of this section, the probate court shall have exclusive jurisdiction over a particular subject matter if both of the following apply:

(a) Another section of the Revised Code expressly confers jurisdiction over that subject matter upon the probate court.

(b) No section of the Revised Code expressly confers jurisdiction over that subject matter upon any other court or agency.

(B)(1) The probate court has concurrent jurisdiction with, and the same powers at law and in

equity as, the general division of the court of common pleas to issue writs and orders, and to hear and determine actions as follows:

(a) If jurisdiction relative to a particular subject matter is stated to be concurrent in a section of the Revised Code or has been construed by judicial decision to be concurrent, any action that involves that subject matter;

(b) Any action that involves an inter vivos trust; a trust created pursuant to section 5815.28 of the Revised Code; a charitable trust or foundation; subject to divisions (A)(1)(t) and (y) of this section, a power of attorney, including, but not limited to, a durable power of attorney; the medical treatment of a competent adult; or a writ of habeas corpus;

(c) Subject to section 2101.31 of the Revised Code, any action with respect to a probate estate, guardianship, trust, or post-death dispute that involves any of the following:

(i) A designation or removal of a beneficiary of a life insurance policy, annuity contract, retirement plan, brokerage account, security account, bank account, real property, or tangible personal property;

(ii) A designation or removal of a payable-on-death beneficiary or transfer-on-death beneficiary;

(iii) A change in the title to any asset involving a joint and survivorship interest;

(iv) An alleged gift;

(v) The passing of assets upon the death of an individual otherwise than by will, intestate succession, or trust.

(2) Any action that involves a concurrent jurisdiction subject matter and that is before the probate court may be transferred by the probate court, on its order, to the general division of the court of common pleas.

(3) Notwithstanding that the probate court has exclusive jurisdiction to render declaratory judgments under Chapter 5817. of the Revised Code, the probate court may transfer the proceeding to the general division of the court of common pleas pursuant to division (A) of section 5817.04 of the Revised Code.

(C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.

(D) The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

Sec. 2105.19. (A) Except as provided in division (C) of this section, no person who is convicted of, pleads guilty to, or is found not guilty by reason of insanity of a violation of or complicity in the violation of section 2903.01, 2903.02, or 2903.03 of the Revised Code or a violation of division (A) of section 2903.04 of the Revised Code that is not a proximate result of a felony violation of section 2903.06 of the Revised Code, or of an existing or former law of any other state, the United States, or a foreign nation, substantially equivalent to a violation of or complicity in the violation of any of these sections, no person who is indicted for a violation of or complicity in the violation of any of those sections or laws and subsequently is adjudicated incompetent to stand trial on that charge, and no juvenile who is found to be a delinquent child by reason of committing an act that, if committed by an adult, would be a violation of or complicity in the violation of any of those

sections or laws, shall in any way benefit by the death. All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's death, shall pass or be paid or distributed as if the person who caused the death of the decedent had predeceased the decedent.

(B) A person prohibited by division (A) of this section from benefiting by the death of another is a constructive trustee for the benefit of those entitled to any property or benefit that the person has obtained, or over which the person has exerted control, because of the decedent's death. A person who purchases any such property or benefit from the constructive trustee, for value, in good faith, and without notice of the constructive trustee's disability under division (A) of this section, acquires good title, but the constructive trustee is accountable to the beneficiaries for the proceeds or value of the property or benefit.

(C) A person who is prohibited from benefiting from a death pursuant to division (A) of this section either because the person was adjudicated incompetent to stand trial or was found not guilty by reason of insanity, or the person's guardian appointed pursuant to Chapter 2111. of the Revised Code or other legal representative, may file a complaint to declare the person's right to benefit from the death in the probate court in which the decedent's estate is being administered or that released the estate from administration. The complaint shall be filed no later than sixty days after the person is adjudicated incompetent to stand trial or found not guilty by reason of insanity. The court shall notify each person who is a devisee or legatee under the decedent's will, or if there is no will, each person who is an heir of the decedent pursuant to section 2105.06 of the Revised Code that a complaint of that nature has been filed within ten days after the filing of the complaint. The person who files the complaint, and each person who is required to be notified of the filing of the complaint under this division, is entitled to a jury trial in the action. To assert the right, the person desiring a jury trial shall demand a jury in the manner prescribed in the Civil Rules.

A person who files a complaint pursuant to this division shall be restored to the person's right to benefit from the death unless the court determines, by a preponderance of the evidence, that the person would have been convicted of a violation of, or complicity in the violation of, section 2903.01, 2903.02, or 2903.03 of the Revised Code or a violation of division (A) of section 2903.04 of the Revised Code that is not a proximate result of a felony violation of section 2903.06 of the Revised Code, or of a law of another state, the United States, or a foreign nation that is substantially similar to any of those sections, if the person had been brought to trial in the case in which the person was adjudicated incompetent or if the person were not insane at the time of the commission of the offense.

Sec. 2107.01. As used in Chapters 2101. to 2131. of the Revised Code:

(A) "Will" includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills, and instruments ~~admitted to probate~~ declared valid under division (A)(1) of section ~~2107.081~~ 5817.10 of the Revised Code, but "will" does not include inter vivos trusts or other instruments that have not been admitted to probate.

(B) "Testator" means any person who makes a will.

Sec. 2107.05. (A) An existing document, book, record, or memorandum may be incorporated in a will by reference, if referred to as being in existence at the time the will is executed. That document, book, record, or memorandum shall be deposited in the probate court when the will is

probated or within thirty days after the will is probated, unless the court grants an extension of time for good cause shown. A copy may be substituted for the original document, book, record, or memorandum if the copy is certified to be correct by a person authorized to take acknowledgments.

(B) Notwithstanding division (A) of this section, if a will incorporates a trust instrument only in the event that a bequest or devise to the trust is ineffective, the trust instrument shall be deposited in the probate court not later than thirty days after the final determination that such bequest or devise is ineffective.

(C) If a testator intends to incorporate a trust instrument in a will, the testator's will shall manifest that intent through the use of the term "incorporate," "made a part of," or similar language. In the absence of such clear and express intent, a trust instrument shall not be incorporated into or made a part of the will. Any language in the testator's will that only identifies a trust shall not be sufficient to manifest an intent to incorporate that trust instrument by reference in the will.

(D) The amendment of this section by adding divisions (B) and (C) applies, and shall be construed as applying, to the wills of testators who die on or after the effective date of this amendment.

Sec. 2107.07. A will may be deposited by the testator, or by some person for the testator, in the office of the judge of the probate court in the county in which the testator lives, before or after the death of the testator, and if deposited after the death of the testator, with or without applying for its probate. Upon the payment of the fee of twenty-five dollars to the court, the judge shall receive, keep, and give a certificate of deposit for the will. That will shall be safely kept until delivered or disposed of as provided by section 2107.08 of the Revised Code. If the will is not delivered or disposed of as provided in that section within one hundred years after the date the will was deposited, the judge may dispose of the will in any manner the judge considers feasible. The judge shall retain an electronic copy of the will prior to its disposal after one hundred years under this section.

Every will that is so deposited shall be enclosed in a sealed envelope that shall be indorsed with the name of the testator. The judge shall indorse on the envelope the date of delivery and the person by whom the will was delivered. The envelope may be indorsed with the name of a person to whom it is to be delivered after the death of the testator. The will shall not be opened or read until delivered to a person entitled to receive it, until the testator files a complaint in the probate court for a declaratory judgment of the validity of the will pursuant to section ~~2107.081~~ 5817.02 of the Revised Code, or until otherwise disposed of as provided in section 2107.08 of the Revised Code. Subject to section 2107.08 of the Revised Code, the deposited will shall not be a public record until the time that an application is filed to probate it.

Sec. 2107.08. During the lifetime of a testator, the testator's will, deposited according to section 2107.07 of the Revised Code, shall be delivered only to the testator, to some person authorized by the testator by a written order, or to a probate court for a determination of its validity when the testator so requests. After the testator's death, the will shall be delivered to the person named in the indorsement on the envelope of the will, if there is a person named who demands it. If the testator has filed a complaint in the probate court for a judgment declaring the validity of the will pursuant to section ~~2107.081~~ 5817.02 of the Revised Code and ~~the court has rendered the~~ a judgment is rendered pursuant to division (A)(1) of section 5817.10 of the Revised Code declaring the will valid, the ~~probate~~ judge ~~with possession~~ of the court who rendered the judgment shall deliver the will

to the proper probate court as determined under section 2107.11 of the Revised Code, upon the death of the testator, for probate.

If no person named in the indorsement demands the will and it is not one that has been declared valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, it shall be publicly opened in the probate court within one month after notice of the testator's death and retained in the office of the probate judge until offered for probate. If the jurisdiction belongs to any other probate court, the will shall be delivered to the person entitled to its custody, to be presented for probate in the other court. If the probate judge who opens the will has jurisdiction of it, the probate judge immediately shall give notice of its existence to the executor named in the will or, if any, to the persons holding a power to nominate an executor as described in section 2107.65 of the Revised Code, or, if it is the case, to the executor named in the will and to the persons holding a power to nominate a coexecutor as described in that section. If no executor is named and no persons hold a power to nominate an executor as described in that section, the probate judge shall give notice to other persons immediately interested.

Sec. 2107.09. (A) If real property is devised or personal property is bequeathed by a will, the executor or any interested person may cause the will to be brought before the probate court of the county in which the decedent was domiciled. By judicial order, the court may compel the person having the custody or control of the will to produce it before the court for the purpose of being proved.

If the person having the custody or control of the will intentionally conceals or withholds it or neglects or refuses to produce it for probate without reasonable cause, the person may be committed to the county jail and kept in custody until the will is produced. The person also shall be liable to any party aggrieved for the damages sustained by that neglect or refusal.

Any judicial order issued pursuant to this section may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered.

The officer to whom the process is delivered shall be liable for neglect in its service or return in the same manner as sheriffs are liable for neglect in not serving or returning a capias issued upon an indictment.

(B) In the case of a will that has been declared valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, the ~~probate~~ judge of the probate court or of the general division of the court of common pleas to which the proceeding was transferred pursuant to division (A) of section 5817.04 of the Revised Code who made the declaration ~~or who has possession of the will~~ shall cause ~~the will and~~ the judgment declaring ~~validity~~ the will valid to be brought before the proper probate court as determined by section 2107.11 of the Revised Code at a time after the death of the testator. If the death of the testator is brought to the attention of the ~~probate~~ applicable judge by an interested party, the judge shall cause the judgment declaring the will valid to be brought before the proper probate court at that time.

Sec. 2107.10. (A) No property or right, testate or intestate, shall pass to a beneficiary named in a will who knows of the existence of the will for one year after the death of the testator and has the power to control it and, without reasonable cause, intentionally conceals or withholds it or neglects or refuses within that one year to cause it to be offered for or admitted to probate. The property devised or bequeathed to that beneficiary shall pass as if the beneficiary had predeceased the testator.

(B) No property or right, testate or intestate, passes to a beneficiary named in a will when the will was declared valid ~~and filed with a probate judge~~ by a court pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, the declaration ~~and filing~~ took place in a county different from the county in which the will of the testator would be probated under section 2107.11 of the Revised Code, and the named beneficiary knew of the declaration ~~and filing~~ and of the death of the testator and did not notify the ~~probate~~ judge ~~with whom~~ of the court in which the will was ~~filed~~ declared valid. This division does not preclude a named beneficiary from acquiring property or rights from the estate of the testator for failing to notify a ~~probate~~ judge of that court if the named beneficiary reasonably believes that the judge has previously been notified of the testator's death.

Sec. 2107.11. (A) A will shall be admitted to probate:

(1) In the county in this state in which the testator was domiciled at the time of the testator's death;

(2) In any county of this state where any real property or personal property of the testator is located if, at the time of the testator's death, the testator was not domiciled in this state, and provided that the will has not previously been admitted to probate in this state or in the state of the testator's domicile;

(3) In the county of this state in which a ~~probate~~ court rendered a judgment declaring that the will was valid ~~and in which the will was filed with the probate court~~ pursuant to division (A)(1) of section 5817.10 of the Revised Code.

(B) For the purpose of division (A)(2) of this section, intangible personal property is located in the place where the instrument evidencing a debt, obligation, stock, or chose in action is located or if there is no instrument of that nature where the debtor resides.

Sec. 2107.12. When a will is presented for probate or for a declaratory judgment of its validity pursuant to ~~section 2107.081~~ Chapter 5817. of the Revised Code, persons interested in its outcome may contest the jurisdiction of the court to entertain the application. Preceding a hearing of a contest as to jurisdiction, all parties named in such will as legatees, devisees, trustees, or executors shall have notice ~~thereof~~ of the hearing in such manner as may be ordered by the court.

When ~~such~~ that contest is made, the parties may call witnesses and shall be heard upon the question involved. The decision of the court as to its jurisdiction may be reviewed on error.

Sec. 2107.16. (A) When offered for probate, a will may be admitted to probate and allowed upon such proof as would be satisfactory, and in like manner as if an absent or incompetent witness were dead:

(1) If it appears to the probate court that a witness to such will has gone to parts unknown;

(2) If the witness was competent at the time of attesting its execution and afterward became incompetent;

(3) If testimony of a witness cannot be obtained within a reasonable time.

(B) When offered for probate, a will shall be admitted to probate and allowed when there has been a prior judgment by a ~~probate~~ court declaring that the will is valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, if the will ~~has not been removed from the possession of the probate judge and~~ has not been ~~modified or~~ revoked ~~under division (C) or (D) of section 2107.084 of the Revised Code~~.

Sec. 2107.18. The probate court shall admit a will to probate if it appears from the face of the

will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which the testator was physically present when it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

The probate court shall admit a will to probate when there has been a prior judgment by a ~~probate~~ court declaring that the will is valid, rendered pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code, if the will ~~has not been removed from the possession of the probate judge and~~ has not been ~~modified or~~ revoked ~~under division (C) or (D) of section 2107.084 of the Revised Code~~.

Sec. 2107.20. When admitted to probate every will shall be filed in the office of the probate judge and recorded, together with any testimony or prior judgment of a ~~probate~~ court declaring the will valid pursuant to division (A)(1) of section 5817.10 of the Revised Code, by the judge or the clerk of the probate court in a book to be kept for that purpose.

A copy of the recorded will, with a copy of the order of probate annexed to the copy of the recorded will, certified by the judge under seal of the judge's court, shall be as effectual in all cases as the original would be, if established by proof.

Sec. 2107.22. (A)(1)(a) When a will has been admitted to probate by a probate court and another will of later date is presented to the same court for probate, notice of the will of later date shall be given to those persons required to be notified under section 2107.19 of the Revised Code, and to the fiduciaries and beneficiaries under the will of earlier date. The probate court may admit the will of later date to probate the same as if no earlier will had been so admitted if it appears from the face of the will of later date, or if an interested person makes a demand as described in division (A)(1)(b) of this section and it appears from the testimony of the witnesses to the will given in accordance with that division, that the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which the testator was physically present when it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.

(b) Upon the demand of a person interested in having a will of later date admitted to probate, the probate court shall cause at least two of the witnesses to the will of later date, and any other witnesses that the interested person desires to have appear, to come before the probate court and provide testimony. If the interested person so requests, the probate court shall issue a subpoena to compel the presence of any such witness before the probate court to provide testimony.

Witnesses before the probate court pursuant to this division shall be examined, and may be cross-examined, in open court, and their testimony shall be reduced to writing and then filed in the records of the probate court pertaining to the testator's estate.

(2) When an authenticated copy of a will has been admitted to record by a probate court, and an authenticated copy of a will of later date that was executed and proved as required by law, is presented to the same court for record, it shall be admitted to record in the same manner as if no authenticated copy of the will of earlier date had been so admitted.

(3) If a probate court admits a will of later date to probate, or an authenticated copy of a will of later date to record, its order shall operate as a revocation of the order admitting the will of earlier

date to probate, or shall operate as a revocation of the order admitting the authenticated copy of the will of earlier date to record. The probate court shall enter on the record of the earlier will a marginal note "later will admitted to probate ..." (giving the date admitted).

(B) When a will that has been declared valid pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code has been admitted to probate by a probate court, and an authenticated copy of another will of later date that was executed and proved as required by law is presented to the same court for record, the will of later date shall be admitted the same as if no other will had been admitted and the proceedings shall continue as provided in this section.

Sec. 2107.33. (A) A will shall be revoked in the following manners:

(1) By the testator by tearing, canceling, obliterating, or destroying it with the intention of revoking it;

(2) By some person, at the request of the testator and in the testator's presence, by tearing, canceling, obliterating, or destroying it with the intention of revoking it;

(3) By some person tearing, canceling, obliterating, or destroying it pursuant to the testator's express written direction;

(4) By some other written will or codicil, executed as prescribed by this chapter;

(5) By some other writing that is signed, attested, and subscribed in the manner provided by this chapter.

(B) ~~A will that has been declared valid and is in the possession of a probate judge also may be revoked according to division (C) of section 2107.084 of the Revised Code.~~

~~(C) If a testator removes a will that has been declared valid and is in the possession of a probate judge pursuant to section 2107.084 of the Revised Code from the possession of the judge, the declaration of validity that was rendered no longer has any effect.~~

~~(D)~~ If after executing a will, a testator is divorced, obtains a dissolution of marriage, has the testator's marriage annulled, or, upon actual separation from the testator's spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, any disposition or appointment of property made by the will to the former spouse or to a trust with powers created by or available to the former spouse, any provision in the will conferring a general or special power of appointment on the former spouse, and any nomination in the will of the former spouse as executor, trustee, or guardian shall be revoked unless the will expressly provides otherwise.

~~(E)~~ (C) Property prevented from passing to a former spouse or to a trust with powers created by or available to the former spouse because of revocation by this section shall pass as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse shall be interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they shall be deemed to be revived by the testator's remarriage with the former spouse or upon the termination of a separation agreement executed by them.

~~(F)~~ (D) A bond, agreement, or covenant made by a testator, for a valuable consideration, to convey property previously devised or bequeathed in a will does not revoke the devise or bequest. The property passes by the devise or bequest, subject to the remedies on the bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, that might be had by law against the heirs of the testator, or the testator's next of kin, if the property had descended to

them.

~~(G)~~ (E) A testator's revocation of a will shall be valid only if the testator, at the time of the revocation, has the same capacity as the law requires for the execution of a will.

~~(H)~~ (F) As used in this section:

(1) "Trust with powers created by or available to the former spouse" means a trust that is revocable by the former spouse, with respect to which the former spouse has a power of withdrawal, or with respect to which the former spouse may take a distribution that is not subject to an ascertainable standard but does not mean a trust in which those powers of the former spouse are revoked by section 5815.31 of the Revised Code or similar provisions in the law of another state.

(2) "Ascertainable standard" means a standard that is related to a trust beneficiary's health, maintenance, support, or education.

Sec. 2107.52. (A) As used in this section:

(1) "Class member" means an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had the individual survived the testator.

(2) "Descendant of a grandparent" means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under either of the following:

(a) The rules of construction applicable to a class gift created in the testator's will if the devise or the exercise of the power of appointment is in the form of a class gift;

(b) The rules for intestate succession if the devise or the exercise of the power of appointment is not in the form of a class gift.

(3) "Devise" means an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment.

(4) "Devisee" means any of the following:

(a) A class member if the devise is in the form of a class gift;

(b) An individual or class member who was deceased at the time the testator executed the testator's will or an individual or class member who was then living but who failed to survive the testator;

(c) An appointee under a power of appointment exercised by the testator's will.

(5) "Per stirpes" means that the shares of the descendants of a devisee who does not survive the testator are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the devisee had died intestate and unmarried on the date of the testator's death.

(6) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor.

(7) "Surviving devisee" or "surviving descendant" means a devisee or descendant, whichever is applicable, who survives the testator by at least one hundred twenty hours.

(8) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(B)(1) As used in "surviving descendants" in divisions (B)(2)(a) and (b) of this section, "descendants" means the descendants of a deceased devisee or class member under the applicable division who would take under a class gift created in the testator's will.

(2) Unless a contrary intent appears in the will, if a devisee fails to survive the testator and is

a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:

(a) If the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. The surviving descendants take, per stirpes, the property to which the devisee would have been entitled had the devisee survived the testator.

(b) If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import that includes more than one generation, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take, per stirpes, the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For purposes of division (B)(2)(b) of this section, "deceased devisee" means a class member who failed to survive the testator by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Attaching the word "surviving" or "living" to a devise, such as a gift "to my surviving (or living) children," is not, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(2) Attaching other words of survivorship to a devise, such as "to my child, if my child survives me," is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(3) A residuary clause is not a sufficient indication of an intent to negate the application of division (B) of this section unless the will specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(4) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment may be substituted for the appointee under this section, whether or not the descendant is an object of the power of appointment.

(D) Except as provided in division (A), (B), or (C) of this section, each of the following applies:

(1) A devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(2) If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

(3) If a residuary devise fails for any reason in its entirety, the residue passes by intestate succession.

(E) This section applies only to outright devises and appointments. Devises and appointments

in trust, including to a testamentary trust, are subject to section 5808.19 of the Revised Code.

(F) This section applies to wills of decedents who die on or after ~~the effective date of this section~~ March 22, 2012.

Sec. 2107.71. (A) A person interested in a will or codicil admitted to probate in the probate court that has not been declared valid by judgment of a ~~probate~~ court pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code ~~or that has been declared valid by judgment of a probate court pursuant to section 2107.084 of the Revised Code but has been removed from the possession of the probate judge,~~ may contest its validity by filing a complaint in the probate court in the county in which the will or codicil was admitted to probate.

(B) Except as otherwise provided in this division, no person may contest the validity of any will or codicil as to facts decided if it was submitted to a probate court by the testator during the testator's lifetime and declared valid by judgment of ~~the probate~~ a court ~~and filed with the judge of the probate court~~ pursuant to division (A)(1) of section ~~2107.084~~ 5817.10 of the Revised Code ~~and if the will was not removed from the possession of the probate judge~~. A person may contest the validity of that will~~, modification,~~ or codicil as to those facts if the person is one who should have been named a party defendant in the action in which the will~~, modification,~~ or codicil was declared valid, pursuant to division (A) of section ~~2107.081 or 2107.084~~ 5817.05 of the Revised Code, and if the person was not named a defendant and properly served in that action. Upon the filing of a complaint contesting the validity of a will or codicil that is authorized by this division, the court shall proceed with the action ~~in the same manner as if the will, modification, or codicil had not been previously declared valid under sections 2107.081 to 2107.085 of the Revised Code~~.

(C) No person may introduce, as evidence in an action authorized by this section contesting the validity of a will, the fact that the testator of the will did not file a complaint for a judgment declaring its validity under ~~section 2107.081~~ Chapter 5817. of the Revised Code.

Sec. 2109.41. (A) Immediately after appointment and throughout the ~~administration of a trust~~ term of the appointment, but subject to section 2109.372 of the Revised Code and except as provided in division (C) of this section, every fiduciary, pending payment of current obligations of the fiduciary's trust or estate, distribution, or investment pursuant to law, shall deposit all funds received by the fiduciary in the fiduciary's name as such fiduciary in one or more depositaries. Each depositary shall be a bank, savings bank, savings and loan association, or credit union located in this state. A corporate fiduciary, authorized to receive deposits of fiduciaries, may be the ~~depository~~ depositary of funds held by it as fiduciary. All deposits made pursuant to division (A) of this section shall be in such class of account as will be most advantageous to the trust or estate, and each depositary shall pay interest at the highest rate customarily paid to its patrons on deposits in accounts of the same class.

(B) The placing of funds in such depositaries under the joint control of the fiduciary and a surety on the bond of the fiduciary shall not increase the liability of the fiduciary.

(C) A fiduciary of a trust or estate may transfer funds received by the fiduciary in the fiduciary's name as such fiduciary to the fiduciary's attorney for deposit in an interest on lawyer's trust account established under division (A)(1)(b) of section 4705.09 of the Revised Code that is maintained by the attorney if ~~both of the following conditions are satisfied:~~

~~(1) The~~ the attorney, in consultation with the fiduciary, has determined that the funds are

nominal in amount ~~and~~ or will be held in the interest on lawyer's trust account for a short period of time.

~~(2) The probate court, upon petition by the fiduciary, has approved the deposit.~~

(D) Notwithstanding any contrary provision in this chapter, a probate court examining a trust or estate may only access the account information of an interest on lawyer's trust account created under this section for purposes of obtaining information related to that particular trust or estate and shall not access records of the interest on lawyer's trust account that pertain to assets of any other estate or trust held in the interest on lawyer's trust account.

