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EDITOR'S MESSAGE

This issue of Probate Law Journal is devoted entirely to work product of the 133rd General Assembly. Its term has now expired, and its legislation must still be signed by the Governor and will not become effective until later this spring. Immediately following this message is a Legislative Report that is a tabulation of the output of trust and estate legislation, bills that made it and bills that failed, either on their merits or for lack of legislative time. Following that are articles identifying and explaining the contents of each of the bills that survived, or almost survived and will be reintroduced in the new General Assembly, most of them in the "first person," that is, authored by the person who identified the problem involved, wrote the statutory solution and authored the definitive Probate Law Journal article on it; and who then shepherded the solution through the EPTPL Section, OSBA Council of Delegates and finally the General Assembly. Please remember to thank them for their efforts, made on your behalf for the improvement of Ohio trust and estate law.

LEGISLATIVE REPORT

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The past legislative biennium is completed, the legislators have gone home, and a new General Assembly will represent us in the new biennium. With the end of the

IN THIS ISSUE:

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2019-2020 session there is both good and bad news. Some trust and estate legislation that we follow made it, some did not.

First, the "dids." Enacted were SB 21, authorizing benefit corporations, and SB 276, an OSBA bill updating the LLC law. Explanations of each of these new laws follow in this issue. We are rushing this information to our readers now, even before the Governor has signed the bills, as he will have no reason to veto them. Their effective dates will be this spring, March or April dates that are 90 days from when they are signed and filed with the Secretary of State.

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Second, the "did nots." HB 464, the OSBA-sponsored trust and estate omnibus bill, failed of final enactment. Its failure makes a good story, so here it is. The bill was late in introduction, not until the second year of the session. The sponsor was Rep. Cupp, a lawyer who has also sponsored prior OSBA bills. You know what came next. The Speaker of the House was indicted, and Rep. Cupp became the new Speaker and had more on his plate than just our bill. The bill did not receive attention until the lame duck session in November, when it finally moved through its House committee and the floor, teeing it up for the Senate. It cleared the Senate committee in the closing days of the lame duck session, and then went to the Senate floor on the last day of the session. It passed the Senate unanimously, as it had passed in the House.

Now it gets tricky. The original bill contained only four rather simple OSBA proposals. It was expected to be amended with seven more important OSBA proposals, that had first to be approved by the OSBA Council of Delegates in April. You know what happened next. The virus came upon us, the April OSBA meeting was cancelled, and approval (of all seven) finally came only by a virtual meeting in July. We were advised that it was then too late to add the new proposals in the House or Senate. Meanwhile, the judges and others had slipped into the bill in the Senate about a dozen of their own wish list items. That meant that after the bill cleared the Senate, it had to return to the House for concurrence in those Senate amendments, usually a formality.

The bill cleared the Senate on the last day of its session, but was somehow de-

layed in its immediate return to the House (also in its last day) for concurrence. It did not arrive there until after the House had adjourned. Too late! So it has not (yet) been enacted.

This is not a serious problem for the state. The leadership promises to give the failed bill early attention in the new legislature. However, it is a problem for Probate Law Journal. This Jan/Feb 2021 issue was to be dedicated entirely to the new legislation, on the assumption there would be a ton of it. Well, there was some, and there should be more done early in the new session. So that's what we are publishing on in this issue, not only what has already been enacted but also what is expected for enactment early in the new session.

Two other failed bills that would have been helpful to trust and estate practitioners may also return in the new legislative session. HB 270 included a simplified procedure for claiming unclaimed funds for a closed estate, and HB 209 would have repealed dower. Two failed bills that were more problematic were HB 449, extending the real estate transfer fee to transfer of interests in certain LLCs and other pass-throughs owning real estate, and HB 692, providing for remote witnessing of electronic wills. Explanations of each of these proposals are contained in prior issues of Probate Law Journal and are also cited in the Legislative Scorecard.

MODERNIZATION OF OHIO LLC LAW

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INTRODUCTION

A complete restatement of the Ohio LLC Act, which was enacted about 25 years ago, has been in the works for a while and was finally approved by both the Senate and the Ohio House of Representatives on December 18, 2020. The new version is based upon the "Revised Prototype Limited Liability Company Act" prepared by the ABA Committee of LLCs, Partnerships, and Unincorporated Entities ("Prototype").

The new Act was sponsored by Senators Roegner and Manning, with considerable participation by the OSBA Corporation Law Committee, chaired by Mike Moeddel from Cincinnati. Other OSBA committees have been consulted, including the Business Entities Committee of the EPTPL Section; the asset protection experts on that Committee have made important contributions. The new Ohio Revised Limited Liability Company Act ("New LLC Act") will become effective on January 1, 2022;[1] and the currently existing LLC Act (R.C. 1705.01 to 1705.61) will be repealed effective January 1, 2022.[2]

The initial plan that both versions of the law would exist together, with the old law applying to existing LLCs and the new law applying to new LLCs, was abandoned during the legislative process, and only the New LLC Act will apply on and after January 1, 2022.

OPERATING AGREEMENT

- An operating agreement may be entered into before, at the time of, or after filing the articles of organization.[3]

- No person can bind the LLC or a series of the LLC unless authorized as agent in the operating agreement, or under Sections 1706.19 or 1706.30, or to the extent provided by law other than Chapter 1706.[4]
- 1706.19 allows an LLC or a series of the LLC to file a form with the Secretary of State stating the authority of a specific person or with respect to persons holding a particular position.[5]

SERIES ASSETS

- The New LLC Act permits the establishment of a "series of assets."[6] The series can act in its own name and can sue or be sued; can contract, hold and convey title; and can grant liens and security interests in assets of the series.[7]
- The operating agreement may provide for one or more "series of assets" with separate rights, powers, or duties for specified property or a separate purpose or investment objective.[8] At least one LLC member must be associated with each series.[9]
- The debts, liabilities, obligations, and expenses with respect to a series "shall be enforceable against the assets of that series only"; and none of the liabilities of the LLC generally or of any other series shall be enforceable against that series.[10]
- It is very much like having a parent LLC with a number of subsidiaries, each holding a separate asset. This structure is well known in the rental real estate business, so that the liability of one building cannot be satisfied by other buildings owned by other LLCs.
- With a series LLC, the separate divisions are established in the Operating Agreement, and there is no need for a subsidiary LLC.
- A series may carry on any activity, whether or not for profit.[11]
- Any series must keep separate records.[12]
- The LLC operating agreement must include a statement of the separate liability for the series.[13]
- The articles filed with the Secretary of State must specifically allow one or more series of assets subject to the provisions of Sec. 1706.761.[14]
- If the requirements for establishment of one or more series are met, the liabilities of the series will be enforceable only against the assets of that series and will not be enforceable against the LLC or another series; and none of the liabilities of the LLC or another series will be enforceable against the assets of the series.[15]
- Assets of a series may be held in the name of the series, in the name of the LLC, through a nominee, or otherwise.[16]

SELECTED PROVISIONS

- An LLC may carry on any lawful activity, "whether or not for profit."[17]
- The New LLC Act confirms that it "shall be construed to give maximum

effect to the principles of freedom of contract and to the enforceability of operating agreements."[18] This is an important provision for people who want to define the rights, duties, and responsibilities that will apply in a business venture without having state law override their agreement with non-waivable duties.

