Cincinnati Bar Association

Your trusted local source for quality CLE.

28th Annual
Basic Estate Planning & Probate Institute

Presented by the CBA Estate Planning & Probate Group

Friday, November 16, 2018

28th Annual Basic Estate Planning & Probate Institute

November 16, 2018

12:30 p.m.	**Registration, Networking & Complimentary Lunch**	
1 p.m.	**Hamilton County Probate Court Update** Judge Ralph E. Winkler and Magistrate Paul D. Rattermann	**TAB A**
2 p.m.	**Tax Reform Update & Advice for Interacting with Financial & Tax Advisors**	**TAB B**
Panelists:	John R. Brinker, Esq., *Law Office of Jay Brinker* Kyle McLaughlin, CFP, CLU, ChFC, *Morgan Stanley* Tony Schweier, CPA, *Clark Schaefer Hackett*	
3 p.m.	**Break**	
3:15 p.m.	**Fiduciary Real Estate Transactions** G. Robert Hines, Esq.	**TAB C**
3:45 p.m.	**Attorney Conduct in the Probate World: Understanding Changes In Ohio's IOLTA Laws Regarding Estate Funds – and *Robertson*** Audra Loomis, Esq., *Frost Brown Todd LLC* Edwin W. Patterson, III, Esq., *General Counsel, Cincinnati Bar Assoc.* Vincent Salinas, Esq., *Law Office of Vincent Salinas*	**TAB D**
4:45 p.m.	**Adjourn**	

TAB
A

Paul D. Rattermann is the Chief Magistrate of the Hamilton County Probate Court. Before joining the Court in 2003, he was in private practice for 17 years and was a partner in the firm of Statman, Harris and Eyrich. His practice concentrated in probate administration, estate planning and credit union law. He is a 1985 graduate of the University of Cincinnati College of Law. He is a member of the Ohio and Cincinnati Bar Associations and the Ohio Association of Magistrates.

Judge Ralph E. Winkler is a lifelong resident of Cincinnati, Ohio. He graduated from The University of Cincinnati in 1983, majoring in Business Administration. From 1983 to 1987 he attended the Salmon P. Chase College of Law at Northern Kentucky University. While in law school, Judge Winkler worked full-time as a law clerk for Judge Donald Schott in the Hamilton County Court of Common Pleas. After passing the Bar Exam and gaining admittance to the Ohio Bar in 1987, Judge Winkler worked as an Assistant County Prosecutor and a Private Lawyer until he was appointed by the Governor of Ohio to serve as a Judge on the Hamilton County Municipal Court in 1999. In November of 1999, he was elected to a six-year term in the Hamilton County Municipal Court. In 2004, he was elected to the Hamilton County Court of Common Pleas and was re-elected for a second term in 2010. In November of 2014, he was elected Probate Judge in Hamilton County.

As a judge for over 17 years, he has presided over 35,000 cases, giving him a wide variety of great experience. He feels blessed to have a job he loves and looks forward to what each new day brings.

Judge Winkler received his diploma in Judicial Skills from the American Academy of Judicial Education in 2004 and in 2008 was named Trial Judge of the Year by Hamilton County Trial Lawyers Association. He has served as Adjunct Professor at The University Cincinnati College of Law. He is married to Tracy Winkler, Hamilton County Clerk of Courts, and has three daughters: Allison, Andrea and Allayna. He also has six grandchildren: Ava, Harrison, Lincoln, Finley, Claire and Edison.

BASIC ESTATE PLANNING INSTITUTE

November 16, 2018

Hamilton County Probate Court Update

Judge Ralph Winkler
Chief Magistrate Paul D Rattermann
230 E. Ninth Street, 10th Floor
Cincinnati, Ohio 45202

A. LIST OF JUDGE'S HEARINGS

This a list of the hearings that Judge Winkler currently conducts. Please note that some of the following types of hearings may also be heard by a magistrate on occasion.

HEARINGS HEARD SOLELY BY JUDGE WINKLER

1. Objections to Magistrate's Decisions and Magistrate's Orders
2. Attorney fee applications over guidelines (Local Rule 71.1(H) permits the assigned Magistrate to consider if consents are obtained)
3. Extraordinary fiduciary fee applications
4. Motions to seal the entire or a portion of the court record in a case (Local Rule 57.2) Also, Motions to unseal (Local Rule 57.3)
5. Motions to unseal a civil commitment record
6. Motions to approve attorney fees exceeding $20,000 in guardianships or trusts (Local Rule 66.1(B)(3) and 74.2(B))
7. Applications to designate heirs at law
8. Applications to admit lost wills
9. Applications to admit non-conforming documents after interlocutory orders denying probate are issued
10. Jury trials and formal pretrials on cases assigned to Judge
11. Applications to complete marriage licenses
12. Name Change applications where applicant seeks to waive publication
13. Agency Adoption petitions

HEARINGS HEARD BY JUDGE WINKLER OR THE MAGISTRATES

In addition to the above, Judge Winkler also hears certain types of hearings which are also heard by the magistrates. These cases are assigned to the Judge and magistrates on a round-robin basis. These include:

1. Adult and minor name changes
2. Guardianships of the person of adults and minors

3. Minor settlements
4. Sales and transfers of structured settlements
5. Adult adoptions and step-parent adoptions.
6. Disinterments and disposition of remains
7. Sundry civil cases (e.g. declaratory judgement actions, trust modification actions).

B. RECENT CHANGES IN PROCEDURE

1. E-Filing is now available for all case types. The Court now accepts funds and filings electronically via the internet.

The web address for e-filing is:

https://efile.probatect.org/

In connection with the initiation of the Court's e-filing system, new Local Rule 57.6 Internet Electronic Filings was adopted and went into effect on May 1, 2017.

Note: Certain types of pleadings cannot be e-filed per the Local Rules. See Local Rule 57.6 (4) & (5). Also, the e-filing system currently can only be used by counsel and not by the pro se public.

2. On June 15, 2018 the Court adopted amendments to Local Rule 57.6 which now permits the Court to accept filings commencing new cases, including the collection of case deposits. That amendment also narrows the list pf pleadings which can not be e-filed.

Of particular importance is the amendment to L.R. 57.6 (5) which adds a provision permitting the e-filing of new testate estates with the Court if certain procedures are followed. Specifically, a pdf copy of the executed will must be e-filed together with the other pleadings opening the estate. The Court will then provisionally accept that copy of the will if the legal requirements to admit the will seem to have been met. Thereafter, the sending party must submit the original will via mail, express delivery, or in person within 5 business days of the electronic filing. If the original is not timely received by the Court, the case will be dismissed.

3 The Court continues to refer cases to mediation under Civil Rule 31. This procedure has proven effective in resolving disputes in an efficient manner. Mediation has been successfully used in disputes ranging from exceptions to inventories and accounts to contested guardianship matters.

As part of the program, the Court will pay for first four hours of mediation at the rate of $225 per hour (for a maximum total of $900). Any additional costs of the mediation is the responsibility of the parties. If the mediation fails and the matter proceeds to trial, the Court may assess the mediation expense it paid as costs to the party that does not prevail.

4 HB 223 went into effect on March 23, 2018. That bill changes certain requirements for the sales of structured settlements requiring approval by the Probate Court. Under the provisions of the new statutes (R.C. 2323.58-.587), the applicant is now the transferee of the proceeds as opposed to the transferor. Additionally, the Court no longer needs to make a lengthy list of "express findings" in its order granting the application and needs only find that the proposed transaction is in the "best interest" of the transferor as approved to being a "fair and responsible" transaction. The transferor must now also list any prior applications to transfer settlement proceeds which were filed previously allowed by the Court.

5. HB 432 became effective on April 4, 2017. Some notable changes were made in that bill:
   a. A spouse is now entitled to receive any number of automobiles with a maximum aggregate value of $65,000. R.C. 2106.18 previously limited the number of automobiles to two with a maximum value of $40,000.
   b. The family allowance for support under R.C. 2106.13 was also amended to allow a spouse to receive an unlimited number of automobiles. As a result of these changes, Form 8.3 Summary of General Rights of Surviving Spouse, Form 6.0 Inventory and Appraisal, and Form 5.1 Assets and Liabilities of Estate to be Relieved From Administration were modified.
   c. Consents to Sell Real Estate maybe be filed in guardianship cases to avoid Sales Cases. R.C. 2127.012 was enacted permitting a guardian to sell real estate owned by his ward if all next of kin listed on Form 15.0 sign a Consent to Power to Sell Real Estate (Form 11.10). The Court requires all persons on the Form 15.0 to sign the consent regardless of where they live. Restrictions also exist on the sale price similar to Consents to Sell utilized in decedent estate cases.
   d. Wills placed on deposit with the Court may be disposed of by the Court after 100 years has passed since the will was deposited. R.C. 2107.07. An electronic copy of the will must be retained prior to its disposal.

C. NEW FORMS

Changes were also made to various pre-existing probate forms by the Court. These forms include:

LIST OF REVISED DOCUMENTS

Form 624.00 Application for Registration of Birth
Form 623.04 Decision of Magistrate
Form 623.03 Order to Register Birth

D. FORM 1.0 SURVIVING SPOUSE, CHILDREN, NEXT OF KIN, LEGATEES AND DEVISEES

A power point display of Form 1.0's filed with the Court will be displayed at the seminar. Discussion will be held on issues presented by these filed pleadings.

E. PROBATE PRACTICE POINTERS

1. When filing any type of account (partial or final) in a decedent estate case for individuals dying on or after January 1, 2002, you must file a Form 13.9 Certificate of Service of Account to Heirs and Beneficiaries.

2. When filing a partial account in a decedent's estate case for those dying on or after January 1, 2002, you must also a Form 13.81 Application for Additional Extension to Administer Estate. The assigned magistrate must consider this application and if granted, will set a new date for the final account to be filed.

3. Remember to type or print the name of the person signing a waiver or consent. This will help the Court ascertain who actually signed the document in cases where the signature is illegible.

4. A testate estate can not be closed until after three months of the filing of the Form 2.4 Certificate of Service of Notice of Probate of Will. This requirement can be waived if all next of kin and beneficiaries named in the will sign H.C. Form 102.42 Waiver of Right to Contest Will.

5. Certificates of Transfer (Form 12.1) can not be issued until after the Inventory for the estate filed and approved. (Note: exceptions to the requirement of approving the Inventory are made where the sole beneficiary of the estate is the fiduciary and\or has waived notice of the hearing on the Inventory).

6. The Court will generally allow the issuance of a Certificate of Transfer during the three month will contest period. However, caution should be exercised in cases where a will contest is likely to be filed. In such instances, the Certificate of Transfer may have to be reversed.

7. Please use blue ink when having a testator sign a will. The witnesses should also use blue ink. This helps identify the original versus a copy.

8. Make sure you use the correct case number on pleadings which are filed.

9. For extra "brownie points", please place the waivers and consents in the order which mirrors how the names are found on the Form 1.0 List of Spouse, Children, Next of Kin. This is especially helpful with large groups of persons included on that form.

10. In lost will cases, it is required that a transcript of the hearing be obtained and be attached to the Entry Admitting Lost Will. Use Form 200.30 to order the transcript.

11. The cashier window closes at 3:45 pm to allow staff to balance the cash drawers at the end of the day. Please avoid filing pleadings near or after that time.

12. In adoption cases, the homestudy must be filed no later than 10 days before the hearing is scheduled to be heard. It is incumbent upon counsel to verify that the homestudy has been timely filed with the Court.

13. Once a citation to appear at the citation docket has been issued; it is too late to request a continuance for filing the document which is overdue. All continuance requests must be made before the citation is issued. The citations are issued early in the month following the month when the "pink card" notice is issued.

14. In minor settlement cases, it is required that the minor attend the hearing (unless waived by the Court). If a parent is seeking a portion of the settlement to compensate themselves (e.g. for lost wages, insurance co-pays, loss of society, etc), the Court may appoint a guardian ad litem for the minor.

15. In estate administration cases where a Representation of Insolvency is filed, a separate Application to Approve Attorney Fees should also be filed at the same time. Both matters will be set for hearing on the same date and notice of both hearings can be sent together to all interested parties.

16. In decedent estate cases involving persons who died after January 1, 2002, the fiduciary of the estate is NOT discharged immediately upon approval of the final account. Discharge occurs one year after approval. R.C. 2109.301. Therefore, do not check the box on Form 13.3 Entry Approving Account which states "Fiduciary discharged herewith" in these cases.

17. The Court requires the filing of a Guardian's Report (Form 17.7) every two years. This requirement applies in all adult guardianship cases including those where the ward is in a static condition (e.g. intellectual disability, traumatic brain injury, coma, etc.). A hearing must be held to waive this requirement.

18. In testate estates where a living trust is a beneficiary, the trust document (and all amendments) must be presented to the Court to verify the existence of the trust and identity of the trustee. The trust is not to be filed. Ideally, the trust should be presented when the estate is opened or, at the latest, when the inventory is filed.
19. A Certificate of Fee Agreement (H.C. Form 210.09) must be signed by both the fiduciary and attorney. The form must be filed with the Court no later than when the inventory is filed. The Fee Agreement itself does not need to be attached to the form.

20. When filing an application to approve attorney fees, please attach your time records to the application. Make sure that the total number of hours spent are included on the time records. This will save the Court from having to manually add up each separate time entry.

21. If a hearing needs to be continued before the date it was originally set for hearing, use Entry Resetting Hearing (Form 230.01). If the matter needs to be continued on the date of the hearing, use Entry Continuing Hearing (Form 230.00). Also, counsel should confer with the opposing side to obtain a list of possible dates for the continuation/reset date.

22. A waiver of, or proof of service of notice of, the hearing on the inventory must be filed for each person listed on Standard Probate Form 1.0. But service by publication of notice of admission of the will to probate, or of the application to administer, is sufficient for a person whose address is unknown.

23. Two waivers or proofs of service of notice are required for the surviving spouse to sign in connection with the inventory: (1) notice of the taking of the inventory; and (2) notice of the hearing on the inventory.