Sec. 2111.182. If a minor is entitled to money or property whether by settlement or judgment for personal injury or damage to tangible or intangible property, inheritance or otherwise, the probate court may order that all or a portion of the amount received by the minor be deposited into a trust for the benefit of that beneficiary until the beneficiary reaches twenty-five years of age, and order the distribution of the amount in accordance with the provisions of the trust. Prior to the appointment as a trustee of a trust created pursuant to this section, the person to be appointed shall be approved by a parent or guardian of the minor beneficiary of the trust, unless otherwise ordered by the probate court.

Sec. 2111.52. (A) A probate court may accept funds or other program assistance from, or charge fees for services described in division (C) of this section rendered to, individuals, corporations, agencies, or organizations, including, but not limited to, a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, unless a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities does not agree to the payment of those fees. Any funds or fees received by the probate court under this division shall be paid into the county treasury and credited to a fund to be known as the county probate court guardianship services fund.

(B) The probate courts of two or more counties may accept funds or other program assistance from, or charge fees for services described in division (C) of this section rendered to, individuals, corporations, agencies, or organizations, including, but not limited to, a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, unless a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities does not agree to the payment of those fees. Any funds or fees received by the probate courts of two or more counties under this division shall be paid into the county treasury of one or more of the counties and credited to a fund to be known as the multicounty probate court guardianship services fund.

(C) The moneys in a county or multicounty probate court guardianship services fund shall be used for services to help ensure the treatment of any person who is under the care of a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, or any other guardianships. These services include, but are not limited to, involuntary commitment proceedings and the establishment and management of adult guardianships, including all associated expenses, for wards who are under the care of a county board of alcohol, drug addiction, and mental health services, a county board of developmental disabilities, or any other guardianships.

(D) If a judge of a probate court determines that some of the moneys in the county or

multicounty probate court guardianship services fund are needed for the efficient operation of the county or multicounty guardianship service board created under division (F) of this section, the moneys may be used for the acquisition of equipment, the hiring and training of staff, community services programs, volunteer guardianship training services, the employment of magistrates, and any other services necessary for the fulfillment of the duties of the county or multicounty guardianship service board.

(E) The moneys in the county or multicounty probate court guardianship services fund that may be used in part for the establishment and management of adult guardianships under division (C) of this section may be utilized to establish a county or multicounty guardianship service.

(F)(1) A county or multicounty guardianship service under division (E) of this section is established by creating a county or multicounty guardianship service board. The judge of the probate court shall appoint one member. The board of directors of a participating county board of developmental disabilities shall appoint one member. The board of directors of a participating county board of alcohol, drug addiction, and mental health services shall appoint one member. Additional members of the guardianship service board may be added if the member or members of a guardianship service board unanimously agree. If neither the county board of developmental disabilities nor the county board of alcohol, drug addiction, and mental health services chooses to participate in the guardianship service board, the probate court may appoint additional members to the guardianship service board. The term of appointment of each member is four years.

(2) The county or multicounty guardianship services board may appoint a director of the board. The board shall determine the compensation of the director based on the availability of funds contained in the county or multicounty probate court guardianship services fund.

(3) The county or multicounty guardianship services board may receive appointments from one or more county probate courts to serve as guardians of both the person and estate of wards. The director or any designee of a county or multicounty guardianship services board may act on behalf of the board in relation to all guardianship matters.

(4) The director of a county or multicounty guardianship services board may hire employees subject to available funds in the county or multicounty probate court guardianship services fund.

(5) The county or multicounty guardianship services board may charge a reasonable fee for services provided to wards. A probate judge shall approve any fees charged by the board under division (F)(5) of this section.

(6) The county or multicounty guardianship services board that is created under division (F)(1) of this section shall promulgate all rules and regulations necessary for the efficient operation of the board and the county or multicounty guardianship services.

Sec. 2113.032. Any person who is eligible to be appointed as a personal representative of an estate under the law of this state or named as executor in a will may file an application with the probate court in the county in which the decedent resided seeking the release of the decedent's medical records and medical billing records for use in evaluating a potential wrongful death, personal injury, or survivorship action on behalf of the decedent. The application shall include a decedent's estate form listing the decedent's known surviving spouse, children, next of kin, legatees, and devisees, if any. The application may be filed prior to the filing of any application for authority to administer the decedent's estate. Nothing in this section requires that an application to administer the

decedent's estate be filed if no estate is needed to be administered, unless otherwise required by law. The probate court shall send a copy of the application to those persons listed on the decedent's estate form described in this section unless otherwise directed by the court. Upon the filing of the application and the payment of a filing fee as determined by the court, and not earlier than ten days following the probate court's transmission of a copy of the application to those persons listed on the decedent's estate form, the probate court may order that the medical records and medical billing records be released without a hearing or with a hearing if needed. The court's order shall direct all medical providers that provided medical care or treatment to the decedent to release those medical records and medical billing records to the applicant for the limited purpose of deciding whether or not to file a wrongful death, personal injury, or survivorship action. The medical records and medical billing records are confidential and shall not be made available for public viewing unless otherwise provided for by law or subsequent court order. Upon obtaining the requested applicable records, and before the expiration of the applicable statute of limitations, the applicant shall file a report with the court certifying that all requested medical records and medical billing records have been received and shall indicate whether an administration of the decedent's estate will be filed.

Sec. 2129.05. Authenticated copies of wills of persons not domiciled in this state, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of that property is situated. The authenticated copies, so recorded, shall be as valid as wills made in this state.

When such a will, or authenticated copy, is admitted to record, a copy of the will or of the authenticated copy, with the copy of the order to record it annexed to that copy, certified by the probate judge under the seal of the probate court, may be filed and recorded in the office of the probate judge of any other county where a part of the property is situated, and it shall be as effectual as the authenticated copy of the will would be if approved and admitted to record by the court.

Sec. 2137.01. As used in this chapter:

(A) "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(B) "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated as agent, attorney in fact, or otherwise.

(C) "Carries" means engages in the transmission of an electronic communication.

(D) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(E) "Content of an electronic communication" means information concerning the substance or meaning of the communication that meets all of the following conditions:

(1) It has been sent or received by a user.

(2) It is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public.

(3) It is not readily accessible to the public.

(F) "Court" means the probate court for all matters in which the court has exclusive

jurisdiction under section 2101.24 of the Revised Code. "Court" also includes the probate court or the general division of the court of common pleas for matters in which such courts have concurrent jurisdiction under section 2101.24 of the Revised Code.

(G) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(H) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(I) "Digital asset" means an electronic record in which an individual has a right or interest. "Digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(J) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(K) "Electronic communication" has the same meaning as in 18 U.S.C. 2510(12), as amended.

(L) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(M) "Fiduciary" means an original, additional, or successor agent, guardian, personal representative, or trustee.

(N)(1) "Guardian" means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or the person and the estate of an incompetent or minor. When applicable, "guardian" includes, but is not limited to, a limited guardian, an interim guardian, a standby guardian, and an emergency guardian appointed pursuant to division (B) of section 2111.02 of the Revised Code. "Guardian" also includes both of the following:

(a) An agency under contract with the department of developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent;

(b) A conservator appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(2) "Guardian" does not include a guardian under sections 5905.01 to 5905.19 of the Revised Code.

(O) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(P) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(Q) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.

(R) "Personal representative" means an executor, administrator, special administrator, or other person acting under the authority of the probate court to perform substantially the same function under the law of this state. "Personal representative" also includes a commissioner in a release of assets from administration under section 2113.03 of the Revised Code and an applicant for

summary release from administration under section 2113.031 of the Revised Code.

(S) "Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal.

(T) "Principal" means an individual who grants authority to an agent in a power of attorney.

(U) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(V) "Remote-computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. 2510(14), as amended.

(W) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(X) "Trustee" means a fiduciary with legal title to property pursuant to an agreement or declaration that creates a beneficial interest in another. "Trustee" includes an original, additional, and successor trustee and a cotrustee.

(Y) "User" means a person that has an account with a custodian.

(Z) "Ward" means any person for whom a guardian is acting or for whom the probate court is acting pursuant to section 2111.50 of the Revised Code. "Ward" includes a person for whom a conservator has been appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

(AA) "Will" includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills, and instruments admitted to probate under ~~section 2107.081~~ Chapter 5817. of the Revised Code. "Will" does not include inter vivos trusts or other instruments that have not been admitted to probate.

Sec. 2151.233. The juvenile court shall not exercise jurisdiction under division (A)(2), (A)(11), or (B)(4) of section 2151.23 of the Revised Code or section 2151.231 of the Revised Code to determine custody or support regarding a child if any of the following apply:

(A) The child's parents are married.

(B) The child's parents are not married and there is an existing order for custody or support regarding the child or the child's sibling over which the juvenile court does not have jurisdiction.

(C) The determination is ancillary to the parents' pending action for divorce, dissolution of marriage, annulment, or legal separation.

Sec. 2151.234. Section 2151.233 of the Revised Code shall not affect the authority of the juvenile court to issue a custody order under division (A)(1) of section 2151.23 of the Revised Code granting custody of the child to a relative or placing a child under a kinship care agreement.

Sec. 2151.235. (A) A juvenile court may transfer jurisdiction over an action or an order it has issued for child support or custody as follows:

(1) To the appropriate common pleas court with domestic relations jurisdiction, if the parents of the child subject to the action or order are married and not parties to a proceeding described in division (A)(3) of this section;

(2) To the appropriate common pleas court with domestic relations jurisdiction, if the parents of the child are not married and there is an existing order for custody or support regarding the child or the child's sibling over which the juvenile court does not have jurisdiction;

(3) To the common pleas court exercising jurisdiction over a pending divorce, dissolution of

marriage, legal separation, or annulment proceeding to which the parents of the child subject to the action or order are parties;

(4) To the common pleas court exercising jurisdiction over a protection order issued under section 3113.31 of the Revised Code if the child or parents of the child are subject to both a child support order and the protection order.

(B) Jurisdiction of the action or order described in division (A) of this section shall be transferred and the receiving court shall have exclusive jurisdiction over the action or order if the following requirements are met:

(1) The common pleas court with domestic relations jurisdiction, juvenile court, or an interested party makes a motion to transfer jurisdiction;

(2) The court receiving jurisdiction consents to the transfer;

(3) The juvenile court certifies all or part of the record in the action or related to the order to the court receiving jurisdiction.

(C) This section applies to all orders in effect, and all actions or proceedings pending or initiated, on or after the effective date of H.B. 595 of the 132nd general assembly.

Sec. 2151.236. If a child is subject to a support order issued by a common pleas court with domestic relations jurisdiction and if a juvenile court adjudicates the child to be delinquent, unruly, abused, neglected, or dependent and grants custody of the child to an individual or entity other than as set forth in the order issued by the common pleas court with domestic relations jurisdiction, the juvenile court shall notify the common pleas court with domestic relations jurisdiction and the child support enforcement agency serving the county of that court. The child support enforcement agency shall review the child support order pursuant to sections 3119.60 and 3119.63 to 3119.76 of the Revised Code.

Sec. 2323.30. In all actions in which the plaintiff is a nonresident of the county in which the action is brought, a partnership suing by its company name, an insolvent corporation, or any party required to furnish security under section 2323.31 of the Revised Code, the plaintiff shall deposit cash or furnish security for costs. The surety must be a resident of the county and approved by the clerk. The obligation of the surety shall be complete by indorsing the summons or signing ~~his~~ the surety's name on the petition as surety for costs. The surety shall be bound for the payment of the costs which are adjudged against the plaintiff in the court in which the action is brought, or in any other court to which it is carried, and for all the costs taxed against the plaintiff in such action, whether ~~he~~ the plaintiff obtains a judgment or not. When a plaintiff makes ~~affidavit of inability either to give security or a cash deposit to secure costs~~ an application to be qualified as an indigent litigant as set forth in section 2323.311 of the Revised Code, the clerk shall receive and file the ~~petition~~ civil action or proceeding. ~~Such affidavit shall be filed with it and treated as are similar papers~~ If the court approves the application, the clerk shall waive the cash deposit or the security under this section, and the court shall proceed on the action or proceeding. If the court denies the application, the clerk shall retain the filing of the civil action or proceeding, and the court shall issue an order granting the applicant whose application is denied thirty days to make the required cash deposit or security prior to any dismissal or other action on the filing.

Sec. 2323.31. The court of common pleas by rule may require an advance deposit for the filing of any civil action or proceeding or of any responsive action by the defendant. On the motion

of ~~the defendant~~ any party, and if satisfied that such deposit is insufficient, the court may require it to be increased from time to time, so as to secure all costs that may accrue in the cause, or may require personal security to be given~~; but~~ . However, if a ~~plaintiff~~ party makes an ~~affidavit of inability either to prepay or give security for costs~~ application to be qualified as an indigent litigant as set forth in section 2323.311 of the Revised Code, the clerk of the court shall receive and file the ~~petition~~ civil action or proceeding or the responsive action by the defendant. ~~Such affidavit shall be filed with the petition, and treated as are similar papers in such cases~~ If the court approves the application, the clerk shall waive the advance deposit or personal security under this section and the court shall proceed with the action or proceeding or the defendant's responsive action. If the court denies the application, the clerk shall retain the filing of the civil action or proceeding or the defendant's responsive action, and the court shall issue an order granting the applicant whose application is denied thirty days to make the required deposit or personal security prior to any dismissal or other action on the filing of the civil action or proceeding or the defendant's responsive action.

Sec. 2323.311. (A) For purposes of this section, "indigent litigant" means a litigant who is unable to make an advance deposit or security for fees or costs as set forth in a civil action or proceeding.

(B)(1) In order to qualify as an indigent litigant, the applicant shall file with the court in which a civil action or proceeding is filed an affidavit of indigency in a form approved by the supreme court, or, until that court approves such a form, a form that requests substantially the same financial information as the financial disclosure and affidavit of indigency form used by the public defender for the appointment of counsel in a criminal case.

(2) The applicant's attorney, or if the litigant is proceeding pro se, the applicant shall file the affidavit of indigency with the court in which the civil action or proceeding is filed.

(3) Upon the filing of a civil action or proceeding and the affidavit of indigency under division (B)(1) of this section, the clerk of the court shall accept the action or proceeding for filing.

(4) A judge or magistrate of the court shall review the affidavit of indigency as filed pursuant to division (B)(2) of this section and shall approve or deny the applicant's application to qualify as an indigent litigant. The judge or magistrate shall approve the application if the applicant's gross income does not exceed one hundred eighty-seven and five-tenths per cent of the federal poverty guidelines as determined by the United States department of health and human services for the state of Ohio and the applicant's monthly expenses are equal to or in excess of the applicant's liquid assets as specified in division (C)(2) of section 120-1-03 of the Administrative Code, as amended, or a substantially similar provision. If the application is approved, the clerk shall waive the advance deposit or security and the court shall proceed with the civil action or proceeding. If the application is denied, the clerk shall retain the filing of the action or proceeding, and the court shall issue an order granting the applicant whose application is denied thirty days to make the required advance deposit or security, prior to any dismissal or other action on the filing of the civil action or proceeding.

(5) Following the filing of the civil action or proceeding with the clerk, the judge or magistrate, at any time while the action or proceeding is pending and on the motion of an applicant, on the motion of the opposing party, or on the court's own motion, may conduct a hearing to inquire into the applicant's status as an indigent litigant. The judge or magistrate shall affirm the applicant's status as an indigent litigant if the applicant's gross income does not exceed one hundred eighty-

seven and five-tenths per cent of the federal poverty guidelines as determined by the United States department of health and human services for the state of Ohio and the applicant's monthly expenses are equal to or in excess of the applicant's liquid assets as specified in division (C)(2) of section 120-1-03 of the Administrative Code, as amended, or a substantially similar provision. If the court finds that the applicant qualifies as an indigent litigant, the court shall proceed with the action or proceeding. If the court finds that the applicant does not qualify as an indigent litigant or no longer qualifies as an indigent litigant if previously so qualified as provided in division (B)(4) of this section, the clerk shall retain the filing of the action or proceeding, and the court shall issue an order granting the applicant whose motion is denied thirty days to make a required deposit or security, prior to any dismissal or other action on the filing or pendency of the civil action or proceeding.

(6) Nothing in this section shall prevent a court from approving or affirming an application to qualify as an indigent litigant for an applicant whose gross income exceeds one hundred eighty-seven and five-tenths per cent of the federal poverty guidelines as determined by the United States department of health and human services for the state of Ohio, or whose liquid assets equal or exceed the applicant's monthly expenses as specified in division (C)(2) of section 120-1-03 of the Administrative Code, as amended, or a substantially similar provision.

(7) Any indigency finding by the court under this section shall excuse the indigent litigant from the obligation to prepay any subsequent fee or cost arising in the civil case or proceeding unless the court addresses the payment or nonpayment of that fee or cost specifically in a court order.

(C) If the indigent litigant as the prevailing party proceeds with an execution on the court's judgment as set forth in Chapter 2327., 2329., 2331., or 2333. of the Revised Code, in order to provide for the recovery of applicable costs, any payment on any execution of the judgment in favor of the indigent litigant shall be made through the clerk of the court. The clerk shall apply that payment to any outstanding costs prior to any disbursement of funds to the indigent litigant. The requirement described in this division may be waived upon entry of the court by the judge or magistrate. The remedy set forth in this division shall not be the exclusive remedy of the clerk of court for the payment of costs. The clerk shall have all remedies available under the law.

Sec. 2323.33. (A) If security for costs is not given in a case mentioned in sections 2323.30 to 2323.32~~, inclusive,~~ of the Revised Code, at any time before the commencement of the trial, on motion of the defendant, and notice to the plaintiff, the court shall dismiss the action, unless in a reasonable time, which it may allow, security is given.

(B) This section does not apply if a party makes an application under section 2323.30 or 2323.31 of the Revised Code to qualify as an indigent litigant as set forth in section 2323.311 of the Revised Code.

Sec. 2701.09. In any county in which a daily law journal is printed, the judges of the courts of record, other than the court of appeals, shall jointly designate such daily law journal as the journal in which shall be published all calendars of the courts of record in such county, which calendars shall contain the numbers and titles of causes, and names of attorneys appearing ~~therein~~ in the causes, together with the motion dockets and such particulars and notices respecting causes, as may be specified by the judges, and each notice required to be published by any of ~~such~~ those judges.

In all cases, proceedings, administrations of estates, assignments, and matters pending in any of the courts of record of ~~such~~ the counties in which legal notices or advertisements are required to be

published, ~~such~~ the law journal shall, once a week and on the same day of the week, publish an abstract of each such legal advertisement, but the jurisdiction over, or irregularity of, a proceeding, trial, or judgment shall not be affected by anything ~~therein~~ in the abstract of legal advertising.

For the publication of such calendars, motion dockets, and notices, the fees for which are not fixed by law, the publisher of the paper shall receive a sum to be fixed by the judges for each case brought, to be paid in advance by the party filing the petition, transcripts for appeal, or lien, unless the party is determined by the court to qualify as an indigent litigant as set forth in section 2323.311 of the Revised Code, to be taxed in the costs and collected as other costs. For the publication of abstracts of legal advertising ~~such~~ the publisher shall receive a sum to be fixed by the judges for each case, proceeding, or matter, in which such advertising is had, to be taxed and collected as a part of the costs ~~thereof~~ of the case, proceeding, or matter.

Sec. 2721.03. Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

The testator of a will may have the validity of the will determined at any time during the testator's lifetime pursuant to ~~sections 2107.081 to 2107.085~~ Chapter 5817. of the Revised Code. The settlor of a trust may have the validity of the trust determined at any time during the settlor's lifetime pursuant to Chapter 5817. of the Revised Code.

Sec. 2746.10. If with respect to the filing of any civil action or proceeding or of a responsive action by a defendant in any court of record, a party qualifies as an indigent litigant as set forth in section 2323.311 of the Revised Code, the clerk of the court shall receive and file the civil action or proceeding or the defendant's responsive action and the court shall waive any advance deposit or security for filing of the civil action or proceeding or the defendant's responsive action, any payment in advance for any taxable costs, including fees for publication or service of process by other means, and any payment in advance of any fee required in connection with prosecuting or advancing the civil action or proceeding or the defendant's responsive action.

Sec. 3105.011. (A) The court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters. This section is not a determination by the general assembly that such equitable powers and jurisdiction do not exist with respect to any such matter.

(B) For purposes of this section, "domestic relations matters" means both of the following:

(1) Any matter committed to the jurisdiction of the division of domestic relations of common pleas courts under section 2301.03 of the Revised Code;

(2) Actions and proceedings under Chapters 3105., 3109., 3111., 3113., 3115., 3119., 3121., 3123., 3125., and 3127. of the Revised Code.

Sec. 3109.06. Except as provided in division (K) of section 2301.03 of the Revised Code, any court, other than a juvenile court, that has jurisdiction in any case respecting the allocation of parental rights and responsibilities for the care of a child under eighteen years of age and the designation of

the child's place of residence and legal custodian or in any case respecting the support of a child under eighteen years of age, may, on its own motion or on motion of any interested party, ~~with the consent of the juvenile court,~~ certify the record in the case or so much of the record and such further information, in narrative form or otherwise, as the court deems necessary or the juvenile court requests, to the juvenile court for further proceedings; upon the certification, the juvenile court shall have exclusive jurisdiction.

In cases in which the court of common pleas finds the parents unsuitable to have the parental rights and responsibilities for the care of the child or children and unsuitable to provide the place of residence and to be the legal custodian of the child or children, consent of the juvenile court shall not be required to such certification. This section applies to actions pending on August 28, 1951.

In any case in which a court of common pleas, or other court having jurisdiction, has issued an order that allocates parental rights and responsibilities for the care of minor children and designates their place of residence and legal custodian of minor children, has made an order for support of minor children, or has done both, the jurisdiction of the court shall not abate upon the death of the person awarded custody but shall continue for all purposes during the minority of the children. The court, upon its own motion or the motion of either parent or of any interested person acting on behalf of the children, may proceed to make further disposition of the case in the best interests of the children and subject to sections 3109.42 to 3109.48 of the Revised Code. If the children are under eighteen years of age, it may certify them, pursuant to this section, to the juvenile court of any county for further proceedings. After certification to a juvenile court, the jurisdiction of the court of common pleas, or other court, shall cease, except as to any payments of spousal support due for the spouse and support payments due and unpaid for the children at the time of the certification.

Any disposition made pursuant to this section, whether by a juvenile court after a case is certified to it, or by any court upon the death of a person awarded custody of a child, shall be made in accordance with sections 3109.04 and 3109.42 to 3109.48 of the Revised Code. If an appeal is taken from a decision made pursuant to this section that allocates parental rights and responsibilities for the care of a minor child and designates the child's place of residence and legal custodian, the court of appeals shall give the case calendar priority and handle it expeditiously.

Sec. 3109.061. Nothing in sections 2151.233 to 2151.236 and 2301.03 of the Revised Code shall be construed to prevent a domestic relations court from certifying a case to a juvenile court under division (D)(2) of section 3109.04 of the Revised Code or section 3109.06 of the Revised Code. Consent of the juvenile court shall not be required for the certification.

Sec. 4705.09. (A)(1)~~(a)~~ Any person admitted to the practice of law in this state by order of the supreme court in accordance with its prescribed and published rules, or any law firm or legal professional association, may establish and maintain an interest-bearing trust account, for purposes of depositing client funds held by the attorney, firm, or association that are nominal in amount or are to be held by the attorney, firm, or association for a short period of time, with any bank, savings bank, or savings and loan association that is authorized to do business in this state and is insured by the federal deposit insurance corporation or the successor to that corporation, or any credit union insured by the national credit union administration operating under the "Federal Credit Union Act," 84 Stat. 994 (1970), 12 ~~U.S.C.A.~~ U.S.C. 1751, or insured by a credit union share guaranty corporation

established under Chapter 1761. of the Revised Code. Each account established under this division shall be in the name of the attorney, firm, or association that established and is maintaining it and shall be identified as an IOLTA or an interest on lawyer's trust account. The name of the account may contain additional identifying features to distinguish it from other trust accounts established and maintained by the attorney, firm, or association.

