New Judges Orientation Part I

Probate Track

December 13, 2024

Thomas J. Moyer Ohio Judicial Center

Columbus, OH

The Supreme Court *of* Ohio
Judicial College

This Page Intentionally Left Blank

THE SUPREME COURT *of* OHIO
JUDICIAL COLLEGE

New Judges Orientation: Part I – PROBATE TRACK
December 13, 2024 – Thomas J. Moyer Ohio Judicial Center, Columbus

AGENDA

FRIDAY, DECEMBER 13

8:30 Duties of a Probate Court Judge – Overview Clerk of Your Own Court
- Miscellaneous Duties
- Magistrates
- Marriage

9:00 Estate Administration
- Requirements of a Valid Will
- Jurisdiction
- Initiating a Will Contest Action
- Standing
- Procedure
- Full Estate
- Releases
- Accounts
- Inventory Approval

9:45 Adoption
- Foreign
- Stepparent
- CSB
- Contested

10:15 Break

10:30 Caseflow Management & Assignment of Judges

10:45 Guardianship
- Definitions: Probate Court, Juvenile Court, Domestic Relations Court
- Venue and Jurisdiction
- Best Interest Analysis
- Guardianship of the Person vs Guardianship of the Estate
- Adult Protective Services (APS)
- Emerging Guardianships
- Power of Attorney versus Conservatorship

11:15 Civil Commitments

- Standard
- Assisted Outpatient Treatment

11:30 Health Care Power of Attorney, Living Will, The Terminally Ill Act and DNR

12:00 Lunch – Pick up boxed lunches and reconvene.

12:15 Attorney Fees

- Statutory Law – Ohio Revised Code
- Probate Court Superintendency Rules
- Ohio Rules of Professional Conduct
- Case Law

12:45 Administrative Duties

- Operational Management
- Budget
- Community Outreach

1:15 General Questions and Answers

2:00 Conclude

Faculty:

- Hon. Kelly Badnell, Richland County Probate Court
- Hon. Dixilene N. Park, Stark County Probate Court

NOTE:

Additional Judicial College courses are available online for self-study hours, please visit https://www.supremecourt.ohio.gov/JudicialCollegePublicCalendar/#/online

To register for a Judicial College course or to view upcoming course offerings, please visit https://www.supremecourt.ohio.gov/JudicialCollegePublicCalendar/#/catchall

FACULTY BIOGRAPHIES

KELLY L. BADNELL has served as Judge of the Probate Division of the Richland County Common Pleas Court since February 2021. Judge Badnell currently serves as the Presiding Judge of the Richland County Common Pleas Court. Judge Badnell received two undergraduate degrees from Washington & Jefferson College, a B.A. in Business Administration and a B.A. in Political Science. She earned her Juris Doctorate Degree from Ohio Northern University, Claude W. Pettit College of Law. Judge Badnell is a former assistant prosecutor, and was engaged in the private practice of law in civil litigation for over 20 years. Judge Badnell is a member of the Ohio Association of Probate Judges, the National College of Probate Judges and the Ohio State Bar Association. She serves as a member of the Probate Law and Procedure Committee and the Probate Forms Committee. She has been a presenter for the Ohio Judicial College. Judge Badnell is married to attorney, David C. Badnell, and they have two children.

DIXILENE PARK is the first woman elected Judge of the Stark County Probate Court. She has served in this capacity since January, 2004. Judge Park is President of Ohio Association of Probate Judges. She is a member of the Ohio Judicial Conference Executive Committee, the National College of Probate Judges, Ohio State Bar Association and Stark County Bar Association. Judge Park also chairs the Probate Forms Committee. Judge Park chairs the Subcommittee on Adult Guardianship of the Advisory Committee on Children and Families of the Ohio Supreme Court. She is a member of the Probate Law and Procedure Committee of the Ohio Judicial Conference. Judge Park also served on the Supreme Court Commission on Continuing Legal Education, the Task Force on the Funding for Ohio Courts and the Task Force to Review the Ohio Disciplinary System.

This Page Intentionally Left Blank

Duty of a Probate Court Judge

Materials Prepared By
Hon. Dixie Park
Stark County Probate Court

NOTES

NOTES

2101.11 Court records - investigators - bond.

(A)(1) The probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate court. The probate judge is authorized to perform the duties of clerk of the judge's court. The probate judge may appoint deputy clerks, court reporters, a bailiff, and any other necessary employees, each of whom shall take an oath of office before entering upon the duties of the employee's appointment and, when so qualified, may perform the duties appertaining to the office of clerk of the court.

2101.05 Oaths and depositions.

A probate judge may administer oaths, take acknowledgment of instruments in writing required to be acknowledged, and take depositions.

Depositions taken according to sections 2319.05 to 2319.31, inclusive, of the Revised Code, to be used on the trial of civil cases, may be taken and used on the trial of any question before the probate court.

Effective Date: 10-01-1953

2101.12 Records to be kept - indexes.

The following records shall be kept by the probate court:

(A) An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties in the bond, and the date of filing and a brief note of each order or proceeding relating to the estate with reference to the journal or other record in which the order or proceeding is found;

(B) A guardian's docket, showing the name of each ward and, if the ward is an infant, the infant's age and the name of the infant's parents, the amount of bond and names of sureties in any bond, any limited powers or limited duration of powers, and the date of filing and a brief note of the orders and proceedings as described in division (A) of this section;

(C) A civil docket, in which shall be noted the names of parties to actions and proceedings, the date of the commencement of the actions and proceedings and of the filing of the papers relating to the actions and proceedings, a brief note of the orders made in the actions and proceedings, and the date of entering the orders;
(D) A journal, in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings;

(E) A record of wills, in which the wills proved in the court shall be recorded with a certificate of the probate of the will, and wills proved elsewhere with the certificate of probate, authenticated copies of which have been admitted to record by the court;

(F) A final record that shall contain a complete record of each cause or matter and shall be completed within ninety days after the final order or judgment has been made in the cause or matter;

(G) An execution docket, in which shall be entered a memorandum of executions issued by the probate judge stating the names of the parties, the name of the person to whom the execution is delivered, the person's return on the execution, the date of issuing the execution, the amount ordered to be collected, stating the costs separately from the fine or damages, the payments on the execution, and the satisfaction of the execution when it is satisfied;

(H) A marriage record, in which shall be entered licenses, the names of the parties to whom a license is issued, the names of the persons applying for a license, a brief statement of the facts sworn to by persons applying for a license, and the returns of the person solemnizing the marriage;

(I) A naturalization record, in which shall be entered the declaration of intention of the person seeking to be naturalized, the oath of the person naturalized, and the affidavit or oath of witnesses who testify in the person's behalf, in which affidavit shall be stated the place of residence of the witnesses;

(J) A permanent record of all births and deaths occurring within the county, reported as provided by law, which record shall be kept in the form and manner that may be designated by the director of health;

(K) A separate record and index of adoptions, in accordance with section 3107.17 of the Revised Code;

(L) A summary release from administration docket, showing the date of the filing of the application for a summary release from administration pursuant to section 2113.031 of the Revised Code, the decedent's name, the applicant's name, whether the applicant is the decedent's surviving spouse or a person described in division (B)(1) of that section, and a brief note of the grant of the order of summary release from administration and of any other order or proceeding relating to the decedent's estate, with reference to the journal or other record in which the order or proceeding is found.

For each record required by this section, an index shall be maintained. Each index shall be kept current with the entries in the record and shall refer to the entries alphabetically by the names of the persons as they were originally entered, indexing the page of the record where the entry is made. On the order of the probate judge, blankbooks, other record forms, or other record-keeping materials approved by the judge for the records and indexes shall be furnished by the board of county commissioners at the expense of the county.

Effective Date: 08-29-2000

2101.121 Record-keeping methods.

(A) A probate court may keep and maintain records that are required by section 2101.12 or another section of the Revised Code by record-keeping methods other than bound volumes of paper pages. These record-keeping methods include, but are not limited to, photography, microphotography, photostatic process, electrostatic process, facsimile reproduction, perforated tape, magnetic tape or other electromagnetic methods, electronic data processing, machine-readable media, and graphic or video display.

(B) If a probate court keeps records by record-keeping methods other than bound volumes of paper pages, it shall possess, and make readily available to the public, machines or equipment necessary for an examination of the records. The machines or equipment shall present the records in a format that is readable without difficulty.

(C) If a probate court keeps records by record-keeping methods other than bound volumes of paper pages, it shall keep and maintain indexes to the records that permit the records to be retrieved readily.

Effective Date: 03-13-1986

2101.13 Probate judge shall make entries omitted by his predecessor.

When a probate judge, whether elected or appointed, enters upon the discharge of the judge's official duties, the judge shall make, in the books and other record-keeping materials of the judge's office, the proper records, entries, and indexes omitted by the judge's predecessors in office. When made, the entries shall have the same validity and effect as though they had been made at the proper time and by the officer whose duty it was to make them, and the judge shall sign all entries and records made by the judge as though the entries, proceedings, and records had been commenced, prosecuted, determined, and made by or before the judge.

Amended by 129th General Assembly File No. 52, SB 124, § 1, eff. 1/13/2012.
Effective Date: 03-13-1986

2101.14 Care and preservation of papers - time stamp.

All pleadings, accounts, vouchers, and other papers in each estate, trust, assignment, guardianship, or other proceeding, ex parte or adversary, which are filed in the probate court shall be kept together, and upon the final termination or settlement of the case, cause, or proceeding shall be preserved for future reference and examination. The papers shall be properly jacketed, and otherwise tied, fastened, or held together, numbered, lettered, or otherwise marked in such manner that they may be readily found by reference to proper memoranda upon the docket, record, or index entries thereof, which memoranda shall be made by the probate judge, or the papers may be kept, maintained, and indexed as described in section 2101.121 of the Revised Code. Certificates of marriage, reports of births and deaths, and similar papers not part of a case

or proceeding, shall be arranged and preserved separately in the order of their dates or in which they were filed. As used in this section “case” or “cause” includes all proceedings in the settlement of any estate, guardianship, or assignment, except as provided in section 2101.141 of the Revised Code.

The probate court shall provide a time stamp and shall stamp on all papers filed in that court the day, month, and year of the filing.

Effective Date: 03-13-1986

2101.141 Record disposal.

The vouchers, proof, or other evidence filed in support of the expenditures or distribution stated in an account, which has been filed in the probate court, may be ordered destroyed or otherwise disposed of five years after the account with which it was filed has been approved or settled and recorded and after there has been a compliance with section 149.38 of the Revised Code.

When the vouchers, proof, or other evidence filed in support of expenditures or distribution stated in an account are microfilmed, they may be ordered destroyed immediately after such record is made and, if required by law, after the approval and settlement of the account.

The inventories, schedules of debts, accounts, pleadings, wills, trusts, bonds, and other papers, excluding vouchers or other evidence of expenditures and distributions, filed in the probate courts by fiduciaries appointed by the probate courts, and all pleadings filed and court entries for the determination of inheritance tax under former sections 5731.01 to 5731.56 of the Revised Code, and estate tax under sections 5731.01 to 5731.51 of the Revised Code, and all documents filed or received and entries made by the court in conjunction with the instruments referred to in this section, after having been recorded, if required by law to be recorded, may be ordered microfilmed and destroyed after being microfilmed. All instruments referred to in this paragraph that are not microfilmed may be ordered destroyed or otherwise disposed of without microfilming after a period of twenty-one years has elapsed from the closing or termination of the administration of the estate, trust, or other fiduciary relationship and after there has been a compliance with section 149.38 of the Revised Code.

Nothing in this section shall apply to records pertaining to estates on which inheritance tax temporary orders are pending.

Prior to the order of the court directing the destruction or disposition of the vouchers, proof, or other evidence of expenditures or distribution, any party in interest, upon application filed, may have the vouchers, proof, or other evidence of expenditures or distribution recorded, upon payment of the costs incident to doing so.

An estate, trust, or other fiduciary relationship shall be deemed to be closed or terminated when a final accounting has been filed, and if required by law at the time of filing, the account has been approved and settled.

Effective Date: 09-26-1990

2101.162 Computerizing court of paying cost of computerized legal research.

(A)(1) The probate judge may determine that, for the efficient operation of the probate court, additional funds are required to computerize the court, make available computerized legal research services, or to do both. Upon making a determination that additional funds are required for either or both of those purposes, the probate judge shall charge a fee not to exceed three dollars or authorize and direct a deputy clerk of the probate court to charge a fee not to exceed three dollars, in addition to the fees specified in divisions (A)(1), (3), (4), (6), (14) to (17), (20) to (25), (27), (30) to (32), (34), (35), (37) to (48), (50) to (55), (59) to (61), (63) to (66), (69), and (72) of section 2101.16 of the Revised Code and the fee charged in connection with the docketing and indexing of an appeal.

(2) All moneys collected under division (A)(1) of this section shall be paid to the county treasurer. The treasurer shall place the moneys from the fees in a separate fund to be disbursed, upon an order of the probate judge, in an amount no greater than the actual cost to the court of procuring and maintaining computerization of the court, computerized legal research services, or both.

(3) If the court determines that the funds in the fund described in division (A)(2) of this section are more than sufficient to satisfy the purpose for which the additional fee described in division (A)(1) of this section was imposed, the court may declare a surplus in the fund and expend those surplus funds for other appropriate technological expenses of the court.

(B)(1) The probate judge may determine that, for the efficient operation of the probate court, additional funds are required to computerize the office of the clerk of the court and, upon that determination, may charge a fee, not to exceed ten dollars, or authorize and direct a deputy clerk of the probate court to charge a fee, not to exceed ten dollars, in addition to the fees specified in divisions (A)(1), (3), (4), (6), (14) to (17), (20) to (25), (27), (30) to (32), (34), (35), (37) to (48), (50) to (55), (59) to (61), (63) to (66), (69), and (72) of section 2101.16 of the Revised Code and the fee charged in connection with the docketing and indexing of an appeal. Subject to division (B)(2) of this section, all moneys collected under this division shall be paid to the county treasurer to be disbursed, upon an order of the probate judge and subject to appropriation by the board of county commissioners, in an amount no greater than the actual cost to the probate court of procuring and maintaining computer systems for the office of the clerk of the court.

(2) If the probate judge makes the determination described in division (B)(1) of this section, the board of county commissioners may issue one or more general obligation bonds for the purpose of procuring and maintaining the computer systems for the office of the clerk of the probate court. In addition to the purposes stated in division (B)(1) of this section for which the moneys collected under that division may be expended, the moneys additionally may be expended to pay debt charges on and financing costs related to any general obligation bonds issued pursuant to

this division as they become due. General obligation bonds issued pursuant to this division are Chapter 133. securities.

Amended by 130th General Assembly, SB 23, § 1, eff. 3/20/2015.
Effective Date: 03-24-1993

2101.18 Fees for other services.

For services for which compensation is not provided but subject to section 2101.27 of the Revised Code insofar as the probate judge solemnizes marriages, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services.

The probate judge shall administer oaths and make certificates in pension and bounty cases without compensation.

Effective Date: 04-11-1991

2101.19 Limitation of charges by probate judge - probate court conduct of business fund.

(A) No probate judge or probate judge's deputy clerk shall sell or offer for sale for more than one dollar any merchandise to be used in connection with any license, order, or document issued by the probate court, or make any charge in connection with the issuance of any license, order, or document except that specifically provided by law.

(B) All moneys obtained from the sale of merchandise to be used in connection with any license, order, or document issued by a probate court shall be paid by the probate judge or the deputy clerk of the court into the county treasury. The moneys shall be credited to a fund to be known as the probate court conduct of business fund. The moneys so credited shall be used solely for the conduct of the business of the probate court.

(C) Upon receipt of an order of the probate judge for the payment of moneys from the fund for the conduct of the business of the court, the county auditor shall draw a warrant on the county treasurer for the amount of money specified in the order, but not exceeding the balance of the moneys in the fund, which warrant shall be made payable to the probate judge or another person designated in the order.
Amended by 129th General Assembly File No. 52, SB 124, § 1, eff. 1/13/2012.
Effective Date: 03-13-1986

2101.37 Judge of court of common pleas to act as probate judge - compensation.

When the probate judge of any county is absent, or is unable to attend court, or the volume of work in the judge's office necessitates it, the judge may call upon a judge of the court of common pleas having jurisdiction in that county to act in the probate judge's place or in

conjunction with the probate judge, or the probate judge may call upon the chief justice of the supreme court, who shall designate a judge of the court of common pleas or a probate judge to act in the place of the absent or incapacitated probate judge or in conjunction with the absent or incapacitated probate judge. If the probate judge of any county dies or resigns during the judge's term of office, a judge of the court of common pleas of that county shall act in the place of the probate judge until a successor is appointed and qualified. When a judge of the court of common pleas or a probate judge so designated resides outside the county in which the designated judge is called upon to act, the designated judge shall receive the compensation that is provided for judges of the court of common pleas designated by the chief justice to hold court outside their respective counties. The record of the cases shall be made and preserved in the proper records of the probate court by the deputy clerk of the probate court.

Amended by 129th General Assembly File No. 52, SB 124, § 1, eff. 1/13/2012.
Effective Date: 10-01-1953

2303.31 Clerks of other courts.

The duties prescribed by law for the clerk of the court of common pleas shall, so far as they are applicable, apply to the clerks of other courts of record.

Effective Date: 10-01-1953

2303.05 Clerk may appoint deputies.

The clerk of the court of common pleas may appoint one or more deputies. Such appointment or appointments shall be endorsed by the clerk and entered on the journal of the court.

Effective Date: 08-30-1957
Amended by 134th General Assembly File, HB 110, § 1, eff. 9/30/2021.

2303.06 Books, stationery, and dockets.

The board of county commissioners shall furnish the clerk of the court of common pleas all things necessary for the prompt discharge of his duty.

Effective Date: 10-01-1953
Amended by 134th General Assembly, HB 567, § 1, eff. 4/6/2023.

2303.07 Oaths and acknowledgments.

The clerk of the court of common pleas may administer oaths and take and certify affidavits, depositions, and acknowledgments of deeds, mortgages, powers of attorney, and other instruments in writing.

Effective Date: 10-01-1953

2303.08 General duties.

The clerk of the court of common pleas shall indorse on each pleading or paper in a cause filed in the clerk's office the time of filing, enter all orders, decrees, judgments, and proceedings of the courts of which such individual is the clerk, make a complete record when ordered on the journal to do so, and pay over to the proper parties all moneys coming into the clerk's hands as clerk. The clerk may refuse to accept for filing any pleading or paper submitted for filing by a person who has been found to be a vexatious litigator under section 2323.52 of the Revised Code and who has failed to obtain leave to proceed under that section.

Effective Date: 03-18-1997

2303.09 Filing and preserving papers.

The clerk of the court of common pleas shall file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding.

Effective Date: 10-01-1953

2303.10 Indorsement of papers.

The clerk of the court of common pleas shall indorse upon every paper filed with him the date of the filing thereof, and upon every order for a provisional remedy and upon every undertaking given thereunder, the date of its return to his office.

Effective Date: 10-01-1953

2303.11 Writs to issue on praecipe.

All writs and orders for provisional remedies, and process of every kind, shall be issued by the clerk of the court of common pleas, or directly by an order or local rule of a court, or by a county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code; but before they are issued a praecipe shall be filed with the clerk demanding the same.

Effective Date: 10-01-1953
Amended by 127th General Assembly, HB 138, § 1, eff. 9/11/2008.

2303.12 Books to be kept by clerk.

(A) As used in this section:

(1) "Case file" means the compendium of original documents filed in a civil action or proceeding in the court of common pleas, including the pleadings, motions, orders, and judgments of the court on a case by case basis.

(2) "General docket" means the appearance docket, trial docket, journal, execution docket, and case files in relation to those dockets and journal.

(B) The clerk of the court of common pleas shall keep at least four books. They shall be called the appearance docket, trial docket and printed duplicates of the trial docket for the use of the court and the officers thereof, journal, and execution docket. The clerk shall also keep a record in book form or the clerk may prepare a record by using any photostatic, photographic, miniature photographic, film, microfilm, or microphotographic process, electrostatic process, perforated tape, magnetic tape, or other electromagnetic means, electronic data processing, machine readable media, graphic or video display, or any combination thereof, which correctly and accurately copies or reproduces the original document, paper, or instrument in writing. The clerk shall use materials that comply with the minimum standards of quality for permanent photographic records prescribed by the National Bureau of Standards. The clerk shall keep an index to the trial docket and to the printed duplicates of the trial docket and of the journal direct, and to the appearance docket, record, and execution docket, direct and reverse. All clerks keeping records and information by the methods described in this section shall keep and make readily available to the public the machine and equipment necessary to reproduce the records and information in a readable form.
(C) The clerk of the court of common pleas shall keep confidential information that is subject to a real property confidentiality notice under section 111.431 of the Revised Code, in accordance with that section.

(D)(1) Subject to division (D)(2) of this section, not later than eighteen months after the effective date of this amendment, the clerk of court shall make available online on the clerk of court's web site the general docket of the court for remote access and printing by the public of the information in that docket, including all individual documents in each case file, pertaining to civil cases filed on or after the effective date of this amendment.

(2) The clerk of court is not required to make available online under division (D)(1) of this section either of the following:

(a) The general docket of the division of domestic relations, the juvenile court, or the probate court;

(b) If the court does not have a division of domestic relations, the general docket in civil cases pertaining to domestic relations.

(E) Nothing in division (D) of this section shall be construed as making available online any of the following:

(1) Internal documents such as notes, emails, drafts, recommendations, advice, or research of judicial officers and court staff;

(2) Any document or any information in a case file the public access to which the court has ordered restricted under the Rules of Superintendence for the Courts of Ohio.

Effective Date: 08-19-1975
Amended by 134th General Assembly, HB 567, § 1, eff. 4/6/2023.

2303.13 Entries on appearance docket and their effect.

The clerk of the court of common pleas shall enter upon the appearance docket at the time of the commencement of an action or proceeding, the names of the parties in full, with names of counsel, and forthwith index the case direct and reverse in the name of each plaintiff and defendant. In like manner and at the time it occurs, he shall also index the name of each person who becomes a party to such action or proceeding. At the time it occurs and under the case so docketed, he shall also enter the issue of the summons or other mesne process or order and the filing of each paper, and he shall record in full the return of such writ or order with the date of its return to the court, which entry shall be evidence of such service.

Effective Date: 10-01-1953

2303.14 Keeping of books and making of records.

The clerk of the court of common pleas shall maintain all materials as referenced in the Rules of Superintendence for the Courts of Ohio appertaining to the court and record its proceedings.

Effective Date: 10-01-1953
Amended by 134th General Assembly, HB 567, § 1, eff. 4/6/2023.

2303.15 Record of orders out of court.

Orders made out of court shall be recorded in a manner consistent with the Rules of Superintendence for the Courts of Ohio.
Effective Date: 10-01-1953
Amended by 134th General Assembly, HB 567, § 1, eff. 4/6/2023.

2303.16 Deposit of fees for foreign writ.

The clerk of the court of common pleas shall not issue a writ in a civil action to another county until the party requiring the issuing thereof has deposited with him sufficient funds to pay the officer to whom it is directed for executing it, and the clerk shall indorse thereon the words,

“Funds deposited to pay for the execution of this writ.” On the return thereof, the clerk shall pay to such officer the fees for executing such writ, and no officer shall be required to serve such writ unless it is so indorsed.

Effective Date: 10-01-1953

2303.17 Clerk shall make complete record.

When ordered on the journal to do so, the clerk of the court of common pleas shall make a complete record within six months after final judgment or order of the proper court. On his failing to make such record within such time, the clerk may be removed by the court of common pleas.

Effective Date: 08-04-1961

2303.18 Indexes of judgments not dormant.

Each clerk of the court of common pleas shall make an alphabetical index of the names of all plaintiffs and defendants to pending suits and living judgments, showing therein in separate columns the names, court, and number of the suit or execution. When there is more than one suit or judgment for or against the same party, it shall be sufficient to index the name but once and make entries opposite thereto, of the court and the number of the suit or execution. No such index shall be made in counties where it has already been done.

Effective Date: 10-01-1953

2303.19 Index to be made.

All suits shall be indexed at the time of the filing of the petition and all judgments shall be indexed at the time of the entry on the journal, revival, or the filing of a transcript thereof as required by section 2303.18 of the Revised Code. Whenever the court of common pleas of a county directs, the clerk of the court of common pleas shall make a re-index, in the manner provided in such section, of all pending suits and living judgments, then on the dockets of either the court of common pleas or the court of appeals, in which re-index all new suits and judgments shall be indexed at the time provided in this section.

Effective Date: 10-01-1953

2303.22 Clerk shall receive and pay over all costs and fees taxed upon writs.

The clerk of the court of common pleas shall receive from the sheriff, or other officer of the court, all costs taxed upon any writ or order issued from the court, such as appraisers’ fees,

printers' fees, or any other fees necessarily incurred in the execution of such writ or order, and on demand pay them to the persons entitled thereto. The sheriff, or other officer of the court, shall tax such costs and collect and pay them to the clerk of the court from which the writ or order issued, giving the name of each individual, and the amount which each is entitled to receive.

Effective Date: 10-01-1953

2303.26 Duties of clerk.

The clerk of the court of common pleas shall exercise the powers conferred and perform the duties enjoined upon the clerk by statute and by the common law; and in the performance of official duties the clerk shall be under the direction of the court. The clerk shall not restrict, prohibit, or otherwise modify the rights of parties to seek service on party defendants allowed by the Rules of Civil Procedure, either singularly or concurrently.

Effective Date: 10-01-1953.
Amended by 131st General Assembly, HB 390, § 1, eff. 9/28/2016.

2303.27 Services without compensation.

The clerk of the court of common pleas shall make no charge for certificates made for pensioners of the United States government, or any oath administered in pension and bounty cases, or on pension vouchers, applications, or affidavits.

Effective Date: 10-01-1953

2303.28 Clerk shall file itemized bill of costs.

In every case immediately on the rendition of judgment, the clerk of the court of common pleas shall make out and file with the papers in the cause, an itemized bill of his costs therein, including the judgment. He shall not issue an execution in any cause for the costs of himself or of any other officer, or receive any costs for himself or any other officer, unless an itemized statement has been rendered.

Effective Date: 10-01-1953

2303.29 Appropriations for issuing motor vehicle titles.

(A) A clerk of the court of common pleas may, or upon the request of the board of county commissioners by the first day of June shall, submit a request for an appropriation to the board of county commissioners detailing the costs required to administer his responsibilities under Chapter 4505. of the Revised Code. If such a request is submitted, the request shall include an

itemized schedule of personnel and supply costs. In addition, the request shall include a summary of the cost of administering Chapter 4505. of the Revised Code during the most recent appropriation period; a detailed estimate of new costs that will result from new responsibilities pursuant to Substitute House Bill 275 of the 114th general assembly or from any subsequent legislation changing fees or poundage established under Chapter 4505. of the Revised Code. If such a request is submitted, it shall be filed with the clerk of the board of county commissioners not later than the first day of November. The board of county commissioners shall consider the request of the clerk and the intent of the legislature prior to adopting the appropriation resolution pursuant to section 5705.28 of the Revised Code.

(B) The board of county commissioners shall budget and appropriate funds for the operation of the office of the clerk of the court of common pleas in an amount sufficient for the prompt discharge of the clerk's duties under Chapter 4505. of the Revised Code.

Effective Date: 08-01-1981

Effective: July 1, 2023

Civ. R. Rule 53

Civ R 53 Magistrates

Currentness

(A) Appointment. A court of record may appoint one or more magistrates who shall have been engaged in the practice of law for at least four years and be in good standing with the Supreme Court of Ohio at the time of appointment. A magistrate appointed under this rule may also serve as a magistrate under Crim. R. 19 or as a traffic magistrate.

(B) Compensation. The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs under Civ. R. 54(D).

(C) Authority.

(1) *Scope*. To assist courts of record and pursuant to reference under Civ. R. 53(D)(1), magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

(a) Determine any motion in any case;

(b) Conduct the trial of any case that will not be tried to a jury;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;

(d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;

(e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Jury trials before Magistrates.* Notwithstanding any other provision of these rules, in jury trials presided over by magistrates, the factual findings of the jury shall be conclusive as in any trial before a judge. All motions presented following the unanimous written consent of the parties, including those under Civ.R. 26, 37, 50, 51, 56, 59, 60, and 62, shall be heard and decided by the magistrate. No objections shall be entertained to the factual findings of a jury, or to the motion or legal rulings made by the magistrate except on appeal to the appropriate appellate court after entry of a final judgment or final appealable order. The trial judge to whom the matter was originally assigned before the parties consented to trial before a magistrate shall enter judgment consistent with the magistrate's journalized entry pursuant to Civ.R. 58, but shall not otherwise review the magistrate's rulings or a jury's factual findings in a jury trial before a magistrate.

(3) *Regulation of Proceedings.* In performing the responsibilities described in Civ. R. 53(C)(1), magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the

efficient performance of those responsibilities, including but not limited to, the following:
(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;
(b) Ruling upon the admissibility of evidence;
(c) Putting witnesses under oath and examining them;
(d) Calling the parties to the action and examining them under oath;
(e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to Crim. R. 46;
(f) Imposing, subject to Civ. R. 53(D)(8), appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) Proceedings in Matters Referred to Magistrates.

(1) *Reference by Court of Record*.

a) Purpose and Method. A court of record may, for one or more of the purposes described in Civ.R. 53(C)(1), refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.
(b) Limitation. A court of record may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.
(2) *Magistrate's Order; Motion to Set Aside Magistrate's Order*.
(a) Magistrate's Order.
(i) Nature of order. Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.
(ii) Form, filing, and service of magistrate's order. A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.
(b) Motion to Set Aside Magistrate's Order. Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's Decision; Objections to Magistrate's Decision*.
(a) Magistrate's Decision.
(i) When Required. Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Civ.R. 53(D)(1).
(ii) Findings of Fact and Conclusions of Law. Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.
(iii) Form; Filing, and Service of Magistrate's Decision. A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).
(b) Objections to Magistrate's Decision.
(i) Time for Filing. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.
(ii) Specificity of Objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.
(iii) Objection to Magistrate's Factual Finding; Transcript or Affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a

party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.
(iv) Waiver of Right to Assign Adoption by Court as Error on Appeal. Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).
(4) *Action of Court on Magistrate's Decision and on Any Objections to Magistrate's Decision; Entry of Judgment or Interim Order by Court*.
(a) Action of Court Required. A magistrate's decision is not effective unless adopted by the court.
(b) Action on Magistrate's Decision. Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.
(c) If No Objections Are Filed. If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.
(d) Action on Objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.
(e) Entry of Judgment or Interim Order by Court. A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.
(i) Judgment. The court may enter a judgment either during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.
(ii) Interim Order. The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight

additional days for good cause shown. An interim order shall comply with Civ.R. 54(A), be journalized pursuant to Civ.R. 58(A), and be served pursuant to Civ.R. 58(B).
(5) *Extension of Time*. For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. “Good cause” includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.
(6) *Disqualification of a Magistrate*. Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.
(7) *Recording of Proceedings Before a Magistrate*. Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.
(8) *Contempt in the Presence of a Magistrate*.
(a) Contempt Order. Contempt sanctions under Civ. R. 53(C)(3)(f) may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.
(b) Filing and Provision of Copies of Contempt Order. A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.
(c) Review of Contempt Order by Court; Bail. The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

CREDIT(S)

(Adopted eff. 7-1-70; amended eff. 7-1-75, 7-1-85, 7-1-92, 7-1-93, 7-1-95, 7-1-96, 7-1-98, 7-1-03, 7-1-06, 7-1-11, 7-1-20, 7-1-23)

STAFF NOTES

2023:

The amendment to division (D)(8)(a) of this rule makes a cross-reference change necessitated by prior amendments to the rule.

2020:

Division (C)(2)

A major improvement to federal practice in the last half century was the authorization given magistrate judges to conduct civil jury trials. F.R.C.P. 73. Following the lead of the federal courts, Ohio magistrates also now conduct civil jury trials with written consent of all parties as authorized by Civ.R. 53(C)(1)(c). Yet, as demonstrated in *Gilson v. American Institute of Alternative Medicine*, 10th Dist. Case No. 15AP-548, 2016-Ohio-1324, ¶¶ 28-29, 103, Ohio procedure remains cumbersome after jury trials conducted by magistrates, and may require the trial court to unnecessarily review factual findings

of the jury and certain interlocutory rulings of a magistrate. This is unnecessarily time consuming and costly.

The amendment adds a new Division (C)(2) and renumbers the existing Division (C)(2) as Division (C)(3). New Civ.R. 53(C)(2) streamlines the procedure following jury trials conducted by magistrates upon unanimous consent of the parties, although still requiring the entry of judgment by the trial court. Factual findings of the jury and the magistrate's interlocutory rulings preceding the entry of judgment, are no longer required to undergo a cumbersome and expensive procedure for which essentially the first line of appeal has been to the trial court, rather than directly to a court of appeals.

2012:

Rule 65.1(F), effective July 1, 2012, relates to the reference to a magistrate of civil protection order proceedings under R.C. 3113.31, R.C. 2151.34, and R.C. 2903.214. Rule 65.1(A) states that the provisions of the rule shall be interpreted and applied in a manner consistent with the intent and purposes of the protection order statutes, and supersede and make inapplicable in those proceedings the provisions of any other rules to the extent that their application is inconsistent with Civ.R. 65.1. Provisions of Civ.R. 65.1(F) which affect Civ.R. 53 include:

Civ.R. 65.1(F)(2)(b)(ii): A magistrate's denial or granting of an ex parte protection order without judicial approval does not constitute a magistrate's order or a magistrate's decision under Civ.R. 53(D)(2) or (3) and is not subject to the requirements of those rules.

Civ.R. 65.1(F)(2)(b)(iii): The court's approval and signing of a magistrate's denial or granting of an ex parte protection order does not constitute a judgment or interim order under Civ.R. 53(D)(4)(e) and is not subject to the requirements of that rule;

Civ.R. 65.1(F)(3)(b): A magistrate's denial or granting of a protection order after a full hearing does not constitute a magistrate's order or a magistrate's decision under Civ.R. 53(D)(2) or (3) and Is not subject to the requirements of those rules;

Civ.R. 65.1(F)(3)(c)(iv): A court's adoption, modification, or rejection of a magistrate's denial or granting of a protection order after a full hearing does not constitute a judgment or interim order under Civ.R. 53(D)(4)(e) and is not subject to the requirements of that rule.

The adoption of Civ.R. 65.1(F) also nullifies comments in the 2006 Staff Note to Civ.R. 53(D)(2)(a)(i) relating to the entry of temporary protection orders under R.C. 3113.31.

The listing above is not exclusive or comprehensive. Additional provisions of Civ.R. 53 relating to such matters as the authority and responsibilities of a magistrate are also affected by Civ.R. 65.1(F). As indicated in the Staff Notes to Rule 65.1, the rule was adopted to provide a set of provisions uniquely applicable to civil protection order proceedings and to provide the court with the discretion to suspend the application in

such proceedings of any other rules to the extent that their application interferes with the statutory process or are inconsistent with its purposes.

2006:

Civ.R. 53 has been reorganized in an effort to make it more helpful to bench and bar and reflective of developments since the rule was last substantially revised effective July 1, 1995. The relatively-few significant changes included in the reorganization are noted below.

Rule 53(A) Appointment

Civ.R. 53(A) is taken verbatim from sentence one of former Civ.R. 53(A). Sup.R. 19 requires that all municipal courts having more than two judges appoint one or more magistrates to hear specified matters. See also Crim.R. 19 and Traf.R. 14.

Rule 53(B) Compensation

Civ.R. 53(B) refers to Civ.R. 54(D) so as to more clearly harmonize Civ.R. 53 with statutory provisions that authorize courts to collect funds from litigants generally and to use the collected funds for purposes that include employment of magistrates. See, *e.g.,* R.C. 1901.26(B)(1), 1907.24(B)(1), 2303.201(E)(1), and 2501.16(B).

Rule 53(C) Authority

Civ.R. 53(C) is drawn largely from former Civ.R. 53(C)(1) and (2) and reflects the admonition of the Supreme Court that "a [magistrate's] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them." *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 615 N.E.2d 617 (emphases added). Civ.R. 53(C)(1)(d) is added to parallel Crim.R. 19(C)(1)(g) and recognize that magistrates have authority to conduct temporary protection order proceedings in accordance with law. Consistent with the admonition in *Hartt*, however, any temporary protection order issued as a result of such proceedings must be signed by a judge.

Rule 53(D) Proceedings in matters referred to magistrates

Civ.R. 53(D)(1) through (4) treat each of the steps that potentially occur if a magistrate participates: (1) reference to a magistrate; (2) magistrate's orders and motions to set aside magistrate's orders; (3) magistrate's decisions and objections to magistrate's decisions; and (4) action of the court on magistrate's decisions and on any objections to magistrate's decisions and entry of judgment or interim order by the court. Civ.R. 53(D)(5) through (8) deal with good cause extensions of time, disqualification of a magistrate, recording of proceedings before a magistrate, and contempt in the presence of a magistrate.

Reference by court of record

Civ.R. 53(D)(1), unlike former Civ.R. 53(C)(1)(b), specifically authorizes reference of types of matters by rule as well as by a specific or general order of reference. In so doing, it recognizes existing practice in some courts. See, e.g., Loc.R. 99.02, Franklin

Cty. Ct. of Common Pleas; Loc. R. 23(B), Hamilton Cty. Ct. of Common Pleas; *State ex rel. Nalls v. Russo,* 96 Ohio St.3d 410, 412-13, 2002-Ohio-4907 at ¶¶ 20-24, 775 N.E.2d 522; *Davis v. Reed* (Aug. 31, 2000), 8th Dist. App. No. 76712, 2000 WL 1231462 at *2 (citing *White v. White* (1977), 50 Ohio App.2d 263, 266-268, 362 N.E.2d 1013), and *Partridge v. Partridge* (Aug. 27, 1999), 2nd Dist. App. No. 98 CA 38, 1999 WL 945046 at *2, (treating a local rule of the Greene Cty. Ct. of Common Pleas, Dom. Rel. Div., as a standing order of reference).

Magistrate's order; motion to set aside magistrate's order

Civ.R. 53(D)(2)(a)(i) generally authorizes a magistrate to enter orders without judicial approval if necessary to regulate the proceedings and, adapting language from Crim.R. 19(B)(5)(a), if "not dispositive of a claim or defense of a party." The new language removes the arguably limiting title of former Civ.R. 53(C)(3)(a) ["Pretrial orders"] and is intended to more accurately reflect proper and existing practice. This language is not intended to narrow the power of a magistrate to enter pretrial orders without judicial approval on matters related to (1) pretrial management under Civ.R. 16; (2) discovery conducted pursuant to Civ.R. 26-37; (3) temporary orders issued pursuant to Civ.R. 75(N); (4) temporary restraining order governing marital property under Civ.R. 75(I)(2); or (5) any other orders necessary to the regulation of proceedings before a magistrate. All temporary protection orders, however, including orders issued to avoid bodily harm pursuant to Civ.R. 75(I)(2), must be signed by a judge and comply fully with the procedures set forth in R.C. 3113.31 and related sections. Civ.R. 53(D)(2)(b) replaces language in former Civ.R. 53(C)(3)(b), which purported to authorize "[a]ny person" to "appeal to the court" from any order of a magistrate "by filing a motion to set the order aside." The new language refers to the appropriate challenge to a magistrate's order as solely a "motion to set aside" the order. Civ.R. 53(D)(2)(b) likewise limits the authorization to file a motion to "any *party,*" though an occasional nonparty may be entitled to file a motion to set aside a magistrate's order. Sentence two of Civ.R. 53(D)(2)(b) changes the trigger for the ten days permitted to file a motion to set aside a magistrate's order from entry of the order to filing of the order, as the latter date is definite and more easily available to counsel.

Magistrate's decision; objections to magistrate's decision

Civ.R. 53(D)(3) prescribes procedures for preparation of a magistrate's decision and for any objections to a magistrate's decision.

Civ.R. 53(D)(3)(a)(ii), unlike former Civ.R. 53(E)(2), adapts language from Civ.R. 52 rather than simply referring to Civ.R. 52. The change is intended to make clear that, e.g., a request for findings of fact and conclusions of law in a referred matter should be directed to the magistrate rather than to the court. Civ.R. 53(D)(3)(a)(ii) explicitly authorizes a magistrate's decision, subject to the terms of the relevant reference, to be general absent a timely request for findings of fact and conclusions of law or a

provision of law that provides otherwise. Occasional decisions under former Civ.R. 53 said as much. See, *e.g., In re Chapman* (Apr. 21, 1997), 12th Dist. App. No. CA96-07-127, 1997 WL 194879 at *2; *Burke v. Brown*, 4th Dist. App. No. 01CA731, 2002-Ohio-6164 at ¶ 21; and *Rush v. Schlagetter* (Apr. 15, 1997), 4th Dist. App. No. 96CA2215, 1997 WL 193169 at *3. For a table of sections of the Ohio Revised Code that purport to make findings of fact by judicial officers mandatory in specified circumstances, see 2 Klein-Darling, Ohio Civil Practice § 52-4, 2002 Pocket Part at 136 (West Group 1997).

Civ.R. 53(D)(3)(a)(iii) now requires that the magistrate's decision be served on the parties or their attorneys no later than three days after the decision was filed. The former rule contained no specific time requirement. The provision further requires that a magistrate's decision include a conspicuous warning of the waiver rule prescribed by amended Civ.R. 53(D)(3)(b)(iv). The latter rule now provides that a party shall not assign as error on appeal a court's adoption of any factual finding or legal conclusion of a magistrate, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless that party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b). While the prior waiver rule, prescribed by former Civ.R. 53(E)(3)(b) (effective July 1, 1995) and former Civ.R. 53(E)(3)(d) (effective July 1, 2003), arguably applied only to findings of fact or conclusions of law specifically designated as such, the amended waiver rule applies to any factual finding or legal conclusion in a magistrate's decision and the required warning is broadened accordingly.

Civ.R. 53(D)(3)(b)(i) retains the fourteen-day time for filing written objections to a magistrate's decision. While the rule continues to authorize filing of objections by a "party," it has been held that a non-party attorney can properly object to a magistrate's decision imposing sanctions on the attorney. *All Climate Heating & Cooling, Inc. v. Zee Properties, Inc*. (May 17, 2001), 10th Dist. App. No. 00AP-1141, 2001 WL 521408 at *3.

Sentence one of Civ.R. 53(D)(3)(b)(iii) requires that an objection to a factual finding in a magistrate's decision, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or by an affidavit of that evidence if a transcript is not available. The Supreme Court has prescribed the consequences on appeal of failure to supply the requisite transcript or affidavit as follows: (1) "appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision]" and (2) "the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254.

Sentence two of Civ.R. 53(D)(3)(b)(iii) adds a new requirement, adapted from Loc.R. 99.05, Franklin Cty. Ct. of Common Pleas, that the requisite transcript or affidavit be filed within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. The last sentence of Civ.R. 53(D)(3)(b)(iii) allows an objecting party to seek leave of court to supplement previously filed objections where the additional objections become apparent after a transcript has been prepared.

Civ.R. 53(D)(3)(b)(iv), as noted above, expands the "waiver rule" prescribed by former Civ.R. 53(E)(3)(b) (effective July 1, 1995) and former Civ.R. 53(E)(3)(d) (effective July 1, 2003) to include any factual finding or legal conclusion in a magistrate's decision, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii). The Rules Advisory Committee was unable to discern a principled reason to apply different requirements to, e.g., a factual finding depending on whether or not that finding is specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii). An exception to the "waiver rule" exists for plain error, which cannot be waived based on a party's failure to object to a magistrate's decision.

Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by the court

Civ.R. 53(D)(4)(a), like sentence one of former Civ.R. 53(E)(4)(a), confirms that a magistrate's decision is not effective unless adopted by the court.

Civ.R. 53(D)(4)(b) provides that a court may properly choose among a wide range of options in response to a magistrate's decision, whether or not objections are timely filed. See, *e.g., Johnson v. Brown* 2nd Dist. App. No. 2002 CA 76, 2003-Ohio-1257 at ¶ 12 (apparently concluding that former Civ.R. 53(E)(4)(b) permitted the trial court to modify an aspect of the magistrate's decision to which no objection had been made). Civ.R. 53(D)(4)(c) provides that if no timely objections are filed, the court may adopt a magistrate's decision unless the court determines that there is an error of law or other defect evident on the face of the decision. A similar result was reached under sentence two of former Civ.R. 53(E)(4)(a). See, *e.g., Perrine v. Perrine*, 9th Dist. App. No. 20923, 2002-Ohio-4351 at ¶ 9; *City of Ravenna Police Dept. v. Sicuro* (Apr. 30, 2002), 11th Dist. App. No. 2001-P-0037; and *In re Weingart* (Jan. 17, 2002), 8th Dist. App. No. 79489, 2002 WL 68204 at *4. The language of Civ.R. 53(D)(4)(c) has been modified in an attempt to make clear that the obligation of the court does not extend to any "error of law" whatever but is limited to errors of law that are evident on the face of the decision. To the extent that decisions such as *In re Kelley*, 11th Dist. App. No. 2002-A-0088, 2003-Ohio-194 at ¶ 8 suggest otherwise, they are rejected. The "evident on the face" standard does not require that the court conduct an independent analysis of the magistrate's decision. The amended rule does not speak to the effect, if any, on the waiver rule prescribed by amended Civ.R. 53(D)(3)(b)(iv) of the "evident on the face"

requirement. At least two courts have explicitly held that the "evident on the face" standard generates an exception to the waiver rule. *Dean-Kitts v. Dean*, 2nd Dist. App. No. 2002CA18, 2002-Ohio-5590 at ¶ 13 and *Hennessy v. Hennessy* (Mar. 24, 2000), 6th Dist. App. No. L-99-1170, 2000 WL 299450 at *1. Other decisions have indicated that the standard may generate an exception to the waiver rule. *Ohlin v. Ohlin* (Nov. 12, 1999), 11th Dist. App. No. 98-PA-87, 1999 WL 1580977 at *2; *Group One Realty, Inc. v. Dixie Intl. Co*. (1998), 125 Ohio App.3d 767, 769, 709 N.E.2d 589; *In re Williams* (Feb. 25, 1997), 10th Dist. App. No. 96APF06-778, 1997 WL 84659 at *1. However, the Supreme Court applied the waiver rule three times without so much as referring to the "evident on the face" standard as a possible exception. *State ex rel. Wilson v. Industrial Common*. (2003), 100 Ohio St.3d 23, 24, 2003-Ohio-4832 at ¶ 4, 795 N.E.2d 662; *State ex rel. Abate v. Industrial Comm'n*. (2002), 96 Ohio St.3d 343, 2002-Ohio-4796, 774 N.E.2d 1212; *State ex rel. Booher v. Honda of America Mfg. Co., Inc*. (2000), 88 Ohio St.3d 52, 2000-Ohio-269, 723 N.E.2d 571.

As noted above, even if no timely objection is made, a court may, pursuant to Civ.R. 53(D)(4)(b), properly choose a course of action other than adopting a magistrate's decision even if there is no error of law or other defect evident on the face of the magistrate's decision.

Sentence one of Civ.R. 53(D)(4)(d), like sentence one of former Civ.R. 53(E)(4)(b), requires that the court rule on timely objections. Sentence two of Civ.R. 53(D)(4)(d) requires that, if timely objection is made to a magistrate's decision, the court give greater scrutiny than if no objections are made. The "independent review as to the objected matters" standard that applies if timely objection is made should be distinguished from the lesser scrutiny permitted if no objections to a magistrate's decision are timely filed, the latter standard having been first adopted by former Civ.R. 53(E)(4)(a), effective July 1, 1995, and retained by new Civ.R. 53(D)(4)(c), discussed above.

The "independent review as to the objected matters" standard is intended to exclude the more limited appellate standards of review and codify the practice approved by most courts of appeals. The Second District Court of Appeals has most clearly and consistently endorsed and explained that standard. *See, e.g., Crosby v. McWilliam,* 2nd Dist. App. No. 19856, 2003-Ohio-6063; *Quick v. Kwiatkowski* (Aug. 3, 2001), 2nd Dist. App. No. 18620, 2001 WL 871406 (acknowledging that "Magistrates truly do the 'heavy lifting' on which we all depend"); *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 758 N.E.2d 1234. Other district courts of appeal have followed suit. *Reese v. Reese,* 3rd Dist. App. No. 14-03-42, 2004-Ohio-1395; *Palenshus v. Smile Dental Group, Inc.*, 3rd Dist. App. No. 3-02-46, 2003-Ohio-3095,; *Huffer v. Chafin*, 5th Dist. App. No. 01 CA 74, 2002-Ohio-356; *Rhoads v. Arthur* (June 30, 1999), 5th Dist. App. No. 98CAF10050, 1999 WL 547574; *Barker v. Barker* (May 4, 2001), 6th Dist. App. No. L-00-1346, 2001 WL

477267; *In re Day,* 7th Dist. App. No. 01 BA 28, 2003-Ohio-1215; *State ex rel. Ricart Auto. Personnel, Inc. v. Industrial Comm'n. of Ohio,* 10th Dist. App. No. 03AP-246, 2003-Ohio-7030; *Holland v. Holland* (Jan. 20, 1998), 10th Dist. App. No. 97APF08-974, 1998 WL 30179; *In re Gibbs* (Mar. 13, 1998), 11th Dist. App. No. 97-L-067, 1998 WL 257317.

Only one court of appeals appears consistently and knowingly to have taken a different approach. *Lowery v. Keystone Bd. of Ed*. (May 9, 2001), 9th Dist. App. No. 99CA007407, 2001 WL 490017; *Weber v. Weber* (June 30, 1999), 9th Dist. App. No. 2846-M, 1999 WL 459359; *Meadows v. Meadows* (Feb. 11, 1998), 9th Dist. App. No. 18382, 1998 WL 78686; *Rogers v. Rogers* (Dec. 17, 1997), 9th Dist. App. No. 18280, 1997 WL 795820.

The Rules Advisory Committee believes that the view adopted by the majority of courts of appeals is correct and that no change was made by the 1995 amendments to Civ.R. 53 in the review required of a trial judge upon the filing of timely objections to a magistrate's decision.

The phrase “as to the objected matters” permits a court to choose to limit its independent review to those matters raised by proper objections. If a court need apply only the “defect evident on the face” standard if no objections are filed at all, then, if one or more objections *are* filed, a court logically need apply the more stringent independent review only to those aspects of the magistrate's decision that are challenged by that objection or those objections.

Sentence three of Civ.R. 53(D)(4)(d) provides that, before ruling on objections, a court may hear additional evidence and that it may refuse to hear additional evidence unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

Civ.R. 53(D)(4)(e) requires that a court that adopts, rejects, or modifies a magistrate's decision also enter a judgment or interim order. Civ.R. 53 (D)(4)(e)(i) permits the court to enter a judgment during the fourteen days permitted for the filing of objections to a magistrate's decision but provides that the timely filing of objections operates as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered. Civ.R. 53(D)(4)(e)(ii) permits the court, if immediate relief is justified, to enter an interim order based on the magistrate's decision without waiting for or ruling on timely objections. The timely filing of objections does not stay such an interim order, but the order may not properly extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. New sentence three of Civ.R. 53(D)(4)(e)(ii) provides that an interim order shall comply with Civ.R. 54(A), be journalized pursuant to Civ.R. 58(A), and be served pursuant to Civ.R. 58(B). See *Hall v. Darr,* 6th Dist. App. No. OT-03-001, 2003-Ohio-1035.