- The New LLC Act also confirms that duties, including fiduciary duties, may be "expanded, or restricted, or eliminated by a written operating agreement."[19]
- But, an operating agreement cannot eliminate the "implied covenant of good faith and fair dealing."[20]
- And, while an operating agreement includes oral agreements;[21] the provisions of the New LLC Act that allow waiver of duties require that those waivers be in a written operating agreement.[22]
- A promise by a member to contribute to an LLC, or a series of the LLC, is not enforceable unless in writing and signed by that member.[23]
- Rules that statutes in derogation of common law must be strictly construed have no application to the New LLC Act.[24]
- But, unless provided otherwise in the New LLC Act, "principles of law and equity" supplement new chapter 1706.[25]
- The failure of an LLC or its members to observe formalities relating to LLC powers or management will not be grounds for imposing liabilities of the LLC upon the members.[26]
- LLCs will be under the direction of its members.[27]
- A "series" of an LLC will be under the direction of the members associated with the series.[28] And the other members will not be involved.[29]
- A member does not violate any duty under the New LLC Act just because the member's conduct furthers the member's own interest.[30]
- The New LLC Act does not distinguish between Member Managed LLCs and Manager Managed LLCs. All LLCs are under the direction of its members.[31]
- But, the members may designate one or more managers to supervise or manage the affairs of the LLC.[32]
- The New LLC Act clearly states that the sole remedy of an LLC judgment creditor is a charging order; that the creditor has no right to foreclose; and that the creditor cannot obtain possession of the debtor's membership interest or the LLC's property.[33]

CLOSING THOUGHTS

- There is much more in the New LLC Act than can be covered here. Fortunately, we all have another year to learn and absorb the new provisions.
- The Corporation Law Committee plans to prepare sample documents for OSBA members, and there will be more articles and seminars. The readability of the New LLC Act is im-

proved, and the "modern" language is easier to read. The Legislative Service Commission has prepared a summary which is available on the Ohio Legislature website along with a copy of the bill (go to legislature.ohio.gov, 133rd G.A., and search for SB 276).[34]

ENDNOTES:

[1]Am. Sub. S.B. No. 276 (the "Bill"); Sec. 1706.83.
[2]Bill, Sections 3 and 4.
[3]Sec. 1706.16(D).
[4]Sec. 1706.18.
[5]Sec. 1706.19.
[6]Sec. 1706.76.
[7]Sec. 1706.05(D).
[8]Sec. 1706.76(A)(1).
[9]Sec. 1706.76(A)(2).
[10]Sec. 1706.761(A)(1) and (2).
[11]Sec. 1706.76(B).
[12]Sec. 1706.761(B)(1).
[13]Sec. 1706.761(B)(2).
[14]Sec. 1706.761(B)(3).
[15]Sec. 1706.762(B); Sec. 1706.761(B).
[16]Sec. 1706.762(A).
[17]Sec. 1706.05(A).
[18]Sec. 1706.06(A).
[19]Sec. 1706.08(B)(1).
[20]Sec. 1706.08(B)(1).
[21]Sec. 1706.01(r).
[22]Sec. 1706.08(B)(1) and (2).
[23]Sec. 1706.281(A).
[24]Sec. 1706.06(c).
[25]Sec. 1706.06(B).
[26]Sec. 1706.26.
[27]Sec. 1706.30.
[28]Sec. 1706.30(A)(2).
[29]Sec. 1706.30(A)(3).
[30]Sec. 1706.31(F).
[31]Sec. 1706.08 to 1706.082.
[32]Sec. 1706.31(A).
[33]Sec. 1706.342(F).
[34] https://www.legislature.ohio.gov.

SPECIAL DELIVERY: OHIO'S BUSINESS BENEFIT CORPORATION HAS ARRIVED

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In the May/June 2020 edition of the Probate Law Journal of Ohio, we reported that Ohio Senate Bill number 21 proposing to amend Ohio's corporate statutes to allow the Articles of Incorporation of Ohio corporations to have one or more beneficial purposes had just been voted out of the Ohio Senate.[1] Soon, Governor DeWine will sign Ohio Senate Bill 21 into law, amending Ohio Revised Code ("R.C.") Chapter 1701 to allow for the articles of an Ohio corporation to provide for one or more beneficial purposes among the purposes for which a corporation can be formed.

The new law is largely as we previously reported. In summary, the new statutory provisions define a "Benefit corporation" to mean "a corporation that sets forth in its articles of incorporation one or more beneficial purposes among the purposes for which the corporation is formed."[2] R.C. 1701.03(A)(2) permits the purposes for which a corporation is formed to include a beneficial purpose. The statutory language defines "beneficial purpose" as "seeking to have a bona fide positive effect or to reduce

one or more bona fide negative effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature for the benefit of persons, entities, communities, or interests other than shareholders in their capacity as shareholders."[3] Except as otherwise provided by the articles of the corporation, inclusion of a beneficial purpose in the corporation's stated purposes does not prevent such corporation from seeking any other purposes for which the corporation is formed, including operation of the corporation for pecuniary gain or profit and distribution of net earnings, and no particular purpose of a corporation would have priority over any other purpose of the corporation.[4] The new statutory provisions clarify that corporations that are not benefit corporations, and therefore do not have a "beneficial purpose," are not required to operate exclusively for profit or distribution of net earnings of the corporation in all instances.[5]

In order to be effective, the articles must expressly provide for a beneficial purpose.[6] The proposed statutory language states that "[a] statement of purpose in the articles that includes any purpose or combination of purposes for which individuals lawfully may associate themselves, ***without*** the express provision of a beneficial purpose, does not establish a beneficial purpose as a purpose of the corporation."[7]

The new statutory provisions provide that an Ohio corporation may not amend its articles to include a beneficial purpose if: (a) the corporation has issued and has outstanding shares listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association(b) the initial articles of the corporation did not include a beneficial purpose.[8] In addition, the new law permits a corporation to prioritize its purposes. Specifically, the articles may set forth "any priority or other method for balancing the purposes for which the corporation is formed."[9]

Unless a corporation is already using the words "benefit" or "b-" prior to the effective date of the new statutory provisions, only a benefit corporation satisfying the requirements of the new statutory provisions would be permitted to use the word "benefit" or "b-" in its name as prefix to "company," "co.," "corporation," "corp.," "incorporated," or "inc."[10]

The newly enacted amendments to R.C. 1701 provide that at the annual shareholder meeting (or at any meeting in lieu thereof) a benefit corporation is required to provide to its shareholders "any written statement or report required by the articles, regulations, or a written agreement of the benefit corporation concerning the beneficial purposes of the benefit corporation and the activities of the benefit corporation toward those beneficial purposes and related provisions set forth in the corporation's articles."[11] In addition, upon shareholder request, the benefit corporation would be required to send such written statements and reports to the requesting shareholder.[12] The failure to provide such written statements or reports exposes the benefit corporation to a monetary penalty of 10 dollars per day per shareholder making the request for any such written statements or reports.[13]

Notably, an Ohio benefit corporation does

not owe a duty to a beneficiary of the beneficial purpose of the benefit corporation (based solely on the status of that person being a beneficiary).[14] If a benefit corporation fails to seek, achieve, or comply with a beneficial purpose, the benefit corporation is not liable for damages.[15]

The revisions to R.C. Chapter 1701 also set forth some safeguards and standards for directors of benefit corporations. The statutory language specifically states that a director does not have a duty to a person who is a beneficiary of a beneficial purpose of a benefit corporation based solely on the status of that person being a beneficiary.[16]

However, the statutory language does provide a means to bring an action to require a benefit corporation to comply with a beneficial purpose set forth in its articles. Such action may be brought only by the benefit corporation or in a derivative action on behalf of the benefit corporation by any of the following: (1) a director of the corporation; (2) persons who, in the aggregate, hold 25% of all shares outstanding and entitled to vote at a meeting of shareholders, or a lesser percentage if the articles or regulations prescribe a lesser percentage; (3) if the benefit corporation is publicly traded, persons who, in the aggregate, own shares of at least $2 million of market value; and (4) any other person that the articles or regulations authorize to bring such an action.[17] Notably absent from the statute is any authorization for the Ohio Attorney General or Ohio Secretary of State to bring an action to require a benefit corporation to comply with the beneficial purposes set forth in its articles.

Ohio now joins at least 37 other states that have enacted benefit corporation statutes.[18] In addition to business benefit corporations, some states have enacted legislation allowing for "stewardship trusts."[19] Oregon recently adopted Or. Rev. Stat. Ann. § 130.193 which allows for a stewardship trust to be formed for a business purpose without a definite or definitely ascertainable beneficiary. Under Oregon's stewardship trust statute, the business purpose may seek economic and noneconomic benefits and may hold an ownership interest of a corporation, partnership, limited partnership, cooperative, limited liability company, limited liability partnership or joint venture.[20] An exploratory committee of the Estate Planning Probate and Trust Law section is investigating whether the current business benefit corporation and Ohio's trust code is sufficient for facilitating the ongoing management of a business' purposes (as well as its profits), or whether there is value for Ohio to adopt this new type of special purpose trust. If you have any comments regarding whether Stewardship Trusts would be beneficial to Ohio, please contact Lee M. Stautberg at Lee.Stautberg@Dinsmore.com.