~~(b) Any person admitted to the practice of law in this state by order of the supreme court in accordance with its prescribed and published rules, or any law firm or legal professional association, may establish and maintain an interest-bearing trust account, for purposes of depositing funds received by a client, in the client's name as fiduciary of a trust or estate, with any bank, savings bank, or savings and loan association that is authorized to do business in this state and is insured by the federal deposit insurance corporation or the successor to that corporation, or any credit union insured by the national credit union administration operating under the "Federal Credit Union Act," 84 Stat. 994 (1970), 12 U.S.C.A. 1751, or insured by a credit union share guaranty corporation established under Chapter 1761. of the Revised Code. Each account established under this division shall be in the name of the attorney, firm, or association that established and is maintaining it and shall be identified as an IOLTA or an interest on lawyer's trust account. The name of the account shall contain additional identifying features to distinguish it from other trust accounts established and maintained by the attorney, firm, or association and to distinguish it from an IOLTA established and maintained under division (A)(1)(a) of this section.~~

~~No funds received by a client, in the client's name as fiduciary of a trust or estate, shall be deposited into an IOLTA established under division (A)(1)(b) of this section unless the deposit has been approved by the probate court under section 2109.41 of the Revised Code.~~

~~Notwithstanding any contrary provision in Chapter 2109. of the Revised Code, a probate court examining a trust or estate may only access the account information of an IOLTA created under this section for purposes of obtaining information related to that particular trust or estate and shall not access records of the IOLTA that pertain to assets of any other estate or trust held in the IOLTA.~~

(2) Each attorney who receives funds belonging to a client shall do one of the following:

(a) Establish and maintain one or more interest-bearing trust accounts in accordance with division (A)(1) of this section or maintain one or more interest-bearing trust accounts previously established in accordance with that division, and deposit all client funds held that are nominal in amount or are to be held by the attorney for a short period of time in the account or accounts;

(b) If the attorney is affiliated with a law firm or legal professional association, comply with division (A)(2)(a) of this section or deposit all client funds held that are nominal in amount or are to be held by the attorney for a short period of time in one or more interest-bearing trust accounts established and maintained by the firm or association in accordance with division (A)(1) of this section.

(3) No funds belonging to any attorney, firm, or legal professional association shall be deposited in any interest-bearing trust account established under division (A)(1) or (2) of this section, except that funds sufficient to pay or enable a waiver of depository institution service charges on the account shall be deposited in the account and other funds belonging to the attorney, firm, or association may be deposited as authorized by the Code of Professional Responsibility adopted by the supreme court. The determinations of whether funds held are nominal or more than nominal in

amount and of whether funds are to be held for a short period or longer than a short period of time rests in the sound judgment of the particular attorney. No imputation of professional misconduct shall arise from the attorney's exercise of judgment in these matters.

(B) All interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section shall be transmitted to the treasurer of state for deposit in the legal aid fund established under section 120.52 of the Revised Code. No part of the interest earned on funds deposited in an interest-bearing trust account established under division (A)(1) or (2) of this section shall be paid to, or inure to the benefit of, the attorney, the attorney's law firm or legal professional association, the client or other person who owns or has a beneficial ownership of the funds deposited, or any other person other than in accordance with this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code.

(C) No liability arising out of any act or omission by any attorney, law firm, or legal professional association with respect to any interest-bearing trust account established under division (A)(1) or (2) of this section shall be imputed to the depository institution.

(D) The supreme court may adopt and enforce rules of professional conduct that pertain to the use, by attorneys, law firms, or legal professional associations, of interest-bearing trust accounts established under division (A)(1) or (2) of this section, and that pertain to the enforcement of division (A)(2) of this section. Any rules adopted by the supreme court under this authority shall conform to the provisions of this section, section 4705.10, and sections 120.51 to 120.55 of the Revised Code.

Sec. 5163.21. (A)(1) This section applies only to either of the following:

(a) Initial eligibility determinations for the medicaid program;

(b) An appeal from an initial eligibility determination pursuant to section 5160.31 of the Revised Code.

(2)(a) Except as provided in division (A)(2)(b) of this section, this section shall not be used by a court to determine the effect of a trust on an individual's initial eligibility for the medicaid program.

(b) The prohibition in division (A)(2)(a) of this section does not apply to an appeal described in division (A)(1)(b) of this section.

(B) As used in this section:

(1) "Trust" means any arrangement in which a grantor transfers real or personal property to a trust with the intention that it be held, managed, or administered by at least one trustee for the benefit of the grantor or beneficiaries. "Trust" includes any legal instrument or device similar to a trust.

(2) "Legal instrument or device similar to a trust" includes, but is not limited to, escrow accounts, investment accounts, partnerships, contracts, and other similar arrangements that are not called trusts under state law but are similar to a trust and to which all of the following apply:

(a) The property in the trust is held, managed, retained, or administered by a trustee.

(b) The trustee has an equitable, legal, or fiduciary duty to hold, manage, retain, or administer the property for the benefit of the beneficiary.

(c) The trustee holds identifiable property for the beneficiary.

(3) "Grantor" is a person who creates a trust, including all of the following:

(a) An individual;

(b) An individual's spouse;

(c) A person, including a court or administrative body, with legal authority to act in place of or on behalf of an individual or an individual's spouse;

(d) A person, including a court or administrative body, that acts at the direction or on request of an individual or the individual's spouse.

(4) "Beneficiary" is a person or persons, including a grantor, who benefits in some way from a trust.

(5) "Trustee" is a person who manages a trust's principal and income for the benefit of the beneficiaries.

(6) "Person" has the same meaning as in section 1.59 of the Revised Code and includes an individual, corporation, business trust, estate, trust, partnership, and association.

(7) "Applicant" is an individual who applies for medicaid or the individual's spouse.

(8) "Recipient" is an individual who receives medicaid or the individual's spouse.

(9) "Revocable trust" is a trust that can be revoked by the grantor or the beneficiary, including all of the following, even if the terms of the trust state that it is irrevocable:

(a) A trust that provides that the trust can be terminated only by a court;

(b) A trust that terminates on the happening of an event, but only if the event occurs at the direction or control of the grantor, beneficiary, or trustee.

(10) "Irrevocable trust" is a trust that cannot be revoked by the grantor or terminated by a court and that terminates only on the occurrence of an event outside of the control or direction of the beneficiary or grantor.

(11) "Payment" is any disbursal from the principal or income of the trust, including actual cash, noncash or property disbursements, or the right to use and occupy real property.

(12) "Payments to or for the benefit of the applicant or recipient" is a payment to any person resulting in a direct or indirect benefit to the applicant or recipient.

(13) "Testamentary trust" is a trust that is established by a will and does not take effect until after the death of the person who created the trust.

(C)(1) If an applicant or recipient is a beneficiary of a trust, the applicant or recipient shall submit a complete copy of the trust instrument to the county department of job and family services and the department of medicaid. A copy shall be considered complete if it contains all pages of the trust instrument and all schedules, attachments, and accounting statements referenced in or associated with the trust. The copy is confidential and is not subject to disclosure under section 149.43 of the Revised Code.

(2) On receipt of a copy of a trust instrument or otherwise determining that an applicant or recipient is a beneficiary of a trust, the county department of job and family services shall determine what type of trust it is and shall treat the trust in accordance with the appropriate provisions of this section and rules adopted under section 5163.02 of the Revised Code governing trusts. The county department of job and family services may determine that any of the following is the case regarding the trust or portion of the trust:

(a) It is a resource available to the applicant or recipient;

(b) It contains income available to the applicant or recipient;

(c) Divisions (C)(2)(a) and (b) of this section are both applicable;

(d) Neither division (C)(2)(a) nor (b) of this section is applicable.

(3) Except as provided in division (F) of this section, a trust or portion of a trust that is a resource available to the applicant or recipient or contains income available to the applicant or recipient shall be counted for purposes of determining medicaid eligibility.

(D)(1) A trust or legal instrument or device similar to a trust shall be considered a medicaid qualifying trust if all of the following apply:

(a) The trust was established on or prior to August 10, 1993.

(b) The trust was not established by a will.

(c) The trust was established by an applicant or recipient.

(d) The applicant or recipient is or may become the beneficiary of all or part of the trust.

(e) Payment from the trust is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the applicant or recipient.

(2) If a trust meets the requirement of division (D)(1) of this section, the amount of the trust that is considered by the county department of job and family services to be a resource available to the applicant or recipient shall be the maximum amount of payments permitted under the terms of the trust to be distributed to the applicant or recipient, assuming the full exercise of discretion by the trustee or trustees. The maximum amount shall include only amounts that are permitted to be distributed but are not distributed from either the income or principal of the trust.

(3) Amounts that are actually distributed from a medicaid qualifying trust to a beneficiary for any purpose shall be treated in accordance with rules adopted under section 5163.02 of the Revised Code governing income.

(4) Availability of a medicaid qualifying trust shall be considered without regard to any of the following:

(a) Whether or not the trust is irrevocable or was established for purposes other than to enable a grantor to qualify for medicaid;

(b) Whether or not the trustee actually exercises discretion.

(5) If any real or personal property is transferred to a medicaid qualifying trust that is not distributable to the applicant or recipient, the transfer shall be considered an improper disposition of assets and shall be subject to section 5163.30 of the Revised Code and rules to implement that section adopted under section 5163.02 of the Revised Code.

(6) The baseline date for the look-back period for disposition of assets involving a medicaid qualifying trust shall be the date on which the applicant or recipient is both institutionalized and first applies for medicaid.

(E)(1) A trust or legal instrument or device similar to a trust shall be considered a self-settled trust if all of the following apply:

(a) The trust was established on or after August 11, 1993.

(b) The trust was not established by a will.

(c) The trust was established by an applicant or recipient, spouse of an applicant or recipient, or a person, including a court or administrative body, with legal authority to act in place of or on behalf of an applicant, recipient, or spouse, or acting at the direction or on request of an applicant, recipient, or spouse.

(2) A trust that meets the requirements of division (E)(1) of this section and is a revocable trust shall be treated by the county department of job and family services as follows:

(a) The corpus of the trust shall be considered a resource available to the applicant or recipient.

(b) Payments from the trust to or for the benefit of the applicant or recipient shall be considered unearned income of the applicant or recipient.

(c) Any other payments from the trust shall be considered an improper disposition of assets and shall be subject to section 5163.30 of the Revised Code and rules to implement that section adopted under section 5163.02 of the Revised Code.

(3) A trust that meets the requirements of division (E)(1) of this section and is an irrevocable trust shall be treated by the county department of job and family services as follows:

(a) If there are any circumstances under which payment from the trust could be made to or for the benefit of the applicant or recipient, including a payment that can be made only in the future, the portion from which payments could be made shall be considered a resource available to the applicant or recipient. The county department of job and family services shall not take into account when payments can be made.

(b) Any payment that is actually made to or for the benefit of the applicant or recipient from either the corpus or income shall be considered unearned income.

(c) If a payment is made to someone other than to the applicant or recipient and the payment is not for the benefit of the applicant or recipient, the payment shall be considered an improper disposition of assets and shall be subject to section 5163.30 of the Revised Code and rules to implement that section adopted under section 5163.02 of the Revised Code.

(d) The date of the disposition shall be the later of the date of establishment of the trust or the date of the occurrence of the event.

(e) When determining the value of the disposed asset under this provision, the value of the trust shall be its value on the date payment to the applicant or recipient was foreclosed.

(f) Any income earned or other resources added subsequent to the foreclosure date shall be added to the total value of the trust.

(g) Any payments to or for the benefit of the applicant or recipient after the foreclosure date but prior to the application date shall be subtracted from the total value. Any other payments shall not be subtracted from the value.

(h) Any addition of assets after the foreclosure date shall be considered a separate disposition.

(4) If a trust is funded with assets of another person or persons in addition to assets of the applicant or recipient, the applicable provisions of this section and rules adopted under section 5163.02 of the Revised Code governing trusts shall apply only to the portion of the trust attributable to the applicant or recipient.

(5) The availability of a self-settled trust shall be considered without regard to any of the following:

(a) The purpose for which the trust is established;

(b) Whether the trustees have exercised or may exercise discretion under the trust;

(c) Any restrictions on when or whether distributions may be made from the trust;

(d) Any restrictions on the use of distributions from the trust.

(6) The baseline date for the look-back period for dispositions of assets involving a self-settled trust shall be the date on which the applicant or recipient is both institutionalized and first

applies for medicaid.

(F) The principal or income from any of the following shall not be a resource available to the applicant or recipient:

(1)(a) A special needs trust that meets all of the following requirements:

(i) The trust contains assets of an applicant or recipient under sixty-five years of age and may contain the assets of other individuals.

(ii) The applicant or recipient is disabled as defined in rules adopted under section 5163.02 of the Revised Code.

(iii) The trust is established for the benefit of the applicant or recipient by any of the following: the applicant or recipient, if established on or after December 13, 2016; a parent, grandparent, or legal guardian~~,~~ of the applicant or recipient; or a court.

(iv) The trust requires that on the death of the applicant or recipient the state will receive all amounts remaining in the trust up to an amount equal to the total amount of medicaid payments made on behalf of the applicant or recipient.

(b) If a special needs trust meets the requirements of division (F)(1)(a) of this section and has been established for a disabled applicant or recipient under sixty-five years of age, the exemption for the trust granted pursuant to division (F) of this section shall continue after the disabled applicant or recipient becomes sixty-five years of age if the applicant or recipient continues to be disabled as defined in rules adopted under section 5163.02 of the Revised Code. Except for income earned by the trust, the grantor shall not add to or otherwise augment the trust after the applicant or recipient attains sixty-five years of age. An addition or augmentation of the trust by the applicant or recipient with the applicant's own assets after the applicant or recipient attains sixty-five years of age shall be treated as an improper disposition of assets.

(c) Cash distributions to the applicant or recipient shall be counted as unearned income. All other distributions from the trust shall be treated as provided in rules adopted under section 5163.02 of the Revised Code governing in-kind income.

(d) Transfers of assets to a special needs trust shall not be treated as an improper transfer of resources. An asset held prior to the transfer to the trust shall be considered as a resource available to the applicant or recipient, income available to the applicant or recipient, or both a resource and income available to the individual.

(2)(a) A qualifying income trust that meets all of the following requirements:

(i) The trust is composed only of pension, social security, and other income to the applicant or recipient, including accumulated interest in the trust.

(ii) The income is received by the individual and the right to receive the income is not assigned or transferred to the trust.

(iii) The trust requires that on the death of the applicant or recipient the state will receive all amounts remaining in the trust up to an amount equal to the total amount of medicaid payments made on behalf of the applicant or recipient.

(b) No resources shall be used to establish or augment the trust.

(c) If an applicant or recipient has irrevocably transferred or assigned the applicant's or recipient's right to receive income to the trust, the trust shall not be considered a qualifying income trust by the county department of job and family services.

(d) Income placed in a qualifying income trust shall not be counted in determining an applicant's or recipient's eligibility for medicaid. The recipient of the funds may place any income directly into a qualifying income trust without those funds adversely affecting the applicant's or recipient's eligibility for medicaid. Income generated by the trust that remains in the trust shall not be considered as income to the applicant or recipient.

(e) All income placed in a qualifying income trust shall be combined with any income available to the individual that is not placed in the trust to arrive at a base income figure to be used for spend down calculations.

(f) The base income figure shall be used for post-eligibility deductions, including personal needs allowance, monthly income allowance, family allowance, and medical expenses not subject to third party payment. Any income remaining shall be used toward payment of patient liability. Payments made from a qualifying income trust shall not be combined with the base income figure for post-eligibility calculations.

(g) The base income figure shall be used when determining the spend down budget for the applicant or recipient. Any income remaining after allowable deductions are permitted as provided under rules adopted under section 5163.02 of the Revised Code shall be considered the applicant's or recipient's spend down liability.

(3)(a) A pooled trust that meets all of the following requirements:

(i) The trust contains the assets of the applicant or recipient of any age who is disabled as defined in rules adopted under section 5163.02 of the Revised Code.

(ii) The trust is established and managed by a nonprofit organization.

(iii) A separate account is maintained for each beneficiary of the trust but, for purposes of investment and management of funds, the trust pools the funds in these accounts.

(iv) Accounts in the trust are established by the applicant or recipient, the applicant's or recipient's parent, grandparent, or legal guardian, or a court solely for the benefit of individuals who are disabled.

(v) The trust requires that, to the extent that any amounts remaining in the beneficiary's account on the death of the beneficiary are not retained by the trust, the trust pay to the state the amounts remaining in the trust up to an amount equal to the total amount of medicaid payments made on behalf of the beneficiary.

(b) Cash distributions to the applicant or recipient shall be counted as unearned income. All other distributions from the trust shall be treated as provided in rules adopted under section 5163.02 of the Revised Code governing in-kind income.

(c) Transfers of assets to a pooled trust shall not be treated as an improper disposition of assets. An asset held prior to the transfer to the trust shall be considered as a resource available to the applicant or recipient, income available to the applicant or recipient, or both a resource and income available to the applicant or recipient.

(4) A supplemental services trust that meets the requirements of section 5815.28 of the Revised Code and to which all of the following apply:

(a) A person may establish a supplemental services trust pursuant to section 5815.28 of the Revised Code only for another person who is eligible to receive services through one of the following agencies:

(i) The department of developmental disabilities;

(ii) A county board of developmental disabilities;

(iii) The department of mental health and addiction services;

(iv) A board of alcohol, drug addiction, and mental health services.

(b) A county department of job and family services shall not determine eligibility for another agency's program. An applicant or recipient shall do one of the following:

(i) Provide documentation from one of the agencies listed in division (F)(4)(a) of this section that establishes that the applicant or recipient was determined to be eligible for services from the agency at the time of the creation of the trust;

(ii) Provide an order from a court of competent jurisdiction that states that the applicant or recipient was eligible for services from one of the agencies listed in division (F)(4)(a) of this section at the time of the creation of the trust.

(c) At the time the trust is created, the trust principal does not exceed the maximum amount permitted. The maximum amount permitted in calendar year 2006 is two hundred twenty-two thousand dollars. Each year thereafter, the maximum amount permitted is the prior year's amount plus two thousand dollars.

(d) A county department of job and family services shall review the trust to determine whether it complies with the provisions of section 5815.28 of the Revised Code.

(e) Payments from supplemental services trusts shall be exempt as long as the payments are for supplemental services as defined in rules adopted under section 5163.02 of the Revised Code. All supplemental services shall be purchased by the trustee and shall not be purchased through direct cash payments to the beneficiary.

(f) If a trust is represented as a supplemental services trust and a county department of job and family services determines that the trust does not meet the requirements provided in division (F)(4) of this section and section 5815.28 of the Revised Code, the county department of job and family services shall not consider it an exempt trust.

(G)(1) A trust or legal instrument or device similar to a trust shall be considered a trust established by an individual for the benefit of the applicant or recipient if all of the following apply:

(a) The trust is created by a person other than the applicant or recipient.

(b) The trust names the applicant or recipient as a beneficiary.

(c) The trust is funded with assets or property in which the applicant or recipient has never held an ownership interest prior to the establishment of the trust.

(2) Any portion of a trust that meets the requirements of division (G)(1) of this section shall be a resource available to the applicant or recipient only if the trust permits the trustee to expend principal, corpus, or assets of the trust for the applicant's or recipient's medical care, care, comfort, maintenance, health, welfare, general well being, or any combination of these purposes.

(3) A trust that meets the requirements of division (G)(1) of this section shall be considered a resource available to the applicant or recipient even if the trust contains any of the following types of provisions:

(a) A provision that prohibits the trustee from making payments that would supplant or replace medicaid or other public assistance;

(b) A provision that prohibits the trustee from making payments that would impact or have an

effect on the applicant's or recipient's right, ability, or opportunity to receive medicaid or other public assistance;

(c) A provision that attempts to prevent the trust or its corpus or principal from being a resource available to the applicant or recipient.

(4) A trust that meets the requirements of division (G)(1) of this section shall not be counted as a resource available to the applicant or recipient if at least one of the following circumstances applies:

(a) If a trust contains a clear statement requiring the trustee to preserve a portion of the trust for another beneficiary or remainderman, that portion of the trust shall not be counted as a resource available to the applicant or recipient. Terms of a trust that grant discretion to preserve a portion of the trust shall not qualify as a clear statement requiring the trustee to preserve a portion of the trust.

(b) If a trust contains a clear statement requiring the trustee to use a portion of the trust for a purpose other than medical care, care, comfort, maintenance, welfare, or general well being of the applicant or recipient, that portion of the trust shall not be counted as a resource available to the applicant or recipient. Terms of a trust that grant discretion to limit the use of a portion of the trust shall not qualify as a clear statement requiring the trustee to use a portion of the trust for a particular purpose.

(c) If a trust contains a clear statement limiting the trustee to making fixed periodic payments, the trust shall not be counted as a resource available to the applicant or recipient and payments shall be treated in accordance with rules adopted under section 5163.02 of the Revised Code governing income. Terms of a trust that grant discretion to limit payments shall not qualify as a clear statement requiring the trustee to make fixed periodic payments.

(d) If a trust contains a clear statement that requires the trustee to terminate the trust if it is counted as a resource available to the applicant or recipient, the trust shall not be counted as such. Terms of a trust that grant discretion to terminate the trust do not qualify as a clear statement requiring the trustee to terminate the trust.

(e) If a person obtains a judgment from a court of competent jurisdiction that expressly prevents the trustee from using part or all of the trust for the medical care, care, comfort, maintenance, welfare, or general well being of the applicant or recipient, the trust or that portion of the trust subject to the court order shall not be counted as a resource available to the applicant or recipient.

(f) If a trust is specifically exempt from being counted as a resource available to the applicant or recipient by a provision of the Revised Code, rules, or federal law, the trust shall not be counted as such.

(g) If an applicant or recipient presents a final judgment from a court demonstrating that the applicant or recipient was unsuccessful in a civil action against the trustee to compel payments from the trust, the trust shall not be counted as a resource available to the applicant or recipient.

(h) If an applicant or recipient presents a final judgment from a court demonstrating that in a civil action against the trustee the applicant or recipient was only able to compel limited or periodic payments, the trust shall not be counted as a resource available to the applicant or recipient and payments shall be treated in accordance with rules adopted under section 5163.02 of the Revised Code governing income.

(i) If an applicant or recipient provides written documentation showing that the cost of a civil action brought to compel payments from the trust would be cost prohibitive, the trust shall not be counted as a resource available to the applicant or recipient.

(5) Any actual payments to the applicant or recipient from a trust that meet the requirements of division (G)(1) of this section, including trusts that are not counted as a resource available to the applicant or recipient, shall be treated as provided in rules adopted under section 5163.02 of the Revised Code governing income. Payments to any person other than the applicant or recipient shall not be considered income to the applicant or recipient. Payments from the trust to a person other than the applicant or recipient shall not be considered an improper disposition of assets.

Sec. 5802.03. ~~The~~ (A) Except as otherwise provided in division (B) of this section, the probate division of the court of common pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders and to hear and determine any action that involves an inter vivos trust.

(B) The probate division of the court of common pleas has exclusive jurisdiction to render declaratory judgments under Chapter 5817. of the Revised Code. However, the probate division of the court of common pleas may transfer a declaratory judgment proceeding under that chapter to the general division of the court of common pleas pursuant to division (A) of section 5817.04 of the Revised Code.

Sec. 5802.05. (A) A provision in the terms of a trust, excluding a testamentary trust, that requires the arbitration of disputes, other than disputes of the validity of all or a part of a trust instrument, between or among the beneficiaries and a fiduciary under the trust, or a combination of those persons or entities, is enforceable.

(B) Unless otherwise specified in the terms of the trust, a trust provision requiring arbitration as described in division (A) of this section shall be presumed to require binding arbitration under Chapter 2711. of the Revised Code.

Sec. 5806.04. (A) ~~Any~~ Subject to division (E) of this section, any of the following actions pertaining to a revocable trust that is made irrevocable by the death of the settlor of the trust shall be commenced by the earlier of the date that is two years after the date of the death of the settlor of the trust or that is six months from the date on which the trustee sends the person bringing the action a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed under this division for commencing an action:

(1) An action to contest the validity of the trust;

(2) An action to contest the validity of any amendment to the trust that was made during the lifetime of the settlor of the trust;

(3) An action to contest the revocation of the trust during the lifetime of the settlor of the trust;

(4) An action to contest the validity of any transfer made to the trust during the lifetime of the settlor of the trust.

(B) Upon the death of the settlor of a revocable trust that was made irrevocable by the death of the settlor, the trustee, without liability, may proceed to distribute the trust property in accordance with the terms of the trust unless either of the following applies:

(1) The trustee has actual knowledge of a pending action to contest the validity of the trust,

any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust.