<u>Extension of time</u>

Civ.R. 53(D)(5) is new and requires the court, for good cause shown, to provide an objecting party with a reasonable extension of time to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. “Good cause” would include the failure of a party to receive timely service of the magistrate's order or decision.

Disqualification of a magistrate

Civ.R. 53(D)(6) has no counterpart in former Civ.R. 53. The statutory procedures for affidavits of disqualification apply to judges rather than magistrates. Rev. Code §§ 2101.39, 2501.13, 2701.03, 2701.131; *In re Disqualification of Light* (1988), 36 Ohio St.3d 604, 522 N.E.2d 458. The new provision is based on the observation of the Chief Justice of the Supreme Court that “[t]he removal of a magistrate is within the discretion of the judge who referred the matter to the magistrate and should be brought by a motion filed with the trial court.” *In re Disqualification of Wilson* (1996), 77 Ohio St.3d 1250, 1251, 674 N.E.2d 260; see also *Mascorro v. Mascorro* (June 9, 2000), 2nd Dist. App. No. 17945, 2000 WL 731751 at *3 (citing *In re Disqualification of Wilson)*; *Reece v. Reece* (June 22, 1994), 2nd Dist. App. No. 93-CA-45, 1994 WL 286282 at *2 (“Appointment of a referee is no different from any other process in which the trial court exercises discretion it is granted by statute or rule. * * * If the defect concerns possible bias or prejudice on the part of the referee, that may be brought to the attention of the court by motion.”); *Moton v. Ford Motor Credit Co.*, 5th Dist. App. No. 01CA74, 2002-Ohio-2857, appeal not allowed (2002), 95 Ohio St.3d 1422, 2002-Ohio-1734, 766 N.E.2d 163, reconsideration denied (2002), 95 Ohio St.3d 1476, 2002-Ohio-244, 768 N.E.2d 1183; *Walser v. Dominion Homes, Inc*. (June 11, 2001), 5th Dist. App. No. 00-CA-G-11-035, 2001 WL 704408 at *5; *Unger v. Unger* (Dec. 29, 2000), 12th Dist. App. No. CA2000-04-009, 2000 WL 1902196 at *2 (citing *In re Disqualification of Wilson, supra)*; *Jordan v. Jordan* (Nov. 15, 1996), 4th Dist. App. No. 1427, 1990 WL 178162 at *5 (“Although referees are not judges and arguably, are not bound by Canon 3(C)(1) of the Code of Judicial Conduct, it would appear axiomatic that a party should be able to petition the court to have a referee removed from the case if the referee is unable to render a fair and impartial decision.”); *In re Reiner* (1991), 74 Ohio App.3d 213, 220, 598 N.E.2d 768 (“where a referee affirmatively states that he is biased on the matter before him, it is an abuse of the court's discretion to fail to recuse the referee”). Particularly because “a [magistrate's] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them,” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphases added), Civ.R. 53(D)(6) contemplates that disqualification on a ground other than bias may sometimes be appropriate.

Recording of proceedings before a magistrate

Civ.R. 53(D)(7), generally requiring recording of proceedings before a magistrate, is taken verbatim from former Civ.R. 53(D)(2).

Contempt in the presence of a magistrate

Civ.R. 53(D)(8) is adapted from sentences two, three, and four of former Civ.R. 53(C)(3)(c). Civ.R. 53(D)(8)(b), unlike its predecessor, explicitly requires that the clerk provide a copy of a contempt order to the subject of the order.

2003:

Rule 53(E) Decisions in referred matters

The amendment to this rule is identical to an amendment to Juv. R. 40(E), also effective July 1, 2003.

It was suggested to the Rules Advisory Committee that the waiver rule prescribed by sentence four of former Civ. R. 53(E)(3)(b) [now division (E)(3)(d)] sometimes surprised counsel and *pro se* litigants because they did not expect to be required to object to a finding of fact or conclusion of law in a magistrate's decision in order to assign its adoption by the trial court as error on appeal. A review of relevant appellate decisions seemed to confirm that suggestion.

It was further suggested that counsel or a *pro se* litigant was particularly likely to be surprised by the waiver rule of sentence four of former Civ. R. 53(E)(3)(b) if a trial court, as authorized by sentence two of Civ. R. 53(E)(4)(a), adopted a magistrate's decision prior to expiration of the fourteen days permitted for the filing of objections. See, e.g., *Riolo v. Navin*, 2002 WL 502408, 2002-Ohio-1551 (8th Dist. Ct. App., 4-19-2002). Since 1995, the potential for surprise posed by the waiver rule may have been exacerbated by the fact that, under the original version of Civ. R. 53, a party did not, by failing to file an objection, waive the right to assign as error on appeal the adoption by a trial court of a finding of fact or conclusion of law of a referee. *Normandy Place Associates v. Beyer*, 2 Ohio St.3d 102, 103 (1982) (syl. 1). As of July 1, 1985, sentence one of Civ. R. 53(E)(6) was amended to read "[a] party may not assign as error the court's adoption of a referee's *finding of fact* unless an objection to that finding is contained in that party's written objections to the referee's report" (emphasis added). See *State ex rel. Donah v. Windham Exempted Village Sch. Dist. Bd. of Ed.*, 69 Ohio St.3d 114, 118 (1994)(confirming that the waiver rule of sentence one of the 1985 version of Civ. R. 53 applied only to findings of fact by a magistrate). The present waiver rule, which applies to both findings of fact and conclusions of law, took effect July 1, 1995, and represents a complete reversal of the no waiver position of the original Civ. R. 53. See *State ex rel. Booher v. Honda of America Mfg., Inc.*, 88 Ohio St.3d 52 (2000)(confirming that the waiver rule now applies to conclusions of law as well as to findings of fact by a magistrate).

The amendment thus makes three changes in Civ. R. 53(E), none of which are intended to modify the substantive scope or effect of the waiver rule contained in sentence four

of former Civ. R. 53(E)(3)(b) [now division (E)(3)(d)]. First, the amendment retains, but breaks into three appropriately-titled subdivisions, the four sentences which comprised former Civ. R. 53(E)(3)(b). Sentences two and three of former Civ. R. 53(E)(3)(b) are included in a new subdivision (c) entitled “Objections to magistrate's findings of fact.” Sentence four of former Civ. R. 53(E)(3)(b), which prescribes the waiver rule, is a new subdivision (d) entitled “Waiver of right to assign adoption by court as error on appeal.”

Second, new language is inserted at the beginning of Civ. R. 53(E)(3)(a) to make it more evident that a party may properly file timely objections to a magistrate's decision even if the trial court has previously adopted that decision as permitted by Civ. R. 53(E)(4)(c).

Third, the amendment adds a new sentence to Civ. R. 53(E)(2), which sentence requires that a magistrate who files a decision which includes findings of fact and conclusions of law also provide a conspicuous warning that timely and specific objection as required by Civ. R. 53(E)(3) is necessary to assign as error on appeal adoption by the trial court of any finding of fact or conclusion of law. It is ordinarily assumed that rule language that prescribes a procedural requirement (see, e.g., sentence six of Civ. R. 51(A), which is analogous to the waiver rule of Civ. R. 53(E)(3)) constitutes sufficient notice to counsel and to *pro se* litigants of that requirement. The Committee nonetheless concluded that the additional provision requiring that a magistrate's decision which includes findings of fact and conclusions of law call attention of counsel and *pro se* litigants to the waiver rule is justified because, as noted above, the original version of Civ. R. 53 imposed no waiver at all and even the 1985 version imposed waiver only as to findings of fact by referees.

1998:

Rule 53(A) Appointment

The 1998 amendment to this division changed “traffic referee” to “traffic magistrate” to conform to the 1996 amendment of Rule 14 of the Ohio Traffic Rules. No substantive change is intended.

Rule 53(C) Reference and powers

The 1998 amendment to division (C)(3)(a) was to change cross-references to Civ.R. 75 necessitated by 1998 amendments to that rule. Division (C)(3)(d) was amended to change “referee” to “magistrate” to conform to the 1996 amendment of Rule 14 of the Ohio Traffic Rules. No substantive change is intended.

Rule 53(E) Decisions in referred matters

The 1998 amendment was to division (E)(4)(b) of this rule. The amendment was made because some trial judges apparently had avoided ruling upon objections to magistrates' reports since the previous rule appeared to require only “consideration”

of the objections. The amendment should clarify that the judge is to rule upon, not just consider, any objections.
An identical amendment was made to division (E)(4)(b) of Juv. R. 40, also effective July 1, 1998.

1996:

Rule 53(E) Decisions in referred matters

The 1996 amendment corrected the first sentence of division (E)(2), which erroneously stated that a magistrate's decision was to include “proposed” findings of fact and conclusions of law. The amendment deleted the word “proposed”. The amendment is technical only and no substantive change is intended.

1995:

Rule 53(A) Appointment

Changes the title of “referee” to “magistrate” and makes clear that the same person may exercise magisterial authority under the Civil and Criminal Rules. By limiting the power of appointment to courts of record, the rule eliminates any authority implicit in the prior rule for appointment of referees by mayor's courts.

Rule 53(B) Compensation

Eliminates the prior authority to tax the compensation of a referee appointed on an interim basis as part of court costs. The Supreme Court Rules Advisory Committee is of the opinion that the salaries of judicial officers should be borne by the taxpayers generally, rather than by the parties to cases.

Rule 53(C) Reference and Powers

(C)(1) Order of Reference. This division replaces language previously found in Rule 53(A). It makes clear that magistrates have authority to act only on matters referred to them by a judge in an order of reference, but permits that order of reference to be categorical or specific to a particular case or motion in a case. Rule 53(C)(1)(a)(iii) codifies in part the result in *Hartt v. Munobe* (1993), 67 Ohio St. 3d 3, but requires that consent to a magistrate's presiding at a jury trial must be written. Division (C)(1)(c) largely tracks prior language, which makes it clear that a particular judge in a given order of reference may limit the powers generally provided in this rule for magistrates.
(C)(2) General Powers. Only stylistic changes are made, except that the provision for recording proceedings before magistrates is moved to Rule 53(D) and changed. (See Staff Note for Rule 53(D) below)
(C)(3) Power to Enter Orders. Division (C)(3)(a) clarifies the authority of magistrates to enter orders that are effective without being approved by a judge. It codifies existing practice in some courts in the state. Division (C)(3)(b) provides that any party may move to set the order aside, but the order remains effective unless a stay is granted.
(C)(3)(b) Contempt in the Magistrate's Presence. This division codifies the inherent power of magistrates, as judicial officers, to deal with contempt of court which occurs

in their actual presence. The core purpose of the contempt power is to permit courts to deal with disruptions of proceedings and to maintain order. This power is as much needed in proceedings before magistrates as before other judicial officers. The rule follows Fed. R. Crim. P. 42 in requiring that the magistrate certify in writing what he or she perceived that constitutes contempt. The clerk is to provide an immediate copy of any magistrate contempt order to an appropriate judge so that there can be prompt judicial review of any contempt order.

(C)(3)(d) Other Orders. The General Assembly has recognized the existence of the referee system and from time to time conferred authority directly on referees, particularly in juvenile matters. This rule is necessary to prevent any inference of intent to override those statutes by adoption of this revised rule.

(C)(3)(e) Form of Magistrate's Orders. This division clarifies the form in which magistrate's orders are to be prepared so that they will be easily identified as such by parties and on the dockets.

Rule 53(D) Proceedings

Prior language largely drawn from Federal Civil Rule 53 relative to special masters and largely applicable to situations where special masters were appointed for individual cases and were not court employees is eliminated. To prevent any implication that proceedings before magistrates are to follow any different procedure from other civil proceedings, division (D)(1) is added. Division (D)(2) requires that proceedings before magistrates be recorded by whatever method a particular court deems appropriate. The rule is not meant to limit courts to particular recording means, but to emphasize that, as judicial officers of courts of record, magistrates should conduct proceedings before them on the record.

Rule 53(E) Decisions in Referred Matters

New division (E) entirely replaces the prior language which required preparation of reports by referees. Experience throughout the state demonstrated that often the report writing requirement substantially slowed the decision of cases without adding anything of value to the decision-making process. The new rule preserves the authority of judges to require reports by so specifying in orders of reference. In the absence of such a requirement, however, magistrates will now prepare a magistrate's decision [division (E)(1)]. If a party desires that the magistrate's decision embody the detail characteristic of a referee's report, the party may make a request for findings of fact and conclusions of law under Civ. R. 52, either before or after the magistrate's decision is filed [division (E)(2)]. The fourteen-day time period for objections is preserved and it begins to run only when a magistrate's decision embodying findings and conclusions is filed, if they have been appropriately requested. [division (E)(3)(a)]. Division (E)(3)(b) prescribes the form of objections and requires that they be specific; a general objection is insufficient to preserve an issue for judicial consideration. The

rule permits the parties to tailor the objection process by providing that a magistrate's findings of fact will be final. The rule reinforces the finality of trial court proceedings by providing that failure to object constitutes a waiver on appeal of a matter which could have been raised by objection. Compare *United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

Division (E)(4) prescribes the procedure to be followed by the court with respect to a magistrate's decision. Proposed decisions are effective only when adopted by the court. However, a magistrate's decision to which no objection is made may be adopted unless there is apparent error; the judge is no longer required to conduct an independent review and make a determination himself or herself. The last sentence of division (E)(4)(b), paralleling Civ. R. 59, permits a court to refuse to hear new evidence on objections unless the evidence would not have been obtained in time to present it to the magistrate.

Division (E)(4)(c) conforms existing law on interim orders to the new style of "magistrate's decision" as opposed to reports. No substantive change is intended.

1993:

Rule 53(C) Powers

A new final sentence is added to Rule 53(C). It permits referees to secure the attendance of contemnors, and will facilitate practice before referees in such matters.

Rule 53(E) Report

A new last sentence is added to Rule 53(E)(1). It permits the referee not to file a report when the parties consent. The change will facilitate practice before referees and apparently codifies existing practice in some courts.

1992:

Rule 53(A) Appointment

A punctuation change is made and surplus language is deleted; no substantive change is intended.

Rule 53(B) Compensation

Masculine references are replaced by gender-neutral language; no substantive change is intended.

Rule 53(C) Powers

This division is completely restructured for clarity, masculine references are replaced by gender-neutral language, and surplus language is deleted. No substantive change is intended.

Rule 53(D) Proceedings

Grammatical changes are made, masculine references are replaced by gender-neutral language, surplus language is deleted, and the style used for rule references is revised. No substantive change is intended.

Rule 53(E) Report

Grammatical changes are made throughout division (E); no substantive change is intended.

1975:

As amended January 10, 1975, the subdivision was rewritten to provide that a party had five days from the filing of the referee's report within which to file objections to the report. In that amendment, the language employed was revised for the purposes of clearer expression. For example, under the amendment, the objections are to be considered as a motion as opposed to the prior provision that the objections be by motion. The latter could be interpreted as requiring a motion separate from, but seeking action on, objections to the report.

When objections to a referee's report are considered as a motion, they are to be served and filed as a motion, thus the specific reference to Civ. R. 6(D) is unnecessary. The options of the court are restated with the explicit addition that the court may hear the matter, that is, the matter referred to the referee, as though it had never been referred. Such an option was always implicit in the procedure.

The subdivision was further amended on April 29, 1975, by removing the five day provision and reinserting the fourteen day provision. The return to the original time period was prompted by the wide variety of matters of diverse complexity subject to referral and the possibility that slow mail delivery could effectively negate the five day time allowance. Civ. R. 53(E)(1) requires the referee to file the report and mail a copy to the parties. The time period for objections is keyed to the filing of the report and not to its receipt by the objecting party. Although simultaneous filing and mailing may be expected, it is not explicitly required. Even if mailed simultaneously with the filing of the report, the probability of a three day lapse from mailing to receipt is substantial. The restoration of the original time period assures an adequate amount of time within which to prepare, serve, and file objections.

Although the amendments are dated January 10, 1975, and April 29, 1975, they are effective on July 1, 1975.

1970:

Rule 53, governing the appointment, duties, and powers of referees, covers an area similarly covered by Federal Rule 53, on the one hand, and by §§ 2315.26, R.C. through 2315.43, R.C., on the other hand. Rule 53 borrows both from the federal rule and from the Ohio statutes.

Throughout its various provisions Rule 53 uses the term “referee” as a general term to govern the duties of a referee as described in §§ 2315.26, R.C. through 2315.37, R.C., and to govern the duties of a master commissioner or special master commissioner described in §§ 2315.38, R.C. through 2315.43, R.C.

Rule 53(A) requires that the referee appointed by the court must be an attorney at law admitted to practice in Ohio. Rule 53(B) indicates that a referee may or may not be a full-time employee of the appointing court.

In addition to describing the powers of the referee (Rule 53(C)) and the proceedings before the referee (Rule 53(D)), the rule requires that the referee file a written report with the court (Rule 53(E)(1)). The parties may object to the report (Rule 53(E)(2)), and the court may adopt, reject, modify, or recommit the report or receive further evidence (Rule 53(E)(2)). Finally, the referee's report is not effective and binding until it is approved by the court and entered as a matter of record. (Rule 53(E)(5)). Rule 53 contemplates that a referee shall aid the court in the expedition of the court's business and not be substitute for the functions of the court.

Part 1:
Historical Perspective

Part 1: Historical Perspective

The 1853 Code of Civil Procedure included Article IV, Trial by Referees. The first section provided that any issue of fact or law could be referred upon consent of the parties. 51 Ohio Laws 103. The second section provided for compulsory reference in those cases which did not involve a right to jury trial at the option of the court.

In *Lawson v. Bissel* (1857), 7 Ohio St. 129, the court considered the procedural provision of references, saying.

> Instead of submitting a case to a jury or the court, the code provides for a third mode of deciding the issues of fact and law: and this is by referees. The referees are substituted for the court and jury; and their province is to decide the facts of the case, if the facts only are submitted; or both the facts and the law of the case, if both are referred. Code §283. The trial before referees is conducted in the same manner as a trial by the court on submission. The evidence is not to be reduced to writing. All such exceptions, as could be made in the progress of a trial before the court, may be taken by either party in a trial before referees and it is only in case an exception is taken, that so much of the testimony as may be necessary to give point and effect to the 133 exception must be embodied in the bill of exceptions. When the reference is to decision facts only, the decision has the effect of a special verdict; if the reference is of the facts and law, the facts and the conclusions of law are stated separately, and the decision stands as the decision of the court., and judgment may be entered thereon as if the action had been tried by the court. The decision of the referees, however, may be reviewed by the court.
>
> These provisions of the code show very clearly that while the trial before referees is subject to the review and revision of the court ordering the reference it is a substitute for a trial in court. The finding of the facts is, in effect, the special verdict of a jury. The conclusions oflaw of the referees stand as the law decision of the court; and if not set aside, a judgment follows of course.

The 1853 Code made no reference to a master commissioner and later legislation re-established the distinctions drawn between a master commissioner and a referee. Prior to the adoption of the Civil Rules, in 1970, referees were provided for in R.C. §§ 2315.26 to 1215.37 and master commissioners were covered in R.C. §§2315.38 to 2315.43.

Civil R. 53, first effective July 1, 1970, repealed R.C. §§1215.26 to 1215.36 and R.C. §§ 2315.38 to 2315.43, because they were in conflict with the rule. Civil R. 53 incorporates provisions found in Federal Rule 53. It uses the term "referee" exclusively and provides for a single uniform method of referring matters and proceeding. Current Civil R. 53, which can be found in Appendix A, now uses the term "magistrates" instead of referees and uses the term "decision" to replace report and recommendation. For ease of reference, included in Appendix B is Juvenile Rule 40 and in Appendix C is Criminal *Rule* 19.

Magistrate's Status

A magistrate is a court employee holding a position subject to appointment, removal, promotion, or reduction by an appointing officer and is in the unclassified civil service. R.C. §124.11. R.C. §124.1 l(A)(10) provides that "officers and employees of the court" are in the unclassified service. As an unclassified employee a magistrate has few employment protections and is most like his or her counterpart in the private sector. A magistrate, like other unclassified employees, can be terminated without cause and serves at the pleasure of the appointing authority.

Magistrates are required to be attorneys at law and therefore are officers of the court. Because they are officers of the court, once appointed as a magistrate, they perform judicial

functions and exercise judicial powers. Magistrates hold hearings and render decisions upon both the facts and the law, which in some cases stand as and for the decisions of the court itself.

In the case of *Dillon v. City of Cleveland* (1927), 117 Ohio St. 258, the Court held "the courts have... inherent power to direct a reference, not, however, permitting a [magistrate] to render any judicial act, but to make findings of fact and decision conclusions [of law], which must be approved and confirmed by the court, and reserving to the court alone the power to render {a] final judgment. Magistrates are aids to the judges of the court and they provide the manpower which would otherwise be unavailable to accomplish the business of the court. The employment of an attorney as a magistrate constitutes the practice of law to meet the qualification for judicial office. See *State, ex rel. Schenck v. Shattuck* (1982), 1 Ohio St.3d 272.

Court's Authority to Use Magistrates

Under the common law, referees in Ohio were called by such names as masters, master commissioners or special masters and were used for limited purposes. Statutory law then expanded the use of referees and magistrates along with the scope of references. When the Rules of Civil Procedure were adopted in 1970, the authority of magistrates was further changed in Civ. R. 53. (See Appendix A).

Qualification of Magistrates

Magistrates must be licensed to practice law in the State of Ohio and engaged in the practice of law for at least 4 years before appointment.[2] Magistrates may be either part-time or

[2] Civ. R 53(A)

full-time employees of the court. The Application section of the Code of Judicial Conduct provides "A judge, within the meaning of this code, is a lawyer who is authorized to perform judicial functions within a court, including an officer such as a magistrate, court commissioner, or special master." Canon 3 of the Code of Judicial Conduct provides that a judge shall conduct the judge's personal and extrajudicial activities so as to minimize the risk of conflict with the obligations of judicial office.

Under former R.C. §2315.35, repealed, a magistrate was required to "be sworn to well and faithfully hear and examine the cause, and to make a just and true decision... according to the best of [his] ability." Civil Rule 53 does not require an oath of office or an oath of performance. However, Sup. R. 19 requires an oath and filing of a certification of the oath within 30 days after appointment with the clerk of the court served by the magistrate taking the oath.

Magistrates, Generally

A magistrate is a quasi-judicial officer who has been given certain authority, such as taking pleas in misdemeanor matters, finding facts and make legal conclusions and dispositions in other matters. A magistrate may issue subpoenas and preside over hearings either for a particular judge or a particular session of court which may include a class of cases, such as traffic, small claims, probate, juvenile or domestic relations.

Authority of Magistrate

The magistrate is best described as being a judge's assistant or aid. A magistrate is called upon to expedite the work of the court by performing those functions necessary to resolving a controversy. Magistrates are particularly useful in protracted fact-finding processes, which

would require a great deal of judge-time, and discovery disputes. The Ohio Constitution, in Sec. 5, Article IV, permits judges to employ those people necessary to accomplish the work of the court.

The authority given to a magistrate to act in cases involving a particular subject or type of matter, or to act in specific cases comes from various sources. Obviously, Civil R. 53 is the general reference rule and provides guidelines for judges in the appointment of magistrates, as well as, a listing of the powers and obligations of magistrates. There are other particular rules for reference, which should be consulted as well. For example, Juvenile R 40, Traffic R. 14, Civil R 75 and the Supreme Court Rules of Superintendence for Municipal and County Courts, Rule 4.

There may be other rule provisions or statutes that should be consulted concerning the use of magistrates in the handling of specific types of cases. For instance, as to municipal and county courts (Rules of Superintendence 19.1), forcible entry and detainer actions (RC.§1923), small claims actions (R.C. §1925), traffic matters (RC. §2935.17 and 2937.46), juvenile matters (Juvenile R 40), domestic relations matters (Civil R 75), probate matters (RC.§§ 2101.06, which was superseded by Civil R. 53 and 73), appellate courts (local rules of the various appellate courts), Court of Claims (LCCR 5(C) and R.C 4743.03 (C) (2)), and ,
R.C. 1925.01, and R.C. Chapter 1923.

Powers

The order of reference, whether issued by a judge of the court or issued by local court rule, generally specifies and limits the magistrate's power. Pursuant to the Civil Rules, a magistrate has the power to:

(a) Determine any motion in any case;

(b) Conduct the trial of any case that will not be tried to a jury;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;

(d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;

(e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule. Civ. R. 53(B)(2).

Civ. R. 53 (C) (3) provides that magistrates are authorized, "subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities." Thus, magistrates have the authority to:

1. Regulate the proceedings held before him or her.
2. Handle a specific issue, case or type of case.
3. Summon and compel the attendance of witnesses.
4. Rule on the admissibility of evidence.
5. Require the production of tangible evidence.
6. Make a record of the evidence offered and excluded, in some cases.
7. Take evidence.
8. Find facts and make conclusions of law.
9. Make dispositions to the referring court.
10. Act only during the time specified in the order of reference.

With regard to any limitation on the time within which the magistrate is to issue a decision or order, the magistrate's authority may be set forth in the court's order of reference, a local rule of court or a particular statute. If no time limit is specified, the magistrate must issue a decision or order in a timely manner, one that allows the court to meet the time requirements set forth in Sup. R. 40. Rules of Superintendence for the Courts of Ohio. Special orders of reference may require the magistrate's work to be completed within a specified time. When a time limit is specified it is jurisdictional and a decision issued beyond the time permitted is void. General orders of reference permit the magistrate to act until a further order of the court is issued.

The magistrate is required to give the same due process, courtesy and opportunity to be heard, as is required of the judge. Nevertheless, the magistrate may conduct a private interrogation of a minor whose custody is being determined in a custody proceeding. *McMullen v. Muir* (1986) 34 Ohio App.3d 241. Such private interrogation may exclude the parties and their counsel. Upon the request of either party "a record must be made," *Walker v. Walker* (1974), 40 Ohio App.2d 6.

Pretrial matters that are necessary to regulate the proceedings and are not dispositive of a claim or defense of a party, may be ruled upon by the magistrate. Civ. R. 53 D(2)(a)(i). Once the magistrate hears the matter that magistrate decides it. The magistrate is authorized, under these circumstances to issue a written order stating the disposition of the matter and such order is effective without judicial approval. It is not necessary for the trial court to approve a magistrate's order before it can become effective.

Magistrates' orders are treated somewhat differently than their decisions. Magistrates' decisions do not take effect until the trial court adopts them. Although judicial review of a

magistrate's order is not mandated, nonetheless a party to the action may seek immediate relief from the magistrate's order by way of a motion made to the trial court to set it aside.

In *City of Cincinnati v. Davis*, First Dist. Nos. C-070838 & C-070845, 2008-Ohio-5281. the question on appeal involved whether a court magistrate had the authority to render a temporary civil protection order under R.C. 2903.214. Upon initially concluding that the Ohio Rules of Civil Procedure were applicable to a "civil protection" proceeding, the appellate court expressly cited the two requirements of Civ.R. 53(D)(2)(a)(i), i.e. the order must: (1) be necessary for the proper regulation of the proceedings; and (2) not be dispositive of a claim or defense. If these requirements are met, a magistrate can render a temporary civil protection order without judicial approval. Additionally, the *Davis* court indicated that the magistrate's temporary order had remained effective throughout the case even though it had never been adopted by the trial court.

Order of Reference

The judge is obligated to provide the magistrate with an adequate order of reference, listing or explaining the scope of the magistrate's inquiry and the character of the decision to be made. When the necessary guidance is lacking from the order of reference, the magistrate should seek clarification from the judge. This will enable the magistrate to perform in accordance with the judge's wishes, without the expenditure of lost time. The magistrate can only exercise that authority that has been given through the order of reference.

The conduct of the magistrate is governed by the order of reference, local rules of court and the appropriate rules of procedure and applicable statutes. Guidance may also

be given to magistrates of the different courts through case law. There are at least three different kinds of references. White v. White (1977), 50 Ohio App.2d 263.

1. An individual journalized order of reference in a particular case or several cases.
2. A blank journalized order of reference in a particular type of cases.
3. A local rule of court providing for automatic reference in certain types of cases.

There are two other possible ways in which a reference might be made. First, while it is not good judicial practice to do so, it is possible to have an oral order of reference-one made in open court. Second, there could be a consent order prepared by the parties where they wish to have the matter referred to a magistrate because of the court's crowded docket and lack of available trial-time. Further, there is a statutory provision for referring a matter to a private judge. See R.C. §2701.10 and Sup. Ct. Jud. R. VI.

An order of reference is a document which grants the magistrate certain powers and spells out exactly what it is that the magistrate is to do. Every magistrate should have a copy of the order of reference under which he or she is authorized to act. Depending upon the language of the order of reference, the magistrate's authority may be general, it may be specific and any limitations placed upon the magistrate's authority should be apparent. For instance, if the magistrate finds that the order of reference is too restrictive, such restriction may be discussed with the appointing judge. Problems with the authority granted may thus be examined and revised in accordance with the needs of the court and the magistrate.

A general order of reference is one where the court will authorize the magistrate to act in a particular class of cases, such as all domestic relations matters, worker's compensation cases,

all small claims cases, municipal court housing matters, forcible entry and detainer, etc. Whereas a specific order of reference authorizes the magistrate to act in a particular case or even a single issue within a particular case. The authority given is only given as to the designated case or the specific issue. The magistrate's power and authority is granted and limited by the words of the order of reference itself regardless of any other statutory or rule authorization.

Several courts provide, by local rule, for the reference of certain matters.

A compulsory reference is made where the parties are not entitled to a jury trial and the judge appoints a magistrate to determine the matter. A reference may not be imposed upon the parties in a case where there is a constitutional right to a jury trial. M.C. Supp. R. 4. The right to a trial by jury is the only preclusion to a compulsory reference. However, if the parties waive the rights to a jury trial, the judge may order the matter referred. Consent also can be implied from a party's acquiescence in the reference, or the lack of any objection to the reference.

A voluntary reference is where the parties consent in writing or upon the record in open court to have the matter heard by a magistrate.

Issues Referred:

The issues referred require the magistrate to exercise both legal and factual problem solving techniques. This involves a number of distinct steps. The magistrate must first identify both the legal and factual issues in a given situation.

Legal Issues

The first legal issue to consider is what standard of proof is required? Is the standard preponderance of the evidence or clear and convincing evidence? Preponderance of the evidence, also known as the balance of probabilities, is the standard required in most civil cases.

This standard is met if the proposition is more likely than not to be true. Effectively, the standard is met if there is greater than a 50 percent chance -that the proposition is true. On the other hand, clear and convincing evidence requires a higher level of persuasion and is sometimes employed in civil procedure, i.e. in cases in equity. To prove something by clear and convincing evidence, the party with the burden of proof must convince the trier of fact that it is substantially more likely than not that the thing is in fact true. This is a lesser requirement than proof beyond a reasonable doubt used in criminal matters. Proof beyond a reasonable doubt requires the magistrate be convinced of the truth of the matter asserted.

At the outset of each hearing, the magistrate should ask the parties to state what burden of proof is required. Hopefully, the parties will agree. However, if they do not agree, the magistrate should ask the parties to provide the authority on which they rely as to the burden of proof. The magistrate must then determine the burden to be used and advise the parties what burden is being employed so that the parties' evidence meets the required burden.

Second, the magistrate should inquire of the parties which statutes or case authorities they are relying upon to support their position. The magistrate should take note of these and if there is agreement, simply state that the particular law is controlling. If there is disagreement, take it under advisement so that further research may be done. Before beginning the writing process the magistrate must select the law relevant to the scenario from the range of cases and statutes offered by counsel and identified independently by the magistrate.

Factual Issues

At the outset of the hearing, in addition to determining the burden of proof and the applicable law, the magistrate should have each party state the issue or issues in dispute. Listening carefully to each presentation, the magistrate should then articulate in his or her own

words the issues to be decided as a result of this hearing. In this way the magistrate is able to control the evidence offered and limit it to the issues raised.

Third, the magistrate must apply the applicable law to the specific facts presented. It is important that the magistrate report the facts accurately.

Fourth, the magistrate must draw a conclusion in order to write a decision dispositive of the issue.

Judgment Affirmed on Appeal

In order that a judgment, based on a magistrate's decision, be affirmed on appeal, the appellate court follows the language of *C.E. Morris Co. v. Foley Constr. Co.,* 54 Ohio St.2d 279. That "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." So that judgments will be affirmed if the appellate court finds that it "is supported by some competent, credible evidence." In *State v. Wilson,* 113 Ohio St. 3d 382, the Supreme Court held that the test for whether a judgment is against the weight of the evidence in civil cases is different from the test applicable in criminal cases. According to the Supreme Court in *Wilson,* the standard applicable in civil cases "was explained in *C.E. Morris Co. v. Foley Constr. Co.,* 54 Ohio St.2d 279." *Id.* at **124."**

Liability

Magistrates, serving the courts under assignment or referral, are immune from civil liability.[9] The conduct of magistrates, while in the performance of their duties, exempts them from civil liability under the doctrine of judicial immunity. "Judicial immunity was created because it was in the public interest to have judges [and magistrates] who were at liberty to exercise their independent and impartial judgment about the merits of a case. Judges [and magistrates] could act without apprehension of the possibility of being exposed to potential damages liability from vexatious and frivolous actions prosecuted by disgruntled litigants. 46 American Jurisprudence 2d (1994), Judges, 69.

[9] *Planey v. Mahoning Cty. Court,* (2009), 154 Ohio Misc.2d 1, see Appendix E.

PROBATE COURT OF MONTGOMERY COUNTY, OHIO
ALICE 0. MCCOLLUM, JUDGE

IN RE: CHANGE OF NAME OF _____
(Present Name)

TO _____
(Name Requested)

CASE NO. _____

MAGISTRATE'S DECISION
CHANGE OF NAME OF MINOR

Pursuant to prior order filed in Case No. 2003 MSC 342545, directing a reference to me to hear and determine according to law, matters pertaining to name changes, I proceeded to hear and examine all of the evidence in the captioned matter.

On _____ ., an application for change of name was heard by the undersigned. I find that proper notice of the application and hearing date was given by one publication in a newspaper of general circulation in the county at least thirty days prior to the hearing on the application and proper notice was given to the legal parents, known father, or alleged father, as required by law. I further find that reasonable and proper cause exists for changing the name and the name change is in the best interest of the minor.

I find the minor's complete name at birth is _____

_____,the minor's date of birth is

_____ and the place of birth is

_____
{City) (County) **(State)**

Therefore, it is my RECOMMENDATION that the name of _____

_____ be changed to

_____

_____
Magistrate

M.C. Form 21.3.1 - Magistrate's Decision - Change ofName of Minor 02/25/2011

ANY PARTY MAY REQUEST WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ACCORDANCE WITH CIVIL RULE 52 AND CIVIL RULE 53.

COUNSEL AND PARTY ARE REFERRED TO CIVIL RULE 53 REGARDING THE FILING OF OBJECTIONS TO THE MAGISTRATE'S DECISION. ANY OBJECTION TO THE DECISION OF THE MAGISTRATE MUST BE FILED IN WRITING WITH THIS COURT WITHIN FOURTEEN DAYS AFTER THE FILING DATE OF THIS DECISION, OR FOURTEEN DAYS AFTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ISSUED, IF REQUESTED. ANY SUCH OBJECTIONS MUST BE SERVED UPON ALL PARTIES TO THIS ACTION.

EXCEPT FOR A CLAIM OF PLAIN ERROR, A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIVIL RILE 53 (D) (3) (a) (ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINGING OR LEGAL CONCLUSION AS REQUIRED BY CIVIL RULE 53 (D) (3) (b).

PROBATE COURT OF MONTGOMERY COUNTY, OHlO
Alice 0. McCollum, Judge

ESTATE OF .....
GUARDIANSHIP OF .....
TRUST OF .....
CASE NO. .....

WAIVER OF OBJECTIONS TO MAGISTRATE'S DECISION

The undersigned, who are interested in this case, acknowledge that they are over the age of eighteen and competent. They hereby waive their right to request written findings of fact and conclusions of law pursuant to Civil Rule 52 and Civil Rule 53 as to the Magistrate's Decision filed in this case at the same time as this waiver.

The undersigned further waive their right to file objections to the Magistrate's Decision pursuant to Civil Rule 53. By signing this waiver form the undersigned further acknowledge that the probate judge may adopt the Magistrate's Decision without further delay.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

PROBATE COURT OF FRANKLIN COUNTY, OHIO
ROBERT G. MONTGOMERY, JUDGE

In re: Application for Correction of Birth Record of Diamond Rane Christiana

Case Number 554337

MAGISTRATE[1]S DECISION

Pursuant to a prior order referring the above entitled proceeding to me for hearing and report, I proceeded under the provisions of §2315.37 of the Ohio Revised Code to hear and examine such proceeding and respectfully submit the following decision thereon.

The matter was heard on the 10th day of August, 2012 upon the application of Diamond Rane Christiana formerly known as Mark Alan Collier to correct her birth record. Appearances were made by Diamond Rane Christiana and her attorney Frederick L. Berkemer.

A copy of the decision of the magistrate was filed on the above stamped date with the Court and copies were mailed to the parties and/or their attorneys of record.

Findings of fact and recommendations are as stated in this report, attached thereto.

NOTICE TO ATTORNEYS AND PARTIES

Ohio Civil Rule of Procedure 53(D)(3)(b)(i) provides as follows:

> *"(i) Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law."

Ohio Civil Rule of Procedure 53(D)(4)(e)(i) provides as follows:

> "(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Civ.R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

These and all other provisions of the Ohio Rules of Civil Procedure must be in compliance or objections will be overruled.

A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law unless the party timely and specifically objects to that finding or conclusion as required by Civ. R. 53(E)(3).

FINDINGS OF FACT

The applicant, Diamond Rane Christiana was born on January 4, 1957 at White Cross Hospital in the Franklin County, City of Columbus, Ohio and named Mark Alan Collier. Her parents were Herbert Franklin Collier and Marilyn Ann Collier. She was born a true hermaphrodite with both male and female sex organs. According to the affidavit of Dr. Gary J. Smith, M.D., marked as exhibit 4:

> "
> 1. Diamond Christiana has been my patient. I am familiar with her medical condition and history.
> 2. Diamond Christiana was a trueborn hermaphrodite, having both male and female sexual organs and characteristics. From a medical standpoint, her sex was never solely male or female at birth.
> 3. She had an irreversible orchietomy in 2006. Her legal sex is now female."

The applicant testified she was born with both a penis and a vagina with ovatestes, meaning her testicles and ovaries were combined into one. Ovatestes produce both testosterone and estrogen. She went through puberty having post menstrual syndrome for ten days every month. She was raised as a boy not feeling she had any choice and tried to hide who she was.

Talessa L. Powell, M.D. also found in a medical record completed by her that the applicant "is a true hermaphrodite and was raised as male. Struggled w/PMS and breast development in the teens and went through surgery to be classified as female this past year." See exhibit 5. Exhibit 6 from Dr. Powell's records show the result of the applicant's bond density report as a normal score for post-menopausal Caucasian women.

This issue of the correction of a birth record has been addressed in *In re: Declaratory Relief for Ladrach,* (1987) 32 Ohio Misc.2d 6; 513 N.E.2d 828; 1987 Ohio Misc. LEXIS 145. That Court found:

> "It is the position of this court that the Ohio correction of birth record statute, *R.C. 3705.20* (now *R.C. 3705.15).* is strictly a 'correction' type statute, which permits the probate court when presented with appropriate documentation to correct errors such as spelling of names, dates, race and sex, if in fact the original entry was in error. There was no error in the designation of Edward Franklin Ladrach as a 'Boy' in the category of 'sex' on his birth certificate, and for this reason the previously mentioned application for correction of birth record was dismissed by this court.
>
> The Supreme Court of Oregon in *K. v. Health Division (1977), 277 Ore. 371, 560 P. 2d 1070,* considered whether to grant the petition of a transsexual to order the change of sex on birth and school records from female to male. The court said, 'it was the intent of the legislature of Oregon that a 'birth certificate' is an historical record of the facts as they existed at the time of birth***,' *id. At 375, 560 P. 2d at 1072,* and further concluded that it was up to the legislature to authorize any such change which would permit the birth certificate to reflect facts as they presently exist."

In the matter at hand the applicant's birth record indicates sex as "male". While it is true that the applicant had male sex organs at the time of her birth, she also had female sex organs. Therefore her birth record is incorrect by indicated her sex only as "male" while she had female attributes as well. Because the birth record is an historical record of the facts as they existed at the time of birth, the birth record should be corrected to show the sex of the applicant as "hermaphrodite".

DECISION OF MAGISTRATE

The Ohio Department of Health, Division of Vital Statistics is to correct the birth record of Diamond Rane Christiana formerly known as Mark Alan Collier, born at White Cross Hospital in the City of Columbus, County of Franklin, Ohio on January 11, 1957 to Herbert Franklin Collier and Marilyn Ann Mawhorter Collier from showing sex as "Male" to showing sex as (Hermaphrodite).

Respectfully submitted

William A. Reddington
Magistrate

CERTIFICATE OF SERVICE

I certify of copy of the foregoing Magistrate's Decision was sent by me by prepaid United States first class mail to:

Frederick L. Berkemer
Attorney for Diamond Rane Christiana
1335 Dublin Road, Suite 215B
Columbus, Ohio 43215

this 31st day of August, 2012.

_____
Deputy Clerk

ENT ERED

PROBATE COURT OF HAMILTON COUNTY

JAMES CISSELL, JUDGE

!i'fB2$_4$!Oll

ESTATE OF BERNICE WILLIAMS. DECEASED
CASE NO. 2011001189

IMAGE NO, !3S

ENTRY ADOPTING DECISION OF MAGISTRATE ANO OVERRULING OBJECTIONS

This matter came before the Court on objections to the magistrate's decision, entered November 16, 2011, which found that the document presented for probate complies with the strictures of RC 2107.24 and that it therefore constitutes the last will and testament of the decedent. and which admitted the will to probate. The objections were filed by Karen Chambers through her counsel, Leslie Thomas. Present before the Court was Leslie Thomas on behalf of Karen Chambers, and Norma Holt Davis on behalf of Yvonne Davis.

FINDINGS OF FACT

1. Bernice Williams ("the decedent} died on February 22, 2011.
2. Karen Chambers, the decedent's daughter, opened the probate estate as an intestate administration and was appointed as administrator.
3. Thereafter, Yvonne Davis presented an application to admit document as last will and testament under RC 2107.24 and revoke the letters of authority issued to Karen Chambers.
4. The document presented for probate is a two page document entitled "Last Will and Testament of Bernice Williams." It is a copy of the original document. It contains the signatures of the decedent and notary Vivlan··w

630.62 | 630.65

ENTERED
Civil Rule 53

(6)

5. Notary Vivian Ward was presented as a witness at the hearing before the magistrate on June 10, 2011. Ms. Ward testified that she notarized the document presented for probate and that she saw the decedent sign the document. See transcript of June 10, 2011 hearing at pages 11-13, 16.
6. Ms. Ward testified that she has no recollection of another witness being present at the time the document was signed, but that there coutd have been another witness. See kl at page 18.
7. *Tracey* Dove was also presented as a witness at the hearing before the magistrate on June 10, 2011. Ms. Dove testified that she was present when the decedent signed the document presented for probate, that she saw Ms. Ward sign the document, and that she saw the decedent sign the document in the presence of Ms. Ward. See id. at pages 28 29.

CONCLUSIONS OF LAW

1. RC 2107.03, entitled "Method of making a will," requires that a will be in writing •and be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature."
2. RC 2107.24, entitled uProbate court to treat document as will despite noncompliance with statute" provides at section (A):

> -If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported wlll has established, by clear and convincing evidence, all of the following:

ENTERED 2
Civil Rule 53
James Cissell

(1) The decedent prepared the document or caused the document to be prepared.
(2) The decedent signed the document and intended the document to constitute the decedent's will.
(3) The decedent signed the document under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division {A)(3) of this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronlc, or other distant communication.·

3. RC 2107.26, entitled "Lost, spoliated or destroyed wllls may be admitted to probate" provides:

"When an orlginal wlll is lost, spoliated, or destroyeo before or after the death of a testator, the probate court shall admit the lost, spoliated, or destroyed will to probate if both of the following apply:

(A) The proponent of the will establishes by clear and convincing evidence both of the following:

(1) The will was executed with the formalities required at the time of execution by the jurisdiction in which it was executed.
(2) The contents of the will.

(B) No person opposing the admission of the will to probate establishes by a preponderance of the evidence that the testator had revoked the will."

DISCUSSION

The document presented for probate does not comply with RC 2107.03, as it does not contain the signature of two witnesses. The question before the Court is whether the document meets the requirements for admission under RC 2107.24. As outlined above, In order to admit a document to probate under RC 2107.24(A), the probate court must find by clear and convincing evidence that three prongs have been met:

(1) The decedent prepared the document or caused the document to be prepared.

ENTERED
Civil Rule 53
James Cissell
3

(2) The decedent signed the document and intended the document to constitute the decedent's will.

(3) The decedent signed the document under division {A)(2) of this section in the conscious presence of two or more witnesses.

There is no dispute that the first and second prongs of the statute are met. C.Ounsel for Karen Chambers, who opposes admission of the document to probate, acknowledged that the first and second prongs are met, and that the only issue is whether the third prong has been met. See transcript of January 9, 2012 hearing at pages 14-15.

The issue Is therefore whether the decedent signed the document in the conscious presence of two or more witnesses. The Court finds by clear and convincing evidence that this prong has been met.

Notary Vivian Ward testified that she notarized the document presented for probate and that she saw the decedent sign the document. Though Ms. Ward had no recollection of another witness being present at the time the document was signed, she testified that there could have been another witness.

Tracey Dove testified that she was present when the decedent signed the document presented for probate, that she saw Ms. Ward sign the document, and that she saw the decedent sign the document In the presence of Ms. Ward.

The Court finds that the testimony of these two witnesses establishes by clear and convincing evidence that the third prong of RC 2107.24 has been met; i.e. that the decedent signed the document In the conscious presence of two or more witnesses.

ENTERED
Civil Rule 53
Jeanne Cissell
OT 4

Based on the evidence presented, the Court finds by clear and convincing evidence that the document presented for probate complies with the requirements of **RC2107.24.**

Given that the document presented **is a** copy, and not the original, the Court must also consider whether the document qualifies for admission under RC 2107.26. Under that statute, the probate court shall admit a lost will to probate if the proponent establishes by clear and convincing that (1) the will was executed with the formalities required at the time of execution by the jurisdiction in which it was executed and (2) the contents of the will, and if no person opposing the admission of the will to probate establlshes by a preponderance of the evidence that the testator had revoked the will.

The Court finds by clear and convincing evidence that these requirements have been met. The proponents have established by clear and convincing evidence that the will was executed in accordance with RC 2107.24, and have also established the contents of the will, as they have presented a topy of the will that was identified by the witnesses. In addition, no person opposing admission of the wilt has established by a preponderance of the evidence that the testator revoked the will.

For the foregoing reasons, the Court adopts the magistrate's decision that found that the document presented for probate complies with the strictures of RC 2107.24 and that it therefore constitutes the last will and testament of the decedent, and which admitted the will to probate. The Court overrules the objections and orders that document presented for probate be admitted to probate as the decedent's last will and testament.

ENTERED
Civil Rule 53
Jeanne Cicconetti
5

The Court notes, as did the magistrate, that it does not address the legal effect of the will at this time.

IT **IS 50 ORDERED.**

JUDGE JAMES CIS S Eo1..L.... L

CC: Leslie Thomas, Esq.
Norma Holt Davis, Esq.

A COPY OF THIS ENTRY
WAS MAILED TO THE PARTIES
LISTED AT LEFT ON 2-24-12
BY _____
DEPUTY CLERK

COURT OF COMMON PLEAS
ENTER
HON. JAMISC ELL
TH CU!RK SHAU SERVE NOTICE
RfliS PUMUANT TO CSVIL
RI.JU!: a& WHICH SHALL SE TAX!O
AS OOITS Hi:'.REIN.

ENTERED
Civil Rule 53

6

PROBATE COURT OF LUCAS COUNTY, UHIU
JACK R. PUFFENBERGE , JUDGE

IN THE MATTER OF:	* * *	CASE NUMBER.....;·-=-=..-:.......;.;;;.'.-......_---=-. __
Respondent, Alleged to be Mentally Ill	* *	**JUDGMENT ENTRY**

This day this cause came on further to be heard upon the evidence presented. The Court finds that respondent was served with Notice of Hearing on and that other parties entitled to notice have either been served or have waived service. The respondent was **present/not present** in Court and is represented by counsel, , Esq. The **Lucas County Community Mental Health Board** was represented by attorney .. ., who presented the case to the Court.

Upon consideration of the testimony of and the other evidence presented, the Court finds clear and convincing evidence that the respondent is a mentally ill person subject to hospitalization by Court Order as defined in Section 5122.0l(B) of the Ohio Revised Code, and orders a commitment for a period not to exceed days to: , which is a designated agency of the **Lucas County Community Mental Health Board.**

Further, the Court makes the following findings and orders:

[ ] The Court determines that the least restrictive alternative available consistent with treatment goals is inpatient hospitalization at .

(J The Court determines that the least restrictive alternative available consistent with treatment goals is treatment at an outpatient facility and the Community Mental Health Board or its designated agency is not permitted to place respondent in an inpatient setting unless a motion is filed with the Court pursuant to Section 5122.15(L) of the Ohio Revised Code.

[ ] The Community Mental Health Board or its designated agency shall determine inpatient, outpatient, or other treatment pursuant to law.

[ ] Jurisdiction is transferred to the County Probate Court.

[ ] Clerk to notify BCI of commitment

Pursuant to Sec. 5122.lS(J) this order shall take immediate effect.

____
, **Magistrate**

Journalized Copies mailed this date of by ordinary U.S. Mail to:

Notification Form for Record Checks
Under O.R.C. 5122.311
Please Type or Print in Ink

Pursuant to Ohio Revised Code 5122.311,

I, Jack R. Puffenberger [**X**] Probate Judge [ ] Chief Clinical Officer
of Lucas County Probate Court [X] County [J Hospital [ ] Other

700 Adams Street, 2nd Floor	Toledo	**OH**	43604-5660	Lucas
Street Address	City	State	Zip	County

report the following regarding a mentally ill person subject to hospitalization by court order or involuntary patient other than one who is a patient only for purposes of observation, to the best of the current knowledge and information available.

Reporting County Court Case#: _;..;...._..;;...;;.._...;.;.___

Name: _____
Last First Middle

Social Security #: _ _ _ _ _ ' _

Last Known Residence:

_____
Street Address City State Zip County

Mailing Address
(if different from above): _____
Street Address City State Zip County

Date of Birth: .·.-..·---------- **Place of Birth:** _____
City State County

Sex ( ] Male Race/National Origin: [ ] White [ ] Hispanic [ ] American Indian/ Alaskan Native

The information contained in this document is true and correct to the best ofmy knowledge.