24. On a relief from administration, attach a copy of the paid funeral bill and indicate who, if anyone, is seeking reimbursement therefor.

25. On a summary release from administration, the only person entitled to recoup the prepayment of funeral and burial expenses is a surviving spouse. If the expenses were prepaid by someone else,

the estate must go through a regular relief from administration in order for that person to be reimbursed.

26. The court will not approve the account of a fiduciary which shows a distribution of the decedent's property in a manner other than as specified in the will, even if all other beneficiaries have consented.

27. Administrators and Commissioners must be Ohio residents.

28. On hearings to appoint a guardian of a minor, it is required that the minor attend the hearing. This requirement can be waived by the Court in unusual circumstances.

29. In cases where notice must be provided to a minor, it is required that 16 and 17 year olds be served. The parent of a 16 or 17 year old may not sign a waiver on their behalf per Civ.R 4.

30. If a codicil is an original; but the will is a copy, a motion to admit the lost will is still required to be filed.

31. The anti-lapse statute applies in estates where a child, sibling, or other next of kin predeceases the decedent leaving issue. The issue would receive what their deceased ancestor would have received had she/he survived the decedent.

TAB
B

John R. (Jay) Brinker, Esq.

Jay Brinker has been in solo practice for25 years. He focuses his practice in estate planning, probate, asset protection, and small business planning.

Jay blogs on celebrity and other newsworthy wills and estates matters. He also is a frequent guest writer for Paul Daugherty's The Morning Line blog in the Cincinnati Enquirer.

The topics of his previous presentations for the CBA include celebrity estate planning news, technology for solo practitioners, the practice of estate planning as a sole practitioner, and a summary of the Notre Dame Estate Planning and Tax Institute.

Jay is a graduate of the University of Cincinnati and Notre Dame Law School.

Kyle McLaughlin

Kyle leads the McLaughlin Wealth Management Group at Morgan Stanley. Kyle joined Morgan Stanley in 2013 and has 26 years of experience in the financial services industry. He is a cum laude graduate of Xavier University with a degree in Economics. Kyle holds FINRA series 7, 65, 63 licenses, CLU® and ChFC® designations, and is a Certified Financial Planner™. Kyle specializes in advising equity-compensated individuals and closely-held business owners on asset management, retirement planning, risk management, legacy planning, and other significant life events. Kyle and his team manage approximately $340 million dollars for individuals and corporations across the United States.

Kyle is active with many charitable organizations, especially The Cure Starts Now. He enjoys golf, travel, and supporting the Xavier Musketeers. He is married with seven children, resides in Hyde Park, and is a member of Cincinnati Country Club.

CLARK SCHAEFER HACKETT
CPAs & ADVISORS

Tony Schweier
Shareholder

Tax Services

PRACTICE SUMMARY:
Tony Schweier specializes in corporate and individual taxation and has been designated by the firm as the primary S Corporation tax resource. Additional areas of expertise include projection and forecasting of financial statements, business mergers and acquisitions as well as strategic planning. Owners of privately-held businesses appreciate that Tony is experienced in the challenges faced by family-owned companies. From start-up to the eventual generational transition or sale, Tony has guided a long list of clients, positioning their organizations to protect owner wealth and maintain company strength.

Tony was recognized as the 2015 recipient of the "Keith Baldwin Volunteer of the Year" award by the University of Cincinnati's Goering Center for Family & Private Business, and was a facilitator for the USA Regional Chamber's Strategic 8 process. He also serves as a frequent advisor and expert witness for various law firms.

EDUCATION:
BSBA, Accounting, Miami University

CERTIFICATIONS:
CPA – States of Ohio and Kentucky
CEPA – Certified Exit Planning Advisor

PROFESSIONAL AFFILIATIONS:
Ohio Society of Certified Public Accountants
American Institute of Certified Public Accountants

COMMUNITY ACTIVITIES:
Western Golf Association, Director
Ken Anderson Foundation, Board Member
BGR Inc, Advisory Board Member
Risk Source/Clark-Theders, Advisory Board Member
Centennial Inc, Advisory Board Member
Goering Center for Family Business, Board of Directors & Past Chair of the Board of Advisors
Cincinnati Metropolitan Housing Authority, Two terms on the Board of Commissioners

HONORS:
2015 "Keith Baldwin Volunteer of the Year" Award - University of Cincinnati's Goering Center for Family & Private Business
Cincinnati Business Courier "Forty Under 40"
Beta Alpha Psi (national accounting honorary society)

TAX PRESENTATION

The Impact of
Tax Cuts and Jobs Act (TCJA)

CLARK SCHAEFER HACKETT
CPAs & Advisors

1

Temporary Provisions

It is important to note that the Tax Cuts and Jobs Act has sunset dates on many of its provisions. Most sunset at the end of 2025.

2

Estate And Generation-Skipping Transfer Taxes

The TCJA increases the federal estate, GST and gift tax unified credit basic exclusion amount to $10,000,000 effective in 2018 and adjusts the amount for inflation.

The TCJA does not repeal the estate tax or the GST.

The exclusion amounts revert to 2017 amounts after December 31, 2025.

3

New Corporate Tax Rate

The TCJA changes the “C” corporate tax rate to a flat 21%.

Corporate AMT is repealed.

4

Change in Entity Structure?

A variety of factors affect the decision by an individual to hold a business as a corporation or a partnership (or other flow-through entity) including (i) the fact that the income of a corporation is taxed twice (once at the corporate level and then again upon a distribution by the corporation or a sale of the stock of the corporation), (ii) the relative tax rates imposed on various types of income received by corporations and individuals, (iii) the fact that it is generally not possible to remove appreciated assets from a corporation without triggering tax on those assets, (iv) the tax consequences resulting from a sale of the business, (v) the application of employment-related taxes and the so-called Medicare tax under Section 1411, and (vi) the possibility of future changes in law (including tax rates).

Our expectation is that these changes in rates will not fundamentally change an individual's determination in deciding whether to hold a business as a corporation or a partnership (or other flow-through entity).

5

S Corporation vs C Corporation			
	S Corporation		C Corporation
Taxable Income	$ 1,000,000		$ 1,000,000
State and Local Income Tax Non-Deductible	$ 45,000		$ -
	$ 1,045,000		$ 1,000,000
199A Deduction	$ 200,000		$ -
	$ 845,000		$ 1,000,000
Federal Tax at 37%	$ 312,650		
Federal Tax at 21%			$ 210,000
Federal Tax on Ordinary Dividend (20%)	$ -		$ 158,000
Federal Tax for ACA(3.8%)	$ -		$ 30,020
Projected after tax Cash Flow	$ 642,350		$ 601,980
Effective Tax Rate	35.77%		39.80%
NOTE: Your stock basis is increased by undistributed S corporation earnings but not if you own a C corporation.			

6

Small Business Deduction Limitation

Threshold amount means $315,000 if filing joint (157,500 single) of taxable income. If you are below the threshold you get the deduction without limitation.

If you are over the threshold the deduction phases out for certain specified businesses.

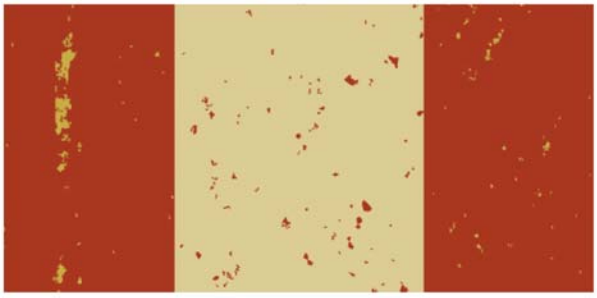
7

The specified businesses are –

Any trade or business involving the performance of services in the files of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees.

8

Tax Rate Structure For Small Businesses



The law provides a 20% deduction for the qualified business income of pass-through entities. The deduction is limited to the lesser of 20% of qualified business income or 1) 50% of W-2 wages paid or 2) 25% of W-2 wages paid plus 2.5%of unadjusted basis of all qualified property.

9

Operating Trade or Business		
Impact of Tax Cuts and Jobs Act		
	Current Law 2017	20% Rule Tax Law 2018 2018
S Corporation Income (using projected taxable income from year end planning)	$ 4,000,000	$ 4,000,000
Pass Through Deduction	0	$ (800,000)
Taxable Income	$ 4,000,000	$ 3,200,000
Income Tax (highest marginal rate 39.6% in 2017; 37% in 2018)	$ 1,584,000	$ 1,184,000
Net Investment Income Tax	$ -	$ -
Federal Tax Savings from State and local income tax deduction	$ (71,280)	$ -
State Tax on income (assumed 4.5% rate for all states combined)	$ 180,000	$ 180,000
Total Tax under 2018 Tax Law		**$ 1,364,000**
Total Tax under 2017 Tax Law	**$ 1,692,720**	
Savings under new tax law		$ 328,720

10

Real Estate Business with Income		
Impact of Tax Cuts and Jobs Act		
		20% Rule
	Current Law	Tax Law 2018
	2017	2018
Partnership Income (using projected taxable income from year end planning)	$ 750,000	$ 750,000
Pass Through Deduction	0	$ (150,000)
Taxable Income	$ 750,000	$ 600,000
Income Tax (highest marginal rate 39.6% in 2017; 37% in 2018)	$ 297,000	$ 222,000
Net Investment Income Tax	$ -	$ -
Federal Tax Savings from State and local income tax deduction	$ (13,365)	$ -
State Tax on income (assumed 4.5% rate for all states combined)	$ 33,750	$ 33,750
Total Tax under 2018 Tax Law		**$ 255,750**
Total Tax under 2017 Tax Law	**$ 317,385**	
Savings under new tax law		$ 61,635

11

The Tax Cuts and Jobs Act allows business to immediately write off (or “expense”) the cost of new investments in depreciable assets other than structures made after September 27, 2017, for the next five years. This policy represents an unprecedented level of expensing with respect to the duration and scope of eligible assets.

“Expensing” of Capital Investments

12

The law on immediate expensing has an interplay with the new interest expense limitation rules. If a real estate business wants to avoid being subject to the interest expense limitation rules then it makes an election to do so and in making such an election the business gives up the ability to immediately expense assets.

Limitations on Immediate Expensing

13

Interest Expense

The TCJA will limit the deduction for net interest expense incurred by a business to 30% of its adjusted taxable income. (This provision excludes dealerships or companies with less than $25 million in annual revenue or electing real estate business.)

For next four years adjusted taxable income means EBITDA calculated on an income tax basis and in year five and after that EBIT calculated on an income tax basis.

14

Interest Expense

The TCJA provides that all disallowed interest will be carried forward indefinitely and treated as interest expense in succeeding taxable years.

15

Electing Real Property Trade or Business

An electing real property trade or business is a business engaged in real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing or brokerage.

Why is this distinction important?

If a real property trade or business makes the election out of the interest expense limitation rule then it cannot use the immediate expensing rules and in fact has to depreciate its assets over longer ADS depreciable lines.

16

Under New Section 461(2) the “excess business loss” of any individual for any taxable year is disallowed and treated as a net operating loss carryover to the following taxable year.

Excess business loss is $250,000 (single) or $500,000 (joint) applied at the individual level.

New Loss Limitation Rule

17

The TCJA disallows deductions for entertainment, amusement or recreation activities under all circumstances. It would also disallow transportation fringe benefits, benefits in form of on-premises gym/athletic facilities or for any personal amenities not directly related to employer’s trade or business.

Entertainment Expenses

18

Meals and Entertainment Changes Under Tax Reform

	2017 Expenses (Old Rules)	2018 Expenses (New Rules)
Office Holiday Parties	100% Deductible	100% Deductible
Entertaining Clients	50% Deductible	Meals – 50% deductible
	Event tickets, 50% deductible for face value of ticket; anything above face value is non-deductible Tickets to qualified charitable events are 100% deductible	No deduction for entertainment expenses
Employee Travel Meals	50% Deductible	50% Deductible
Meals Provided for Convenience of Employer	100% deductible provided they are excludible from employees' gross income as de minimis fringe beneftis; otherwise, 50% deductible	50% Deductible (nondeductible after 2025)

19

Various Credits

The TCJA retains the Work Opportunity Tax Credit (WOTC).

The TCJA retains the R & D tax credit.

The TCJA retains the low income housing tax credit.

20

The TCJA repeals IRC § 708(b)(7)(B) “Technical Termination“ rule.

Now if there is a more than 50% change of ownership the partnership is deemed to continue.

Partnership Technical Termination Repeal

21

Individual Tax Rate Structure

Under current law, taxable income is subject to seven tax brackets. The TCJA retains seven brackets but the top rate is now 37% not 39.6%.

22

Like-Kind Exchanges

The TCJA limits deferral of gain on Like-Kind Exchanges to real property that is not held primarily for sale.

23

Tax Rules Affecting Specific Industries

Special tax regimes exist to govern the tax treatment of certain industries and sectors. The framework will modernize these rules to ensure that the tax code better reflects economic reality and that such rules provide little opportunity for tax avoidance.

24

Individual Income Tax Rates

Current Law for 2018 Tax Year Married Couples Filing Jointly			Tax Cuts and Jobs Act Married Couples Filing Jointly		
Ordinary Income Tax Rate	Taxable Income over ($)	But not more than ($)	Ordinary Income Tax Rate	Taxable Income over ($)	But not more than ($)
10.0%	--	19,050	10.0%	--	19,050
15.0%	19,050	77,400	12.0%	19,050	77,400
25.0%	77,400	156,150	22.0%	77,400	165,000
28.0%	156,150	237,950	24.0%	165,000	315,000
33.0%	237,950	424,950	32.0%	315,000	400,000
35.0%	424,950	480,050	35.0%	400,000	600,000
39.6%	480,050		37.0%	600,000	

23

Standard Deduction And Personal Exemptions

- Increase standard deduction to $24,000 (MFJ) from projected $13,000
- Increase standard deduction to $12,000 (Single) from projected $6,500
- Repeal deduction for personal exemptions. Currently $4,050 for taxpayer, spouse and dependents.