(2) The trustee receives written notification from a potential contestant of a potential action to contest the validity of the trust, any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust, and the action is actually filed within ninety days after the written notification was given to the trustee.

(C) If a distribution of trust property is made pursuant to division (B) of this section, a beneficiary of the trust shall return any distribution to the extent that it exceeds the distribution to which the beneficiary is entitled if the trust, an amendment to the trust, or a transfer made to the trust later is determined to be invalid.

(D) This section applies only to revocable trusts that are made irrevocable by the death of the settlor of the trust if the grantor dies on or after July 23, 2002.

(E) Except as otherwise provided in this division, no person may contest the validity of any trust as to facts decided if the trust was submitted to a probate court by the settlor during the settlor's lifetime and declared valid by the judgment of a court pursuant to division (B)(1) of section 5817.10 of the Revised Code. A person may contest the validity of that trust as to those facts if the person is one who should have been named a party defendant in the action in which the trust was declared valid, pursuant to division (A) of section 5817.06 of the Revised Code, and if the person was not named a defendant and properly served in that action.

Sec. 5808.19. (A) As used in this section, unless otherwise provided in any other provision in this section:

(1) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(2) "Class member" means an individual who fails to survive the distribution date by at least one hundred twenty hours but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date by at least one hundred twenty hours.

(3) "Descendant of a grandparent of the transferor" means an individual who would qualify as a descendant of a grandparent of the transferor under the rules of construction that would apply to a class gift under the transferor's will to the descendants of the transferor's grandparent.

(4) "Distribution date," with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day but may occur at a time during the course of a day.

(5) "Future interest" means an alternative future interest or a future interest in the form of a class gift.

(6) "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or a transfer to an existing trust, or by an exercise of a power of appointment to an existing trust, that directs the continuance of an existing trust, designates a beneficiary of an existing trust, or creates a trust.

(7) "Per stirpes" means that the shares of the descendants of a beneficiary who does not survive the distribution date by at least one hundred twenty hours are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the beneficiary had died intestate and unmarried on the distribution date.

(8) "Revocable trust" means a trust that was revocable immediately before the settlor's death by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, was serving.

(9) "Stepchild" means a child of the surviving, deceased, or former spouse of the transferor and not of the transferor.

(10) "Transferor" means any of the following:

(a) The donor and donee of a power of appointment, if the future interest was in property as a result of the exercise of a power of appointment;

(b) The testator, if the future interest was devised by will;

(c) The settlor, if the future interest was conveyed by inter vivos trust.

(B)(1)(a) As used in "surviving descendants" in divisions (B)(2)(b)(i) and (ii) of this section, "descendants" means the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

(b) As used in divisions (B)(2)(b)(i) and (ii) of this section, "surviving beneficiaries" or "surviving descendants" means beneficiaries or descendants, whichever is applicable, who survive the distribution date by at least one hundred twenty hours.

(2) Unless a contrary intent appears in the instrument creating a future interest under the terms of a trust, each of the following applies:

(a) A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date by at least one hundred twenty hours.

(b) If a beneficiary of a future interest under the terms of a trust does not survive the distribution date by at least one hundred twenty hours and if the beneficiary is a grandparent of the transferor, a descendant of a grandparent of the transferor, or a stepchild of the transferor, either of the following applies:

(i) If the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. The surviving descendants take, per stirpes, the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date by at least one hundred twenty hours.

(ii) If the future interest is in the form of a class gift, other than a future interest to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import <u>that includes more than one generation</u>, a substitute gift is created in the surviving descendants of the deceased beneficiary or beneficiaries. The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least one hundred twenty hours passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date by at least one hundred twenty hours. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take, per stirpes, the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date by at least one hundred twenty hours. For purposes of division (B)(2)(b)(ii) of this section, "deceased beneficiary" means a class

member who failed to survive the distribution date by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Describing a class of beneficiaries as "surviving" or "living," without specifying when the beneficiaries must be surviving or living, such as a gift "for my spouse for life, then to my surviving (or living) children," is not, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section.

(2) Subject to division (C)(1) of this section, attaching words of survivorship to a future interest under the terms of a trust, such as "for my spouse for life, then to my children who survive my spouse" or "for my spouse for life, then to my then-living children" is, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section. Words of survivorship under division (C)(2) of this section include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed as condition-precedent, condition-subsequent, or in any other form.

(3) A residuary clause in a will is not a sufficient indication of an intent that is contrary to the application of this section, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause. A residuary clause in a revocable trust instrument is not a sufficient indication of an intent that is contrary to the application of this section unless the distribution date is the date of the settlor's death and the revocable trust instrument specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(D) If, after the application of divisions (B) and (C) of this section there is no surviving taker of the property, and a contrary intent does not appear in the instrument creating the future interest, the property passes in the following order:

(1) If the future interest was created by the exercise of a power of appointment, the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.

(2) If no taker is produced under division (D)(1) of this section and the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will. For purposes of division (D)(2) of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(3) If no taker is produced under divisions (D)(1) and (2) of this section, the transferor is deceased, and the trust was created in a nonresiduary gift under the terms of a revocable trust of the transferor, the property passes under the residuary clause in the transferor's revocable trust instrument. For purposes of division (D)(3) of this section, the residuary clause in the transferor's revocable trust instrument is treated as creating a future interest under the terms of a trust.

(4) If no taker is produced under divisions (D)(1), (2), and (3) of this section, the property passes to those persons who would succeed to the transferor's intestate estate and in the shares as provided in the intestate succession law of the transferor's domicile if the transferor died on the distribution date. Notwithstanding division (A)(10) of this section, for purposes of division (D)(4) of

this section, if the future interest was created by the exercise of a power of appointment, "transferor" means the donor if the power is a nongeneral power, or the donee if the power is a general power.

(E) This section applies to all trusts that become irrevocable on or after ~~the effective date of this section~~ March 22, 2012. This section does not apply to any trust that was irrevocable before ~~the effective date of this section~~ March 22, 2012, even if property was added to the trust on or after ~~that effective date~~ March 22, 2012.

Sec. 5815.16. (A) Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.

(B) Any communication between an attorney and a client who is acting as a fiduciary is privileged and protected from disclosure to third parties to whom the fiduciary owes fiduciary duties to the same extent as if the client was not acting as a fiduciary.

(C) As used in this section, "fiduciary" means a trustee under an express trust or an executor or administrator of a decedent's estate.

Sec. 5817.01. As used in this chapter:

(A)(1) "Beneficiary under a trust" means either of the following:

(a) Any person that has a present or future beneficial interest in a trust, whether vested or contingent;

(b) Any person that, in a capacity other than that of trustee, holds a power of appointment over trust property, but does not include the class of permitted appointees among whom the power holder may appoint.

(2) "Beneficiary under a trust" includes a charitable organization that is expressly designated in the terms of the trust to receive distributions, but does not include any charitable organization that is not expressly designated in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions.

(B)(1) "Beneficiary under a will" means either of the following:

(a) Any person designated in a will to receive a testamentary disposition of real or personal property;

(b) Any person that, in a capacity other than that of executor, holds a power of appointment over estate assets, but does not include the class of permitted appointees among whom the power holder may appoint.

(2) "Beneficiary under a will" includes a charitable organization that is expressly designated in the terms of the will to receive testamentary distributions, but does not include any charitable organization that is not expressly designated in the terms of the will to receive distributions, but to whom the executor may in its discretion make distributions.

(C) "Court" means the probate court of the county in which the complaint under section 5817.02 or 5817.03 of the Revised Code is filed or the general division of the court of common pleas to which the probate court transfers the proceeding under division (A) of section 5817.04 of the Revised Code.

(D) "Related trust" means a trust for which both of the following apply:

(1) The testator is the settlor of the trust.

(2) The trust is named as a beneficiary in the will in accordance with section 2107.63 of the Revised Code.

(E) "Related will" means a will for which both of the following apply:

(1) The testator is the settlor of a trust.

(2) The will names the trust as a beneficiary in accordance with section 2107.63 of the Revised Code.

(F) "Trust" means an inter vivos revocable or irrevocable trust instrument to which, at the time the complaint for declaration of validity is filed under section 5817.03 of the Revised Code, either of the following applies:

(1) The settlor resides in, or is domiciled in, this state.

(2) The trust's principal place of administration is in this state.

Sec. 5817.02. (A) A testator may file a complaint with the probate court to determine before the testator's death that the testator's will is a valid will subject only to subsequent revocation or modification of the will. The right to file a complaint for a determination of the validity of a testator's will under this chapter, or to voluntarily dismiss a complaint once filed, is personal to the testator and may not be exercised by the testator's guardian or an agent under the testator's power of attorney.

(B) A testator who desires to obtain a validity determination as to the testator's will shall file a complaint to determine the validity of both the will and any related trust.

(C) The failure of a testator to file a complaint for a judgment declaring the validity of a will shall not be construed as evidence or an admission that the will is not valid.

(D) A complaint for a determination of the validity of a testator's will shall be accompanied by an express written waiver of the testator's physician-patient privilege provided in division (B) of section 2317.02 of the Revised Code.

Sec. 5817.03. (A) A settlor may file a complaint with the probate court to determine before the settlor's death that the settlor's trust is valid and enforceable under its terms, subject only to a subsequent revocation or modification of the trust. The right to file a complaint for a determination of the validity of a settlor's trust under this chapter, or to voluntarily dismiss a complaint once filed, is personal to the settlor and may not be exercised by the settlor's guardian or an agent under the settlor's power of attorney.

(B) A settlor who desires to obtain a validity determination as to the settlor's trust shall file a complaint to determine the validity of both the trust and the related will.

(C) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust shall not be construed as evidence or an admission that the trust is not valid.

(D) A complaint for a determination of the validity of a settlor's trust shall be accompanied by an express written waiver of the settlor's physician-patient privilege provided in division (B) of section 2317.02 of the Revised Code.

Sec. 5817.04. (A) A complaint to determine the validity of a will or a trust shall be filed with the probate court. The probate judge, upon the motion of a party or the judge's own motion, may transfer the proceeding to the general division of the court of common pleas.

(B) The venue for a complaint under section 5817.02 of the Revised Code is either of the following:

(1) The probate court of the county in this state where the testator is domiciled;

(2) If the testator is not domiciled in this state, the probate court of any county in this state where any real property or personal property of the testator is located or, if there is no such property, the probate court of any county in this state.

(C) The venue for a complaint under section 5817.03 of the Revised Code is either of the following:

(1) The probate court of the county in this state where the settlor resides or is domiciled;

(2) If the settlor does not reside or is not domiciled in this state, the probate court of the county in this state in which the trust's principal place of administration is located.

Sec. 5817.05. (A) A complaint under section 5817.02 of the Revised Code shall name as party defendants all of the following, as applicable:

(1) The testator's spouse;

(2) The testator's children;

(3) The testator's heirs who would take property pursuant to section 2105.06 of the Revised Code had the testator died intestate at the time the complaint is filed;

(4) The testator's beneficiaries under the will;

(5) Any beneficiary under the testator's most recent prior will.

(B) A complaint under section 5817.02 of the Revised Code may name as a party defendant any other person that the testator believes may have a pecuniary interest in the determination of the validity of the testator's will.

(C) A complaint under section 5817.02 of the Revised Code may contain all or any of the following:

(1) A statement that a copy of the will has been filed with the court;

(2) A statement that the will is in writing;

(3) A statement that the will was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's express direction;

(4) A statement that the will was signed in the conscious presence of the testator by two or more competent individuals, each of whom either witnessed the testator sign the will, or heard the testator acknowledge signing the will;

(5) A statement that the will was executed with the testator's testamentary intent;

(6) A statement that the testator had testamentary capacity;

(7) A statement that the testator executed the will free from undue influence, not under restraint or duress, and in the exercise of the testator's free will;

(8) A statement that the execution of the will was not the result of fraud or mistake;

(9) The names and addresses of the testator and all of the defendants and, if any of the defendants are minors, their ages;

(10) A statement that the will has not been revoked or modified;

(11) A statement that the testator is familiar with the contents of the will.

Sec. 5817.06. (A) A complaint under section 5817.03 of the Revised Code shall name as party defendants the following, as applicable:

(1) The settlor's spouse;

(2) The settlor's children;

(3) The settlor's heirs who would take property pursuant to section 2105.06 of the Revised

Code had the settlor died intestate at the time the complaint is filed;

(4) The trustee or trustees under the trust;

(5) The beneficiaries under the trust;

(6) If the trust amends, amends and restates, or replaces a prior trust, any beneficiary under the settlor's most recent prior trust.

(B) A complaint under section 5817.03 of the Revised Code may name as a party defendant any other person that the settlor believes may have a pecuniary interest in the determination of the validity of the settlor's trust.

(C) A complaint under section 5817.03 of the Revised Code may contain all or any of the following:

(1) A statement that a copy of the trust has been filed with the court;

(2) A statement that the trust is in writing and was signed by the settlor;

(3) A statement that the trust was executed with the intent to create a trust;

(4) A statement that the settlor had the legal capacity to enter into and establish the trust;

(5) A statement that the trust has a definite beneficiary or is one of the following:

(a) A charitable trust;

(b) A trust for the care of an animal as provided in section 5804.08 of the Revised Code;

(c) A trust for a noncharitable purpose as provided in section 5804.09 of the Revised Code.

(6) A statement that the trustee of the trust has duties to perform;

(7) A statement that the same person is not the sole trustee and sole beneficiary of the trust;

(8) A statement that the settlor executed the trust free from undue influence, not under restraint or duress, and in the exercise of the settlor's free will;

(9) A statement that execution of the trust was not the result of fraud or mistake;

(10) The names and addresses of the settlor and all of the defendants and, if any of the defendants are minors, their ages;

(11) A statement that the trust has not been revoked or modified;

(12) A statement that the settlor is familiar with the contents of the trust.

Sec. 5817.07. (A) Service of process, with a copy of the complaint and the will, and a copy of the related trust, if applicable, shall be made on every party defendant named in the complaint filed under section 5817.02 of the Revised Code, as provided in the applicable Rules of Civil Procedure.

(B) Service of process, with a copy of the complaint and the trust, and a copy of the related will, if applicable, shall be made on every party defendant named in the complaint filed under section 5817.03 of the Revised Code, as provided in the applicable Rules of Civil Procedure.

Sec. 5817.08. (A) After a complaint is filed under section 5817.02 or 5817.03 of the Revised Code, the court shall fix a time and place for a hearing.

(B) Notice of the hearing shall be given to the testator or settlor, as applicable, and to all party defendants, as provided in the applicable Rules of Civil Procedure.

(C) The hearing shall be adversarial in nature and shall be conducted pursuant to sections 2101.31 and 2721.10 of the Revised Code, except as otherwise provided in this chapter.

Sec. 5817.09. (A) The testator or settlor has the burden of establishing prima facie proof of the execution of the will or trust, as applicable. A person who opposes the complaint has the burden of establishing one or more of the following:

(1) The lack of testamentary intent or the intent to create a trust, as the case may be;

(2) The lack of the testator's testamentary capacity, or the settlor's legal capacity to enter into and establish the trust;

(3) Undue influence, restraint, or duress on the testator or settlor;

(4) Fraud or mistake in the execution of the will or trust;

(5) Revocation of the will or trust.

(B) A party to the proceeding has the ultimate burden of persuasion as to the matters for which the party has the initial burden of proof.

Sec. 5817.10. (A)(1) The court shall declare the will valid if it finds all of the following:

(a) The will was properly executed pursuant to section 2107.03 of the Revised Code or under any prior law of this state that was in effect at the time of execution.

(b) The testator had the requisite testamentary capacity, was free from undue influence, and was not under restraint or duress.

(c) The execution of the will was not the result of fraud or mistake.

(2) After the testator's death, unless the will is modified or revoked after the court's declaration under division (A)(1) of this section, the will has full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request.

(B)(1) The court shall declare the trust valid if it finds all of the following:

(a) The trust meets the requirements of section 5804.02 of the Revised Code.

(b) The settlor had the legal capacity to enter into and establish the trust, was free from undue influence, and was not under restraint or duress.

(c) The execution of the trust was not the result of fraud or mistake.

(2) Unless the trust is modified or revoked after the court's declaration, the trust has full legal effect.

(C) The court may, if it finds the will or trust to be valid, attach a copy of the valid document to the court's judgment entry, but failure to do so shall not affect the determination of validity of the will or trust.

Sec. 5817.11. (A) Unless the will or trust is modified or revoked, and except as otherwise provided in this section, no person may contest the validity of a will or trust that is declared valid in a proceeding pursuant to this chapter.

(B) The failure to name a necessary defendant under division (A) of section 5817.05 of the Revised Code is not jurisdictional. A declaration of a will's validity under this chapter shall be binding upon all defendants who were named or represented, and properly served pursuant to division (A) of section 5817.07 of the Revised Code, notwithstanding the failure to name a necessary defendant. However, if a person is one who should have been named a party defendant in the action in which the will was declared valid and if the person was not named a defendant and properly served in that action, that person, after the testator's death, may contest the validity of a will declared valid.

(C) The failure to name a necessary defendant under division (A) of section 5817.06 of the Revised Code is not jurisdictional. A declaration of a trust's validity under this chapter shall be binding upon all defendants who were named or represented, and properly served pursuant to division (B) of section 5817.07 of the Revised Code, notwithstanding the failure to name a necessary

defendant. However, if a person is one who should have been named a party defendant in the action in which the trust was declared valid and if the person was not named a defendant and properly served in that action, that person may contest the validity of a trust declared valid.

(D) In determining whether a person was a party defendant and properly served in an action to declare a will or trust valid under this chapter, the representation rules of Chapter 5803. of the Revised Code shall be applied, and a person represented in the action under those rules is bound by the declaration of validity even if, by the time of the testator's death, or the challenge to the trust, the representing person has died or would no longer be able to represent the person to be represented in the proceeding under this chapter.

Sec. 5817.12. (A) After a declaration of a will's validity under division (A)(1) of section 5817.10 of the Revised Code, the will may be modified by a later will or codicil executed according to the laws of this state or another state, and the will may be revoked under section 2107.33 of the Revised Code or other applicable law.

(B) The revocation by a later will, or other document under section 2107.33 of the Revised Code, of a will that has been declared valid under division (A)(1) of section 5817.10 of the Revised Code does not affect the will or the prior declaration of its validity if the later will or other document is found by a court of competent jurisdiction to be invalid due to the testator's lack of testamentary capacity, or undue influence, restraint, or duress on the testator, or otherwise.

(C) The amendment by a later codicil of a will that has been declared valid under division (A)(1) of section 5817.10 of the Revised Code does not affect the will or the prior declaration of its validity except as provided by the codicil. However, the codicil is not considered validated under this chapter unless its validity is also declared as provided in this chapter.

Sec. 5817.13. (A) After a declaration of a trust's validity under division (B)(1) of section 5817.10 of the Revised Code, the trust may be modified, terminated, revoked, or reformed under sections 5804.10 to 5804.16 of the Revised Code, or other applicable law.

(B) The modification, termination, revocation, or reformation by a new trust or other document of a trust that has been declared valid under division (B)(1) of section 5817.10 of the Revised Code does not affect the trust or the prior declaration of its validity if the later trust or other document is found by a court of competent jurisdiction to be invalid due to the settlor's lack of capacity, or undue influence, restraint, or duress on the settlor, or otherwise.

(C) An amendment of a trust that has been declared valid under division (B)(1) of section 5817.10 of the Revised Code does not affect the trust or the prior declaration of its validity except as provided by the amendment. However, the amendment is not considered validated under this chapter unless its validity is also declared as provided in this chapter.

Sec. 5817.14. (A) The finding of facts by a court in a proceeding brought under this chapter is not admissible as evidence in any proceeding other than a proceeding brought to determine the validity of a will or trust.

(B) The determination or judgment rendered in a proceeding under this chapter is not binding upon the parties to that proceeding in any action that is not brought to determine the validity of a will or trust.

(C) The failure of a testator to file a complaint for a judgment declaring the validity of a will that the testator has executed is not admissible as evidence in any proceeding to determine the

validity of that will or any other will executed by the testator.

(D) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust that the settlor has executed is not admissible as evidence in any proceeding to determine the validity of that trust or any other trust executed by the settlor.

SECTION 2. That existing sections 313.14, 1901.26, 1907.24, 2101.24, 2105.19, 2107.01, 2107.05, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.52, 2107.71, 2109.41, 2129.05, 2137.01, 2323.30, 2323.31, 2323.33, 2701.09, 2721.03, 3105.011, 3109.06, 4705.09, 5163.21, 5802.03, 5806.04, 5808.19, and 5815.16 and sections 2107.081, 2107.082, 2107.083, 2107.084, and 2107.085 of the Revised Code are hereby repealed.

SECTION 3. This act's amendment of section 2107.05 of the Revised Code is intended to abrogate the holdings of the Ohio Supreme Court in *Hageman v. Cleveland Trust Company*, 45 Ohio St.2d 178 (1976) and the Ohio Second District Court of Appeals in *Gehrke v. Senkiw*, 2016 Ohio 2657 (2016).

SECTION 4. Section 2101.24 of the Revised Code is presented in this act as a composite of the section as amended by both Sub. S.B. 23 of the 130th General Assembly and Sub. H.B. 158 of the 131st General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Speaker _____ of the House of Representatives.

President _____ of the Senate.

Passed _____, 20____

Approved _____, 20____

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

_____

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the ____ day of _____, A. D. 20____.

_____

Secretary of State.

File No. _____ Effective Date _____

TAB
C

Judge Ralph Winkler is a lifelong resident of Cincinnati, Ohio. He graduated from Colerain High School in 1979 and the University of Cincinnati in 1983 with a Bachelor of Business Administration. He earned his J.D. from Chase Law School at Northern Kentucky University graduating in 1987. While in law school, Judge Winkler worked full time as a law clerk in the Hamilton County Court of Common Pleas. After passing the Bar in 1987, he worked in the private practice of law and as an assistant prosecutor until April of 1999 when the Governor appointed him a Hamilton County Municipal Court Judge. In 2004, he was elected to the Hamilton County Court of Common Pleas and was reelected for a second term in 2010. In 2004, Judge Winkler received his diploma in Judicial Skills from the American Academy of Judicial Education and in 2008 was named Trial Judge of the Year by the Hamilton County Trial Lawyers Association. He has served as adjunct professor at the University of Cincinnati College of Law. After winning the Election for Hamilton County Probate Court Judge in November 2014, in 2015 Judge Winkler began serving the public by hearing cases involving adoptions, mental health care, guardianships, estates, and other probate cases. He is married to Teresa Winkler and has three daughters and seven grandchildren. As a judge since 1999, he has presided over 36,000 + cases, giving him a wide variety of great experience. He feels blessed to hold a job he loves and looks forward to what each new day brings.

TAB
D

Kenneth P. Coyne

Ken has represented clients in estate planning, trust and estate administration, elder law, estate and gift tax controversies, and contested trusts and estate matters since 1998. He combines in depth knowledge of the law and a common sense approach to achieve practical results. He believes excellent counsel requires a commitment to building a long-term client relationship.

Education

- Miami University, B.A., 1995
- Emory University School of Law, J.D., 1998

Professional Affiliations

- Cincinnati and Ohio Bar Associations
- Fellow, The American College of Trust and Estate Counsel
- Cincinnati Estate Planning Counsel (President 2015-2016)
- Ronald McDonald House, Member of Planned Giving Council

Recognitions

- Recognized by *Thomson Reuters* as an Ohio Super Lawyer (2018 & 2019)
- Recognized by *Thomson Reuters* as an Ohio Super Lawyer, Rising Star (2006, 2011, & 2012)

Recent Professional Contributions

- Article, Kenneth P. Coyne, "The False Panacea of Transfer on Death Registration and Beneficiary Designations as Will (and Trust) Substitutes," *Probate Law Journal of Ohio*, July/August 2018

- Presentation "The False Panacea of Transfer on Death Registration and Beneficiary Designations as Will (and Trust) Substitutes – Potential Landmines and Considerations in Relying on Beneficiary Designations as Dispositive Instruments," The American College of Trust and Estate Counsel, Ohio Fellows Meeting, April 29, 2018

- Presentation "Drafting Powers of Attorney: Considerations as Estate Planning and Needs of Clients Evolve," 35th Annual Advanced Estate Planning Institute, sponsored by Cincinnati Bar Association, March 2, 2018

- Presentation "Trusts as Beneficiaries of IRAs: The Importance of Beneficiary Designations; Case Studies in What Can Go Wrong; Common Pitfalls; And Some

CINCINNATI BAR ASSOCIATION
36TH ANNUAL ADVANCED ESTATE PLANNING INSTITUTE

FEBRUARY 8, 2019

The False Panacea of Transfer on Death Registrations and Beneficiary Designations as Will (and Trust) Substitutes – Potential Landmines and Considerations in Relying on Beneficiary Designations as Dispositive Instruments

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The False Panacea of Transfer on Death Registrations and Beneficiary Designations as Will (and Trust) Substitutes – Potential Landmines and Considerations in Relying on Beneficiary Designations as Dispositive Instruments

I. Landscape of Estate Planning

- De Facto (at least temporary) Repeal

  - Estate *taxes* have been affecting less and less clients. The temporary increased exclusion amount until 2026 causes estate tax to affect even less clients.