_____ _____
Date Signature of Judge or Chief Clinical Officer

109: 5-3-01 Procedure for reporting incompetency records.

(A) Not later than seven (7) days after a person is found to be a mentally ill person subject to hospitalization by court order or becomes an involuntary patient other than one who is a patient only for purposes ofobservation, the Probate Judge who made the adjudication or the Chief Clinical Officer of the hospital, agency, or facility in which the person is an involuntary patient must transmit this form to the bureau of criminal identification and investigation.

(B) The foregoing shall be submitted to the bureau of criminal identification and investigation in one of the following ways:
(1) Through the mail to the "Bureau of Criminal Identification and Investigation, P.O. Box 365, London, Ohio 43140."
(2) Electronically in a format designated by the superintendent.

(C) This notification is required under R.C. 5122.311 for the purpose of conducting incompetency records checks pursuant to RC. 311.41 (application to sheriff for concealed handgun permit).

(D) "Involuntary patient" means **a** person who is ordered to undergo treatment or continuing evaluation and treatment at a hospital, agency, or facility, or through an individual professional, under sections 2945.38, 2945.39, 2945.40, 2945.402 or committed to a hospital, facility, agency, Alcohol Drug Addiction Mental Health Services/Community Mental Health board or other person or place under section 5122.l4l or 5122.l5 of the Revised Code. "Involuntary patient" does not include persons admitted for purposes ofevllluation pursuant to section 2945.371 of the Revised Code. or for care, observation and treatment pending examination or hearing under section 5122.10 or 5122.11of the Revised Code.

(E) "For purposes ofobservation" means held at a center, program or facility for purposes of evaluation pursuant to section 2945.37I of the Revised Code or admitted for purposes of care, observation and treatment pending examination or hearing pursuant to section 5122.10 or 5122.11 of the Revised Code.

(F) "Mentally ill person subject to hospitalization by court order" and "patient" are defined at O.R.C. 5122.01.

PROBATE COURT OF LUCAS COUNTY, OHIO
JACK R. PUFFENBERGER, JUDGE

*
*
*

IN THE MATTER OF:

CASE NO.;;;.....=-:.=....--=-=·~..-.....-.._ .....__ _

MAGISTRATE'S DECISION
ON MEDICATION HEARING

_____

RESPONDENT

Magistrate _____

Pursuant to a prior Court Order referring the above-entitled proceedings to me for a hearing and report. [See Civil Rule 53 and Lucas County Local Probate Rule 78.1 (I) (I)]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This date of _ _-_, this matter came on for hearing pursuant to Section 2101.24(A)(l)(u) for a judicial determination that the above-named Respondent lacks the capacity to give a fully informed, intelligent and knowing consent for the administration of medication. The Court finds that all persons who were entitled to notice of the hearing were given or waived notice thereof, in writing or orally at hearing, that the Respondent is a resident of **Lucas County,** and that this Court has proper jurisdiction. The Respondent was **present/not present** in Court and represented by Attorney . The Northwest Ohio Psychiatric Hospital (NOPH) and/or the Mental Health Board was represented by Attorney , who presented the case to the Court. The above-named Respondent was hospitalized by Court Order by the Lucas County Probate Court pursuant to R.C. 5112.141 or 5122.15 on for a period not to exceed.

The following witnesses testified:

The following Exhibit(s) were admitted into evidence without objection: The Medication Information Packet.

Evidence presented shows that the Respondent has a full capacity assessment review, with the following individual(s) acting as assessor(s):

The findings of this (these) assessor(s), along with written physical and psychiatric examinations were reviewed by Thomas Osinowo, M.D., Chief Clinical Officer of NOPH. Doctor and Dr. Osinowo are in agreement that involuntarily administered medication should be authorized and that the Respondent lacks the capacity to give informed consent.

Upon consideration of the testimony and exhibits, this Magistrate finds clear and convincing evidence that the Respondent lacks the capacity to give a fully informed, intelligent and knowing consent and further that the administration of said medications is in the best interest of the Respondent. The following medications are authorized for a period not to exceed :

The above medications are stated in maximum dosages are recommended to be authorized. The treating psychiatrist, in exercising his/her professional judgment, shall prescribe, monitor and titrate the medication as the condition of the patient indicates, without exceeding the upper limit allowed by the Court.

IT IS SO RECOMMENDED

_____ _____

Date , Magistrate

NOTICE TO ATTORNEYS AND PARTIES

Ohio Civil Rule of Procedure 53 (D) (3) (b) (i) provides as follows: A party may, within fourteen (14) days of the filing of this Decision, serve and file written Objections with this Court. See also Civil Rule 53 (D) (3) (b) (ii) as to the Form of Objections. See also R.C. 2101.24 (A) (1) (U). A party shall not assign as error on appeal the court's adoption of any findings of fact or conclusion of law in that decision unless the party timely and specifically objects to that finding or conclusion as required by [Civ. R. 53(0) (3) (b) *(iv)].*

Copies of the foregoing Magistrate's Decision were mailed by ordinary U.S. Mail this date of, to the following persons:

_____,Esq., for the Board

_____,Esq., Counsel for Respondent

_____, forNOPH

PROBATE COURT OF LUCAS COUNTY, OHIO
JACK R. PUFFENBERGER, JUDGE

IN THE MATTER OF:

CASE NO. _____ _

JUDGMENT ENTRY APPROVING MAGISTRATE'S DECISION AND ORDERING MEDICATION

_____

RESPONDENT

* * * * * * *

Pursuant to Ohio Civil Rules, the Court has by general order of reference directed that this case be referred to a magistrate, which magistrate has the powers specified in said Ohio Civil Rules. The magistrate shall file the decision.

This date of , this matter came on for review of the Decision of Magistrate dated and filed on . Upon careful and independent examination and analysis of the Magistrate's decision, the Court finds the decision of the Magistrate is sufficient for the Court to make an independent analysis of the issue and to apply appropriate rules of law in reaching a judgment. Therefore, the Court adopts the decision and approves same, unless specifically modified or vacated and enters the same as a matter of record, and includes same as the Court's findings and judgment herein. The Court incorporates by reference the attached decision and orders and makes as the judgment of this Court the following:

It is determined that the Respondent lacks the capacity to give a fully informed, intelligent and knowing consent for the administration of medication, and further that the administration of said medication is in the best interest of the Respondent. The following medication(s) are authorized for a period not to exceed

The above medications are stated in maximum dosages authorized. The treating psychiatrist, in exercising his/her professional judgment, shall prescribe, monitor and titrate the medication as the condition of the patient indicates, without exceeding the upper limit allowed by the Court.

Pursuant to Civil Rule 53(D) (4) (i), this Judgment is being made as a permanent order without waiting for timely objections by the parties and shall take immediate effect. If timely objections are filed to the Magistrate's Decision, the objections shall operate as an automatic stay of execution of judgment until further order of this Court.

IT IS SO ORDERED.

_____
Jack R. Puffenberger,
Probate Judge

Copies mailed this date to:

_____,Esq., for the Board

_____,Esq., Counsel for Respondent

_____,for NOPH

LOCAL RU LES

LOCAL RULE 54.1 **MAGISTRATES**

A. **Appointment/Powers.**

Magistrates may be appointed by the Common Pleas Court Probate Judge, and shall serve as full-time or part-lime employees of the Court as provided in Civil Rule 53. Civil Magistrates shall have those powers as set out in Civil Rule 53 and as set out in any Order of Reference.

B. **General Order of Reference.**

The Magistrates so appointed are hereby referred all matters, including pretrials, pertaining to estates, guardianships, trusts, adoptions, civil commitments, and name changes. This Reference includes all powers of the Court except as restricted by law.

C. **Decisions.**

Prior to an objeciion to a Magistrate's Decision. a request for Findings of Fact and Conclusions of law may be filed, pursuant to Civil Rule 52.

[Former Rule 19.1 amended and renumbered as *Rule 54.1, effective June 10, 1998; amended effective April 1, 2005.]*

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO
PROBATE DIVISION

IN THE MATTER OF:	*	**CASE NO. MS-64815**
THE APPOINTMENT OF MAGISTRATES	*	**JUDGMENT ENTRY ORDER OF REFERENCE**

This matter came to be heard this day upon the Court's own motion and pursuant to Rule 53 of the Ohio Rules of Civil Procedure as amended.

It is **ORDERED, ADJUDGED AND DECREED** that pursuant to Civil Rule 53(A):

Kevin P. Buckley, an Attorney at Law. admitted to practice in the State of Ohio, is appointed as a Magistrate in the Probate Court of Lucas County, Ohio, effective February 4, 1997.

Eileen M. Sullivan, an Attorney at Law, admitted to practice in the State of Ohio, is appointed as a Magistrate in the Probate Court of Lucas County, Ohio, effective February 4, 1997.

Trevor N. Fernandes, an Attorney at Law, admitted to practice in the State of Ohio, is appointed as a Magistrate in the Probate Court of Lucas County, Ohio, effective February 9, 1998.

Nancy A. Miller, an Attorney at Law, admitted to practice in the State of Ohio, is appointed as a Magistrate in the Probate Court of Lucas County, Ohio, effective May 24, 1999.

Maria Quinto Morgan, an Attorney at Law, admitted to practice in the State of Ohio, is appointed as a Magistrate in the Probate Court of Lucas County, Ohio, effective February 24, 2000.

Paul Jomantas, an Attorney at Law, admitted to practice in the State of Ohio, is appointed as a Magistrate in the Probate Court of Lucas County, Ohio, effective January 16, 2001.

It is further ordered pursuant to Civil Rule 53(C)(1)(b) that all categories of motions and cases within the jurisdiction of this Court pursuant to RC. 2101.24 shall be referred to the Magistrates.

It is further ordered that the Magistrates shall regulate all proceedings in every hearing as if by the Court and do all acts and take all measures necessary or proper for the efficient performance of the Magistrate's duties.

1/16/01
DATE

JUDGE JACK R. PUFFENBERGER

LN
DATE JOURNALIZED
JAN 17 2001

RULE 11. MAGISTRATE

11.01 GENERAL ORDER OF REFERENCE:

(A) Pursuant to the provisions of Rule 53 of the Ohio Rules of Civil Procedure, every Magistrate appointed as a Magistrate of the Ashland County Common Pleas Court, General and Domestic Relations Divisions, shall have full authority to conduct proceedings in all domestic relations proceedings, civil protection order and civil stalking protection order cases, foreclosures, and all other civil actions, as if upon General Order of Reference made by this Court.

(B) Pursuant to Criminal Rule 19, every Magistrate appointed as a Magistrate of the Ashland County Common Pleas Court, General and Domestic Relations Divisions, shall have full

authority to conduct bond settings, initial appearances, arraignments, and preliminary hearings in criminal cases, as if upon General Order of Reference made by this Court.

11.02 SIGNATURE FOR MAGISTRATE: Any interlocutory or temporary order in a case assigned to the Magistrate may be submitted to the Court as a "Magistrate's Order" with a signature solely for the Magistrate. Any final appealable order submitted by counsel in a case assigned to the Magistrate shall be titled as a "Judgment Entry" contain signature lines for both the Magistrate and the Judge. The signature lines shall both be on the right side of the Judgment Entry, with the Magistrate's signature line below the Judge's signature line.

11.03 MOTIONS TO SET ASIDE MAGISTRATE'S ORDER OR OBJECTIONS TO MAGISTRATE'S DECISION:

(A) A party filing a motion to set aside the Magistrate's Order or objection to a Magistrate's Decision shall file said pleading in compliance with Civil Rule 53 or Criminal Rule 19.

(B) The Motion or Objection shall state grounds for the relief requested in specific terms.

(C) A copy of the motion or objection shall be served on opposing counsel. A copy of any objection relating to child or spousal support shall also be served on the Child Support Enforcement Agency by the objecting party.

(D) No extensions of time to file Motions to Set Aside or Objections shall be granted. If the party cannot state particular grounds for relief at the time the motion or objection is filed, the party may request an extension of time to supplement the motion or objection with those particulars.

11.04 FAILURE TO PROVIDE TRANSCRIPT IN SUPPORT OF MOTION OR

OBJECTION: Failure to provide a transcript in support of a motion to set aside or objection will result in consideration of the legal grounds of the motion or objection only, and not any disputed factual issue.

11.05 FINDINGS OF FACT AND CONCLUSIONS OF LAW: Any party may request findings of fact and conclusions of law in connection with a Magistrate's Decision. That request does not extend the rule date for filing an objection to the Magistrate's Decision. No requests for findings of fact and conclusions of law will be entertained with regard to a Magistrate's Order since Magistrate's Orders are interlocutory in nature.

RULE 12.

COUNTY LOCAL RULE 53.2 - Location

Court sessions shall be held at in Family Courtroom# **l,** or# 2 on the first floor of the Logan County Courthouse or Courtroom# 3 located on the second floor of the Logan County Courthouse or Courtroom # **4** located in the Logan County Annex building thereof in such manner as shall be ordered by Judge Michael L. Brady or Judge Dan W. Bratka; sessions may be held at such other places in this County as may be provided by order of either Judge from time to time or for special cases as the interests of justice may require.

RULES4

CONDUCT OF COURT

COUNTY LOCAL RULE 54.1-Magistrates

Magistrates may be appointed by the Administrative Judge of the Family Court, and shall serve as full-time or part-time employees of the Court as provided in Civil Rule 53. Civil Magistrates shall have those powers as set out in Civil Rule 53 and as set out in any Order of Reference.

The Magistrates so appointed are hereby referred all matters, including pre-trials, pertaining to estates, guardianships, trusts, adoptions, civil commitments, and name changes and minor settlements. This reference includes all powers of the court except as restricted by law.

Prior to an appeal of, or objection to, a Magistrate's decision, a request for Finding of Fact and Conclusions of Law shall be filed, pursuant to Civil Rule 52.

2-Probate Local Rules

SLIP OPINION No. 2012-Omo-2845

MILLER, CROSS-APPELL EE, *v.* NELSON-MILLER, CROSS-APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Miller v. Nelson-Miller,* Slip Opinion No. 2012-Ohio-2845.]

Civil procedure-Civ.R. 58-Effect of judge 'sfailure to sign judgment entry.

(No. 2011-1172-Submitted April 4, 2012-Decided June 27, 2012.) CROSS-APPEAL from the Court of Appeals for Delaware County,
No. 10 CAF 09 0074, 201 I-Ohio-2649.

SYLLABUS OF THE COURT

In a court that properly has jurisdiction over the subject matter and the parties, the court's noncompliance with the ministerial duties of Civ.R. 58(A) renders the judgment voidable and not void.

MCGEE BROWN, J.

{11} Appellant, Rebecca S. Nelson-Miller, as administrator of the estate of Norman Leslie Miller, cross-appeals from a decision of the Fifth District Court of Appeals that held that the 2005 agreed judgment entry of divorce between

Norman and cross-appellee, Beth Miller, n.k.a. Knece, was void for noncompliance with Civ.R. 58(A) due to the trial court's improper delegation of its judgment-entry signatory duties to a magistrate. We are asked to determine whether the trial court's noncompliance with the signature requirement of Civ.R. 58(A) caused the 2005 judgment entry to be void or merely voidable. We hold that where a court possesses jurisdiction over the parties and subject matter, mechanical irregularities regarding the trial court's signature render the judgment voidable, not void.

Factual and Procedural Background

{,r 2} Norman and Beth were married from 1990 to 2004, when Beth filed a complaint for divorce with the Domestic Relations Division of the Delaware County Court of Common Pleas, and Norman responded with a counterclaim for divorce. The case was referred to Magistrate Lianne Sefcovic. The parties agreed to temporary orders and scheduled a settlement conference to detennine a final order on December 21, 2004.

{13} On December 27, 2004, a document was filed with the trial court captioned "Agreed Judgment Entry (Decree of Divorce)." The agreement contained a number of handwritten revisions, approval of each of which was indicated by Norman's and Beth's initials. The agreement was signed by both parties and their counsel. In the space provided for the judge's signature, Magistrate Sefcovic signed Judge Everett Krueger's name, followed by the magistrate's initials. On the same day, a shared-parenting decree with an agreed shared-parenting plan was filed, again bearing the signatures of the parties and their counsel, and with a signature for Judge Krueger followed by the magistrate's initials. On October 14, 2005, the trial court entered a judgment entry decree of divorce, sua sponte adopting the December 27, 2004 memorandum of agreement and incorporated it in a final agreed decree of divorce. Again, the judge's signature was provided by proxy with the magistrate's initials.

{, **4}** In March 2007, Norman moved to amend the shared-parenting plan and recalculate child support, and an agreed entry was issued in July 2007. The parties did not contest the validity of the 2005 divorce decree while resolving their postdecree issues. Relying on the 2005 divorce decree, Beth obtained a new marriage license and remarried in August 2007. Norman remarried as well, in October 2008.

{15} In April 2009, Beth moved to vacate the 2005 divorce decree and to strike the 2004 agreed judgment entry, arguing that the entries were void for failure to comply with Civ.R. 58(A) due to the improper signature by Magistrate Sefcovic in place of Judge Krueger. For purposes of the 2009 proceedings, Judge Krueger filed an affidavit stating that he had given Magistrate Sefcovic the authority to sign the judge's name to all judgment entries that were agreed to and approved by the parties.

{1 6} Following an evidentiary hearing, Magistrate David Laughlin issued a decision upholding the validity of the 2005 divorce decree and the 2004 agreed judgment entry. The magistrate stated that Judge Krueger had validly authorized and directed Magistrate Sefcovic to provide his signature for agreed- upon entries that would not involve "any contest or independent adjudication." The decision reasoned that the error alleged by Beth would be voidable at most, and not subject to collateral attack. The decision further stated that the alleged error, as voidable, had been waived by both parties in their failure to file objections and their reliance on the enforceability of the divorce decree for the purpose of remarrying and for renegotiating the shared-parenting plan.

{17} Beth filed timely objections to the magistrate's decision. The trial court overruled the objections and adopted the magistrate's decision. Beth then appealed to the Fifth District Court of Appeals. While the appeal was pending, the appellate court was notified that Norman had passed away on January 25,

2010. His surviving spouse, Rebecca Nelson-Miller, as administrator of Norman's estate, was substituted as a party in this matter.

{,r 8} In May 2011, the Fifth District reversed and remanded the trial court's decision, holding that Civ.R. 53 does not permit a magistrate to enter judgments and that the trial court therefore did not have the authority to delegate the duty of signing agreed judgment entries. The Fifth District further held that Civ.R. 58 requires the trial court's signature, that a judgment without the signature of the trial court is simply not a judgment, and that the 2005 divorce decree was therefore void because it was not personally signed by the trial judge.

{,r 9} On remand, the trial court issued a judgment entry dated June 7, 2011, which stated that "the undersigned Judge hereby substitutes his original signature below for (the 2004 agreed judgment entry, the 2005 divorce decree, and the 2007 postdecree judgment entry], effective the date of the original filing date for each thereof, and as if fully signed in the previous entry."

{,r 10} Beth sought this court's review, arguing that the divorce action abated upon Norman's death and that the appellate court should have dismissed the entire divorce action rather than remanding. Norman's estate cross-appealed, arguing that the trial judge's authorization to the magistrate satisfied the signature requirement of Civ.R. 58 and alternatively arguing that the error was voidable, rather than void. Of the foregoing arguments, this court accepted jurisdiction only over the following proposition of law in the cross-appeal: "If the trial court fails to comply with the signature requirement of Civ**.R.** 58(A) by failing to personally sign the judgment entry, the resulting judgment is voidable, not void, and may be attacked only through a direct appeal. A party is estopped from collaterally attacking the validity of the judgment."

Analysis

{,r 11} Civ.R. 58(A) is titled "Preparation; entry; effect" and provides that an entry of judgment is effective once (I) the court prepares the judgment, (2) the

court signs the judgment, and (3) the court clerk enters the judgment upon the journal. The parties concede for purposes of this appeal that the Ohio Rules of Civil Procedure do not allow the trial court to delegate its signatory duties to a magistrate. The sole question for us to resolve is whether the improper signature causes the judgment to be void, or whether it is an error that renders the judgment merely voidable. We hold that it is the latter.

{, **12}** This court has long held that the question of whether a judgment is void or voidable generally depends on "whether the Court rendering the judgment has jurisdiction." *Cochran's Heirs' Lessee v. Loring,* 17 Ohio 409, 423 (1848).

> "The distinction is between the lack of power or want of jurisdiction in the Court, and a wrongful or defective execution of power. In the first instance all acts of the Court not having jurisdiction or power are void, in the latter voidable only. A Court then, may act, first, without power or jurisdiction; second, having power or jurisdiction, may exercise it wrongfully; or third, irregularly. In the first instance, the act or judgment of the Court is wholly void, and is as though it had not been done. The second is wrong and must be reversed upon error. The third is irregular, and must be corrected by motion."

Id at 423, quoting *Paine 's Lessee v. Mooreland,* 15 Ohio 435, 445 (l 846). Thus, a judgment is generally void only when the court rendering the judgment lacks subject-matter jurisdiction or jurisdiction over the parties; however, a voidable

judgment is one rendered by a court that lacks jurisdiction over the particular case due to error or irregularity. *In re JJ.,* 111 Ohio St.3d 205, 2006-Ohio-5484, 855

N.E.2d 851, at ,r lO, 15.

{,i 13} In *J.J.,* a magistrate contravened Sup.R. 4(B), which gives administrative judges the sole authority to transfer cases, when the magistrate transferred a custody case to a visiting judge. *Id.* at ,r 5, 16. Like the appeltee in the present case, the appellee in *J.J.* argued that because the magistrate acted outside of his authority, the resulting proceedings were void. *Id.* at ,r 6. This court took the opportunity to explain the important distinctions between subject- matter jurisdiction and jurisdiction over a particular case and concluded that while the Rules of Superintendence did not give the magistrate the authority to transfer cases, the magistrate's improper transfer had no effect on the subject-matter jurisdiction of the court. *Id.* at ,r 16. Rather, the magistrate's action constituted a mere procedural irregularity that affected the court's jurisdiction over the particular case, resulting only in a voidable judgment. *Id* at ,r 15. As a consequence of the judgment's being a voidable rather than a void judgment, the appellant in *J.J.* waived the procedural irregularity by failure to raise a timely objection. *Id* at ,r 16.

{,i 14} This court was following the same principles when it decided *State ex rel. Lesher v. Kainrad,* 65 Ohio St.2d 68,417 N.E.2d 1382 (1981). In *Lesher,* a couple attended their divorce hearing before a referee and on that same day filed an agreed entry of divorce, which was signed by both parties and the trial judge. No referee's report was filed between the time of the hearing and the time of the final entry, as required by former Civ.R. 53(E). Years later, the husband filed a mandamus action, alleging that the divorce decree was void for failure to comply with Civ.R. 53 and therefore subject to collateral attack. "In order to avoid finding many alleged divorces complete nullities," this court held that the failure to comply with Civ.R. 53 rendered the judgment voidable, not void. *Id.* at 71, following *Eisenberg v. Peyton, 56*

Ohio App.2d 144, 150, 38 l N.E.2d 1136 (1978) ("To hold that failure to follow Civil Rule 53 terminates jurisdiction and

voids all actions and judgments entered by the trial court flies in the face of well- established law and such a result was obviously not the intention of this Court").

{115} Some of Ohio's appellate courts have extended the principles espoused in *Lesher* to other instances of noncompliance with Civ.R. 58. *See, e.g., Platt v. Lander.* 2d Dist. No. 12371, 1991 WL 76767 (May 7, 1991); *Beal v. Beal,*
5th Dist. No. CA 2182, 1984 WL 7428 (Apr. 3, 1984); *lamb v. Lamb,* 2d Dist. No. 92-DM-1074, 2011-Ohio-2970. In *Platt,* the Second District held that although a rubber stamp of a judge's signature violates Civ.R. 58, the final order bearing the stamp is voidable, not void. In *Beal,* the Fifth District upheld the validity of a divorce where the divorce decree was originally signed only by a referee and subsequently signed by a trial court judge in a nunc pro tune entry. Because the appellant in that case waited nine years before challenging the validity of the divorce and had filed no direct objections to the decree, the court held that appellant's due-process rights were not violated and upheld the divorce as final.

{, **16}** In *Lamb,* the Second District continued with its reasoning in *Platt* and held that the " 'lack of a signature on a judgment does not constitute a jurisdictional defect.' * * * Rather, '[it] is an irregularity or defect which has no
effect upon the jurisdiction of the trial court.' " *Lamb* at ,r 12, quoting *Brewer v. Gansheimer,* 11th Dist. No. 200 l-A-0045, 200 I WL 1182934, *2 (Oct. 5, 200 l). The Second District went on to hold that regardless of whether an appellate court would be permitted to correct a Civ.R. 58 error in a direct appeal, or whether the error must instead be corrected by a timely motion to the trial court due to the lack of a final, appealable order, the error does not render the judgment void, and an appellant is estopped from collaterally attacking the judgment after failing to timely object or appeal. *Lamb* at ,i 13.

{, **17}** The crux of the appellee's argument in the case at hand is the same as the appellant's unsuccessful argument in *Lamb:* that the lack of a valid

signature rendered the judgment void. We find our previous decisions in *Lesher* and *In re J.J.* to be analogous and the reasoning of *Lamb* to be persuasive, and we therefore hold that the lack of a valid signature is an irregularity that has no bearing on the subject-matter jurisdiction of the trial court and renders the judgment voidable rather than void.

{118} In addition to the fundamental jurisdictional justifications for finding a defectively signed divorce decree to be voidable rather than void, we also find that there are public-policy reasons supporting this conclusion. First, we have a strong interest in preserving the finality of judgments. Finality produces "'certainty in the law and public confidence in the system's ability to resolve disputes.'" *Strack v. Pelton,* 70 Ohio St.3d 172, 175, 637 N.E.2d 914 (1994),

quoting *Knapp* v. *Knapp,* 24 Ohio St.3d 141, 144-145, 493 N.E.2d 1353 (1986). If delayed attacks such as the appellee's were possible, domestic court decisions would be perpetually open to attack, and finality would be impossible. *In re Hatcher,* 443 Mich. 426, 440, 505 N.W.2d 834 (1993). Here, the parties received full notice of the merits of the 2004 agreed entry and 2005 divorce decree, the defective signature was easily discoverable, it in no way infringed on the parties· due-process rights, and the parties explicitly relied on the validity of the underlying divorce in order to remarry. "Clearly as a matter of common sense, common law, and common justice, [the appellee] ought not, after concurring in the order for [over three] years, be thereafter heard to complain by a collateral attack* * *." *Heflebower v. Heflebower,* 102 Ohio St. 674, 678, 133 N.E. 455

(1921).

{119} Second, and more specifically, a declaration that every divorce decree that does not fully comply with Civ.R. 58 is void and null would be "pregnant with fearful consequences." *Bingham v. M;//er,* 17 Ohio 445, 448 (1848). In *Bingham,* although this court declared the legislature's 40-

year practice of granting divorces to be unconstitutional, we refrained from declaring

the acts of divorce to be void, because "second marriages have been contracted, and children born, and it would bastardize all these." *Id.* In the present case, it was the longstanding practice of the Domestic Relations Division of the Delaware County Court of Common Pleas to assign magistrates the task of signing agreed entries of divorce, meaning that hundreds or thousands of uncontested divorces will be affected by this decision. Long-reaching consequences would affect later marriages, children, all subsequent tax filings, inheritance, property divisions, estate plans, and numerous other proceedings and rights. To declare all divorce decrees with faulty signatures to be void ab initio would create absolute chaos. By declining to make such a declaration, we avoid the mass nullification of final judgment entries of divorce, and the confusion that would certainly ensue.

{11 20} In a court that properly has jurisdiction over the subject matter and the parties, the court's noncompliance with the ministerial duties of Civ.R. 58(A) renders the judgment voidable and not void. Neither party sought any timely objection or appeal from the 2005 divorce decree, and we hold that the appellee's attempted collateral attack on the trial court's voidable judgment entry in 2009 was untimely and improper.

Conclusion

{121} For the foregoing reasons, we reverse the decision of the court of appeals, and we reinstate the trial court's 2005 judgment entry decree of divorce.

Judgment reversed.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL, LANZINGER, and CUPP, JJ., concur.

LANZINGER, J., concurring.

{122} After acknowledging that the trial court has no authority to delegate signature on entries (i.e., the court has a duty to sign entries

pursuant to Civ.R. 58), the majority cites two cases decided over 150 years ago to explain

why the judgment entry in question was voidable rather than void. " 'The distinction is between the lack of power or want of jurisdiction in the Court, and a wrongful or defective execution of power. In the first instance all acts of the Court not having jurisdiction or power are void, in the latter voidable only.' " *Cochran's Heirs' Lessee v. Loring,* 17 Ohio 409, 423 (1848), quoting *Paine's Lessee v. Mooreland,* 15 Ohio 435, 445 (1846). It is only in the last few years that this court has disregarded the distinction in criminal cases. *See State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961; *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568; *State v. Singleton,* 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958; *State v. Fischer,* 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332; *State v. Harris,* Ohio St.3d _, 2012-Ohio-1908, _ N.E.2d _.

{123} In holding that when a court possesses jurisdiction over the parties and subject matter, mechanical irregularities regarding the trial court's signature render the judgment voidable, not void, the majority reaffirms the traditional distinction between the terms "void" and "voidable." I heartily concur and only hope that this analysis will also extend to our criminal cases in the future.

Elizabeth N. Gaba, for cross-appellee.

Douglas W. Warnock Co., LP.A., and Douglas W. Warnock; and Bricker & Eckler, L.L.P., and Matthew W. Warnock, for cross-appellant.

[Cite as *State ex rel. Fillinger v. McCormick*, 2012-Ohio-3469.J

qcourt of ppeals of ®bto

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98191

(a) STATE OF OHIO, EX REL. JUDY FILLINGER

RELATOR

vs.

(b) JUDGE TIMOTHY McCORMICK, ET AL.

RESPONDENTS

JUDGMENT:
WRIT DENIED

Writ of Procedendo
Motion No. 454610
Order No. 456992

RELEASE DATE: July 27, 2012

COLLEEN CONWAY COONEY, J.:

{ l} On April 9, 2012, the relator, Judy Fillinger, commenced this procedendo action against the respondents, Judge Timothy McCormick and Magistrate Kevin Augustyn. The relator seeks to compel the respondents (1) to issue findings of fact and conclusions of law to the magistrate's decision, (2) to rule on each of the objections made to the magistrate's decision, and (3) to issue a final, appealable order in the underlying case, *Morgan Stanley Credit Corp. Cent. v. Fillinger*, Cuyahoga C.P. No. CV-736882, a foreclosure action. On April 27, 2012, the respondents moved for summary judgment, and Fillinger filed her brief in opposition on May 14, 2012. For the following reasons, this court grants the motion for summary judgment and denies the application for a writ of procedendo.

Procedural and Factual Background

{12} Morgan Stanley Credit Corporation (hereinafter "Morgan Stanley") commenced the underlying case in September 2009. Judge McCormick was assigned to the case, and he referred the case to Magistrate Augustyn to try issues of law and fact arising from the case. Nevertheless, when both Morgan Stanley and Fillinger filed motions for summary judgment in October 2011, Judge McCormick ruled on those motions. On January 4, 2012, he denied Fillinger's summary judgment motion and

granted Morgan Stanley's dispositive motion. These orders only stated the rulings on the summary judgment motions. They did not specify any relief or award. Thus, the judge further ordered: "Pursuant to Cuyahoga County Local Rule 24, the plaintiff is ordered to file and submit to the magistrate a proposed magistrate's decision granting a decree of foreclosure." (1-4-12 journal entry.)

{13} On January 9, 2012, Morgan Stanley filed a proposed magistrate's decision, and on January 10, 2012, the magistrate issued a six-page decision. The next day, pursuant to Civ.R. 53(D)(3), Fillinger requested findings of fact and conclusions of law on the magistrate's decision.[1] Fillinger also filed a notice of appeal on January 11, 2012, to appeal the judge's rulings on the motions for summary judgment and the magistrate's decision. *Morgan Stanley Credit Corp. v. Fillinger*, 8th Dist. No. 97824.

{14} On January 18, 2012, Judge McCormick denied Fillinger's request for findings of fact and conclusions of law. He reasoned that because the judge, and not the magistrate, ruled on the summary judgment motions, the procedures pursuant to Civ.R. 53 were not invoked and were not applicable and because findings of fact and conclusions of law are not required when resolving summary judgment motions pursuant to Civ.R. 52 and 56.

{,5} On February 24, 2012, this court dismissed the appeal, Appeal No. 97824, for lack of jurisdiction because there was no final, appealable order. This court noted

[1]Fillinger filed a counterclaim and various third-party complaints; these included claims for forgery. A review of the docket in the underlying case and the materials submitted indicate that the trial court resolved all of those claims.

that the orders resolving the motions for summary judgment contemplated further action, specifically the magistrate's decision. A judgment that leaves issues unresolved and contemplates further action is not a final, appealable order.

{16} On March I, 2012, Fillinger renewed her request for findings of fact and conclusions of law. On March 12, 2012, the judge again denied the request. He noted that findings of fact and conclusions of law are not necessary on a ruling on a motion for summary judgment and that the magistrate made all of the necessary findings and conclusions in the decision.

{17} On the same day, the judge also issued a judgment entry adopting the magistrate's decision. In this order, he reiterated that the court had granted Morgan Stanley's motion for summary judgment and denied Fillinger's motion. The judge granted Morgan Stan]ey a judgment in rem of $87,734.91 plus interest. He noted that there could be no personal judgment against Fillinger because she had received a discharge in bankruptcy. He then ordered foreclosure and marshalling of liens. He also ordered that a scrivener's error in the mortgage be corrected and specified no just reason for delay.

{18} On March 21, 2012, Fillinger filed objections to the magistrate's decision, which the judge denied on April 4, 2012, because they were untimely from the initial entry of the magistrate's decision on January 10, 2012. Fillinger then commenced this procedendo action, and filed a notice of appeal on April 10, 2012, *Morgan Stanley Credit Corp. v. Fillinger*, 8th Dist. No. 98197.

Legal Analysis

{,9} The gravamen of Fillinger's complaint for procedendo is a determination from this court as to whether the procedures in Civ.R. 53 are applicable to the matter sub judice. As she states on page four of her response to the motion for summary judgment, "At issue here is how one preserves appeal where the trial court, instead of proceeding wholly by Rule 56 or wholly by Rule 53, adopts a hybrid procedure." She argues that by ordering a magistrate's decision granting a decree of foreclosure, the respondent judge may have necessarily invoked all of the procedures attendant to Civ.R. 53, even if he had granted summary judgment pursuant to Civ.R. 56. Thus, she had the right to findings of fact and conclusions of law, which would trigger the proper time for filing necessary objections to the magistrate's decision. The failure to file such objections could have preclusive effects on the pending appeal. Civ.R. 53(D)(3)(b)(iv). Indeed, Fillinger concludes her response by stating: "Respondents' actions are only complained of insofar as they prevent appeal." (5-14-12 Relator's response, pg. 7.) She submits that issuance of a writ of procedendo would be a "reasonable remedy." (5-14-12 Relator's response, pg. 6.)

{110} However, the writ of procedendo is not to provide advisory opinions or declaratory judgments. The writ of procedendo is merely an order from a court of superior jurisdiction to one of inferior jurisdiction to proceed to judgment. *Yee v. Erie Cty. Sheriff's Dept.*, 51 Ohio St.3d 43, 553 N.E.2d 1354 (1990). Procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily

delayed proceeding to judgment. *State ex rel. Watkins v. Eighth Dist. Court of Appeals,* 82 Ohio St.3d 532, 1998-Ohio- l 90, 696 N.E.2d 1079. However, the writ will not issue to control what the judgment should be, nor will it issue for the purpose of controlling or interfering with ordinary court procedure. Thus, procedendo will not lie to control the exercise of judicial discretion. Moreover. it will not issue if the petitioner has or had an adequate remedy at law. *State ex rel. Utley v. Abruzzo,* 17 Ohio St.3d 203, 478 N.E.2d 789 (1985); *State ex rel. Hansen v. Reed,* 63 Ohio St.3d 597,589 N.E.2d 1324 (1992).

{111} In the present case, the trial court proceeded to judgment. It ruled that findings of fact and conclusions of law were not required because the trial court had determined the case on motions for summary judgment. It denied the objections on the grounds that they were untimely. It issued a final judgment repeating its rulings on the motions for summary judgment, correcting a clerical error in the mortgage, ordering foreclosure, and specifying no just reason for delay. Indeed, Fillinger does not argue in her response to the respondents' motion for summary judgment that the March 12, 2012 judgment entry adopting the magistrate's decision is not a final order; she concedes that claim. She really wants a determination whether the respondents had the obligation to follow the procedures in Civ.R. 53. Because the trial court had proceeded to judgment on the matters presented, this court denies the application for a writ of procedendo and does not address whether the respondents should have followed the procedures in Civ.R. 53.

{ 12} Additionally, the relator failed to support her complaint with an affidavit "specifying the details of the claim" as required by Loc.App.R. 45(B)(l)(a). *State ex rel. Leon v. Cuyahoga Cty. Court of Common Pleas,* 123 Ohio St.3d 124, 2009-Ohio-4688, 914 N.E.2d 402; *State ex rel. Wilson v. Calabrese,* 8th Dist. No. 70077, 1996 Ohio App. LEXIS 6213 (Jan. 18, 1996); and *State ex rel. Smith v. McMonagle,* 8th Dist. No. 70899 (July 17, 1996). In *Leon,* the Supreme Court of Ohio upheld this court's ruling that merely stating in an affidavit that the complaint was true and correct was insufficient to comply with the local rule.

{113} Accordingly, this court grants the respondents' motion for summary judgment and denies the application for a writ of procedendo. Relator to pay costs. This court directs the clerk of court to serve all parties notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

Writ denied.

COLLEEN CONWAY COONEY, JUDGE

JAMES J. SWEENEY, P.J., and
EILEEN A. GALLAGHER, J., CONCUR

[Cite as *State ex rel. M.L.G. v. Montgomery,* 2012-Ohio-3591.J

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. M.L.G.,

Relator,

v.

No. 12.AP-13

Robert G. Montgomery, in his official Capacity as a Judge of the Franklin County Probate Court and Franklin County Probate Court,

(REGULAR CALENDAR)

Respondents,

J.L.H. and **M.B.H.,**

Intervenors-Respondents.

In the matter of: M.E.G.,

M.L.G.,

Petitioner-Appellee,

v.

No. 12.AP-401
(C.P.C. ogJU-08-11743)

J.L.G.,

(REGULAR CALENDAR)

Respondent-Appellant.

DECISION

Rendered on August 9, 2012

Massucci & Kline LLC, LeeAnn M. Massucci and *Kenneth R. Kline,* for M.L.G.

Ron O'Brien, Prosecuting Attorney, and *A. Paul Thies,* for Robert G. Montgomery and Franklin County Probate Court.

Einstein & Poling, LLC, and *Dianne D. Einstein,* for J.L.H. (&a J.L.G.) and M.B.H.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION
AND
APPEAL FROM THE FRANKLIN COUNIY COURT OF COMMON PLEAS,
DMSION OF DOMESTIC RELATIONS, JUVENILE BRANCH

CONNOR,J.

{, **l}** In these consolidated appeals, we address two related actions. Case No. 12AP-13 involves an original action in which objections have been filed to the magistrate's decision denying a request for writs of mandamus and prohibition arising out of a final decree of adoption issued by the Franklin County Probate Court ("probate court"). Case No. 12AP-401 involves an appeal from a judgment entry issued by the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch ("juvenile court"), granting shared custody to a nonparent. For the reasons that follow, we sustain the objections but otherwise adopt the magistrate's findings of fact and conclusions of law, except as to the conclusion that the juvenile court had jurisdiction to decide the custody issue, and we further remand the judgment of the juvenile court with instructions to dismiss the action.

{, **2}** In case No. 12AP-13, relator, M.L.G., filed an original action requesting this court to issue a writ of prohibition ordering respondent, the Honorable Robert G. Montgomery ("Judge Montgomery"), a judge in the Franklin County Probate Court, to cease finalization of the adoption of the minor child, M.E.G., and to issue a writ of mandamus ordering Judge Montgomery to void the adoption of M.E.G. by intervenor- respondent, M.B.H. (formerly M.E.G.'s stepfather). This court referred this matter to a magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued a decision, which includes findings of fact and conclusions of law, which is appended to this decision. Intervenors-respondents, J.L.H (fka J.L.G.)[1] and M.B.H. (collectively, "J.L.H. and M.B.H."), have filed objections to the

---

[1] J.L.H. is the minor child's biological mother and was formerly known as J.L.G. She became known as J.L.H. upon her marriage to M.B.H. At the time the custody complaint was filed in juvenile court, she was known as J.L.G. For ease of discussion, we shall refer to her throughout as J.L.H.

magistrate's decision recommending the denial of M.L.G.'s request for writs of prohibition and mandamus and granting their motion to dismiss on the limited grounds that the magistrate erred in her determination that the adoption has no effect on the jurisdiction of the juvenile court on the related custody case.

{13} In case No. 12AP-401, respondent-appellant, J.L.H., appeals from a judgment entry of the juvenile court, denying her motion to dismiss petitioner-appellee M.L.G.'s complaint for custody, as well as her motion to vacate visitation orders, and granting M.L.G. shared legal custody of M.E.G.

{14} M.L.G. and J.L.H. were a same-sex couple who began a long-term relationship in approximately 1998. The two women formalized their relationship by attending pre-wedding counseling and entering into a "holy union" through a ceremony attended by their friends and relatives in September 1999. In October 1999, they executed a "Marital Commitment Agreement." They also executed wills in which each woman left her property to the other, rather than their next of kin.

{15} The parties had discussions about beginning a family and decided J.L.H. would get pregnant first because she was older. The parties selected a private donor and J.L.H. was artificially inseminated. J.L.H. gave birth to M.E.G. on July 22, 2005.

{, 6} J.L.H. and M.L.G. lived together with M.E.G. for the first three years of the minor child's life. The parties did not enter into a written agreement regarding custody of M.E.G. In May 2008, M.L.G. and J.L.H. ended their relationship. J.L.H. and M.E.G. moved out of the house they had all shared in Toledo, Ohio and relocated to the Columbus area, while M.L.G. remained in the Toledo area.

{, 7} For approximately one year after the termination of the relationship, the parties continued with an informal arrangement regarding M.E.G. However, in August 2009, J.L.H. severed M.L.G.'s contact and communication with M.E.G. On August 28, 2009, M.L.G. filed a complaint for custody of M.E.G. in the juvenile court. The court ordered M.L.G. to have visitation with M.E.G. pending disposition of the custody action.

{, 8} On November 13, 2009, J.L.H. married M.B.H. On July 1, 2010, M.B.H. filed a petition in the probate court to adopt M.E.G.

{, 9} On September 14, 2010, the custody trial in this matter began in the juvenile court and spanned approximately ten non-consecutive days, with testimony finally

concluding on November 1, 2010, and with the final submission of closing arguments on November 15, 2010.

{110} On January 6, 2011, a final decree of adoption was issued by the probate court, which finalized the adoption of M.E.G. by M.B.H. On February 14, 2011, J.L.H. filed a motion to dismiss M.L.G.'s petition for custody on the grounds that the final decree of adoption divested the juvenile court of jurisdiction. Although approximately two months had passed since the conclusion of the custody trial, the magistrate had not yet issued a decision on the custody issue at that time.

{1[11} On September 26, 2011, the juvenile court magistrate issued a judgment entry denying J.L.H.'s motion to dismiss and motion to vacate the visitation order. The juvenile court magistrate also granted M.L.G. shared legal custody of M.E.G. Specifically, the juvenile court magistrate determined M.B.H's adoption of M.E.G. did not divest the juvenile court of jurisdiction to determine custody of M.E.G. The juvenile court magistrate also found J.L.H. had contractually, through her words and actions, relinquished custody of M.E.G. to M.L.G. and, furthermore, it was in the best interest of M.E.G. to order shared custody between J.L.H. and M.L.G.

{, **12}** On October 11, 2011, J.L.H. filed objections to the juvenile court magistrate's decision. A hearing was held before the juvenile court judge on the objections on November 15, 2011.

{113} On January 4, 2012, M.L.G. filed her complaint for writs of prohibition and mandamus in this court, claiming the probate court is without jurisdiction to finalize the adoption of M.E.G. by M.B.H. Specifically, M.L.G. requested the issuance of a writ of prohibition prohibiting Judge Montgomery and the probate court from further finalizing the adoption of M.E.G., and the issuance of a writ of mandamus ordering Judge Montgomery and the probate court to immediately void the adoption of M.E.G. by M.B.H.

{1[14} On January 27, 2012, Judge Montgomery filed a motion to dismiss the complaint for the writs, arguing, inter alia, that M.L.G. lacked standing to bring the complaint because she is not a "parent" to M.E.G., and that M.L.G. is not entitled to the writs because she cannot establish a clear legal right to the extraordinary relief requested, the Judge Montgomery does not have a duty to perform the requested acts, and M.L.G. has or had adequate remedies at law.

{,I 15} On March 26, 2012, the court of appeals magistrate issued a decision denying M.L.G.'s requests for writs of prohibition and mandamus and granting Judge Montgomery's motion to dismiss. Specifically, the magistrate determined M.L.G. is not a parent, and therefore, she has no parental rights. Because she has no parental rights to lose, M.L.G.'s consent to the adoption of M.E.G. was not necessary, and consequently, she has no standing to challenge the adoption. Additionally, the appellate magistrate determined the matter pending in the juvenile court is a custody issue, rather than a parenting issue, and the juvenile court has jurisdiction to consider custody issues between a parent and a nonparent, despite the adoption, because the proceedings in probate court do not affect the status of the custody matter in juvenile court.

{,I 16} On April 9, 2012, J.L.H. and M.B.H. filed objections to the decision issued by the court of appeals magistrate. Specifically, J.L.H. and M.B.H. objected to the magistrate's determination that the juvenile court has jurisdiction to consider custody/visitation issues between the parties and that the proceedings in the probate court do not affect the custody matter in the juvenile court. M.L.G. filed a memorandum contra the objections and also asks this court to reconsider the appellate magistrate's denial of the writs of prohibition and mandamus.

{,I 17} On April 26, 2012, the juvenile court, after conducting a de novo review of the juvenile magistrate's findings and rulings, overruled J.L.H.'s objections to the juvenile magistrate's decision, finding: (1) because M.L.G. is not and cannot be a "parent," the probate court was not required to refrain from proceedings with the adoption; (2) the juvenile court was not divested of jurisdiction by the probate court's exclusive jurisdiction over adoption matters, as the adoption proceedings did not affect the status of the custody matter in the juvenile court; (3) there was reliable, credible evidence presented to demonstrate J.L.H. intended to relinquish a portion of her custodial rights to M.L.G.; and (4) it is in M.E.G.'s best interest to order shared custody.

{,I 18} On May 3, 2012, J.L.H. filed a timely notice of appeal challenging the juvenile court's determination and raising two assignments of error for our review:

> I. The juvenile court erred by denying [J.L.H.'s] motion to dismiss for lack of jurisdiction based on the issuance of the final adoption decree.

> II. The juvenile court erred by awarding shared custody to [M.L.G.].

{119} We begin our analysis by addressing J.L.H. and M.B.H.'s objections to the decision of the appellate court magistrate, which are limited to certain conclusions of law reached by the magistrate. Although J.L.H. and M.B.H. agree with the magistrate's ultimate decision to grant their motion to dismiss and to deny M.L.G.'s request for writs of prohibition and mandamus, they object to the following determinations set forth by the magistrate: "As indicated previously, despite the fact that M.L.G. is not and cannot legally be identified as M.E.G.'s parent, the juvenile court does have jurisdiction to consider custody/visitation issues between the parties. * * * The proceedings in the probate court do not affect the status of the custody matter in the juvenile court." Magistrate's Decision, at 6. Specifically, J.L.H. and M.B.H. dispute the magistrate's determination that the probate court's issuance of a final decree of adoption does not divest the juvenile court of jurisdiction to decide the custody matter.

{, **20}** This objection is substantially similar to J.L.H.'s first assignment of error, in which she argues the juvenile court erred by failing to grant her motion to dismiss for lack of subject-matter jurisdiction, due to the probate court's issuance of a final decree of adoption. Therefore, we shall analyze these two challenges together.

{1 21} "It is well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by the persons considered nonparents at law." *In re Bonfield,* 97 Ohio St.3d 387, 2002-Ohio-6660, ,i 43. Additionally, a parent may relinquish sole custody of a child in favor of shared custody with a nonparent. *In re Mullen,* 185 Ohio App.3d 457, 2009-Ohio-6934, **,i** 6 (1st Dist.), citing *Bonfield.* Nevertheless, pursuant to R.C. 3107.15(A), a final decree of adoption relieves the biological parents or other legal parents of all parental rights and responsibilities and terminates all legal relationships between the adopted person and the adopted person's relatives or former family.

{122} R.C. 3107.15, entitled "Effect of adoption," reads in relevant part as follows:

> (A) A final decree of adoption and an interlocutory order of adoption that has become final as issued by a court of this state, * * * shall have the following effects as to all matters within the jurisdiction or before a court of this state * * *:
>
> (1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological or other legal

> parents of the adopted person of all parental rights and responsibilities, and to terminate all legal relationships between the adopted person and the adopted person's relatives, including the adopted person's biological or other legal parents, so that the adopted person thereafter is a stranger to the adopted person's former relatives for all purposes including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the person by name or by some designation not based on a parent and child or blood relationship;
>
> (2) To create the relationship of parent and child between petitioner and the adopted person, as if the adopted person were a legitimate blood descendant of the petitioner, for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after the adoption is decreed, and * * * which do not expressly exclude an adopted person from their operation or effect[.]

{,I 23J A same-sex partner who is not the biological mother of a child cannot be considered a "parent" under Ohio law. *Bonfield* at 35-36. Therefore, under *Bonfield,* M.L.G. is not a "parent" and has no parental rights. Consequently, despite M.L.G.'s claim that she (or at least the juvenile court) should have received notification of the adoption and an opportunity to be heard in the adoption proceedings because she is a nonparent under *Bonfield,* her notification of or consent to the adoption of M.E.G. was not required by law, and she is without standing to challenge the adoption. Additionally, because the action in juvenile court was not a parentage action (but rather a custody action) and, thus, no "parenting" action was pending in juvenile court, we find the probate court, which has exclusive jurisdiction over matters of adoption, acted properly in moving forward with the adoption. More important, however, is our determination that the final decree of adoption seived to terminate all pre-adoption legal relationships between M.E.G. (the adopted person) and her former family, except those established through her biological mother (J.L.H.), as shall be explained more fully below.

{124} An adoption terminates the jurisdiction of a juvenile court, a divorce court, and/or a probate court as it relates to the granting of post-adoption visitation rights with respect to former parents *(State ex rel. Kaylor v. Bruening,* Bo Ohio St.3d 142 (1997); domestic relations court lacked jurisdiction to proceed on biological mother's pending

motions after probate court issued a final decree of adoption); former grandparents *(In re Adoption of Ridenour*, 61 Ohio St.3d 319 (1991); Supreme Court of Ohio reversed decision allowing grandparents to obtain visitation rights following an adoption by strangers)[2]; former relatives *(In re Adoption of Zschach*, 75 Ohio St.3d 648 (1996); pursuant to R.C. 3107.15(A)(1), a court lacks authority to incorporate visitation rights into a final decree of adoption for any biological relative); or to "an 'other person' * * * whose grounds for seeking visitation arose out of the prior family relationship." *See In re L.H.*, 183 Ohio App.3d 505, 2009-Ohio-3046, 27 (2d Dist.).