24

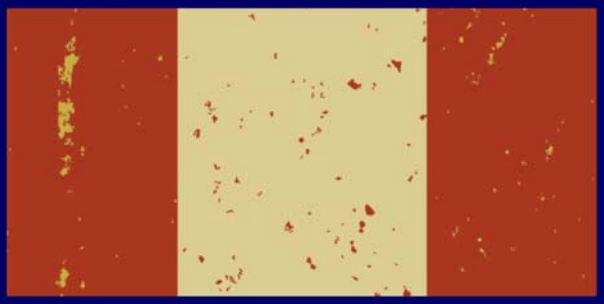
- Retroactive 7.5% of AGI floor for medical expense deduction through 2018, regardless of age
- Limit deduction for state and local taxes to $10,000 (MFJ). Combines real property taxes, personal property taxes, income taxes and sales taxes (if elected)
- Limit mortgage interest deduction on loans up to $750,000 (MFJ). Debt incurred before 12/15/17 is grandfathered and subject to $1,000,000 limitation.

Itemized Deductions

25

Itemized Deductions

- Suspend the deduction for interest on home equity indebtedness for tax years 2018 through 2025.
- Increase AGI limitation for cash charitable contributions from 50% of AGI to 60% of AGI.
- Repeal deduction for contributions to higher education institutions if related to right to purchase tickets or seating at an athletic event.



Itemized Deductions

- Suspend deduction for personal casualty losses, except for federally-declared disasters
- Suspend the deduction for miscellaneous itemized deductions that are subject to the 2% AGI floor
- Suspend 3% limitation on itemized deductions for taxpayers with AGI over threshold amount (Pease limitation)

27

Alternative Minimum Tax

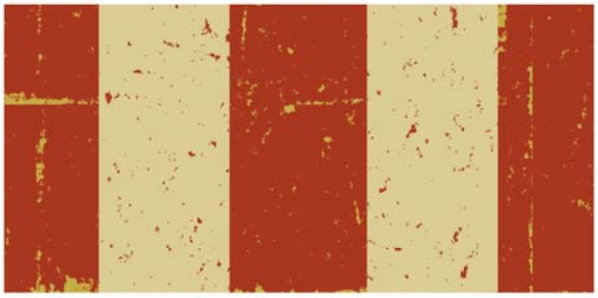
- Retain the individual alternative minimum tax (AMT)
- Increase the AMT exemption amount for individuals to $109,400 (MFJ) and $70,300 (Single)
- Increase AMT phase out threshold from $164,100 to $1,000,000 (MFJ)
- No change to exemption amount and phase out amount for trusts and estates

28

Other Provisions

- Increase child tax credit from $1,000 to $2,000 for each qualifying child (phased-out based on modified AGI). Increase AGI phase-out from $110,000 to $400,000 for joint filers.
- Temporarily provide a $500 nonrefundable credit for dependents other than qualifying children.
- Repeal deduction for alimony payments for payor spouse and no income inclusion for the payee spouse. Effective for any divorce or separation agreement executed after December 31, 2018.

29



Other Provisions

- Repeal of special rule permitting recharacterization of IRA contributions
  - Repeal rule that allows taxpayers to recharacterize a contribution to a traditional IRA as a contribution to a Roth IRA, or vice versa
  - Repeal rule that permits taxpayers to recharacterize a conversion of a traditional IRA to a Roth IRA.
  - Effective for tax years beginning after December 31, 2017

30

Other Provisions

- Suspend deduction for moving expenses incurred in connection with a new job. Benefit is maintained for members of the armed services.
- Suspend the exclusion from employee's income for qualified moving expense reimbursements provided by an employer. Exception provided for active duty military.
- Elementary and high school expenses of up to $10,000 per year would be qualified expenses for Sec. 529 plans.

31

Basic Estate Planning Institute – Cincinnati Bar Association
Tax Considerations in Estate Planning Panel

Estate planning may minimize transfer taxes, maximize the benefits of giving to charity, and allow the retention of some control over gifted property. Which estate planning strategies are employed (and when) depends on one's particular circumstances, priorities and goals. Financial Planners work in collaboration with counsel from attorneys and CPAS to consider: Gift Tax, Estate Tax, Generation Skipping Transfer Tax.

Estate Planning Process

- First and foremost, financial planners cannot offer legal or tax advice. They partner with attorneys and CPAs when developing an estate plan.
- Wills, Revocable Living Trusts, etc. are usually addressed first by a client's attorney.
- Individuals expecting to have an estate in excess of the federal estate tax exemption amount often consider making gifts because a lifetime gift removes the asset and any of its future appreciation from the total estate of the donor. This potentially minimizes the total estate and gift tax. This decision is again made in consultation with the attorney or CPA.
- Leveraged gifts (like a Grantor Retained Annuity Trust) can be used to attempt to transfer assets in excess of the exclusions from, and credits against, the transfer tax (or where the donor wants to preserve the exclusions and/or credits for later use). Individuals not interested in keeping control can make outright gifts.

Financial Planning

Sophisticated modeling is now available to create financial plans for clients. The modeling can offer different scenarios depending upon personal factors like age of retirement, standard of living, dreams, and goals. Current tax law is built into the program to determine social security benefits, tax rate on assets, etc.

Bottom line: Tax law is always changing and evolving. We, as financial planners, stay educated and current so we can have meaningful conversations with clients, their attorneys and their CPAS as we plan for client futures. Tax considerations are a cornerstone to the planning. To that end, we work actively to develop partnerships with estate planning professionals to better serve our clients.

TAB
C

G. Robert Hines

G. Robert Hines is an attorney practicing in Cincinnati, Ohio with an emphasis in commercial law, real estate law, title insurance law and probate and estate planning. He is a member of the Ohio State Bar Association, Cincinnati Bar Association, Ohio Land Title Association and Southwestern Ohio Land Title Association. He has maintained a solo practice for over 40 years and has been a licensed title insurance agent for over 29 years. Bob was the recipient of the Cincinnati Bar Association Real Property Practitioner of the Year Award in 2012.

FIDUCIARY REAL ESTATE TRANSACTIONS

Cincinnati Bar Association
28th Annual Basic Estate Planning & Probate Institute
November 16, 2018

G. Robert Hines, Esq.

I. TITLE TO DECEDENT'S REAL ESTATE

A. Vesting of Title.

A decedent's interest in real estate vests in the decedent's heirs or devisees immediately upon the decedent's death. Title cannot be held in abeyance. The source of title of decedent's real estate passing to his devisees or heirs is his will, once admitted to probate, or the laws of intestate succession.

NOTE: Errors or omissions in the Certificate of Transfer do not affect the title to real estate, unless such errors are such as to cause future difficulties in obtaining a transfer through the Auditor's Office or unless such error raises a reasonable doubt of the facts of ownership as shown in title documents. See Standards of Title Examination, Section 5.3A.

B. Title is conditional.

The vesting of real estate in the heirs or devisees of the decedent is not absolute, but conditional. Title to real estate passes to the heirs or devisees subject to divestment. For instance, if there is not sufficient personal property to pay the debts of the decedent, the property shall be sold. Likewise, the will may confer a power of sale upon an executor for the payment of debts, or otherwise. In both instances, the heirs' or devisees' interest in the decedent's real estate will be automatically divested as a result of a valid land sale in probate court. The vesting of real estate in the heirs or devisees may also be conditional upon the right of the surviving spouse to purchase the mansion house or other real estate, if not specifically devised by the decedent. Also, her right to elect to receive the mansion house or elect to take against the will divest other heirs of their interest. In all of these instances, the title that was conditionally vested in the heirs or devisees is divested by operation of law.

NOTE: Normally, a valid power of sale to pay debts is superior to a specific devisee. However, a specific devisee may have a right to object to the executor's sale of the real estate. A quit claim deed or consent to sell should be obtained.

NOTE: A previously issued Certificate of Transfer does not necessarily preclude Executor from selling real estate if it is later determined it is necessary to sell the real estate to pay debts. A hearing to vacate entry issuing certificate of transfer will require notice to or consent by devisees.

NOTE: Hamilton County Probate Court has adopted the creative concept of approving a fiduciary's "abandonment" of an interest in real estate being administered that is deemed to be not "saleable" by the fiduciary as a result of either its physical condition or its lack of equity because of valid encumbrances. There is no statutory or common law authority to support the concept of a right to "abandon" and it is of no legal consequence. It appears to be created out of an administrative necessity because certain troubled real estate in an estate administration cannot be sold and the secured parties are not proceeding to foreclosure. It would seem that a cleaner procedure to dispose of troubled real estate in an estate administration would be to have the court order that the real estate be distributed in accordance with either the Will or the statute of descent and distribution, as the case may be, to those distributees (who have not disclaimed that interest) by a Certificate of Transfer, subject, however, to any unpaid secured and unsecured creditors' claims, administration expenses and estate taxes, if any. Again, title is not held in abeyance and it vests where it vests by operation of law. Local housing code violations, both civil and criminal penalties, and civil liability imputed to the legal owner for the condition of the real estate should be a major concern to devisees and next-of-kin who do not disclaim title to such problem real estate.

C. Descent and Distribution.

Descent means the legal transfer of title to real estate not disposed of by will upon the death of an owner to his heirs. Real estate passes in parcenary by operation of law to those next-of-kin or other distributees (stepchildren or their lineal descendants or the State of Ohio by escheatment) according to O.R.C. Section 2105.06, which states:

> "When a person dies intestate having title or right to any personal property, or to any real property or inheritance, in this state, **the personal property shall be distributed, and the real property or inheritance shall descend and pass in parcenary,** except as otherwise provided by law, in the following course:"

Administration is not essential to the vesting of title to real estate in the heirs. It may be necessary, within the period of the statute of limitations, to establish the proper payment of any estate taxes (10 years) or the claims of creditors (4 years). The names of the heirs and the facts related to such inheritance are ordinarily ascertained by administration proceedings, but they may be alternatively evidenced by a Certificate of Transfer (O.R.C. Section 2113.61 (D)) or an "Affidavit of Descent" (O.R.C. Section 317.22) without administration. The overriding issue is whether that record title which evidences the "title transaction" upon the death of the deceased owner provides insurable facts, verified by a person with sufficient personal knowledge to an insurable certainty, without the prosecution of a determination of heirship action, which would extinguish the legal interests, if any, of any "unknown heirs" of the decedent. The legal interests of those "unknown heirs" otherwise survive unless and until extinguished by adverse possession. A legal interest held by an "unknown heir" is not a "latent equity" that would be cut off by a sale to a bona fide purchaser taking title for value without notice of that interest.

D. Ohio's Uniform Simultaneous Death Act.

Effective May 16, 2002, Ohio adopted the Uniform Simultaneous Death Act which, among other things, repealed O.R.C. Section 2105.21, which previously required that a surviving spouse, other heir at law, legatee or devisee survive the death of the decedent by thirty (30) days in order to succeed to any testate or intestate distribution, and adopted O.R.C. Section 2105.31 to 2105.39 which provides that a person must survive another person by 120 hours to be deemed to have survived that person before succeeding to any probate or nonprobate property. This new statute now establishes a uniform 120-hour survivorship threshold in order to succeed to survivorship assets, transfer on death assets, payable on death assets, and the like, as well as the testate and intestate assets provided for by the previous statute. A physician's determination of death in a Certificate of Death is prima-facie evidence of the fact, place, date and time of the person's death and the identity of the decedent.

II. WILLS AND THEIR PROBLEMS

A. Admission of a will to probate.

Probate Court is required to admit a will to probate if it appears from the face of the will that the will was executed in accordance with law. See O.R.C. Section 2107.18. The post-admission notice requirements that all persons who would be entitled to inherit from the testator if he had died intestate, as well as legatees and devisees, be given written notice or otherwise waive does not affect the executor's ability to sell real estate.

B. Testamentary power of sale.

1. Once the will is validly admitted, the executor or testamentary trustee may be authorized to sell the real estate without an order from Probate Court if the will contains a valid testamentary power of sale, that is, a specific provision in the will empowering the executor to sell all real estate generally, or the specific parcel in question. See O.R.C. Section 2113.39. Much like the requirement that a power of attorney contain a specific power to convey or mortgage real estate, a power of sale in a will must grant specific authority for the fiduciary to sell at private or public sale.

NOTE: Title Standard 3.10 was amended on May 18, 1994 to bring it in accord with O.R.C. Section 2113.39. However, Problem A posed the question: "Can an executor convey good title, under an otherwise valid power, immediately after the probate of the will and the filing of the affidavit (certificate) required by ORC Section 2107.19?". Although certain Probate Courts have adopted a local custom of requiring the affidavit (certificate), there is no statutory requirement that the certificate be filed by the fiduciary or the attorney for the fiduciary (confirming service of notice or waiver of notice of the admission of the will) prior to sale. Such an omission only affects the postponement of the commencement of the will contest time.

NOTE: There is no statutory or common law requirement to require the filing of the Inventory before taking a deed from the fiduciary. Years ago, it was thought to be prudent to insist that the Inventory be filed prior to taking a fiduciary deed so that the fiduciary went "on record" as asserting full ownership to the real estate and placing a market value on it. However, accepting a fiduciary deed with fiduciary covenants contained in O.R.C.

Section 5302.09 seems to be sufficient to dispense with such a requirement.

2. Sales made lawfully and in good faith by the fiduciary, for value and in good faith on the part of the purchasers shall be valid even though the will may thereafter be declared invalid or the surviving spouse may thereafter elect to take against the will. See O.R.C. Section 2113.23

3. Except for a "local custom" enforced in Hamilton County, the power to sell under the terms of a will generally survive to an administrator with the will annexed in the event an executor dies or resigns.

a. The language in the will must show a clear intent that the power to sell vested in the named executor is not a personal trust.

b. There can be no specific prohibition against the power surviving to a successor fiduciary not named in the will.

c. If the property is ordered to be sold, the power would definitely survive.

d. If there is doubt, require consents from all devisees to empower under O.R.C. Section 2127.011.