  - Estimates of who will actually have to pay estate tax vary. But, all agree that estate taxes will affect less than 1% of Americans at least until 2026.

  - In fact, estate tax has affected a very small subset of the population since the American Taxpayer Relief Act of 2012. While commentators discuss *reform*, we have been in a world of de facto repeal for years.

- Perceptions

  - Prospective clients likely feel estate planning is not needed because they are no longer "wealthy," even clients with 7-figure wealth.

  - Prospective client perspective may be driven or affected by views of the professional advisor community which may have sentiment that estate planning is less important due to current estate tax landscape.

  - Some advisors – i.e. referral sources – may have such a sentiment based on many factors, including an apparent ever-increasing downward pressure on fees and their resulting perception that advisors must offer an increasing panoply of services including "estate planning," which may equate to beneficiary designations or attorneys who will provide "stock" plans for a negotiated or flat fee.

  - In one instance, a financial advisory firm sent a newsletter to clients indicating that with increased exclusions and portability, couples with $7,000,000 no longer needed the "complexity or constraints" of a trust!

  - As a result, more and more clients are resorting to designations for estate planning. Beneficiary designations, transfer on death registrations, and payable on death designations are used as substitutes to wills or trusts. Assets as diverse as depository accounts, investment accounts, automobiles, real estate, retirement accounts, and closely-held business interests all may pass by beneficiary designation.

- This material will focus on financial assets (marketable securities, bonds, cash, etc.) and will use the term "beneficiary designation" generically.

II. Landmines

1. Authority – Who will have authority to act after the death of an account owner?

   - *Traditional planning* (i.e. using wills and trusts as dispositive instruments) – The owner with authority is generally clear.

     - An account owned by a trust ("Trust Account") will have a successor trustee. That trustee will have authority to act regarding the account.

     - An account owned by an individual for which no beneficiary designation applies ("Probate Account") will be subject to a court-appointed executor or administrator.

   - *"Simple" planning* (i.e. relying on beneficiary designations) – The individual with authority will be uncertain.

     - Accounts may have multiple beneficiaries.

     - Accounts may have beneficiaries who receive unequal portions of the account – e.g. one beneficiary may receive 50%; one may receive 40%; and one may receive 10%.

     - Some beneficiaries may not be individuals.

     - An account owner's executor will have no authority over an account (unless the client names the estate as beneficiary which would only occur by mistake or on the death of all named beneficiaries by default).

     - As will be seen below, some financial institutions require unanimity among beneficiaries post death.

     - With or without an unanimity requirement, one beneficiary who may not be familiar with the financial advisor, who may live abroad, who may be a minor or incompetent, who may be suffering from health problems, who may have addiction problems, who may be independently wealthy and need not place immediate attention on account, or who may simply be intransigent can likely cause significant problems or delay.

2. Timing – How long will it take until a decision maker has authority over an account?

   - *Traditional planning* – Authority will be established relatively quickly.

     - Probate Account – Typically, an executor or administrator will be appointed and receive letters of authority.

     - Trust Account – Under Ohio law, and at least in other states who have adopted the Uniform Trust Code, authority of successor trustee may be established literally upon death with the execution of a Certification of Trust.[1] In some instances, a successor trustee will already be acting due to infirmity, age, or other planning reasons or a co-trustee may be in office.

     - Even if a successor trustee must establish authority, a new account agreement need not be executed because account ownership is not changing, only the nominal ownership will have changed. It must be acknowledged, however, that many institutions may very well require new account registration. An EIN will also need to be obtained if the grantor was serving as trustee. Nonetheless, if a successor trustee has established authority under applicable state law and investment direction was not followed because institutional registration requests were not completed and substantial loss occurred, a very interesting legal matter may ensue.

   - *Simple planning* – Significant delay can occur before authority is established.

     - Admittedly, in instances where there is only one beneficiary, authority will be established fairly quickly and perhaps faster than executor authority.

     - In an account with multiple beneficiaries, with some living in multiple domestic or foreign jurisdictions, with some being minors or incompetent, or with some being a charity with resulting boards and procedures, significant time may elapse before authority is established, even in harmonious settings.

3. Investment Management – What investment management/strategy should or can be followed during the interregnum between death of account owner and establishment of authority over account or creation of separate beneficiary accounts?

   Every individual has a different age, investment time horizon, risk tolerance, goals, net worth, income sources, dependents, debt service obligations, expenses, spending habits, and simple preferences. In short, everyone has their unique "Financial Picture."

[1] R.C. 5810.13.

- *Traditional planning* – There is a way to address various beneficial Financial Pictures.

  - Probate Account – The executor will have singular authority and a fiduciary obligation to assess various Financial Pictures in making investment decisions.

  - Trust Account – The trustee will have singular authority and a fiduciary obligation to assess Financial Pictures in making investment decisions and must do so in the interests of the beneficiaries.[2]

- *Simple planning* – There will be no singular authority to assess what could be many disparate Financial Pictures.

  - Again, some financial institutions will require unanimity among TOD beneficiaries.

  - Imagine an account holder with "very modest" wealth under today's planning paradigm of $2,500,000 made up of a well-diversified indexed fund based strategy with three beneficiaries: one beneficiary is the decedent's sibling who is 84 years old with dementia in a long term care facility (20%); two other beneficiaries (40% each) are the decedent's children – one is a busy professional and one is a professional student abroad. Imagine also a world in financial disarray that produces a 40% "correction" in the market.

  - Assume further that the account fell in value to $1,500,000 six months after the decedent's death and not all of the beneficiaries' "paperwork" was completed and returned to the financial institution.

  - Sibling's 20% share was reduced from $500,000 to $300,000 (or a full two years of care at the long term care facility).

  - Contrast that to a "very complicated trust" that provided a 20% share (of course held in a wholly discretionary trust under R.C. 5801.01(Y)) for the sibling, with two 40% shares subject to immediate withdrawal for children, with a corporate successor trustee who immediately established account authority, and liquidated the account (or at least sibling's portion of it) upon assessing the Financial Pictures and the VIX index.

[2] R.C. 5808.01.

4. Taxes – Income taxes are still a problem and remain – along with death – a certainty.

   Investment accounts will necessarily have activity and trades in the year of the decedent's death until the date of death; and investment accounts may have activity and trades after death due to a financial institution trading without knowledge of a death or because some financial institutions may continue to trade. Regardless of trading activity, interest and dividends will be paid to accounts. This means tax reporting must be addressed in year of death and beyond. Split reporting – between the decedent's social security number and the successor in interest – should, but does not always, occur.

   - *Traditional planning* – A singular voice will be able to assess and address tax reporting and payment.

     - Probate Account – An executor will coordinate all tax reporting for the estate and is required to file the decedent's final income tax return.

     - Trust Account – A trustee will be able to begin tax reporting after a decedent's death – including on a fiscal year in many instances – and will likely be able to coordinate reporting with the decedent's executor.

   - *Simple planning* – Tax reporting for beneficiary designated accounts could be cumbersome and problematic.

     - Interest and dividends (and potentially gains/losses) could be reported to beneficiaries who have yet to receive the actual assets creating the items of income (Note: almost all financial institutions request/require social security numbers of beneficiaries).

     - Alternatively, the decedent – i.e. estate – could have items of income reported to he/she/it when assets will not pass to the decedent's estate.

     - Example 1: A decedent dies in December with a $2,500,000 transfer on death account passing to three beneficiaries equally. The account generated $150,000 of income. Financial institution does not provide "split reporting" and reports all items of income to the three beneficiaries whose social security numbers are provided on the beneficiary form. One of those beneficiaries is a person in a long term care facility with dementia with no legal guardianship. The agent under a power of attorney for that beneficiary does not immediately commence guardianship proceedings after the financial institution does not accept agent's authority. The financial institution requires all beneficiaries to submit "paperwork" before transitioning account to any beneficiary. Three new accounts are not created until July of the year after death. Meanwhile,

beneficiaries have $50,000 of income reported to each and no funds from which to pay resulting tax.

- Example 2: Decedent dies in July with the same account and same beneficiaries mentioned in Example 1. Again, $150,000 of income was generated in the year of death. Again, the financial institution does not provide split reporting, but, instead issues a 1099 and other tax reporting under decedent's social security number. The account is transferred in January of the year following death. Now, the decedent (and his/her estate) has $150,000 of reportable income and no assets.

- Of course, proper dialogue with beneficiaries and executor (if there is even an executor appointed), proper reporting to tax authorities, and proper communication with the financial institution can rectify such situations. But, the cure can be more complex, time-consuming, and expensive than what traditional planning could have provided.

5. Estate taxes – Transfer taxes may actually still be assessed!

   Estate taxes may still be due for our clients – especially after 2025 when the plans that are being created now will be implemented – and it cannot be predicted with certainty where clients will die and whether domicile at death will result in state transfer tax.

   - *Traditional planning* – An executor or trustee will have authority *and* obligation in most instances to report, apportion, and pay transfer taxes.

     - Probate Account – The executor is charged with reporting and paying transfer tax.

     - Trust Account – The trustee will likely have assets and specific direction in the instrument regarding the payment of transfer taxes.

   - *Simple planning* – It is quite possible that no one will have authority and no one will have adequate assets to pay the entire tax bill. And in instances where the majority of wealth passes outside of fiduciary control, it will likely be very difficult to identify an executor willing to take responsibility of administration which includes tax reporting without sufficient funds to pay taxes, let alone be compensated.

     - While transferee liability will apply to interests passing by beneficiary designation,[3] coordination may be difficult and cumbersome if not impossible.

[3] IRC § 6901.

- Moreover, transfer tax liability associated with decedent's gross estate that passes primarily outside of an estate or trust may be significant enough that it may actually prevent an executor from agreeing to serve which could delay (in some instances significantly) estate matters and the transfer of estate assets.

- Example 3: Decedent died with a gross estate of ~$12,000,000 in 2015. She had 9 accounts passing by transfer on death registration and 9 qualified retirement accounts. She also had probate assets of only ~$600,000 which included 2 parcels of real estate. There were a total of 10 "non-probate" beneficiaries – including 2 minors and 1 incompetent. Two siblings were residuary beneficiaries of the probate estate and 8 charities also received specific bequests (ranging from $500 to $1,000) under the will. The beneficiaries lived in 4 states and no one other than decedent lived in Ohio. The Will contained a garden variety apportionment clause charging *all* transfer taxes to the residue.

    - The administration lasted approximately two years.

    - Two nominated corporate fiduciaries refused to serve as executor.

    - Fortunately, the "family" of beneficiaries was pleasant and generally had no animosity among each other.

    - Still, the reporting of income taxes for the decedent, the payment of debts, the payment of estate taxes, and other factors required a very complicated *rolling* calculation to confirm estate taxes due that could not be conclusively determined until different departments of the IRS gave "final answers" – e.g. the decedent's final income tax return could not be confirmed until an answer was received regarding a waiver of penalty for a failure to take required minimum distributions (Form 5329) and the estate tax return could not be finalized until income tax liability was confirmed.

    - Additionally, several creditors and charities could not be paid until final tax determinations were made.

    - In fact, charities could only be paid with beneficiary agreement because the residue was completely exhausted due to apportionment of transfer taxes under the instrument.

6. <u>Debts</u> – Decedents will always have debts.

   If assets pass solely or primarily outside of a will or trust, identifying the source of payment for debts may be difficult.

- *Traditional planning* – The source of debt payment will be clear.
    - Probate Account – Under Ohio law, the executor is charged with paying all debts properly presented from probate assets.
    - Trust Account – A trustee will be given direction under the instrument regarding the payment of debts or expenses.
- *Simple planning* – Securing the payment of debts may be difficult.
    - Payment of a decedent's debts in Ohio from non-probate assets is generally not required as it is in other jurisdictions.[4]
    - Yet, some practical implications regarding the payment of debts and expenses when assets pass primarily by beneficiary designation should be considered.
    - If all assets pass outside of probate (or a trust), available funds for the payment of funeral expenses and ordinary operating expenses for residential real estate may not be accessible or identified.
    - In a harmonious family situation, such routine and uncontested debts will be addressed. But, in situations where beneficiaries are not easily identified, where beneficiaries cannot or do not efficiently facilitate transfer of account by beneficiary designation, or where beneficiaries just do not cooperate, legitimate debts and expenses may not receive attention for considerable time.

7. Predeceased Beneficiaries – Providing for "out of order deaths" may be problematic.

   A plan executed today may not be implemented for years when intended initial beneficiaries are deceased.

   - *Traditional planning* – The law or instrument will provide answers that are typically aligned with a decedent's probable intent.
       - Probate Account – A will almost always directs the distribution of assets upon the death of a beneficiary; or, anti-lapse statutes will save bad drafting.[5]
       - Trust Account – A trust will also almost always direct the disposition of assets upon the death of a beneficiary; or, an anti-lapse statute will save bad drafting.[6]

[4] Debt payment from non-probate assets is required if an applicable trust instrument requires such payment. This issue is beyond the scope of this outline/presentation.
[5] R.C. 2107.52.
[6] R.C. 5808.19.

- *Simple planning* – The distribution of assets in the event a beneficiary predeceases an account owner will be determined by the attorneys, marketing personnel, risk management team, and business decisions of a financial institution who drafted the applicable beneficiary designation form and controlled by state law of its choice.

    - Different designation forms and different account agreements provide for vastly different results when a beneficiary predeceases an account owner or survives the owner but dies before distribution of his or her share.

    - Per stirpes may be defined under a different state's law.

    - A per stirpital beneficiary designation may *not* be permitted.

    - Successor or contingent beneficiaries may *not* be permitted.

    - Surviving beneficiaries may share a deceased beneficiary's share *proportionately*.

    - Surviving beneficiaries may share a deceased beneficiary's share *equally*.

    - Interests may pass to an estate which may be the precise event intended to be avoided.

    - Even if assets pass in a desired way, assets may pass to a minor when an adult was contemplated.

8. Realities of Life – A beneficiary's status or station in life may change.

   Realities of life occur between execution and implementation of plan. A perfectly healthy beneficiary can become ill, suffer from addiction, or be subject to significant creditor claims.

   - *Traditional planning* – Drafting for contingencies is possible and typically addressed.

       - Probate Account – A will can provide for contingencies or change in status.

       - Trust Account – A trust is ideally suited to address contingencies, even unforeseen contingencies.

       - A trust can provide for successive interests and contain a facility of payment provision (and even if a facility of payment provision is not provided, the Uniform Trust Codes can assist).[7]

[7] R.C. 5808.16(U).

- In unforeseen situations, a trustee can still manage a bad situation. A trustee can seek instructions from a court if a beneficiary is exercising a withdrawal right and cannot handle his or her financial affairs or a trustee can seek modification of the trust in unanticipated circumstances.[8]

- No financial institution simply holding the residue of the account will have the *standing* or *desire* to address a dilemma for a family.

III. Highlights of Applicable Law

- *See* Uniform Transfer on Death Security Registration Act ("UTODSA" or "Act"), National Conference of Commissioners on Uniform State Laws, Exhibit A.

- Ohio Transfer on Death Security Registration Act ("OTODSA" or "Act") – R.C. 1709.01 – 1709.11

- UTODSA/OTODSA Highlights

  - The drafting committee of the UTODSA received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that the Act takes full account of the practical requirements for efficient transfer within the securities industry.[9]

  - "Beneficiary Form" means a registration of a security that indicates the present owner of the security and the intention of the present owner regarding the person who will become the owner of the security upon the death of the present owner.[10]

  - "Person" means an individual, a corporation, an organization, or other legal entity.[11]

  - "Register," including its derivatives, means to issue a certificate showing the ownership of the certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing the ownership of that security.[12]

  - "Registering entity" means a person who originates or transfers a security title by registration and includes, but is not limited to, a financial institution maintaining security accounts for customers, a securities dealer or broker maintaining security

[8] R.C. 5804.12.
[9] UTODSA, Prefatory Note at page 1.
[10] R.C. 1709.01(A).
[11] R.C. 1709.01(D).
[12] R.C. 1709.01(G).

accounts for customers, and a transfer agent or other person acting for or as an issuer of securities.[13]

- "Survive" is not defined. No effort was made in the Act to define "survival" as it is for purposes of intestate succession in the Uniform Probate Code which requires survival by an heir of the ancestor for 120 hours. For purposes of the Act, "survive" is used in its common law sense of outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.[14]

- A security may be registered in beneficiary form if the form is authorized by the OTODSA or similar laws of the:
  - State of organization of its issuer or registered entity;
  - State in which the principal office of the registering entity is located;
  - State in which the office of the transfer agent or the office making the registration is located; or
  - State listed as the address of the owner at the time of the registration.[15]

- A registration in a state without a similar transfer on death security act is nevertheless presumed valid as a matter of contract law.[16]

- Ownership of a security registered in beneficiary form shall pass to the beneficiary or beneficiaries who survived all owners.[17]

- On proof of death of all owners *and compliance with any applicable requirements of the registering entity*, a security registered in beneficiary form may be re-registered in the name of the beneficiary or beneficiaries who survive the death of all owners.[18]

- Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interest *as tenants in common*. If no beneficiary survives the death of all owners, the security shall be included in the estate of the deceased sole owner of it or the estate of the last to die of multiple owners of it.[19]

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[13] R.C. 1709.01(H).
[14] UTODSA, Official Comment § 1.
[15] R.C. 1709.03.
[16] Id.
[17] R.C. 1709.07.
[18] Id. (emphasis added).
[19] Id. (emphasis added).

- The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as TOD A (20%), B (30%), C (50%), would be improper. The UTODSA enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration and beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.[20]

- A registering entity is not required to offer or accept requests for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by the Act.[21]

- A registering entity is discharged from all claims to the security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with the Act and does so in good faith reliance on the registration, on the Act, and on the information provided to it by an affidavit of:
  - Personal representative of a deceased owner;
  - Surviving beneficiary of the representatives of the surviving beneficiary; or
  - *Other information available to the registering entity.*[22]

- The protections of the Act do not extend to a re-registration or payment made after a registering entity has received written notice from any claimant to any interest in the security that objects to the implementation of a registration in beneficiary form.[23]

- The protections provided by the Act to the registering entity do not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.[24]

- Ohio has not adopted the *augmented estate* approach for elective shares or creditor claims as Uniform Probate Code adopting jurisdictions have. Compare R.C. 1709.09 and UTODSA § 9, generally.

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[20] UTODSA, Official Comment § 7.
[21] R.C. 1709.08(A).
[22] R.C. 1709.08(C) (emphasis added).
[23] R.C. 1709.08(C).
[24] R.C. 1709.08(D). *See also,* R.C. 2101.24(B)(1)(c).

- The principle of the augmented estate is based on the underlying principle that the law of the decedent's last domicile should be controlling as to rules of public policy that override the decedent's power to devise a probate estate to anyone he or she chooses. This principle is implemented by subjecting donee recipients of a decedent's largesse to liability under the decedent's domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should interstate collection proceedings be necessary.[25]

- A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive and implement requests for registration in that form, including requests for cancellation of previously registered TOD beneficiary designations and requests for re-registration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting descendants of a named beneficiary to take in the place of the named beneficiary when he dies.[26]

- Substitute TOD beneficiaries may be added. Substitution may be indicated by appending to the name of the primary beneficiary the letters "ldps," standing for lineal descendants per stirpes. This designation substitutes the descendants of a deceased beneficiary who survived the owner of a security for a beneficiary who fails to so survive, the descendants to be identified and to share *in accordance with the law of the domicile of the beneficiary, at the time of the death of the owner, governing inheritance by descendants of an intestate*.[27]

- Other forms identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in the terms and conditions of a registering entity.[28]

- The Act shall be liberally construed and applied to promote the underlying purposes and policy and to make uniform the laws with respect to the subject of the Act among states enacting similar laws.[29]

- Principles of law and equity supplement the Act's provisions.[30]

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[25] UTODSA, Official Comment § 9(4).
[26] R.C. 1709.10(A).
[27] R.C. 1709.10(B) (emphasis added).
[28] R.C. 1709.10(C).
[29] R.C. 1709.11(B).
[30] R.C. 1709.11(C).

- The OTODSA applies to the registrations of securities in beneficiary form made prior to, on, or after the effective date of the Act, by decedents dying prior to, on, or after that date (10/1/93).[31]

- Under the Act a "request" for a registration in beneficiary form may be in any form chosen by the registering entity. The Act does not prescribe a particular form and *does not impose record-keeping requirements.* Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.[32]

IV. A Look into Industry Practice

1. Company A

   - Governing law – Pennsylvania

     - However, the brokerage account agreement is governed by *New York* Law

   - Applicable Documents – approximately 27 pages, consisting of:

     - TOD Agreement
     - Application Form
     - Brokerage Account Agreement

   - Predeceased Beneficiary

     - The share of any primary beneficiary who has not survived the owner will be divided *proportionately* among the surviving primary beneficiaries. If there are no surviving primary beneficiaries, assets will be payable to secondary (contingent) beneficiaries, if any, who shall succeed to the rights of the primary beneficiary under the agreement.

   - Beneficiary Responsibilities and Identification

     - Company, in its sole discretion, may require and may rely upon a certification of the identity of plan beneficiaries from an authorized party.

[31] R.C. 1709.11(D).
[32] UTODSA, Official Comment § 8 (emphasis added).

- The account owner agrees that Company will be fully indemnified against any cost or damage it incurs in connection with its good faith reliance upon the representations of any authorized party.

- The authorized party may be the executor, administrator, or personal representative of the account owner's estate; the trustee of a trust beneficiary; the beneficiary; *or any other person deemed appropriate by the Company to act on behalf of the estate of the account owner or the plan beneficiary after the account owner's death.*

- Miscellaneous

  - *Minor Beneficiaries* – Company may, *in its absolute discretion*, transfer or distribute the assets to which the minor is entitled to an account for the benefit of the minor or to a person or persons demonstrated to *Company's satisfaction* to be authorized to act on behalf of the minor.

  - *Advice* – Company strongly encourages you to seek professional advice in making the determination that the TOD agreement is appropriate before establishing your agreement. Company has no fiduciary duty as trustee or otherwise under the agreement.

  - *Fees* – Company currently charges no special fees to establish or maintain the TOD agreement. However, if deemed necessary, Company reserves the right to impose fees in the future.

  - *Indemnification* – You, your estate, and your successors in interest agree to indemnify and hold harmless Company and, in the case of a brokerage account, Company's marketing corporation and its successors, parents, subsidiaries, affiliates, directors, officers, and employees, from and against all claims, actions, costs, and liabilities including reasonable attorney fees arising out of or relating (i) to any provision of any statute, will, trust, agreement or other agreement, or any verbal arrangement or understanding that conflicts with your plan; or (ii) Company's reliance upon any certification, information, or documentation provided by you or an authorized party.

  - *Disputes or Controversy* – Company reserves the right to seek judicial determination in a court of competent jurisdiction which determination shall be binding upon all parties claiming an interest in the account. The cost of seeking such determination, including all costs, fees, and expenses (including attorney fees) will be borne by the account.

  - Company also asserts in materials, "Living trusts do have a downside, however. Because they're drafted by attorneys, they are more expensive and time

consuming to establish and may be more difficult to modify than a transfer on death plan."

2. Company B

   - Governing Law – New York

   - Applicable Documents

     - TOD Agreement
     - Account Agreement

   - Predeceased Beneficiary

     - Option to choose either: the surviving beneficiaries in a ratio based upon the surviving beneficiaries above stated percentages; or pass to the estate of the account owner. If neither box is selected, the percentage of the TOD assets designated for the deceased beneficiary shall pass to the estate of the account owner.

     - The TOD Agreement does *not provide* for contingent or successor beneficiaries.