{, **25}** Based upon current statutory authority and case law, we believe a final decree of adoption awards all custodial rights solely to the adoptive parents and as a result, no other court can make any subsequent custody determinations which would award custodial rights to any other person based on a pre-adoption relationship which infringes upon the adoptive parents' custodial rights. Stated differently, we interpret R.C. 3107.15 as severing legal relationships with non-relatives, such as M.L.G., who attempt to base their claims on relationships in existence prior to the adoption. This is, in essence, what occurred in *L.H.*, a case which we find to be persuasive.

{126} In that case, a woman who was married was given custody of a non-biological child, but her spouse was not given custody of the child. The couple subsequently divorced and the ex-husband was awarded visitation with the child. The woman later re-married and she and her new husband adopted the child and moved to terminate her ex-husband's visitation rights. The juvenile court found the visitation was proper, pursuant to R.C. 3109.051, after finding the ex-husband had acted as a father figure for the child, was very bonded with the child, and it was in the best interest of the child to continue with the visitation. However, the Second District Court of Appeals

[2] During oral argument, counsel for J.L.H. and **M.B.H.** referenced supplemental authority not previously referenced in her brief or memorandum contra in which grandparents were granted visitation rights where a child was adopted by a stepparent following the death and/or disappearance of one of the biological parents. *See Welsh v. Laffey*, 16 Ohio App.3d 110 (12th Dist.1984), and *Graziano v. Davis*, 50 Ohio App.2d 83 (7th Dist.1976). However, counsel did not file a notice of supplemental authority, despite an oral advisement to do so. *See also* App.R. 21. Furthermore, even if we were to consider these cases, they are distinguishable from the instant case, in that they are guided by specific statutes governing situations involving deceased parents and grandparent rights, which, in addition, have since been amended. *See* former R.C. 3109.05 and 3109.11. Additionally, *Welsh* has been at least impliedly overruled by *Ridenour* and *In re Martin*, 68 Ohio St.3d 250 (1994) (with respect to R.C. 3107.15 and grandparent visitation rights, the statute does not distinguish between adoptions by strangers and adoptions by nonstrangers). *See also Foor v. Foor*, 133 Ohio App.3d 250, 255 (12th Dist.1999).

reversed, finding that R.C. 3107.15(A)(1) prevents a juvenile court from awarding visitation pursuant to R.C. 3109.051(B)(1). The court of appeals determined R.C. 3109.051(B){1) addresses visitation in the context of a domestic relations proceeding, rather than in the context of an adoption. The court of appeals further found "the effect of R.C. 3107.15(A) is to deny standing to former relatives of an adopted child to seek visitation pursuant to R.C. 3107.051(B)." *L.H.* at ,r 27, citing *Farley v. Farley,* 85 Ohio App.3d 113 (5th Dist.1992). "The same would apply to an 'other person' * * * whose grounds for seeking visitation arose out of the prior family relationship." *Id.*

{,I 27} "Adoption is a function of the state which necessitates the exercise of power in determining the proper custody of a child." *State ex rel. Portage Cty. Welfare Dept. v. Summers,* 38 Ohio St.2d 144, 150 (1974). The adoption decree is a determination of custody. As a result, we agree with J.L.H. and M.B.H.'s assertion that it is illogical to find that an adoption proceeding and a custody proceeding between a parent and a non parent are two separate matters that can be determined concurrently by two different courts. If adoptive parents are ordered to permit visitation with various third parties, they "will not enjoy the same autonomy as natural parents." *Ridenour* at 327. A final decree of adoption must be dispositive of any concurrent custody proceedings in another court and it must place all custodial rights in the adoptive parents. Therefore, we find a final decree of adoption terminates the jurisdiction of a juvenile court to award custodial rights to a nonparent on the basis of a pre-adoption relationship with the minor child.

t, 28} Based upon the foregoing, and following an independent review pursuant to Civ.R. 53, we find the court of appeals magistrate erred in concluding the adoption had no effect on the custody proceedings in juvenile court and in finding the juvenile court had jurisdiction to consider the custody issues between M.L.G. and J.L.H. Instead, we find the final decree of adoption divested the juvenile court of jurisdiction to hear the custody matter. Contrary to the magistrate's conclusion that the two matters can be pursued concurrently, we find the juvenile court erred in exercising jurisdiction over the custody matter. Therefore, we sustain J.L.H. and M.B.H.'s objections but adopt the magistrate's findings of fact and conclusions of law, subject to the exceptions noted above. In accordance with the magistrate's decision we deny the requested writs of mandamus and prohibition.

{, 29} Similarly, for the same reasons, we find the trial court erred in denying J.L.H.'s motion to dismiss the complaint for custody and to vacate the order of visitation for lack of jurisdiction. Because a final decree of adoption was issued, we find the juvenile court was without jurisdiction to subsequently award shared custody to M.L.G. Accordingly, we sustain respondent-appellant J.L.H.'s first assignment of error.

{, **30}** Furthermore, because the juvenile court was without jurisdiction to make a determination of custody, it logically follows, based upon our reasoning as set forth above, that the juvenile court erred in awarding shared custody to both M.L.G. and J.L.H. based on a pre-adoption relationship when the juvenile court lacked jurisdiction to do so. Therefore, we sustain J.L.H.'s second assignment of error. As a result, we need not address the issue of whether J.L.H. relinquished partial custody of M.E.G. by her actions or whether or not shared custody is in the best interest of M.E.G.

{, **31}** In conclusion, we sustain J.L.H. and M.B.H.'s objections but adopt the magistrate's findings of facts and conclusions of law, except as to the conclusion that the adoption had no effect on the custody proceedings in juvenile court and the finding that the juvenile court had jurisdiction to consider the custody issues between M.L.G. and J.L.H. In addition, we sustain J.L.H.'s first and second assignments of error, and reverse and remand this matter to the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, with instructions to dismiss the action.

Objections sustained; writs of prohibition and mandamus denied in case No.12AP-13; judgment reversed; cause *remanded with instructions in case No. 12AP-401.*

BROWN, P.J., and Kl.ATI, J., concur.

Magistrate Requirements

(2) Eligibility

Under Civil Rule 53, Juvenile Rule 40, Criminal Rule 19, Traffic Rule 14 and Superintendence Rule 19 (A), a magistrate shall have been engaged in the practice of law for at least four years and be in good standing with the Supreme Court of Ohio at the time of appointment.

(3) Appointment and Authority

Under Civil Rule 53, Juvenile Rule 40, Criminal Rule 19 and Traffic Rule 14, a court of record may appoint one or more magistrates who shall have been engaged in the practice of law for at least four years and be in good standing with the Supreme Court of Ohio at the time of the appointment. Superintendence Rule 19.1 requires that all municipal courts having more than two judges shall appoint one or more magistrates to hear specified proceedings. They derive their authority under the same Rules. Magistrates are also granted special authority to hear protection orders under Civil Rule 65.1.

(4) Annual Registration

Magistrates are required to complete an annual registration pursuant to Rule 19 of the Rules of Superintendence and Rule 10 of the Rules for the Government of the Bar.

If your appointment occurred after 12/31/17, the administrative judge of your appointing court must notify the Office of Attorney Services of your appointment pursuant to Rules 4.01 and Rule 19 of the Rules of Superintendence for the Courts of Ohio, **before** you can annually register.

Instructions for annual registration and for notification of the termination of an appointment

Register
Administrative Judges Notification of Magistrate Appointments and Terminations

Please contact the Office of Attorney Services by either calling 614.387.9320 or by sending an email to attyreg@sc.ohio.gov if you have any questions.

For more information about Magistrate Registration contact:

Gina Palmer, Director
Supreme Court of Ohio
Office of Attorney Services
c/o Magistrate Annual Registration
65 South Front St., 5th Floor
Columbus, Ohio 43215-3431
Phone: 614-387-9320

(5) CLE Requirement

Effective Jan. 1, 2019, the Continuing Legal Education (CLE) requirements increased for magistrates to the same requirement as judges. All magistrates, including full-time and part-time magistrates, are required to earn 40 hours of continuing legal education, including 10 hours of instruction through courses offered by the Ohio Supreme Court Judicial College, every two years. Further, as part of the 10-hour Judicial College education requirement, three hours of instruction must be designated as "judicial conduct," which may include courses on topics such as judicial ethics, judicial professionalism, and access to justice. Gov. Bar R. X, Sec. 10(C).

The increased CLE requirements first apply to magistrates whose last names begin with the letters A through L for the 2018/2019 compliance period ending Dec. 31, 2019. These magistrates are required to complete a prorated requirement of 32 hours. As part of the 32 hours, a minimum of 10 hours must be from courses offered by the Judicial College, including three hours of judicial conduct.

Magistrates with the last name starting with M through Z will be required to comply with the 40-hour requirement beginning with the 2019/2020 compliance period.

Attorneys appointed as a magistrate on or after Jan. 1, 2019, or sitting magistrates who change jurisdictions will also be required to complete the orientation and mentor program.

Any questions regarding the requirements should be directed to the Office of Attorney Services at 614.387.9320.

(6) Magistrate Orientation

Effective January 1, 2019, and as part of the 40-hour requirement as a new magistrate (see #8 or #9 above), you will be required to complete the Magistrate Orientation Program, which is conducted by the Supreme Court of Ohio Judicial College. The orientation program must be completed within 12 months of your date of appointment as a magistrate. This orientation is also required for those magistrates who have changed court jurisdictions. Please check the Judicial College course calendar for the dates of this program. Questions should be directed to the Judicial College at 614.387.9445 or jcollege@sc.ohio.gov. Please note that the orientation is approved for Judicial College credit hours.

In addition, any magistrate who changes court jurisdictions must complete the orientation program. What does that mean?

The following chart provides examples in which a magistrate may or may not have to take the magistrate orientation program:

Former Court Appointment	**New Court Appointment Beginning Jan. 1, 2019, or later**	**New Magistrate Orientation Required?**
Municipal	Court of Common Pleas	Yes
Juvenile	Juvenile/Probate	Yes (probate portion only)
Domestic Relations in County A	Domestic Relations in County B	No

(7) Mentorship

Pursuant to Rule X for the Government of the Bar, all new magistrates must also participate in a one-year mentoring program as part of The Magistrate Orientation Program. The Judicial College Mentor Program seeks to elevate the competence, collegiality, and success of Ohio's judiciary. What is required of a mentor? The mentor's responsibility is to provide information, assistance, and encouragement to the new magistrate during the first year on the bench. The program requires a minimum of four quarterly contacts over the course of a twelve-month period. What are the benefits to the mentor? Mentors often find that serving as a mentor gives them: · Renewed sense of purpose · Opportunity to give back to the judicial community and leave a legacy · Opportunity to reflect on one's own practices.

If you would like to serve as a Mentor, click the following link: http://bit.ly/MentorVolunteerForm

For more information, contact Sam Campbell, Education Program Manager for the Ohio Judicial College at 614-387-9462 or email him at Sam.Campbell@sc.ohio.gov

(8) Financial Disclosure

A magistrate serving on a full- or part-time basis any time during the year is required by R.C. 102.02(A)(2)(c) and Rule 3.15 of the Ohio Code of Judicial Conduct to complete and file an annual financial disclosure statement. Effective in 2014, there is the option to complete the form electronically, but this option will become mandatory in 2016.

The online portal may be accessed at https://disclosure.ethics.ohio.gov.

If you do not choose to file electronically this year, a copy of the financial disclosure statement and instructions regarding completion of your form may be found at http://www.supremecourt.ohio.gov/Boards/BOC/FDS

(9) Code of Judicial Conduct

Both Full and Part-Time Magistrates are subject to the Code of Judicial Conduct which may be found at

http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf

Marriage

Marriage is a solemn and exalted state, sanctified by the church, respected by society, and licensed by the State. Marriage is basically a contract between two parties; the prospective husband and the prospective wife. However, there is a third party to all contracts of marriage - the State. It is the State that by law provides conditions to and limitations of the marriage contract.

The Probate Court is the sole agency, under the laws of the State of Ohio, vested with the authority to issue marriage licenses.

Fee

The fee for obtaining a marriage license is $44.00 payable in cash. This fee is non-refundable. Of this fee, $17.00 is allocated to a fund established by the State of Ohio to provide financial assistance to shelters for victims of domestic violence.

Who May Apply?

Persons of 18 years of age who are not nearer of kin than second cousins may apply for a marriage license. Application must be made in person by both parties. Applicants must have their driver's license or other positive form of identification such as military or state identification. Also, applicants under age 21 must have their birth certificate.

Information Required

Each of the applicants must supply to the Court their respective address, name, age, place of birth, occupation, social security number, father's name, mother's maiden name, if known, and the name of the person who is expected to solemnize the marriage.

Disabilities

No marriage license shall be granted when either of the applicants is under the influence of intoxicating liquor or controlled substances or is infected with syphilis in a form that is communicable or likely to become so.

Minors

If both persons to be joined in marriage are the age of seventeen years, they may be joined in marriage only if the juvenile court has filed a consent to the marriage under section 3101.04 of the Revised Code.

(B) If only one person is the age of seventeen years, that person may be joined in marriage only if both of the following apply:

(1) The juvenile court has filed a consent to the marriage under section 3101.04 of the Revised Code.

(2) The other person to be joined in marriage is not more than four years older.

Marriage Counseling

Applicants under 18 years of age must furnish a written statement from a priest, minister, rabbi or other qualified counselor from whom they have received marriage counseling.

Residence Qualifications

One or both of the applicants must be a resident of Trumbull County for a marriage license to be issued. Applicants from out of state may apply for a marriage license in Trumbull County, provided the marriage ceremony is performed in Trumbull County.

Prior Marriages

If either party has been previously married, the application shall include the names of the parties to any such marriage and of any minor children. If divorced, a certified copy of the divorce decree must be submitted to the Probate Court at the time of the application.

Blood Test

No longer required.

Who May Perform the Marriage Ceremony?

An ordained or licensed minister of any religious society or congregation within this state licensed to perform marriages, a judge of a county court in his county, an authorized judge of a municipal court, the mayor of a municipal corporation in any county in which such municipal corporation wholly or partly lies, the superintendent of the state school for the deaf, or any religious society in conformity with the rules and regulations of its church may perform the marriage ceremony.

Time Limitations

Once the license is issued, it is only valid for a sixty day calendar period. If a marriage license has expired, re-application is necessary and a new license must be issued.

Change of Name

Traditionally, the bride takes the last name of her husband although it is not necessary or mandatory that she do so. However, if she does, it is the newlywed's responsibility to see that the appropriate agencies are notified. This includes: among others, businesses and stores with whom she has credit accounts, banks where she has checking and savings accounts, the Social Security Administration, the Board of Elections, and the Bureau of Motor Vehicles to see that her driver's license is changed.

Corrections

All applicants must check their license prior to leaving the Court in order to ascertain that all of the information is correct and that no errors have been made.

This Page Intentionally Left Blank

Administration of Estates

Materials Prepared By
Hon. Dixie Park
Stark County Probate Court

NOTES

NOTES

ADMINISTRATION OF ESTATES - REFERENCE SHEET

Proceeding	Code Section	Time Requirement	Proceeding	Code Section	Time Requirement
Simultaneous Death Act	§2105.32	Person must survive by 120 hours (5 days)	Report of newly Discovered Assets	§2113.69	30 days after receipt of such assets
Intestate Succession	§2105.06	Spouse inherits entire estate if children common to both parents	Hearing on Approval of Inventory	§2115.16	Not later than 1 month after inventory filed
Application to Probate Will	§2107.11	On presentment of will	Notice to Surviving Spouse of Taking Inventory	§2115.04	Not less than 5 days previous to taking inventory
Will admitted to Probate	§2107.18		Sale of Personal Property; Application to Sell	§2113.40; §2113.41	Any time after filing inventory
Application for Appointment of Fiduciary	§2113.07	After probate of Will; if no Will, then any time after death	Action to sell real estate	§2127.02; §2127.03	When personal estate found insufficient to pay debts or legacies
Bonds	§2109.04 - §2109.15	Before Appointment	Application to Distribute Personal property to Spouse of lntestate	§2106.10; §2103.11	Before final account filed
Certificate of Service of Notice of Probate of Will	§2107.19	Within two (2) weeks of the admission of the will to probate	Determination of Heirs	§2123.01	Before distribution of estate
Election of Spouse	§2106.01	Within 5 months from fiduciary appointment	Claims of Fiduciary Against Estate	§2117.02	Within 3 months after appointment
Written Waivers of Service of Citation to Elect Spousal Rights	§2106.01	Surviving spouse who acknowledges being advised of election rights may file waiver at the time the application to administer is filed	Claims Against the Estate	§2117.06	For deaths on and after 04/08/04, within 6 months after death of decedent
Will Contest	§2107.76	3 months after filing notice of probate of Will	Final Account	§2109.301	Within 6 months after appointment unless extended 13 months
Non-complying Wills & Lost	§2107.24; §2107.27		Hearings on Accounts; Notice	§2109.32	Not earlier than 30 days after account filed
File Inventory and Appraisal	§2115.02	Within 3 months after fiduciary appointment	Exceptions to Account; Additional Notice	§2109.33	Not less than 5 days prior to account approval hearing
Certification of Transfer of Real Estate	§2113.61	Any time after filing Inventory; Court must issue the certificate within 5 days of filing	Distribution	§2113.53	Any time following appointment if no Will Contest subject to creditor claims
			Unclaimed Funds	§2113.64	Before final distribution

ADMINISTRATION FORMS GUIDELINE

APPLICATION TO PROBATE A WILL

- Form 2.0
- Will admitted by multiple journal entry
- If will is not admitted:
    - Set for hearing
    - Separate journal entry denying will's admission to probate

CERTIFICATE OF SERVICE OF NOTICE OF PROBATE OF WILL

- Form 2.4
- Persons entitled to notice include all the persons who would be entitled to inherit from the decedent had the decedent died intestate and to all legatees and devisees named in the will who do not waive notice.

APPOINTMENT OF EXECUTOR/ADMINISTRATOR

- Form 4.0
- Multiple Journal Entry
- If granted subject to bond: No letters of appointment until bond is posted
- If bond is required, Ohio law requires bond in the amount of twice the value of personal property
    - Court has list of registered bonding agents
    - Bond approved by application counter

RELEASE FROM ADMINISTRATION

- Form 5.0
- Applicable when assets do not exceed the statutory limits
- Notice is required
- Assets and liabilities of estate must be listed on Form 5.1
- Finalized by a journal entry relieving estate from administration (Form 5.6)
- Certificate of Transfer must also be filed (Form 12.1)

NOTICE TO ADMINISTRATOR OF ESTATE RECOVERY PROGRAM

- Form 7.0
- Required if decedent is 55 years of age or older at the time of death and has been a recipient of medical assistance

INVENTORY AND APPRAISAL

- Due within three months of appointment
- Once an inventory has been filed, a Hearing on Inventory is set before a magistrate
- Inventory Form generated by filing Form 3.0

APPLICATION FROM CERTIFICATE OF TRANSFER

- Form 12.0
- Records new ownership interest in real property
- Accompanied by Certificate of Transfer: Form 12.1

APPLICATION TO SELL PERSONAL PROPERTY

- Form 9.0
- Sale must be in the best interest of the estate and property for sale must not be subject to demand by distribution in kind to surviving spouse or other entitled beneficiary or specifically bequeathed unless sale is necessary to pay debts or entitled beneficiaries consented
- Property must be itemized
- Finalized by entry authorizing sale (Form 9.1)

APPLICATION TO DISTRIBUTE IN KIND

- Form 10.0
- Finalized entry approved distribution in kind (Form 10.1)

WRONGFUL DEATH AND SURVIVAL CLAIMS

- Application to Approve Settlement and Distribution (Form 14.0)
- Waiver and Consent required (Form 14.1)
- Finalized by entry approving settlement and distribution of wrongful death and survival claims (Form 14.2)
- Post distribution, Form 14.4 must be filed showing how the proceeds have been paid
    - o Documentation is required

Forms are available on the Cuyahoga County Probate Court website at probate.cuyahogacounty.us

Updated 9/2012

ADMINISTRATION FACT SHEET

Probating an Estate: Opening the Estate

The probating of an estate requires the appointment by the Probate Court of a suitable person to supervise the administration of the estate. The person appointed is called an executor, if named in a will, or an administrator, if there is no will. The executor or administrator may be an individual, a bank, or trust company.

- If the decedent had a will, any person may present that will and file an Application to Probate a Will (R.C. 2107.11)
- An application for Appointment of Fiduciary may be made after the probate of a will, or if no will, then any time after death (R.C. 2113.07)

If the total value of all property in the decedent's name is $35,000 or less where the surviving spouse is not the sole heir, or $100,000 or less where the surviving spouse is the sole heir, the estate can be relieved from the administration requirements.

Fiduciary Qualifications: Testate Estates

- Named executor, if resident of Ohio, except that a non-resident may be appointed, if qualified, pursuant to a will, who is related to decedent by blood or marriage or if not, resides in a state that has a statute and rules that authorize a non-resident to serve as executor with named in a will (RC. 2109.21)
    - o A nonresident executor is required to post bond
- Next of kin, if resident of Ohio, who are also vested beneficiaries in the will
- Any suitable person, if resident of Ohio, with approval of the court

Fiduciary Qualifications: Intestate Estates

- Surviving spouse, if resident of Ohio
- Next of kin, if resident of Ohio
- Any suitable person, if resident of Ohio, with approval of the Court

Duties of an Executor or Administrator

- To determine the names, ages, and degree of relationship of heirs;
- To take possession of, and conserve all of the real and personal property of the decedent;
- To file with the probate court an inventory of all the assets held in the name of the decedent;
- To receive and determine the validity of all claims against the decedent's estate;
- To make distribution of the estate's assets to the proper persons;
- To file an account of all receipts and disbursements made by the executor or administration with the Probate Court.

Fiduciary Deadlines

- **2 Weeks From Admission of Will to Probate:** Certificate of Service of Notice of Probate of Will (R.C. 2107.19)
    - Filing Notice of Probate of Will begins 3--month Will Contest Period (R.C. 2107.76)

- **90 Days From Appointment:** File Inventory and Appraisal (R.C. 2115.02)
    - Surviving spouse must receive notice of taking inventory **at least** 5 **days prior** to taking inventory (R.C. 2115.04)
    - Application to Sell Personal Property and Sale of Personal Property are permitted any time after filing of inventory (R.C. 2113.40 and 2113.41)
    - Certificate of transfer of Real Estate any time after filing inventory; Court must issue the certificate **within** 5 **days** of filing (R.C. 2113.61)
    - Hearing on Approval of Inventory is held not later than 1 month after inventory is filed (R.C. 2115.16)

- **90 Days From Appointment:** Claims of Fiduciary Against Estate (R.C. 2117.02)

- **5 Months From Appointment:** Deadline for Election of Spouse (R.C. 2106.01)
    - Surviving spouse who acknowledges being advised of election rights may file waiver at the time the application to administer is filed (R.C. 2106.01)

- **6 Months From Appointment:** Final Account filed unless extended 13 months
    - Application to Distribute Personal Property to Spouse of Intestate must be made before Final Account is filed (R.C. 2106.01)
    - Hearing on account must be set **not earlier than 30 days** after account is filed (R.C. 2109.32)
    - Notice of hearing shall be served **at least 15 days prior** to the hearing on account (R.C. 2109.33)
    - Exceptions to an account must be filed **at least 5 days prior** to the hearing (R.C. 2109.33)

- Report of newly discovered assets must be made **within 30 days** after receipt of such assets (R.C. 2113.69)

- Determination of Heirs must occur before distribution of the estate (R.C. 2123.01)

- Distribution may occur at any time following appointment if no Will Contest (subject to creditor claims) (R.C. 2113.53)
    - Creditors have 6 months from date of death of decedent to make claims against the estate (R.C. 2117.06)

- **Miscellaneous**
  - Action to sell real estate is proper when personal estate found insufficient to pay debts of legacies (R.C. 2127.02 and R.C. 2127.03)
  - Fiduciary may petition the court for authority to purchase property of the estate if certain conditions are met (R.C. 2109.44)

CHECKLIST FOR ACCOUNTS

I. REQUIREMENTS

A. GENERAL

1. Legible
2. Mathematically correct
3. Accounting period covered by account
4. Current address and telephone number of fiduciary (update computer, if necessary)
5. Current address, telephone number and registration number of attorney (update computer, if necessary)
6. Include all assets carried forward from inventory or last account
7. Include additional assets acquired since Inventory or last account
8. Computation, court order, or consent for fiduciary fees (consents not available in guardianships)
9. Court order or consent for attorney fees (consents not available in guardianships)
10. Proof of existence of all assets on hand
11. Court costs paid.

B. REAL ESTATE

1. Escrow statements for sales of real estate
2. Gross sales price and all expenses itemized on account.

C. PERSONAL PROPERTY

1. Detailed description (e.g. name of institution and account number for bank accounts, name of company and number of shares of stocks)
2. Inclusion of interest and dividend income or any other return on assets

D. BOND

1. Amount equal to double the value of all personal property. Ohio Rev. Code Sec. 2109.04, 2109.06
2. Additional bond order if increase in amount of bond required.

E. EXECUTION

1. Signature of fiduciary
2. Must be an original signature, not a copy

II. ADDITIONAL REQUIREMENTS FOR ESTATE, GUARDIANSHIPS AND TRUSTS

A. ESTATES

1. If Will probated, Certificate of Service of Notice of Probate of Will required before any accounts filed.

2. If partial account, Application to Extend Administration (Form 13.8) required
3. If third partial or more, or if estate three or more years old, written explanation required as to why estate still open together with approval of magistrate
4. Distributions pursuant to Statute of Descent and Distribution (Ohio Rev. Code Sec.2105.06) or terms of Will, whichever is applicable
5. Certificate of Transfer if real estate not sold
6. Final account can not be filed until three months have elapsed from filing of Certificate of Service of Notice of Probate of Will (the will contest period- Ohio Rev. Code. Sec. 2107.76)
7. If final account, confirm the following are paid:
    1. Funeral bill
    2. Appraisal fee
    3. Family allowance, if applicable
    4. All claims
    5. Ohio Estate Tax
8. If final account, Certificate of Service of Account to Heirs or Beneficiaries (Form 13.9) required, unless waiver is filed

B. GUARDIANSHIPS

1. Court approval for all expenditures (i.e. authority to expend funds)
2. Cancelled checks/receipts (vouchers) filed for all disbursements
3. Guardian Report (Form 17.7) and Statement of Expert Evaluation (Form 17.1) for guardianships of incompetents
4. Computation for guardian fee pursuant to Rule 73.1 of the Cuyahoga County Probate Court

C. TRUSTS

1. Distributions to beneficiaries pursuant to terms of trust
2. Cancelled checks/receipts (vouchers) filed for all disbursements)
3. Computation for trustee fees pursuant to Rule 74.1 of the Cuyahoga County Probate Court

III. ALTERNATIVE FOR ESTATES - CERTIFICATES OF TERMINATION

A. PURPOSE

1. Simplification of Probate process where fiduciary is the sole heir
2. Eliminates need for filing of accounts

B. REQUIREMENTS

1. Fiduciary is sole heir
2. Date of death of decedent on or after June 23, 1994
3. Approval of inventory
4. Will contest period elapsed
5. Ohio Estate Tax return filed and tax paid.

CHECKLIST FOR INVENTORIES

I. REQUIREMENTS

A. GENERAL
1. Legible
2. Mathematically correct
3. Current address and telephone number of fiduciary (update computer, if necessary)
4. Current address, telephone number and registration number of attorney (update computer, if necessary)

B. REAL ESTATE
1. Address
2. Statement of interest owned by decedent (e.g.½, full, etc.)
3. Statement of Value

C. PERSONALPROPER1Y
1. Detailed description (e.g. name of institution and account number for bank accounts, name of company and number of shares of stocks)
2. Statement of Value

D. BOND
1. Amount equal to double the value of all personal property. Ohio Rev. Code Sec. 2109.04, 2109.06
2. Additional bond order if increase in amount of bond required.

E. EXECUTION
1. Signature of fiduciary
2. Must be an original signature, not a copy

II. ADDITIONAL REQUIREMENTS FOR ESTATE AND GUARDIANSHIPS

A. ESTATES
1. Issuance by Court
2. Signature of court-appointed appraiser, or attach County Auditor's value, if elected
3. Full legal description for real estate
4. Signature of surviving spouse on Waiver of Notice of Taking of Inventory or evidence of service (i.e. certified mail receipt). Ohio Rev. Code Sec. 2115.04
5. Service of notice of hearing upon heirs or beneficiaries

B. GUARDIANSHIPS

1. All income, including social security and pensions, must be listed at total for 24 months (12 months if Veteran's Administration benefits received)
2. Amount of bond includes double the amount of the income listed.

Cuyahoga County

Probate Court Procedure Manual

For Counter Personnel

Updated August 2012

Table of Contents

INTRODUCTION

The purpose of this guide is to assist Counter personnel in learning the primary duties and procedures of the Applications and Information Counter. It is not intended to be a definitive guide; Counter procedure is complex and frequently demands the help and continued cooperation from all Counter personnel. It is hoped, however, that this guide will form a basis from which an understanding of daily Counter procedures can be grasped.

The guide begins with a brief explanation of how the Court processes an application (or motion, or order, etc.). A general description of department procedure follows, and provides reference information necessary for processing applications. Further information can be obtained from the ***Ohio Probate Code*** book.

I. General Workflow

Filings at the Probate Court circulate through a procedural review from department to department according to a systematic process, or ***WORKFLOW.*** Although the Applications and Information Department reviews and processes a variety of Probate applications, most of the work results from Estate, Guardianship, and Name Change cases.

ESTATES

All new filings, including estate filings, generally begin at the Applications and Information department, where names are indexed against the Probate Court record. Currently, the Court record includes the Courtview database (1975 - present cases) and the microfiche slides (cases from 1890 - 1997). Application names must be indexed to determine whether there has been a previous filing with the Court, including any/all Wills deposited at the Court for safe keeping. After indexing, Counter personnel review the application for proper jurisdiction and completion.

Upon review, all new estate applications must be accompanied by a **Face Sheet** before they proceed to the **Cashier department** for Court costs and case number assignment. In the event that a hearing is required, notification as such is provided on the application's Face Sheet before it proceeds to the Cashier department and appropriate departments for **scheduling.**

Once an application has been assigned a case number, further docket entries and case information are entered into the Court record by the **Data Entry department.**
All letters of appointment/certifications are issued by the Quality Assurance department.

Guardianships

The Application is brought to the **Applications and Information Counter** for review. All new guardianship filings must first be indexed against Court records, including the Courtview database (1975 - present cases) and the microfiche slides (cases from 1890 - 1997). Any prior guardianship filings will reference/retain the same case number. Incompetent guardianships are also indexed for possible **Nomination as Guardian** (O.R.C. 2111.121) deposited with the court for safe keeping.

After indexing and further Counter review, the application proceeds to the **Cashier Department** for Court costs and case number assignment. After a case number has been assigned, the application is forwarded to the **Guardianship Department,** Room 257, for final review, data entry, issuance of notices, and scheduling of a hearing date. **All letters of appointment/certifications are issued by the Quality Assurance Department.**

NAME CHANGES

All applications for name changes begin at the **Applications Counter** for indexing and review. After Counter review, the application proceeds to the **Cashier Department** for payment of Court Costs and case number assignment. After a case number has been assigned, **a hearing date must be scheduled in Room 117.**

(Note: When a previous name change for a minor has been denied in Cuyahoga County, any subsequent application for change of the minor's name will retain the same case number.)

FACE SHEETS

Counter personnel must attach a **Face Sheet** to each new filing. The Applications Department reviews each new filing that the Applications Department reviews (including guardianship, estate, etc.). Face Sheets perform essential functions to ensure proper filing procedure:

- As a step-by-step checklist to confirm appropriate Counter review
- As an identification of action codes for the Cashier department to create initial docket entries
- As a means of providing Notice to the Estate Recovery (MEDICAID) Program
- As a means of correspondence between departments and Court Magistrates
- As a numerical, room-to-room guide for persons filing at Probate Court

All Face Sheets must be initialed by the clerk who has reviewed the application.

II. Counter Procedural Review

APPLICATIONS AND INFORMATION COUNTER PROCEDURE

Every application filed at the Applications and Information Counter must be thoroughly indexed prior to further processing and review. Indexing provides Counter personnel with all pertinent information that may affect the application and filing procedures. After the application has been indexed (and completed, if necessary), Counter personnel continue to review each document for jurisdiction and any errors or omissions. Counter staff will determine if all applicable provisions have been met for the purpose of proper filing with the Court. The following *Ohio Probate Code* and Cuyahoga Probate Court rules apply:

NOTICE TO ADMINISTRATOR OF ESTATE RECOVERY PROGRAM (O.R.C. 2117.061)

Upon filing of an Application for Authority to Administer Estate (Form 4.0), Application to Relieve Estate from Administration (Form 5.0), or Application for Summary Release from Administration (Form 5.10) where the decedent had a date of death on or after September 26, 2003, was age 55 years or older, and was a recipient of MEDICAID the person responsible for the estate (i.e. the Fiduciary, Applicant, or Commissioner) shall issue notice by certificate mail using the Notice to Administrator of Estate Recovery Program (Form 7.0).

Counter personnel shall issue Form 7.0 at the time of the estate filing when the Applicant for the estate indicates "yes" to the decedent's receipt of MEDICAID benefits. This notice is issued to the Estate Recovery Division of the Attorney General of Ohio. Once service is perfected it is filed with Counter personnel along with the green return receipt showing delivery and is docketed with code "NOA" with narrative entry "Notice to Administrator of Estate Recovery Program filed."

APPLICATION TO PROBATE WILL

Jurisdiction: a Will shall be admitted for Probate (O.R.C. 2107.11)

1. In the county of domicile of the testator, if domiciled in Ohio; or

2. In any county of Ohio where real or personal property of the testator is located, provided that the testator was not domiciled in this state and such Will has not previously been admitted for Probate in this state, or the state of the testator's domicile.

Examination of Will

1. Will must be properly executed, including **signatures of the testator and two witnesses.**

2. Will must be **original,** not a copy. (If there are any questions regarding the validity of the Will, Applicants should be directed to a Magistrate for further review, prior to case number assignment.)

Examination of Application to Probate Will (Form 2.0)

Application must contain the following:

1. Testator's name and any variations (AKAs, FKAs, and OWs)
2. Case number, if previously assigned
3. Testator's date of death (Note: All Applicants, with exception to attorneys, should present a copy of the Death Certificate for review)
4. Complete address of decedent's domicile
5. Signature, typed/printed name, address, and phone number of each Applicant
6. Signature, typed/printed name, address, phone and registration number of Applicant's attorney, if any
7. Attached and completed Next **of Kin page (Form 1.0),** listing the surviving spouse, if any, and/or all next of kin and vested beneficiaries, including:

   a) next of kin determined by O.R.C. 2105.06

   b) address(es), if known, relationships of next of kin (including birth date of any minors) must be indicated

   c) where applicable, the appropriate box checked regarding surviving spouse's relationship to decedent's children (i.e., natural/adoptive parent of decedent's children, or stepparent to decedent's children)

   d) address(es) of vested beneficiaries should be indicated

   e) the appropriate box regarding charitable trusts should be checked

f) signature of the Applicant, or his/her attorney, and the date of signing

Presentation and Admittance of Will

After examination, Counter personnel must affix the **Will Presented for Probate** stamp (to the left) and **Will Admitted for Probate** stamp (to the right) margins of the application, below the caption lines, including a **date stamp** and **reviewer's initials** for each notation.

After the Will has been admitted, the reviewer must note the number of pages in the Will at the top of the application. At the back of the admitted Will, reviewer must note the number of pages in the Will at the top of the application. At the back of the admitted Will, reviewer should note that the Will has been probated, including the decedent's last name and date of admittance.

Notice of Probate of Will (Date of death prior to 5/31/90)

1. Notice or Waiver (Form 2.1) must be given by Applicant to:

a) surviving spouse, regardless ofresidence

b) next of kin residing in United States

Certificate of Service of Notice of Probate of Will *(O.R.C.* 2107.19) (Forms 2.4, 2.1, 2.2)

1. When a Will has been admitted for Probate, an interested party shall serve **Notice (Form 2.2) or obtain a written Waiver** from all next of kin pursuant to O.R.C. 2105.06 and to all vested beneficiaries named in the Will, regardless of residence.

2. If Notice is necessary, it must be served after the Will has been admitted for Probate. Notice is issued by certified mail, addressed to the individual at his/her usual place of residence with a green certified mail receipt showing to whom Notice was delivered and the date of service.

3. If upon attempting to serve Notice by certified mail, such service is refused or undeliverable, a motion to serve by ordinary mail must be filed for the unsuccessful service.

4. **Publication** is ordered through the Court and forwarded to the **Daily Legal News** for all parties and unknown next of kin to be served whose whereabouts are unknown.

5. The certificate of service of notice must be signed by an interested person. When a fiduciary is appointed, the certificate must be filed within 60 days of the date of appointment.

This filing initiates the Will contest period of J. months for estates of decedents who die *on or after* January 1, 2002 or months for decedents who die *before* January 1, 2002.

6. All other service (i.e., Notice to person of equal/lesser priority) governed by rules 73 and 4.2 of Ohio Rules of Civil Procedure.

APPLICATION FOR AUTHORITY TO ADMINISTER ESTATE

Jurisdiction:

1. Testate: letters testamentary or of administration shall be granted by the Probate Court in which such Will was admitted for Probate, if such Will has been admitted for Probate in Ohio

2. **Intestate:** letters of administration shall be granted by the Probate Court of the county in which the decedent resided at the time of death

Examination of Application (Form 4.0)

Application must contain the following:

1. Decedent's name and any variations (AKAs, FKAs, and OWs)
2. Case number, if previously assigned
3. Decedent's date of death (all Applicants, with exception to attorneys, should present a copy of the Death Certificate for review)
4. Complete address of decedent's domicile
5. The correct fiduciary designation
6. The appropriate box checked, indicating ***decedent did not leave a Will, Will admitted for Probate, or a supplemental application for ancillary administration is attached***
7. If a Will has been probated, reviewer should note **"WPB"** in the top-left comer of the application and the date the Will was admitted for Probate
8. Iflntestate, an attached and completed **Next of Kin page (Form 1.0),** listing the surviving spouse, if any, and/or all next of kin and vested beneficiaries
9. Estimated values of personal and real properties, as well as any rental income the fiduciary will receive
10. The amount the Applicant owes the estate
11. The amount the estate owes the Applicant
12. The appropriate box checked regarding bond, or waiver thereof according to Will
13. Signature, typed/printed name and variations, address, and phone number of Applicant
14. Signature, typed/printed name, address and phone number and registration number of Applicant's attorney, if any

Fiduciary Qualifications and Residency Requirements

1. Testate: Persons entitled to administer estate determined by Will, O.R.C. 2113.05, 2109.21:

a) Named executor, ifresident of Ohio, except that a non-resident may be appointed, if qualified, pursuant to a Will, who is related to decedent by blood or marriage or if not, resides in a state that has statute and rules that authorize a nonresident to serve as executor when named in a Will (O.R.C. 2109.21).

A nonresident executor is required to post Bond

b) Next of kin, ifresident of Ohio, who are also vested beneficiaries in the Will

c) Any suitable person, if resident of Ohio, with approval of the Court

2. **Intestate:** persons entitled to administer estate determined by O.R.C. 2113.06, 2109.21:

a) Surviving spouse, ifresident of Ohio

b) Next of kin, if resident of Ohio

c) Any suitable person, if resident of Ohio, with approval of Court

Testate Appointment of Fiduciary for Probate Estates

Once the application has been reviewed and if the Will requires no bond and has been admitted for Probate, Counter personnel may grant appointment to the named executor (or alternate executor, etc.), noting **"Heard and Granted without Bond"** and the date and reviewer's initials to the right-hand margin of the application.

If the named executor is not currently a resident of Ohio, the application must be sent to a Magistrate for further review and the setting of bond.

Intestate Appointment of Fiduciary for Probate Estates

(Including Administration with Will annexed - WWA)

Once the application has been reviewed, select Counter personnel are permitted to set bond when the Applicant is the direct line of kinship (O.R.C. 2105.06) and resident of Ohio.

The bond shall be waived (O.R.C. 2109.07) if the Applicant is the surviving spouse or the Applicant is the next-of-kin and entitled to the entire net proceeds of the estate.

All other related persons applying to administer an estate must be sent to a Magistrate for further review and the setting of bond.

Non related Applicants require the approval of filing by Magistrate John Polito or Magistrate Charles Brown.

Notice of Hearing on Appointment of Fiduciary (Form 4.4)

Notice of Hearing on Appointment of Fiduciary must be issued prior to case number assignment. When someone other than person having priority to administer estate applies, the

application is set for hearing and notice is given by citation, where possible, to all parties having first rights to serve as fiduciary that have not waived their right to administer the estate.

All other service (i.e., notice to person of equal/lesser priority) governed by rules 73 and 4.2 of Ohio Rules of Civil Procedure.

Notice to Administrator of the Estate Recovery Program (Form 7.0)

When applicable refer to page 6.

Citation to Surviving Spouse [O.R.C. 2106.0l(A)]

On appointment of Fiduciary with Application to Administer Estate, or if necessary the filing of a Bond, Probate Court shall issue a citation to the surviving spouse concerning his/her rights.

After examination Counter personnel shall affix **Issued Citation to Spouse** stamp to the top right margin of the Application. This Citation is then issued by the Data Entry Department for dates of death on or after January **1,** 2002. For dates of death occurring before January 1, 2002, Counter personnel shall affix the **Old Law** stamp to the top right margin of the Application. The Accounting Department shall issue the citation upon filing of the Inventory.

Waiver of Service to Surviving Spouse of the Citation to Elect (FORM 8.6) [O.R.C. 2106.0l(A)]

The surviving spouse may waive Citation by submitting to the Court (Form 8.6), Waiver of Service to Surviving Spouse of the Citation to Elect. This Waiver shall be attached to the Application for Authority to Administer Estate (Form 4.0). After examination and acceptance of the Waiver, Counter personnel must enter the following notation in the upper right hand comer of Form 4.0: **"Waiver of Citation filed."**

COURT APPOINTMENT OF AN APPRAISER

For all estates where a fiduciary has been appointed, the Court requires the fiduciary to file for an **Appointment of an Appraiser (Form 3.0).** All real property must be listed with estimated values (the Fiduciary may accept the Cuyahoga County Auditor's valuation or request a Court appointed appraiser), including the full address of all real estate. For real estate located in Ohio, but in a county other than Cuyahoga, the Fiduciary must file an additional **Appointment of Appraiser (Form 3.0).** Two inventories will be issued and required. Upon acceptance, Counter personnel must note the fiduciary appointment date at the top of the application and their initials at the lower left comer of the application. This filing precedes the issuance of the estate Inventory and Appraisal.

ANCILLARY ADMINISTRATION OF A PROBATE ESTATE

An ancillary administration proceeds as a second or subsequent action to collect assets or to commence litigation on behalf of the estate in that jurisdiction when a decedent dies testate or intestate and was not a resident of Ohio at the date of death.

Real estate within Cuyahoga County owned by the decedent of another state must be transferred by one of the following proceedings:

Transfer of Real Estate to Heirs

When decedent's domicile is outside of Ohio and real estate is located in Cuyahoga County, Court proceedings must have been filed in another state prior to transfer of the real estate to heirs. Such proceedings must be filed with a Court Magistrate in Cuyahoga County and be accompanied by:

1) a Motion to Admit Exemplified Copy of Proceedings to Record

2) an Application for **Certificate of Transfer (Forms 12.0, 12.1 and 10.4)**

(Exception: Where decedent's only probate asset is real property located in Cuyahoga County)

Sale of Real Estate (including Sale for Payment of Debts)

When decedent's domicile is outside of Ohio and real estate is located in Cuyahoga County, Court proceedings must have been filed in another state prior to sale of the real estate. Such proceedings must be filed with a Court Magistrate in Cuyahoga County and be accompanied by:

1) a Motion to Admit Exemplified Copy of Proceedings to Record

2) a supplemental Ancillary Application for Authority to Administer (Form 4.1).

(Exception: Where decedent's only probate asset is real property located in Cuyahoga County)

When no principal domiciliary administration has been commenced in another state, no exemplification of proceedings is necessary for sale or transfer of real estate. Rather, sale or transfer must proceed with the administration of the estate in the county in which the property is located.

APPLICATION TO RELIEVE ESTATE FROM ADMINISTRATION

(Forms 5.0, 1.0, 5.1, 5.6, and where applicable, 12.1)

Examination of Application (Form 5.0)

Application must contain the following:

1. Decedent's name and any variations (AKAs, FKAs, and OWs)

2. Case number, if previously assigned

3. Decedent's date of death (all Applicants, with exception to attorneys, should present a copy of the Death Certificate for review)

4. Complete address of decedent's domicile

5. The appropriate box checked, indicating: **Decedent's Will has been admitted to Probate** or **Decedent did not leave a Will**

6. The appropriate box checked, indicating the monetary value of decedent's estate with respect to decedent's date of death

7. Signature, typed/printed name and variations, address, and phone number of Applicant

8. Signature, typed/printed name, address and phone number and registration number of Applicant's attorney, if any

9. Iflntestate, an attached and completed **Next of Kin page (Form 1.0),** listing the surviving spouse, if any, and/or all next of kin and vested beneficiaries

10. An attached and completed list (Form 5.1) of **decedent's Probate assets and debts,** including **documents verifying Probate assets and a paid funeral and cemetery bill receipt or waiver from funeral director.** The form should be dated and signed by the Applicant.

11. An attached and completed **Entry (Form 5.6),** containing the following:

a) Decedent's name and any variations (AKAs, FKAs, OWs)

b) The case number, if previously assigned

c) The appropriate box checked indicating a **testate or intestate** application

d) Names of distributes

e) Exact description of property passing to the distribute(s), including value

12. Where applicable, an attached and completed **Certificate of Transfer (Form 12.1),** containing the following:

a) Decedent's name and any variations (AKAs, FKAs, OWs)

b) The case number, if previously assigned

c) Certificate of Transfer number **(NOTE:** The appropriate box referencing the certificate of transfer should be checked and completed on the **Entry (Form 5.6))**

d) The appropriate box checked indicating a **testate** or **intestate** application

e) Decedent's date of death

f) Name(s) and address(es) or person(s) to whom real estate is passing

g) The interest passing to each person (i.e., if person designated is entitled to one-half of decedent's interest, note one-half, regardless of the interest decedent held)

h) On the reverse side of the Certificate (Form 12.1), the decedent's interest in real estate and the legal description of real estate passing, including the permanent parcel number should be indicated

OHIO ESTATE TAX Form 22 must be filed for any transfer of real estate.
All Ohio Estate Tax (OET) forms can be picked up in Rm. 105 at the Probate Court.

Notice to Administrator of the Estate Recovery Program (Form 7.0) When applicable refer to page 6.

APPLICATION FOR SUMMARY RELEASE FROM ADMINISTRATION

(Forms 5.10, 1.0, 5.11 and where applicable, 12.0 and 12.1)

Applicant qualifications. Applicant must be either the decedent's surviving spouse or the Next of Kin who has paid or is obligated in writing to pay decedent's funeral and burial expenses. Application must contain the following: O.R.C. 2113.031

Note: When filing the **Summary Release** it is not necessary to Probate a will unless the will has been deposited with the Court for safe keeping.

Examination of Application (Form 5.10)

Application must contain the following:

1. Decedent's name and any variations (AKAs, FKAs, OWs)
2. Case number, if previously assigned
3. Decedent's date of death (all Applicants, with exception to attorneys, should present a copy of the Death Certificate for review)
4. Complete address of decedent's domicile
5. The appropriate box checked indicating: ***the applicant is the decedent's surviving spouse or Next of Kin who has paid or is obligated in writing to pay decedent's funeral and burial expenses.***
6. List of Assets (valued at time of death): motor vehicles, accounts at financial institution, stocks and bonds, real estate (use Form 12.0 and 12.1), etc. Including documents verifying Probate assets with a paid funeral and cemetery bill.
7. Signature, typed/printed name, address and phone number and registration number of Applicant's attorney, if any
8. Signature, typed/printed name, address, and phone number of each Applicant
9. Notary or deputy clerk signature and seal

Attach **Next of Kin page** (Form 1.0) listing the surviving spouse, if any, and/or all next of kind and, where applicable, vested beneficiaries.

Entry Granting Summary Release from Administration (Form 5.11)

1. Decedent's name and any variations (AKAs, FKAs, OWs)
2. The case number, if previously assigned
3. Applicant's name
4. Appropriate box checked: relating to property or certificate of transfer.

Where applicable, an attached and complete **Certificate of Transfer (Form 12.0)**

1. Decedent's name and any variations (AKAs, FKAs, OWs)
2. The case number, if previously assigned
3. Date of Death
4. Complete address of decedent's domicile
5. Enter Certificate of Transfer number
6. Check applicable boxes (a) decedent died intestate or testate, and (b) the Transfer is pursuant to decedent's will or pursuant to the statutes of descent and distribution.
7. Signature of Applicant and Title or status
8. An attached and completed **Certificate of Transfer (Forms 12.1),** containing the following:
    a) Decedent's name and any variations (AKAs, FKAs, OWs)
    b) The case number, if previously assigned
    c) Certificate of Transfer number
    d) The appropriate box checked indicated a **testate or intestate** application
    e) Decedent's date of death
    f) Name(s) and address(es) or person(s) to whom real estate is passing
    g) The interest passing to each person (i.e., if person designated is entitled to one-half of decedent's interest, note one-half, regardless of the interest decedent held)
    h) On the reverse side of the Certificate (form 12.1), the decedent's interest in real estate and the legal description of real estate passing, including the permanent parcel number should be indicated

Notice to Administrator of the Estate recovery Program (Form 7.0) When applicable refer to page 6.

APPLICATION FOR APPOINTMENT OF TESTAMENTARY TRUSTEE

A **Testamentary Trust** is a trust established **within a Will** and executed upon death of the testator with the formalities required of a Will.

Qualifications and Residency Requirements

Named Trustee may be appointed, ifresident of Ohio, except that a non resident may be appointed, if qualified and pursuant to a Will, who is related to decedent by blood or marriage or if not, resides in a state that has statute and rules that authorize a nonresident to serve as trustee when named in a Will (O.R.C. 2109.21). **A non-resident trustee is required to post Bond.**

Examination of Application (Form PC-42)

*A **copy of decedent's Will** must accompany the Application which contains the following:*

1. The testator's name and any variations, as appears in estate file

2. The testator's city and state ofresident

3. The names of the trust beneficiaries

4. The testator's name, as above, and case number of prior Estate filing

5. Estimated values of the personal and real properties, as well as any rental income the trustee will receive

6. The appropriate box checked regarding bond or waiver thereof according to decedent's Will

7. Signature, typed/printed name and variations, address and phone number of each Applicant

8. Typed/printed name, address and phone number and registration number of Applicant's attorney, if any

9. An acceptance of duties as trustee, signed by each Applicant

Appointment of Trustee and Notice of Appointment

Once the application has been reviewed and if the admitted Will requires no bond of the Trustee, Counter personnel may grant appointment to the named Trustee (or alternate trustee, etc.), noting the appointment at the right-hand margin of the application as **"Heard and Granted without Bond," including date-stamp and reviewer's initials.**

If the named trustee is not currently a resident of Ohio, the application must be sent to a Magistrate for further review and the setting of bond.