ENDNOTES:

[1]Lee M. Stautberg and Melissa Spievack, More than the Money: Ohio's Proposed Business Benefit Corporation, 30 Ohio Prob. L.J. 211, 30 No. 5 Ohio Prob. L.J. NL 8 (May/June 2020).

[2]R.C. 1701.01(FF).

[3]R.C. 1701.01(GG).

[4]R.C. 1701.03(A)(2).

[5]R.C. 1701.03(A)(3).

[6]R.C. 1701.03(A)(4).

[7]R.C. 1701.03(A)(4) (emphasis added).

[8]R.C. 1701.03(A)(5).

[9]R.C. 1701.04(B)(3).

[10]R.C. 1701.05(A)(2).

[11]R.C. 1701.38(A)(3(C).

[12]R.C. 1701.38(A)(3(C).

[13]R.C. 1701.94(A)(6).

[14]R.C. 1701.96(A)

[15]R.C. 1701.96(B).

[16]R.C. 1701.59(D)(3).

[17]R.C. 1701.96(c).

[18]See https://benefitcorp.net/policymakers/state-by-state-status.

[19]"In a steward-owned company, the people actively involved in a business control the business. Equitable ownership is separated from management, with the goal that management will focus on the business's purposes and not just on the business's profits." Susan N. Gary, The Oregon Stewardship Trust: A New Type of Purpose Trust that Enables Steward-Ownership of a Business, 88 U. Cin. L. Rev. 707, 707 (2020) (citing THE PURPOSE FOUNDATION, STEWARD-OWNERSHIP (2018), https://purposeeconomy.org/content/uploads/purposebooklet_en.pdf [https://perma.cc/Z8WP-LSH9]; The Purpose Foundation, RSF Social Finance, Organic Valley & Organically Grown Company, Steward-ownership: Ownership and finance solutions for mission-driven businesses, presentation prepared for Expo-West 2019 (on file with author); Alexander A. Bove, Jr., The Purpose Trust Has a New Purpose, 33 PROB. & PROP. 40 (Jul.-Aug. 2019)).

[20]Or. Rev. Stat. Ann. § 130.193(2).

EXPANDED "ESTATE PLANNING" FOR A WARD BY A GUARDIAN (EFFECTIVE DATE TBD)

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◆ **Caution:** These legislative proposals were NOT enacted this year, for the reasons detailed in the Legislative Report in this issue of PLJO. They are expected to receive early attention of the new General Assembly in 2021 and perhaps become effective later this year.

The Governor recently signed into law Sub HB 464 No. of the 133rd General Assembly, amending, among other laws, R.C. 2111.50 to allow guardians to engage in estate planning for a ward. Under prior guardianship law, a guardian could, with probate court approval, engage in limited types of estate planning for the ward. Previously, with probate court approval, a guardian could only:

- Convey or release the present, contingent, or expectant interests in real or personal property of the ward, including, but not limited to, dower and any right of survivorship incident to a survivorship tenancy, joint tenancy, or tenancy by the entireties
- Create revocable trusts of property of the estate of the ward that may not extend beyond the minority, disability, or life of the ward
- Exercise rights to elect options under annuities and insurance policies, and to surrender an annuity or insurance policy for its cash value

R.C. 2111.50 now allows a guardian to seek probate court approval to disclaim a ward's interest in property, create transfer on death beneficiary designations for the ward, change beneficiary designations for the ward's insurance policies, retirement plans, or annuities, and create a revocable trust for a ward which may extend beyond the life of the ward. Protections are put

into place by requiring notice to any person whose interest in the ward's estate upon death would be affected before probate court approval could be granted.

The additional powers do not impose a duty on a guardian to engage in estate planning for the ward. Rather, the amendments to R.C. 2111.50 augment the estate planning tools already available to guardians and enhance the guardian's ability to protect, preserve, and efficiently administer the ward's estate for the ward and the ward's beneficiaries. The effective date of the amendment is yet to be determined.

AMENDED OHIO REVISED CODE § 2106.13: REDUCTION IN ALLOWANCE FOR SUPPORT APPLIES ONLY IF MULTIPLE VEHICLES SELECTED BY SURVIVING SPOUSE

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◆ **Caution:** These legislative proposals were NOT enacted this year, for the reasons detailed in the Legislative Report in this issue of PLJO. They are expected to receive early attention of the new General Assembly in 2021 and perhaps become effective later this year.

H.B. 464 amends Ohio Revised Code Section 2106.13 parts (A) and (C) to clarify that a surviving spouse is entitled to receive the spousal share of the allowance of support **and** one automobile without reducing the value of the allowance, consistent with Ohio law since 1990. This clarification is desired to eliminate a perceived ambiguity in the previous 2017 version of Section 2106.13 which suggested that the election of a single automobile by a surviving spouse would reduce the allowance for support. Prior to H.B. 464, the 2017 version of Ohio Revised Code Section 2106.13(A) stated:

> **Sec. 2106.13(A)** If a person dies leaving a surviving spouse and no minor children, leaving a surviving spouse and minor children, or leaving minor children and no surviving spouse, the surviving spouse, minor children, or both shall be entitled to receive, subject to division (B) of this section, in money or property the sum of forty thousand dollars as an allowance for support. **If the surviving spouse selected one** or more **automobile**s under section 2106.18 of the Revised Code, **the allowance for support prescribed by this section shall be reduced by the value of the automobile having the lowest value if more than one automobile is so selected**. The money or property set off as an allowance for support shall be considered estate assets. (*Emphasis added for discussion below*.)

By referencing "one or more automobiles," the statute arguably required a reduction of the spousal allowance if even a single automobile is selected by a surviving spouse. That interpretation ignored the balance of the sentence conditioning the reduction on selecting "more than one automobile." Additionally, the legislative history of Section 2106.13 indicated a continuing legislative intent to provide to a surviving spouse both the spouse's full share of the allowance for support **and** an automobile without reducing the value of the support allowance.

The version of Section 2106.13(A) prior to the 2017 version permitted a surviving spouse to claim up to two of the deceased

spouse's automobiles. The language was clear that the spouse's support allowance would only be reduced if more than one automobile was selected by the surviving spouse as follows:

> **PREVIOUS Sec. 2106.13(A)** If a person dies leaving a surviving spouse and no minor children, leaving a surviving spouse and minor children, or leaving minor children and no surviving spouse, the surviving spouse, minor children, or both shall be entitled to receive, subject to division (B) of this section, in money or property the sum of forty thousand dollars as an allowance for support. **If the surviving spouse selected two automobiles under section 2106.18 of the Revised Code, the allowance for support prescribed by this section shall be reduced by the value of the automobile having the lower value of the two automobiles so selected.** The money or property set off as an allowance for support shall be considered estate assets. (*Emphasis added*.)

House Bill 432 then amended Section 2106.18(A) on April 6, 2017 to the statute permitting more than two automobiles to be selected by a surviving spouse if the total value of the vehicles does not exceed $65,000. In conjunction with that change, House Bill 432 amended Section 2106.13 to eliminate the reference to "two automobiles" and replaced it with the current language referencing "one or more automobiles."

Every iteration of Sections 2106.13(A) and 2106.18(A) since 1990 until the 2017 version clearly gave the surviving spouse BOTH the spousal allowance for support **and** one automobile without reducing the allowance. The 1990 legislation, adopted May 31, 1990 in Ohio House Bill 346, created the statutes for the spouse's allowance for support (Section 2106.13) and the additional election to select a single automobile (Section 2106.18). After Section 2106.18 was expanded to permit a spouse to select two automobiles, the offset to the allowance for support was added in the statute (printed above) requiring the value of the least expensive automobile to be deducted from the allowance for support. This still resulted in the right for the surviving spouse to select a single automobile without reducing the allowance for support. Our EPTPL Section unanimously agreed that the current Section 2106.13(A) was intended to continue the option to receive both the spousal allowance for support **and** an automobile without reducing the allowance for support. The intention of 2017's House Bill 432 was to reduce the spouse's allowance for support **only if multiple automobiles are elected**, and then, only to reduce the allowance by the value of the least expensive automobile elected.