4. Except for a surviving spouse selling to herself under the provisions of O.R.C. Section 2127.011 and a fiduciary obtaining court authority to purchase property of the estate directly in his individual capacity in accordance with the procedure set out in O.R.C. Section 2109.44, any other sale and conveyance by the fiduciary to himself or herself is void ab initio on the basis of self-dealing. In the event that the fiduciary intends to purchase estate or trust assets, he or she must resign and have a successor fiduciary independently sell and convey to the former fiduciary. Otherwise, quitclaim deeds would be required from all heirs or devisees, as the case may be.

C. Sale within will contest period.

1. Even though a bona fide purchaser is protected under O.R.C. Section 2113.23 if the power of sale is exercised prior to the commencement of a will contest action, the filing of a will contest suspends, for all practical purposes, the testamentary power of sale. See Bernheim vs. Stark, 9 Ohio App. 40 (1918).

2. The period for the commencement of a will contest action is limited to three (3) months after the executor or his attorney files a "certificate" or "certificates" evidencing the giving of, or inability to give, the previously described post-admission notices to the requisite persons. See O.R.C. Section 2107.76. A will contest action filed by a person under disability within three (3) months after the disability is removed will not affect bona fide purchasers' superior rights.

D. Protection of purchaser against later will.

Section 2107.47 protects a bona fide purchaser, lessee or encumbrancer for value who acquires his title from either an heir of a decedent or a beneficiary under a prior will of a decedent, which interest was acquired without knowledge of a later will of a decedent that effectively disposes of the real estate to another person, unless the later will is offered for record within three (3) months after the death of the decedent after which a bona fide purchaser, lessor, or encumbrancer, for value, may safely obtain title, estate, or interest in land that is acquired from an heir or beneficiary of a decedent. A consequence of this October 1, 1996 revision is that these protections would be available to estates relieved from administration, a gap which existed under the previous law.

E. Admission of foreign will to record in Ohio required.

Before a fiduciary can sell Ohio real estate, ancillary proceedings must be commenced only after the foreign will of the non-resident decedent is admitted to record locally and accepted by the Ohio jurisdiction under its full faith and credit provisions. Likewise, a testate succession of Ohio real estate can only be established by such admission of the will in Ohio.

III. RIGHTS OF SURVIVING SPOUSE

A. Statute of descent and distribution

1. O.R.C. Section 2105.06(B), effective March 22, 2001, provides that the surviving spouse takes the whole estate if he or she is the parent of all of the decedent's children who survive or have lineal descendants surviving.

2. The surviving spouse's statutory share continues to be $60,000.00 plus one-half (1/2) of the remainder, if the natural or adoptive parent of one child, or $20,000.00, plus one-half (1/2) of the remainder, when not the natural or adoptive parent of one child, as well as a similar monetary allowance plus one-third (1/3) of the remainder when more than one child is surviving. See O.R.C. Section 2105.06(C) and (D).

3. However, all real estate passes to the next of kin in parcenary, that is, according to the undivided fractional interest each heir is entitled to, but subject to a charge for the monetary share of the surviving spouse. See O.R.C. Section 2105.061. A common title problem in intestate situations occurs when children do, in fact, inherit and there is the erroneous transfer of the real estate only to the surviving spouse when her monetary share exceeds the value of the decedent's interest in the real estate. Title vests in parcenary in the next of kin by operation of law regardless of the erroneous listing of the surviving spouse as the sole transferee on a Certificate of Transfer and deeds must be obtained for each heir's fractional interest.

B. Election by surviving spouse to receive mansion house.

1. When necessary, a surviving spouse can divest children of an intestate of his or her interest in the real estate by properly electing to receive the mansion house as part of her intestate share. See O.R.C. Section 2106.10. By using the $60,000.00 (or $20,000.00) spousal monetary share and the $40,000.00 family allowance, a spouse could use up to $100,000.00 to take the decedent's interest in the mansion house.

2. The surviving spouse's intestate share must be equal to or greater than the decedent's interest in the mansion house, after the deduction of all liens attributable to the decedent's interest.

3. The election must be made at or before the time a final account is rendered or prior to an order relieving the estate from administration and the election is evidenced by checking the Application for Certificate of Transfer in the appropriate box and completing the computations on the reverse side. See O.R.C. Section 2106.10(D).

4. If the surviving spouse dies prior to making an election, the surviving spouse shall be conclusively presumed not to have made such an election. After the surviving spouse's death, no other person is authorized to make an election for the surviving spouse.

5. If the surviving spouse's intestate share is not equal to or greater than the decedent's interest in the mansion house, the surviving spouse may still purchase the mansion house at the appraised value, if not specifically devised, by filing a petition after the filing of the Inventory but not later than one (1) month after the approval of the inventory. See O.R.C. Section 2106.16(B).

(a) The petition shall contain an accurate description of the real estate;

(b) The executor, the persons to whom the real estate passes by inheritance or residuary devise (but not their spouses) and all mortgagees and other lienholders whose claims affect the real estate shall be named parties defendant;

(c) Summons shall issue as required by the Civil Rules; and

(d) Title shall be conveyed to the surviving spouse by a deed from the executor, administrator or commissioner.

C. Summary release from administration.

In those situations when a deceased spouse dies with assets not exceeding $45,000.00 (arrived at by the sum of the family allowance and the $5,000.00 funeral allowance), a surviving spouse with no minor children can obtain the immediate transfer of those assets upon filing an Application certifying under oath the value of the assets, including the deceased spouse's interest in any real estate, and obtain an immediate order for the transfer and the issuance of a Certificate of Transfer to the surviving spouse. The benefit of such summary proceeding is that no notice need be given to a decedent's other next of kin as in the case of a "relief from administration" under O.R.C. Section 2113.03.

D. Election of spouse to take against will.

1. The election of a surviving spouse to take under the will or according to the statutes of descent and distribution may be made at anytime after the death of the decedent but shall be made not later than five (5) months from the appointment of the fiduciary. The election must be made in person (cannot be made by an attorney-in-fact) and can be extended by motion. It is presumed that the spouse elects to take under the will if the surviving spouse succeeds to the entire estate of the testator (O.R.C. Section 2106.01).

2. If the spouse elects to take against the will, such spouse gets one-half (1/2) of the net estate and the right to elect to take the mansion house, if decedent was survived by one child or lineal descendant and one-third (1/3) of the net estate and the right to elect to take the mansion house, if decedent was survived by two (2) or more children or lineal descendants.

IV. RELIEF FROM ADMINISTRATION

A. Effective August 29, 2000, O.R.C. Section 2113.03 was amended to increase the maximum value of a decedent's estate that may be relieved from administration to $100,000.00, if the decedent's surviving spouse is entitled to inherit all assets of the decedent's estate under a valid will or under O.R.C. Sections 2105.06 and 2106.13 (family allowance). Otherwise, the threshold amount to relieve all other estates from administration is $35,000.00.

B. O.R.C. Section 2113.03(B) states that an order of the court relieving the estate from administration shall have the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from possible claims of unsecured creditors of the decedent.

V. STATUTORY POWER OF SALE

A. Nature of power. See O.R.C. Section 2127.011

1. Unless expressly prohibited by will, a fiduciary may sell real estate upon the written consent of the surviving spouse, all of the legatees and devisees in the case of a testate estate, and all of the heirs in the case of an intestate estate.

2. The statutory power of sale may be general or limited to a specific parcel or parcels of real estate and is in addition to other methods provided by law or in the will.

B. Conditions.

1. The required consents must be filed in writing.

2. The sale price must be at least eighty percent (80%) of the appraised value as set forth in the approved inventory or amended inventory.

3. No person of whom consent is required may be a minor and no person may give the consent of a minor.

4. The statute does not preclude a consent being given by the executor or administrator of a subsequently deceased heir, legatee or devisee or of a guardian of an incompetent heir, legatee or devisee.

5. The surviving spouse may sell to himself or herself, contrary to the general prohibition against self-dealing.

6. If the power is to be limited, the parcels of real estate subject to the power must be described on the reverse side of the Form 11.0.

VI. EFFECT OF LIENS AGAINST DEVISEE OR HEIR

A. Where a judgment creditor of a devisee of real estate under a will has a judgment lien against such devisee and the premises are sold by the executor at private sale to pay debts under the powers granted him in such will, the interest of such devisee is transferred to the fund arising from such sale, and consequently the lien of such judgment creditor upon such real estate is divested and is transferred to the interest of such devisee in the fund arising from the sale, and the purchaser obtains title free from such judgment lien. See Gauthier v. Ozark Land Company, 11 O.App.311 (1932).

B. Although no cases have been reported construing the effect of a judgment lien filed against an heir or devisee after the death of the decedent where the surviving spouse has elected to receive the mansion house as part of the intestate share, it seems apparent that the judgment lien, like the heir's or devisee's interest in the real estate, is conditional and divested by operation of law upon a valid election.

Certainly, if the statute allows the surviving spouse to divest the in interest of the heir or devisee in the real estate by her unilateral election, a judgment creditor of such heir or devisee can have no greater right to claim that his lien cannot be divested.

C. Moreover, no cases have been reported construing the effect of a judgment lien filed against an heir or devisee and perfected after the death of the decedent where the executor or administrator sells the real property out of the estate under the consent statute the estate under the consent statute when all of the conditions of O.R.C. Section 2127.011 have been fulfilled. Because it was the intent of the legislature to authorize an executor or administrator to sell the real property out of the estate without court intervention and with the same authority and effect as he would if he was authorized by will, it seems apparent that, again, the interest of such heir or devisee is transferred to the fund arising from such sale, and consequently the lien of such judgment creditor upon such real estate is divested and is transferred to the interest of such devisee in the fund arising from the sale, and the purchaser obtains title free from such judgment lien. There are, however, a few attorneys of the opinion that a sale by an executor or administrator under this consent statute does not offer the same protection to a purchaser as that offered under a power

of sale in a will, presumably viewing the consent statute as a form of an amicable partition. It is hoped that either judicial or legislative authority is adopted which clarifies the position that a sale by an administrator or executor under the consent statute is no different than had that authority been granted by will.

Although the fiduciary has the duty to distribute the heir's distribution to the creditor, it is suggested that the attorney for the creditor attach the proceeds thru a garnishment order.

VII. CLAIMS AGAINST ESTATE

A. O.R.C. Section 2117.06, amended as of April 8, 2004, requires that all creditors of a decedent present their claims in writing to the executor or administrator or by ordinary mail addressed to the decedent, which mailing is actually received by the person who is eventually appointed the executor or administrator within six (6) months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is actually appointed during that six (6) month period. This reduced the claims period from its previous one-year period. A claim not so presented within six (6) months after the death of the decedent is forever barred (except for federal and state tax claims and Medicaid claims). An important exception to the requirement that a claim be served is contained in O.R.C. Section 2117.10 which states that the failure of the holder of a valid lien upon the assets of an estate to present his claim upon the indebtedness secured by such lien...shall not affect such lien if the same is evidenced by a document admitted to public record or is evidenced by actual possession of the real property which is the subject of such lien. It should be noted, however, that this exception was not extended to a judgment creditor of the decedent who failed to present his claim within the prescribed time in In Re Estate of Knepper, 107 O.App.3d 78 (1995).

B. As a general rule, all unpaid debts of a decedent which are so presented within six months of the decedent's death become a lien upon his real estate and the heirs or devisees to whom it descends take the title subject to these debts and whoever purchases from such heirs or devisees does so subject to such unpaid debts.

However, such debts cease to be a lien on such estate assets after four (4) years from the death of a decedent or upon the filing of the final account in the estate when sold to a bona fide purchaser. See O.R.C. Section 2117.36.

C. A sale by a fiduciary under a power of sale contained in a will, upon the consent of the heirs or devisees, or under court order in a land sale proceeding, frees the real estate from all claims of heirs, devisees, legatees, creditors of the estate and Ohio estate taxes, the same being divested and transferred to the fund arising from the proceeds of the sale and the purchaser obtains title free from such claims. However, such a sale will not transfer real estate free of the claims of secured creditors, such as mortgagees and other lien holders of the decedent unless paid or made a party to the sales case. If the estate may be insolvent, all secured and general creditors must be made a party to a sales case.

VIII. LAND SALE ACTIONS - DECEDENT'S ESTATE

A. Judicial sales through Probate Court - when required.

An Executor or Administrator cannot sell real estate, except as a statute or will provision empowers him to do so, and a sale of land without proper authority is void. The statutory provisions of O.R.C. Section 2127.01, et seq., apply to all types of sales by fiduciaries, except those pursuant to testamentary power of sale or the statutory power of sale under O.R.C. Section 2127.011.

B. Subject matter jurisdiction - Permissive right to land sale.

In general, there are four (4) circumstances wherein a fiduciary may file a land sale action:

1. Sale to pay debts (O.R.C. Section 2127.02)

When the fiduciary ascertains that the personal property in the estate is not sufficient to pay all of the debts of the decedent, together with the $40,000.00 support allowance to the surviving spouse and children, together with costs and fees, he shall commence action to sell the decedent's real estate.

2. Sale to pay legacy (O.R.C. Section 2127.03)

When a legacy has a charge on real estate and the personal property is insufficient to pay the legacy, together with the debts of the decedent, the fiduciary shall commence an action to sell the real estate so charged.

3. Sale upon the consent or demand of all beneficiaries, even though not required to be sold to pay debts or legacies (O.R.C. Section 2127.04(A)).

When all of the parties entitled to share in an estate upon distribution consent to the proceedings, the fiduciary may, upon the request of such persons, commence an action in Probate Court for the authority to sell all or part of the decedent's real estate.

a. A guardian may make such a request or give the consent on behalf of his ward.

b. This proceeding is, in effect, a simplified amicable partition action.

c. Any interest that decedent has in the real estate, whether legal or equitable, may be sold.

4. Sale at the election of the fiduciary where at least fifty percent (50%) of all persons holding an interest in the real estate have consented to the sale, even though not required to be sold to pay debts or legacies (O.R.C. Section 2127.04 (B)).

C. Procedure

Rule 73(A) of the Ohio Rules of Civil Procedure provides that the Rules of Civil Procedure shall apply to proceedings in Probate Court, except to the extent that, by their nature, they would be clearly inapplicable.