If someone other than the person(s) named as trustee(s) in decedent's Will applies, notice must be issued to the person(s) named as trustee(s), including any/all alternates.

All other related persons applying as Trustee must be sent to a Magistrate for further review and the setting of bond.

Non related Applicants require the approval by Magistrate John Polito or Magistrate Charles Brown.

APPLICATION FOR APPOINTMENT OF GUARDIAN FOR INCOMPETENT

Jurisdiction:

1. Resident ward: letters of guardianship shall be granted by the Probate Court of the county in which the person for whom appointment is sought currently resides or has a legal settlement

2. **Nonresident ward:** letters of guardianship of the estate only may be granted by the Probate Court of the county in which property of the ward, or a portion thereof, is situated

Qualifications and Residency Requirements

Determined by O.R.C.2111.02, 2109.21(C) (as follows):

Any interest party, resident of the state of Ohio may apply as guardian, where any directed next-of-kin of the prospective ward shall have the first rights to apply as guardian or waive their notice and consent of any other application.

Non related Applicants (Person Only) require the approval of filing by any Magistrate.

Non related Applicants for guardian of the estate require the approval of filing by Magistrate John Polito or Magistrate Charles Brown.

Examination of Application (Forms 17.0, 15.0, 17.1, 15.2)

Application must contain the following: O.R.C. 2111.03:

1. The name of the prospective ward and any variations (AKAs, FKAs, OWs)
2. The case number, if previously assigned
3. The name and age of the prospective ward, as alleged by Applicant
4. The current and legal residencies of the prospective ward
5. Brief description of the prospective ward's disability, O.R.C.2111.01
6. A description of the prospective ward's estate, both personal and real properties, including any rental income
7. Question as to whether Applicant is a fiduciary of an estate wherein prospective ward has an interest
8. Type of guardianship applied for (e.g., limited, person, person and estate, etc.)
9. Length of guardianship noted as Indefinite or Definite (if definite, note month and year)
10. Relationship of Applicant to prospective ward
11. Applicant's statement of charges or conviction of crime

12. Applicant's signature, typed/printed full address and phone number, age, and social security number
13. Typed/printed name, address, phone and registration number of Applicant's attorney, if any
14. An attached and completed **Next of Kin page (Form 15.0)** for the prospective ward, as determined by O.R.C. 2105.06, indicating relationship and address of each next of kin, including the birth date of any minor
15. A **Statement of Expert Evaluation (Form 17.1),** as determined by O.R.C.2111.031, must be completed for the hearing or attached at the time of filing
16. An attached and signed **Fiduciary's Acceptance (Form 15.2)** as Guardian

Note: any/all notice of guardianship is issued by the Guardianship Department.

APPLICATION FOR APPOINTMENT OF GUARDIAN FOR MINOR

Jurisdiction:

1. Resident ward: letters of guardianship shall be granted by the Probate Court of the county in which the person for whom appointment is sought currently resides or has a legal settlement

2. **Nonresident ward:** letters of guardianship of the estate only may be granted by the Probate Court of the county in which property of the ward, or a portion thereof, is situated

Note:

A. Applicants must be questioned if custody has EVER been granted or is pending with any other Court or agency (i.e., Domestic Relations, Juvenile Court).

B. If the Applicant for the minor is the grandparent, the grandparent may file (1) Power of Attorney (POA) completed by parent(s), a custodian, or a guardian of a child, or (2) Child Caretaker Authorization Affidavit (CAA), created by the grandparent when the child's parent(s), guardian, or custodian cannot be located. The grandparent must file the POA or CAA with the Juvenile Court, Clerk of Court of the county where the grandparent resides or any court that has jurisdiction over the child.

Qualifications and Residency Requirements

Determined by O.R.C.2111.02, 2109.21 (as follows)

Any interested party, resident of the state of Ohio may apply as guardian, where any direct next-of-kin of the prospective ward shall have the first rights to apply as guardian or waive their notice and consent of any other application.

Non related Applicants (Person Only) require the approval of filing by any Magistrate.

Non related Applicants for guardian of the estate require the approval of filing by Magistrate John Polito or Magistrate Charles Brown.

Examination of Application (Forms 16.0, 15.0, 16.1, 15.2)

Application must contain the following: O.R.C. 2111.03:

1. The name(s) of minor and any variations
2. The case number, if previously assigned
3. The county of Applicant
4. Name, date of birth and current residence of minor
5. Reason for guardianship, O.R.C.2111.06
6. Type of guardianship (e.g., limited, person, person and estate, etc.)

7. Length of guardianship noted as Indefinite or Definite (if Definite, note month and year)

8. Applicant's statement of charges or conviction of crime

9. Description of minor's estate, both personal and real properties, including any rental income

10. Signature, typed/printed full address and phone number of the Applicant and **their relation to prospective ward**

11. Typed/printed name, address, phone and registration number of Applicant's attorney, if any

12. Consent or **Selection of Guardian (Form 16.2)** by the minor over fourteen years of age must be completed by the hearing or at the time of filing

13. An attached and completed **Next of Kin page (Form 15.0)** of the minor(s) as determined by O.R.C. 2105.06, indicating relationship and address of each next of kin, including the birth date of any minors

14. An **Affidavit (form 16.1),** signed by the Applicant and notarized, concerning residence and any custody proceedings involving the minor, when guardianship of the Person of the minor is sought, including:

a) Minor's residence within the last five years

b) Whether Applicant has been a participant in any other custody proceeding

c) Whether Applicant has information of any other custody proceeding

d) Whether Applicant has knowledge of any person, other than those stated in the application, who claims custody or visitation rights

15. An attached and signed Fiduciary's Acceptance as Guardian

Notice Must Be Issued by Guardianship Department and Given To:

a) Each minor for whom appointment is sought, if over fourteen years of age

b) Each parent of the minor whose name and address is known or can be ascertained and provided that the parent is free from disability other than minority

If parent's name or whereabouts is unknown, an **Affidavit (Form PC-NC-4)** attesting such is required

c) The next of kin known if:

1) There is no living parent

2) The name and address of the parent cannot be ascertained

3) The parent is under disability other than minority

d) The person having custody of the minor

Method of service upon minor for whom appointment is sought, if over fourteen years of age, governed by O.R.C.2111.04:

a) Personal service by Sheriff

b) Personal service by Applicant or Guardianship department

Method of service upon all other parties by rules 73 and 4.2 of Rules of Civil Procedure

III. Bonds

BONDS

All fiduciary bonds filed with the Court must contain the following:

1. Proper caption, as appears on the application to appoint fiduciary, including variations
2. Case number if previously assigned
3. Amount of bond obtained (must be at least the amount ordered by Court, if previously ordered)
4. Signature, typed/printed name and variations (as appear on the application) of the fiduciary/principal
5. Typed/printed name of the surety bonding company and bonding agent, registered with the Court database or with proper certification (e.g., Power of Attorney)
6. The correct fiduciary title (where applicable) stamped at the bottom of the bond.
7. Upon review and approval, bond must be stamped **"FILED"** and initialed by Counter personnel before it is processed to the Data Entry (or to the Cashier's department, when a case number has not been previously assigned)

ADDITIONAL BONDS

Every additional bond filed with the Court must be obtained from the same surety bonding company as the original bond. In addition to the requirements for original bonds above, additional bonds must be accompanied by an order of bond by the Court, issued by a Magistrate or by the Accounts Department.

Once the additional bond has been reviewed and accepted for approval, it must be stamped **"FILED,"** initialed, and docketed by Counter personnel.

Appendices

A. Fiduciary Titles

B. Docket Entry Codes

A. FIDUCIARY TITLES

The following are the titles of fiduciaries and their successors appointed by the Court. (Note: A successor fiduciary may be appointed only if the prior fiduciary has died, resigned, or been removed.):

Testate Estate

Executor (First-named or Alternates)

Successor Executor (After appointment, if named as Alternate in Will)

Administrator W.W.A. (Executors and/or Alternates declined, deceased with no prior appointment)

Administrator D.B.N. W.W.A. (After appointment, if deceased, resigned, or removed)

Successor Administrator D.B.N. W.W.A. (If deceased, resigned, or removed) or

Intestate Estate

Administrator (No Will)

Administrator D.B.N. (After appointment, if deceased, resigned, or removed)

Successor Administrator D.B.N. (If deceased, resigned, or removed)

Ancillary Administration

Ancillary Administrator/ Successor Ancillary Administrator

Testamentary Trust

Testamentary Trustee/ Successor Testamentary Trustee

Guardianship

Guardian/ Successor Guardian

B. DOCKET ENTRY CODES

BONDS

1. BOND	Bond ordered in the amount of$ _ , where previous bond was $0.00
2.BONDADD (Order for Additional Bond)	Additional Bond Ordered in the amount of $_
3. FIDBONDADD (Bond Filed)	Fiduciary's Additional Bond in the amount of $___ filed, given with: _

CERTIFICATE OF NOTICE

1. ES2.4	Certificate of Service of Notice to Probate Will filed
2. ES2.4SUPP	Supplemental Certificate of Service of Notice to Probate Will filed

SERVICE

1. PS (Personal Service)	Personal Service

Upon Return of Service and Subpoena

2.SS (Successful Service Return)	Successful Service
3. US (Unsuccessful Service Return)	Unsuccessful Service
4. PC105-1RET (for Subpoenas)	Return of Subpoena *Docket wording: "Return of Subpoena for (Servee), served (date)."

PUBLICATION

11. PUBORD	Publication Ordered

ESTATE RECOVERY

I.NOA	Notice to Administrator of Estate Recovery Program Filed

BARE BONES
OF
INSOLVENCY LAW
&
ORDER OF PAYMENT OF DEBTS

SECTION 2117.15, OHIO REVISED CODE: PAYMENT OF DEBTS

An executor or administrator may proceed to pay the debts due from the estate in accordance with Chapters 2113. to 2125. of the Revised Code. If it appears at any time that the estate is insolvent, the executor or administrator may report that fact to the court, and apply for any order that the executor or administrator considers necessary because of the insolvency. In case of insolvency, a creditor who has been paid according to law shall not be required to make any refund.

SECTION 2117.25, OHIO REVISED CODE: ORDER OF PAYMENT

"(A) Every executor or administrator shall proceed with diligence to pay the debts of the decedent and shall apply the assets in the following order:"

(1) Costs and expenses of administration;

(2) An amount, not exceeding four thousand dollars, for funeral expenses that are included in the bill of a funeral director, funeral expenses other than those in the bill of a funeral director that are approved by the probate court, and an amount, not exceeding three thousand dollars, for burial and cemetery expenses, including that portion of the funeral director's bill allocated to cemetery expenses that have been paid to the cemetery by the funeral director.

For purposes of division (A) (2) of this section, burial and cemetery expenses shall be limited to the following:

(a) The purchase of a right of interment;

(b) Monuments or other markers;

(c) The outer burial container;

(d) The cost of opening and closing the place of interment;

(e) The urn.

(3) The allowance for support made to the surviving spouse, minor children, or both under section 2106.13 of the Revised Code;

(4) Debts entitled to a preference under the laws of the United States;

(5) Expenses of the last sickness of the decedent;

(6) If the total bill of a funeral director for funeral expenses exceeds four thousand dollars, then, in addition to the amount described in division (A) (2) of this section, an amount, not exceeding two thousand dollars, for funeral expenses that are included in the bill and that exceed four thousand dollars;

(7) Expenses of the decedent's last continuous stay in a nursing home as defined in section 3721.01 of the Revised Code, residential facility as defined in section 5123.19 of the Revised Code, or hospital long-term care unit as defined in section 3721.50 of the Revised Code.

For purposes of division (A) (7) of this section, a decedent's last continuance stay includes up to thirty consecutive days during which the decedent was temporarily absent from the nursing home, residential facility, or hospital long-term care unit.

(8) Personal property taxes, claims made under the medicaid estate recovery program instituted pursuant to section 5111.11 of the Revised Code, and obligations for which the decedent was personally liable to the state or any of its subdivisions;

(9) Debts for manual labor performed for the decedent within twelve months preceding the decedent's death, not exceeding three hundred dollars to any one person;

(10) Other debts for which claims have been presented and finally allowed.

ADDITION PROVISIONS OF 2117.25, ORC

(C) Any natural person or fiduciary who pays a claim of any creditor of the decedent is subrogated to the rights of that creditor against the estate for payment of such claim;

(Most often experienced by a person who pays some or all of the funeral expenses of a family member)

(D) (2) The giving of written notice to an executor or administrator of the filing of a motion or application to revive an action pending at the time of his death shall be the equivalent to the presentation of a claim to the executor or administrator for the purpose of determining the order of any payment of judgment or decree entered in such action.

(E) No payment shall be made to the creditors of one class until all those of the preceding class are all paid or provided for. If the assets are insufficient to pay all the claims of one class, the creditors of that class shall be paid ratably.

(F) If it appears at any time that the assets have been exhausted in paying prior or preferred charges, allowances, or claims, those payments shall be a bar to an action on any claim not entitled to that priority or preference.

Prepared by:
Magistrate Ralph V. Cosiano
Last Updated 8/28/2012

PROBATE

Originally prepared by John Donnelly, Presiding Judge and John E. Corrigan, Judge
Probate Court, Cuyahoga County
Updated 9/2012 (originally a pamphlet)

The Probate Court

The Probate Court is established in each county of Ohio to supervise the administration of the estate of a decedent who was a legal resident in the county at the time of his or her death. Each transaction involved in the administration of an estate is subject to the examination and approval of the Probate Court.

Other matters within the Probate Court's jurisdiction are: issuance of marriage licenses, adoptions, guardianship proceedings, the involuntary commitment of the mentally ill, and land appropriation cases.

What Is A Probate Estate?

A probate estate is a legal proceeding provided for by Ohio law to determine the assets of a deceased person who was an Ohio resident at the time of death, the value of those assets, and the distribution of those assets to the persons, entitled to them by law.

Why Is A Probate Estate Necessary?

A probate estate is necessary to protect and conserve the assets of a decedent for the heirs, creditors, and other persons interested in an estate. The probate estate will provide for the payment of outstanding debts, the payment of taxes, and the distribution of the remaining assets to the persons entitled to receive them under the decedent's will, or by law.

What Procedures Are Involved In **Probating An Estate?**

The probating of an estate requires the appointment by the Probate Court of a suitable person to supervise the administration of the estate. The person appointed is called an executor, if named in a will, or an administrator, if there is no will.

The executor or administrator may be an individual, a bank, or trust company.

The duties of an executor or administrator are:

1. To determine the names, ages, and degree of relationship of heirs;
2. To take possession of, and conserve all of the real and personal property of the decedent;
3. To file with the Probate Court an inventory of all the assets held in the name of the decedent;

4. To receive and determine the validity of all claims against the decedent's estate;
5. To file tax returns and to pay income and estate taxes;
6. To make distribution of the estate's assets to the property persons;
7. To file an account of all receipts and disbursements made by the executor or administrator with the Probate Court.

If the total value of all property in the decedent's name is $35,000 or less, the estate can be relieved from the administration requirements.

For dates of death on and after March 18, 1999, assets of $100,000 or less can be relieved from administration provided the surviving spouse is the sole heir at law or under a will.

What Is Survivorship Tenancy?

Real estate may be owned by two or more persons in survivorship form so that upon the death of any one of them the title of the deceased person would pass to the survivor or survivors. Title may be transferred without court proceedings by filing an affidavit and death certificate with the County Auditor and Recorder.

What Is Joint and Survivorship Property?

Joint and survivorship property is property held by two or more persons jointly; each party has equal rights of possession and income. On the death of one joint tenant, that interest transfers to the benefit of the survivor or the survivors in equal shares, without court proceedings. One joint tenant can sever the joint tenancy by conveying his or her interest to a third party.

Joint and survivorship ownership may be useful in certain situations. However, court proceedings may be necessary to transfer clear title to the assets and to determine Ohio Estate taxes. Tax consequences can be detrimental to the beneficiaries if joint and survivorship ownership is used imprudently.

What Costs Are Involved In Probating An Estate?

The costs involving in probating an estate are court costs, executor or administrator fees, attorney fees, and taxes.

Court costs are based on a schedule of charges established by the state legislature for each type of document filed in the Probate Court. A court cost deposit of $125 is required when opening an estate, although $200 is recommended to cover additional costs which accrue with subsequent filings.

Executor or administrator fees are established by the state legislature and are based on a percentage of the estate. The percentages are from 1% to 4%, depending upon the nature and value of the assets.

Attorney fees are based on Rule 71.1 of the Probate Court of Cuyahoga County, which reads as follows:

"(A) **Court's Authority to Determine Attorney Fees.** Attorney fees for the administration of a decedent's estate shall be reasonable and beneficial to the decedent's estate. Attorney fees are governed by the Rules of Professional Conduct and the Rules of Superintendence adopted by the Supreme Court of Ohio. The Court has the ultimate responsibility and authority to determine attorney fees in a decedent's estate as required by such Rules.

(B) **Ordinary Fees.** Attorney fees for the administration of a decedent's estate computed in accordance with the schedule of compensation set forth below shall be approved without a hearing. Such schedule however, is not to be considered or represented to clients as a schedule of minimum or maximum attorney fees to be charged.

(1) Appraised value (when not sold) or gross proceeds (when sold) of personal property included on the inventory; gross proceeds of sale of real estate under power of sale in Will, purchased by election of surviving spouse at appraised value or sold by judicial proceedings and amount of estate income for which the fiduciary accounts:

(a) For the first $100,000 at a rate of 4%;

(b) From $100,001 to $400,000 at a rate of 3%;

(c) For $400,001 and above at a rate of 2%

(2) Appraised value of real estate transferred to heirs or devisees by affidavit or certificate of transfer when no sale is involved at a rate of 1%.

(3) Release of assets from administration, the greater of $500 or 1.5% of all such property.

(4) On all other property not included in this rule:

(a) If a federal estate tax return is not required, 1% of all such property.

(b) If a federal estate tax return is required, 2% of all such property.

(C) **Extraordinary Fees.** In addition to attorney fees for ordinary services, the attorney for the fiduciary upon application may be allowed further reasonable attorney fees for any extraordinary service. What is an extraordinary service may vary depending upon many factors including the size of the decedent's estate. Extraordinary services include but are not limited to:

(1) Involvement in a will contest, will construction, a proceeding for determination of beneficiaries, a contested claim, elective share

proceeding, apportionment of estate taxes, or any other adversarial proceeding or litigation by or against the estate.

(2) Representation of the personal representative in audit or any proceeding for adjustment, determination or collection of taxes.

(3) Tax advice on post mortem tax planning.

(4) Purchase, sale, lease or encumbrance of real property by the fiduciary or involvement in zoning, land use, environmental or other similar matters.

(5) Representation regarding carrying on the decedent's business or conducting other commercial activity by the fiduciary.

(6) Fiduciary or attorney compensation disputes.

(7) Proceedings involving ancillary administration of assets not subject to administration in this state.

(D) Fixed or Contingency Fees. Except as otherwise required under Sup. **R.** 71, where the attorney on application to the court prior to or during administration requests a fixed or contingent fee, the court, if it deems appropriate and after notice to the interested parties, may fix a reasonable fixed fee for services beneficial to the administration of the estate or may approve a contingency fee under appropriate circumstances. Notice to the trustee of a testamentary or inter vivos trust shall be deemed notice to all beneficiaries of such trust. Nothing in this rule is intended to permit a contingency fee for estate administration services.

(E) **When a Hearing on Attorney Fees is Not Necessary.** Upon administration of a decedent's estate, a hearing on attorney fees is not required in any of the following cases:

(1) Payment of an attorney fee is included in an accounting filed by a fiduciary who is also a sole beneficiary of a solvent estate.

(2) If all of the interested parties whose share will be charged with the payment of any part of the fee, consent in writing to the specific dollar amount to be paid, and such consent instrument is filed with the account which claims credit for the fee paid; provided however, a guardian may consent for his ward; the fiduciary of a deceased beneficiary's estate may consent on behalf of the deceased beneficiary; and a testamentary trustee or inter vivos trustee may consent on behalf of all trust beneficiaries.

(3) Computation form for ordinary compensation contains a calculation which reflects that the attorney fees taken are within the guidelines contained in Local Rule 71.1(B) su ject to the conditions therein. An itemized record of the attorney fees must accompany the computation form when filed without consents.

(F) **Interested Party.** For purposes of this rule, an interested party is one who has a direct pecuniary interest in the payment of an attorney fee charged for the administration of a decedent's estate.

(G) **General Provisions.** Notwithstanding anything herein to the contrary, if by reason of the application or the percentages to values of assets, disparity or injustice results and whether or not consents have been submitted, filed, or are otherwise not necessary, such disparity or injustice may be reviewed and adjusted by the Court on the Court's own motion with respect to any account reflecting such compensation or upon exceptions to such an account filed by an interested party."

All taxes are due on or after the death of the decedent must be paid by the executor or administrator of the estate. The taxes that must be paid are: real estate taxes, personal property taxes, local, state, and federal income taxes, and federal estate taxes.

PROBATE COURT OF COUNTY, OHIO

, JUDGE

ESTATE OF _____ ,DECEASED

CASE NO. _____

APPLICATION FOR CERTIFICATE OF TRANSFER

[R.C. 2113.61)

Applicant states that decedent died on .....

Decedent's domicile at death was _____

Street Address

_____

City or Village, or Township if unincorporated area — County

_____

Post Office — State — Zip Code

Decedent died owning the real property described in the accompanying Certificate of Transfer No._____ ,which also lists those persons to whom the real property passed. Applicant asks the Court to issue a Certificate of Transfer so that new ownership interests may be recorded.

[Check the applicable boxes]

D Decedent died intestate.

D Decedent died testate on _____ ;will admitted to probate on _____ __

D Decedent's known debts have been paid or secured to be paid.

D Sufficient other assets are in hand to pay decedent's known debts.

D Estate is insolvent and the transfer shall apply toward the allowance for support.

D Applicant was appointed by this Court on _____ and is the qualified and acting executor or administrator of decedent's estate.

D Executor or administrator of decedent's estate failed to file this application before being discharged.

D Applicant is the executor or administrator appointed in another state. There is and has been no ancillary administration in Ohio. The real property to be transferred is located in this county.

D The transfer is subject to a written contract for the sale and conveyance of the real property, entered into but uncompleted by decedent before death. A copy of the contract is attached.

D The transfer is pursuant to decedent's Will.

D The transfer is pursuant to the statutes of descent and distribution.

D The transfer is pursuant to summary release from administration [R.C.2113.031(0)(3)]

D The real property to be transferred is subject to a charge in favor of the surviving spouse in the amount of $ _____ as computed pursuant to R.C. 2106.1 1 on attached Exhibit A, and as shown on the accompanying Certificate of Transfer, in respect of the unpaid balance of the specific monetary share which is part of the surviving spouse's total intestate share.

CASE NO._____

D Spousal elections have been exercised.

D Disclaimers or assignments have been filed.

☐ The transfer is of decedent's entire interest in the mansion house *to* the surviving spouse, who hereby elects to take such interest as part or all of the intestate share and/or allowance for support. **[If this paragraph is checked, the following must be completed, and both the surviving spouse and applicant must sign this form).**

The value of the total intestate share to which decedent's surviving spouse is entitled is ..... $ _____

The value of the allowance for support to which decedent's surviving spouse is entitled is .....$ _____

The value of decedent's entire interest in the mansion house is:

Interest in mansion house..... $ _____

Interest in household goods in house..... $ _____

Interest in lots or farm land adjacent to house and used in conjunction with it, which are described in certificate of transfer and which spouse hereby elects to include ..... $ _____

Less: Decedent's share of liens on any and all of above..... $ _____

Total $ _____ $ _____

_____ _____

Surviving Spouse Applicant

_____

Title or status

ENTRY ISSUING CERTIFICATE OF TRANSFER

The Court finding that the *above* application contains the information required by statute orders that Certificate of Transfer No._____ be filed with this Entry and a copy of the Certificate of Transfer be issued for recording.

D **(Check if applicable]** The Court further finds that the transfer is subject to a charge pursuant to R. C. 2106.11.

_____ _____

Date , Probate Judge

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ESTATE OF _____ **,DECEASED**

CASE NO. _____

CERTIFICATE OF TRANSFER

NO. _____

[Check one of the following]

D Decedent died intestate.

D Decedent died testate.

Decedent died on _____ owning the real property described in this certificate. The persons to whom such real property passed by devise, descent or election are as follows:

Name	**Residence Address**	**Transferee's share of decedent's interest**

[Complete if applicable] The real property described in this certificate is subject to a charge of$ _____

in favor of decedent's surviving spouse, _____ in respect of

the unpaid balance of the specific monetary share which is part of the surviving spouse's total intestate share.

CASE NO. _____

The legal description of decedent's interest in the real property subject to this certificate is: **[use extra sheets if necessary.)**

Prior Instrument Reference:

Parcel No:

ISSUANCE

This Certificate of Transfer is issued this ___ _ day of _____

_____
Dixie Park - Probate Judge

CERTIFICATION

certify that this document is a true copy of the original Certificate of Transfer No. _ _ _ _ issued on

_____ and kept by me as custodian of the official records of this Court.

_____ _____
Date Dixie Park - Probate Judge

By _____
Deputy Clerk

This Page Intentionally Left Blank

Construction of Will

Materials Prepared By
Hon. Jack R. Puffenberger
Lucas County Probate Court

NOTES

NOTES

WHEN IS A WILL CONSTRUCTION NECESSARY?

- There is no necessity for construction of a will when the language of the will is clear and unambiguous; however, there is a need when the language used does not clearly and definitely express the testator's intent or if there are inconsistencies in the words, which obscure the testator's intentions.

- The use of the language of succession in a manner, which deviates from established concepts of intestate succession, may raise issues related to the intention of the testator.

- A will construction may be needed in cases in which the designation of beneficiaries is other than by name; errors in names to determine the identity of the intended beneficiary; and to determine the designation of the beneficiaries' shares and the sources of those shares; to determine whether conditions imposed by the testator upon beneficiaries contravene statutes or public policy.

- Deficient grammar and poor expression do not rise to the level of the need for a will construction unless the intent of the testator is in doubt.

- The only true issues are intent, and affecting the intended result despite all of the possible questions that can be raised.

- The right to dispose of property by will and how an individual exercises that right is conferred by statute, not an inherent right. An adult who is of sound mind and free of restraint may dispose of his or her property in any way (s) he sees fit provided the disposition is not contrary to law. Within the latitude allowed by statute the testator is free to make any disposition (s) he desires and that disposition may be completely inequitable. Even though another disposition would be more equitable, desirable, or just, neither a Probate Court nor the beneficiaries can alter the course prescribed in the will in order to achieve greater equity in disposition.

HOW DO YOU CONSTRUE A WILL?

- R.C. §§ 2113.51 to 2113.56 provide methods by which the executor may protect him or herself against personal liability in the distribution of the assets.

- Four methods are used to obtain a judicial determination, which interprets the terms of the will for the benefit of the executor and beneficiaries

- One method of construing a will is when any issue of interpretation arises in any proceeding before the Probate Court as part of the administration of the estate. Probate Court under R.C. § 2101.24(C) has plenary power at law and in equity to dispose fully of any matter properly before the court unless the power is expressly limited or denied by statute. "Except as otherwise provided by law, the probate court has exclusive jurisdiction... (to) construe wills..."

- A second method for obtaining a judicial interpretation is found in the general construction statute, which applies to all fiduciaries. It authorizes the executor to bring an action asking for the direction or judgment of the court in any matter respecting the estate, or property, or rights of the interested party.

- A party in interest may make a written request to the executor to file an action and if the executor fails to do so within 30 days of the request the interested party may bring the action. The case is to be venued in the Probate Court in the county in which the case is being administered.

- The construction proceeding is initiated by filing a complaint. The complaint must show that the plaintiff is entitled to relief and that an immediate necessity exists. The possibility of a doubt as to meaning arising sometime in the future is not enough. The statute provides that the action may be brought against creditors, legatees, distributees, or other parties.

- The plaintiff, executor, or interested person, if the executor fails to act, should join all of those persons who are interested in the distribution under the will so that their rights may be established without multiple litigation. The joinder of parties is set forth in Civ.R. 19(A), which provides that any person who claims an interest in the subject matter, and the interest is such that disposition of the action in the person's absence would impede the person's ability to protect the interest or leave the other parties subject to multiple obligations should be joined. If the executor has a personal interest as a legatee or devisee the executor should join him or herself individually, as a party defendant. The action to construe is against all affected persons.

- Under Civ.R. 10(D) the plaintiff must attach a copy of the complaint because the claim is founded on the written instrument. Service of process is prescribed in Civ.R. 4 to Civ.R. 4.6.

- There is no default in a construction of trust action as answers by the defendants are unnecessary. The issues for construction are raised in the complaint. An individual defendant may, however, assert some claim for relief other than construction. The judgment of the court is effective as to the parties to the action only and the judgment is res judicata as to the issues

of fact determined as between the parties and their successors' interest. the judgment is appealable and subject to Civ.R. 60, correction of and relief from judgment. Unless the court determines facts in a construction action there is no entitlement to separate findings of fact and conclusions of law under Civ.R. 52.

- Another method of obtaining a construction of the will is by declaratory judgment under R.C. 2721.05. A declaratory judgment by R.C. § 2721.02 has the effect of a final judgment or decree. An interested party can request a declaratory judgment. Declaratory judgments by statute, R.C. § 2721.08 are reviewed in the same manner as other judgments.

- Under R.C. 2721.03, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

- The testator of a will may have the validity of the will determined at any time during the testator's lifetime pursuant to Chapter 5817. of the Revised Code. The settlor of a trust may have the validity of the trust determined at any time during the settlor's lifetime pursuant to Chapter 5817. of the Revised Code.

- The surviving spouse has the exclusive method of achieving construction under R.C. 2106.03 (see R.C. 2107.40 for estates of persons deceased prior to May 31, 1990). The statute provides that the surviving spouse may file a complaint in Probate Court to have the will construed in favor of the surviving spouse. The statute provides that all interested persons may be made defendants. The basic purpose of the action is to give the surviving spouse, who is not the executor, an opportunity to have ambiguities resolved so that the surviving spouse can make an informed election to take under the will or statute.

- Service of summons, pleading, evidence, and judgment are the same as for an executor's action.

- The statutory language "construction in favor of the spouse" indicates that the scope of the inquiry is the entitlement of the surviving spouse. A party defendant is entitled to file an answer, which raises a construction issue not directly related to the surviving spouse's entitlement.

- Probate Court has exclusive jurisdiction to construe wills by these means where the sole issue is construction of the will but the General Division may construe a will as an incident to issues in the litigation before it.

RULES OF CONSTRUCTION

- It is settled beyond all possible doubt that the function of the court in a will construction case is to determine and apply the testator's intention as expressed in the language of the whole will, read in the light of the circumstances surrounding its execution. In the construction of the will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.

- Such intention must be ascertained from the words contained in the will. The words contained in the will, if technical, must be taken in their technical sense, unless it appears from the context that they were used by the testator in some secondary sense. All of the parts of the will must be construed together, and effect, if possible, given to every word contained to it. The whole will means the body of the will together with any codicils.

- If a dispute arises as to the identity of any person or thing named in the will, extrinsic facts may be resorted to, in so far as they can be made ancillary to the right interpretations of the testator's words, but for no other purpose.

- R.C. § 2107.05 provides that an existing document, book, record, or memorandum may be incorporated into a will if it is referred to as existing at the time the will is executed.

- That document, book, record, or memorandum shall be deposited in the probate court when the will is probated or within thirty days after the will is probated, unless the court grants an extension of time for good cause shown. A copy may be substituted for the original document, book, record, or memorandum if the copy is certified to be correct by a person authorized to take acknowledgments.

    - If a will incorporates a trust instrument only in the event that a bequest or devise to the trust is ineffective, the trust instrument shall be deposited in the probate court not later than thirty days after the final determination that such bequest or devise is ineffective. This shall be construed as applying, to the wills of testators who die on or after the effective date of the March 22, 2019 Amendment.

    - If a testator intends to incorporate a trust instrument in a will, the testator's will shall manifest that intent through the use of the term "incorporate," "made a part of," or similar language. In the absence of such clear and express intent, a trust instrument shall not be incorporated into or made a part of the will. Any language in the testator's will that only identifies a trust shall not be sufficient to manifest an intent to incorporate that trust instrument by reference in the will. This shall be construed as applying, to the wills of testators

who die on or after the effective date of the March 22, 2019 Amendment.

- The critical time in a construction of a will is the date of the testator's death. The language used by the testator may indicate an intent to alter which law applies and may manifest the testator's intent to either revoke or amend the trust.

- The Probate Court may not modify the provisions of the changes in monetary value, property value, circumstances and needs of the beneficiary even though the testator would have made modifications if he had foreseen the changes.

- In construing a will, intestacy is to be avoided if at all possible. An exception is when the testator expresses a contrary intent. If there is language in a will, which may be construed, to sustain the will and which may also be construed so as to defeat the will, the sustaining construction is favored. A will is to be construed in its entirety giving effect to all of its provisions if at all possible. A provision should not be rejected in the absence of total and irreconcilable conflict.

- Although the intent of the testator controls construction, there is an exception when the intent is contrary to law or public policy. A provision in contravention to the rule against perpetuities, R.C. 2131.08, is an example of a will provision contrary to law as is a provision which imposes an absolute restraint on marriage as a condition to receiving a part of the estate.

- Words appearing in a will are to be taken in their primary or ordinary sense unless the will manifests usage in some other sense. Words may be added in the construction of a will, but an omission may be supplied only if the words are needed to make plain the intent of the testator as manifested by the entire will, an intention which has not been accurately or completely expressed in the language of the will.

- A practical rule of construction in ascertaining the intent of a testator is that the court should assume a non-technical attitude and attempt to think as the testator thought. The difficulty in determining a testator's intent is such that precedent provides little help. Patterns may be discerned but specific guidelines are few.

EXTRINSIC EVIDENCE OF INTENT

- The intent of the testator is to be ascertained from the words contained in the will. If the language presents no ambiguities, there is no basis for resort to extrinsic evidence. Ambiguity may appear on the face of the will, a patent ambiguity, or it may be a latent ambiguity, which is not apparent until its existence is disclosed by some extrinsic evidence.

- The parol evidence rule is relevant. In construing a will, parol evidence may not

alter plain meaning and may not add to nor take away words or provisions of a will. The principal question is the existence of an ambiguity and if an ambiguity exists it can be resolved by extrinsic evidence, parol or written. Absent ambiguity, extrinsic evidence is not admissible, there being nothing to resolve.

IDENTIFICATION OF BENEFICIARIES

- Heirs is a flexible term and is to be construed in such a manner as to give effect to the manifest intention of the testator, but if there is a doubt as to the intent, the technical meaning is applied. Heirs of the body and issue have been held to be synonymous terms. Descendant, issue and offspring are synonymous terms meaning the testator's children to the remotest degree.
  Ordinarily no distinction is made between heir and next of kin.

- When the mother of an illegitimate child uses the words heir in her will, the child born out of wedlock is included as an heir, but if the word heir is used in the will of the natural father who has acknowledged or legitimated the child and has not been the subject of a parentage action, the illegitimate child is not included as an heir. The child inherits only from his or her mother.

- Issue has multiple meanings in descent and distribution. The appropriate meaning, when used in a will, is dependent upon the circumstances under which it is used. Issue is synonymous with heirs of the body and descendants, and includes children adopted under R.C. § 3107.l5(A)(2) although the children need not to have been adopted in Ohio.

  A child "en ventre sa mere" at the testator's death is a child in being, and included in the class of beneficiaries designated as children at the time of the testator's death.

- A designated heir pursuant to R.C.§ 2105.15 stands in the relationship of a child but is excluded from the term issue of the body.

- Next of kin for purposes of R.C. § 2105.06(H), the statute of descent and distribution, means collateral relatives of a more remote degree than lineal descendants of grandparents because other persons are named in the statute of descent and distribution.

- For purposes of construing a will, next of kin is limited to those relatives who would inherit under the statute of descent and distribution in the order prescribed. Standing alone, nieces and nephews means the children of brothers and sisters excluding those of the deceased spouse. Expressed intent in the will, however, may alter this to include them.

- Pursuant to R.C.§ 2107.34 a pretermitted person may be a child, natural or adopted, or designated heir. Pretermission occurs if the testator ignores the birth,

adoption or designation occurring after the execution of the will and makes no provision for that child. Pretermission does not occur if it is clear from the will that the testator did not intend to make provisions for the after born child, after adopted child, or post-designated heir. It is not involved if the terms of the will are such that the after born child is included within the terms of the will such as "I give the rest, residue, and remainder of my estate to my children." A problem does arise if the testator makes a gift to his children, Jack and Sarah, naming them and then does not alter his will to provide for the after born child.

- Pretermission occurs also when a child or designated heir is absent, reported dead, and proves to be alive after the execution of the will, provided the will does not express an intent to disinherit such child or designated heir. R.C. § 2107.34 recognizes that the testator may intend to disinherit, therefore preventing pretermission.

- Any person born more than three hundred days after the date of death of a testator shall not inherit under the testator's will as a child or heir of the testator unless the will clearly provides otherwise. If a will clearly provides that such a posthumously born child or heir shall inherit under the will, notwithstanding any provision in the will to the contrary, that child or heir shall inherit only if born within a period of one year and three hundred days from the date of death of the testator. This division does not apply to the terms of a testamentary trust.

DETERMINATION OF HEIRSHIP

When property passes under a will to persons not named in the will, the proceedings under R.C. § 2123.01 may be had in the Probate Court to determine the persons entitled to the property.

LAPSE

- Lapse means falling from the original condition and in general refers to a bequest or devise which would have taken effect if the testator had died immediately after executing his will, but which fails because the devisee or legatee, has, in some way, become incapable of taking under the will between the time of execution of the will and the death of the testator.

- Ohio's anti-lapse section is R.C.§ 2107.52. It applies only when the devise or bequest of real or personal property is made to a relative of the testator.

The statute contemplates only relative by consanguinity and excludes relatives by affinity. Under R.C.§ 2107.52, the relative dead at the time the will was executed or dying after the execution of the will and before the death of the testator must leave issue for the anti-lapse statute to apply. For the purpose of the statute, issue means descendant, adopted as well as natural. Neither

stepchildren nor in-laws are included as they are relatives by affinity.

- If the testator fails to dispose of all his property and fails to include a residuary clause in the will, the property remaining after paying debts and satisfying the devises and bequests passes as intestate property. A lapsed residuary devise passes under the residuary clause unless there is a contrary intent expressed by the testator in the will.

- The anti-lapse statute applies only to relatives not charities, however the law does not favor the lapse of charitable bequests. In a case in which a church was named in a will, but before the testator's death it was consolidated with another church, and the testator continued to attend and support the church without changing his will, the bequest was found not to have lapsed. governing the consolidation of two or more governing churches was used to save it.

- The Cy Pres Doctrine may also be applied to prevent a lapse of a charitable devise. Cy Pres is an equitable rule of construction. It means, "as near may be" and is applied when an instrument may not be given literal effect.

- The anti-lapse statute may be avoided with a sufficient indication of intent in the will. This is accomplished by providing for survivorship in a devise to a class, by providing for representation in devises to one or more persons, and by providing for substitution in a devise.

RESTRAINTS

- R.C. § 2107.51 provides that every devise of lands, tenements or hereditaments in a will shall convey all the estate of the devisor therein, unless it clearly appears by the will that the devisor intended to convey a lesser estate. This statute states a rule of construction to aid the court in ascertaining the intent of the testator; the intent to convey a lesser estate than that held by the testator must clearly appear in the will. The paramount question in determining what was devised is the testator's intent. There can be conflicting provisions within a will but they must be resolved in the light of the entire will. R.C.§ 2107.51 applies to land by its terms, but the same rule applies to personal property.

- A testator may attach any conditions to the gift provided that the conditions do not contravene a provision of law or public policy. One electing to take a bequest under the will takes subject to the conditions expressed in the will provided they are not contrary to law or public policy. Conditions may be imposed upon the use of property.

- A testator may condition a gift on the beneficiary's forbearance of any contest of the will. Such a no contest provision, sometimes known as an in terrorem clause, has been held to be valid and the beneficiaries failure to observe it resulted in forfeiture of the legacy which then passes to the residuary legatees. A

declaratory judgment action construing a clause in the will, wherein assertions of invalidity of the will were present, has been found not to constitute a will contest that contravened the no contest provision of the will. Filing an objection to a fiduciary's proposal to allocate estate taxes was also found not to violate a no contest provision when it was done by seeking instructions from the probate court.

- In *Stevens v. Nat'l City Bank*, 45 Ohio St. 3d 276 (1989), the Ohio Supreme Court gives an excellent review of will construction cases.

DISINHERITANCE

- The failure to satisfy a condition imposed upon a benefit affects the disinheritance of the beneficiary. The testator is free to make such disposition of his property as he wishes provided it isn't contrary to law or public policy. Contrary to law includes the inability to disinherit a surviving spouse who elects to take against the will.

- A basic rule of will construction is that an heir at law is disinherited only by express words or by necessary implication from the language of the will. The presumption is in favor of the heir. A testator need not leave a nominal amount to effect a disinheritance.

CONTRACT TO MAKE A WILL

- Pursuant to R.C. 2107.04, No agreement to make a will or to make a devise or bequest by will shall be enforceable unless it is in writing. The agreement shall be signed by the maker or by some other person at the maker's express direction. If signed by a person other than the maker, the instrument shall be subscribed by two or more competent witnesses who heard the maker acknowledge that it was signed at the maker's direction

- The Ohio Supreme Court has held that contract to make a will may be specifically enforced against the heirs of the person promising to make the will if the will is not executed. In *Kretzerv. Brubaker*, 74 Ohio St. 3d 519, 660, the Ohio Supreme Court addressed the issue of whether a particular will, executed contemporaneously with an agreement to make a will, actually complied with the terms of the agreement.

This Page Intentionally Left Blank

Inventories and Accounts

Materials Prepared By
Magistrate Ralph P. Sobieski

NOTES

NOTES

I. BASIC FILING REQUIREMENTS

A. INVENTORIES

1. ESTATES

    a. Due within 3 months after date of appointment. (O.R.C. 2115.02)

    b. If predecessor filed an inventory, no need to file another one, unless prior proceedings vacated.

    c. Inventory obtained in Cuyahoga County upon filing of appointment of appraiser form. (Form 3.0)

    d. Notice to surviving spouse relative to taking of inventory, unless waived. (O.R.C. 2115.04)

    e. Upon filing, hearing date assigned for approval. (O.R.C. 2115.16) (See "ACCOUNT & INVENTORY APPROVAL" attached)

    f. Unless notice is waived, fiduciary shall serve notice of approval hearing to surviving spouse and next of kin if intestate or to all beneficiaries if testate (See Rule 64.1 of the Cuyahoga County Probate Court) (Form 6.3)

2. GUARDIANSHIPS/TRUSTS

    a. Due within 3 months of date of appointment. (O.R.C. 2111.14 – guardianships; O.R.C. 2109.58 – trusts)

    b. Each guardian/trustee is required to file inventory regardless of whether predecessor filed one.

B. ACCOUNTS

1. ESTATES

    a. Final account due 6 months after appointment (O.R.C. 2109.301) or application to extend administration (Form 13.8), which, if granted, requires next account in thirteen months after appointment, then every year thereafter. (Rule 64.4 of the Cuyahoga County Probate Court)

b. Upon filing, hearing date assigned for approval. (O.R.C. 2109.32) (See Form 3.0)

c. Unless notice is waived, fiduciary shall serve copy of final account and notice of approval hearing by certified mail to surviving spouse and next of kin if intestate or to all residual beneficiaries if testate. (Rule 64.2 of the Cuyahoga County Probate Court) (Form 13.5)

d. Fiduciary shall file Certificate of Service with final account. (Form 13.9)

2. GUARDIANSHIPS/TRUSTS

a. Accounts due every 2 years from date of appointment except for guardianships involving veterans administration benefits for which accountings are required annually. (O.R.C. 2109.302, 2109.303, 5905.11)

b. Upon filing, hearing date assigned for approval. (O.R.C. 2109.32) (See "ACCOUNT & INVENTORY APPROVAL" attached)

c. Guardians of incompetents must file a Report of Guardian (Form 17.7) and a Statement of Expert Evaluation (Form 17.1) with their accounts. (O.R.C. 2111.49(A))

d. Unless notice is waived, guardians shall serve copy of final account and notice of approval hearing to all next of kin of ward, while trustees shall serve same to all beneficiaries. (Rules 64.2 of the Cuyahoga County Probate Court) (Form 13.5)

e. Guardians/Trustees shall file Certificate of Service with final account (Form 13.9)

II. CORRECTIONS OF INACCURATE FILINGS OF INVENTORIES/ACCOUNTS

A. INVENTORIES

1. Report of Newly Discovered Asset – Estates

2. Supplemental Inventory - Guardianships or Trusts

3. Motion to Correct with journal entry

B. ACCOUNTS

1. Amended Account – supersedes account which it amends.

2. Cumulative and incorporates corrections.

III. CHALLENGES TO INACCURATE FILINGS OF INVENTORIES/ACCOUNTS

A. BEFORE ARRIVAL

1. INVENTORIES

   a. Exceptions – estates – should be filed 5 days before the hearing on the approval of the inventory. (O.R.C. 2115.16)

   b. Exceptions – guardianships/trusts – should be filed within 6 months after the return of the inventory. (O.R.C. 2109.58)

2. ACCOUNTS

   a. Exceptions – should be filed 5 days before the hearing on the approval of the account. (O.R.C. 2109.33)

   b. Applies to all accounts whether estate, guardianship or trust.

B. AFTER ARRIVAL

1. Motion to Vacate (Ohio Rule Civ. Pro. 60(B).

2. See, also, O.R.C. 2109.35 for additional authority relative to vacating approvals of accounts.

IV. CONSEQUENCES OF FAILURE TO FILE INVENTORIES/ACCOUNTS

A. **REMOVAL** – (See O.R.C. 2109.24 for complete list of grounds for removal).

B. **MOTION TO SURCHARGE** – (See O.R.C. 2109.19)

1. PARTIES – Usually a removed fiduciary, a successor fiduciary, and a surety.

2. PURPOSE – To secure and safeguard assets and see that all valid debts are paid and distributions made.

3. DISCUSSION – See article, Actions on Fiduciary Bonds in Probate Court, by Jerome C. Tinianow

V. PROCEDURAL FORMAT FOR HEARINGS ON EXCEPTIONS/MOTIONS TO SURCHARGE

A. **FIRST HEARING** – treated as a pre-trial (Rule 78.1 of the Cuyahoga County Probate Court) with discussion centered around the following:

Issues
Settlement
Discovery

B. **FINAL HEARING** – Evidentiary hearing that results in Report of Magistrate. (See Ohio Rule Civ. Pro. 53)

VI. COMMENTS AND SUGGESTIONS

A. ESTATES

1. RELEASE OF ASSETS (O.R.C. 2113.03)

    a. $35,000 or less where surviving spouse is not the sole heir. (Effective for date of death on or after 11/9/94)

    b. $100,000 or less where surviving spouse is the sole heir. (Effective for date of death on or after 3/18/99)

2. CERTIFICATE OF TERMINATION (O.R.C. 2109.301 (Form 13.6)

    a. Executor or administrator is also sole legatee, devisee or heir

    b. Date of death on or after 6/23/94

    c. Inventory has been approved

    d. Will contest period has elapsed

3. Only one waive of partial account will be accepted without showing of good cause (Form 13.4)

4. Need to file Certificate of Service of Notice of Probate of Will before any accounts accepted for filing.

5. Explanation required on estate accounts stating why estates remain open when 3 or more years old.

6. Allowance for support of surviving spouse and minor children (O.R.C. 2106.13) is considered a debt of the estate and is entitled to priority under (O.R.C. 2117.25)

B. GUARDIANSHIPS

1. Guardians must have authority from court to expend funds for all disbursements or surcharges can result.

2. Request financial institutions to mail a copy of each monthly statement on a guardian's bank account to counsel for review.

C. GENERAL

1. Requests for extension of time to file inventories/accounts must be in writing, signed by the fiduciary, and demonstrate good cause shown.

2. All accounts, except for estates, required to have cancelled check or prior receipts to support all disbursements. General receipts that are not specific as to amount are not acceptable. (Rule 64.3 of the Cuyahoga County Probate Court)

3. Do not commingle fiduciary funds in an attorney escrow account.

4. All accounts should include a detailed itemization of assets on hand at the end of an accounting period and proof of same should be Exhibited to the court.

5. If in doubt, ASK QUESTIONS before client is removed and surcharged.

6. Fully disclose all activity of an extraordinary nature on the account to avoid confusion, particularly if the item is material.

7. FIDUCIARY FEES – computation schedules (See Forms labeled "COMPUTATION OF _____FEES"

8. ATTORNEY FEES

    a. Guardianships/Trusts – court order required

    b. Estates – court order or consent of residual beneficiaries required.

    c. All attorney fees on all accounts are reviewed for reasonableness and the court can order fee applications despite consents (Rule 71.1 of the Cuyahoga County Probate Court)

9. Review and follow checklist for inventories/accounts (See "CHECKLIST FOR ACCOUNTS")

10. Stay Current with changes in laws, rules and forms

Rule 64.1 – Inventory

Pursuant to O.R.C. 2115.16 and Civil Rule 73(E)(7) unless notice is waived, upon filing of an inventory as required by R.C. 2115.02, the executor or administrator shall serve the notice of the hearing by ordinary mail upon the surviving spouse and all next of kin in an intestate estate and to all beneficiaries in a testate estate.

Rule 64.2 – Accounts

Pursuant to O.R.C. 2109.30, 2109.301-2109.303, 2109.32, 2109.33, and Civil Rule 73(E)(7) unless notice is waived, upon filing of final accounts, the fiduciary shall serve a copy of the account and the notice of the hearing by certified mail as follows:

A. Decedent's Estates -
   To the surviving spouse and all next of kin in an
   intestate estate and to all residual beneficiaries in a testate estate.
B. Guardianships -
   To all next of kin of the ward.
C. Trusts -
   To all beneficiaries.

Any person entitled to notice who is under 16 years of age shall be served in accordance with Civil Rule 4.2(B)

Rule 64.3 – Accounts

In accordance with O.R.C. 2109.301(A) vouchers or proof of disbursements shall not be required to be filed by executors or administrators unless otherwise ordered by the Court.

Original vouchers or receipts of disbursements must be filed with accounts of guardians, conservators or trustees.

Rule 64.4 – Accounts

In accordance with O.R.C. 2109.301(B) the final account in estates shall be filed within six (6) months after appointment of the executor or administrator.

Upon motion of the fiduciary or counsel for the estate, the time for filing an account in an estate may be extended to thirteen (13) months from the date of appointment or other appropriate time for any of the reasons set forth in O.R.C. 2109.301(B).