     - Company will *not honor* any attempt to alter or amend this agreement to provide for contingent or successor beneficiaries, including any designation of *lineal descendants per stirpes*.

   - Beneficiary Responsibilities and Identification. To transfer assets to beneficiaries, all obligations or debts must be satisfied and Company must be provided with:

     - A signed and notarized request to execute the transfer that details the division and the transfer of the TOD assets (Note: each beneficiary must provide an identical (or substantially similar) notarized request); and

     - For the account owner whose death triggered the transfer provisions under this agreement:

       - Certified copy of the death certificate
       - Affidavit of Domicile
       - Inheritance or estate tax waiver
       - *Any other documents that Company deems necessary* to transfer ownership of TOD assets to the beneficiaries and to fulfill its tax reporting requirements.
       - Company may rely conclusively upon instructions from *all* beneficiaries in completing a transfer of the TOD assets and shall not be liable to any third party for completing such a transfer.

- Company will not transfer assets until it receives written instructions from *all named beneficiaries* or their representatives, as applicable.

- Miscellaneous

  - *Tax Reporting* – For tax reporting purposes, in the event of any liquidation in the TOD account following the death of the account owner, Company will report any applicable proceeds for asset sales utilizing the decedent's social security number and any attendant tax consequences should be addressed on the decedent's final tax return upon consultation with the attorney or tax advisor representing the decedent's estate.

  - *Liability* – The provisions of this agreement shall be binding on the account owner's estate, beneficiaries, heirs, legal estate representatives, successors and assigns, and shall survive the termination of this agreement or the TOD account. This agreement does not create a trust, constructive or otherwise.

  - *Distribution to Minor Beneficiaries* – If a beneficiary is a minor at the time the agreement is signed, account owner must designate an UTMA account or designate a court-appointed guardian to receive assets.

3. Company C

   - Governing Law – California

     - However, to the extent a cash sweep or bank account is opened with the Company, Nevada law may apply.

   - Applicable Documents – 129 pages, including:

     - Account Agreement
     - Designated Beneficiary Agreement

   - Predeceased Beneficiaries

     - Per stirpes or per capita may be selected. But, per stirpes is specifically defined and is modern per stirpes (sometimes called per capita with representation) as opposed to classic or strict per stirpes.

   - Beneficiary Responsibilities and Identification

     - Each beneficiary will be required to open an account at Company or to identify an appropriate existing Company account to facilitate transfer of the account assets and to *execute an indemnification* in the amount of the account's assets.

Company may resolve any reasonable doubt as to the disposition of the account's assets by judicial termination which shall be binding on all parties. All legal and other applicable expenses shall be paid from the assets in the account as permitted by state law.

- Miscellaneous

  - *Advice* – You acknowledge that a plan is a substitute for a will, trust, or other testamentary disposition of those assets subject to the designation and may have significant tax, estate planning, or other legal consequences. Company recommends that you seek advice from your tax or estate planning advisor prior to enrolling in the designation.

    - Company has no fiduciary duty as a trustee under the agreement.

    - You acknowledge that Company does not give legal advice or tax advice. However, we may provide you with *general tax and estate planning information and principles*. You agree that these principles do not apply to your specific circumstances or take into account your comprehensive tax or estate planning situation. For that type of assistance, you agree to consult your own tax or legal advisor.

  - *Change in beneficiary relationship* – Company agreement provides, "changes in the relationship between the account holders and any designated beneficiary, including, but not limited to, subsequent marriage, dissolution of marriage, remarriage, or adoption will not automatically add or revoke designations of beneficiaries. **For example, if a former spouse was designated beneficiary prior to the dissolution of your marriage, the former spouse will remain a beneficiary after the dissolution unless you revoke his or her designation as a beneficiary by completing this form in its entirety."**[33]

  - *Fees* – You will not be charged a setup fee. Other fees for services may apply.

  - *Distribution to Minor Beneficiaries* – A choice is provided to designate an UTMA account or acknowledge that a court-appointed guardian will manage the assets pursuant to ongoing court supervision.

[33] *But see* R.C. 5815.33.

4. Company D

- Governing Law – Missouri

- Applicable Documents – Approximately 27 pages, including:

  - TOD Agreement
  - Account Agreement and Disclosure
  - Client Services Agreement

- Predeceased Beneficiary – In the event any designated primary beneficiary does not survive the account owner, then that primary beneficiary's allocated portion of the eligible assets in the account shall pass to the corresponding contingent beneficiaries listed on the beneficiary form in the proportions specified on such form.

- Beneficiary Responsibilities and Identification – Company shall be entitled to receive a certified death certificate of the deceased account owner and any deceased beneficiary, an inheritance tax waiver, and such additional documentation as Company may, *in its sole discretion, deem appropriate* before making such transfer.

- Miscellaneous

  - *Fees* – Company charges $300 for a transfer on death registration due at time of transfer.

  - *Survivorship Requirement* – 120 hours.

  - *Liability* – Company shall have no liability to any beneficiary for any loss of or fluctuation in the value of the assets held in the account in which fluctuation or loss may occur after the death of the account owner and before transfer of assets to beneficiaries. Company shall, in its sole discretion, determine reasonable methods for transferring or otherwise administering assets, payments, or dividends received in the account after the death of the account owner.

  - *Time period* – If a beneficiary does not claim such beneficiary's share under the terms of the agreement within one year of the account owner's date of death, Company shall treat the beneficiary as the beneficiary did not survive the account owner.

  - *Effect of Divorce* – Dissolution of marriage automatically revokes a designation of a former spouse of the account owner as a beneficiary of the account under this agreement. If the account owner dies prior to changing the designation of such former spouse as beneficiary, the former spouse will be treated as if he or she predeceased the account owner.

- *Indemnification* – The account owner and his or her executors, personal representatives, heirs, beneficiaries, legal representatives, successors, and assigns agree to indemnify, defend, and hold harmless Company and its affiliates and their respective general partners, directors, officers, employees, legal representatives, successors, and assigns (each of whom is sometimes referred to herein as the indemnified party) against and from any and all damages, losses, liability, obligations, penalties, claims, judgments, or expenses of every kind and nature whatsoever that may be at any time incurred by or assessed against any indemnified party arising from or in connection in any way directly or indirectly related to or involving this agreement.

- *Unilateral Revision* – Company may amend this agreement prospectively for any reason or retroactively if necessary to comply with state law changes. Within a reasonable time after such amendment, Company shall notify account owner of such amendment.

Planning Options," Stock Yards Bank & Trust Company, 2017 Estate and Tax Seminar Louisville, Kentucky, November 2, 2017

- Presentation "Presentment of Creditor Claims Post *Wilson v. Lawrence* – Has Anything Changed?" Cincinnati Bar Association, July 18, 2017

- Presentation "Simple Trusts: A Tool to Protect Our Clients During Life, to Ease Administration After Death, and to Avoid Controversy," Cincinnati Bar Association, November 19, 2016

- Article, Kenneth P. Coyne and Kacey Marr Vaught, "Simple Trusts: A Tool to Protect Clients During Life, to Ease Administration After Death, and to Avoid Controversy," CBA Report, November 2016

- Presentation "Does Irrevocable Really Mean Irrevocable," Stock Yards Bank & Trust Company 2016 Estate and Tax Seminar, Louisville, Kentucky, October 27, 2016

- Article, "Time to Revisit Powers of Attorney: Strategies for Decreasing the Potential for Agent Mishandling and Misconduct," *Probate Law Journal of Ohio*, July/August 2016

- Presentation "Time to Revisit Powers of Attorney," Ohio State Bar Association, All Ohio Legal Forum, April 29, 2016

- Presentation "Trust Modifications and Private Settlement Agreements: Changing Trusts in Changing Times," Probate Law Seminar, sponsored by the Butler County Bar Association, February 15, 2016; Co-Presenter with William Graf

- Instructor with William Graf and Mark Stiebel of an 18-week course on Estate Planning and Drafting, sponsored by the Cincinnati Bar Association, presented January through May, 2016

- Presentation "Best Ideas to Protect an Estate Plan from Mischief and Malice," Annual Best Ideas Program, sponsored by the Cincinnati Estate Planning Council, April 30, 2015

- Presentation "Trust Modifications Based on the Ohio Trust Code: The Grantor & Trustee Perspectives," 32nd Annual Advanced Estate Planning Institute, sponsored by the Cincinnati Bar Association, February 27, 2015; Co-Presenter with William Graf

- Article "Drafting To Guide Trustees: Is It Time To Loosen The HEMS Handcuffs?" *Probate Law Journal of Ohio*, September/October 2014, Volume 25, Issue 1

- Presentation "Case Studies in the Exercise of Trustee Discretion: How Trustees Do What We Ask Them to Do, and How We Can Help Trustees Do What Grantors Want Them to Do," The Marvin R. Pliskin Advanced Probate and Estate Planning Seminar, sponsored

by the Ohio State Bar Association, September 19, 2014; Co-Presenter with Michael Barnes and Jane Higgins Marx.

- Presentation "I Want My Money, What is Taking So Long?" 31st Annual Advanced Estate Planning Institute, sponsored by the Cincinnati Bar Association, May 16, 2014

- Instructor with William Graf and Mark Stiebel of an 18-week course on Estate Planning and Drafting, sponsored by the Cincinnati Bar Association, presented January through May, 2014

- Presentation "Estate Planning, Not Estate Tax Planning: General Planning Considerations that Existed, Exist, and Will Continue to Exist," 23rd Annual Basic Estate Planning & Probate Institute, sponsored by the Cincinnati Bar Association, November 1, 2013, and Butler County Bar Association, February 17, 2014

- Article "Diversification (From a Trustee's Perspective) – A Fundamental Duty to be Ignored Only with Caution and After Deliberation," *Probate Law Journal of Ohio*, September/October 2013, Volume 24, Issue 1

- Presentation "Estate Plan Update – A Survey," CBA Brown Bag Seminar Series, sponsored by the Cincinnati Bar Association, July 10, 2013

- Presentation "Planning for the 'Mere' Wealthy After *Permanent* Estate Tax Change," 30th Annual Advanced Estate Planning Institute, sponsored by the Cincinnati Bar Association, May 10, 2013

- Presentation "Trust Law – Modifying Trusts and New Changes to Help Meet Your Client's Needs," 14th Annual Estate and Tax Planning Professional Seminar – Atrium Medical Center Foundation, November 9, 2012

- Presentation "The Ohio Trust Code: An Overview Five Years after Enactment," 22nd Annual Basic Estate Planning & Probate Institute, sponsored by the Cincinnati Bar Association, November 2, 2012

- Presentation "Staying Current with the Ohio Trust Code – Useful New Tools and Practical Application" sponsored by the Cincinnati Bar Association, July 31, 2012

Exhibit A

UNIFORM TOD SECURITY REGISTRATION ACT (1989/1998)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-EIGHTH YEAR
IN KAUAI, HAWAII
JULY 28 - AUGUST 4, 1989

Approved by the American Bar Association
Chicago, Illinois, August 9, 1990

September 11, 2014

UNIFORM TOD SECURITY REGISTRATION ACT (1989/1998)

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UNIFORM TOD SECURITY REGISTRATION ACT (1989/1998)

PREFATORY NOTE

This Act is a free-standing version of Part 3 of Article VI of the Uniform Probate Code, as adopted by the National Conference of Commissioners on Uniform State Laws in 1989. The purpose of the Act is to allow the owner of securities to register the title in transfer-on-death (TOD) form. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered. The legislation enables an issuer, transfer agent, broker, or other such intermediary to transfer the securities directly to the designated transferee on the owner's death. Thus, TOD registration achieves for securities a certain parity with existing TOD and pay-on-death (POD) facilities for bank deposits and other assets passing at death outside the probate process.

The TOD registration under this Act is designed to give the owner of securities who wishes to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only so long as the co-owners cooperate. Difficulties arise when co-owners fall into disagreement, or when one becomes afflicted or insolvent.

Use of the TOD registration form encouraged by this legislation has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred, or whenever the owner otherwise complies with the issuer's conditions for changing the title form of the investment. The Act recognizes, in Section 2, that co-owners with right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as he or she sees fit after the other's death.

Implementation of the Act is wholly optional with issuers. The drafting committee received the benefit of considerable advice and assistance from representatives of the mutual fund and stock transfer industries during the course of its three years of preparatory work. Accordingly, it is believed that the Act takes full account of the practical requirements for efficient transfer within the securities industry.

Section 3 invites application of the legislation to locally owned securities though the statute may not have been locally enacted, so long as the Act is in force in a jurisdiction of the issuer or transfer agent. Thus, if the principal jurisdictions in which securities issuers and transfer agents are sited enact the measure, its benefits will become generally available to persons domiciled in states that do not at once enact the statute.

The legislation has been drafted as a separate Act, hence not interpolated as an expansion

of the former UPC Article VI, Part 1, treating bank accounts ("multiple-party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities. By virtue either of statute or of account terms (contract), multiple-party bank accounts allow any one cotenant to consume or transfer account balances. See R. Brown, The Law of Personal Property § 65, at 217 (2d ed. 1955); Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1112 (1984). The rule for securities, however, has been the rule that applies to real property: all cotenants must act together in transferring the securities. This difference in the legal regime reflects differences in function among the types of assets. Multiple-party bank accounts typically arise as convenience accounts, to facilitate frequent small transactions, often on an agency basis (as when spouses or relatives share an account). Securities resemble real estate in that the values are typically large and the transactions relatively infrequent, which is why the legal regime requires the concurrence of all concurrent owners for transfers affecting such assets.

Recently, of course, this distinction between bank accounts and securities has begun to crumble. Banks are offering certificates of deposit of large value under the same account forms that were devised for low-value convenience accounts. Meanwhile, brokerage houses with their so-called cash management accounts and mutual funds with their money market accounts have rendered securities subject to small recurrent transactions. In the latest developments, even the line between real estate and bank accounts is becoming indistinct, as the "home equity line of credit" creates a check-writing conduit to real estate values.

Nevertheless, even though new forms of contract have rendered the boundaries between securities and bank accounts less firm, the distinction seems intuitively correct for statutory default rules. True co-owners of securities, like owners of realty, should act together in transferring the asset.

The joint bank account and the Totten trust originated in ambiguous lifetime ownership forms, which required former UPC Section 6-103 or comparable state legislation to clarify that an inter vivos transfer was not intended. In the securities field, by contrast, we start with unambiguous lifetime ownership rules. The sole purpose of the present statute is to facilitate a nonprobate TOD mechanism as an option for those owners.

For a comprehensive discussion of the issues entailed in this legislation, see Wellman, Transfer-on-Death Securities Registration: A New Title Form, 21 Ga. L. Rev. 789 (1987).

UNIFORM TOD SECURITY REGISTRATION ACT (1989/1998)

SECTION 1. DEFINITIONS. In this [act], unless the context otherwise requires:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Devisee" means any person designated in a will to receive a disposition of real or personal property.

(3) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(4) "Person" means an individual, a corporation, an organization, or other legal entity.

(5) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(6) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(7) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(10) "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(11) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

Comment

The definition of "security" is derived from UCC Section 8-102 and includes shares of mutual funds and other investment companies. The defined term "security account" is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

"Survive" is not defined. No effort is made in this Act to define survival as it is for purposes of intestate succession in UPC Section 2-104 which requires survival by an heir of the ancestor for 120 hours. For purposes of this Act, survive is used in its common law sense of outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.

The definitions of "devisee," "heirs," "person," "personal representative," "property," and "state" are taken from Section 1-201 of the Uniform Probate Code, which includes this Act as Part 3 of Article VI.

SECTION 2. REGISTRATION IN BENEFICIARY FORM; SOLE OR JOINT TENANCY OWNERSHIP. Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common.

Comment

This section is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of *all* co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holding into separate registrations of the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term "individuals," as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict individuals using this ownership form as to their choice of death beneficiary. The definition of "beneficiary form" in Section 1 indicates that any "person" may be designated beneficiary in a registration in beneficiary form. "Person" is defined so that a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

SECTION 3. REGISTRATION IN BENEFICIARY FORM; APPLICABLE LAW. A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the

registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

Comment

This section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on an enactment of this Act in X Company's state of incorporation, or in the state of incorporation of X Company's transfer agent. Or, an enactment by the state of the issuer's principal office, the transfer agent's principal office, or of the issuer's office making the registration also would validate the registration. An enactment of the state of the registering owner's address at time of registration also might be used for validation purposes.

The last sentence of this section is designed, as is UPC Section 6-101, to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this Act.

SECTION 4. ORIGINATION OF REGISTRATION IN BENEFICIARY FORM.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

Comment

As noted above in commentary to Section 2, this Act places no restriction on who may be designated beneficiary in a registration in beneficiary form.

SECTION 5. FORM OF REGISTRATION IN BENEFICIARY FORM.

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD," or by the words "pay on death" or the abbreviation "POD," after the name

of the registered owner and before the name of a beneficiary.

Comment

The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner's death so that the sums realized may be "paid" to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid nonprobate death benefit or transfer on death.

SECTION 6. EFFECT OF REGISTRATION IN BENEFICIARY FORM. The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

Comment

This section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant. See Section 10. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

SECTION 7. OWNERSHIP ON DEATH OF OWNER. On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security

registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

Comment

Even though multiple owners holding in the beneficiary form here authorized hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary also should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 8 deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; Section 10 enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as "TOD A (20%), B (30%), C (50%)," would be improper. Though not included in the beneficiary forms described for illustrative purposes in Section 10, the Act enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration in beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any anti-lapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative.

See the Comment to Section 1 regarding the meaning of "survive" for purposes of this Act.

SECTION 8. PROTECTION OF REGISTERING ENTITY.

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this [act].

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this [act].

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with Section 7 and does so in good faith reliance (i) on the registration, (ii) on this [act], and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this [act] do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this [act].

(d) The protection provided by this [act] to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to

ownership of the security transferred or its value or proceeds.

Comment

It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. The Act does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

"Good faith" as used in this section is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing," as specified in Revised U.C.C. Section 1-201(b)(20).

The protections described in this section are generally in harmony with those provided in the Uniform Commercial Code. U.C.C. Section 8-404(c), as revised in 1994, provides that an issuer is generally not liable to third parties for registering transfer of a security pursuant to an effective indorsement or instruction. U.C.C. Section 8-107(b) provides that an indorsement or instruction is effective if it is made by the appropriate person, and under Section 8-107(a)(4) the term "appropriate person" includes a deceased person's "successor taking under other law." The beneficiary under Uniform Probate Code Section 6-307 is such a successor, so that the issuer registering transfer as contemplated by that section pursuant to the beneficiary's indorsement or instruction is generally protected. See also official comment 2 to U.C.C. Section 8-107 ("If the registration of a security or a securities account contains a designation of a death beneficiary under the Uniform Transfer on Death Security Registration Act or comparable legislation, the designated beneficiary would, under that law, have power to transfer upon the person's death and so would be the appropriate person.").

Under subsection (c) of this section, the protections of this part do not apply to a registration made after the registering entity receives "written notice" of objection from a claimant. The protections of the Uniform Commercial Code may, however, continue to apply notwithstanding such a notice, because the exceptions to U.C.C. Section 8-404(c) generally require substantially more than written notice – for example, an injunction or other legal process enjoining the issuer from registering the transfer. See U.C.C. Section 8-404(a)(3). Under the statute as revised in 1994, an issuer receiving mere notice from a third party no longer has a duty to inquire into the third party's claim. See official comment 3 to U.C.C. Section 8-404.

SECTION 9. NONTESTAMENTARY TRANSFER ON DEATH

(a) In this section, "nonprobate transfer" means a transfer described in subsection (b) by an owner whose last domicile was in this state.

(b) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this [act] and is not testamentary.

(c) A transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against that estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received by that transferee.

(d) Nonprobate transferees are liable for the insufficiency described in subsection (c) in the following order of priority:

(1) a transferee designated in the decedent's will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received;

(3) other nonprobate transferees, in proportion to the values received.

(e) A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

(f) Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this State, whether or not the transferee is located in this

State.

(g) A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(h) A proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.

(i) Unless a written notice asserting that a decedent's estate is insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, a trustee receiving a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary.

Comment

In 1998, the Uniform Law Commission approved a new UPC Section, §6-102, designed to give family exemption beneficiaries and decedents' creditors remedies against recipients of nonprobate transfers at death by most forms of will substitutes. The remedy is available only when probate assets are insufficient to protect these traditional probate estate priorities. The

UPC counterpart of this act, UPC 6-309, was revised by eliminating subsection (b). A jurisdiction having legislation similar to UPC 6-102 should enact the UPC counterpart of this section, UPC Section 6-309.

In order to bring this free-standing act into conformity with the above changes, Section 9 was revised by moving the content of what had been subsection (a) into (b) and re-casting (a) to make "nonprobate transfer" serve to link the exemption and creditor protections described in UPC Section 6-102 with this act. In result, the broad definition of "nonprobate transfer" that serves in UPC Section 6-102 to cover most will substitutes has been narrowed for purposes of this act to apply only to death benefits resulting from TOD security registrations.

Subsection (d) through (i) of this section as revised in 1998 almost match up with subsections (c) through (i) of UPC Section 6-102. The differences are that subsection (d) of this section matches (c) in 6-102, and this act has no counterpart for subsection (d) which deals with abatement of gifts at death via revocable trusts. The latter omission makes the content of subsections (e) through (h) of this section identical to subsections (e) through (h) of UPC Section 6-102. Subsections (i) in the two models are similar, except that Section 9(i) of this Act does not include registrar protection covered in UPC Section 6-102 (i)(1), that matter being thoroughly covered by other sections of this Act. The balance of this commentary is based on UPC Section 6-102 commentary.

1. The remedy described by this section is a duty on one receiving a non-probate transfer (defined in subsection (a) to refer only to a death benefit that is effective under subsection (b)) to contribute as necessary to satisfy family exemptions and duly allowed creditors' claims remaining unpaid because of inadequate probate estate values. The maximum liability for a single non-probate transferee is the amount received. Unless other priorities described in subsection (c) apply, two or more transferees are severally liable for proportions of the liability based on amounts received by each.

If there are no probate assets, or if no probate proceeding has been initiated, a creditor or other person seeking to use this section would need to secure appointment of a personal representative to invoke UPC procedures for establishing a creditor's claim as "allowed." The use of regular probate proceedings as a prerequisite to gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI since original promulgation in 1969. The arrangement works well in practice if procedures for opening estates, satisfying probate exemptions, and presenting claims, approximate UPC procedures.

2. Trusts and non-trust recipients of TOD registration death benefits incur liability in the order described in subsection (d). Note that either a revocable or an irrevocable trust might be designated devisee of a pour-over provision that would make the trust the "principal non-probate instrument in the decedent's estate plan", and, so, liable under subsection (d)(2) ahead of other nonprobate transferees to the extent of values acquired as TOD registration death benefit. Note, too, that nothing would pass to the receptacle trust by the pour-over devise if all probate estate assets are used to discharge exemptions and claims. Still, the fact that the trust was designated to

receive a pour-over devise signals that the trust probably includes the equivalent of a residuary clause measuring benefits by available assets and signaling probable intention of the settlor that residuary benefits should abate before other trust gifts if necessary because of settlor's debts.

3. Subsection (e) recognizes that a number of separate instruments and transactions, executed at different times and with or without internal references linking them to other documents, may constitute the paperwork describing succession to a decedent's assets by probate and nonprobate methods. By authorizing control of abatement among gifts made by various transfers at death by the last executed instrument, the subsection permits a simple, last-minute override of earlier directions concerning a decedent's wishes regarding priorities among successors. Thus, a will or trust amendment can correct or avoid liquidity and abatement problems discovered prior to death. The expression "block buster will" was coined by estate planners in the mid-70's to refer to proposed legislation enabling a later will to override death benefits by any nonprobate transfer device. This subsection meets some of the goals of advocates of this legislation.

4. Subsection (f) is based on the principle employed in UPC's Augmented Estate Elective Share remedy (UPC Sections 2-201 through 2-214) in relation to nonprobate transfers made to persons in other states, possibly by transactions governed by laws of other states. The underlying principle is that the law of a decedent's last domicile should be controlling as to rules of public policy that override the decedent's power to devise a probate estate to anyone he or she chooses. The principle is implemented by subjecting donee recipients of a decedent's largesse to liability under the decedent's domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should interstate collection proceedings be necessary.