The statute is clear once again that the spousal share of the allowance for support is not reduced if a single automobile is selected by the surviving spouse, and that the allowance is reduced by the value of the lowest valued vehicle only if multiple automobiles are selected. H.B. 464 eliminated the prior ambiguity in parts (A) and (C) Ohio Revised Code Section 2106.13 as follows:

> (A) If a person dies leaving a surviving spouse and no minor children, leaving a surviving spouse and minor children, or leaving minor children and no surviving spouse, the surviving spouse, minor children, or both shall be entitled to receive, subject to division (B) of this section, in money or property the sum of forty thousand dollars as an allowance for support.

If the surviving spouse selected ~~one or more automobiles~~ **more than one automobile** under section 2106.18 of the Revised Code, the allowance for support prescribed by this section shall be reduced by the value of the automobile having the lowest value ~~if more than one automobile is~~ **of the automobiles** so selected. The money or property set off as an allowance for support shall be considered estate assets.

(c) If the surviving spouse selected ~~one or more automobiles~~ **more than one automobile** under section 2106.18 of the Revised Code, the probate court, in considering the respective needs of the surviving spouse and the minor children when allocating an allowance for support under division (B)(3) of this section, shall consider the benefit derived by the surviving spouse from the transfer of the automobile having the lowest value ~~if more than one automobile is~~ **of the automobiles** so selected.

GOING BARE, OR NOT: *THE REPEAL OF R.C. 5805.06(B)(2)*

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◆ **Caution:** These legislative proposals were NOT enacted this year, for the reasons detailed in the Legislative Report in this issue of PLJO. They are expected to receive early attention of the new General Assembly in 2021 and perhaps become effective later this year.

H.B. 464, by repealing R.C. 5805.06(B)(2), expands asset protection opportunities in Ohio. This section, which is one of the most misunderstood and unfair provisions in the entire Uniform Trust Code, states:

> "Upon the lapse, release, or waiver of the power of withdrawal, the holder is treated as the settlor of the trust. . . ."

This, standing alone, may appear innocuous; however, the trouble becomes readily apparent when it is read in conjunction with R.C. 5805.06(A)(2):

> ". . . with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."

These provisions, when combined, interfere with sound, flexible estate planning.

We discussed the problem with R.C. 5805.06(A)(2) at length in our 2019 article "Asset Protection Opportunities Expanded by the Repeal of Ohio Revised Code Section 5805.06(B)(2)"[1]. The premise of that article was:

> From a beneficiary's perspective, an inheritance that is left in trust is always better than one received outright. While it is commonly agreed that all generalizations are false, this one is not. The reason is simple: the protection afforded by a spendthrift provision is nearly ironclad. Almost all clients recoil at the thought of a child losing an inheritance in a nasty divorce from hell or to a potential greedy personal injury judgment creditor who was a recipient of an out of control jury award. We know how difficult and expensive it can be to establish an Ohio Legacy Trust, yet even better protections can be so easily provided in a simple third-party settled beneficiary-controlled discretionary trust. Why would anyone not do this? It's because many clients see no compelling need to restrict their children's access to their eventual inheritances. It is our hope that with the repeal of R.C. 5805.06(B), a

perceived drafting error in the Uniform Trust Code will be corrected in Ohio, and each trust beneficiary can be given the choice of receiving their inheritance outright or holding it as trustee of the deceased settlor.

In our practice, we encourage many of our clients to leave their estates to their children or other primary beneficiaries in trust, with the beneficiary serving as the trustee. Many clients, however, are unsure about how to proceed without first discussing this idea with their children. Those discussions are typically unhelpful for various reasons. The optimal flexibility can be achieved by letting each beneficiary decide whether or not they want to receive their inheritance outright (i.e. "bare") or in trust ("not") following the settlor's death. Under current law, permitting the choice between "outright" or "in trust" to be made after the settlor's death, destroys *for all time* the asset protection benefits of the arrangement, because letting the withdrawal right lapse causes the beneficiary to be treated as the settlor of the trust for creditor rights purposes. While giving creditors access to currently exercisable withdrawal rights is a well-established principle, allowing that access for the remainder of the beneficiary's lifetime—long after the withdrawal right had lapsed—is a result that has virtually no support under common law principles and is one that has no place whatsoever in the Ohio Trust Code. With the repeal of R.C. Sec. 5805.06(B)(2), this concern is eliminated, except with respect to unpaid creditors which the beneficiary might actually have during that limited period during with the withdrawal right is exercisable. Future non-exception creditors arriving on the scene after the right has lapsed would have no ability to reach trust assets.

The trust design that would be facilitated by this repeal is essentially this: the settlor's trust divides into equal shares for the settlor's children or other beneficiaries upon death. Each beneficiary is given a limited period of time, such as 60 days following the settlor's death, to demand distribution of their share, but if that right is not exercised, then the share would automatically be allocated to a separate subtrust for the beneficiary. With respect to each subtrust, the primary beneficiary would (1) be the trustee; (2) be entitled to all income; (3) be entitled to such amounts of principal as the trustee, with expanded discretion, determines appropriate for their comfortable support and maintenance, without the need to consider other income or resources; (4) have a broad testamentary power of appointment; and (5) have the ability to select a disinterested trustee, who would have the powers to distribute principal to the beneficiary for any purpose and to decant the trust. The trust would also state that the interests of the remainder beneficiaries are subordinate to the interest of the current beneficiary. Because decisions based upon more facts are almost always better than decisions based upon fewer, the ability of the beneficiary to choose between going bare or not (i.e. receiving an outright distribution or leaving the inheritance in trust) is best made after the settlor's death.

The obvious downside, of course, is that a beneficiary might have creditor issues at the time of the settlor's death that did not exist at the date of the trust's creation. In situations where a primary beneficiary has existing creditor issues, is a spendthrift, or has significant marital issues, other options that we discussed in our earlier

article might be preferable. Essentially, however, the same type of choice can be offered by fairly simple safeguards.

Most practitioners understand that during the period a withdrawal power is exercisable may be exercised, such as an annual 5 and 5 power, the beneficiary's creditors can reach trust assets up to the amount that can be withdrawn. This is exactly what happened in *Fahey Banking Company v. Carpenter*[2]. In that case, the beneficiary who had an annual right to withdraw the greater of $5000 or 5% of the trust property was treated as the settlor of the trust with respect to the amount that could be withdrawn. As a result, the trust's spendthrift provision was inapplicable, and the creditor presumably prevailed. What is not generally understood, however, is the fact that under current law a withdrawal right that lapsed potentially many years or decades earlier can forever destroy all asset protection features of the trust, including its spendthrift protection, for the duration of the beneficiary's lifetime. While *Fahey* is the first Ohio Trust Code case that addressed a lapsed withdrawal right, because the withdrawal right at issue was limited to the "5 and 5" power, the ability of future creditors to reach trust assets was not an issue.

With the repeal of R.C. 5805.06(B)(2), the beneficiary will no longer be treated as the settlor of the trust for creditor rights purposes, so the issue of future creditors will become moot. What will not become moot, however, are the tax consequences of the lapse of a withdrawal right, which were discussed in our earlier article and which are of critical importance to beneficiaries who may be subject to the federal estate tax.

Lastly, the repeal of R.C. 5805.06(B)(2) removes a potential Medicaid challenge to certain wholly discretionary trusts. Many trusts contain provisions permitting the trustee to convert the interest of a beneficiary who becomes disabled into a wholly discretionary trust. If such a beneficiary had at one time a withdrawal right over their trust prior to its conversion to a wholly discretionary trust, that beneficiary would, as a matter of law, been treated as the settlor of the trust. Just as R.C. 5805.06(B)(2) voids spendthrift protections, it would also very likely result in the wholly discretionary trust being treated as a first party-settled trust, thereby destroying the beneficiary's eligibility for means tested public benefits such as Medicaid and Supplemental Security Income for the trust's failure to qualify as an exempt trust under Ohio's Medicaid trust rule.

With the repeal of R.C. 5805.06(B)(2), we can now offer our clients a much higher degree of flexibility by allowing them to permit their beneficiaries to choose between an outright distribution and a beneficiary-controlled asset protection trust.