Rule 71.1 – Attorney Fees

A. Court's Authority to Determine Attorney Fees. Attorney fees for the administration of a decedent's estate shall be reasonable and beneficial to the decedent's estate. Attorney fees are governed by the Rules of Professional Conduct and the Rules of Superintendence adopted by the Supreme Court of Ohio. The Court has the ultimate responsibility and authority to determine attorney fees in a decedent's estate as required by such Rules.
B. Ordinary Fees. Attorney fees for the administration of a decedent's estate computed in accordance with the schedule of compensation set forth below shall be approved without a hearing. Such schedule however, is not to be considered or represented to clients as a schedule of minimum or maximum attorney fees to be charged.
    1. Appraised value (when not sold) or gross proceeds (when sold) of personal property included on the inventory; gross proceeds of sale of real estate under power of sale in Will, purchased by election of surviving spouse at appraised value or sold by judicial proceedings and amount of estate income for which the fiduciary accounts:
        a) For the first $100,000 at a rate of 4%;
        b) From $100,001 to $400,000 at a rate of 3%;
        c) For $400,001 and above at a rate of 2%
    2. Appraised value of real estate transferred to heirs or devisees by affidavit or certificate of transfer when no sale is involved at a rate of 1%.
    3. Release of assets from administration, the greater of $500 or 1.5% of all such property.

4. On all other property not included in this rule:
    a) If a federal estate tax return is not required, 1% of all such property.
    b) If a federal estate tax return is required, 2% of all such property.

C. Extraordinary Fees. In addition to attorney fees for ordinary services, the attorney for the fiduciary upon application may be allowed further reasonable attorney fees for any extraordinary service. What is an extraordinary service may vary depending upon many factors including the size of the decedent's estate. Extraordinary services include but are not limited to:
    1. Involvement in a will contest, will construction, a proceeding for determination of beneficiaries, a contested claim, elective share proceeding, apportionment of estate taxes, or any other adversarial proceeding or litigation by or against the estate.
    2. Representation of the personal representative in audit or any proceeding for adjustment, determination or collection of taxes.
    3. Tax advice on post mortem tax planning.
    4. Purchase, sale, lease or encumbrance of real property by the fiduciary or involvement in zoning, land use, environmental or other similar matters.
    5. Representation regarding carrying on the decedent's business or conducting other commercial activity by the fiduciary.
    6. Fiduciary or attorney compensation disputes.
    7. Proceedings involving ancillary administration of assets not subject to administration in this state.
D. Fixed or Contingency Fees. Except as otherwise required under Sup. R. 71, where the attorney on application to the court prior to or during administration requests a fixed or contingent fee, the court, if it deems appropriate and after notice to the interested parties, may fix a reasonable fixed fee for services beneficial to the administration of the estate or may approve a contingency fee under appropriate circumstances. Notice to the trustee of a testamentary or inter vivos trust shall be deemed notice to all beneficiaries of such trust. Nothing in this rule is intended to permit a contingency fee for estate administration services.
E. When a Hearing on Attorney Fees is Not Necessary. Upon administration of a decedent's estate, a hearing on attorney fees is not required in any of the following cases:
    1. Payment of an attorney fee is included in an accounting filed by a fiduciary who is also a sole beneficiary of a solvent estate.
    2. If all of the interested parties whose share will be charged with the payment of any part of the fee, consent in writing to the specific dollar amount to be paid, and such consent instrument is filed with the account which claims credit for the fee paid; provided however, a guardian may consent for his ward; the fiduciary of a deceased beneficiary's estate may consent on behalf of the deceased beneficiary; and a testamentary trustee or inter vivos trustee may consent on behalf of all trust beneficiaries.
    3. Computation form for ordinary compensation contains a calculation which reflects that the attorney fees taken are within the guidelines contained in Local Rule 71.1(B) subject to the conditions therein. An itemized record of the attorney fees must accompany the computation form when filed without consents.
F. Interested Party. For purposes of this rule, an interested party is one who has a direct pecuniary interest in the payment of an attorney fee charged for the administration of a decedent's estate.
G. General Provisions. Notwithstanding anything herein to the contrary, if by reason of the application or the percentages to values of assets, disparity or injustice results and whether or not consents have been submitted, filed, or are otherwise not necessary, such disparity or injustice may be reviewed and adjusted by the Court on the Court's own motion with respect to any account reflecting such compensation or upon exceptions to such an account filed by an interested party.

Rule 78.1 – Case management

I. Supervision of estates, trusts and guardianships, adoption and psychiatric proceedings.
    A. The Court shall keep an inventory of all pending cases.
    B. Each successive month, the Court shall make a report:
        1. listing all new cases filed.
        2. removing all cases where a final account has been approved or final judgment has been rendered.

3. listing the status of each open case.

II. Civil Actions
   A. The Court shall keep an inventory of all pending cases.
   B. Each successive month, the Court shall make a report:
      1. listing all new cases filed.
      2. removing all cases where a final judgment has been rendered.
      3. listing the status of each open case.
   C. A pretrial conference shall be conducted in all cases prior to trial except in land sale proceedings.
   D. Within 30 days after the answer date, the case shall be set by the Court for a pretrial conference.
   E. Notice of the pretrial conference shall be given to all parties or their counsel of record by certified mail not less than 14 days prior to the conference. Applications for continuance of the conference shall be in writing and filed with the Court in a timely manner.
   F. At the conclusion of the pretrial conference, the Court shall prepare a pretrial order setting forth:
      1. discovery deadline date
      2. exchange of witness list date
      3. pleadings and briefing date
      4. trial date

III. Land Sales
   A. The Court shall keep an inventory of all pending cases.
   B. All land sales which have not been concluded within one year from the date of filing shall be dismissed unless good cause is shown.

CHECKLIST FOR ACCOUNTS – UPDATED AUGUST 2012

I. REQUIREMENTS

A. GENERAL

1. Legible
2. Mathematically correct
3. Accounting period covered by account
4. Current address and telephone number of fiduciary (update computer, if necessary)
5. Current address, telephone number and registration number of attorney (update computer, if necessary)
6. Include all assets carried forward from inventory or last account
7. Include additional assets acquired since Inventory or last account
8. Computation, court order, or consent for fiduciary fees (consents not available in guardianships)
9. Court order or consent for attorney fees (consents not available in guardianships)
10. Proof of existence of all assets on hand
11. Court costs paid.

B. REAL ESTATE

1. Escrow statements for sales of real estate
2. Gross sales price and all expenses itemized on account.

C. PERSONAL PROPERTY

1. Detailed description (e.g. name of institution and account number for bank accounts, name of company and number of shares of stocks)
2. Inclusion of interest and dividend income or any other return on assets

D. BOND

1. Amount equal to double the value of all personal property. Ohio Rev. Code Sec. 2109.04, 2109.06
2. Additional bond order if increase in amount of bond required.

E. EXECUTION

1. Signature of fiduciary
2. Must be an original signature, not a copy

II. ADDITIONAL REQUIREMENTS FOR ESTATE, GUARDIANSHIPS AND TRUSTS

A. ESTATES

1. If Will probated, Certificate of Service of Notice of Probate of Will required before any accounts filed.
2. If partial account, Application to Extend Administration (Form 13.8) required
3. If third partial or more, or if estate three or more years old, written explanation required as to why estate still open together with approval of magistrate
4. Distributions pursuant to Statute of Descent and Distribution (Ohio Rev. Code Sec.2105.06) or terms of Will, whichever is applicable
5. Certificate of Transfer if real estate not sold
6. Final account can not be filed until three months have elapsed from filing of Certificate of Service of Notice of Probate of Will (the will contest period – Ohio Rev. Code. Sec. 2107.76)
7. If final account, confirm the following are paid:
    1. Funeral bill
    2. Appraisal fee
    3. Family allowance, if applicable
    4. All claims
    5. Ohio Estate Tax
8. If final account, Certificate of Service of Account to Heirs or Beneficiaries (Form 13.9) required, unless waiver is filed

B. GUARDIANSHIPS

1. Court approval for all expenditures (i.e. authority to expend funds)
2. Cancelled checks/receipts (vouchers) filed for all disbursements

3. Guardian Report (Form 17.7) and Statement of Expert Evaluation (Form 17.1) for guardianships of incompetents
4. Computation for guardian fee pursuant to Rule 73.1 of the Cuyahoga County Probate Court

C. TRUSTS

1. Distributions to beneficiaries pursuant to terms of trust
2. Cancelled checks/receipts (vouchers) filed for all disbursements)
3. Computation for trustee fees pursuant to Rule 74.1 of the Cuyahoga County Probate Court

III. ALTERNATIVE FOR ESTATES – CERTIFICATES OF TERMINATION

A. PURPOSE

1. Simplification of Probate process where fiduciary is the sole heir
2. Eliminates need for filing of accounts

B. REQUIREMENTS

1. Fiduciary is sole heir
2. Date of death of decedent on or after June 23, 1994
3. Approval of inventory
4. Will contest period elapsed
5. Ohio Estate Tax return filed and tax paid.

CHECKLIST FOR INVENTORIES – UPDATED AUGUST 2012

I. REQUIREMENTS

A. GENERAL

1. Legible
2. Mathematically correct
3. Current address and telephone number of fiduciary (update computer, if necessary)
4. Current address, telephone number and registration number of attorney (update computer, if necessary)

B. REAL ESTATE

1. Address
2. Statement of interest owned by decedent (e.g. ½, full, etc.)
3. Statement of Value

C. PERSONAL PROPERTY

1. Detailed description (e.g. name of institution and account number for bank accounts, name of company and number of shares of stocks)
2. Statement of Value

D. BOND

1. Amount equal to double the value of all personal property. Ohio Rev. Code Sec. 2109.04, 2109.06
2. Additional bond order if increase in amount of bond required.

E. EXECUTION

1. Signature of fiduciary
2. Must be an original signature, not a copy

II. ADDITIONAL REQUIREMENTS FOR ESTATE AND GUARDIANSHIPS

A. ESTATES

1. Issuance by Court
2. Signature of court-appointed appraiser, or attach County Auditor's value, if elected
3. Full legal description for real estate
4. Signature of surviving spouse on Waiver of Notice of Taking of Inventory or evidence of service (i.e. certified mail receipt). Ohio Rev. Code Sec. 2115.04
5. Service of notice of hearing upon heirs or beneficiaries

B. GUARDIANSHIPS

1. All income, including social security and pensions, must be listed at total for 24 months (12 months if Veteran's Administration benefits received)
2. Amount of bond includes double the amount of the income listed.

2007
ACCOUNT & INVENTORY APPROVAL
PROBATE COURT 216 443-8770

FILING DATES		APPROVAL DATES	
		2109.32 ACCOUNT	2115.16 INVENTORY
12/19/06	01102107	02/05/07	01/17/07
01/03/07	01/16	02120/07	01/31/07
01/17	01/29	03/05/07	02/14/07
01/30	02/12	03/1-9/07	02/28/07
02/13	02126	04/02/07	03/14/07
02/27	03/12	04/16/07	03/28/07
03/13	03/26	04/30/07	04/11/07
03/27	04/0	05/14/07	04/25/07
04/10	04/23	05/29/07-	05/09/07
04/24	05/07	06/11/07	05/23/07
05/08	05/21	06/25/07	06/06/07
05/22	06/04	07/09/07	06/20/07
06/05	06/18	07/23/07	07/05/07
06/19	07/02	08/06/07	07/18/07
07/03	07/16	08/20/07	08/01/07.
07/17	07/30	09/04/07	08/15/07
07/31	08/10	-09/17/07	08/29/07
08114	08/27	10/01/07	09/12107
08/28	09/10	10/1&07	09/26/07
09/11	09/24	10/2.9/07	.10/10/07
09/25	10/09	11/13/07	10/24/07
10/10	10/22	1112:6/07	11/07/07
10/23	11/05	12/10/07	11/21/07
11/06	11/19	12/24/07	12/05/07
11/20	12/03	01/07/08	12/1.9/07
12/04	12/17	01 2/08	01/02/08
12/18	12/31	02/04/08	01/1 /08
01/02/08	01/14/08-	02/19/08	01/30/08
01/15	01/28	03/03/08	02/13/08

LEGAL HOLIDAYS

NEW YEARS DAY	01/01/07	**LABOR** DAY	09/03/07
MARTIN L. KING DAY	01/15/07	COLUMBUS DAY	10/08/07

PRESIDENTS DAY	02/19/07	VETERAN'S DAY	11/12/07
MEMORIAL DAY	05/28/07	THANKSGIVING DAYS	11/22 thru 11/23/07
INDEPENDENCE DAY	07/04/07	CHRISTMAS DAY	12/25/07

ALL INVENTORY AND ACCOUNT APPROVAL HEARINGS WILL BE HELD AT 9:00 AM

This Page Intentionally Left Blank

Will Contests and Trial Management

Materials Prepared By
Hon. Laura J. Gallagher
Cuyahoga County Probate Court

NOTES

NOTES

I. REQUIREMENTS OF A VALID WILL

A. REQUIREMENTS OF A VALID WILL - R.C. 2107.02 & 2107.03

- Person at least ***18 years of age***, of sound mind and memory and ***not under restraint***.
  - Must understand the nature of the business in which he is engaged;
  - Must comprehend, generally, the nature and extent of his property;
  - Must hold in his mind the names and identity of those who have a natural claim on his bounty;
  - Must be able to appreciate his relationship to members of his family. *Roll v. Edwards*, 4th Dist. No. 05CA2833, 2006 WL 439423, *4 (Feb. 21, 2006), citing *Niemes v. Niemes*, 97 Ohio St. 145, 155, 119 N.E. 503 (1917) (the *Niemes* test).
- Must be ***in writing*** unless it is an oral will, which must meet the exacting requirement of R.C. 2107.60 to be valid.
- Must be ***signed at the end*** by the testator or by some other person in the testator's conscious presence and at the testator's express direction.
- Must be signed in the ***conscious presence of two competent witnesses.***
  - "**Conscious presence**" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication. *See* Comment in the report to the Council of Delegates, OSBA Report, October 14, 2007, vol. 80 #42; *Whitacre v. Crowe*, 9th Dist. No. 11CA0019-M, 2012-0hio-2981.
  - Anyone generally competent may witness the execution of the Will, except a minor. R.C. 2107.06.
  - Witnesses should be disinterested parties to the Will.
  - An interested witness will not invalidate the execution, but the bequest or devise to that witness will be void if the interested witness is one of only two witnesses to the Will. R.C. 2107.15.)

II. JURISDICTION

A. THE WILL

- Application to Probate a Will - R.C. 2107.11
  - *A Will shall be admitted for Probate*: (1) In the county in Ohio in which the testator was domiciled at the time of the testator's death; (2) In any county of Ohio where any real

property or personal property of the testator is located if, at the time of the testator's death, the testator was not domiciled in this state, and provided that the Will has not previously been admitted to probate in this state or in the state of the testator's domicile; (3) In the county of Ohio in which a probate court rendered a judgment declaring that the Will was valid and in which the Will was filed with the probate court.

- *The Application must contain the following*: (1) Testator's name and any variations, (2) Testator's date of death, (3) Complete address of decedent's domicile, (4) Signature, printed name, address and phone number of each applicant and their attorney, (5) Complete Next of Kin page listing surviving spouse, if any, and/or all next of kin.
- *Certificate of Service of Notice of Probate of Will* – R.C. 2107.19: When a Will has been admitted for Probate, the fiduciary or any other interested person shall serve notice within ***2 weeks*** on the surviving spouse, all persons who would be entitled to inherit from the testator if the testator had died intestate, and to all legatees and devisees named in the Will. Notice shall mention the probate of the Will and state that the person is named as a beneficiary.
  - Waivers may be filed any time prior to or after the Will was admitted to Probate.
  - The certificate of service of notice must be signed by an interested person.
  - When a fiduciary is appointed, the certificate must be filed within ***two months*** (60 days) from the date of appointment. R.C. 2107.19. Failure to file the certificate subjects the fiduciary to a citation and penalty.
  - If no fiduciary is appointed, the certificate must be filed within ***two months*** after the admission of the will to probate. R.C. 2107.19.
  - The filing of the Certificate of Service of Notice of Probate of the Will initiates the ***three month*** (90 days) Will Contest Period. R.C. 2107.76.

- <u>Presentation of Creditor's Claims:</u> Creditor must present claims against the Estate within ***6 months*** of the date of death and set forth the claimant's address. R.C. 2117.06.
- <u>Admission of Wills to Probate - R.C. 2107.18</u>
  - Wills are to be admitted if it appears from the face of the Will or testimony of the witnesses to a Will that the execution of the Will complies with:
    - The law in force at the time of the execution of the Will in the jurisdiction in which it was executed;
    - The law in force in Ohio at the time of the death of the testator; or

        - The law in force in the jurisdiction in which the testator was domiciled at the time of the testator's death.
    - Wills are to be admitted to probate when there has been a prior judgment by a probate court declaring that the Will is valid under R.C. 5817.10, and it has not been revoked.
- Challenging Jurisdiction – R.C. 2107.12
    - Persons are allowed to contest the jurisdiction of the court to entertain the application to probate a Will.
    - Notice must be given to all parties named in the will as legatees, devisees, trustees, or executors.

B. THE WILL CONTEST

- Exclusive Jurisdiction
    - The Probate court has exclusive jurisdiction to hear and determine actions to contest the validity of Wills. R.C. 2101.24(A)(l)(p).
    - The Court of Common Pleas should transfer, not dismiss, any Will contest action mistakenly docketed in the general division.

C. VENUE

- A Will contest action must be filed in the county where the Will or Codicil was admitted to probate. R.C. 2107.71(A).

III. INITIATING A WILL CONTEST ACTION

- A Will contest commences with the filing of a complaint by any person interested in the Will or Codicil admitted to Probate. R.C. 2107.7l(A).
- If a Will has a ***no contest clause***, the parties may be barred from a Will contest proceeding. *Modie v. Andrews*, 9th Dist. No. C.A. 21029, 2002-0hio-5765, *2, citing *Bradford v. Bradford*, 19 Ohio St. 546,2 Am.Rep. 419 (1869), syllabus paragraph one.
- The **Savings Statue** - R.C. 2305.19, does not apply to a Will Contest action. R.C. 2107.76.

A. STATUTE OF LIMITATIONS – R.C. 2107.76

- The Complaint in Will contest must be filed within ***3 months*** (90 days) after the fiduciary files a Certificate of Service of Notice of Probate of Will or waiver of such notice or the Will is forever binding on all parties, except those under a legal disability.
- Any person under a legal disability may bring a Will Contest action within ***3 months*** (90 days) after the disability is removed. This right will not affect the rights of the purchaser, lessee, or encumbrancer for value in good faith and will not impose liability on the fiduciary who has acted in good faith.
- Service of the Complaint in Will Contest must be obtained within one year of the filing of the Complaint. Civ.R. 3(A).

B. INTERESTED PERSONS

- An interested person is one who has a direst pecuniary interest in the estate of the putative testator which would be impaired or defeated if the instrument admitted to probate is a valid Will. *Chilcote v. Hoffman*, 97 Ohio St. 98, 104-05, L.R.A. 1918D, 575 (1918)); *St. Sylvester Church v. Haren-Williams*, 7th Dist. No. 842, 2001-0hio-3296, *2 (June 18, 2001).
- **Interested persons include the following:**
  - **Next-of-Kin** who would be a beneficiary if the probated Will is declared invalid. *Adams v. Gurklies et al*., 88 Ohio App. 225, 226-27,91 N.E.2d 706 (2d Dist. 1949).
  - **Judgment Creditor** who has a lien by levy on property which in the absence of a Will would be property of the debtor and has the legal capacity to contest the validity of a Will disposing property to another person. *State ex rel. Young v. Morrow*, 131 Ohio St. 266, 277, 2 N.E.2d 595 (1936), citing *Bloor v. Platt*, 78 Ohio St. 46, 84 N.E. 604 (1908), paragraph one of the syllabus.
  - **Guardian** of a ward, providing that the contest is for the best interest of the ward. R.C. 2111.14. *In re Kowalk''s Guardianship*, 80 Ohio App. 515, 518-19, 76 N.E.2d 899 (3d Dist. 1946).
  - **Beneficiary** under a prior Will has a pecuniary interest in the estate of the testator and entitles him to contest another alleged Will of the same testator which would destroy, reduce or impair his share in such estate. R.C. 2107.22(A)(1)(b). *Kennedy v. Walcutt*, 118 Ohio St. 442,444, 161 N.E. 336 (1928), paragraph one of the syllabus (overruled on other grounds by *Krischbaum v. Dillon*, 58 Ohio St. 3d 58, 64, 567 N.E.2d 1291 (1962);

Hlavin v. Lukas (1985), 1985 WL 10879 citing *Machovina v. Machovina* (1936), 132 Ohio St. 171.

- **NOTE** that standing disputes can arise when an intervening Will exists between the probated Will and the Will in which plaintiff is a named beneficiary. The Court may determine the validity of the intervening Will on hearing after a challenge to plaintiff's standing. If the intervening Will is valid and revokes all prior Wills, a "pecuniary interest" does not exist to support a Will contest, since plaintiff would not benefit even if successful in setting aside the probated Will. *See Barnhart v. Barnhart*, 4th Dist. No. 921, 1983 WL 3108 (January 28, 1983).
- **Illegitimate Child** may inherit from and to their mother, and from and to those from whom the mother may inherit. R.C. 2105.17. In contrast, an illegitimate child may only inherit from a natural father through means provided in descent and distribution statutes, or by action to establish paternity. R.C. 2105.01 *et seq.*, R.C. 3111.04.

IV. STANDING

A. ORDINARY PARTIES – R.C. 2107.12

- Personal representative who operates by authority of the Will;
- Legatees and Devisees under the Will which is under attack; and
- Decedent's heirs.
    - **NOTE:** A person who would not stand to inherit from a testator under intestate succession statutes must demonstrate prima facie validity of will under which he or she claims in order to establish required pecuniary interests to contest Will. *Sheridan v. Harbison*, 101 Ohio App. 3d 206,655 N.E.2d 256 (1995).

B. NECESSARY PARTIES – R.C. 2107.73

- Those who will gain or lose by reason of probate of the Will;
- Persons designated in a Will to receive a testamentary disposition of real or personal property;
- Heirs who would take property had the testator died intestate - R.C. 2105.06;
- Executors or administrators with the Will annexed;
- Attorney General R.C. 109.25; and

- Other interested parties

C. JOINDER OF NECESSARY PARTIES

- All parties having a direct interest in the outcome of the Will contest should be joined for a complete adjudication of all rights arising from the probate or denial of probate.
- **CASE LAW:**
    - Amendments to the complaint may be made to join necessary parties and such amendments would, under the rules of civil procedure, relate back to the date of the original filing. Civ.R. 15(C); R.C. 2107.72; *State, ex rel. Smith v. Court of Common Pleas, Probate Div*., 70 Ohio St.2d 213,436 N.E.2d 1005 (1982); Kocis *v. Chorba,* 6th Dist. No. OT-97-033, 1998 WL 135078 (March 20, 1998).
    - A provision in a Will directing that a debt of the testator be paid does not make the creditor a legatee or necessary party to a Will contest action. *Hirsch v. Hirsch*, 32 Ohio App. 2d 200, 289 N.E.2d 386 (1972).
    - Where the estate of a decedent is relieved from administration after the probate of the Will an action to contest the Will is filed within the require time, the executor nominated by the Will but never appointed by the probate court is a nonexistent executor and cannot be a person interested in a Will contest or joined as a party. *Hecker v. Schuler*, 12 Ohio St. 2d 58, 231 N.E.2d 877 (1967); *Beverly v. Beverly*, 33 Ohio App.2d 199,293 N.E.2d 562 (6th Dist. 1973).

D. STANDING ISSUES

- Surviving spouse has no standing to contest the Will of a deceased husband where the same result can be accomplished by electing against the will. R.C. 2106.01; *Klicke v. Uhlenbrock*, 94 Ohio Law Abs. 402, 200 N.E.2d 497 (C.P. 1964).
- Designated heir can inherit only from and not through his designator. *PNC Bank, Ohio, N.A. v. Stanton*, 104 Ohio App.3d 558,662 N.E.2d 875 (1st Dist. 1995); R.C. 2105.15.
- Person who wishes to initiate a Will contest must have something economic to gain or lose (no matter how slight) as a result of the contest.
- Person who will take as much under the Will as a former Will which that person wants probated cannot bring a Will contest. 79 Am. Jur. 2d Wills § 781; 39 A.L.R.3d 321.

- Person who is *only* a legatee or devisee under Will and who will receive nothing if Will is set aside is not a "person interested" entitled to bring action to contest Will and have the same set aside. *Steinberg v. Cent. Trust Co.*, 18 Ohio St. 2d 33, 247 N.E.2d 303 (1969); *Roll v. Edwards*, 4th Dist. No. 05CA2833, 2006 WL 439423.
- Persons whose *only* interest in a probated will is that they were named executors in a prior non-probated Will does not make them an "interested person" with standing in a will contest. *Hermann v. Crossen*, 81 Ohio Law Abs. 322, 160 N.E.2d 404 (8th Dist. 1959), paragraph three of the syllabus.

E. DOCTRINE OF EQUITABLE ELECTION

- A person cannot accept benefits accruing to him by a Will and at the same time refuse to recognize validity of will in other respects. *Luttrell v. Luttrell*, 4 Ohio App. 2d 305, 212 N.E.2d 641 (1st Dist. 1965).
    - This doctrine may not be applied to prejudice of third parties. *Id.*
- The acceptance of a bequest of personal property does not prevent the contest of the Will by a beneficiary, if the legatee returns the bequest to the executor. *Spangler v. Beare*, 2 Ohio App. 133, 26 Ohio C.D. 37, 1913 WL 908 (5th Dist. 1913).
- Legatee receiving benefit may not contest Will unless benefit was received without knowledge of right of election or receipt was induced by fraud, and in such case, legatee must restore benefit or offer to do so. *Bender v. Bateman*, 33 Ohio App. 66, 168 N.E. 574 (5th Dist. 1929).

V. CHALLENGING A WILL

A. INVALID WILL

- Person was not of sound mind when the will was made;
- Under restraint;
- Not of age;
- Will was forged;
- Will was not properly executed or constructed; or
- Will has been revoked.

B. TESTAMENTARY CAPACITY

- Burden falls on the proponent to prove due execute of the Will by preponderance of the evidence. *In re Estate of Lucitte* (2012), 2012 WL 362002, citing *Willis v. Baker* (1906), 75 Ohio St. 291 paragraph 1 of the syllabus.
- Testamentary capacity is different than sanity. A testator may be legally sane yet lack testamentary capacity. *Niemes v. Niemes*, 97 Ohio St. 145, 119 N.E. 503 (1917).
- Conversely, a mentally incompetent person may have adequate capacity or experience a lucid interval. *In re Burrows' Estate* (1900), 11 Ohio Dec. 229.
- Testamentary capacity exists when the testator has sufficient mind and memory:
    - To understand the nature of the business in which he is engaged;
    - To comprehend generally the nature and extent of his property;
    - To hold in his mind the names and identity of those who have natural claims upon his bounty;
    - To be able to appreciate his relation to the members of his family. *Roll v. Edwards*, 4th Dist. No. 05CA2833, 2006 WL 439423, citing *Niemes v. Niemes*, 97 Ohio St. 145, 119N.E. 503 (1917).

C. UNDUE INFLUENCE AND RESTRAINT

- Susceptible testator;
- Opportunity for another to exert undue influence;
- Undue influence in fact extend or attempted; and
- Result showing effect of that influence. *Kryder v. Kryder* (2012) 2012 WL 1866376 citing *West v. Henry* (1962), 173 Ohio St. 498.
- Evidence must be confined to a reasonable time both before and after the execution of the Will. *DiPietro v. DiPietro* (1983), 10 Ohio App.3d 44, citing *Kennedy v. Walcutt* (1928), 118 Ohio St. 442 overruled on other grounds, *Krischbaum v. Dillon* (1962), 58 Ohio St. 3d 58.
- Portions of the Will alleged to be product of undue influence could be stricken thereby leaving the remainder of the Will allowed to stand if those portions could be separated without defeating the testator's intent.
- A Will contest action is not the proper forum to: (1) set aside alleged fraudulent transfers of personal and real property; (2) to remove an executor; or (3) for discovery purposes.

VI. PROCEDURE

Rules of Civil Procedure apply in a will contest action. R.C. 2107.72; Ohio Civil Rule I.

A. PLEADINGS

- **Complaint:** must allege that the purported Will is not the last Will and testament of the decedent. *Sours v. Shuler* (1932), 42 Ohio App. 393 (failing to allege may be cured by amendment event after limitation period has run); must also allege that plaintiff is an interested person in the Will to be contested. R.C. 2107.71(A).
- **Counterclaim or Cross-claim:** Action will not survive on its own if plaintiff dismisses the complaint.
- **Answer:** Defendant must file an answer within 28 days after service of summons and complaint or after the completion of service by publication as prescribed in Civ.R. 12. However, there may be no default judgment entered in a Will contest.
- Will Contest Action is a special statutory proceeding under Civil Rule 1 and R.C. 2107.72.
- **NOTE:** The exclusive method of challenging a Will which has been admitted to probate is by a Will contest action, and a complaint which seeks relief by way of a declaratory judgment in such an instance fails to state a cause of action in which relief may be granted. *Davidson v. Brate*, 44 Ohio App. 2d 248, 337 N.E.2d 642 (1st Dist. 1974).

B. PRE-TRIALS

- Initial period held one month after service is complete;
- Pretrial Order: discovery deadlines, witness lists, dates for further pretrials, trial date;
- Pretrial Motions: Motion in Limine; Motion for Sequestration of Witnesses; Motions for Continuance or Consolidation; Motion to Dismiss; other housekeeping matters.

C. TRIAL

- Probate court shall conduct hearing, adversary in nature, on validity of a Will. R.C. 2107.083;
- Similar to other civil actions;
- Right to a jury trial must be demanded as prescribed in Civ. R. 38; R.C. 2107.72(B)(l);

- Demand of a jury trial may be withdrawn if all parties to the action who are not in default of answering consent to the withdrawal either prior to trial or present at time of trial commencement. R.C. 2107.72(B)(2);
- Jury must render a verdict in writing and signed by 3/4 or more of their number as prescribed in Civ.R. 48;
- "Effective Order of Probate" - prima facie evidence of attestation, execution and validity and contesting party may call any witness to the Will. R.C. 2107.74.
- Hospital records are admissible as they relate to the issues involved. R.C. 2317.40;
- Doctor-Patient privilege does not apply to physicians on issues relevant to competency of the patient at the time the Will was executed. R.C. 2317.02(B)(l)(e); and
- Attorney-Client privilege does not apply as to communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties in a Will contest when the dispute addresses the competency of the deceased client or whether the client was the victim of fraud, undue influence or duress when executing the document that is the basis of the dispute. R.C. 2317.02(A)(l).

D. POST-TRIAL

- Motion for a New Trial must be plead with specificity; no general allegations;
- Motion for Judgment N.O.V.; and appeal.

-Intentionally Left Blank-

Civil Matter Instructions: Property-Related Issues
CHAPTER CV 633: WILLS

CV 633.01 Validity of will or codicil [Rev. 11/7/20]

R.C. 2107.71 creates a civil action to contest the validity of a will or codicil. These instructions contain two proof of claim subsections, 2(A) (greater weight) and 2(B) (clear and convincing), based on the nature of the claim.

1. GENERAL. The plaintiff(s) claims that (insert name of person making [will] [codicil])'s (will) (codicil) is invalid.

2. PROOF OF CLAIM.

    - (A) INVALIDITY (GREATER WEIGHT). Before you can find for the plaintiff(s), you must find by the greater weight of the evidence that
        - (1) the person making the (will) (codicil) was not of sound mind and memory when the (will) (codicil) was made;
        - (2) the person making the (will) (codicil) was not 18 years of age;
        - (3) the (will) (codicil) was forged;
        - (4) the (will) (codicil) was not properly (made) (signed);
        - (5) the (will) (codicil) was revoked.
            - Generally, there will be no dispute that the testator was 18 years of age or that the will was properly executed. There may be a dispute as to whether the testator's or witnesses' names were forged. If forgery becomes a jury question, the judge will need to draft appropriate instructions. See R.C. 2913.01; OJI-CR 513.31(A) §§7.
    - (B) INVALIDITY (CLEAR AND CONVINCING). Before you can find for the plaintiff(s), you must find by clear and convincing evidence that
        - (1) the party making the (will) (codicil) was under (restraint) ([undue] [improper] influence); ("generally, undue influence must be proven by clear and convincing evidence which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established"). *Young v. Kaufman*, 8th Dist. Cuyahoga Nos. 104990 and 105359, 2017-Ohio-9015, Black v. Watson, 8th Dist. Cuyahoga No. 103600, 2016-Ohio-1470, Fox v. Stockmaster, 3rd Dist. Seneca Nos. 13-01-34 and 13-01-35, 2002-Ohio-2824.
        - (2) the (will) (codicil) was the product of fraud.
            - "The degree of proof to set aside a document for fraud is clear and convincing evidence." *Cross v. Ledford*, 161 Ohio St. 469 (1954). See OJI-CV 303.07.

3. WILL. "Will" means a written instrument made by a person eighteen years of age or older who is of sound mind and memory and not under restraint in order to dispose of his/her property after his/her death.

4. CODICIL. A "codicil" means a written instrument made by a person eighteen years of age or older who is of sound mind and memory and not under restraint that is a post-script to a will and must be construed together with the will.

5. 5. PROPERLY (EXECUTED) (SIGNED) (ADDITIONAL). “Properly (executed) (signed)” means a (will) (codicil) must be
    - in writing; and
    - signed at the end by (the person making it) (some person at the express direction of the party making it and in his/her conscious presence); and
    - signed by at least two competent witnesses in the conscious presence of the party making the (will) (codicil) who (saw the party making the [will] [codicil] sign it) (heard the person making the [will] [codicil] acknowledge his/her signature); and

6. COMPETENT WITNESS. “Competent witness” means a person who is capable of receiving accurate impressions of the facts and relating them truthfully.

7. CONSCIOUS PRESENCE. “Conscious presence” means within the range of any of the senses of the person making the will, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

8. PROBATE. Probate is a court procedure by which a will is proved to be valid or invalid.

    - The parties agree that the (will) (codicil) was written and signed as required by law.
    - Even though a (will) (codicil) is admitted to probate, it does not mean it validly disposes of the property of the party making the (will) (codicil) according to his/her wishes, but it is evidence of validity.

9. PREPONDERANCE. OJI-CV 303.05.

Though the words "sound mind and memory" and " not under restraint" have been in the statute at least since 1932, no brief definition has been (before now) attempted. " Undue influence" and " restraint" have been used interchangeably. Note deletion of instruction on presumption. See West v. Henry (1962), 173 Ohio St. 498,501,502, 20 O.O.2d 119, 184 NE.2d 200; OJI-CV 309.01.

10. CLEAR AND CONVINCING. OJI-CV 303.07.

11. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the evidence that the plaintiff proved his/her claim that the (will) (codicil) was not properly executed, then you will enter a verdict for the plaintiff.

12. CONCLUSION FOR DEFENDANT. If you find that the plaintiff failed to prove his/her claim by the greater weight of the evidence that the (will) (codicil) was not properly executed, then you will enter a verdict for the defendant.

CV 633.03 Sound Mind and Memory [Rev. 11/7/20]

1. GENERAL. In determining the soundness of the mind and memory of the testator, the law does not undertake to determine the level of a person's intelligence nor to define the exact quality of mind and memory which a testator must possess at the time a will is made.

2. ELEMENTS. However, the law requires:

(a.) That the testator understand that he is making a will to dispose of his property at death.

(b.) That the testator understands generally the nature and extent of his property.

(c.) That the testator has in his mind the names and identity of those persons who are his relatives, next-of-kin, or the natural objects of his bounty and understand his relationship to them.

3. MENTAL CAPACITY REQUIREMENTS. A testator is not required to have sufficient mental capacity to make a contract or to conduct normal business affairs. He must, however, have a sufficiently active mind and memory to understand the three conditions just given to you. He must be able to remember them a sufficient length of time to consider their obvious relations to each other, and to be able to form a rational judgment with reference to them, even though he may not be able to understand and appreciate these matters as well as a person who has vigorous health, in both mind and body. It is not necessary that he be aware of these three conditions and have them in his mind at all times, since his health and mental condition may vary from time to time. But he must have them in mind during the time that he signs the will.

- 3. CONCLUSION FOR PLAINTIFF. If you find by the greater weight of the evidence that the plaintiff proved his/her claim that the person making the (will) (codicil) was not of sound mind and memory at the time of the (making) (signing) of the (will) (codicil), then you will enter a verdict for the plaintiff.
- 4. CONCLUSION FOR DEFENDANT. If you find that the plaintiff failed to prove his/her claim by the greater weight of the evidence that the person making the (will) (codicil) was not of sound mind and memory at the time of the (making) (signing) of the (will) (codicil), then you will enter a verdict for the defendant.

CV 633.05 Under Restraint (Undue Influence) [Rev. 4/15/23]

1. GENERAL. The plaintiff claims that the person making the (will) (codicil) was under (undue) (improper) influence at the time that he/she signed the (will) (codicil).

2. ELEMENTS. Being under restraint and being subject to undue influence are one and the same. The essential elements of undue influence are:

(a.) A testator is a person who is or can be influenced by reason of advanced age, physical infirmities, mental condition, fear, or for any other reason would yield to the desire or will of another person or persons;

(b.) The opportunity for a person or persons to exert it;

(c.) The fact of improper influence exerted or attempted;

(d.) A will showing the effect of such influence.

3. UNDUE (IMPROPER) INFLUENCE. Undue influence sufficient to invalidate a will is that which substitutes the plans or desires of another for those of the testator. The influence must be such as to control the mind of the testator in the making of his will, to overcome his power of resistance, and to result in his making a distribution of his property which he would not have made if he were left to act freely and according to his own plans and desires.

    - UNDUE INFLUENCE (ADDITIONAL). The mere existence of undue influence or an opportunity to exercise it, although coupled with interest or motive to do so, is not sufficient to invalidate a will. Such influence must actually be exerted on the mind of the testator with respect to the execution of the will in question. It must be shown that the undue influence resulted in the making of a will containing the disposition of property that the testator would not have otherwise made.

4. GENERAL INFLUENCE. General influence, however strong or controlling, is not undue/improper influence unless it is brought to bear directly upon the act of preparing the will and imposes another person's plans or desires upon the testator. If the will, as finally executed, expresses the free and voluntary plans and desires of the testator, the will is valid, regardless of the exercise of influence.

5. CONFIDENTIAL OR FIDUCIARY RELATIONSHIP: PRESUMPTION (ADDITIONAL). A person in a confidential or fiduciary relationship may have more opportunity to exert (undue) (improper) influence than a mere acquaintance. A (will) (codicil) is therefore looked upon with some suspicion that (undue) (improper) influence may have been brought to bear on the person making the (will) (codicil) if a confidential or fiduciary relationship exists. If you find that a confidential or fiduciary relationship existed between the person making the (will) (codicil) and the beneficiary, the defendant must prove by the greater weight of the evidence that his/her conduct was free of (undue) (improper) influence and the person making the (will) (codicil) acted voluntarily and according to his/her own plans and desires. However, the burden of proof remains on the plaintiff(s) to prove (undue) (improper) influence by clear and convincing evidence.

    - CONFIDENTIAL RELATIONSHIP. A “confidential relationship” exists whenever trust and confidence is placed in the integrity and (fidelity) (loyalty) of another. A “confidential relationship” can be moral, social, domestic, or merely personal in nature.

    - FIDUCIARY RELATIONSHIP. A “fiduciary relationship” is a relationship in which special confidence and trust is placed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust. A “fiduciary relationship” may be created out of an informal relationship, but this is done only

when both parties understand that a special trust or confidence has been established. A "fiduciary relationship" may also exist when there is some formal legal relationship such as one created by a power of attorney.

6. CLEAR AND CONVINCING. OJI-CV 303.07.

7. CONCLUSION FOR PLAINTIFF. If you find by clear and convincing evidence that the plaintiff proved his/her claim that (undue) (improper) influence was exerted by or on behalf of the defendant on the person making the (will) (codicil) at the time of the (making) (signing) of the (will) (codicil), then you must enter a verdict for the plaintiff.

8. CONCLUSION FOR DEFENDANT. If you find that the plaintiff failed to prove his/her claim by clear and convincing evidence that (undue) (improper) influence was exerted on the person making the (will) (codicil) at the time of the (making) (signing) of the (will) (codicil), then you must enter a verdict for the defendant.

CV 633.07 Conclusion or Summary [Rev 11/7/20]

1. If fraud becomes a jury question, the judge will need to draft appropriate instructions. See OJI-CV Chapter 449.
    - The degree of proof to set aside a document for fraud is clear and convincing evidence. *Cross v. Ledford*, 161 Ohio St. 469 (1954). See OJI-CV 303.07.
2. The fact that a person who has the capacity to make a will disposes of his property in an unnatural manner, or unjustly, or not equally and at variance with earlier statements by the testator concerning his relatives or next-of-kin, or the natural objects of his bounty, does not invalidate his will unless the contestants prove by the greater weight of the evidence that the testator was not of sound mind and memory or that undue influence was actually exercised on the testator at or prior to the time of the making of the will, and that such (lack of mental capacity) (undue influence) was in operation at the time of the execution of the will, and that the (lack of mental capacity) (undue influence) (resulted in a) (was used for the purpose of obtaining, producing or coercing a) will in favor of particular individuals.

3. CONSIDER. You have the right to consider evidence tending to show that the will was just or unjust, reasonable or unreasonable, natural or unnatural; the value and nature of testator's estate; financial condition of those who might naturally expect to be beneficiaries at the time this will was made, and any other factors that you find from the evidence, in determining whether, at the time of the execution of the will, the testator was (of sound mind and memory sufficient to legally execute a will) (under restraint or subject to undue influence)

CIVIL TRIAL JURY INSTRUCTIONS
CONVERSIONS

Citation to new jury instructions
1 OJI-CV 301.03, 1 CV Ohio Jury Instructions 301.03

Title 3 - General Civil Trial Instructions
CHAPTER CV 301: PRELIMINARY JURY MATTERS
CHAPTER CV 303: STANDARDS OF PROOF
CHAPTER CV 305: EVIDENCE AND CREDIBILITY
CHAPTER CV 309: INSTRUCTIONS DURING TRIAL
CHAPTER CV 311: INTRODUCTION OF SELECTED ISSUES
CHAPTER CV 317: CLOSING INSTRUCTIONS
CHAPTER CV 319: DELIBERATIONS
Title 6 - Civil Matter Instructions: Property-Related Issues
CHAPTER CV 633: WILLS

301.01 qualifying the jury
CV 301.03 Qualifying the jury *[Rev. 2-22-20}*

301.02 orientation of jury and 301.03 recess instructions
CV 301.05 Orientation for new jury *[Rev. 1-22-11}*
CV 301.07 Admonitions to the jury *[Rev. 8-15-12}*
CV 309.13 Recess instructions *[Rev. 3-19-11}*

CV 301.09 Jurors taking notes *[Rev. 1-22-11}*
CV 301.11 Jurors asking questions *[Rev. 1-22-11}*

301.05 general instructions
CV 301.07 Admonitions to the jury *[Rev. 8-15-12}*
CV 303.03 Burden of proof *[Rev. 10-22-11}*
CV 303.05 Preponderance *[Rev. 12-11-10}*
CV 303.07 Clear and convincing *[Rev. 2-24-18}*
CV 305.01 Evidence and inferences *[Rev. 8-17-11}*
CV 305.03 Evidence excludes *[Rev. 3-19-11}*
CV 305.05 Credibility *[Rev. 8-15-12}*
CV 309.03 Prima facie evidence *[Rev. 3-19-11}*
CV 309.09 Opinion of layperson *[Rev. 1-22-11}*
CV 309.11 Expert witness and hypothetical question *[Rev. 12-11-10}*
CV 311.01 Presentation of issues *[Rev. 10-22-11}*
CV 633.01 Validity of will or codicil *[Rev. 11/7/20}*

CV 633.03 Sound Mind and Memory *[Rev. 11/7/20}*
CV 633.05 Under (Undue) (Improper) Influence Defined *[Rev. 4/15/23}*
CV 633.07 Fraud *[Rev. 11/7/20}*
CV 633.11 Revocation *[Rev. 11/7/20}*
CV 633.13 Verdict *[Rev. 11/7/20}*
CV 317.01 Introduction to deliberations: sample instructions *[Rev. 12-11-10}*
CV 317.03 Common closing remarks; sample instructions *[Rev. 2-1-20}*
CV 317.05 Alternate Jurors *[Rev. 1-21-12}*
CV 317.07 Final closing instructions *[Rev. 8-6-14}*
CV 317.09 Overnight adjournment *[Rev. 2-25-12}*
CV 319.07 Deadlock *[Rev. 8-5-18}*
CV 633.13 Verdict (for discussion on wills) *[Rev. 11-17-20}*

CIVIL ACTIONS: SAMPLE JURY INSTRUCTIONS

CV 203.01 Welcoming Remarks [Rev. 10-23-10]

The judge should take this opportunity to introduce himself/herself and the court staff. The judge should address a cellular telephone use policy or other rules unique to that judge's courtroom. The judge may explain the purpose of juries as an essential element of the American justice system. It is also an opportunity to acknowledge the public service of the jurors or prospective jurors.

1. INTRODUCTIONS. For the record, this is ____ (insert case number), entitled State of Ohio versus _____ (insert name of case). Appearing on behalf of the plaintiff is Attorney _____ (insert name of attorney). Would you rise, please, and introduce yourself and your client to the jury?
   Appearing on behalf of the defendant is Attorney _____ (insert name of attorney). Would you rise, please, and introduce yourself and your client to the jury?
2. **CLAIM(S).** (Insert brief synopsis of the complaint and answer). I will explain the elements to you in more detail at a later time.

CV 203.03 Voir Dire Questions: Sample Instruction *[Rev. 1-22-11]*

This is one commonly used approach to voir dire. There are other acceptable approaches that the trial judge may wish to explore.

1. ADMINISTRATION OF OATH. If you would all please rise. (Oath *to venire then administered by judge or clerk of courts.)*

Be seated, please.

2. JUDGE'S VOIR DIRE.

(A) ROLE OF AJUROR. I am now going to question the prospective jurors who are seated in the jury box concerning their qualifications to serve as jurors in this case. All members of this jury panel, however, should pay close attention to my questions, making mental note of the answers you would give if these questions were asked of you. If you are called to the jury box, you will be asked to give your answers to these or similar questions. I am sure that each of you is generally qualified to be a juror. However, there may be something that could disqualify you in this case. *(Direct the next sentence to prospective jurors seated in the jury box.)* In the trial of this case, each side is entitled to have a fair, unbiased, and unprejudiced jury. If there is any fact or any reason why any of you might be biased or prejudiced in any way, you must disclose such reason when you are asked to do so. It is your duty to make this disclosure. If this disclosure is of a personal nature, you have the option to make this disclosure in private to the court and counsel. After my questions, the attorneys will ask you questions. These questions are not designed to pry into your personal affairs, but to discover whether you have any knowledge of this case; whether you have any pre- conceived opinion that you cannot set aside; or whether you have had any experience that might cause you to identify yourself with any party. These questions are necessary to ensure each party a fair and impartial jury. After the examination by the court and counsel, you may be excused. If you are excused, do not be offended and do not try to figure out why.

(B) JUDGE'S QUESTIONS TO JURY.

(1) Are any of you related by family or marriage, or do any of you have any personal acquaintance with or knowledge of, either directly or indirectly:

(a) the plaintiff: (*insert name of plaintiff>;*

(b) the plaintiff' s lawyers: (*insert name of plaintiff's lawyers);*

(c) the defendant: (*insert name of defendant);* or

(d) the defendant' s lawyers: (*insert name of defendant's lawyers)?*

(2) The complaint in this case alleges that (*insert allegations included in the complaint)* and the answer alleges (*insert allegations included in the answer).* Do any of you have any prior knowledge of or information concerning the facts involved in this case?

(3) Do any of you have any personal interest of any kind in this case?

(4) During the trial of this case, the following persons may be called as witnesses to testify on behalf of the parties: (*insert name of witnesses).* Have any of you heard of or otherwise been acquainted with any of the witnesses just named? The parties are not required and might not wish to call all of these witnesses, and may later find it necessary to call other witnesses.

(5) Do any of you have any feeling, thought, inclination, premonition, prejudice,

or bias that might influence or interfere with your full and impartial consideration of the evidence that will be produced by the plaintiff and the defendant and that might influence you for or against either party?

(6) Are any of you related to or acquainted with each other? If so, will it create any problem if you serve on the same jury? Will it offend you if your relative or acquaintance is excused?

(7) How many of you have been involved personally in a lawsuit either as a party or a witness, or have had a relative or close friend as a party in a lawsuit? If so, would you describe the type of case?

(8) May I see the hands of those of you who have served as jurors in other cases? *(Direct the following questions to each person whose hand is raised.)*

(a) Would you tell us about the case or cases on which you served prior to today?

(b) Does your prior jury experience interfere in any way with your ability to be fair and impartial to each party in this case?

(c) (*If the prior jury experience was in a criminal case, the judge may wish to briefly discuss the difference in the burdens of proof)* You must understand that there are substantial differences in the rules applicable to the trial of criminal cases from those applicable to the trial of civil cases. This is particularly true in respect to the burden of proof. In a civil case, the plaintiff must prove his/her case by a preponderance of the evidence. In a criminal case, the defendant is presumed to be innocent. Before he/she may be found guilty, the prosecution must prove his/her guilt beyond a reasonable doubt. Will each of you be able to set aside the instructions that you received in your previous cases and try this case on the instructions given by me?

(9) It is important that I have your assurance that you will, without reservation, follow my instructions and rulings on the law and will apply the law that I give you to this case. To put it somewhat differently, whether you approve or disapprove of the court' s rulings or instructions, it is your solemn duty to accept as correct these statements of the law. You may not substitute your own idea of what you think the law is or ought to be. Will all of you follow the law as given to you by me in this case?

(10) (OPTIONAL). Will you be able to listen to the testimony of a police or other law enforcement officer and measure it by the same standards you use to test the credibility of any other witness?

(11) Do any of you, any member of your immediate family, or any close friends have a legal or medical background?

(12) Do you know of any other reason, or has anything occurred during this question period, that might make it difficult for you to be fair and impartial in

this case?

(13) I expect this case to take (*insert number of days)* days. There may be some long hours involved or it may take longer than I expect. *(Advise prospective jurors of daily timeframes.)* You will all be given time to contact family and friends to change or modify plans you may have. Will this cause any added hardship you cannot reasonably overcome, or do you have any issues in your personal life that might divert your attention from this case?