D. Complaint

An action to obtain authority to sell real estate is commenced by the fiduciary by filing a Complaint in Probate Court (O.R.C. Section 2127.10), which contains:

1. A description of the real estate to be sold;

2. Its value;

3. The nature of the interest of the decedent;

4. The recital of all mortgages and liens upon the real estate and any adverse interests; and

5. A statement as to the reason for the sale and any additional facts necessary to constitute a cause of action under the statute.

E. Fractional interest or sale of entire interest.

1. When the interest of a decedent or of a ward is fractional and undivided, the action to sell shall be only for the sale of the fractional interest, except that the executor or administrator or the owner of any other fractional interest, or any lien holder may, by pleading all of the interest in the property and the liens thereon, require that the entire interest be sold.

2. The owners of the various interests in the real estate and the liens thereon shall receive their respective shares of the proceeds of sale, after payment has been made of the expenses of sale, including reasonable attorney fees.

F. Parties

The executor or administrator is the plaintiff in the land sale proceedings and the persons who must be made parties defendant are specified in O.R.C. Section 2127.12, as follows:

1. The surviving spouse

2. The heirs and devisees. If there is a will, only the devisees need be joined. However, if a period for a will contest has not run, good practice demands that the heirs also be made parties. If unknown heirs are to be joined, a special provision for serving unknown

heirs appears in O.R.C. Section 2703.24 (distinguish this from residence unknown under Civil Rule 4.4). The spouses of the heirs and devisees need not be made parties defendant, but the spouses of the owners of a fractional interest should be made a party.

3. Mortgagees or other lien holders. This includes a judgment creditor of an heir who obtained a judgment, filed a certificate of judgment or levied on the heir's interest between decedent's death and the filing of the Complaint. See Keenan vs. Wilson, 19 O. App. 499 (1925).

There is authority that when the estate is insolvent, the decedent's general creditors should be made parties defendant. See Ruff vs. Baker, 146 Ohio St. 456 (1946).

G. Service

Service of summons in an action to sell real estate of a decedent shall be had as in other civil actions, but if any competent person in interest enters his appearance or consents in writing to the sale, service on such person shall not be necessary (O.R.C. Section 2127.14). Therefore, if all parties consent in writing to the sale, an order for sale may be issued forthwith.

H. Necessity of guardian ad litem for minor or incompetent parties.

It is important to note that if any one of the parties defendant is a minor or otherwise incompetent, a guardian ad litem must be appointed and must file an answer on his or her behalf. This guardian ad litem cannot enter the appearance on behalf of such minor, but independent Rule 4 service must be first perfected on such minor or incompetent prior to the appointment of the guardian ad litem. See Civil Rule 17(A) and 54(B).

I. Entry finding sale necessary.

Because an executor or administrator cannot sell property except as provided by statutes, the Court must first specifically find that the sale is necessary under O.R.C. Section 2127.02 through 2127.04.

J. Appraisement

1. If the entire interest in the real estate is owned by the decedent and if an appraisement is included in the inventory of the estate, the Probate Court may order a sale in accordance with such appraisement or the Court may order a new appraisement.

2. However, a sale of the entire interest in the real estate when a decedent owned only an undivided fractional interest therein requires a new appraisement.

K. Additional Bond

Upon the return and approval of the appraisement, the Court shall require the fiduciary to execute a bond in an amount which the Court deems sufficient, normally twice the appraised value of the real estate. The amount of the original bond will be considered in determining the amount of the additional bond.

L. Allowable Expenses

1. Real estate commission. A real estate commission may be paid but if the same is not demanded in the original Complaint, it can be paid only upon notice and hearing prior to the sale.

2. Title abstract or the premium for the issuance of title insurance may also be approved by Court order.

M. Order of Sale

After filing an approval of the additional bond, the Court shall order the real estate sold as requested by the Complaint, either at public sale (publication for three successive weeks and auction at two-thirds (2/3) of the appraised value) or private sale (at not less than the appraised value).

N. Order Confirming Sale and Ordering Deed

1. After the return of the sale by the fiduciary, the Court shall confirm the sale and order the deed of the fiduciary, which deed vests in the purchaser the title held by the decedent and any interests of other parties ordered sold.

2. After the closing, an Order of Distribution is entered directing that the proceeds of the sale shall be distributed in the following order of priority:

a. The costs and expenses of sale, including reasonable attorney fees to be fixed by Probate Court (6% of the first $10,000.00 and 2% of the remainder), fee for the appraiser, bond premium and fee for guardian ad litem, if any.

b. Taxes, assessments, mortgages and judgments against the decedent according to their respective priorities, so far as they operate as a lien on the real estate sold.

c. To the payment of legacies charged to the real estate if the sale was to pay legacies.

d. To the debts and claims of the estate in order provided by law.

e. Any surplus is to be considered real estate and distributed accordingly.

IX. MEDICAID LIENS

The Office of the Attorney General is charged with asserting and prosecuting claims for Medicaid payments made on behalf of the decedent and liens imposed against real estate of a Medicaid recipient pursuant to O.R.C. Section 5111.11. Known generally as "Medicaid Estate Recovery Liens", mandated since January 1, 1995, such liens assert a claim for reimbursement against survivorship property and all other real and personal property in which the Medicaid recipient had any legal interest at the moment before his or her death, including a transfer-on-death interest. After the death of the Medicaid recipient, any real estate that the Ohio Department of Job and Family Services previously determined to be exempt for purposes of determining Medicaid eligibility is no longer exempt or excluded.

The Ohio Attorney General, on behalf of ODJFS, may file a certificate of lien to effectuate a MER lien in favor of the Ohio Department of Job and Family Services in the real estate records of the County Recorder's Office in the county where the Medicaid recipient, or his or her spouse, owns an interest in real estate. From the time of filing in the County Recorder's office, the lien attaches to all interests in real estate owned by the Medicaid recipient, or his or her spouse, for all amounts for which recovery may be made. There is no expiration date for such lien.

X. PROCEEDINGS TO BAR CLAIMS OF CREDITORS WHEN ADMINISTRATION HAD IN FOREIGN STATE

A. Title to the real estate owned by a non-resident decedent can be cleared of creditors' claims without an ancillary administration in Ohio.

B. Present Procedure. See O.R.C Section 2129.02

1. The foreign fiduciary files an application to admit authenticated copy of will and appointment. No notice of filing is required.

2. The claim of any creditor of such decedent not presented to such court within six (6) months after the date of death is forever barred as a lien upon the real estate of the decedent in this state.

XI. ANCILLARY ADMINISTRATION

A. Title to the real estate owned by a non-resident decedent can be sold only through an ancillary administration of the decedent's estate. Notwithstanding the sufficiency of the foreign proceedings, only a local probate court has jurisdiction to affect title to Ohio real estate and only a local probate court can empower a fiduciary to sell decedent's real estate.

B. Present Procedure. See O.R.C Section 2129.08

1. After an authenticated copy of the will of the non-resident decedent has been admitted to record locally, together with a complete exemplification of the record of the foreign proceedings, the local probate court will appoint an ancillary administrator, either as nominated in the will or otherwise.

2. Once the foreign will is admitted and the ancillary administrator appointed, the proceedings are identical to a resident decedent's administration, with the issuance of letters of authority, inventory, claims filing and the like. The real estate can be sold under a sufficient power of sale in the will or under the consent statute.

XII. DISCLAIMERS

A. An individual at least 18 years of age may voluntarily disclaim (partially or fully) an interest in property acquired by testate or intestate succession or nontestamentary succession by filing the disclaimer, properly acknowledged, in Probate Court or the Recorder's Office, or both, as the case may require (O.R.C. Section 5815.36). As of May 14, 2008, a disclaimer no longer must be executed within nine (9) months of the effective date of the donative instrument.

B. A disclaimer has the legal effect of causing the disclaiming person to be considered as having predeceased the decedent, so that the interest in the property will either lapse or, if the disclaimant is a blood relative of the decedent, the property will pass on to the lineal descendants of the disclaimant (anti-lapse statute). It should be noted that a disclaimer can be attached by a creditor of the disclaimant as a transfer in fraud of credits.

XIII. GUARDIANSHIPS

A. The appointment of a guardian must be examined to insure that the notice requirements are complied with because:

1. if notice is defective, the court does not have jurisdiction and the appointment of the guardian is not valid; and

2. if the original appointment is not valid, then the guardian does not thereafter have any authority to act and any subsequent land sale proceeding would be defective and void. See Horn v. Childers, 116 O.App. 175 (1959).

B. Under the Guardianship Reform Bill, which took effect on January 1, 1990, the following changes included:

1. Written notice of the time and place of the hearing on the appointment of a guardian must be personally served on the alleged incompetent by a court investigator.

2. Notice must be given to the next of kin who reside in Ohio. "Next of kin" means any person who would inherit under Chapter 2105 if the ward dies intestate.

3. the period between service and the appointment was extended from 3 to 7 days, but for good cause shown, the Court may appoint a guardian prior to the expiration of 7 days.

C. It should be noted that there is a "savings" provision in O.R.C. Section 2111.48 that states that no sale shall be declared invalid for the reason that such guardian was not vested with all the statutory powers and such acts are legal and effective. It is certain that this provision cannot cure the jurisdiction defect of failing to properly serve the ward.

D. The following persons are necessary parties in a guardian's judicial land sale proceeding brought to sell property of the ward in accordance with O.R.C. Section 2127.10 and O.R.C. Section 2127.12:

1. the ward;

2. the surviving spouse of the ward, if any; and

3. all person entitled to the next estate of inheritance from the ward who are known to reside in Ohio (this is a limitation from a decedent's sale proceeding where residence is not a factor).

E. A guardian ad litem must be appointed to represent the interest of the ward and any other minor or incompetent party.

F. All other procedures are basically the same as in a decedent's sales case.

G. Effective on April 6, 2017, O.R.C. Section 2127.12, captioned "Disposal of real estate", provides that, in addition to other methods provided by law, a guardian of the estate may sell at public or private sale any real estate belonging to the guardianship estate at any time, and may execute and deliver deeds and other instruments of conveyance if all of the following conditions are met:

1. The ward's spouse and all persons entitled to the next estate of inheritance from the ward in the real property give written consent to a power of sale for a particular parcel of real estate or a power of sale for the real estate belonging to the estate. Each consent to a power of sale must be filed with Probate Court.

2. Any sale under a power of sale authorized under the section shall be made at a price of at least eighty percent (80%) of the appraised value, as set forth in an approved inventory, if the real estate was appraised within two years prior to the filing of the consents. Otherwise, a new appraisal must be completed.

3. No power of sale provided for in the section is effective if the ward's spouse or any next of kin is a minor. No person may give the consent of the minor.

4. Upon filing the consents, the guardian shall execute a bond or additional bond payable to the state in an amount that the court considers sufficient, having regard to the amount of the real estate to be sold, its appraised value, the amount of the original bond given by the guardian, and the distribution to be made of the proceeds arising from the sale.

5. A ward's spouse who is the guardian of the estate may sell the real estate to self pursuant to this section.

XIV. CONSERVATORSHIP

A. O.R.C. Section 2111.021 was adopted January 1, 1990 and provides for the appointment of a "conservator" to be appointed at the request of a competent adult who is physically infirm to place, for a definite or indefinite period of time, his person, or any or all of his real or personal property, or both, under a conservatorship with the court.

B. After the appointment of the conservator, all assets so submitted will be treated similar to the assets of a ward under a guardianship.

C. However, in a conservatorship, the petitioner may terminate or modify the conservatorship by an application to probate court. This is a beneficial provision because a conservator would have to proceed through a sales case when the competent owner chooses to sell any of his real estate. In such event, the statute suggests that a termination notice be filed by the petitioner, a waiver of service of notice be filed by the conservator and a termination of conservatorship be entered by the court to allow the owner to sign a deed. In the alternative, a modification of conservatorship could be entered upon the joint application of both the petitioner and the conservator, which releases the subject property, but does not terminate the conservatorship. After such a modification, a general warranty deed could be taken from the original owner.

TAB
D

Audra E. Loomis
Frost Brown Todd LLC
Cincinnati, Ohio

Mrs. Loomis received her BA from Miami University and her JD from the University of Virginia School of Law. She was admitted to the Ohio Bar in November 2017. Her professional memberships include the Ohio State Bar Association and the Cincinnati Bar Association. Mrs. Loomis is an Associate in the Tax, Benefits, and Estates Practice Group in Frost Brown Todd's Cincinnati office. She joined the firm in 2017, after participating in the 2016 Summer Associate Program. She focuses her practice in the areas of estate planning, business succession planning, probate estate and trust administration, and charitable giving.

EDWIN W. PATTERSON III

Mr. Patterson has been employed by the Cincinnati Bar Association since 1982, and presently holds the title of General Counsel. His primary responsibilities, as counsel to the Certified Grievance Committee, include supervising the intake and evaluation of grievances against attorneys, case management for the Committees, and representation of the Association at administrative hearings. He also serves as an advisor to the Ethics, Fee Arbitration, Unauthorized Practice of Law and Professionalism Committees of the Cincinnati Bar Association.

He is frequently called upon to interpret the rules of ethics for members of the Bar and has lectured on legal ethics at seminars sponsored by the Cincinnati Bar Association, the University of Cincinnati College of Law, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, the Hamilton County Trial Lawyers Association, and others. He served on the Ohio Supreme Court's Task Force on Rules of Professional Conduct from 2003-2006.

Mr. Patterson is a graduate of Miami University and the University of Toledo College of Law. He was admitted to the practice of law in Michigan in 1978, and in Ohio in 1979. He previously served as Commission Counsel to the Ohio Ethics Commission.

Vincent A. Salinas, Sr. has held positions in estate and trust administration as a Trust Officer with a large bank in Southwestern Ohio and later as a Vice-President and Trust Officer with banks in Northern Indiana. He has extensive experience in the areas of Estate Planning and Administration, Probate and Trust Law, Business Organizations, Retirement Planning, and individual and fiduciary Taxation. Mr. Salinas has been advising high wealth clients in complex estate and trust planning and administration matters. He has represented numerous businesses and family members relative to the transition of such businesses. Mr. Salinas has served as a lecturer on Estate Planning and Probate matters in Indiana and Ohio.