ENDNOTES:

[1]May/June 2019 Vol 29, Issue 5

[2]*Fahey Banking Company v. Carpenter*, 2019-Ohio-679, 2019 WL 951188 (Ohio Ct. App. 10th Dist. Franklin County 2019). This case was discussed in Case Summaries, 29 PLJO 89,131-32, 29 No. 4 Ohio Prob. L.J. NL 13 (March/April 2019).

TRUSTEE REMOVAL BAR IS MORE CLEARLY LIMITED TO CURRENTLY SERVING TRUSTEES

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◆ **Caution:** These legislative proposals were NOT enacted this year, for the reasons detailed in the Legislative Report in this issue of PLJO. They are expected to receive early attention of the new General Assembly in 2021 and perhaps become effective later this year.

The Ohio Trust Code denies to a court power to remove a trustee except for cause, R.C. 5804.11(B) and 5807.06. Further, a private settlement agreement may contain only provisions that could be properly approved by a court, R.C. 5801.10(C), so it also cannot remove a trustee except for cause. Some have considered it uncertain whether a nomination of a future or successor trustee is subject to this bar, that is, whether a future or successor trustee can be "removed" even before he assumes office. For example, a trust may provide for the surviving spouse to be trustee and for a named bank to become successor trustee when she dies, resigns or is disabled and a successor may be required. May the court or a private settlement agreement change that successor to a different bank, or to an individual?

By HB 464 the statute has been clarified to confirm that such a future or successor trustee may be changed by the court or by a private settlement agreement, by an underscored two-word addition to R.C. 5804.11(B) as follows: "A noncharitable irrevocable trust may be modified, but not to remove or replace the currently serving trustee, upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust." This sentence previously generating the uncertainty was added in the Ohio version of the Uniform Trust Code to limit the power of the court to remove currently serving trustees to removal for cause, and it was not intended further to limit the power of the court or the use of private settlement agreements with respect those who had yet even become trustees (how would you remove a future or successor trustee only for cause, where he has never had an opportunity to misbehave, may not even know of his nomination and may never *yet* become trustee because he may die or decline to serve or the trust may terminate?). R.C. 5801.10(B) requires only that "the currently serving trustees" be parties to such an agreement, so that a named future or successor trustee may not even be a party to it or be aware of its nomination or of the proceeding to change it. This amendment simply adds to RC 5804.11(B) these two words from R.C. 5801.10(B). Further, authority that a bar to removal of a trustee should not apply to one who has not yet even become trustee is the celebrated case of *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803); rarely can one cite such august authority for a current trust issue! For further information see Brucken, When It's Not Removal of a Trustee, 27 PLJO 159, 27 No. 4 Ohio Prob. L.J. NL 1 (March/April 2017).

HB 464—TECHNICAL CORRECTIONS TO THE OHIO LEGACY TRUST ACT—ORC 5816.01 ET SEQ.

By D. Bowen ("Bo") Loeffler, Esq.

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in collaboration with John E. Sullivan III, Esq., Brian Layman, Esq. and Daniel Griffith, Esq.

◆ **Caution:** These legislative proposals were NOT enacted this year, for the reasons detailed in the Legislative Report in this issue of PLJO. They are expected to receive early attention of the new General Assembly in 2021 and perhaps become effective later this year.

THE OHIO LEGACY TRUST ACT—BACKGROUND

The Ohio Legacy Trust Act ("Act") which permits the creation of domestic asset protection trusts (also known as Ohio Legacy Trusts) in Ohio became law on March 27, 2013. At the time, the Act was an integral piece of a larger bill known as the Ohio Asset Management and Modernization Act of 2012 which would become a part of House Bill 479 (129th Ohio General Assembly File No. 201). Since its enactment, the Act has received very favorable reviews by national commentators and practitioners alike and has resulted in Ohio being consistently rated as one of the top jurisdictions for domestic asset protection trust planning. In order to keep the Act up to date and competitive with other domestic asset protection jurisdictions, the original authors[1] of the Act working in conjunction with the Ohio State Bar Association's (OSBA) Asset Protection and Legacy Trust Subcommittee and Ohio Majority Floor Leader Rep. William Seitz (R-Cincinnati), prepared a number of technical corrections to the Act.[2] Originally, these were associated with another Ohio legislative bill. However, most recently, through the efforts of Scott Lundregan of the OSBA and Rep. William Seitz, these technical corrections to the Ohio Legacy Trust Act, have now become a part of HB 464.

HB 464—TECHNICAL CORRECTIONS TO THE OHIO LEGACY TRUST ACT

Proposed ORC 5816.10(I)—Decanting. Proposed changes to ORC 5816.10(I) will provide that "decanting" can expressly take place from one Ohio Legacy Trust to another Ohio Legacy Trust.

Proposed ORC 5816.05(N)—Swap Power. Proposed changes to ORC 5816.05(N) will provide that an Ohio Legacy Trust can expressly include a "swap power" under Internal Revenue Code 675.

Proposed ORC 5816.10 (A) & ORC 5816.10(K)—Clarification of Conflicts of Law and emphasis on the Strong Public Policy of Ohio. Proposed changes to ORC 5816.10(A) & ORC 5816.10(K) not only clarifies that these specific statutory provisions governing transfers involving an Ohio Legacy Trust, "preempt existing fraudulent transfer laws," but they are also the "strong public policy" of Ohio.

Proposed ORC 5l16.02(H)—Transfers. Proposed changes to ORC 5816.02(H) will clarify the current reference of a "transfer" to include "direct or indirect" transfers, thus making clear that indirect transfers into an Ohio Legacy trust are also covered by its protections.

Proposed ORC 5l16.02(S)(1)(b)(i)—Superintendent of Banks. Proposed

changes to ORC 5816.02 (S) by adding ORC 5816.0(S)(1)(b)(i) will clarify the current reference to the "superintendent of banks" to include a more contemporary reference to the "superintendent of financial institutions."

Proposed ORC 5816.02(S)(2)—Records. Proposed changes to ORC 5816.02(S)(2) will clarify the current reference to "records" to include a more modernized reference to "electronic or physical" records.

Proposed ORC 5816.05(A)—Defined Event. Proposed changes to ORC 5816.05(A) will clarify the current reference to a "defined event" to include a more familiar reference to a "stated contingency."

Proposed ORC 5816.06(E)—Affidavit of Solvency. Proposed changes to ORC 5816.06(E) will include a "then" to create a clear "if-then" statement regarding the effects of a flawed or omitted affidavit of solvency.

Proposed ORC 5816.09—Orders. Proposed changes to ORC 5816.09 will include various grammatical and definitional clean-ups related to "orders" issued by courts (typically out-of-state courts) that do not apply Ohio law to a legacy trust dispute.

Proposed ORC 5816.10(E)(2)—Grammar Clean Ups. Proposed changes to ORC 5816.10(E)(2) will make "grammatical clean-ups" to its last sentence.

Proposed ORC 5816.10(H)—Scope of Legacy Trust Matters. Proposed changes to ORC 5816.10 (H) include inserting the phrase "any legacy trust matter" twice, to more clearly express the intended broad scope of this particular legacy trust statutory provision.

Proposed ORC 5816.10(J)—Clarification of the words Action and Proceeding. Proposed changes to ORC 5816.10 (J) are added to give more consistent meaning to the words "action" and "proceeding."

Proposed ORC 5816.02(S)—New Additions to Qualified Trustee. Proposed changes to ORC 5816.02(S) include provisions as set forth in new ORC 5816.02(S)(b)(ii)(I)-(IV) to permit an Ohio Family Trust Company (FTC) to be the qualified trustee of an Ohio Legacy Trust. A "qualified trustee" as defined under Ohio Revised Code ("ORC") 5816.02(S) is required of all Ohio Legacy Trusts. HB 464 would permit a licensed or unlicensed Ohio Family Trust Company ("FTC") organized as a corporation or limited liability company under Ohio law as set forth in ORC 1112.01, et. seq., to serve as a qualified trustee. The criteria under proposed ORC 5816.02(S)(b)(ii)(I)-(IV), for an Ohio FTC to be a qualified trustee for an Ohio Legacy Trust would include: maintaining an office in Ohio, maintaining a bank or brokerage account in Ohio, maintaining electronic or physical records in Ohio and satisfying the other requirements of ORC 1112.14 (B), (C), (D) and E(1). Additionally, when a FTC is the qualified trustee of an Ohio Legacy Trust ("OLT") and in order to maintain the asset protection integrity of an Ohio Legacy Trust involving the settlor or beneficiary of an OLT, proposed ORC 5816.02(S)(b)(ii)(V) provides the following requirements and protections:

> "No beneficiary of a legacy trust, when acting for or on behalf of a family trust company, or when acting as an officer,

manager, director, employee, or other agent or representative of a family trust company, may have any vote or authority regarding any decision to make or withhold any distribution from such legacy trust to or for the benefit of that beneficiary."