5. The first and third sentences of subsection (g) are identical to sentences in what originally appeared as Section 15 of the Uniform Multiple Person Accounts Act, upon which this section was based. The second sentence is new. It reflects sensitivity for the dilemma confronting a probate fiduciary who, acting as required of a fiduciary, concludes that the costs and risks associated with a possible recovery from a nonprobate transferee outweigh the probable advantages to the estate and its claimants. A creditor whose claim has been allowed but remains unsatisfied and whose demand for a proceeding has been turned down by the estate fiduciary may proceed at personal risk in efforts to enforce the estate claim against the nonprobate beneficiary. This is so because the last two sentences of subsection (g) shift the risk of unrecoverable costs from the decedent's estate to the claimant who undertakes collection efforts on behalf of the decedent's estate. Any recovery of costs should be used to reimburse the claimant who bore the risk of loss for the proceeding. A personal representative considering declination a demand for a proceeding should note that the "good faith" standard of this section must be determined in light of the representative's general responsibility as a fiduciary.

6. Subparagraph (h) meshes with time limits in UPC sections governing allowance and disallowance of claims. See UPC Sections 3-804 and 3-806.

7. Subsection (i) is designed to enable trustees handling nonprobate transfers to distribute trust assets in accordance with trust terms if no warning of probable estate insolvency has been received. Beneficiaries receiving distribution from a trustee take subject to personal liability in the amount and priority of the trustee based on the value distributed.

SECTION 10. TERMS, CONDITIONS, AND FORMS FOR REGISTRATION.

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a

registering entity may authorize:

(1) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(2) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(3) Multiple owners-primary and secondary (substituted) beneficiaries: John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown or John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

Comment

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under the Act and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; i.e., that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 7.

SECTION 11. SHORT TITLE; RULES OF CONSTRUCTION.

(1) This [act] shall be known as and may be cited as the Uniform TOD Security Registration Act (1989/1998).

(2) This [act] shall be liberally construed and applied to promote its underlying purposes and policy and to make uniform the laws with respect to the subject of this [act] among states enacting it.

(3) Unless displaced by the particular provisions of this [act], the principles of law and equity supplement its provisions.

SECTION 12. APPLICATION OF ACT. This [act] applies to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date].

TAB
E

Ashley Burke is a partner at Burke & Pecquet, LLC and is certified as an Elder Law Specialist by the Ohio State Bar Association and National Elder Law Foundation. She advises clients on Medicaid planning, estate planning for families with disabilities, lifetime gifting and transfers at death, and asset protection. She assists clients with Trust and Estate Administration. She obtained her law degree, *cum laude*, from the University of Cincinnati College of Law in 2009 and her Bachelor of Arts in Sociology and Criminology, *summa cum laude*, from The Ohio State University in 2006. She is admitted to the Ohio Bar and the Kentucky Bar. She is a member of the National Academy of Elder Law Attorneys (Past-President, Ohio Chapter and member of the NAELA Litigation Committee); Ohio State Bar Association (Elder and Special Needs Law Committee Vice-Chair); and Cincinnati Bar Association (Vice-Chair of the Elder Law Practice Group). She also acts as a Stakeholder Liaison with the Ohio Department of Medicaid. She has been named Cincinnati Magazine's *Rising Star Super Lawyer* in the area of Elder Law in 2014, 2015, 2016, 2017, 2018, & 2019. Ms. Burke is a frequent presenter on topics related to elder law and special needs. For more information, please visit www.b-pelderlaw.com.

Medicaid Eligibility for Long Term Care and Use of Annuities in Planning

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Medicaid

- Federal and State Program based on financial and medical needs.
- Medicaid pays for 70% of all nursing home care and pays for care for over 48,000 individuals on a HCBS Waiver.
- Federal Financial Participation (FFP): Federal pays 60% of costs and Ohio pays 40% of costs.

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Basic Eligibility

- Be aged, blind, or disabled
- Have income under $2,313 or have a Qualified Income Trust
- Have counted assets equal less than the allowable amount
- Need the services

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Medical Necessity Eligibility

- You must need one of the following:
  - hands-on assistance with two activities of daily living, or
  - hands-on assistance with one activity of daily living and assistance with medications, or
  - supervision 24 hours/day to prevent harm, or
  - skilled care at less than skilled level, or
  - skilled care at skilled level.

4

Income Eligibility

- Countable Income must be at or below $2,313(2019).
- If it is a married couple, only the income of the spouse that is in the nursing home is reviewed when determining eligibility.

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Income con't

- Medicaid uses your gross income – and does not subtract deductions for taxes, child support, alimony; Medicaid will allow you to keep paying health insurance premiums.
- Income is earned and unearned. It typically includes all amounts received each month by the individual for support or maintenance.

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Income Cap

- In August 2016 Ohio became a 1634 Sate under the Social Security Act.
- This made Ohio an income cap state
- Now an individual must have income less than the special income limit of $2,313 (2019). If an individual's income is over the cap, a Qualified Income Trust is needed.

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Qualified Income Trust (QIT)

- Also know as Miller Trusts.
- Authorized under 42 U.S.C. 1396p(d)(4)(B) and O.A.C. 5160:1-3-05.02 and 5160:0-6-03.2.
- Only income can be deposited to a QIT.
- Income held by a QIT still used in post eligibility calculations.

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Exempt Resources

- Home and "all land associated with it" resided in by:
  - Applicant if he or she has signed an "intent to return home letter"
  - community spouse
  - Sibling with equity 1/year
  - Dependent (under age of 21)/blind/disabled child
  - Dependent relative

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Exempt Resources

- One vehicle
- cash value life insurance if face value is ≤ $1,500
- Irrevocable funeral plan for applicant and spouse
- Cemetery lots for applicant, spouse, and members of "immediate family"
- Household goods and personal effects

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Resource Eligibility

- For an individual:

  $2,000 or less in Countable Resources

- For a married couple:

  The Community Spouse can keep the greater of $25,284 or ½ of the countable resources up to $126,420

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Community Spouse Resource Allowance - CSRA

- Countable Resources are valued as of date institutionalized for 30 days or longer
- "snapshot"
- Calculate CSRA

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Example CSRA

- $100,000
- CS gets ½ = $50,000
- IS gets $2,000
- Countable resources must be at or below $52,000 for Medicaid eligibility

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CSRA Example

- $25,000
- CS gets $24,720
- IS gets $2,000
- Since countable resources are less than $27,284 ($25,284 + $2,000), this couple will meet resource eligibility requirements.

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CSRA Example

- $300,000
- CS gets $126,420
- IS gets $2,000
- Countable Resources must be at or below $128,420 to be Medicaid eligible

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Spend Down of Resources

- Pay off bills
- Purchase prepaid irrev. funeral contracts
- Purchase exempt resources for community spouse - new car, residence, home improvements, etc.
- Prepay supplemental cost of private room
- Purchase Medicaid Compliant Annuity

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Example

Snapshot		$100,000
Must be at or below $52,000		
$100,000		
- 18,000	prepaid funerals	
$82,000		
- 15,000	new furniture, appliances, car, etc.	
67,000		
4,500	power wheelchair	
62,500		
- 4,500	attorney fee	
58,000		
- 6,500	one month nursing facility cost	
51,500	eligible	

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Medicaid Compliant Annuities

- Not tax-deferred/investment tool
- Must comply with O.A.C. 5160:1-6-06.01
  - Immediately Payable
  - Irrevocable
  - Non-assignable
  - Actuarial sound
  - No balloon payment or deferral
  - State named as remainder beneficiary in first position

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1035 Exchange

- To limit tax implications of surrendering assets, you can try to do a like-kind exchange under Section 1035 of the IRC.
- The tax implications are then spread out over the term of the annuity.

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Name on the Check Rule

- If the Institutionalized Spouse is the one with the large IRA in his or her name, one option is to try to have the Institutionalized Spouse transfer the IRA to a Medicaid Compliant Annuity for the benefit of the Community Spouse.
- Very Risky- if state finds income belongs to Institutionalized Spouse almost all the income will go to the nursing home as patient liability and the Community Spouse no longer has access to the funds.

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Example

Snapshot $350,000
Must be at or below $128,420 ($126,420 + 2,000)

$350,000	Snapshot
-128,420	CSRA
$221,580	
-20,000	irrevocable funerals
$201,590	
- 25,000	new car
176,580	
- 176,580	Medicaid Complaint Annuity for Spouse
0	

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Monthly Income Allowance and Annuities

- Most Community Spouses will lose their MIA if they purchase an annuity. In some circumstances it may be more beneficial for the Community Spouse to get the MIA and do other planning options.

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Monthly Income Allowance

- Jim and Jane are married. Jim is in the nursing home. Jane receives $1,850/month in Social Security. Jim receives $2,000/month in Social Security.
- Jane has the following monthly payments: $550/mortgage; $175/property taxes; $25/property insurance.

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MIA Continued

- $550 + $175 + $25 + $544 (standard utility allowance)= $1,294
- $1,294- $617.25 (excess shelter standard)= $676.75
- $2,030 (MMMNA Min.) + $676.75=$2,734
- $2,734-$1,850 (Jane's Income)=$884
- Therefore, Jane can keep $884 a month of Jim's income.

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Transfers

- 5 Year Look Back from Date of Application
- Countable Resources & Home
- Presumption = improper
- Clear, convincing, and credible to rebut
- Amount of transferred asset ÷ $6,570
- Period of Restricted Coverage where bills will not be paid

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General Transfer Rule

- 4 Elements:
  - 1. The Transfer of a Legal Interest
  - 2. in a Countable Resource
  - 3. For Less than Fair Market Value
  - 4. For the Purpose of Qualifying for Medicaid or to Avoid the Use of the Resource. (This has to be rebutted by clear and convincing evidence)

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Permitted Transfers

- Between Spouses or for the sole benefit of the spouse.
- Transfer of any asset to a disabled child
- Transfers for Fair Market Value
- Transfers of an Exempt Resource other than the House.
- Transfers into a special needs trust or a Medicaid Pooled Trust.

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Transfer Rule for the Home

- Can transfer the house to the spouse, provided the Spouse does not subsequently transfer to a third party.
- Children under the age of 21
- Child who is blind or permanently disabled.
- Adult Child Caretaker Exemption
- Sibling with an equity interest.

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Penalty Period

- The amount of the transferred assets is divided by the average private pay rate of a nursing facility as determined by the Ohio Department of Aging, currently $6,570. This determines the number of months Medicaid will not pay for nursing facility services, HCBS Wavier Services.
- Does not begin until apply and the individual is otherwise eligible.

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Example:

- Joan gives $100,000 cash to her niece on January 1, 2019. The next day, Joan goes to a nursing home and applies for Medicaid.
- $100,000/ $6,570= 15.2 months
- Therefore, for 15.2 months Medicaid will not pay nursing services for Joan.

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Medicaid Gifting

- Some clients wish to preserve assets for their children or grandchildren.
- Medicaid gifting is complicated and if done incorrectly can have devastating financial consequences.
- Partial Returns are no longer allowed. Gifting can only be accomplished in Ohio by doing pre-planning and waiting 5 years, using a gift annuity, or in certain circumstances a Pooled Medicaid Payback Trust.

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Annuities for Single Individuals

- Same type of annuity already discussed. Must meet same requirements (i.e. actuarial sound, name state as beneficiary, etc.)
- Need to calculate monthly negative cash flow and be ready to apply for Medicaid. Timing is key!

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Example of Negative Cash Flow:

- Joe is single. He has 2 children: Jim and Judy. He has $200,000 in countable resources. Joe's monthly income consists of $2,500 in SS and $1,000 in a pension. His monthly health insurance premium is $125 and his prescriptions cost $25/month. The nursing home daily room rate is $315 ($9,765/month)

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Negative Cash Flow continued…

To calculate monthly negative cash flow:

	$9,765 nursing home cost
+	$125 insurance premium
	$50 prescription costs
=	$9,940
_	$3,500 monthly income
=	$6,440 monthly deficit

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Gifting/Annuity Strategy

- If gift $100,000 to Jim and Judy, this would result in a penalty period of 15.22 months ($100,000 / $6,570)
- If use the remaining $100,000 to purchase a Medicaid Compliant Annuity, we subtract the set-up fee of $1,500 and then divide the remaining $98,500 by the monthly deficit of $6,440, which results in funds to pay 15.29 months.

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Practice Tips:

- Keep in mind that there may be other miscellaneous costs or expenses for the client and that if an annuity exceeds a calendar year the cost of the nursing facility will likely increase.
- It is preferable to place the "gifted" funds into a trust because the goal is the gifted funds are to remain in an account until the Medicaid recipient passes away because if the Medicaid rules change or the monthly deficit changes drastically funds will be needed to pay for care.

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Proceed with Caution:

- Gift/Annuity also be used for HCBS Waivers, such as PASSPORT or the Assisted Living Waiver. However, most Assisted Living Facilities have a private pay duration. Some practitioners are gifting assets and applying for Medicaid. In this scenario, the annuity pays the private pay requirement, so that at the end of that private pay duration Medicaid would take over.
- Some States will deny the Medicaid Application if filed during a duration of stay requirement.

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Proceed with Caution:

- Medicaid Annuities in general are constantly being evaluated by the States and Federal government. For example, Maine recently passed a Medicaid waiver that places a limit on annuities for Community Spouses.

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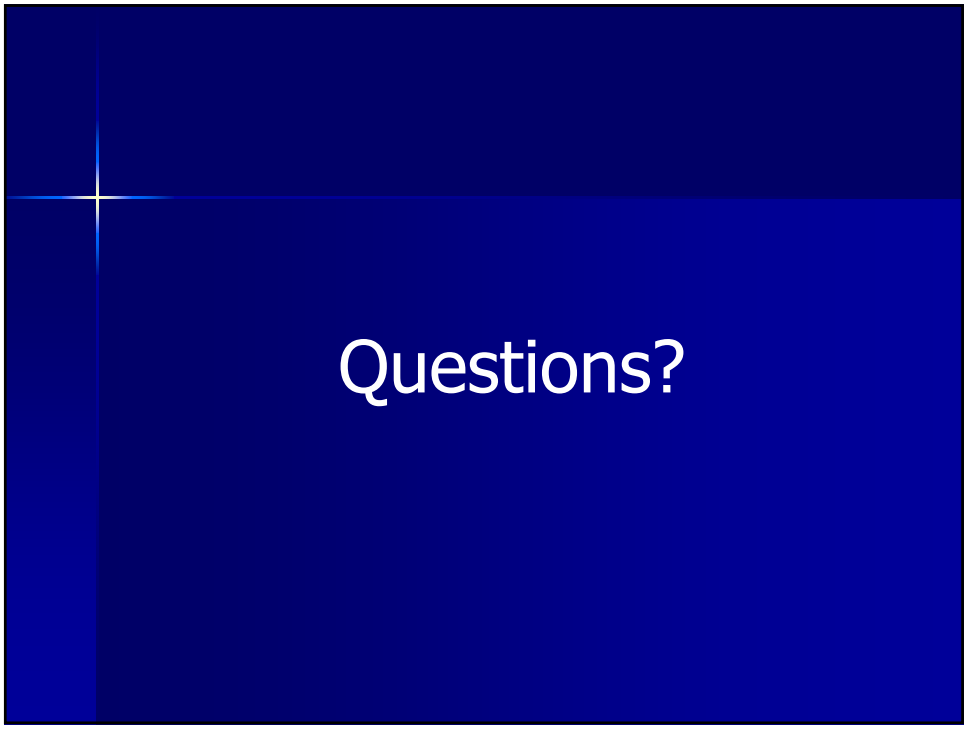

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MEDICAID ELIGIBILITY FOR LONG TERM CARE SERVICES AND USE OF ANNUITIES IN PLANNING

Medicaid is a federal/state program based on financial and medical need. The Medicaid program will pay for most medically-necessary services for individuals who qualify. Medicaid pays for 70% of all nursing home care and serves approximately 48,000 individuals in home and community-based waiver programs.[1]

The Ohio Department of Medicaid operates the Medicaid program in Ohio. The County Departments of Job and Family Services process Medicaid applications and make initial eligibility decisions.

There are many different categories of individuals who can be eligible for Medicaid. **This presentation only addresses the category of individuals who need Medicaid to pay for nursing facility level of care services**.

[1] Medicaid's "Day of Reckoning" SFY 2006-07 Executive Budget presented by Barbara Coulter Edwards, Ohio Medicaid Director, at the Ohio Aging Advocacy in Action 2005 Conference, March 2, 2005.

The eligibility rules are found in Ohio Administrative Code chapters 5160:1-3 and 5160:1-6.[2]

An individual must meet three basic rules to be eligible for Medicaid:

1. the individual must be categorically eligible
2. the individual's countable income must be at or below a certain level
3. the individual's countable, available resources must be at or below $2,000

CATEGORICAL ELIGIBILITY

An individual can be eligible for Medicaid to pay for nursing home care only if he or she is a member of one of the following three categories: aged (65 or older), blind, or disabled. If the individual meets the nursing facility level of care, he is presumed to be disabled. Nursing Facility Level of Care means the care must be "medically necessary;" consequently, the individual must need one of the following:

- √ hands-on assistance with two activities of daily living, or
- √ hands-on assistance with one activity of daily living and assistance with medications, or
- √ supervision 24 hours/day to prevent harm, or
- √ skilled care at less than skilled level, or
- √ skilled care at skilled level.

See O.A.C. 5160-3-08.

[2] Due to Ohio's change to a 1634 state, if any of Ohio's rules are silent or need clarifications, practitioners can look to the POMS for guidance.

INCOME ELIGIBILITY

Income is defined at O.A.C. 5160:1-3-03.1 as what can reasonably be expected to be received each month, or periodically, for that individual's support.

Income is earned or unearned. Income includes all amounts received each month by the individual for support/maintenance from sources such as Social Security, pension, income from a trust, IRAs and Annuities from which the individual is receiving a periodic payment, retirement plans, Veterans Benefits, Railroad Retirement, etc. An individual is required to explore all potential sources of income.

If the individual is married and institutionalized, only the income attributed to that individual is considered. In other words, there is no deeming of income between spouses once institutionalization occurs. Similarly, when a child enters a nursing facility or home and community-based care, the parent's income will not be deemed to the child beginning the month after institutionalization.

When a married individual receives a joint check with his or her spouse, the income is attributed in accordance with the ownership rights on the check.

In August 2016, Ohio went from a 209(b) state to a 1634 state under the Social Security Act. This has made Ohio an income cap state. Under an income cap state, an individual must have income less than the special income limit of $2,313 (2019). If an individual has income above the special income limit the Medicaid rules allow for the use of a Qualified Income Trust, also

known as Miller Trusts, to assist with making an individual income eligible. Qualified Income Trusts are authorized under 42 U.S.C. § 1396p(d)(4)(B), O.A.C. 5160:1-3-05.2 and O.A.C. 5160:1-6-03.2.[3]

RESOURCES

The Medicaid resource standard for an individual is $2,000. The individual must have a legal interest in the property and the property must be available to the individual for use and disposition for the resource to be countable. "Resources" are everything left after the income is taken out for the month.

Medicaid excludes the value of:

1. The home and the land associated with it, occupied by:
    - the individual,
    - the individual's spouse,
    - it is occupied by a dependent relative,
    - it is occupied by the individual's child who is under the age of 21 or is permanently blind or disabled,
    - it is occupied by the individual's child who is age 65 or older and is verifiably financially dependent upon the individual for housing,
    - it is occupied by the individual's brother or sister who owns an equity interest in the home and who has lived in the home for at least one year before the individual's admission to the nursing home,[4]

[3] More information about QITs can be found at ODM's website http://medicaid.ohio.gov/
[4] See O.A.C. 5160:1-3-05.13

or

- it has been transferred to a son or daughter who has been living in the home and has been providing care that delayed the parent's need for nursing home care for at least 2 years prior to admission.[5]

If none of these apply and the individual does not plan to return to the home than the home will lose its exemption. An individual can sign an affidavit stating that they intend to return to the home and this will make the home exempt for eligibility purposes.

2. Life insurance with a face value equal to or less than $1,500; if face value is over $1,500, then all of the cash value is counted. O.A.C. 5160:1-3-05.12.
3. Irrevocable burial contracts for individual or spouse, and burial space for individual, spouse, family members. O.A.C. 5160:1-3-05.6 and 5160:1-3-05.7.
4. One motor vehicle, regardless of value. O.A.C. 5160:1-3-05.11
5. Income producing property used to meet basic living needs. Equity is excluded up to $6,000, only if income produced exceeds 6% of equity. O.A.C. 5160:1-3-05.19.
6. Property that produces goods or services to provide for basic living needs, up to a maximum of $6,000 in equity. O.A.C. 5160:1-3-05.19.
7. Receipt of certain lump sums, such as retroactive benefits, Social Security/SSI, for the first six months after receipt. O.A.C. 5160:1-3-05.8.
8. Household goods and personal effects. O.A.C. 5160:1-3-05.10.

[5] See OAC 5160:1-6-06

9. ABLE accounts also known as a STABLE accounts in Ohio, this account is similar to a 529 account in the fact that it is a savings account that is administered by the state. This account can be created for any person diagnosed with a disability of which the onset of the disability was prior to age 26 and can hold funds up to $100,000 before interference with benefits, however, only $15,000 a year can be placed into these accounts.[6]
10. Any resource which is not otherwise available for use by the individual: does the individual have the legal right and ability to use and dispose of the property? If the property cannot be sold, it should not be available. Examples: life estates with no value, property held in ownership with another when the co-owner refuses to liquidate the property. O.A.C. 5160:1-3-05.17.

Resource Calculation where there is no Community Spouse: Add all countable available resources and compare to the resource standard of $2,000. If under that standard, the individual meets the resource test.

Community Spouse Resource Allowance (CSRA): The "Community Spouse" is the spouse living in the community and the one that is not applying for Medicaid. The "Institutionalized Spouse" is the spouse applying for Medicaid benefits. Add countable available resources based on the value as of the first continuous date of institutionalization for the Institutionalized Spouse (30 days or more) – the "snapshot" date, then apply the total to the following formula:

Community Spouse receives a RESOURCE ALLOWANCE of:

THE **GREATER** OF:

$25,284 (2019),
OR
one-half of remaining countable available resources
not to exceed $126,420 (2019).[7]

[6] For more information on STABLE accounts please see http://www.stableaccount.com/

[7] A community spouse maybe entitled to a greater amount if established at fair hearing the community spouse needs

Institutionalized spouse receives a "resource allowance" of $2,000, and is resource-eligible when total countable resources are at or below amount allocated per above formula. Example: Couple has $100,000 in countable resources on date of institutionalization. Community spouse is allocated $50,000; institutionalized spouse is allocated $2,000. Countable resources must be reduced to at or below $52,000 for the Institutionalized spouse to be eligible for Medicaid payment for his or her care.

42 U.S.C. 1396r-5(c)&(e); O.A.C. 5160:1-6-04.

Spending Down Resources to Eligibility for a Married Couple:

Mr. Smith enters the facility January 1, 2019. Mrs. Smith lives at home. The countable Medicaid assets total $160,000. The assets must be reduced to $82,000 before Medicaid can pay for Mr. Smith's care, the spend down can be as follows:

$160,000.	Mrs. Smith's Resource Allowance (1/2 of $160,000) plus Mr. Smith's
-82,000.	Resource Amount of $2,000
78,000.	
-20,000.	2 funerals
58,000.	
-25,000.	new car
33,000.	
-9,000.	home repairs
24,000.	
-24,000.	care – 3 months
0.	

resource above the maximum allowed CSRA to generate income so that he or she receives the minimum income allowed under the Monthly Income Allowance Rules, see O.A.C. 5101:6-7-02.

ANNUITIES FOR MARRIED COUPLES

A planning technique for married couples is the purchase of an annuity, where the community spouse exchanges spend-down funds for a stream of income, and provided the annuity complies with Medicaid annuity rule found at 42 U.S.C. 1396p(c)(1)(F) and (G), the purchase is a proper use of spend-down funds. Annuities were authorized as a Medicaid planning technique in the Deficit Reduction Act (DRA) of 2006. However, Ohio challenged the use of annuities for married couples until 2016.

Medicaid compliant annuities are not tax-deferred annuities that most people are familiar with. They are not used as an investment tool. The annuity needs to be immediately payable, irrevocable, non-assignable, actuarially sound, does not have balloon payment or deferral, and the State is named as the remainder beneficiary in the first position. O.A.C. 5160:1-6-06.1

When implementing a Medicaid plan, you should try to limit the tax implication of surrendering or transferring assets. As discussed above, life insurance, annuities, 401(k)s, and IRAs are considered available resources for Medicaid.