Education

- Xavier University (B.S.B.A. Finance)
- Salmon P. Chase College of Law Northern Kentucky (J.D.)
-

Admitted to:

- United States Court of Appeals 6th Circuit

United States District Courts:

- Southern District of Ohio
- Northern District of Indiana
- Supreme Court of Ohio
- Supreme Court of Indiana
- Supreme Court of Kentucky

Attorney Conduct in the Probate World:
Understanding Changes in Ohio's IOLTA Laws Regarding Estate Funds

November 16, 2018

Presented by:
Audra E. Loomis, Esq.[1]
Frost Brown Todd LLC
3300 Great American Tower
301 E. Fourth Street
Cincinnati, Ohio 45202
(513) 651-6723
aloomis@fbtlaw.com

[1] The author has used her best efforts to include accurate and up-to-date information in these materials. The author makes no warranties about the legal conclusions stated or implicit in these materials. These materials are not intended as legal advice and should not be relied upon as such. Readers are cautioned to check the applicable statutes for themselves and to exercise independent professional judgment.

I. Previous Ohio Revised Code IOLTA Provisions:

A. Ohio Revised Code § 4705.09 - Establishing interest-bearing trust accounts:

i. Effective to March 22, 2018.

ii. ORC § 4705.09(A)(1):

> "(A)(1) 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. 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. Ohio Revised Code § 2109.41 - Deposit of Funds by Fiduciary:

i. Effective to March 22, 2018.

ii. ORC § 2109.41:

> "Immediately after appointment and throughout the administration of a trust, but subject to section 2109.372 of the Revised Code, every fiduciary, pending payment of current obligations of the fiduciary's trust, 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 of funds held by it as fiduciary. All deposits made pursuant to this section shall be in such class of account as will be most advantageous to the trust, and each depositary shall pay interest at the highest rate customarily paid to its patrons on deposits in accounts of the same class.

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."

II. Current Ohio Revised Code IOLTA Provisions:

A. Ohio Revised Code § 4705.09 - Establishing interest-bearing trust accounts:

i. Effective March 23, 2018.

ii. ORC § 4705.09(A)(1):

"(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. 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."

B. Ohio Revised Code § 2109.41 - Deposit of Funds by Fiduciary:

i. Effective March 23, 2018.

ii. ORC § 2109.41:

"(A) Immediately after appointment and throughout the administration of a trust, 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, 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 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, 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 attorney, in consultation with the fiduciary, has determined that the funds are nominal in amount and 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."

III. Concerns and Interpretation Issues with Amended Provisions:[2]

[2] For additional discussion of these issues, see Patricia A. Pacenta, *Recent Changes to Ohio's IOLTA Statute Adversely Impact Trust and Estate Attorneys*, 28 NO. 6 OHIO PROB. L.J. NL 3 (July/August 2018).

A. Required Probate Court approval for deposits.

B. No De Minimis Exception.

C. Deposited funds must be nominal AND held for a short period of time.

D. Are separate IOLTA accounts required?

E. Which fiduciaries are subject to the new requirements?

IV. EPTPL Section Drafting Proposed Legislation:

A. The Estate Planning, Trust and Probate Law (EPTPL) Section of the Ohio State Bar Association is in the process of drafting proposed amendments to ORC §§ 2109.41 and 4705.09 to address the issues discussed in Section III.

V. Conclusion:

A. Until ORC §§ 2109.41 and 4705.09 are amended, Ohio estate planning attorneys are left with several unclear provisions in the current IOLTA statutes. Attorneys should be cautious in depositing any funds received by a fiduciary in the fiduciary's name in an IOLTA account until the amendments are passed or, at the very least, until further guidance is provided by the legislature or the governing probate court.

An Interview in the Round
CBA v. Robertson: Precedent or Aberration?

By Edwin W. Patterson III

The Supreme Court of Ohio's decision in *Cincinnati Bar Assn. v. Robertson* continues to reverberate two years after it was released.[1] Numerous members of the probate bar have questioned what, if anything, *Robertson* stands for. I recently initiated a discussion among three attorneys who were close to this case, including two who tried the case to a hearing panel of the Board of Professional Conduct.

Jonathan E. Coughlan, a director of Kegler Brown and the former Ohio Disciplinary Counsel, represented David Robertson. Vincent A. Salinas, a member of the CBA's Grievance Committee, represented the CBA. John J. Mueller, also a member of that committee, has both prosecuted and defended attorneys in disciplinary and malpractice cases.

The parties stipulated to three violations of the Rules of Professional Conduct. Two violations were based on the timing and amount of attorney fees that were taken; these charges have not been the subject of debate. The third charge, that of a conflict of interest, was based on a scenario the Supreme Court described thusly: *"In July 2012, Deborah Lewallen retained Robertson to represent her as the executor of her father's estate. Three of Lewallen's siblings and seven of the decedent's grandchildren — who were also beneficiaries of the estate — thereafter attempted to remove Lewallen as executor and filed objections to the estate inventory, arguing that Lewallen and her husband had improperly removed items from the estate. Upon Lewallen's request, Robertson also agreed to defend her and her husband against her family members' objections and their attempt to remove her as executor."*[2]

The Board Opinion

TP: Let's look at the Board Opinion.[3]

VS: This is where I think there may be some holes.

TP: The board found that "Respondent did not indicate to Lewallen that his representation would create a conflict of interest."[4] Maybe he didn't think it created a conflict of interest. Did the written fee agreement with Lewallen in any way describe the scope or description of the representation?[5]

VS: No.

TP: The board concluded that "Respondent did not inform Lewallen that a conflict was created." Well, back on the first page in paragraph five, they seem to be criticizing him for not indicating that a conflict was created. Again, my question is maybe he didn't think he had a conflict?[6]

JC: I think that's part of the problem.

VS: That was Jon's argument.

JC: He didn't see it as one when it first got raised.

TP: Right, he believed the allegations were false and additionally, he believed it was incumbent upon him as attorney for the fiduciary to ensure an accurate accounting of estate.

JC: Right, that is what he thought his job was on her behalf as the fiduciary.

TP: What is the lawyer's job here? The lawyer's job is to make sure the right thing gets done. If his client is lying and stealing, that's a problem. If he believes that the allegations are false and he believes that his client is still trying to be the fiduciary of the estate, despite the protests of her relatives, I don't think the lawyer has a conflict.

JM: His goal in representing that fiduciary is to assure that the fiduciary does the job that the probate court appointed him to do, consistent with law and consistent with the protection of the interests of the estate. That's it. So, when the lawyer in that circumstance makes a decision, that's the framework within which the lawyer operates or should operate.

JC: I think what you're pointing out in the board's finding is what maybe some of the estate lawyers are struggling with. They believe that on behalf of their client, the fiduciary, it is their job to deal with bogus allegations which are only going to slow down the process and maybe make a muck of the estate and interject erroneous or irrelevant claims. That, I am sure, happens all

the time. Beneficiaries make all sorts of allegations. If their concern is that this court opinion requires them to jump off or deal with this as a conflict the minute it gets raised, that's problematic. I don't think that is what the opinion does, though.

JM: I think that is exactly right. Jon has hit it on the head and identified the source of the problem. The fact that one of the beneficiaries raises an issue that the lawyer believes lacks merit does not automatically require a lawyer's disqualification because it involves an allegation against the fiduciary. It may start an analysis, but it does not per se require the lawyer to withdraw because of a conflict.

JC: I think part of the nuance here is the allegation that she did something [bad] before the testator passed away. So she impacted the estate, allegedly, before it even came into existence.

VS: Now, in Robertson's situation, he claimed that he represented the father, Mayborg, and that he participated in what was going on, so he had a better view of what may or may not have transpired.

JC: He knew what the real factors were, in theory.

TP: What troubled me with that was I asked myself was Robertson putting in the testator's intent just from his own memory. In other words, once the testator passed away, aren't you bound by the documents there?

VS: Yes. What they did is they filed to have her removed and the basis for the removal was that there was participation with her and her husband and [Robertson] made a judgment call that he was there to protect what happened, not necessarily to protect the estate. That is a real issue. He was basically suggesting that he could represent her because he knew, or he had facts that would suggest, that this is what her father wanted.

JC: But the problem is that we're talking about a lawyer in that situation at some point making a judgment about the validity of the allegations. That is partly what everybody has to do.

VS: That is precisely what I am getting at. The principal issue is did he understand the facts, did he observe that there potentially could be a conflict, did he do anything at all to attempt to address that? And it's not there.

TP: The board found that Robertson "never divided any of his billing of this estate between regular estate administration and defense of Lewallen from the family members' claims."[7]

JC: He has acknowledged that he should have set up a separate engagement letter; he should have had a waiver.

TP: Jon, how would a separate engagement letter have worked?

JC: "I represent you in your individual capacity as someone who has been subject to these allegations. I will defend you as to those allegations. You must pay me separately. It cannot necessarily come out of the estate. We can make an application later, but there are no promises."

VS: But does that negate the conflict?

JC: No, but then you go to a waiver. If you understand there is a potential conflict and you are waiving –

VS: But who waives what?

JC: That's the problem.

JC: I think I have no problem going to Lewallen and saying, "In your personal capacity I need you to waive." She can do that. But in a representative capacity, can she then waive a conflict that she has?

TP: No. I don't think so.

VS: I don't think so.

JM: If the allegations involve solely the administration of the estate and activities after the commencement of the fiduciary relationship, the analysis is a lot easier. Then I think the lawyer can conclude he has no conflict of interest and it is OK to proceed. If on the other hand it involves either conduct post-estate organization, probate, or beforehand and it involves an allegation that the fiduciary personally benefitted to the detriment of all others –

VS: Then that is a fraud issue, right?

JM: It doesn't have to be a fraud issue, but it could be something in the nature of it. I think at that point, the lawyer personally is making decisions that involve a couple of layers of risk analysis.

JC: You could be in the middle of a hearing on the disqualification of the fiduciary when you learn something for the first time from the witness stand that blows the conflict out into the open, one that you didn't know existed. All of a sudden, boom, here's this document and here's this testimony. So you take that risk.

TP: What you just said, the board found that "Respondent believed that the claims were without merit given the fact that he created many of the documents that they claim were inappropriate."[8]

JC: Right.

TP: "Additionally, Respondent claimed he had a duty as a lawyer for the fiduciary to provide an accurate account of the estate." I think he's saying the right things there.

JC: Yes.

JM: But those same statements also explain to me why, in this particular circumstance, I think Robertson should have gotten out. Because the only way, in the circumstances, that he could prove that the claims against the fiduciary lacked merit was to testify.

JC: But could he have stayed on on behalf of the estate or the fiduciary, if we look at it that way, under that circumstance. He could have gone to her and said, "OK, look, now I am going to be a witness, you have to get someone else to handle this." I suppose.

TP: The board concluded "Respondent in this matter represented Lewallen in her individual capacity and in her capacity as fiduciary." Then, "the fiduciary has an obligation to the beneficiaries and the beneficiaries…"[9]

JC: No, I don't agree with that.

VS: See that's the –

TP: That's not even right, is it?

JC: No, that's not right. That flies in the face of the statute.

VS: No. I think part of the problem is that sentence.

JC: Well, the court adopted some of that language, which was frustrating.

The Court Opinion[10]

TP: I think paragraph three is the big problem. I don't like "not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer."[11]

VS: It suffers from poor drafting. It's undivided loyalty to the fiduciary. If an issue comes up that suggests that the fiduciary may have done something to conceal assets, may have done something wrong, I think you have a hard analysis. Again, it comes down to the facts or the circumstances. I don't know how else you analyze it. There's no easy answer.

JC: I agree, but it brings us back to what you started with, which is that lawyers at the big firms are representing these huge estates and they've got one fiduciary and everybody is going after the fiduciary for whatever bizarre reason. And they don't want to be in a position where every week they are having to deal with a conflict of interest.

VS: You're right. It happens.

TP: What's the standard of care there for that attorney? Say the attorney represents the fiduciary, someone's making these allegations. The attorney doesn't have actual knowledge that the fiduciary did something wrong.

JC: Does he or she have an obligation to investigate it? Whatever obligations the fiduciary has is what the lawyer has to uphold.

JM: If I'm the lawyer representing the plaintiff who has asserted a claim against the lawyer who failed to conduct some kind of investigation in those circumstances, I think I have a breach of the duty of care on the part of the lawyer because the moment an adverse claim is raised, we have a litigation possibility. In a litigation possibility, the standard of care, as I've always understood it, requires the lawyer to reasonably investigate it, to make a reasonable investigation of facts, to research the law and determine the law that would apply to those facts.

JC: You want to know whether you have a conflict situation.

JM: Exactly. The benefit for any lawyer discharging that duty is that it provides the basis for the lawyer to begin the analysis.

JC: I think you've got an obligation to figure it out. If you find a problem, you've got an obligation under Rule 3.3 to take the reasonable, remedial action, which is to go to the fiduciary

and say, "You've got to clean this up right now."

JM: Right, because if you do that investigation, it tells you whether the inquiry is the remedial approach, or do you start off by advising the fiduciary that he or she might want to consult with independent counsel, because if he tells you something against his own or her own interest, you may have to reveal that?

JC: Right, because you don't represent them in a personal capacity at that time.

JM: One of the things is, looking at this in the abstract, the law doesn't expect us to be perfect. We're going to make judgment calls. If we make a judgment call and embark on a path and then do the "uh-oh" somewhere down the road, I don't think anybody faults us, particularly if we have to get off.

JC: And I agree. That's where David [Robertson] would sit here and say, "I knew about those underlying transactions. I did the paperwork. I knew it was a bogus allegation against the fiduciary." That's what he would say. "I did that work. So, you can't tell me to investigate it and maybe have a problem. I already knew there was nothing to it."

JM: And I understand that from the conflict point. At that point what he should have concluded is that to protect my client, I need to testify. –

JC: Oh, no, I agree.

JM: I need to testify and I shouldn't continue the representation.