3. **ATTORNEYS' VOIR DIRE.**

(A) *(At sidebar, the court can ask the attorneys whether there are additional questions they wish the court to ask of the jury.)*

(B) (The *trial judge must permit counsel to supplement the judge's examination of the prospective jurors. The scope of such additional questions or supplemental examination shall be within reasonable limits prescribed by the trial judge in his/her sound discretion. It is helpful to give counsel copies of rules on voir dire, suggestions provided in OJI-CV 301.01, section 4, that defines the scope of their supplemental examination.)*

4. CHALLENGES FOR CAUSE. (The *court should ask counsel for each party to exercise any challenges for cause that have not been agreed upon or have not been ordered by the court.)*

5. PEREMPTORY CHALLENGES. The next stage of voir dire involves peremptory challenges. Each side may excuse a limited number of jurors without giving any reason. *(At this point, the court calls on each side, alternately, to exercise any peremptory challenges).*

6. REPLACEMENT JURORS AFTER CHALLENGE. (*When a new prospective juror is seated, the court should ask him/her the following questions.)*

(A) Have you heard the questions by the court and counsel and the answers by the other prospective jurors?

(B) Is there anything that comes to mind as a result of those questions that you should bring to the court' s attention or any reason why you cannot be a fair and impartial juror? *(It may be wise to revisit individual areas of inquiry to refresh the prospective juror's recollection.)*

(C) Can you think of any reason why you might not be able to listen to the evidence in this case fairly or why you should not be on this jury?

(D) (The *court should let counsel inquire of the replacement juror.)*

7. ALTERNATE JURORS. *(Depending on the anticipated length of the trial or type of case, the trial judge will determine the number of alternate jurors, up to a maximum of six, and select them one at a time.)*

8. ADMINISTER THE OATH TO THEJURYBYTHEJUDGE ORDESIGNEE. Do you swear or affirm that you will diligently inquire into and carefully deliberate all matters between (*insert name of plaintiff*> and (*insert name of defendant)?* Do you swear or affirm you will do this to the best of your skill and understanding, without bias or prejudice? (So,

help you God) (This you do as you shall answer under the pains and penalties of perjury). If so, say" I do (swear) (affirm)."

9. **DISMISSAL OF REMAINING PANEL.** *(At this point, excuse the remaining members of the venire and instruct them regarding future reporting requirements.)*

CV 205.01 Preliminary Instructions: Sample Instruction *[Rev. 10-23-10]*

1. GENERAL. Before we hear the opening statements of counsel and begin to take evidence, I will give you preliminary instructions to follow as you listen to and consider the evidence in this case. Later, after you have heard all of the evidence and closing arguments of counsel, I will give you further instructions on the law that you are to follow in this case. It is my duty as judge to instruct you on the law, and it is your duty to follow the law as I give it to you.

2. EVALUATING THE EVIDENCE. First of all, it is your exclusive duty to decide all questions of fact submitted to you. In connection with this duty, you must decide the effect and value of the evidence. You must not be influenced in your decision by sympathy, prejudice, or passion toward any party, witness, or attorney in the case. If, in these instructions or in instructions that I give you at the conclusion of the evidence, any principle or idea is repeated or stated in varying ways, no emphasis is intended and you must not infer any. Therefore, you must not single out any particular sentence or individual point or instruction and ignore the others. Rather, you are to consider all of the instructions as a whole, and you are to consider each instruction in relation to all the other instructions. The fact that I give you some of the instructions now and some at the conclusion of the evidence has no significance as to their relative importance, nor does the order in which I give them to you.

3. THE ATTORNEYS' ROLES. The attorneys for the parties will, of course, have active roles in the trial. They will make opening statements to you, question witnesses and make objections, and finally will argue the case as the last step before you hear my final instructions and commence your deliberations. Remember that attorneys are not witnesses, and because it is your duty to decide the case solely on the evidence that you see or hear in the trial, you must not consider as evidence any statement by any attorney made during the trial. There is an exception, and that is if the attorneys agree to any fact. Such agreement, stipulation, or admission of fact will be brought to your attention, and it will then be your duty to regard such fact as being conclusively proved without the necessity of further evidence on the fact.

4. OBJECTIONS. If a question is asked and an objection to the question is sustained, you will not hear the answer. You must not speculate as to what the answer might have been or as to the reason for the objection. If an answer is given to a question and the Court grants a motion to strike the answer, you are to disregard completely such question

and answer and not consider them for any purpose. A question in and of itself is not evidence, and you may consider the question only as it supplies meaning to the answer.

5. CREDIBILITY OF WITNESSES. As jurors, you have the sole and exclusive duty to decide the credibility of the witnesses who will testify in this case, which simply means that it is you who must decide whether to believe or disbelieve a particular witness. In making these decisions, you will apply the tests of truthfulness that you apply in your daily lives. These tests include the appearance of each witness on the stand; the witness' manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, hear, and know the things about which he or she testified; the witness' accuracy of memory, frankness or lack of it, intelligence, interest, and bias, if any; together with all the facts and circumstances surrounding the testimony. When applying these tests, you will assign to the testimony of each witness such weight as you deem proper. You are not required to believe the testimony of any witness simply because it was given under oath. You may believe or disbelieve all or any part of the testimony of any witness. You are not required to believe the testimony of any witness simply because the testimony was given under oath. You may believe or disbelieve all or any part of the testimony of any witness.

6. WEIGHT OF TESTIMONY. You should not decide any issue of fact merely on the basis of the number of witnesses that testify on each side of such issue. Rather, the final test in judging evidence should be the force and weight of the evidence, regardless of the number of witnesses on each side. The testimony of one witness believed by you is sufficient to prove any fact. Also, discrepancies in a witness' testimony or between one witness' testimony and that of others, if there are any, does not necessarily mean that you should disbelieve the witness. People commonly forget facts or recollect them erroneously after the passage of time. You are certainly all aware of the fact that two people who are witnesses to an incident may often see or hear it differently. In considering a discrepancy in a witness' testimony, you should consider whether such discrepancy concerns an important fact or a trivial one.

7. OTHER TYPES OF EVIDENCE (OPTIONAL). During the course of the trial, certain testimony of an unavailable witness may be presented by deposition. A deposition is testimony that has been taken under oath before the trial by video or transcribed into written form for use at trial. Likewise, certain questions known as interrogatories and their answers may be read into evidence. An interrogatory is a question that one party asked another in writing before trial, the answer to which was given under oath in writing. You are to consider any questions and answers in depositions, and any interrogatories and their answers, as if they were presented live in the court.

8. CONCLUSION. This concludes my preliminary instructions. Please keep these instructions in mind as you listen to the evidence and statements of counsel. I may give you additional instructions during the trial. When the presentation of the evidence and

closing arguments have concluded, I will give you additional instructions on the law that you are to follow together with the instructions you have just heard and any instructions given during the trial.

CV 205.03 Admonitions to the Jury: Sample Instruction *[Rev. 8-5-12]*

1. FAIR AND ATTENTIVE. It is important that you be fair and attentive throughout the trial. Do not discuss this case among yourselves or with anyone else. This includes family, friends, and the media. You must not post anything about this case on the Internet or on any electronic device including cell phones. This would include blogs and social networking sites such as Myspace, Facebook, Twitter, and others. Any such violation could lead to a mistrial and would severely compromise the parties' right to a fair trial. Do not permit anyone to discuss this case with you or in your presence. Do not form or express any opinion on this case until it is finally submitted to you.

2. AMONG YOURSELVES. You may not discuss this case among yourselves until it is finally submitted to you. You will receive the opening statements, the evidence, the closing arguments, and the law in that order. It would be unfair to discuss the case among yourselves before you receive everything necessary for your decision.

3. DO NOT DISCUSS OUTSIDE COURT. You should explain this rule prohibiting discussion of the case to your family and friends. When (the trial is over) (your jury duty is completed), I will release you from this prohibition. At that time, you may, but are not required to, discuss the case and your experiences as a juror.

4. REPORT VIOLATION. You are instructed not to talk with the attorneys, parties, or witnesses during the trial. Likewise, they must not talk with you. You must also not talk with anyone else about this case during the trial. If anyone should attempt to discuss the case with you, report the incident to me or to the bailiff immediately.

5. WARNING. Do not investigate or attempt to obtain additional information about this case from any source outside the courtroom. (This includes visiting the scene of the event or viewing pictures obtained on your own, including those obtained on the Internet, such as on Google Earth. This case involves the scene as it existed at the time of the event, not as it exists today. Viewing the scene, pictures, or other materials without the benefit of explanation in court is unfair to the parties who need you to decide this case solely upon the evidence that is admitted in this case.)

   You are prohibited from performing your own experiments and conducting your own research, including Internet research. Such information may be incomplete, inaccurate, or irrelevant to the issues in this case. It is vital that you carefully follow these instructions. The reason is simple. The law requires that you consider only the testimony and evidence you hear and see in this courtroom.

6. NEWSPAPER, RADIO, AND TV. You must consider and decide this case only upon the evidence received at the trial. If you acquire any information from an outside source, you must report it to the bailiff immediately.

   You are instructed not to read, view, or listen to any report in the newspaper or on the radio or television on the subject of this trial; do not permit anyone to read or comment upon

them to you or in your presence. Media reports may be incomplete or inaccurate. You must consider and decide this case only upon the evidence received at the trial. If you acquire any information from an outside source, you must not report it to other jurors and you must disregard it in your deliberations. In addition, you must report the outside source of information to the bailiff or to the court at the first opportunity.

7. MEDIA DISTRACTION (OPTIONAL). These proceedings may be (broadcast) (photographed) (recorded) by members of the news media. You must not allow this fact to divert your attention from this case or to interfere with your duties as jurors. Further, you are not allowed to talk to members of the media during this trial.

8. VIOLATION. Any violation of these orders may require a new trial and may subject those involved to sanctions, including contempt of court.

9. PERSONAL PROBLEM. If, during the trial, issues arise that would affect your ability to pay attention and sit as a fair and impartial juror, you must explain the matter to the bailiff who will inform me. At any time if you cannot hear a witness, an attorney, or me, please make that fact known immediately by raising your hand.

10. RECESS. I will remind you of these instructions at each recess. If I forget to do so, however, they nevertheless apply to your conduct throughout the trial.

11. JURORS TAKING NOTES. OJI-CV 301.09.

12. JURORS ASKING QUESTIONS. OJI-CV 301.11.

13. INTERPRETERS AND TRANSLATORS. OJI-CV 301.13.

CV 205.05 Recess Instructions: Sample Instruction *[Rev. 10-23-10]*

1. REQUIRED ADMONITION. Do not discuss this case among yourselves. Do not permit anyone to discuss it with you or in your presence. It is your duty not to form or express an opinion on the case until it is finally submitted to you.

2. REMINDER. Remember the admonitions the court previously gave you concerning your conduct.

WILL CONTEST
OHIO JURY INSTRUCTION

301.03 QUALIFYING THE JURY [Rev 1-22-11]

Good Morning Ladies and Gentlemen!

You have been summoned as prospective jurors in a Will Contest, Case No. _____ in the Probate Division, Court of Common Pleas, Cuyahoga County.

Sir/Madam, would you please introduce your clients. Thank You.

Each party to this case is entitled to jurors who approach this case with open minds and agree to keep their minds open until a verdict is reached. Jurors must be as free as humanly possible from bias, prejudice, or sympathy, and not influenced by preconceived ideas either as to the facts or the law. You are all probably qualified to serve as jurors; however, there might be something that could disqualify you in this particular case.

At this time the Court and counsel will ask you questions. These questions are not designed to pry into your personal affairs, but to discover if you have any knowledge of this case, have any preconceived opinions which you cannot lay aside, or if there is anything in your personal or family life that might cause you to identify yourself with either the plaintiff or defendant. These questions are necessary to assure each party an impartial jury. For those persons who have been summoned as jurors, the Court reminds you that jury service is a civic duty. To maintain democracy, each must make some sacrifice. Remember, as we proceed to select the jury and try this case, that you are serving your community and that you, too, may someday require a jury.

As prospective jurors, you will be sworn and the Court and counsel will question you to determine your ability to be fair and impartial in this case.

Kindly stand and raise your right hands.

Do you, and each of you, solemnly swear
That you will truly and fully answer all
Questions put to you by the Court and
counsel in the case now called for trial and
this you do as you shall answer god?

301.05 ORIENTATION FOR NEW JURY [Rev 1-22-11]

Jury service may be strange to you, so a short explanation is in order. Those who participate in a lawsuit must do so in accordance with established rules. This is true of the witnesses, lawyers, and judge, and especially you, as jurors.

The lawyers present the evidence according to the rules. The judge enforces the rules and determines the admissibility if the evidence.

You will be the sole judges of the facts, the credibility of the witnesses and the weight to be given to the testimony. Later, the Court will furnish the law and you will apply that law to the facts. It is your sworn duty to accept the law as given you by the Court.

The procedure for the trial is as follows: First, counsel outlines what they expect their evidence will be. These opening statements are not evidence, but they are a preview of the claims of each party, designed to help you follow the evidence as it is presented. Then, each side offers evidence to support its claim. The plaintiff proceeds first, followed by the defendant; and, thereafter, rebuttal evidence may be offered. The trial concludes with arguments of counsel and the instructions of law by the Court. Thereafter, you will deliberate on your verdict.

During the course of the trial, from time to time, you will hear the lawyers object to questions or answers that are asked, or given by, the witnesses. The objections are not made for the purpose of withholding anything from you, but are made because counsel believe that the

question asked or the answer given is not in accordance with the rules of evidence and, therefore, should not be made in your presence.

For the same reason, lawyers may confer with the judge at the bench or, you may even be asked to retire to the jury room at times in order that legal points and matters of procedure may be discussed.

Members of the jury, it is important that you be fair and attentive throughout the trial.

Do not discuss this case among yourselves or with anyone else. Do not permit anyone to discuss it with you or in your presence. Do not form or express any opinion on the case until it is finally submitted to you.

More difficult for you to understand is that you may not discuss this case among yourselves until it is finally submitted to you. You will hear the opening statements, the evidence, the arguments of counsel, and the law in that order. It would be unfair to discuss the case among yourselves before you receive everything necessary for your decision,

You must explain this rule to your family and friends. When the trial is over (when your jury duty is completed), you will be released from this instruction. At that time, you may (but you are not required to) discuss the case and your experiences as a juror. Until that moment, control your natural desire to discuss the case, both here and at home.

The Court instructs you not to converse with the attorneys, parties, or witnesses during the trial. Likewise, the participants in the trial must not converse with you. If anyone should attempt to discuss the case with you, report the incident to the Court or to the bailiff immediately.

You may not investigate or attempt to obtain additional information on this case outside the courtroom. It is highly improper for any one of you to attempt to do so.

During the progress of the trial, there will be periods of time during which you will be

allowed to separate, such as recesses for lunch periods and overnight. During those periods of time that you are outside the courtroom and are permitted to separate, you must not talk about this case among yourselves or with anyone else.

During the trial, do not talk to any of the parties, their lawyers or any of the witnesses.

If any attempt is made by anyone to talk to you concerning the matters here under consideration, you should report the fact to the Court immediately.

You should keep an open mind. You should not form or express an opinion during the trail and should reach no conclusion in this cause until you have heard all the evidence, the arguments of counsel, and the final instructions as to the law which will be given to you by the Court.

309.13 RECESS INSTRUCTIONS [Rev 3-19-11]

REQUIRED ADMONITION. Do not discuss this case among yourselves. Do not permit anyone to discuss it with you or in your presence. It is your duty not to form or express an opinion on the case until it is finally submitted to you.

301.05 GENERAL INSTRUCTIONS [Rev 1-22-11]

CHARGE TO JURY

Members of the jury, you have heard the evidence and arguments of counsel. It is now the duty of the Court to instruct you on the law which applies to this case. You and I have separate functions: You decide the disputed facts and the Court provides the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law, nor to apply your own conception of what you think the law should be. These instructions constitute the law of this case.

I remind you that the administration of justice requires faithful performance of duty by

everyone who is a part of that effort. As jurors, you are a key part of that effort and the faithful performance of your duty is vital to achieve justice.

You must apply all the laws as I state it in these instructions: that is, you are not free to follow one instruction and ignore the other.

You determine the facts in this cause from the evidence that has been introduced in open court. When the facts are determined you apply the law and determine the issue presented. Your verdict must be based upon evidence and not under speculation, guess, or conjecture. Neither sympathy for, not prejudice against, any of the parties to this cause should influence you in any way in arriving at your verdict.

During this charge, I may appear to emphasize words or sentences. Do not assume from that emphasis or form any gesture that I may make, or any manner of delivery used, that I am stating the law to the advantage of either side of this cause.

As you were told at the outset of this trial, this is a Will Contest Proceeding. There is only one issue to decide this case: Is the instrument in writing dated the _____day of _____20_, the Last Will and Testament of _____.

I charge you by law. Any person of full age, of sound memory, and not under restraint, may dispose of his or her property by will in any unlawful manner.

However, if such person was:

1. Not of sound mind when the will was made; or

2. Was under restraint; or

3. If the will was forged; or

4. If the will was not properly executed; or

5. If the will has been revoked: or

6. If the person making the will was not of full age,

then it is not a valid will.

In this case the plaintiff/contestant, _____alleges that the will before the court is not a valid will of _____, deceased, for the reasons that he was under restraint at the time that the will was executed and that a fraud was perpetrated upon him by defendant.

There is but one issue in this case: that is, whether the will before you is valid, but two bases for invalidity have been claimed.

The person who claims that certain facts exist must prove them by evidence. This obligation is known as the burden of proof and in this case the burden of proof is on the plaintiff/contestant.

What is evidence? Evidence is the testimony received from the witnesses, the exhibits, admitted during the trial and any facts which the Court requires you to accept as true. Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. Circumstantial evidence is proof of facts or circumstances from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind. You may infer only from facts that have been proved by the greater weight of this evidence, but you may not infer a fact or facts or make inferences from a speculative or remote basis that has not been established by the greater weight of evidence. The evidence does not include statements made by counsel during the trial. The opening statements and the closing arguments of counsel are designed to assist you, but they are not evidence. Statements that were stricken by the Court and which you were instructed to disregard are not evidence and must be treated as though you never hear them.

You must not speculate as to why the Court sustained the objection to any question or what

the answer to such a question might have been. You must not draw and inference or speculate on the truth of any suggestion included in a question that was not answered.

The burden of proof is on the plaintiff/contestant to prove the facts supporting the claim of the invalidity of the will by a preponderance of the evidence. A preponderance of the evidence means the greater weight thereof, the greater credibility, the greater probability of fact. It is evidence that you believe because it outweighs or overbalances in your minds the evidence opposed to it. It is that evidence which is more provable, more persuasive, or of greater probative value. Quality may, or may not be, identical with the quantity or the greater number of witnesses. In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it. If the weight of the evidence is equally balanced or if you are unable to determine which side has a preponderance, then the party who has the burden of proof has not established the issue by a preponderance of the evidence.

The order of the Probate Court admitting the will to probate is prima facie evidence of the attestation, execution, and validity of the will. The words prima facie mean that the fact is presumed to be true unless overcome by some evidence to the contrary. Prima facie evidence mat be sufficient to establish the validity of the will unless overcome by evidence of greater weight.

One basis for invalidity of the will in this action is that _____, the person who made the will is known in law as testator, was under restraint: that is, he was unduly influenced by another. Undue influence which would invalidate a will is that which substitutes the wishes of another for those of the testator. The influence must be such as to control the mental operations of the testator in the making of his will, overcome his power of resistance, and oblige him to make a disposition of his property which he would not have made if left to act freely according to his own wishes and pleasure. To invalidate a will, undue influence must so

overcome power and control the mind of the testator as to destroy his free agency and force him to express the will of another rather than his own. The mere presence of influence is not sufficient. Undue influence must be present and effective at the time of execution of the will causing disposition and gifts which the testator otherwise would not have made. The essential elements of undue influence are:

1. A susceptible testator;
2. Another's opportunity to use influence over the testator;
c. The actual use of, or attempt to use, such influence upon testator; and
d. A result showing the effect of such influence.

A susceptible testator is one who from age, infirmities, mental condition, fear or for any other reason that you may find would be subject to or yield to the exertion of undue influence upon him. The mere existence of undue influence or an opportunity to exercise it, even though coupled with an interest or motive, is not sufficient to invalidate a will. Such influence must actually be exerted on the mind of the testator with respect to the execution of the will in question. It must be shown that the undue influence resulted in making a testamentary disposition that the testator otherwise would not have made. General influence, however, strong or controlling, is not undue influence unless brought to bear directly upon the act of preparing the will and imposes someone else's wishes upon testator. If the will as finally executed, expresses the free and voluntary wishes and desires of the testator, the will is valid, regardless of the exercise of influence. The fact that a person of testamentary capacity disposes of his property in an unnatural manner, unjustly or unequally, or at variance with earlier expressions of the testator concerning relatives does not invalidate the will unless the contestant proves that the undue influence was actually exercised on the testator at the time of its execution, and was used for the purpose of procuring or coercing a will

in favor of a particular party or parties. The exercise of undue influence in the execution of a will not to be shown by direct proof, it may be inferred from circumstances.

Another basis for asserting the invalidity of the will is that a fraud was perpetrated upon the testator by the defendant in the execution of the will. Fraud is defined as a false representation of fact, whether by words, conduct or concealment which misleads and is intended to mislead another so that he relies in it to his injury, the law requires that the plaintiff prove by clear and convincing evidence each of the following elements:

(1) A false representation of fact that was made with knowledge of its falsity or with utter disregard and recklessness about its falsity so that knowledge may be found; OR a knowing concealment of fact which was done where there was a duty to disclose:

(2) The representation or concealment was material to the transaction;

(3) The representation or concealment was made with the intent of misleading plaintiff into relying upon it;

(4) The Plaintiff was justified in relying on the representation or concealment and did, in fact, so rely;

(5) the plaintiff was injured and the injury was proximately caused by his reliance on the representation or concealment.

The representation must be material: that is, it must be important, necessary or having influence on the transaction. It must be so substantial and important that it influenced the person to whom it was made or from whom it was concealed. A representation is false when it is not substantially true. The truth or falsity of a representation depends on the natural and obvious meanings of the words taking into consideration all the surrounding circumstances. A person

knows a representation is false when he is aware it is not substantially true. A representation is made with utter disregard and recklessness when the person who makes the representation is completely careless or indifferent to the consequences or the risk that representation will cause the person to whom it is made to do or not do certain things. If a person has no knowledge of fact, but asserted it as true when it was false, you may find that he made the representation with utter disregard and recklessness. A representation recklessly made without knowledge of the truth is the same as false representation knowingly made. A person intends to mislead another to rely on a representation when it is his purpose to mislead. A person's intent is known only to himself unless he expresses it to others or indicates it by his conduct, intent is determined from the in which the representation is made, the means used and all the facts and circumstances in evidence. There is justifiable reliance in a representation or concealment when a person of ordinary care would rely on it under the same of similar circumstances. The plaintiff must be directly damaged by the reliance on the representation or concealment. This means that the damage was caused by the representation or concealment in a natural and continuous sequence and without which damage would not have occurred.

The burden of proof is on the plaintiffs to establish by clear and convincing evidence that the defendant exerted a fraud over the testator in the execution of his will. Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the tier of facts a firm belief or conviction as to the allegations sought to be established. It is defined as that measure or degree of proof which is more than a mere "preponderance of the evidence, "but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of their trier of fact a firm belief or conviction as to the facts sough to be established. If you find that the plaintiff has proved by clear and convincing evidence all the

elements of fraud, your verdict must be for the plaintiff and the return of wrongfully transferred property to the estate. However, if you find that the plaintiff has failed to prove by clear and convincing evidence any one or more of the elements of fraud or if you are unable to determine what happened, your verdict must be for the defendant. The question is not whether defendant is liable in fraud for damages, but whether the execution of the will was fraudulently induces so as to cause the property to remain as estate assets.

A person who has had an opportunity to observe is permitted to express opinions on matters within common knowledge of all persons. In this case, _____has been permitted to express opinions as to touching upon the mental capacity of the testator. You are instructed that the opinion of the witness is not fact; it is opinion. You must determine the value of that opinion upon considering the opportunity that the witness has to observe the testator and his knowledge and experience the making such evaluations. In addition, you will apply the usual rules for testing credibility of the witnesses and for determining the weight to be given their testimony.

You are not required to believe the testimony of any witnesses simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

In summary, the Court charges you that if there is real or apparent conflict in the evidence, it is your duty to reconcile that conflict so far as possible. It is your duty to determine what you will accept as true and what you will reject as false.

You should determine this case according to the evidence produced and submitted to you in open court, and in accordance with these instructions, and upon nothing else. You will not

indulge in any speculation or suppositions concerning what a witness might have said if permitted to testify when they were not, but you will consider the testimony as it is and only as it is, in the record.

You must decide this case upon the testimony which has been given by the witnesses and upon the exhibits introduced into evidence. Statements made by counsel in arguments to the Court and jury are not to be considered as evidence by you unless it corresponds with your memory of the evidence as you heard the witnesses give it.

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. In determining the eight to be given the testimony and the credibility of a witness, you may take into consideration their manner and demeanor, their bias or fairness as exhibited on the witness stand, their knowledge about the things to which they are testifying, their interest in the general result of this case, the inherent probability or improbability of the story they tell, the extent to which their testimony is corroborated or contradicted by other witnesses, and the strength and accuracy of their memory.

Exhibits have been introduced into evidence, and you will have the, with you in your jury room. You have a right and should consider these exhibits as well as the oral testimony.

Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination, to insist upon a certain verdict because your sense of pride may be aroused and you may hesitate to give up your position, of shown, that is not correct.

Consult with one another in the jury room and deliberate with a view to reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after a discussion of the case with you fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should

not surrender honest convictions concerning the weight if the evidence in order to be congenial or to reach a verdict simply because of the opinion of the other jurors.

In fulfilling your duty as jurors, your efforts must be to arrive at a fair and just verdict.

This being civil action, three-fourths of your number; that is, six or more of you must agree to arrive at a verdict. When six or more of you have arrived at a verdict, those of you agreeing to the verdict will sign the form of verdict agreed too. You will have this verdict form in the jury room with you.

Your signatures on the verdict form are to be in ink.

When you retire, appoint one of your number foreman or forewoman who will preside over your deliberations. The Court will place in your possession the exhibits and verdict form. The foreperson will retain possession of these records including the verdict, and return with them to the courtroom. Until your verdict is announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

If you have a question it should first be discussed in the privacy of your jury room. It should not reflect the status of your deliberations. It should be reduced to writing so that there will be no misunderstanding as to what is requested.

It may be difficult to remember all of the evidence or the law. If you disagree as to the evidence or as to the law it is proper under certain circumstances for the Court to furnish such information. So not make a request at this moment. If, after you return to the jury room, you require such information, the foreperson should reduce the request to writing, indication specifically what is requested. Such communication must be delivered to the bailiff, Mrs. Hogan who will submit it to the Court.

When you have reached a verdict, advise the bailiff. You will then be returned to the

courtroom.

317.05 ALTERNATE JURORS [Rev 1-21-12]

Mr. _____, you were selected as an alternate juror. No misfortune has been experienced by any of the jurors and it has not been necessary for you to replace one of them. You have rendered a valuable service as an alternate juror and I thank you for that service. In excusing you from this case, I ask you not to discuss this case with anyone or to tell anyone how you would have voted until after the jury has returned a verdict. After that you may use your own judgment in the matter. Please see the (clerk/assignment commissioner) as to when you are to report for further duty.

A presumption of undue influence, rebuttable by a preponderance of the evidence, arises when (I) the relationship of attorney and client exists between a testatrix and an attorney, (ii) the attorney is named as beneficiary in the will, (iii) the attorney/beneficiary is not related by blood or marriage to the testator, and (iv) the attorney/beneficiary actively participates in the preparation of the will.

Krischbaum v. Dillon (1991), 58 Ohio St. 3d 58.

COMPLAINT TO SET ASIDE A TRUST

CHARGE TO JURY

Members of the jury, you have heard the evidence and the arguments of counsel. It is now the duty of the Court to instruct you on the law which applies to this case. You and I have separate functions: You decide the disputed facts and the Court provides the instructions of law. It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law, nor to apply your own conception of what you think the law should be. These instructions constitute the law in this case.

I remind you that the administration of justice requires faithful performance of duty by everyone who is part of that effort. As jurors, you are a key part of that effort and the faithful performance of your duty is vital to achieve justice.

You must apply the law as I state it in these instructions: that is, you are not free to follow one instruction and ignore another.

You determine the facts in this case from the evidence that has been introduced in open court. When the facts are determined you apply the law and determine the issue presented. Your verdict must be based upon evidence and not upon speculation, guess or conjecture. Neither sympathy for, nor prejudice against, any of the parties to this case should influence you in any way in arriving at your verdict.

During your charge, I may appear to emphasize words or sentences. Do not assume from that emphasis or from any gesture that I may make, or any manner of delivery used, that I am stating the law to the advantage of either side of this case.

As you were told at the outset of this trial, this is a Complaint to Set Aside a Trust proceeding. There is only one issue to decide in this case: Is the instrument in writing dated the __day of ___20_, the Trust of _____, deceased.

I charge you by law. Any person of full age, of sound mind and memory, and not under restraint, may dispose of his or her property by trust.

However, if such person was: (1) Not of sound mind when the trust was made; or (2) Was under restraint; then it is not a valid trust.

In this case the plaintiff/contestant, ____alleged that the Trust before the court is not the valid Trust of _____, deceased, for the reasons that he was not of sound mind and that he was under restraint at the time that the Trust was executed.

There is but one issue in this case; that is, whether the Trust before you is valid.

The person who claims that certain facts exist must prove them by evidence. This obligation is known as the burden of proof and in this case the burden of proof is on the plaintiff/contestant.

What is evidence? Evidence is the testimony received from the witnesses, the exhibits admitted during trial and any facts which the court requires you to accept as true. Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. Circumstantial evidence is proof of facts or circumstances from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind. You may infer only from facts that have been proved by the greater weight of the evidence. The evidence does not include statements made by counsel during trial. The opening and closing arguments or counsel are designed to assist you, but they are not evidence. Statements that are stricken by the Court and which you were instructed to disregard are not evidence and must be treated as though you never heard them.

You must not speculate as to why the Court sustained the objection to any question or what the answer to such a question might have been. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

The burden of proof is on the plaintiff/contestant to prove the facts supporting the claim of invalidity of the Trust by a preponderance of the evidence. A preponderance of the evidence means the greater weight thereof, the greater credibility, the greater probability of fact. It is evidence that you believe because it outweighs or overbalances in your minds the evidence opposed to it. It is that evidence which is more provable, more persuasive, or of greater probative value. Quality may, or may not be, identical with the quantity or the greater number of witnesses. In determining whether an issue has been

proven by a preponderance of the evidence, you should consider all of the evidence, regardless of who produced it. If the weight of the evidence is equally balanced or if you are unable to determine which side has a preponderance, then the party who has the burden of proof has NOT established the issue by a preponderance of the evidence.

One of the bases for invalidity of the Trust claimed in this action is that _, the person who made the Trust and is known in law as the settler, was not of sound mind and memory when the trust was made. In determining the sufficiency of mind and memory the law does not undertake to test a person's intelligence nor to define the exact quantity of mind and memory which the settler must possess. However, the law requires that:

1. The settler understands the nature of the business in which he is engage. That is, knows that he is making a trust.

2. That the settler understands generally the nature and extent of his property.

3. That he has in his mind the names and identity of those who have a natural claim on his property.

4. That he be able to understand his relationship to the members of his family.

He is not required to have sufficient capacity to make a contract or to conduct business affairs such as where one mind comes into contact with or opposes another in an adversary relationship. He must, however, have sufficient active memory to collect in his thoughts, without prompting, the four conditions just given to you; to hold them in his mind a sufficient length of time to consider their obvious relation to each other; and be able to form a rational judgment with reference to them, even though he may not be able to understand and appreciate these matters as well as the person who is in vigorous health of mind and body. It is not necessary that he have these conditions in mind at all times as health and mental condition may vary; but he must have them in mind at the time he executes the amended trust agreement. You have the right to consider evidence tending to show that the amended trust agreement was just or

unjust, reasonable or unreasonable, natural or unnatural; the value and nature of the settlor's estate; the financial condition of those who might naturally expect to be beneficiaries at the time the trust was made; and any other factors you find from the evidence in determining whether or not at the time of execution of the trust the settler had sufficient mind and memory as defined herein to legally execute a trust.

The second basis for invalidity of the trust claimed in this action is that ____, the person who made the Trust and is known in law as the settler, was under restraint; that is, he was unduly influenced by another. Undue influence which would invalidate a trust is that which substitutes the wishes of another for those of the settler. The trust, overcome his power of resistance, and oblige him to make a disposition of his property which he would not have made if left to act freely according to his own wishes and pleasure. To invalidate a trust, undue influence must so overcome and control the mind of the settler as to destroy his free agency and force him to express the will of another rather than his own. The mere presence of influence is not sufficient. Undue influence must be present and effective at the time of execution of the trust causing disposition and gifts which the settler otherwise would not have made. The essential elements of undue influence are:

1. A susceptible settler;

2. Another's opportunity to use influence over the settler;

3. The actual use of, or attempt to use, such influence upon settler; and

4. A result showing the effect of such influence.

A susceptible settler is one who from age, infirmities, mental condition, fear or for any other reason that you may find would be subject to or yield to the exertion of undue influence upon him. The mere existence of undue influence or an opportunity to exercise it, even though coupled with an interest or motive, is not sufficient to invalidate a trust. Such influence must actually be exerted on the mind of the

settler with respect to the execution of the trust in question. It must be shown that the undue influence resulted in making a disposition that the settler otherwise would not have made. General influence, however strong or controlling, is not undue influence unless brought to bear directly on the act of preparing the trust and imposes someone else's wishes upon the settler. If the trust as finally executed expresses the free and voluntary wishes and desires of the settler, the trust is valid, regardless of the exercise of influence. The fact that a person disposes of his property in an unnatural manner, unjustly or unequally, or at variance with earlier expressions of the settler concerning relatives does not invalidate the trust unless the contestant proves that undue influence was actually exercised on the settler at or prior to the time of making the trust and that such undue influence was operative at the time of its execution, and was used for the purpose of procuring or coercing a trust in favor of a particular party or parties. The exercise of undue influence in the execution of a trust need not be shown by direct proof, it may be inferred from circumstances.

A person who has had an opportunity to observe is permitted to express opinions on matters within common knowledge of all persons. In this case witnesses have been permitted to express opinions as to touching upon the mental capacity of the settler. You are instructed that the opinion of the witness is not fact; it is opinion. You must determine the value of that opinion upon considering the opportunity that the witnesses had to observe the settler and his knowledge and experience in making such evaluations. In addition, you will apply the usual rules for testing credibility of the witnesses and for determining the weight to be given their testimony.

You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

In summary, the Court charges you that if there is a real or apparent conflict in the evidence, it is your duty to reconcile that conflict so far as possible. It is your duty to determine what you will accept as true and what you will reject as false.

You should determine this case according to the evidence produced and submitted to you in open

court, and in accordance with these instructions, and upon nothing else. You will not indulge in any speculation or suppositions concerning what a witness might have said if permitted to testify when they were not, but you will consider the testimony as it is and only as it is, in the record.

You must decide this case upon the testimony which has been given by the witnesses and upon the exhibits introduced into evidence. Statements made by counsel in arguments to the Court and jury are not to be considered as evidence by you unless it corresponds with your memory of the evidence as you heard the witnesses give it.

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. In determining the weight to be given the testimony and the credibility of a witness, you may take into consideration their manner and demeanor, their bias or fairness as exhibited on the witness stand, their knowledge about the things to which they are testifying, their interest in the general result of the case, the inherent probability or improbability of the story they tell, the extent to which their testimony is corroborated or contradicted by other witnesses, and the strength and accuracy of their memory.

Exhibits have been introduced into evidence, and you will have them with you in your jury room. You have a right to and should consider these exhibits as well as the oral testimony.

Your initial conduct upon entering the jury room is a matter of importance. It is not wise to immediately express a determination, to insist upon a certain verdict because your sense of pride may be aroused and you may hesitate to give up your position, if shown, that it is not correct.

Consult with one another in the jury room and deliberate with a view to reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after a discussion of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender honest convictions concerning the weight of the evidence in order to be congenial or to reach a verdict simply because of the opinion of the other jurors. In fulfilling your duty as jurors, your efforts must be to arrive at a fair and just verdict.

This being a civil action, three-fourths of your number; that is, six or more of you must agree to arrive at a verdict. When six or more of you have arrived at a verdict, those of you agreeing to the verdict will sign the form of verdict so agreed to. You will have this verdict form in the jury room with you. Your signatures on the verdict form are to be in ink.

When you retire, appoint one of your number foreman or forewoman who will preside over your deliberations. The Court will place in your possession the exhibits and the verdict form. The foreperson will retain possession of these records including the verdict, and return with them to the courtroom. Until your verdict is announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

If you have a question it should first be discussed in the privacy of your jury room. It should not reflect the status of your deliberations. It should be reduced to writing so that there will be no misunderstanding as to what is requested. It may be difficult to remember all of the evidence or the law. If you disagree as to the evidence or as to the law it is proper under certain circumstances for the Court to furnish such information. Do not make a request at this moment. If, after you return to the jury room, you require such information, the foreperson should reduce the request to writing, indicating specifically what is requested. Such communication must be delivered to the bailiff,

_____, who will submit it to the Court. When you have reached a verdict, advise the bailiff. You will then be returned to the courtroom.

317.05 EXCUSE THE ALTERNATE JUROR

_____, you were selected as an alternate juror. No misfortune has been experienced and so it is not necessary for you to replace one of the jurors. You have rendered a valuable service as an alternate juror and I thank you for that service. In excusing you from this case, I ask you not to discuss this case with anyone or to tell anyone how you would have voted until after the jury has returned a verdict. After that you may use your own judgment in the matter. Please see the (clerk/assignment commissioner) as to when you are to report for further duty.

This Page Intentionally Left Blank

Adoption - Placement

Materials Prepared By
Hon. Dixie Park
Stark County Probate Court

NOTES

NOTES

I. OVERVIEW

A. Jurisdiction

1. R.C. §3107. *et seq.* governs adoptions. The Probate Court's exclusive jurisdiction over adoptions is established at R.C. §3107.01(D):

"Court" means the probate courts of this state, and when the context requires, means the court of any other state empowered to grant petitions for adoption.

2. The Ohio Supreme Court has stated: "[o]riginal and exclusive jurisdiction over adoption proceedings is vested specifically in the probate court." *State ex rel. Portage Cty. Welfare Dept. v. Summers* (1974), 38 Ohio St.2d 144, 311 N.E.2d 6, paragraph 2 of the syllabus.

3. Overlapping jurisdiction with the juvenile court may occur

a. Parentage issues (R.C. §3111.06)

b. Permanent custody issues (R.C. §2151. *et seq.*)

c. Juvenile court may order custody of child to non-family member (R.C. §2151.353)

B. Venue (R.C. 3107.04)

1. R.C. 3107.04 provides that a petition for adoption shall be filed in:

a. The court in the county in which the person to be adopted was born; or

b. The court in the county in which, at the time of filing, the petitioner or the person to be adopted or parent of the person to be adopted resides; or

c. The court in the county in which the petitioner is stationed in military service; or

d. The court in the county in which the agency having the permanent custody of the person to be adopted is located.

2. The court may stay the proceedings and certify the matter to another forum in the event the court finds the interests of justice warrant.

3. R.C.§5103.20 codifies the Interstate Compact for the Placement of Children, and provides a uniform process through which children can be placed from one member state jurisdiction into a safe and suitable home in another member state jurisdiction in a timely manner.

C. Who may be adopted? (R.C.3107.02)

1. A minor (anyone under 18 years of age) may be adopted. R.C. §3107.01 and R.C. §3107.02.

2. There is no requirement under Ohio law that the minor to be adopted be a citizen of the U.S.

3. R.C. §3107.02 provides that an adult can be adopted under the following circumstances:

   a. If totally and permanently disabled

   b. If mentally retarded

   c. If adult has established a child-foster-caregiver or child-stepparent relationship with the petitioners as a minor and consents to the adoption

   d. If adult was in a planned permanent living arrangement with a public children services or private child placing agency if the adult consents to the adoption

   e. If adult is the child of the spouse of the petitioner and the adult consents to the adoption

4. R.C. §3107.07 provides for adoption of a foreign child in Ohio:

   "Consent to adoption is not required of any of the following … (J) Any parent, legal guardian, or other lawful custodian in a foreign country, if the person to be adopted has been released for adoption pursuant to the laws of the country in which the person resides and the release of such person is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to the United States pursuant to section 101(b)(1)(F) of the 'Immigration and Nationality Act,' 75 Stat. 650 (1961), 8 U.S.C. 1101(b)(1)(F), as amended or reenacted."

5. Special needs children may be adopted in Ohio. "Special needs child" is defined at R.C. §5153.163.

a. The Ohio Department of Jobs & Family Services has defined special needs as "a condition or circumstance that makes some children harder to place for adoption, such as emotional or physical disorders, age, race, inclusion in a sibling group, a history of abuse, or other factors."

b. A county children services board may enter into an agreement with the parent, guardian, or other person having legal custody of a special needs child with respect to the custody, care, or placement of such child. All necessary care must be provided by the county children services board through its own means, unless or until it is determined that the child, parent, guardian, or other responsible person is able to pay for the cost of care to be rendered.

c. Title IV-E Adoption Assistance may provide financial support to those who adopt eligible special needs children. Title IV-E Adoption Assistance provides financial assistance to eligible families based on the child's special needs at the time of the adoptive placement, and may include monthly adoption assistance payments and Medicaid eligibility.

D. Who may adopt?

1. A husband and wife together as long as at least one of them is an adult.

2. An unmarried adult may adopt. However, the right is permissive and not absolute, as both R.C. §3107.02 and 03 use the verb "may". *In re Adoption of Charles B.*, 50 Ohio St.3d 88, paragraph 2 of the syllabus.

3. An unmarried minor parent of the person to be adopted, and under certain circumstances a married adult without the other spouse. R.C. §3107.03.

4. Foster parents. R.C. §5103.161

5. The primary factor in determining the suitability of adoptive parents is the best interests of the child. "Pursuant to R.C. 3107.14, adoption matters must be decided on a case-by-case basis through the able exercise of discretion by the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted. (R.C. 3107.14[C] construed and applied.)" *In re Adoption of Charles B.* at paragraph 3 of the syllabus.

6. Currently, same sex couples may legally marry in 17 states and the District of Columbia. On December 23, 2013, the United States District Court for the Southern District of Ohio decided the case of *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, in which it held that same sex marriages obtained in

jurisdictions in which they are legal must be recognized in the state of Ohio for purposes of naming a surviving spouse on a death certificate.

Judge Black held: "[t]he right to remain married is therefore properly recognized as one that is a fundamental liberty interest appropriately protected by the Due Process [and Equal Protection] Clause[s] of the United States Constitution. Here, Ohio's marriage recognition bans violate this fundamental right without rational justification." *Id.* at 978.

Judge Black went on to state: "[i]n the family law context, while opposite-sex married couples can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. While Ohio courts allow an individual gay or lesbian person to adopt a child, a same-sex couple cannot." *Id.* at 980.

7. On April 14, 2014, Judge Black once again addressed the validity of same sex marriages performed in states in which they are legally recognized in the case of *Henry v. Himes*, S.D.Ohio No. 1:14-cv-129 (Apr. 14, 2014).

   In *Henry,* plaintiffs included a married same sex male couple residing in New York who adopted a child born in Ohio. Plaintiffs, all of whom had been married in states that recognized same sex marriages, sought to have both partners named on their child's birth certificate. The state of Ohio, relying on the statutory and constitutional ban on the recognition of same sex marriage regardless of where consummated, argued that both parents could not be named on the birth certificates.

   Judge Black held that not only is "…the marriage recognition ban … unenforceable in the birth certificate context, but … it is facially unconstitutional and unenforceable in any context whatsoever." *Id.* at 12. The State has appealed Judge Black's decision; however, "10 out of 10 federal rulings since … *U.S. v. Winsor*" struck down DOMA have declared similar bans in states across the country unconstitutional and enjoined the enforcement of them. *Id.* at 2. Thus, reversal appears unlikely.

   The impact of this ruling on adoption applications submitted in Ohio by same sex couples married in states recognizing their marriage remains to be seen. If *Henry* is affirmed, it may be arguable that same sex married couples must be permitted to apply for adoption as a couple.

E. Closed adoptions are adoptions in which the records of the biological parent(s) are kept under seal.

1. SB 23, recently passed by the Ohio legislature and signed by Governor Kasich, provides that Ohio adoptees adopted between January 1, 1964 and September 18, 1996 can access their original birth certificates starting March 20, 2015.

2. Repeals Ohio Adoption Registry

3. Pertains only to records housed at the Ohio Department of Health, Division of Vital Statistics, in Columbus.

4. Documents which will be available include the adoptee's original birth certificate, adoption decree and amended birth certificate.

5. Birth parent may complete a "Contact Preference Form" (CPF) through which he or she may express desire about contact.

   a) Birth parent may express desire for contact and provide personal contact information;
   b) Birth parent may express desire for contact and provide contact information for a third party through whom the adoptee can make contact;
   c) Birth parent may express desire to not be contacted; if this option is selected, birth parent is encouraged to file a medical history form.

6. The new law contains a birth parent redaction provision that gives a birth parent one year (until March 2015) within which to voluntarily come forward to file a form requesting that their name be removed from the version of the original birth certificate that is released to the adoptee; in order for the redaction request to be accepted by the Department of Vital Statistics, birth parent must complete a current medical history form.

7. Records become available to adoptees in March 2015.

8. See handouts regarding implementation.

F. Open adoptions are adoptions in which biological and adoptive parents have access to information about the other. Ohio provides for open adoptions at R.C.§3107.60 *et seq.* In open adoptions, profiles of prospective adoptive parents may be shown to the birth parent upon request. R.C.§3107.61.

G. Generally, "private/independent adoptions" are adoptions coordinated by an independent agency or attorney, involve a child who is not in the custody of the

state, and involve the consent of the birth parent(s) directly to the adoptive parents. Requires probate court approval.

H. Generally, "public/agency adoptions" are adoptions in which the child is a ward of the state, either through permanent surrender of parental rights by the birth parent(s) or permanent custody proceedings by the state.

II. TYPES OF PLACEMENT

A. Private Placement

1. Person(s) not related to minor by consanguinity may adopt the minor, and Proceed pursuant to R.C. §5103.16(D):

> "(D) No child shall be placed or received for adoption or with intent to adopt unless placement is made by a public children services agency, an institution or association that is certified by the department of job and family services under section 5103.03 of the Revised Code to place children for adoption, or custodians in another state or foreign country, or unless all of the following criteria are met:
>
> "(1) Prior to the placement and receiving of the child, the parent or parents of the child personally have applied to, and appeared before, the probate court of the county in which the parent or parents reside, or in which the person seeking to adopt the child resides, for approval of the proposed placement specified in the application and have signed and filed with the court a written statement showing that the parent or parents are aware of their right to contest the decree of adoption subject to the limitations of section 3107.16 of the Revised Code;
>
> "(2) The court ordered an independent home study of the proposed placement to be conducted as provided in section 3107.031 of the Revised Code, and after completion of the home study, the court determined that the proposed placement is in the best interest of the child;
>
> "(3) The court has approved of record the proposed placement.
>
> "In determining whether a custodian has authority to place children for adoption under the laws of a foreign country, the probate court shall determine whether the child has been released for adoption pursuant to the laws of the country in which the child resides, and if the release is in a form that satisfies the requirements of the immigration and naturalization service of the United States department of justice for purposes of immigration to this country pursuant to section 101(b)(1)(F) of the "Immigration and

Nationality Act," 75 Stat. 650 (1961), 8 U.S.C. 1101 (b)(1)(F), as amended or reenacted.

"If the parent or parents of the child are deceased or have abandoned the child, as determined under division (A) of section 3107.07 of the Revised Code, the application for approval of the proposed adoptive placement may be brought by the relative seeking to adopt the child, or by the department, board, or organization not otherwise having legal authority to place the orphaned or abandoned child for adoption, but having legal custody of the orphaned or abandoned child, in the probate court of the county in which the child is a resident, or in which the department, board, or organization is located, or where the person or persons with whom the child is to be placed reside. Unless the parent, parents, or guardian of the person of the child personally have appeared before the court and applied for approval of the placement, notice of the hearing on the application shall be served on the parent, parents, or guardian.

"The consent to placement, surrender, or adoption executed by a minor parent before a judge of the probate court or an authorized deputy or referee of the court, whether executed within or outside the confines of the court, is as valid as though executed by an adult. A consent given as above before an employee of a children services agency that is licensed as provided by law, is equally effective, if the consent also is accompanied by an affidavit executed by the witnessing employee or employees to the effect that the legal rights of the parents have been fully explained to the parents, prior to the execution of any consent, and that the action was done after the birth of the child.

"If the court approves a placement, the prospective adoptive parent with whom the child is placed has care, custody, and control of the child pending further order of the court."

2. Consent to placement must be written (R.C. §3107.06), and be provided by:

   a. Mother - R.C.§3107.06(A)

   b. Father - R.C. §3107.06(B)

      1) The child was conceived or born while the father was married to the mother;

      2) The child is his by adoption;

3) Prior to the date the petition was filed, a court or administrative body determined that he has a parent-child relationship with the minor; or

4) He acknowledged paternity of the child and that acknowledgment has become final pursuant to R.C. §§2151.232, 3111.25, or 3111.821.

c. Putative father - R.C. §3107.06(C)

d. Person or agency having permanent custody of child - R.C. §3107.06(D).

e. A child over 12 years of age, unless the court finds that it is in the best interest of the child to not require the child's consent - R.C. §3107.06(E)

3. Manner of Consent set forth in R.C. §3107.08:

"(A) The required consent to adoption may be executed at any time after seventy-two hours after the birth of a minor, and shall be executed in the following manner:

"(1) If by the person to be adopted, in the presence of the court;

"(2) If by a parent of the person to be adopted, in accordance with section 3107.081 of the Revised Code;

"(3) If by an agency, by the executive head or other authorized representative, in the presence of a person authorized to take acknowledgments;

"(4) If by any other person, in the presence of the court or in the presence of a person authorized to take acknowledgments;

"(5) If by a juvenile court, by appropriate order.

"(B) A consent which does not name or otherwise identify the prospective adoptive parent is valid if it contains a statement by the person giving consent that it was voluntarily executed irrespective of disclosure of the name or other identification of the prospective adoptive parent."

4. Assessor meets with parent(s) prior to consent

a. An assessor is an individual who is employed by, appointed by, or under contract with a court, public or private agency who conducts an inquiry into

the conditions surrounding the child sought to be adopted as well as a home study of prospective adoptive parent(s).

b. Assessors must meet certain criteria as set forth by R.C. §3107.014, which states in pertinent part:

"(A) Except as provided in division (B) of this section, only an individual who meets all of the following requirements may perform the duties of an assessor under sections 3107.031, 3107.032, 3107.082, 3107.09, 3107.101, 3107.12, 5103.0324, and 5103.152 of the Revised Code:

"(1) The individual must be in the employ of, appointed by, or under contract with a court, public children services agency, private child placing agency, or private noncustodial agency;

"(2) The individual must be one of the following:

"(a) A professional counselor, social worker, or marriage and family therapist licensed under Chapter 4757. of the Revised Code;

"(b) A psychologist licensed under Chapter 4732. of the Revised Code;

"(c) A student working to earn a four-year, post-secondary degree, or higher, in a social or behavior science, or both, who conducts assessor's duties under the supervision of a professional counselor, social worker, or marriage and family therapist licensed under Chapter 4757. of the Revised Code or a psychologist licensed under Chapter 4732. of the Revised Code. Beginning July 1, 2009, a student is eligible under this division only if the supervising professional counselor, social worker, marriage and family therapist, or psychologist has completed training in accordance with rules adopted under section 3107.015 of the Revised Code.