If a client already has a life insurance, endowment, or annuity contract, then under 1035 of the Internal Revenue Code, the life insurance, endowment, or annuity contract is allowed, under certain circumstances, to effect a like-kind exchange. If all the rules are followed, the gain in the original policy will not be taxed at the time of the exchange. A 1035 exchange can be useful when it allows the client to defer taxable gain on the surrender of the old contract or to carry

over the basis from the original contract to the new contract. The following 1035 exchanges are allowed:

- Life insurance contract for an annuity contract, endowment contract, or another life insurance contract.
- An endowment contract for an annuity contract, endowment contract, or another life insurance contract.
- An annuity contract for another annuity contract.

Keep in mind that when a life insurance contract is exchanged for another life insurance contract, the contract must relate to the "same insured." For example, a single life policy may not be exchanged for a joint life policy, and vice versa. In the case of an exchange of annuity contracts, the regulations required that both contracts involve the same "obligees." For a number of years, the prevailing view was that "obligee" was synonymous with "annuitant." However, the IRS clarified in a 2003 private letter ruling that the term "obligee" refers to the owner of the contract.

The IRS permits various combinations of multiple contract exchanges. When the exchange results in multiple contracts, the basis from the original contract(s) must be allocated to the new contracts in proportion to the allocation of cash values to the new contracts. The IRS also allows consolidation of 2 or more contracts from two different carriers. Partial exchanges are also allowed under a 1998 Tax Court case in which the IRS permitted the exchange of a portion of the value in an existing annuity for a new annuity contract.

Since IRAs are considered countable assets for Medicaid purposes in Ohio, rather than liquidate an IRA and risk facing large tax consequences, the client may be able to rollover or transfer his or her IRA into a Medicaid Compliant Annuity. The IRA will be eliminated as a countable asset, and immediate tax consequences are avoided. The income from the Medicaid Compliant Annuity is taxable in the year of receipt, allowing the owner to spread any tax consequences out over the term of the annuity.

If the client is already over age 70 ½, the Medicaid Compliant Annuity is not subject to Required Minimum Distributions (RMDs). Since they are Single Premium Immediate Annuities (SPIAs) with added restrictions, the IRS considers future RMDs satisfied, and the amount invested into the annuity is not subject to annual RMD calculations.

In cases that involve married couples, if the Community Spouse has an IRA, the account can be transferred to Medicaid Compliant Annuity for his or her benefit. In some states, if the Institutionalized Spouse has the IRA, the couple could consider using the "Name on the Check Rule" in which the Institutionalized Spouse's IRA is transferred to a Medicaid Compliant Annuity for the benefit of the Community Spouse. This is risky because if the State finds it to be income to the Institutionalized Spouse, not Community Spouse, most if not all of the monthly income will go to the nursing home as patient liability and you have lost a major resource for the Community Spouse.

If you use an annuity as a planning tool, be sure to calculate the anticipated Monthly Income Allowance (MIA) before it is purchased. A determination of whether the annuity is the best

way to go depends in part on the impact it has on the community spouse's income and the receipt of the MIA. See below for a discussion on MIA.

Example:

Mr. Smith enters the facility January 1, 2019. Mrs. Smith lives at home. The countable Medicaid assets total $350,000. The assets must be reduced to $128,420 before Medicaid can pay for Mr. Smith's care, the spend down can be as follows:

$350,000.	Mrs. Smith's Resource Allowance (Max CSRA of $126,420 plus
-128,420.	Mr. Smith's Resource Amount of $2,000)
221,580.	
-20,000.	2 funerals
201,580.	
-25,000.	new car
176,580.	
-176,580.	purchase Medicaid Compliant Annuity
0.	

Monthly Income Allowance for Community Spouse:

Monthly Income Allowance: The Monthly Income Allowance, or MIA, is the amount set aside from nursing facility resident's income to support the community spouse and/or dependent children. The formula to determine the amount for the community spouse is:

Determine the Minimum Monthly Maintenance Needs Allowance (MMMNA), currently $2,057.50 (2019)[8],

Add to this the amount that the community spouse's shelter costs (rent/mortgage, property taxes, insurance, and utilities that exceed a standard utility allowance of $544/2019 exceed an Excess Shelter Allowance ($617.25/2019) - if the community spouse's shelter costs do not exceed the Excess Shelter Allowance, then skip this step;

Add any excess amount awarded by court order or state hearing;

Add a Family Allowance equal to one-third of the MMMNA less the gross amount of the family member's income;

Subtract the amount of the community spouse's gross monthly income. The result is the amount of the institutionalized spouse's income that the community spouse may keep each month to meet his or her needs while living in the community. This is referred to as The Maintenance Need Allowance.

42 U.S.C. 1396r-5(d); O.A.C. 5160:1-6-07.

There is a maximum (MMMNA) that a Community Spouse is entitled to, which for 2019 it is $3,160.50. Therefore, if the community spouse has monthly income above $3,160.50, he or she will not be entitled to a monthly income allowance.

[8] The maximum MMNA a community spouse is entitled to is $3,090(2018)

Example MMMNA:

Jim is in a nursing home and has been found eligible for Medicaid. Jim is married to Jane who is the community spouse. Jane receives Social Security of $1,850. Jim Receives social security of $2,000. Jane has the following monthly payments: mortgage payment of $550, property taxes of $175, and property insurance of $25.

MMMNA Calculation

$550 Mortgage
$175 Property Taxes
$25 Property Insurance
$544 Standard Utility Allowance

= $1294
-$617.25 Excess Shelter Standard

=$676.25 Total ESA

MMMNA Minimum is $2,057.50 + $676.25 = $2,734.25

MMMNA $2,734.25 – $1,850 (Jane's income) = $884.25. This is the amount of Jim's income Jane can keep.

TRANSFER OF ASSETS

Medicaid Transfer of Asset rules are complicated. A transfer of assets during the Medicaid look back period can have a profound and possibly disastrous effect on the individual's ability

to obtain Medicaid. Medicaid looks back 5 years from the date of an application to see if the applicant has made any transfer of assets.

The Medicaid transfer of assets rules can be found at 42 U.S.C. 1396p(c) & (e), R.C. § 5163.30, and O.A.C. 5160:1-6-06.

If Medicaid determines a transfer of an asset was improper, Medicaid will imply a restricted period of coverage. During the period of restricted coverage, Medicaid will not pay for an individual's room and board at the nursing facility.

The Medicaid transfer penalty rules currently apply only to nursing facility services or services provided through a home and community-based waiver (such as PASSPORT, Assisted Living Waiver, and the Home Care Waiver program). The individual under a Medicaid transfer penalty remains potentially eligible for Medicaid to pay for all other medical services, such as pharmaceutical drugs and home health benefits. The Medicaid penalty is a "restricted period of coverage."

The Transfer of Asset rules:
Federal and Ohio law set forth three transfer of asset Medicaid rules - the general rule, which applies to all types of assets other than the home, and the more specific rules which apply to transfers of the home and transfers to a trust.

General transfer of asset Medicaid rule:

A resource transfer is considered to be improper if the individual transfers his legal interest in a countable resource for less than fair market value for the purpose of qualifying for Medicaid or to avoid the use of the resource.

Four elements to an improper transfer:

1. The transfer of a legal interest:

   An exchange of ownership, such as taking one's name off of an asset, giving an asset away to another person or entity, the reduction of an ownership interest in property, including acts done by a spouse, agent, or attorney-in-fact. Adding a name to an asset as a joint tenant is not a transfer of a resource, but adding a tenant-in-common is a transfer of a resource because it is a reduction of ownership

2. In a countable resource:

   Except for transfers of the home, the asset being transferred must be "countable" for Medicaid purposes for the transfer to be considered improper. In other words, the transfer of an exempt resource is by definition not improper, with the exception of the transfer of a home (see below).

3. For less than fair market value:

   The individual must receive less than the fair value of the asset being transferred to be considered to be improper. Example: The individual owns two cars, the first is exempt, the other is worth $25,000 and the individual sells it for $15,000. This will be found to have been transferred for less than fair market value in the

amount of $10,000. The $10,000 is used to calculate the restricted period of coverage, which is discussed below.

4. For the purpose of qualifying for Medicaid or to avoid the use of a resource:

   A transfer of an asset is not improper if made for reasons not associated with obtaining Medicaid or remaining eligible for Medicaid.

If the transfer falls within the above definition, then a presumption arises that the transfer was done to qualify for Medicaid. This presumption may be rebutted with clear, convincing and credible evidence that the transfer was solely for other reasons, such as transfers made (1) as part of an established gifting pattern or (2) with the intent and belief that fair value was being received in exchange for the transferred asset, and (3) transfers made prior to the need for medical services, when the individual is in good health.

Certain transfers are permitted:

1. Transfers between spouses or to another for the sole benefit of the spouse.
2. The transfer of any asset to a disabled child. "Disabled child" means disabled by the definition of the Social Security Administration.
3. Transfers for fair value.
4. Transfers of an exempt resource other than the home.
5. Transfers into a special needs trust or a Medicaid pooled trust.
6. Transfers made exclusively for a reason other than qualifying for Medicaid.

Ohio's home transfer Medicaid rule:

Transfers of an otherwise exempt home are considered improper if made for less than fair market value during the 60- months prior to Medicaid application, or any time after, unless the home was transferred to one of the following individuals:

1. The individual's spouse, provided the spouse does not subsequently transfer the home to a third party.
2. The individual's child under the age of 21.
3. The individual's child over the age of 21 who is blind or permanently disabled (meets the disability criteria for Social Security benefits).
4. The individual's child over the age of 21, who was living in the home for the two-year period before the individual is placed into the nursing facility, and who, during this two-year period, provided care to the individual that prevented the individual from entering the facility. This "Adult Caretaker Child" exception to the home transfer rule requires that the child provide evidence of the parent's level of care – the parent must have needed care at the intermediate or skilled level for the entire two-year period, as certified by the parent's physician.
5. The individual's sibling who has lived in the home for the year before the individual enters the nursing facility and who has an equity interest in the home.

When transfers are examined: the "Look-back" period:

When an individual applies for Medicaid, Medicaid examines transfers made by the individual, his or her spouse, or any individual acting on the individual/spouse's behalf, during the sixty-month period before the application and institutionalization, (or if not institutionalized, the date of application). This is called the "look back" period. Transfers made during this time

period are presumed to have been done to qualify for Medicaid or to protect future eligibility. If this presumption is not rebutted by clear, convincing and credible evidence, then Medicaid imposes a penalty, called a "restricted period of eligibility."

Consequence of an improper transfer:

Transfers of assets that are determined to be improper result in a penalty. Medicaid will not pay for the following medical services during the period of restricted coverage:

> Nursing facility services
>
> Home and Community Based Services (such as PASSPORT, the Home Care Waiver, Individual Options Waiver, the Residential Facility Services Waiver, the Assisted Living Waiver)

The penalty period.

The length of time during which the penalty applies, is determined by the following formula:

> The amount of the transferred asset is divided by the average private pay rate of a nursing facility in Ohio, currently $6,570, to determine the number of months that Medicaid will not pay for the above listed services.

The penalty begins the month the applicant is "otherwise eligible" and carries forward until the number of months is satisfied or all of the assets have been reconveyed.[9]

There is no cap on the length of the penalty period.

[9] As of 1/1/2016, partial returns are no longer allowed to reduce a penalty period. O.A.C. 5160:1-6-06.5(F). The only way to reduce a penalty is to return all of the transferred assets.

Example:

> Joan gives $100,000 cash to her niece on January 1, 2019. The next day, Joan goes into a nursing facility and applies for Medicaid. Medicaid looks back 60 months from January 2, 2019, the date Joan both enters the facility and applies for Medicaid. The January 1, 2019 gift is reviewed. Joan is unable to rebut the presumption that the transfer was done so Joan could get Medicaid to pay for her care, and a penalty is applied. The penalty begins the month that Joan lived in a nursing home and applied for Medicaid and but for the gift is eligible for Medicaid. Therefore, the penalty will begin, January 2019, and goes forward for 15.2 months: $100,000 ÷ $6,570 = 15.2 months.

Undue hardship:

When an asset has been transferred and the individual is unable to rebut the presumption that the transfer is improper, Medicaid must determine whether the individual will suffer undue hardship if Medicaid benefits are denied.

> An undue hardship is said to exist if the individual's attempts to make the resources available by consulting with legal counsel and it has been determined that the resources no longer exist, are unavailable or that the costs in attempting to retrieve the resources are prohibitive. And further, the individual is in jeopardy of being from the nursing facility or his medical care will be endangered.

Incompetent individuals with no agent or guardian are referred to the county prosecutor or Medicaid's in-house legal staff to attempt to make the resource available.

ANNUITY PLANNING FOR SINGLE INDIVIDUALS.

For individuals who are in a nursing facility or need care at home or in an assisted living facility, they will not be eligible for Medicaid until their assets are at or below $2,000. It is hard for many individuals to see their assets dwindle and for family members to see their loved ones not have the proper funds to pay for quality of life items. For many of our single clients we will "gift" or transfer assets in an effort to preserve some of the assets.

One way to gift assets is to use a Medicaid Compliant Annuity. These are the exact same ones we use for Community Spouses (discussed above), but they are usually for a much shorter period.

Transfer of assets or the "gift" should not be done until you have calculated the negative monthly cash flow and are ready to apply for Medicaid. In this strategy a portion of the individual's assets are gifted and the other portion are used to purchase a Medicaid Compliant Annuity. Medicaid will impose a penalty on portion of assets that were gifted. The annuity is used to pay for care during the penalty period.

For example, Joe is single and he has 2 children, Jim and Judy. Joe entered a nursing home 6 weeks ago. He currently has $200,000 in countable resources. His monthly income consists of $2,500 in Social Security and $1,000 in a pension. He has a monthly health insurance premium of $125 and prescription costs of $25. The nursing facility daily room rate is $315, or $9,765 a month.

To calculate monthly negative cash flow:

	$9,765 nursing home cost
+	$125 insurance premium
	$50 prescription costs
=	$9,940
_	$3,500 monthly income
=	$6,440 monthly deficit

To calculate the gifting strategy:

If gift $100,000 to Jim and Judy (can be outright or in trust), this would result in a penalty period of 15.22 months ($100,000 / $6,570)

If use the remaining $100,000 to purchase a Medicaid Compliant Annuity, we subtract the set-up fee of $1,500 and then divide the remaining $98,500 by the monthly deficit of $6,440, which results in funds to pay 15.29 months.

Keep in mind that there may be other miscellaneous costs or expenses for the client and that if an annuity exceeds a calendar year the cost of the nursing facility will likely increase.

It is preferable to place the "gifted" funds into a trust because the goal is the gifted funds are to remain in an account until the Medicaid recipient passes away because if the Medicaid rules change or the monthly deficit changes drastically funds will be needed to pay for care.

The above gifting strategy can also be used for HCBS Waivers, such as PASSPORT or the Assisted Living Waiver. However, most Assisted Living Facilities will require a resident to private pay for a certain duration, ranging from 12 to 24 months. For residents with significant assets, some practitioners are gifting assets and applying for Medicaid. In this scenario, the annuity pays the private pay requirement, so that at the end of that private pay duration Medicaid would take over.

However, this is something that many States are watching and taking action on. Some States will deny the Medicaid Application if filed during a duration of stay requirement. See State of New Jersey Dept. Of Human Services Division of Medical Assistance and Health Services Final Agency Decision, OAL DKT. No. HMA 18569-2016 (June 5, 2017).

Medicaid Annuities in general are constantly being evaluated by the States and Federal government. For example, Maine recently passed a Medicaid waiver that places a limit on annuities for Community Spouses. Maine now requires the length of the payout of the annuity to equal 80% or greater of the life expectancy of the annuitant.

TAB
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BRIEF BIOGRAPHY

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Gretchen Koehler Mote is Director of Loss Prevention for Ohio Bar Liability Insurance Company (OBLIC), a lawyers' professional liability insurance company. She has been with OBLIC for over 25 years. She has also served as Claims Counsel. Gretchen is a graduate of Capital University Law School. She received a Bachelor of Arts degree, *Summa Cum Laude*, from Capital University.

Gretchen has given presentations for law schools, Defense Research Institute, National Association of Bar Related Insurance Companies, American Bar Association, and Ohio State Bar Association as well as numerous Continuing Legal Education seminars. She is a member of the Columbus Bar Association, Ohio State Bar Association, American Bar Association, Ohio Association of Civil Trial Attorneys and the Defense Research Institute.

Gretchen currently serves on the Admission to the Bar Committee of the Columbus Bar Association and is past Chair of the Admission to the Bar Committee, Governmental Agencies Committee and Insurance Committee of the Columbus Bar Association. She is a mentor at Capital University Law School, the Moritz College of Law at the Ohio State University and the Ohio Supreme Court Lawyer to Lawyer Mentoring Program. She is a Past President of the Ohio Association of Civil Trial Attorneys and currently serves as Chair of the OACTA Women in the Law Committee. She has also served on the DRI Women's Sharing Success Seminar planning and marketing committees. She frequently writes for publications for lawyers on ethics and loss prevention topics.

Gretchen received the 2018 Josiah H. Blackmore Dean's Award from Capital University Law School at the Annual Alumni Luncheon recognizing her service to the law school.

Gretchen is a Past President of the Columbus Symphony Chorus, with which she continues to sing. Her musical avocation was featured in the article *Lawyers With Artistic License* in the **Columbus Bar Lawyers Quarterly**.

Gretchen is married to Scott R. Mote, Executive Director of the Ohio Lawyers' Assistance Program. They have one daughter, Elizabeth "Liz" Mote, a graduate of Capital University Law School, who is practicing law in Columbus, Ohio.

ETHICAL ISSUES FOR ESTATE PLANNERS

36th Annual Advanced Estate Planning Institute
Cincinnati Bar Association
February 8, 2019

Gretchen Koehler Mote, Esq.,
Director of Loss Prevention
Ohio Bar Liability Insurance Company

OHIO BAR LIABILITY INSURANCE CO.
PROBATE, ESTATE & TRUSTS: DO'S & DON'TS

DO	DON'T
✓ Keep up to date on the Local Rules for the Probate Court(s) where you practice. To find your local rules, click here.	✓ Don't assume all probate courts have the same local rules.
✓ Use the correct Probate Forms. Click here to view.	✓ Don't forget to check that you have the most current form.
DO	**DON'T**
✓ Always run a conflict of interest check before undertaking representation.	✓ Don't neglect conflicts of interest that may develop after representation is undertaken. Click here to read more.
✓ Be aware of Adult Guardianship Program requirements. Click here to read more. ✓ Follow procedures for legal fees.	✓ Don't forget to check with your local probate court for other court-approved courses. ✓ Don't take a fee without approval if it is required by the Court.
DO	**DON'T**
✓ Consider becoming a certified specialist in Estate Planning, Trust and Probate Law. Click here for information from the Ohio Supreme Court. Click here for information from the Ohio State Bar Association.	✓ Don't get in over your head in a complicated matter. Consider contacting an OSBA Certified Specialist in Estate Planning, Trust and Probate Law to assist! Click here to view OSBA Certified Specialists.

I. KEEP UP TO DATE ON LOCAL RULES FOR YOUR PROBATE COURT

You can access rules for Ohio Trial Courts and Local Rules on the website of the Supreme Court of Ohio. Rule 5 of the Rules of Superintendence for Ohio Courts requires each court to file with the Clerk of the Supreme Court a current copy of its local rules of court or a letter certifying that no changes have been made to the most recently submitted rules by Feb. 1 of each year.

Delaware County Probate Court Local Rules are effective January 3, 2018, as adopted by Judgment Entry filed January 3, 2018. These rules supersede prior rules of practice.

II. USE CORRECT PROBATE FORMS

Forms for the Probate Courts are usually included in the Local Rules. Delaware County includes a LOCAL FORMS INDEX at page 94 of the Local Rules.

- Don't try to use a form from another probate court in your case!
- Forms change! Be sure you are using the current form.

III. ALWAYS RUN A CONFLICTS CHECK

Conflicts of interest are increasingly a problem in probate cases. Keep conflicts in mind as the case develops. Click here to read more.

- Keep in mind: Who is my client?

IV. BE AWARE OF ADULT GUARDIANSHIP PROGRAM

Mandatory adult guardianship education is required by Superintendence Rules **66.06** and **66.07** , including a one-time fundamentals course and continuing education requirements for each following year. The Supreme Court of Ohio offers free courses to guardians of adults. The video library has many useful topics such as Adult Guardianship: Guardianship of the Estate – Participant Manual, Medications and Medical Advocacy and Government Benefits.

V. CONSIDER ISSUES WHEN REPRESENTING CLIENT WITH DIMINISHED CAPACITY

Ohio Rules of Professional Conduct
Rule 1.14 Client With Diminished Capacity

(a) When client's capacity

To make adequately considered decisions
In connection with a representation

Is diminished because of

Minority
Mental impairment
Some other reason

Lawyer shall – as far as *reasonably** possible – maintain normal lawyer-client relationship with the client

* "*Reasonably*" is a defined term in **Rule 1.0 Terminology**
(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(b) When lawyer *reasonably believes*** that the client has diminished capacity

Is at risk of substantial

Physical
Financial
Or other harm

Unless action is taken

And cannot adequately act in the client's own interest

The lawyer may take *reasonably** necessary protective action

Including consulting with individuals or entities that have the ability to take action to protect the client

And in appropriate cases, seeking the appointment of a

Guardian ad litem
Conservator
Guardian

"*Reasonably believes*" is a defined term in **Rule 1.0 Terminology
(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(c) Information related to the representation of a client with diminished capacity is protected by **Rule 1.6 Confidentiality of Information**

When taking protective action pursuant to division (b)

The lawyer is impliedly authorized under rule 1.6(a) to reveal information about the client

But only to the extent *reasonably** necessary to protect the client's interests

VI. LAWYERS ACTING AS TRUSTEES

Coverage is often the biggest question from lawyers acting as trustees. Before undertaking duties as a trustee, check whether there is malpractice coverage. Policies differ! READ YOUR POLICY! Fulfill the obligations when acting as a trustee of a trust. Don't be lax in administering the trust.

- Keep accurate accounting records.

  If a question arises from a beneficiary or other interested party, the inability to immediately respond with an explanation backed by adequate accounting records may lead to an inference that the trustee is hiding something nefarious or is unable to provide the information due to some defalcation of duty as a fiduciary for not maintaining accurate records.

- If a trustee is uncertain as to his/her duties as trustee under a trust, then it is often wise to seek advice from independent counsel.

  Obtaining such advice may help shield the trustee from claims of breach of duty by interested parties or assist in providing an explanation for the course of conduct followed by the trustee if questioned by interested parties.

- If the obligations of the trustee involve making decisions regarding financial matters or investments, then advice of an investment advisor should be obtained.

  There may be no coverage under the lawyers professional liability policy for claims made against a trustee or other fiduciary arising out of alleged failures to make appropriate investment decisions.

- See *Dueck v Clifton Club Co.,* 2017-Ohio-7161

  Lawyer for trustee may have duty to provide advice/information to beneficiaries as well.

VII. OTHER ISSUES TO AVOID

Other big causes of probate, estate and trust problrms are:

- Failure to obtain client's consent of to inform client. Communication remains paramount – especially when dealing with families and money!

- Inadequate discovery of facts or inadequate investigation. Don't assume the "facts" as given from a person's memory! Do the facts check to be sure!

- Fraud is another leading cause of claims in this area of law. Have adequate policies in place and consider fiduciary bonds as appropriate.

VIII. DON'T GET IN OVER YOUR HEAD

Failure to know or properly apply the law is a leading cause of probate, estate and trust claims. Planning or strategy errors are a second leading cause of probate, estate and trust claims. Consider becoming a Certified Specialist. Attorney Specialization Programs are offered by the Ohio State Bar Association in Elder Law and Estate Planning, Trust and Probate Law.

If you need assistance with a complicated matter consider contacting a Certified Elder Law Specialist or an Estate Planning, Trust and Probate Law Specialist.

IX. TAKEAWAYS…

Probate isn't an area for "dabblers"! There's so much more than "filling out forms." And while you may be representing the estates of deceased persons, the beneficiaries certainly aren't dead! You will need to keep them informed and know the nuances of the law to correctly administer the estate.

If you have questions, ASK for assistance from experienced lawyers who practice in the area. Check with your Probate Court to be sure you are following the procedures according to the local rules.

X. SPEAKER CONTACT INFORMATION

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