ENDNOTES:

[1]The original authors of HB 479 and the Ohio Legacy Trust Act were D. Bowen ("Bo") Loeffler, John E. Sullivan III, Michael Stegman, Brian Layman and Daniel Griffith. D. Bowen ("Bo") Loeffler and Michael Stegman are the currently serving co-chairs of the Ohio Asset Protection and Legacy Trust subcommittee of the Ohio State Bar Association's Estate Planning Trust & Probate Law Council.

[2]Much of the content of this article also comes from the proponent testimony and witness statements of D. Bowen (Bo) Loeffler and John E. Sullivan III submitted to the Ohio House of Representatives Civil Justice Committee on December 9, 2019. In particular, the author also thanks John E. Sullivan III for his detailed analysis of the technical corrections contained in his witness statement submitted to the Civil Justice Committee.

PROPOSED UPDATES TO OHIO NAME CHANGE LAW

Hon. Thomas M. O'Diam

Judge, Greene County Probate Court
Xenia, Ohio

◆ **Caution:** These legislative proposals were NOT enacted this year, for the reasons detailed in the Legislative Report in this issue of PLJO. They are expected to receive early attention of the new General Assembly in 2021 and perhaps become effective later this year.

October 1, 2021 is the deadline to obtain a federally compliant driver's license or state identification card under the Department of Homeland Security REAL ID regulations. After that, no one will get through a TSA checkpoint to board an airplane without it. This has caused a significant increase in name change cases for Ohio probate courts.

In order to obtain a compliant ID, a person's name must be consistent on all official identity documents—birth record, social security card, marriage record, divorce decree, driver's license, passport, or other government-issued form of identification. Each link in the person's chain of identity must connect, from the birth record forward. Even minor misspellings and inconsistencies are problematic, and changes must be properly documented. If there is a break in the chain of identity, a name change in probate court is often the only way to fix it.

Current Ohio law does not provide an appropriate remedy to fix name discrepancies in all cases. Chapter 2717 of *Ohio Revised Code* in its present form permits changing a person's name only to something different than the name on the birth record, ignoring other scenarios. The court's order changes the name for *all* purposes from that point forward, but the new name often differs from the name the person uses on other official identity documents, which causes new problems in the person's chain of identity.

For example: Assume a married woman, who has taken her husband's surname, files a name change action to correct a discrepancy on her original birth record. The court order granting the name change will necessarily use her birth surname. Since the name change order is effective for *all* purposes, the applicant would effectively lose her married surname. While she fixed

one link of her identity chain, she broke the links on identity documents in her married name.

A portion of the Probate Omnibus Bill, H.B. 464, in the previous session of the Ohio Legislature sought to revamp the name change process. H.B. 464 failed to receive a final vote before the Legislature adjourned for the year, but the name change legislation will be reintroduced in the current legislative session.

The name change legislation has two objectives. First, it simplifies the existing name change process, making it faster, less cumbersome, and less expensive. Second, it adds a completely new process—a name conformity action—to make a person's legal name consistent on all official identity documents by correcting a misspelling, inconsistency, or other error on one or more official identity documents.

The public will have better tools to fix problems in their identity documents, and probate courts will have broader discretion to tailor useful remedies. Residency requirements will shorten from one year to 60 days. Hearings and notice by publication will be discretionary, rather than mandatory. The process should take a matter of days, instead of weeks or months. This legislation is a win for everyone.

ADDITIONAL PROPOSALS OF SUB. H.B. 464 STILL AWAITING ENACTMENT

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◆ **Caution:** These legislative proposals were NOT enacted this year, for the reasons detailed in the Legislative Report in this issue of PLJO. They are expected to receive early attention of the new General Assembly in 2021 and perhaps become effective later this year.

Substitute House Bill 464 was the legislative vehicle in the 133rd General Assembly for several legislative proposals developed by the Ohio State Bar Association ("OSBA") Estate Planning, Trust, and Probate Law Section. The bill was first introduced on January 9, 2020 and, after its assignment to the House Civil Justice Committee, it was amended to include a number of additional legislative proposals from groups other than the OSBA. While Sub. H.B. 464 ultimately failed to win final approval in the 133rd General Assembly, it was well supported in both the House and the Senate, and it is anticipated that it will be re-introduced and placed on a "fast track" to enactment early in the 134th General Assembly.

The additional legislative proposals in Sub H.B. 464 that did not originate with the OSBA's Estate Planning, Trust, and Probate Law Section included changes to the Ohio Legacy Trust Act (which are described in a separate article by Bo Loeffler), the modernization of name change procedures (which are described in a separate article by Judge Thomas O'Diam), and the five additional proposals that are summarized below.

NONPROFIT CORPORATION AS GUARDIAN

Sub. H.B. 464 includes a proposal supported by the Ohio Judicial Conference, the Ohio Guardianship Association, and Advocacy for Protective Services, Inc. that

would amend R.C. 2111.10 to provide that an Ohio non-profit, tax-exempt corporation can be appointed as guardian of both the estate and the person of an incompetent when certified by the probate court to receive such an appointment. This proposal would create a "small county alternative" to the guardianship services board under R.C. 2111.52. For a further description of this proposal, please see J. Furniss, *2020 Probate Omnibus Bill (H.B. 464) Attracts Additional Proposals*, 30 Prob. L.J. Ohio 237 (July-Aug. 2020).

After being added to Sub. H.B. 464, this proposal was amended to provide that the nonprofit corporation appointed as guardian of an incompetent must be domiciled in Ohio and shall not be the residential caregiver, health care provider, or employer of the incompetent.[1]

INVOLUNTARY MENTAL HEALTH TREATMENT PLACEMENTS

Sub. H.B. 464 includes a proposal that is supported by both the Ohio Probate Judges Association and the Ohio Judicial Conference and would make various changes to the process for mental health treatment placements under R.C. Chapter 5122. Notably, the proposal would enable specially trained advanced practice registered nurses to testify at initial phase and extension hearings for such placements.

Under a 2018 change to Ohio law,[2] clinical nurse specialists and certified nurse practitioners with special psychiatric-mental health certifications were permitted to initiate emergency hospitalizations of mentally ill persons subject to court order (within the meaning of R.C. 5111.01), which is the initial step in beginning a mental health treatment placement (or so-called "civil commitment"). According to proponent testimony offered by Judge Elinore Marsh Stormer of the Summit County Probate Court, that particular change was important because "the number of psychiatrists who practice in hospital and community settings has dropped substantially. Frankly, there were not enough doctors available to work through the initial process so mentally ill people were simply being returned to the streets."[3] "[C]ommunity treatment centers now rely heavily on specially trained advanced practice nurses to work under physician supervision directly with patients. Psychiatric nurse practitioners have taken a huge burden off the doctors allowing them to focus on the medical aspects of treatment."[4]

After an emergency hospitalization, a patient is entitled to a hearing to determine whether the patient shall be committed for an initial phase, not to exceed 90 days, and a hearing for any subsequent extensions. Under current law, at the hearings, the court is required to consider the patient's diagnosis and prognosis from a psychiatrist or licensed clinical psychologist. However, courts have reported that there are not enough professionals who are in a position to testify at these hearings. As an example, Judge Stormer noted in her testimony, "Recently, in Summit County, we had to cancel extension hearings because there were no doctors available to testify." She added, "Summit County is not unique. The shortage of psychiatrists exists through Ohio, especially in rural areas."[5]

Sub. H. B. 464 would expand the professionals who can provide testimony as to a

patient's diagnosis and prognosis by authorizing testimony from clinical nurse specialists and certified nurse practitioners with special psychiatric-mental health certifications.[6]

METHOD FOR MAKING ANATOMICAL GIFTS

Sub. H.B. 464 includes a proposal that was developed by organ procurement organizations Lifebanc, Life Center, Life Connection and Lifeline of Ohio. The OSBA also expressed its support for this proposal.