TP: So, the remedy is for the lawyer to investigate the allegations and if the lawyer comes to the conclusion that the fiduciary has clean hands, the lawyer stays on –

JC: But gets off for any allegations in case they have to be called as witnesses. Yeah, I think that's the analysis –

JC: You don't represent the individual personally. You never represent them personally, so you can't get a waiver from her in that capacity. But I think you've got to go to the fiduciary and say – I would want to put it on paper – "I'm only representing you on this. Here are some risks. I may be a witness." You have an obligation to the estate and the fiduciary, and her role as the fiduciary, to make sure everything gets handled properly.

Conclusion

TP: So, our advice, going forward, to a lawyer in this circumstance who represents the fiduciary, and there are allegations made against the fiduciary, would be to?

JC: One, have malpractice insurance.

TP: I would take a look at Rules 3.3 and 4.1 for some guidance, and proceed in good faith.

JC: And understand your role is for the fiduciary of an estate and not for any other purpose or function. One of the problems, under these circumstances, was representing the executrix on an issue that was personal to her.

JM: The lawyer has to protect against blurring the identity of the person or entity that he represents, because, in doing so, the lawyer can inadvertently run afoul of even the standard of care or the standard of conduct. The risk on the standard of conduct violation is a disciplinary complaint. Sometimes in the practice of law, there is no clear answer and the lawyer has to make a judgment call and decide on a course of action. And again, that involves the risk analysis, both for the lawyer and for the affected client. At the end of the day, one makes a judgment call.

Sidebar

Does R.C.§5815.16 Apply to the Case?

TP: The statute keeps coming up.

VS: If you have a statute that says that someone is not liable, the attorney is not liable to the beneficiaries, that's all well and good, but does that take it out from underneath the Supreme Court disciplinary rules? It's a completely separate issue.

JC: I don't see how the statute really plays here. I agree with Vince. This is a statute that limits lawyer liability as to certain parties in these circumstances. That's not what we are talking about. We're talking about what is the lawyer's duty when a claim made against the fiduciary creates potential liability to the fiduciary personally.

TP: If it's clear that Robertson has no duty to these beneficiaries, he's still got the underlying principal duty to the court to make sure the thing is properly administered. How that happens at the end of the day is not the question; how many cousins there are, how many grandchildren, that's not really the issue.

JC: Or their ability to come after him, not an issue.

JM: The statute can only regulate civil liability and civil duties. The ethical duties are the responsibility of the Supreme Court. That's the rules of professional conduct. By constitution, the Supreme Court has the exclusive jurisdiction over that area and, consequently, the legislature cannot write a statute that denies for lawyers the existence of a liability or a duty that the Supreme Court says exists.

JC: I agree completely with Jack. But I would also add that the focus should be the lawyer's duty to the fiduciary as fiduciary and the lawyer's duty to the fiduciary as an individual. Beneficiaries are not in the equation.

JM: Yes, exactly.

VS: I agree 100%.

Patterson is general counsel for the Cincinnati Bar Association.

1 *Cincinnati Bar Assn. v. Robertson*, 145 Ohio St.3d 302, 2016-Ohio-654, 49 N.E.3d 284
2 *Id.*at ¶2
3 *Cincinnati Bar Assn. v. Robertson*, Bd. Of Prof. Cond., No. 2014-068 (August 7, 2015).
4 *Id.* at ¶5
5 *Id.* at ¶12
6 *Id.* at ¶17
7 *Id.* at ¶30
8 *Id.* at ¶42
9 *Id.* at ¶55
10 *Cincinnati Bar Assn. v. Robertson*, 145 Ohio St.3d 302, 2016-Ohio-654, 49 N.E.3d 284
11 *Id.* at ¶3

BEFORE THE BOARD OF PROFESSIONAL CONDUCT OF THE SUPREME COURT OF OHIO

In re:

Complaint against

David Franklin Robertson, Jr.
Attorney Reg. No. 0074030

Respondent

Cincinnati Bar Association

Relator

Case No. 2014-068

Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct of the Supreme Court of Ohio

OVERVIEW

{¶1} This matter was heard on May 4, 2015 in Columbus before a panel consisting of Sharon Harwood, Judge William A. Klatt, and McKenzie Davis, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11(A).

{¶2} Respondent was represented by Jonathan Coughlan. Vincent Salinas and Howard Schwartz appeared on behalf of Relator.

{¶3} Respondent represented Frank Mayborg on various matters, including developing his estate, prior to his death. After Mayborg passed away, one of his daughters (Lewallen) requested that Respondent represent her as the fiduciary of the estate. Respondent agreed.

{¶4} Shortly thereafter, other family members filed objections to both Lewallen serving as fiduciary and the inventory of the estate. Lewallen requested Respondent to represent her and her husband against these claims.

{¶5} Respondent believed these were baseless claims and believed he could disprove them. Respondent did not indicate to Lewallen that the representation would create a conflict of

interest. Respondent worked numerous hours to disprove those claims. After a number of months, the family members withdrew their objections.

{¶6} Respondent submitted various request for attorney fees for the work completed in defending the family objections. The judge denied all of his requests. Respondent thereafter requested partial attorney fees directly from his client, with the understanding the estate would reimburse Lewallen. Respondent made this request without court approval as required by the local rule. When filing the final fiduciary account with the court, Respondent failed to indicate that he had received any attorney fees from Lewallen.

{¶7} The parties filed joint stipulated rule violations setting forth three rule violations.

{¶8} The panel recommends Respondent be suspended from the practice of law for six months, all stayed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶9} Based on the agreed stipulations filed on April 30, 2015 and the evidence presented during the hearing, the panel makes the following findings of fact.

{¶10} Respondent was admitted to the practice of law in the state of Ohio on November 13, 2001. Respondent is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar.

{¶11} Respondent began working for the law firm Dinsmore and Shohl briefly before moving his practice to the north side of Cincinnati with Mitch Lippert and Dick Finan. Respondent has handled approximately sixty estates.

{¶12} Respondent was retained to represent Deborah Lewallen, the daughter of Frank Mayborg, who was a client that had passed away just prior to the representation. Lewallen was the fiduciary of the estate of Frank Mayborg.

{¶13} On July 6, 2012, Respondent entered into a written fee agreement with Lewallen. The fee agreement allowed for attorney fees to be paid pursuant to the guidelines of the Hamilton County Probate Court, specifically, Rule 71.1(C), which reads as follows:

> Attorney fees for the administration of a decedent's probate estate ordinarily shall be paid at the time the fiduciary's final account or certification of termination is prepared for filing with the Court, and such fee shall not be paid to two weeks before the filing of the fiduciary's final account or certification of termination.

{¶14} On August 6, 2012, Lewallen's sister, Karen Scherpenberg, filed an application to have her removed as the fiduciary. Shortly after, Lewallen's other siblings and seven of Mayborg's grandchildren joined the effort to have Lewallen removed as fiduciary.

{¶15} In addition to the application of removal, the other family members filed objections to the inventory filed by Lewallen. The family members alleged that various items were removed from the estate. In particular, the family members alleged Lewallen was involved in causing Frank Mayborg to take a mortgage on his home in the amount of $85,000 approximately three weeks prior to his death and that Mayborg gave Lewallen's husband the sum of $110,000 twelve days prior to his death. The family members assert the $110,000 paid to Lewallen's husband should be included in the estate inventory.

{¶16} Respondent was asked by Lewallen to defend her from these allegations. Respondent was Mayborg's attorney prior to death and was aware of his desires, including the circumstances surrounding the $110,000. Respondent agreed, but did not seek any consent from any beneficiary nor obtain a separate fee agreement.

{¶17} Respondent also did not inform Lewallen that a conflict was created between Respondent's representation of Lewallen as fiduciary of the estate, and Respondent's representation of Lewallen individually and her husband as to the allegations that they had engaged in misconduct.

{¶18} Respondent believed that the allegations were false and were intended to harass Lewallen. Additionally, Respondent believed it was incumbent upon him as attorney for the fiduciary to ensure an accurate accounting of the estate. Respondent spent a significant amount of time working to resolve the allegations on behalf of Lewallen.

{¶19} On February 5, 2013, six months after the initial filing, the family members voluntarily withdrew the application for removal.

{¶20} On February 25, 2013, Respondent filed, with Lewallen's signature, an application for partial payment of attorney fees. On March 13, 2013, Respondent filed an application for extraordinary attorney fees.

{¶21} On March 7, 2013, the court denied interim attorney fees at that point in the case.

{¶22} On March 13, 2013, Respondent filed an application for extraordinary attorney fees.

{¶23} On March 20, 2013, the judge presiding over the matter stated the following on the record to both counsel and parties:

> Okay folks, now let me tell you. I don't know what your arrangements are for paying your respective attorneys, but don't presume that your – the hourly rate that they're charging is going to be covered out of this estate. It's going to be pro – most likely out of your pockets on this stuff of -- of things of this nature. So my suggestion to you is you make a proper economic decision over how you're going to handle this stuff.
>
> * * *
>
> Let me repeat for your benefit, and for her benefit, for Mr. Robertson's benefit. I have final authority of what's being paid for attorney's fees out of this estate. And if it's my finding that there was wasted time and I don't grant it all, then I presume—I don't know what his arrangement is. But whatever I don't grant, she's going to have to pay out of her own pocket, okay? And you folks are in the same situation as far as for your attorneys.
>
> Stipulated Ex. 48 at 19-20 and 31-32.

{¶24} On March 21, 2013, the probate judge issued a court order that the two applications for payment of attorney fees would be held in abeyance until the estate was ready to be closed. The probate judge issued the order after the in court discussion between the parties about any "other matters."

{¶25} On or about March 21, 2013, Respondent emailed Lewallen, without court approval, requesting $5,000 payment from her personal account for outstanding attorney fees. Respondent indicated that he was suffering a cash flow problem. Respondent also insinuates he could and would give more attention and work harder if Lewallen would pay partial attorney fees immediately. Below is an excerpt of a March 21, 2013 email from Respondent to Lewallen:

> After you left I reviewed my finances with the file and it has proved very challenging to finance the litigation in this case. Attached is the last printed statement of legal fees. I understand that you are not in a position to pay all of the fees due at the current time. The guidelines fee on this case is approximately $11,000. I could hold off on that guideline fee amount for at least three more months, if the remaining balance could be paid over the next 6-8 weeks. The immediate influx of the $5,000 discussed today will be a significant help. Please look into what you can do to bring the reminder of the bill in place over the next several weeks.
>
> Stipulated Ex. 38.

{¶26} Lewallen inquired whether the amount would be reimbursed plus interest from the estate. Respondent, via email on March 22, 2013, answered in the following manner:

> Yes, at the Judge's discretion – You are paying for a benefit to the estate and have the right to be reimbursed for estate expenses. If the Judge was to find that you had acted or that I had acted in a way to harm the estate, then he would not award for that. If what the siblings were saying was true, there would be an argument. The interest expense would be his judgment as to reasonableness – was this done in a way to maximize the benefit/minimize the harm to the estate.
>
> Stipulated Ex. 40.

{¶27} Respondent followed up with another email on May 30, 2013 again suggesting his abilities to perform in this matter would be greatly enhanced if Lewallen would provide

additional funding. Below is an excerpt of the May 30, 2013 email from Respondent to Lewallen:

> I have, and managed to continue work but the pace has slowed over the last week and a half. The payment of that invoice would relieve other pressures that would allow me to turn the heat back up on your case.
>
> Stipulated Ex. 43.

{¶28} Respondent continued to push the importance of the payment of attorney fees and the effect on performance later in the email:

> I want to move heaven and earth to go after them with all we have, your lack of cash flow on this case is now undermining my ability to do that. As I committed to Debbie, I will do my best regardless, but I will be capable of much more if the cash flow issue is resolved.
>
> *Id.*

{¶29} On March 23, 2013 pursuant to the request, Lewallen paid Respondent $5,000. On April 1, 2013 pursuant to the request, Lewallen paid Respondent $5,000. On May 31, 2013 pursuant to the request, Lewallen paid Respondent $7,820. On July 19, 2013 pursuant to a request from Respondent, Lewallen paid attorney Jeremy Evans $5,500 (Respondent brought in Evans to assist in the litigation).

{¶30} Respondent never divided any of his billing of this estate between regular estate administration and defense of Lewallen from the family members' claims. Additionally, Respondent did not obtain court approval to take these fees.

{¶31} On September 16, 2013, the probate court awarded Respondent a total of $14,000 in fees and ordered that such fees should not be paid prior to two weeks before the filing of the fiduciary's final account.

{¶32} On September 30, 2013, Respondent filed a second extraordinary fee application asking the court to approve the sum of $29,480 as fees from the estate for the work performed between March 8, 2013 and September 17, 2013.

{¶33} On October 17, 2013, Respondent, Evans, and Robert Smith (now representing Lewallen in the fee dispute) appeared before the probate judge to determine what, if anything should be reimbursed out of the estate. The judge, in the hearing, made it clear he was not interested in awarding any more than the $14,000 for matters associated with the estate as set forth in the earlier ruling.

{¶34} The next day, October 18, 2013 the court issued an order that "the award of $14,000 represents the full amount of attorney fees from all sources approved for activities conducted on behalf of the estate."

{¶35} On November 12, 2013, Respondent filed a fiduciary account for the time period from March 9, 2013 to October 28, 2013. That account, signed by both Respondent and Lewallen, reported $0 attorney fees paid during that time period even though Lewallen had paid a total of $23,230 to Respondent and attorney Jeremy Evans.

{¶36} On May 16, 2014, Respondent filed a final fiduciary account for the period of October 29, 2013 to May 16, 2014 which accurately stated that for the prior accounting period of July 9, 2012 to March 8, 2013 there were $0 in attorney fees paid but which inaccurately stated that for the prior accounting period of March 9, 2013 to October 28, 2013 $0 attorney fees were paid.

{¶37} The final fiduciary account dated May 16, 2014 stated that the attorney fees paid were $14,000 out of the estate, but did not indicate the $23,320 Lewallen paid to both Respondent and attorney Jeremy Evans.