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

The rationale for this change is that it would allow for donors to be more quickly identified and would avoid confusion that sometimes results when there are multiple inconsistent instructions. For an additional discussion of this proposal, please see J. Furniss, *2020 Probate Omnibus Bill (H.B. 464) Attracts Additional Proposals*, 30 Prob. L.J. Ohio 237, 30 No. 6 Ohio Prob. L.J. NL 3 (July-Aug. 2020).

PRIVATE JUDGING REFORM

Sub. H.B. 464 includes a proposal supported by the Ohio Judicial Conference to reform private judging. According to proponent testimony from Judge Randall Fuller on behalf of the Ohio Judicial Conference, this proposal was prompted by "numerous problems as it relates to the use of private judges, particularly in domestic relations cases."[7] These problems were detailed in other proponent testimony before the House Civil Justice Committee.[8]

The proposal would address these serious concerns by making three changes to R.C. 2701.10. First, it would provide courts with discretion to refer a case to a private judge, rather than requiring a court to refer a matter upon the request of the parties. Second, it would require that the written agreement between the parties and the private judge set forth a procedure for terminating the agreement. Third, it would return jurisdiction to the referring judge upon conclusion of the referred action or determination of the submitted issue or question. It is hoped that, with these changes, the practice of private judging may continue in appropriate cases.[9]

ADMINISTRATION OF CEMETERY ENDOWMENT CARE TRUSTS

Sub. H.B. 464 includes a proposal that would update the provisions of Ohio law relating to the investment and expenditure of cemetery endowment care trusts that are required to be maintained by cemeteries under R.C. § 1721.21. For additional discussion of this proposal, please see J. Furniss, *2020 Probate Omnibus Bill (H.B. 464) Attracts Additional Proposals*, 30 Prob. L.J. Ohio 237 (July-Aug. 2020).

◆ **Author's Note:** While political predic-

tions can sometimes be as reliable as weather forecasts in Ohio, these particular proposals do appear to be well-supported and are likely to move forward in a new bill in 2021.

ENDNOTES:

[1]This particular change was the result of a collaboration between the Ohio Judicial Conference and Rep. Skindell. *See* House Civil Justice Committee. Proponent Testimony on House Bill 464 from Judge Timothy J. Grendell for the Ohio Judicial Conference (Nov. 17, 2020).

[2]*See* 132 Sub. H.B. 111 (effective, in part, on Sept. 28, 2018).

[3]*See* House Civil Justice Committee, Proponent Testimony on House Bill 464 from Judge Elinore Marsh Stormer (Nov. 17, 2020).

[4]*See* House Civil Justice Committee, Proponent Testimony on House Bill 464 from Judge Elinore Marsh Stormer (Nov. 17, 2020).

[5]*See* House Civil Justice Committee, Proponent Testimony on House Bill 464 from Judge Elinore Marsh Stormer (Nov. 17, 2020).

[6]*See* R.C. 5122.15(E).

[7]House Civil Justice Committee, Proponent Testimony, Judge Randall Fuller for Ohio Judicial Conference, Feb. 26, 2020.

[8]*See* House Civil Justice Committee, Proponent Testimony of John Kim, Feb. 26, 2020.

[9]*See* Senate Judiciary Committee, Proponent Testimony of Paul Pfeifer for Ohio Judicial Conference, Dec. 16, 2020.

CASE SUMMARIES

Widok v. Estate of Wolf

Headnote: Wills and contests

Citation: 2020-Ohio-5178, 2020 WL 6504277 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

Plaintiff had been helpful to decedent and pre-deceased sister, and had claimed that he was told by the decedent's sister he would be the executor of her estate and would be "pleasantly surprised" when she passed. After her death, no will was produced, and, months later, defendant (who was her primary heir by intestacy) was claimed to have admitted finding and destroying the will that was alleged to provide for plaintiff. The plaintiff presented this narrative claim as a claim against the defendant's estate, and the claim was rejected. The trial court granted summary judgment to defendant's estate (defendant having since died), holding that the statute of frauds, R.C. 1335.05 barred the action; any promise of testamentary gift was only oral, and was required to be in writing as based on services by plaintiff to others than defendant.

The appellate court reversed and ordered trial, noting the claim that the oral contract was also that plaintiff would inherit from defendant if he stopped looking for the missing will, a contract not required to be in writing. The case also contains discussion of a multitude of other claims, such as whether the probate court has jurisdiction to hear claims of fraud.

Thanks to Timothy J. Gallagher of Reminger Co. LPA of Cleveland for editing this summary.

DeChellis v. Estate of DeChellis

Headnote: Gifts

Citation: 2020-Ohio-5111, 2020 WL 6375476 (Ohio Ct. App. 5th Dist. Stark County 2020)

$750,000 cash was claimed to be excluded from the probate estate as a com-

pleted predeath gift. The estate was successful in a R.C. 2109.50 action to claim it, that was affirmed on appeal. The claimed donee then filed to vacate these judgements, claiming that the probate court lacked jurisdiction because it was a completed gift and thus could not be part of the probate estate. Of course, the probate court denied vacation, affirmed on this appeal. The prior action had determined it was not a completed gift and is res judicata. Note the circuity, with plaintiffs claiming that IF their desired result had been obtained, that is, if the cash had been excluded from the estate, THEN there might have been no jurisdiction. But see R.C. 2101.24(B) that expressly grants probate courts concurrent jurisdiction over "an alleged gift." So why was jurisdiction even questioned?

Estate of Grossman

Headnote: Safe deposit box contents

Citation: 2020-Ohio-5236, 2020 WL 6559175 (Ohio Ct. App. 11th Dist. Ashtabula County 2020)

Decedent had a bank safe deposit box that contained $36,000 cash belonging to her. She later added one daughter on the box. The bank box form said that the box itself was joint and survivorship with decedent and the daughter as co-lessors, but that the form did not affect title to the contents of the box. Decedent left three daughters, and litigation among them followed. A probate estate beneficiary filed exceptions to the estate inventory, challenging omission from it of the cash in the box. The probate court held the cash was an asset of the probate estate and not joint and survivorship, relying on the bank box form. Affirmed on appeal. This case reminds us to check carefully the bank forms for such safe deposit boxes.

Matter of Evans v. Evans-Sanford

Headnote: Wills and contests

Citation: 2020-Ohio-5315, 2020 WL 6743975 (Ohio Ct. App. 4th Dist. Scioto County 2020)

Decedent left a wife and son, the latter in prison. The will leaving all to the wife was probated and the estate administered and closed. Over 20 years later the son filed a will contest. The three (then four) month period for contest under R.C. 2107.76 had apparently run, but the son claimed the period was tolled as he was in prison, citing R.C. 2107.76 as tolling the will contest period while a person is "under any legal disability" and R.C. 2131.02 that defines legal disability to include "persons in captivity." The trial court granted judgment on the pleadings to the mother, holding that a person in the penitentiary was not "in captivity." The appellate court affirmed, noting also that the son had been out of prison for a period so even by his argument the tolling had ended long before his suit.

Saber Healthcare v. Hudgins

Headnote: Claims

Citation: 2020-Ohio-5603, 2020 WL 7250348 (Ohio Ct. App. 9th Dist. Summit County 2020)

This is yet another late claim. The nursing home mailed a post-death claim for pre-death services to the person who had been guardian and would later become the administrator. The claim was mailed two months after death, but the administrator was not appointed until a year after death.

The nursing home filed a motion in the probate court to compel payment. The motion was dismissed because the claim was not presented to a then-acting administrator, and his failure to act on it within 30 days could not be an acceptance of the claim. Affirmed on appeal. The court noted that the nursing home could have opened the estate itself within the six months period and then presented its claim, rejecting its argument that such an option was unreasonable.