{¶38} Respondent received the $14,000 check drawn from the estate at the final accounting. Respondent immediately endorsed the check over to Lewallen and delivered it to her.

{¶39} On March 28, 2014, Lewallen filed a grievance against Respondent.

{¶40} On November 14, 2014, Respondent reimbursed Lewallen $9,320.

{¶41} Respondent stipulated to and the panel finds the following violations by clear and convincing evidence:

- Prof. Cond. R. 1.7(b) [conflict of interest: current clients];
- Prof. Cond. R. 3.4(c) [knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on a good faith assertion that no valid obligation exists]; and
- Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice].

{¶42} Respondent violated Prof. Cond. R. 1.7(b) by agreeing to represent Lewallen in the defense of the claims brought forth by the other family members while representing her as the fiduciary of the estate. Respondent believed that the claims were designed to harass Lewallen, and he knew they were without merit given the fact that he created many of the documents they claimed were inappropriate. Hearing Tr. 96. Additionally, Respondent claimed he had a duty as the lawyer for the fiduciary to provide an accurate account of the estate. Hearing Tr. 100. However, Respondent's obligations as counsel ran not only to Lewallen as the executrix of her father's estate but to the estate itself, inasmuch as it was the embodiment of the will, literally and figuratively, of Frank Mayborg, now deceased. To the extent the claims of the Lewallen's other family members implicate potential wrongdoing that would diminish the estate, Respondent cannot simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer. Although Respondent ultimately was able

to achieve a dismissal of the other family members' claims and thus avoid prolonged litigation involving the estate, that does not eliminate the conflict of interest his dual representation created in the first place.

{¶43} Respondent violated Prof. Cond. R. 3.4(c) by receiving fees, at his own request to the client, that had not been authorized by the court as required by Local Rule 71.1. Respondent was aware any attorney fees paid required court approval. Hearing Tr. 78. Although the judge's comments were somewhat confusing and ambiguous related to any other matters between the family members, Respondent conceded the estate was a single matter. Hearing Tr. 31. Additionally, the probate judge issued the court order on fees after the in-court discussion that Respondent is suggesting created ambiguity. Respondent should have known the court order would supersede any discussion that occurred in court. By fighting the allegation in probate court and not in common pleas court, it remained one single matter in probate court. Therefore, Respondent could not collect any fees for work on behalf of Lewallen without court approval.

{¶44} Respondent violated Prof. Cond. R. 8.4(d) by receiving fees that had not been authorized by the court as required by Local Rule 71.1 and filing documentation with the court that indicated he had not received any attorney fees, despite receiving over $17,000.

AGGRAVATION, MITIGATION, AND SANCTION

{¶45} The guidelines governing mitigation and aggravation in attorney disciplinary cases are found in Gov. Bar R. V, Section 13, which lists factors that may be considered in recommending either a more or less severe sanction than is recommended by either party.

{¶46} The party stipulated to the following factors in mitigation that would justify a less severe sanction:

- Respondent has no prior discipline;
- Respondent made restitution;

- Respondent has fully cooperated with Relator during the course of the investigation as well as the Board of Professional Conduct during these proceedings.

{¶47} Respondent also offered, not as part of the stipulations, but rather during the hearing, as mitigation his various attempts to "do the right thing" during the estate matter. While not blaming the judge, Respondent suggested the courtroom discussions with the judge created such ambiguity on whether Respondent could bill for two separate matters. Hearing Tr. 67. The panel acknowledges the difficult circumstance and ambiguity the judge created.

{¶48} The parties did not stipulate, nor did Relator offer at the hearing, any aggravation that would justify a more severe sanction.

{¶49} The parties stipulated to the alleged rule violations, however the parties did not stipulate on a recommended sanction. Relator recommended that Respondent receives a six-month, fully stayed suspension. Respondent recommended a public reprimand.

{¶50} Relator cites *Disciplinary Counsel v. Shaw*, 138 Ohio St.3d 522, 2014-Ohio-1025, as justification for its recommended sanction. In *Shaw*, the attorney named his own five children as beneficiaries in a trust he prepared for a client, borrowed $13,000 from the same client without advising the client of the inherent conflict of interest and then failed to repay the loan as agreed, and accepted attorney fees for a guardianship without obtaining prior approval from the probate court. The Court concluded a two-year suspension, with one year stayed, was appropriate.

{¶51} Relator also cited *Dayton Bar Assn. v. Parisi*, 131 Ohio St.3d 345, 2012-Ohio-879, as justification for their recommended sanction. In *Parisi*, the attorney represented both the proposed guardian and the ward in a guardianship proceeding, collecting legal fees from the client's account without court approval while the application for guardianship was pending and

collecting a clearly excessive fee from an elderly client with diminished mental capacity. The Court in *Parisi* concluded a six-month suspension, all stayed was warranted.

{¶52} Respondent contends and the panel agrees the facts in *Shaw* are too different to the present case. In the first matter, Shaw included his own children as beneficiaries and took a loan that was not repaid. Secondly, Shaw actually took money from the estate without court approval. One could argue Respondent did the same by requesting money directly from Lewallen, but it's clearly a completely different circumstance, notwithstanding the belief that part of the work he did could have been interpreted as a different matter (as alluded to by the probate judge). Also, the sanction in the first *Shaw* matter was much more significant than what is even being requested by Relator. For these reasons, the panel finds *Shaw* of little benefit.

{¶53} The second *Shaw* matter includes practice while under suspension and other violations that are not present here.

{¶54} Respondent also contends *Parisi* is not instructive here. The panel, however, disagrees. Respondent suggests that because Parisi was representing the ward as well as the niece applying for guardianship during the proceeding, it makes the matter inapplicable to the present case. Although willing to acknowledge *Parisi* is a different forum and a more cut and dry conflict than what Respondent created, the panel believes it provides guidance.

{¶55} As the Court stated in *Parisi*, no matter how well-intended, a lawyer cannot represent both parties in a proceeding. Respondent, in this matter, represented Lewallen in her individual capacity and her capacity as fiduciary. Respondent spent significant time fighting the allegations, despite the fact the allegations were being asserted by beneficiaries. The fiduciary has an obligation to the beneficiaries and the beneficiaries were the ones making the complaints.

Respondent thought that because he knew Mayborg's intentions, he could resolve this on behalf of Lewallen.

{¶56} This issue represented much of the concern the panel had in this matter. Even during the hearing, Respondent continued to assert his ability to differentiate between his two roles. While he admitted wrongdoing, Respondent continued to assert his duty, as attorney to the fiduciary, to fight the beneficiaries who asserted claims against the estate. Respondent additionally claimed he had a duty of candor to the court that required him to fight claims against the estate. Hearing Tr. 100.

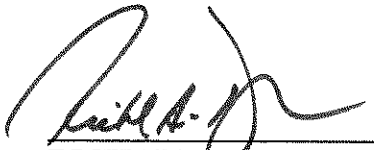
{¶57} Finally, the last issue to give the panel pause is the request for attorney fees from the client. In addition to the obvious Prof. Cond. R. 3.4(c) violation in taking a fee not authorized by the court, the panel was particularly disturbed by the email requesting funds. Specifically, Respondent insinuates the amount of money he received would impact his overall performance in the matter. The panel believes attorneys should be compensated for work completed however, the notion that an attorney will perform better if money is provided immediately is not something that should be encouraged.

{¶58} For these reasons, the panel concludes a sanction more than a public reprimand is warranted. Therefore, the appropriate sanction for Respondent is six-month suspension from the practice of law, all stayed.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on August 7, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, David Franklin Robertson, Jr., be suspended from the practice of law for six months, stayed in its entirety, and ordered to pay the costs of these proceedings.

Pursuant to the order of the Board of Professional Conduct of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.



RICHARD A. DOVE, Director

CINCINNATI BAR ASSOCIATION *v.* ROBERTSON.

[Cite as *Cincinnati Bar Assn. v. Robertson,* 145 Ohio St.3d 302, 2016-Ohio-654.]

Attorneys—Misconduct—Violations of the Rules of Professional Conduct—Stayed six-month suspension.

(No. 2015-1312—Submitted September 15, 2015—Decided February 25, 2016.)

ON CERTIFIED REPORT by the Board of Professional Conduct of the Supreme Court, No. 2014-068.

Per Curiam.

{¶ 1} Respondent, David Franklin Robertson Jr. of Cincinnati, Ohio, Attorney Registration No. 0074030, was admitted to the practice of law in Ohio in 2001. Relator, Cincinnati Bar Association, has charged him with professional misconduct arising out of his representation of a client in the probate court of Hamilton County. Based on the parties' stipulations and the evidence presented at the panel hearing of the Board of Professional Conduct, the board recommends that we sanction him with a stayed six-month suspension. Neither party has filed objections to the board's report, and based on our independent review of the record, we accept the board's findings of misconduct and agree with the recommended sanction.

Misconduct

{¶ 2} In July 2012, Deborah Lewallen retained Robertson to represent her as the executor of her father's estate. Three of Lewallen's siblings and seven of the decedent's grandchildren—who were also beneficiaries of the estate—thereafter attempted to remove Lewallen as executor and filed objections to the estate inventory, arguing that Lewallen and her husband had improperly removed items

from the estate. Upon Lewallen's request, Robertson also agreed to defend her and her husband against her family members' objections and their attempt to remove her as executor.

{¶ 3} Robertson, however, failed to explain to Lewallen that his representation of her and her husband in their personal capacities created a conflict of interest. Specifically, the board found that "[t]o the extent the claims of the Lewallen's [sic] other family members implicate[d] potential wrongdoing that would diminish the estate, Respondent [could] not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer." Accordingly, the parties stipulated and the board found that Robertson's dual representation of Lewallen in her individual capacity and in her role as fiduciary of the estate violated Prof.Cond.R. 1.7(b) (prohibiting a lawyer from accepting or continuing representation of a client if a conflict of interest would be created, unless the affected client gives informed consent in writing).

{¶ 4} The family members eventually withdrew their request to remove Lewallen, and due to the extensive litigation, Robertson filed applications with the probate court for partial payment of attorney fees. A local rule, however, required that attorney fees for the administration of an estate be paid at the time of the fiduciary's final account and with prior court approval. Accordingly, the judge held Robertson's applications in abeyance until the estate was ready to be closed.

{¶ 5} Notwithstanding the local rule and the court's order, Robertson asked Lewallen for payment of his fees, with the understanding that the estate would eventually reimburse her when it was terminated. Between March and July 2013, she paid $17,820 to Robertson and $5,500 to an attorney who had assisted him. However, in October 2013, the court awarded Robertson only $14,000 in fees for activities conducted on behalf of the estate. Prior to filing the final account, Robertson endorsed an estate check for $14,000 and then delivered those funds to Lewallen. When he filed the final account, he did not report that Lewallen had paid

$23,320 in attorney fees and, instead, reported only that $14,000 in attorney fees had been paid.

{¶ 6} The parties stipulated and the board found that by accepting attorney fees that had not yet been approved by the court, as required by local rule, Robertson violated Prof.Cond.R. 3.4(c) (prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal). Similarly, the board found that by accepting attorney fees without court approval and by filing documentation in the court that inaccurately reported the amount of attorney fees he had received, Robertson also violated Prof.Cond.R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice).

{¶ 7} We agree with these findings of misconduct.

Sanction

{¶ 8} When imposing sanctions for attorney misconduct, we consider several relevant factors, including the ethical duties that the lawyer violated, the sanctions imposed in similar cases, and the aggravating and mitigating factors listed in Gov.Bar R. V(13).

{¶ 9} In this case, the board concluded that the following mitigating factors were applicable: Robertson had no prior discipline; he made restitution by reimbursing Lewallen the additional $9,320 in fees that she had paid to him and his associate; and he fully cooperated in the disciplinary process. *See* Gov.Bar R. V(13)(C)(1), (3), and (4). In addition, the board acknowledged that despite the local rule, some of Robertson's courtroom discussions with the judge created ambiguity regarding how to bill for his time. The board found no aggravating factors.

{¶ 10} To support its recommended sanction, the board cites *Dayton Bar Assn. v. Parisi*, 131 Ohio St.3d 345, 2012-Ohio-879, 965 N.E.2d 268. In that case, we imposed a stayed six-month suspension on an attorney who (1) had a conflict of interest by representing both a proposed ward and the ward's niece in a

guardianship proceeding, (2) engaged in conduct that was prejudicial to the administration of justice by using her power of attorney over the proposed ward's affairs to pay her own attorney fees without first obtaining court approval, and (3) charged a clearly excessive fee. In sanctioning the attorney, we emphasized that no matter how well intentioned an attorney's motive is, the professional conduct rules prohibit representation of clients with adverse interests, unless certain exceptions apply, including the informed consent of each affected client. *Id.* at ¶ 12-13.

{¶ 11} We agree with the board that *Parisi* is instructive. Similar to the attorney in that case, Robertson's dual representation resulted in a conflict of interest, and he accepted attorney fees without court approval. Therefore, a similar sanction is warranted here. And as the board noted, no matter how well intentioned Robertson was, he should have recognized that he had created a conflict not only by accepting representation of Lewallen in her individual capacity—after having already agreed to represent her as fiduciary of the estate—but also by spending a significant amount of time defending against the allegations asserted by the estate's other beneficiaries. *See also Disciplinary Counsel v. Dettinger*, 121 Ohio St.3d 400, 2009-Ohio-1429, 904 N.E.2d 890 (imposing a stayed six-month suspension on an attorney who borrowed money from a client without disclosing the inherent conflict of interest or advising the client or—upon the client's death, his executor—to seek independent counsel).

Conclusion

{¶ 12} Having considered the ethical duties violated, the mitigating factors, the absence of any aggravating factors, and the sanctions imposed in comparable cases, we accept the board's recommended sanction. David Franklin Robertson Jr. is hereby suspended from the practice of law for six months, with the suspension stayed in its entirety. Costs are taxed to Robertson.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Vincent A. Salinas Sr., Howard M. Schwartz, and Edwin W. Patterson III, General Counsel, for relator.

Kegler, Brown, Hill & Ritter Co., L.P.A., and Jonathan E. Coughlan, for respondent.