In re Estate of DeChellis

Headnote: Removal of fiduciary

Citation: 2020-Ohio-5631, 2020 WL 7259179 (Ohio Ct. App. 5th Dist. Stark County 2020)

Extensive prior litigation resulted in a concealment judgment under RC 2109.50 for $750,000 against certain beneficiaries of the estate. All of the beneficiaries then entered into a settlement. The administrator of the estate declined to follow the settlement as it varied from the concealment judgment and other prior court orders, and instead filed with the court a request for instructions. The beneficiaries countered with demand for his removal for failing to honor their settlement. The trial court held the administrator entitled to obtain its instructions; further, that the administrator could not honor the settlement without its approval by the court because the concealment judgment was not just for the benefit of the beneficiaries but also involved the estate and the court as parties to it; and the court thus declined to remove the administrator. Affirmed on appeal.

See related completed predeath case of *DeChellis v. Estate of DeChellis*, 2020-Ohio-5111, 2020 WL 6375476 (Ohio Ct. App. 5th Dist. Stark County 2020), *supra*.

In re Estate of Shaffer

Headnote: Wills and contests

Citation: In re Estate of Shaffer, 2020-Ohio-6672, 2020 WL 7379116 (Ohio 2020), opinion superseded on reconsideration, 2020-Ohio-6973, 2020 WL 7866253 (Ohio 2020) and reconsideration granted, 2020-Ohio-6985, 2020 WL 7864347 (Ohio 2020)

Decedent became ill, decided to go to the hospital, asked those present for some paper, and wrote out a homemade will that left a portion of his estate to a friend. The two witnesses present, one of whom was that friend, did not sign the instrument. When decedent later died, probate under RC 2107.24, that permits probate of a will not signed by the witnesses on clear and convincing evidence that the instrument was intended as a will, was denied for lack of such evidence. The probate court also held that the bequest to the interested witness was voided by RC 2107.15, that voids a bequest to a witness whose testimony is necessary to prove the will. The appellate court at 2019-Ohio-234 reversed and allowed probate, finding sufficient evidence and holding that RC 2107.15 does not apply to a proceeding under RC 2107.24 and void the bequest to a witness testifying in the proceeding where the witness did not sign the will.

The Ohio Supreme Court unanimously reversed the appellate court, holding that RC 2107.15 the interested witness statute applies to all wills, including those admitted under RC 2107.24 for lack of signing by the witnesses. Otherwise an interested

witness could maintain his bequest by simply declining to sign the will. See Hochstetler, "Where There's a Will, There's a Way: The Harmless Error Rule, Interested-Witness Rule, and In re Estate of Shaffer," 30 PLJO 202, 30 No. 5 Ohio Prob. L.J. NL 5 (May/June 2020).

Estate of Welch v. Taylor

Headnote: Gifts

Citation: 2020-Ohio-6909, 2020 WL 7690304 (Ohio Ct. App. 12th Dist. Clinton County 2020)

Decedent had after the death of his wife become dependent upon defendant, and made various lifetime gifts to defendant. After his death, plaintiffs as beneficiaries of his estate sued to reclaim the gifts for his estate, claiming lack of capacity to make them and undue influence. The probate court granted summary judgment to defendant, for four reasons: it was too late to file a will contest, it was too late to file a claim against the estate, the final account had already been filed and no grounds were claimed for reopening it, and plaintiff's prior filing in the general division of the trial court (that was dismissed for lack of jurisdiction) barred action in probate. Reversed on appeal and remanded, none of the four grounds was presented by the case, that sought only return of the gifts to the estate.

Zarlenga v. Zarlenga

Headnote: Removal of trustee

Citation: 2020-Ohio-6947, 2020 WL 7753954 (Ohio Ct. App. 7th Dist. Mahoning County 2020)

Decedent left a wife and seven children. He established A/B trusts for the life of his wife, with remainder equally to all seven children. The principal trust asset was three companies in the trucking and construction business. Two sons were trustees and trust advisers. Shortly before the death of the wife, one son trustee discovered issues with the other son trustee's (his brother) management of the trusts and companies, and ultimately sued over it for himself and his siblings. The trial court found that the son trustee had largely ignored the terms of the trusts, treated them as his personal accounts and substantially mismanaged them for his personal benefit, removing the son as trustee and trust adviser and surcharging him about $2.8 million for mismanagement and embezzlement. Affirmed on appeal.

In re Estate of Baughman

Headnote: Powers of attorney

Citation: 2020-Ohio-6928, 2020 WL 7711249 (Ohio Ct. App. 5th Dist. Licking County 2020)

Decedent left four sons. He had given a power of attorney to one of them. A second son filed a petition under R.C. 1337.36 for review of the actions of the agent-son during their parent's lifetime. The probate court found what it described as theft, recklessness, dishonesty, carelessness and poor judgment by the agent; indeed, the agent admitted he had never even read the POA document. The agent was surcharged with over $300,000. Affirmed on appeal.

In re L.M.W.

Headnote: Wills and contests

Citation: 2020-Ohio-6856, 2020 WL 7682285 (Ohio Ct. App. 9th Dist. Summit County 2020)

Decedent's 1991 will was admitted to probate, naming her daughter as residuary beneficiary. Later a granddaughter filed a later 2002 will naming the granddaughter as residuary beneficiary. The court held the hearing required by R.C. 2107.22, testimony was presented by the witnesses to the later will (the attorney and his secretary) on its proper execution, and it was admitted to probate. The daughter appealed arguing that the witnesses to the 2002 will did not know the testatrix who thus might have been an imposter. The appellate court affirmed admission of the will, noting that a hearing on admission is not a will contest and that issues such as the identity of the testatrix and undue influence were for any later contest only.

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LEGISLATIVE SCORECARD

Keep this Scorecard as a supplement to your 2020 Ohio Probate Code (complete to Sept. 30, 2020) for up-to-date information on probate and trust legislation.

Enacted legislation

None now

Pending legislation

Authorize benefit corporations	SB 21	Eff. 3-24-21
See Stautberg and Spievack, *Special Delivery: Ohio's Business Benefit Corporation has Arrived*, 31 PLJO 114 (Jan/Feb 2021)		
Update LLC Act	SB 276	Eff. 4-12-21
See Graf, *Modernization of Ohio LLC Law*, 31 PLJO 111 (Jan/Feb 2021)		

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

Permit waivers of inventories and accounts	Ohio BAR of 10-17-94
See EPTPL Section Report, *Waiver of Filing of Inventory and Accounts OSBA Reform Proposal*, 28 No. 2 Ohio Prob. L.J. NL 1 (Nov/Dec 2017)	
Guardianship estate planning authority	Spring 2019*
See Thakur, *Proposal: Authorizing "Estate Planning" For a Ward by a Guardian*, 29 PLJO 141 (May/June 2019)	
See Thakur, Expanded "Estate Planning" for a Ward by a Guardian (Effective date TBBD), 31 PLJO 117 (Jan/Feb 2021)	
Spousal vehicle transfer	Spring 2019*

See Lanham, *EPTPL Section Proposes to Amend RC 2106.13(A)*, 29 PLJO 152 (May/June 2019) See Lanham, *Amended Ohio Revised Code § 2106.13: Reduction in allowance for support applies only if multiple vehicles selected by surviving spouse*, 31 PLJO 118 (Jan/Feb 2021)	
Creditor rights after lapse of power to withdraw See Davis, *Asset Protection Opportunities expanded by the repeal of Ohio Revised Code Section 5805.06(B)(2)*, 29 PLJO 147 (May/June 2019); See Davis, *Going Bare, or Not: The Repeal of 5805.06(B)(2)*, 31 PLJO 120 (Jan/Feb 2021) Brucken, *Ohio Trust Code Amendments*, 29 PLJO 139 (May/June 2019)	Spring 2019*
Changing nomination of future trustees See Brucken, *Ohio Trust Code Amendments*, 29 PLJO 139 (May/June 2019) Brucken, *Trustee removal bar is more clearly limited to currently serving trustees*, 31 PLJO 123 (Jan/Feb 2021)	Spring 2019*
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TOD for tangible personal property See Harris, Transferring Tangible Personal Property by Beneficiary Designation, 29 PLJO 144 (May/June 2019)	Spring 2020

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

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

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