"(d) A civil service employee engaging in social work without a license under Chapter 4757. of the Revised Code, as permitted by division (A)(5) of section 4757.41 of the Revised Code;

"(e) A former employee of a public children services agency who, while so employed, conducted the duties of an assessor.

(f) An employee of a court or public children services agency who is employed to conduct the duties of an assessor;

(g) A PCSA caseworker or PCSA caseworker supervisor as defined in section 5153.01 of the Revised Code;

(h) An individual who holds at least a bachelor's degree in any of the following human services fields and has at least one year of experience working with families and children:

(i) Social work;

(ii) Sociology;

(iii) Psychology;

(iv) Guidance and counseling;

(v) Education;

(vi) Religious education;

(vii) Business administration;

(viii) Criminal justice;

(ix) Public administration;

(x) Child care administration;

(xi) Nursing;

(xii) Family studies;

(xiii) Any other human services field related to working with children and families.

"(3) The individual must complete training in accordance with rules adopted under section 3107.015 of the Revised Code."

c. In open adoptions, the assessor may, at the birth parent(s) request, show the birth parent(s) profiles of prospective adoptive parent(s). R.C. §3107.61.

5. Circumstances under which consent is not required include:

a. Parent, guardian or other person having custody of a child permanently surrenders custody pursuant to R.C. §§5103.15(B), 3107.07(C).

b. Petition for adoption alleges, and the court finds after notice and hearing, that the parent failed without justifiable cause to have *de*

minimis contact with the minor or to provide support for the minor for one year. R.C. §3107.07(A).

c. Consent is not required of the putative father when

1) The putative father fails to register as the minor's putative father with the putative father registry not later than thirty days after the minor's birth; or

2) The court finds after proper service of notice and hearing that the putative father is not the father of the minor, has willfully abandoned or failed to care for and support the minor, or has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first. R.C. §3107.07(B).

d. Consent is not required of a parent whose parental rights have been terminated through a permanent custody hearing. R.C. §3107.07(D).

e. Consent is not required if a parent is married to the petitioner and supports the adoption. R.C. §3107.07(E).

f. Consent is not required of the father or putative father of the minor if the minor was conceived during the commission of a rape. R.C. §3107.07(F).

6. Home Study

a. Assessor conducts a home study of anyone seeking to adopt a minor in order to ensure suitability of the potential adoptive parent(s). R.C. §3107.031.

b. Assessor must submit a written report of the home study to the probate court at least 10 days before the hearing on the petition. R.C. §3107.031.

c. A criminal background check must be conducted of the prospective adoptive parent(s) and all persons 18 years of age and older who will be living with the minor. R.C. §2151.86.

d. An assessor must conduct a prefinalization assessment of the minor and the prospective adoptive parent(s) and submit a detailed report to the court prior to the issuance of a final decree of adoption or finalization of an interlocutory order of adoption except in cases of stepparent adoption of a stepchild. R.C. §3107.12.

7. Initial Steps for Private Placement – Stark County Example

a. Stark County has customized placement forms. Copies are attached.

b. An Application for Placement for Adoption is filed by the birth parents. If applicable, an Affidavit Regarding Birth Father is filed by birth mother.

c. A Pre-Placement Application is filed by the potential adoptive parent(s).

d. Attorney for prospective adoptive parent(s) files an Application for Appointment and Judgment Entry ordering a home study by a qualified assessor who has been approved by the court. R.C. §3107.031 addresses the Home Study.

e. Putative father registry requirements must be satisfied, if applicable.

f. Upon birth of the child, the court is notified and a placement hearing is scheduled.

1) Placement hearing is scheduled with court and birth parent(s) no sooner than 72 hours after the birth of the child, at which time the birth parent(s) appear personally before the court, are examined under oath, and complete the following:

(a) A Consent and Finality of Adoption Decree.

(b) An Explanation of Withdrawal of Consent and Finality of Adoption Decree.

(c) ODHS Form 1693 entitled Ohio Law and Adoption Material, and ODHS Form 1616 entitled Social and Medical Histories.

2) Court interviews prospective adoptive parents and reviews their Pre-Placement Application, Agreement to Pay Expenses, and home study. The Agreement to Pay Expenses is signed by the prospective adoptive parents in open court.

3) The prospective adoptive parents are advised of their responsibility to obtain a medical examination of the child prior to removal from the hospital, or to advise the court they have made arrangements for a medical exam. The prospective adoptive parents are advised that neither the court nor the ODHS can make any representations regarding the medical health of the child.

4) If all proceeds well at the placement hearing, the Judge signs a Judgment Entry approving placement for adoption and a Judgment Entry ordering the hospital to release the child to either to the attorney for the prospective adoptive parents or to the prospective adoptive parents.

5) The prospective adoptive parents may file a Petition for Adoption with the court once there has been compliance with the Ohio Putative Father Registry.

g. Finalization of Adoption

1) Steps to finalize adoption

a) The prospective adoptive parent(s) file a Petition for Adoption with the court.

b) The court will schedule a hearing on the Petition for Adoption no sooner than 45 days after it is filed.

c) The assessor shall conduct a prefinalization assessment and submit a written detailed report to the court within 20 days prior to the hearing.

d) If the placement appears to be the in the best interest of the child, the court will issue a Final Decree of Adoption or Finalization of an Interlocutory Order of Adoption.

2) A final decree of adoption shall not be issued and an interlocutory order does not become final until the person to be adopted has lived in the adoptive home for at least six-months after placement by an agency or for at least six-months after the Department of Human Services or the court has been informed of the placement and has had an opportunity to assess the adoptive home. R.C. §3107.13

3) A final decree of adoption may not be issued by a probate court unless the social and medical histories of the biological parents required under RC 3107.12(D) (6) are filed with the court as provided in RC 3107.14.

4) Effects of Final Decree of Adoption are set forth in R.C. §3107.15.

B. Stepparent, Grandparent and Relative Placement

1. Stepparent Adoption

a. R.C. §3107.03 sets forth who may adopt, and states in pertinent part: "(D) A married adult without the other spouse joining as a petitioner if any of the following apply:
"(1) The other spouse is a parent of the person to be adopted and supports the adoption."

b. R.C.§5103.16(E) provides that R.C.§5103.16 does not apply to stepparent adoptions

c. Valid ceremonial marriage

d. Biological parent must consent unless, after notice and hearing, the petitioner can show by clear and convincing evidence that

(1) Parent failed without justifiable cause to have *de minimis* contact with minor for one year prior to petition; or

(2) Parent failed without justifiable cause to provide support for the minor for one year.

R.C. §3107.07(A); *In the Matter of the Adoption of Kevin and Samuel Corl*, Licking App. No. 2004-CA-96, ¶¶12-13.

e. Expressly exempted from the placement statute (R.C. §5103.16(E)); however, home study is still required.

f. Forms required to process stepparent adoption

1) Form 18.0 – Petition for Adoption of Minor
2) Certified copy of minor's birth certificate

3) Form 18.1 – Judgment Entry Setting Hearing and Ordering Notice (notice MUST be given not less than twenty (20) days before the date of the hearing)

4) SCPC Form 18.10 – Application for Approval of Assessor

5) Form 18.3 – Consent of Custodial Parent (usually mother)

6) Form 18.3 – Consent of Father; OR Form 18.2 – Notice of Hearing on Petition for Adoption (see consent section above)

g. Forms required at time of hearing

1) Home study

2) Proof of Publication (if notice given to biological father by publication)

3) Form 18.4 – Judgment Entry Finding Consent Not Required (mandatory if you do not have father's consent)

4) Form 18.7 – Final Decree of Adoption (without Interlocutory Order)

5) Form 18.8 – Adoption Certificate for Parents

6) HEA 2757 – Vital Statistics, Certificate of Adoption

h. Hearing Conducted as follows:

1) Petitioner and spouse must appear

2) Minor MUST appear (minor excused during any detrimental testimony or evidence, and not in hearing room while father's consent is determined)

3) All parties placed under oath

4) Counsel inquires of all parties - purpose of inquiry: identify parties and their background, suitability of Petitioner, and why adoption is in best interest of minor

i. Finalization of Adoption - A final decree shall not be issued in the case of adoption by a stepparent until at least six-months after filing of the petition *or* until the child has lived in the home for at least six-months. R.C. 3107.13.

2. Grandparent Adoptions

a. Grandparents are expressly exempted from the placement statute. R.C. §5103.16(E).

b. Necessary forms same as private adoption and, if applicable, copy of juvenile court Judgment Entry granting custody or placement

c. Hearing conducted in same manner as stepparent hearing

3. Relative Adoptions

    a. Relative must have a Custody Order from juvenile court

    b. Adoption proceeds in same manner as grandparent adoption

    c. Finalization of adoption same as other placements

C. Agency Placement

1. Permanent Surrender occurs when birth parent(s) voluntarily surrender custody of minor to an agency for purposes of placement. R.C. §5103.15

    a. Court must approve

    b. Non-adversarial proceeding

    c. Assessor must complete report

2. Permanent Custody occurs when a public agency initiates a permanent custody action in juvenile court. R.C. §§2151.353, 2151.413, 2151.414, 2151.415.

    a. Abuse

    b. Neglect

    c. Dependency

3. Forms required at initial filing

    a. Form 18.0 – Petition for Adoption of Minor

    b. Certified copy of minor's birth certificate

    c. Form 18.1 – Judgment Entry Setting Hearing and Ordering Notice

    d. SCPC Form 18.10 – Application for Approval of Assessor

    e. Form 18.3 – Consent of Agency

e. Certified copy of juvenile court order approving permanent surrender or juvenile court order granting permanent custody to agency

4. Forms required at hearing

   a. Home study

   b. Form 18.7 – Final Decree of Adoption

   c. Exceptions if minor not placed for six months

      1) Court will count time in foster care toward six months if public agency

      2) If minor not in petitioner's home for six months, interlocutory order will issue

   d. Form 18.8 – Adoption Certificate for Parents

   e. HEA 2757 – Vital Statistics, Certificate of Adoption

5. Hearing

   a. Petitioners MUST appear

   b. Minor MUST appear

   c. All parties placed under oath

   d. Counsel inquires of parties to advise court of parties' identities and backgrounds, and establish suitability of petitioners and why adoption is in best interests of minor

6. Finalization of adoption same as other placements

ATTENTION | ALL OHIO BIRTHPARENTS

OHIO'S NEW ADOPTION LAW
GOES INTO EFFECT ON MARCH 20, 2014
HOW WILL IT IMPACT YOU?

Was your child placed for adoption BEFORE September 1996?

YES

If your adult child requests their file, would you like them to know how to reach you?

YES
I would like to give them my direct contact information

Fill out Contact Preference Form, Option 1 to give your personal contact information to your child.

Contact Preference Form Option 1

YES
But not directly.

My Child | Third Party | Me

Fill out Contact Preference Form, Option 2 to provide the contact information of a friend, family member or other trusted third party that your child can contact.

Contact Preference Form Option 2

NO

If your adult child requests their file, are you OK with your name being released?

YES

Birth Certificate Parent Name

Fill out Contact Preference Form, Option 3.

This option allows your child's original birth certificate to be released to them intact, which is important to your child's sense of history and heritage if they have requested their birth certificate.

Contact Preference Form Option 3

NO

Fill out the Birthparent Name Redaction Form. Your child's file will be released to them with your name removed.

Birth Certificate Parent Name

This option is only available if your adoption was between 1/1/64-9/17/96. The Birthparent Name Redaction Form will be available only until 03/19/2015.

NOTE: Adoption searches have always been possible in Ohio without the adoption file. Before and after this new law was passed, there has been no way to guarantee anonymity in adoption. Please consider using the **Contact Preference Form** instead to give your child a clear understanding of your wishes.

Birthparent Name Redaction Form

NO

At the time of adoption, you may have signed paperwork permitting or preventing your child from accessing their adoption file at the **Ohio Department of Health (ODH)**.

If you might have signed paperwork preventing your child from accessing their file and you have since had a change of heart, submit an **Authorization of Release Form for Biological Parent**.

ADOPTION FILE

If you did not sign any paperwork or have already given your child access to their file, you may submit the new **Contact Preference Form** to let your child know your preferences for contact.

MARCH 20 2014 — **BIRTHPARENT WINDOW OPENS**

MARCH 19 2015 — The Birthparent Name Redaction Form will be available only until 03/19/2015

MARCH 20 2015 — **ADOPTEE WINDOW OPENS**

You can change your choice at anytime by filing a new form.

With Contact Preference Form Options 1, 2 & 3, the Medical History Form is OPTIONAL.

MEDICAL HISTORY FORM

With the Birthparent Name Redaction Form, the Medical History Form is MANDATORY.

THERE IS SUPPORT AVAILABLE IF YOU WOULD LIKE TO TALK TO SOMEONE ABOUT THESE CHOICES OR BIRTHPARENT ISSUES IN GENERAL.

ADOPTION NETWORK | www.adoptionnetwork.org | (216) 325-1000 | www.ohiobirthparents.org | ohio BIRTHPARENT group

ATTENTION OHIO ADOPTEES

OHIO'S NEW ADOPTION RECORDS LAW
WHAT TO DO & WHEN TO DO IT

DATE OF ADOPTION FINALIZATION	START DATE	THINGS TO DO
All Years	NOW	EXPLORE YOUR **SEARCH OPTIONS** · FIND POST-ADOPTION SUPPORT **GROUPS & RESOURCES** Non-profit organizations like Adoption Network Cleveland and Ohio Birthparent Group can help.
All Years	NOW	REQUEST YOUR **NON-IDENTIFYING INFORMATION** 18+ If you are age 18 or older, you can locate more information about your personal history by **Requesting Your Non-Identifying Information** from the attorney or agency that facilitated your adoption. These requests can take months to process, so start today!
All Years	NOW	FORM HEA 3036 · FILE AN **AUTHORIZATION OF RELEASE OF ADOPTED NAME** · Adopted Name · 21+ If you are age 21 or older and want your adopted name to be released to your birthparents or siblings, you can file an **Authorization of Release of Adopted Name (HEA 3036)**. If a birthparent or sibling files an Application for Release of Adopted Name (HEA 3039), your adopted name can be released to them if your authorization is on file.
Dec 31, 1963 and earlier	NOW	ADOPTION FILES HELD BY OHIO DEPARTMENT OF HEALTH ARE **ALREADY OPEN** TO ADOPTEES OF THIS ERA. REQUEST YOUR INFORMATION TODAY (FORM HEA 3011)! · FORM HEA 3011
On/After Sept 18, 1996	SEPT 2014	18+ · ADOPTION FILES HELD BY OHIO DEPARTMENT OF HEALTH ARE **ALREADY OPEN** TO ADOPTEES OF THIS ERA! · FORM HEA 3038 If your adoption was finalized on/after Sept 18th, 1996, Ohio Department of Health (ODH) already makes your adoption file available once you turn 18. If you are age 18-20, your adoptive parents can file **Form HEA 3038** to request your adoption file on your behalf. Adoptees ages 21+ can file Form HEA 3038 directly. Adoptees will receive the contents of their file unless their birthparent has denied access.
Jan 1, 1964-Sept 17, 1996	MARCH 20 2015	REQUEST **YOUR ADOPTION FILE** FROM **OHIO DEPARTMENT OF HEALTH** **ADOPTEE WINDOW OPENS** to begin requesting your adoption files from Ohio Department of Health (ODH). Do NOT submit requests to ODH before this date, as they will not be considered prior to opening day. More information about these request forms will be available closer to 'opening day' of the Adoptee Window.

THERE IS SUPPORT AVAILABLE IF YOU WOULD LIKE TO TALK TO SOMEONE ABOUT THESE CHOICES OR ADOPTION ISSUES IN GENERAL.

ADOPTION NETWORK | www.adoptionnetwork.org | (216) 325-1000 | www.ohiobirthparents.org | ohio BIRTHPARENT group

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

IN THE MATTER OF THE ADOPTION OF _____
(Name after adoption)

CASE NO. _____

PETITION FOR ADOPTION OF MINOR

[R.C. 3107.05]

The undersigned petitions to adopt _____, a minor, and to change the name of the minor to _____.

PETITIONER

The petitioner states the following:

Full Name: _____ Age _____

Full Name: _____ Age _____

Place of Residence: _____
Street Address

_____

_____
Post Office State Zip Code Duration of residence

Marital Status: _____ Date and Place of Marriage: _____

Relationship of Minor to Petitioner: _____

The petitioner has facilities and resource suitable to provide for the nurture and care of the minor and it is the desire of the petitioner to establish the relationship of parent and child with the minor.

MINOR TO BE ADOPTED

Birth Name: _____ Date of Birth: _____

Place of Birth: _____ Property and Value: _____

☐ The minor is living in the home of the petitioner, and was placed therein for adoption on the _____ day of _____, 20____ by _____.

☐ The minor is not living in the home of the petitioner, and resides at _____
_____.

A certified copy of the birth certificate of the minor is filed with this petition or is not available due to the following:

_____
_____.

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

JUDGMENT ENTRY
SETTING HEARING AND ORDERING NOTICE
[R.C. 3107.11]

On the _____ day of _____ , _____

_____

filed a petition to adopt _____

and to change the name of the minor to _____

It is ordered that the Petition for Adoption will be heard on the _____day of _____ ,

_____, at _____ o'clock ____ .M.,and that notice shall be given as required by law.

_____
Dixie Park, Probate Judge

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

NOTICE OF HEARING ON PETITION FOR ADOPTION

Notice must be served not less than 20 days before the date of hearing

[R.C. 3107.11]

To: _____
(Give Names and Addresses)

You are hereby notified that on the _____ day of _____, _____ _____, filed in this Court a Petition for Adoption of _____, a minor, whose date of birth is _____, and for change of the name of the minor to _____. This Court, located at Suite 501, Stark County Office Building,110 Central Plaza, South, Canton, Ohio 44702-1413 will hear the petition on the _____ day of _____, _____ at _____ o'clock ____. M.

It is alleged in the petition, pursuant to R.C. 3107.07, that the consent of _____ is not required due to the following:
(Name)

☐ That person is a parent who has failed without justifiable cause to provide more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition or placement of the minor in the home of the petitioner.

☐ That person is a parent who has failed without justifiable cause to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner.

☐ State other grounds under R.C. 3107.07 (includes putative father of the minor born prior to January 1, 1997).
_____

"A FINAL DECREE OF ADOPTION, IF GRANTED, WILL RELIEVE YOU OF ALL PARENTAL RIGHTS AND RESPONSIBILITIES, INCLUDING THE RIGHT TO CONTACT THE MINOR, AND, EXCEPT WITH RESPECT TO A SPOUSE OF THE ADOPTION PETITIONER AND RELATIVES OF THAT SPOUSE, TERMINATE ALL LEGAL RELATIONSHIPS BETWEEN THE MINOR AND YOU AND THE MINOR'S OTHER RELATIVES, SO THAT THE MINOR THEREAFTER IS A STRANGER TO YOU AND THE MINOR'S FORMER RELATIVES FOR ALL PURPOSES. IF YOU WISH TO CONTEST THE ADOPTION, YOU MUST FILE AN OBJECTION TO THE PETITION WITHIN FOURTEEN DAYS AFTER PROOF OF SERVICE OF NOTICE OF THE FILING OF THE PETITION AND OF THE TIME AND PLACE OF HEARING IS GIVEN TO YOU. IF YOU WISH TO CONTEST THE ADOPTION, YOU MUST ALSO APPEAR AT THE HEARING. A FINAL DECREE OF ADOPTION MAY BE ENTERED IF YOU FAIL TO FILE AN OBJECTION TO THE ADOPTION PETITION OR APPEAR AT THE HEARING."

Dixie Park - Probate Judge

By: _____
Deputy Clerk

SCPC 18.2 NOTICE OF HEARING ON PETITION FOR ADOPTION

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

IN THE MATTER OF THE ADOPTION OF _____
(Name after adoption)

CASE NO. _____

CONSENT TO ADOPTION

[R.C. 3107.06, 3107.08 & 3107.081]

The undersigned _____

[check one of the following seven capacities by which your consent is given]

- ☐ Mother
- ☐ Father
- ☐ Parent
- ☐ Putative father who has registered under R.C. 3107.062
- ☐ Agency having permanent custody
- ☐ Minor, who is more than twelve years of age (this consent must be executed in the presence of the Court)
- ☐ Other_____

hereby waives notice of the hearing on the Petition For Adoption to be filed in the court, and consents to the adoption of _____
(Name before adoption)

as proposed in the petition.

The undersigned further states that this consent is voluntarily executed irrespective of disclosure of the name or other identification of the prospective adopting parents.

_____

Sworn to before me and signed in my presence this _____day of_____, 20___

_____
Person authorized pursuant to R.C. Chapter 3107 to take this acknowledgement

_____
Title

Print Form

FORM 18.3 - CONSENT TO ADOPTION

Amended: March 15, 2016
Discard all previous versions of this form

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

JUDGMENT ENTRY FINDING CONSENT NOT REQUIRED
[R.C. 3107.07]

The Court finds all parties properly before the Court by waiver of notice or by proper service and after hearing the testimony of witnesses, and the evidence, finds that the consent of _____ is not required because;

☐ That person is a parent who has failed without justifiable cause to provide more than de minimis contact with the minor for a period of at least one year immediately preceding the filing of the adoption petition or placement of the minor in the home of the petitioner.

☐ That person is a parent who has failed without justifiable cause to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediateily preceding the filing of the adoption petition or the placement of the minor in the home of the petitioner.

☐ State other grounds under 3107.07 (includes putative father of the minor born prior to January 1, 1997).

_____

_____

_____

It is ordered that the consent of the above-named person is not required.

_____
Dixie Park, Probate Judge

SCPC FORM 18.4 - JUDGMENT ENTRY FINDING CONSENT NOT REQUIRED

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

INTERLOCUTORY ORDER OF ADOPTION

[R.C. 3107.14]

This day this matter came on to be heard on the petition of _____ _____ for the adoption and change of name of the minor being adopted.

The Court finds that notice has been given to all parties in interest; that all consents have been filed herein or have been found not required; that the allegations in the petition are true; that the minor has been lawfully placed in the home of the petitioner; that the minor has resided for a period of _____ in the home of the petitioner in accordance with the laws relating to the placement of children; that the best interests of the minor will be promoted by the adoption and that the accountings, as required, have been filed, reviewed and approved.

It is therefore ordered that an Interlocutory Order of Adoption is granted, and this cause is continued until the minor has lived in the home of the petitioner for at least six months.

It is further ordered that the assessor shall make and file a further assessment on or before _____

_____ Date

_____ Dixie Park, Probate Judge

FORM 18.5- INTERLOCUTORY ORDER OF ADOPTION **10/1/97**

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

IN THE MATTER OF THE ADOPTION OF _____

CASE NO. _____

FINAL DECREE OF ADOPTION

(After Interlocutory Order)
[R.C. 3107.14]

The Court finds that the minor has now lived in the home of the petitioner, _____ _____ for at least six months; that a further report of the assessor has been filed and is approved; that the adoption is in the best interest of the minor being adopted; that the accountings, as required, have been filed, reviewed and approved; and that the minor is an adopted person.

It is therefore ordered that the Petition for Adoption is granted, and that the name of the minor is changed to _____..

_____ Date

_____ Dixie Park, Probate Judge

FORM 18.6 - FINAL DECREE OF ADOPTION
(After Interlocutory Order)

Amended: March 1, 2017
Discard all previous versions of this form

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

IN THE MATTER OF THE ADOPTION OF _____

CASE NO. _____

FINAL DECREE OF ADOPTION

(Without Interlocutory Order)
[R. C. 3107.13, 3107.14 & 3107.19]

This day this matter came on to be heard on the petition of _____ _____ for the adoption and change of name of the minor being adopted.

The Court finds that notice has been given to all parties; that all consents have been filed or have been found not required; that the allegations in the petition are true; that the minor has been lawfully placed in the home of the petitioner; that the minor has lived in the home of the petitioner for six months as required by law; that a report of the assessor has been filed and is approved; that the adoption is in the best interest of the minor being adopted; that the accountings, as required, have been filed, reviewed and approved, and that the minor is an adopted person.

It is therefore ordered that the Petition for Adoption is granted, and that the name of the minor is changed to _____

_____ Date

_____ Dixie Park, Probate Judge

FORM 18.7 - FINAL DECREE OF ADOPTION
(WITHOUT INTERLOCUTORY ORDER)

Amended: March 1, 2017
Discard all previous versions of this form

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

ADOPTION CERTIFICATE FOR PARENTS

This is to certify, that in an action pending in this Court, on a petition filed by _____

_____

to adopt _____

a minor, satisfactory evidence was submitted to prove, and the Court found, that the minor was born on the _____ day of _____, at _____ and that all necessary proceedings relative to an adoption were complied with; and the Court on the _____ day of _____, decreed that the minor is legally adopted by _____ and the minor's name is changed to _____ in the records of the Court.

WITNESS my signature and seal of said Court,

this _____ day of _____, _____ .

_____
Dixie Park, Probate Judge

By: _____
Deputy Clerk

FORM 18.8 - ADOPTION CERTIFICATE FOR PARENTS 10/1/97

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

PETITIONER'S ACCOUNT

(R.C. 3107.055)

☐ PRELIMINARY ESTIMATE ACCOUNTING
(To be filed not later than date petition filed)

☐ FINAL ACCOUNTING
(To be filed not later than 10 days prior to date of final hearing)

This accounting specifies all disbursements of anything of value the petitioner, a person on the petitioner's behalf, and the agency or attorney made and have agreed to make in connection with the minor's permanent surrender under division (B) of Section 5103.15 of the Revised Code, placement under Section 5103.16 of the Revised Code, and adoption under Chapter 3107. (Attach extra sheets if necessary)

DATE	NAME AND ADDRESS	DISBURSEMENTS MADE OR AGREED TO BE MADE	ACTUAL COSTS
	PHYSICIAN		
	HOSPITAL/MEDICAL FACILITY		
	ATTORNEY		
	ACTUAL COST TO THE ATTORNEY		
	AGENCY		
	ACTUAL COST TO THE AGENCY		
	MAINTENANCE AND MEDICAL CARE REQUIRED UNDER R.C. 5103.15		
	EXPENSES PURSUANT TO O.R.C. 3107.055(C)(9)		
	FOSTER CARE		
	GUARDIAN AD LITEM		
	COURT COSTS		
	ALL OTHER DISBURSEMENTS		
	TOTAL		

FORM 18.9 - PETITIONER'S ACCOUNT 09/1/2011

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

APPLICATION FOR APPROVAL OF ASSESSOR

The attorney for the prospective adoptive parents requests that the Court approve _____ _____ as the assessor.

_____
Attorney for Prospective Adoptive Parents

JUDGMENT ENTRY
APPROVING APPOINTMENT OF ASSESSOR

The Court hereby approves _____ as the assessor and orders this assessor to conduct a homestudy and to make a report to the Court in writing, together with recommendations concerning the adoption and the prospective adoptive parents.

The assessor shall prepare and file a homestudy at least 10 days before the petition for adoption will be heard, which hearing date is _____

_____
HON. DIXIE PARK
PROBATE JUDGE

SCPC FORM 18.10 - APPLICATION AND JUDGMENT ENTRY APPROVAL OF ASSESSOR 5/98

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

IN THE MATTER OF THE ADOPTION _____
(Name after adoption)

CASE NO. _____

PETITION FOR ADOPTION OF ADULT

[R.C. 3107.02]

The undersigned respectfully petitions the court for permission to adopt _____

an adult and to have the adult's name changed to _____.

The Petitioner may adopt the adult because the adult:

- ☐ is totally and permanently disabled.
- ☐ is determined to be a person with an intellectual disability
- ☐ had established a child-foster caregiver, kinship caregiver, or child-stepparent relationship with the petitioner as a minor.
- ☐ was, at the time of the adult's eighteenth birthday, in the permanent custody of or in a planned permanent living arrangement with a public children services agency or a private child placing agency.
- ☐ is the child of the spouse of the petitioner.

_____	_____
Attorney for Petitioner	Petitioner
_____	_____
Typed or Printed Name	Typed or Printed Name
_____	_____
Address	Address
_____ _____ _____	_____ _____ _____
City State Zip Code	City State Zip Code
_____	_____
Phone Number (include area code)	Phone Number (include area code)

Attorney Registration No. _____

ENTRY

This cause is set for hearing on the _____ day of _____, 20____ at _____ o'clock ____.m.

_____
DIXIE PARK, PROBATE JUDGE

FORM 19.0 - PETITION FOR ADOPTION OF ADULT

Amended: March 1, 2017
Discard all previous versions of this form

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

FINAL ORDER OF ADOPTION OF ADULT

This day this cause came on to be heard on the petition of _____

_____ to adopt _____

_____, an adult, and on the evidence.

On consideration thereof the Court finds (R.C. 3107.02(B)) _____

_____

_____

_____

and that the adoption should be granted.

It is ordered that the name of the adopted adult be changed to _____

_____

It is therefore further ordered that a final decree of adoption be, and the same hereby is entered herein.

It is further ordered that at that time a Certificate of Adoption, certified by the Court, be forwarded

to the State Department of Health, Division of Vital Statistics at _____

Further, that a copy of this decree be forwarded to the Ohio State Department of Human Services for statistical purposes.

_____ _____

Date DIXIE PARK - PROBATE JUDGE

FORM 19.1 - FINAL ORDER OF ADOPTION OF ADULT

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)

CASE NO. _____

PETITION TO RECOGNIZE FOREIGN ADOPTION

[R.C. 3107.18]

[Check applicable boxes, complete blanks, strike inapplicable language, and attach supporting documentation]

The Petitioner(s) is/are the adoptive parent(s) of a minor child pursuant to a Foreign Decree or Certificate of Adoption and state that:

PETITIONER(S)

Petitioner's Full Name: _____

Petitioner's Full Name: _____

Residence: _____

Duration of Residence: _____

Marital Status: _____

Date and Place of Marriage: _____

ADOPTED CHILD

Name of Child before Adoption: _____

Name of Child after Adoption: _____

Date and Place of Birth: _____

Attached is a certified copy of the child's Birth Certificate, and if not in English, also attached is a translation certified as to its accuracy by the translator.

A Foreign Decree or Certificate of Adoption in compliance with the laws of the Country of _____ was issued by (Name of Court) _____ in Case Number _____ on the _____ day of _____, 20___.

FORM 19.2 - PETITION TO RECOGNIZE FOREIGN ADOPTION

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____

CASE NO. _____

DECREE OF FOREIGN ADOPTION

This matter came on to be heard on the _____ day of _____, _____, upon the Petition of Foreign Adoption filed by _____

_____

The Court finds that the petitioner(s) has/have complied with the requirements of R.C. 31 07.1 8, and that giving effect to the decree or certificate of adoption that was issued under the laws of a foreign country would not violate the public policy of the State of Ohio.

It is therefore **ORDERED** that:

☐ A Final Decree recognizing the foreign decree or certificate of adoption is entered herein;

☐ An Interlocutory Decree recognizing the foreign decree or certificate of adoption is entered herein which, unless vacated, shall become final on _____

☐ The child's name shall be changed from: _____ to:

_____

☐ The Department of Health shall issue a foreign birth record for the child pursuant to R.C. 3705.1 2(A)(4);

_____

_____

_____

_____ _____

Date Dixie N. Park - Probate Judge

SCPC FORM 19.3 - DECREE OF FOREIGN ADOPTION 3/97

PROBATE COURT OF STARK COUNTY, OHIO
DIXIE PARK, JUDGE

ADOPTION OF _____
(Name after adoption)
CASE NO. _____

ORDER FOR OHIO BIRTH RECORD FOR FOREIGN BORN CHILD

This matter came on to be heard on the _____ day of _____, 20____, upon the Petition to Recognize Foreign Adoption filed by _____
_____.

The Court finds the petitioner(s) has/have complied with the requirements of R.C. 3107.18 and giving effect to the Decree or Certificate of Adoption that was issued under the laws of a foreign country would not violate the public policy of the State of Ohio.

It is therefore **ORDERED** that:

☐ A Final Decree recognizing the Foreign Decree of Certificate of Adoption is entered, herein;

☐ An Interlocutory Decree recognizing the Foreign Decree or Certificate of Adoption is entered herein which, unless vacated, shall become final on _____.

☐ The child's name shall be changed from: _____

to _____

☐ The Ohio Department of Health shall issue a new birth record for the child pursuant to R.C. 3705.12(A)(1).

☐ Other _____
_____
_____

_____ _____
Date JUDGE

FORM 19.3 - ORDER FOR OHIO BIRTH RECORD FOR FOREIGN BORN CHILD

This Page Intentionally Left Blank

Caseflow Management and Assignment of Judges

Materials Prepared By
Hon. Laura J. Gallagher
Cuyahoga County Probate Court

NOTES

NOTES

Caseflow Management

Mission:
To stimulate the development of comprehensive approaches to caseflow management and delay reduction in Ohio's family, civil, criminal and appellate courts.

Objective:
To provide practical and cost-effective solutions for local court case management concerns.

Requests:
Contact **casemgmt@sc.ohio.gov,** or call 614.387.9410.

Introduction and Overview

"Caseflow management" can be defined as the entire set of actions that a court takes to monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all postdipostion court work, in order to make sure that justice is done promptly.i According to the National Association for Court Management (NACM) in its Core Competency Curriculum Guidelines, "Properly understood, caseflow management is the absolute heart of court management.,,;;

Years of research and experience in courts across the country confirm that for caseflow management to work effectively in a court, it is essential that there be a solid management foundation: there must be (a) leadership; (b) commitment among judges and court staff to managing the pace oflitigation; (c) communications within the court and with lawyers and other institutional participants connected with the case; and (d) a learning environment enabling a court to be flexible in the face of changing events. Moreover, there must be active attention to features that caseflow management shares with day-to-day management of any activity: (1) establishing appropriate expectations; (2) monitoring actual performance; and (3) holding participants accountable and taking responsibility to bring actual performance more in line with expectations.[1]

---

[1] The central tenets of caseflow management have been developed, tested, and confirmed over a period of over 25 years since the early 1970's. For a general overview, see David Steelman, "What Have We Learned About Court Delay, 'Local Legal Culture,' and Caseflow Management Since the Late 1970s?" *Justice System Journal* (Vol. 19, No.2, 1997) 145. For more details, see Maureen Solomon, *Casjlow Management in the Trial Court* (1973); Steven Flanders, *Case Management and Court Management in United States District Court* (1977); Thomas Church, et al.,

General and Specific Caseflow Management Techniques

With a strong foundation and active attention to day-to-day management, a court is in a position to make effective use of standard caseflow management techniques. The following general techniques have consistently been found to yield positive results for trial courts seeking to improve their management of the pace of litigation.[iii]

- Early court intervention and continuous court control of case progress
- Differentiated case management (DCM)
- Meaningful pretrial courts events and realistic pretrial schedules
- Firm and credible trial dates
- Trial management
- Management of court events after initial disposition

Within this general framework, there are more specific techniques that have been identified for successful caseflow management for particular kinds of cases. These include the following:[iv]

- **Proven Techniques in Civil Cases:**
  - Early court involvement
  - Case screening and DCM track assignment
  - Coordination and management of alternative dispute resolution (ADR)
  - Effective trial scheduling
  - Managing complex litigation

- **Techniques for Management of Probate Cases:**
  - Establish overall timetables for contested cases to govern time from initiation to trial or nontribal disposition
  - Monitor and control contested case progress from initiation
  - Establish time expectations for completion of discovery in contested cases and progress toward initial disposition
  - Make an early appointment of counsel for a respondent when appropriate
  - Use pretrial conferences and ADR in contested cases to promote early nontribal resolution; and set an early date for trial or hearing
  - Manage trials effectively, avoiding discontinuous-day trials

---

Justice Delayed: The Pace of Litigation in Urban Trials Courts (1978); Ernest Friesen, et al., *Justice in Felony Courts: A Prescription to Control Delay* (1979); Larry Sipes, et al., *Managing to Reduce Delay* (1980); Maureen Solomon and Douglas Somerlot, *Casejlow Management in the Trial Court: Now and For the Future* (1987); Barry Mahoney, et al., *Changing Times in Trial Courts: Casejlow Management and Delay Reduction in Urban Trial Courts* (1986); John Goerdt, Chris Lornvardias, GeoffGallas and Barry Mahoney, *Examining Court Delay: The Pace of Litigation in 26 Urban Trail Courts* (1989); William Hewitt, Georff Gallas and Barry Mahoney, *Courts that Succeed: Six Profiles of Successful Courts* (1990); Goerdt, Lomvardias, and Gallas, *Reexamining the Pace of Litigation in 39 Urban Trail Courts* (1991); American Bar Association, *Standards Relating to Trial Courts, 1992 Edition* (1992); Roger Hanson, *Time on Appeal* (1996); Brian Ostrom and Roger Hanson, Efficiency, *Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts* (1999); and Ann Keith and Carol Flango, *Expediting Dependency Appeals: Strategies to Reduce Delay* (2002).

- Actively monitor compliance with requirements that guardians or conservators give periodic accountings to the court and the filing of reports on the performance by fiduciaries for their responsibilities to those for whom they are responsible[v]
- Use court monitoring of fiduciary filings to remind executors, guardians and conservators that the court is overseeing their performance and to ascertain whether there have been abuse by fiduciaries[vi]
- Be prepared to enforce court order by means including sanctions, and take immediate action to ensure the safety and welfare of a respondent if the court learns of abuse or neglect.[VII]

Resources

For citations to some of the literature on caseflow management, see the works cited in the endnotes. Of particular interest may be the following recent publications by the National Center for State Courts, which can be downloaded through the Center's website (www.ncsc.org):

- Daniel]. Hall and Lee Suskin, *Reengineering Lessons from the Field* (2010).
- David C. Steelman, *Improving Caseflow Management: A Brief Guide* (Feb. 2008).
- Brian Ostrom and Roger Hanson, *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts* (1999).
- David C. Steelman and Alicia K. Davis, *Probate DCM to Protect Vulnerable Adults* (2012).
- David C. Steelman,John Goerdt, and James McMillan, *Casejlow Management: The Heart of Court Management: The Heart of Court Management in the New Millennium* (2004).
- Ann Keith and Carol Flango, *Expediting Dependency Appeals: Strategies to Reduce Delay* (2002).

Contacts for National Center for State Courts (www.ncsc.org)

- Joy M. Keller, Director of Knowledge and Information Services, 757-293-9477, jkeller@ncsc.org
- Pamela Casey, Vice President, Research Division, 757-259-1508, pcasey@ncsc.org
- Laurie Givens, Vice President of Court Consulting Services, 757-259-1559, lgivens@ncsc.org
- Jennifer Elek, Principal Court Research Associate, 757-259-1836, jelek@ncsc.org
- Kim Etherton, Principal Court Management Consultant, 757-259-1857, ketherton@ncsc.org

Williamsburg, VA 23185
Phone (800) 616-6164

Assignment of Judges

The Ohio Constitution and the Revised Code vest the Chief Justice of the Supreme Court with the authority to make temporary assignments of judges to serve in any court in the state as established by law in whatever circumstances the Chief Justice deems appropriate.

Guidelines, found at http://www.supremecourt.ohio.gov/JCS/judgeAssignGuide.pdf, are issued by the Chief Justice and intended to establish consistent standards and procedures in implementing this authority. While these guidelines may impose specific duties upon other persons, the Chief Justice may waive compliance with any guidelines to assist the exercise of that discretion.

Relevant portions of these guidelines include:

- SECTION 2.0. REQUIREMENTS AND PROCEDURES.
- SECTION 3.0. FACTORS IN SELECTING JUDGES.
- SECTION 4.0. LEVELS OF ASSIGNMENT.
- SECTION 5.0. CERTIFICATES AND RESPONSIBILITIES ON ASSIGNMENT.
- SECTION 6.0. REIMBURSEMENT AND COMPENSATION.

Courtools

CourTools© (www.courtools.org) is a project from the National Center for State Courts which enables courts to collect and present evidence of their success in meeting the needs and expectations of customers. These performance measures provide courts with accountability in the administration and effectiveness of the courts, a structured means to set an agenda for policy discussions, and demonstrate quality of service delivery.

The following are a set of core court performance measures:

- **Measure 1: Access and Fairness**
  - Purpose: To rate court users on accessibility and treatment in terms of fairness, equality, and respect.
  - Method: Brief self-administered survey using a 1-5 scale questions on access and fairness, along with pertinent background on respondent.

- **Measure 2: Clearance Rates**
  - Purpose: Tracks the number of outgoing cases as a percentage of the number of incoming cases to measure whether the court is keeping up with its incoming caseload.
  - Method: Count of incoming cases and outgoing cases during a given time period.

- **Measure 3: Time to Disposition**
  - Purpose: Management tool to assess the length of time it takes a court to process cases.
  - Method: Track the percentage of cases disposed or otherwise resolved within established time frame.

- **Measure 4: Age of Active Pending Caseload**
  - Purpose: Compile a complete and accurate inventory of active pending cases.
  - Method: Analyze the age of active cases that are pending before the court, measured as the number of days from filing until time of measurement.

- **Measure 5: Trial Date Certainty**
  - Purpose: To evaluate the effectiveness of calendaring and continuance practices of the court.
  - Method: Measure the number of times cases disposed by trial are scheduled for trial

- **Measure 6: Reliability and Integrity of Case Files**
  - Purpose: Analyze maintenance of case records to ensure reliable and accurate case file system

- Method: Identify percentage of files that can be retrieved within established time standards, and that meet established standards for completeness and accuracy of contents.

- **Measure 7: Collection of Monetary Penalties**
  - Purpose: Determine the percentage of court orders for monetary penalties are enforced,
  - Method: Retrieval of payments collected and distributed within established timelines.

- **Measure 8: Effective Use of Jurors**
  - Purpose: To determine the effectives of jury management practices and to minimize the number of unused prospective jurors.
  - Method: Calculate the Juror Yield (number of qualified selected jurors) and Juror Utilization (rate at which prospective jurors are used).

- **Measure 9: Court Employee Satisfaction**
  - Purpose: Tool for surveying employee opinions and perceptions of the workplace.
  - Method: Access through opinion surveys conducted on regular basis.

- **Measure 10: Cost per Case**
  - Purpose: To evaluate exiting case processing practices and to improve court operations.
  - Method: Determine the average cost of processing in a single case, by case type to include tot court expenditures, case disposition by major case type, and a complete inventory of all judicial officers and court staff.

Superintendence Rules for Caseflow Management & General Court Operations

Rule 4.01 requires the administrative judges of the court to timely file all administrative judge reports required by the Case Management Section of the Supreme Court (found at https://www.supremecourt.ohio.gov/courts/services-to-courts/case-management-section/statistical-reporting-information-and-forms/).

Rule 5 (D)(1) requires the adoption of a local rule of a case management plan for the purpose of ensuring the readiness of cases for pretrial and trial, and maintaining and improving the timely disposition of cases. The rule further stipulated that the plan shall include:

1) An early case management conference,
2) Referral to appropriate and available alternative dispute resolution programs
3) Establishment of binding case management schedule, and
4) A pretrial conference in cases where the trial judge determines a conference is necessary and appropriate.

Rule 35 gives the authority of the Ohio Supreme Court to have a Case Management Section that will receive, analyze, maintain, audit, and publish statistical data from the courts; offer training about reporting required; and perform audits of the courts to monitor statistical reporting.

ENDNOTES

[i] David C. Steelman, Joh David C. Steelman, John Goerdt, and James McMillan, *Casejlow Management: The Heart of Court Management: The Heart of Court Management in the New Millennium* (2000), xi.

[ii] NACM, Professional Development Advisory Committee, "Core Competency Curriculum Guidelines: History, Overview and Future Uses," *Court Manager* (Vol. 13, No. 1, Winter 1998) 6.

[iii] See Steelman, Goerdt, and McMillan, *Casejlow Management: The Heart of the Court Management in the New Millennium,* Chapter 1.

[iv] Ibid., see Chapters II and III.

[v] See *National Probate Court Standards* (1993), Standards 3.3.15 (guardians), 3.4.15 and 3.4.16 (conservators).

[vi] See David Steelman, *Service to Citizens by the Probate/Mental Health Department of the Superior Court of Arizona in Maricopa County: A Technical Assistance Report* (1997), p. 8.

[vii] See *National Probate Court Standards* (1993), Standards 3.3.17 (guardians), 3.4.15 and 3.4.18 (conservators).

This Page Intentionally Left Blank

Conservatorship

Materials Prepared By
Hon. Dixie Park
Stark County Probate Court

NOTES

NOTES

CONSERVATORSHIP

I. SUMMARY (reproduced from a pamphlet prepared by the Ohio Association of Probate Judges)

- WHAT IS A CONSERVATORSHIP?
  A conservatorship is a voluntary trust relationship using guardianship laws and procedures as its basis, in which one party, known as a conservator, acts with Court supervision for a competent, physically infirmed adult, who is called the conservatee.

- WHO CHOOSES THE CONSERVATOR?
  A conservatorship is based on the consent of the person for whom the conservatorship is to benefit. Thus, the conservatee decides who will serve as conservator, and what property and powers of the conservatee will be included in the conservatorship. In addition, the conservatee decides which of the guardianship duties and procedures and conservator follows and the Court enforces.

- WHAT IS THE COURT'S ROLE?
  After a petition is filed, and the matter heard, the Court will determine if the petitioner is infirmed, the petition is voluntary and the conservator is suitable. If the petition is granted, the Court, while the conservatorship exists, will apply the laws and procedures of Ohio pertaining to guardianship, except those excluded by the conservatee.

II. APPLICABLE STATUTES

2111.01 Guardian and conservatorship definitions.

As used in Chapters 2101. to 2131. of the Revised Code:

(F) "Conservator" means a conservator appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

2111.021 Physically infirm adult may petition for conservatorship.

A competent adult who is physically infirm may petition the probate court of the county in which the petitioner resides, to place, for a definite or indefinite period of time, the petitioner's person, any or all of the petitioner's real or personal property, or both under a conservatorship with the court. A petitioner either may grant specific powers to the conservator or court or may limit any powers granted by law to the conservator or court, except that the petitioner may not limit the powers granted to the court by this section and may not limit the requirement for bond as determined by the court. The petition shall state whether the person of the competent adult will be placed under the conservatorship, shall state with particularity all real and personal property that will be placed under the conservatorship, shall state the powers granted and any limitation upon the powers of the conservator or court, and shall state the name of a proposed suitable conservator.

After a hearing, if the court finds that the petition was voluntarily filed and that the proposed conservator is suitable, the court shall issue an order of conservatorship. Upon issuance of the order, all sections of the Revised Code governing a guardianship of the person, the estate, or both, whichever is involved, except those sections the application of which specifically is limited by the petitioner, and all rules and procedures governing a guardianship of the person, the estate, or both, shall apply to the conservatorship, including, but not limited to, applicable bond and accounting requirements.

A conservatorship shall terminate upon a judicial determination of incompetency, the death of the petitioner, the order of the probate court, or the execution of a written termination notice by the petitioner. A termination notice shall take effect upon execution by the petitioner, and shall be filed with the court and served upon the conservator. A termination notice executed by a petitioner relative to a conservatorship of the estate and the termination of a conservatorship of the estate based upon a termination notice are void unless the termination notice is filed with the court within fourteen days after its execution. Modification of the powers of a conservator or the court may be made by the petitioner upon motion to the court at any time during the conservatorship. Neither the establishment of a conservatorship nor the filing of a petition for conservatorship with the probate court shall be considered as evidence of mental impairment under section 2111.01 of the Revised Code.

Upon motion to the probate court and a showing of good cause, the court may make confidential, or remove from confidential status, any file, record, petition, motion, account, or paper, except for an index, docket, or journal, that pertains to a conservatorship and that is in the possession of the court.

III. TERMINATION

A Conservatorship is terminated by judicial determination of incompetency, the death of the conservatee, the Order of the Probate Court, or the execution of a written termination notice by the conservatee provided that said written notice is filed with the Probate Court within 14 days of execution.

IV. CASELAW

In re Conservatorship of Adamosky, 2011-Ohio-3166.

The 7th District Court of Appeals found that R.C. 2111.471 applied to a conservatorship pursuant to the language in R.C. 2111.021 which states that "all section of the Revised Code governing guardianship of the person, the estate, or both, whichever is involved, except those section limited by the petitioner, and all rules and procedures governing such guardianship, shall apply to the conservatorship... " The Court held that a prior to entering an order transferring conservatorship to another county, the trial court must determine whether the conservatee's residence had changed and whether the transfer was in the conservatee's best interests.

The Court also made a determination with regard to the payment of attorney fees in conservatorship cases. The Court held that a contract between a conservatee and attorney for payment of fees in a conservatorship proceeding did not deprive the probate court of authority to consider whether the attorney's request for fees was reasonable. The Court reasoned that the probate court has jurisdiction to settle a conservatorship account and since the attorney fees were to be paid from estate funds, calculation of fees was within the probate court's authority.

Miebach v. Mathias (1998), 91 Misc. 2d 72.

Children of an adult ward of a conservatorship sued the conservator for breach of fiduciary duty after the conservator made disbursements of the ward's assets for the conservator's own benefit. The conservator offered as a defense the fact that the conservatee had authorized the disbursements. The Plaintiffs argued that this was not a valid defense. The Court noted that there were no limitations on the conservator in the letters of conservatorship. The Court further noted that the relationship between a conservator and conservatee was different from that of a guardian and ward in that the conservatee was not incompetent. The Court held that a competent but physically infirm ward could authorize the conservator to make disbursements for the conservator's own benefit.

In re Conservatorship of Ahmed, 2003-Ohio-3272.

The conservator in the case was an attorney, and the conservatee was a prisoner. The conservatee allegedly requested the conservatorship so that the attorney could assist in accessing bank accounts and paying for costs associated with defending the criminal charges. Various disputes arose among the conservator and the conservatee which were presented to the court. The court found that the conservatee had waived his right to appeal any errors in the appointment as he did not appeal from the Judgment Entry appointing the conservator. The conservatee appealed the court's denial of revocation of the conservatorship. The Court of appeals affirmed the trial court finding that the revocation was faulty as the writing was not dated and there was no evidence that the filing of the revocation was made within 14 days of execution.

V. APPLICABLE FORMS- See Standard Probate Forms Tab

20.0 - Application for Appointment of Conservator
20.1 - Judgment Entry Appointment of Conservator
20.2 - Letters of Conservatorship
20.5 -Application for Authority to Expend Funds (Conservator)

Guardianship

Materials Prepared By
Hon. Dixie Park
Stark County Probate Court

NOTES

NOTES

I. PROBATE COURT DEFINITIONS - R.C. 2111.01

Guardian - R.C. 2111.01(A): Means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor. When applicable, a guardian includes, but is not limited to an interim guardian, a standby guardian, and an emergency guardian appointed by division (B) of section 2111.02 of the Revised Code. A guardian also includes an agency under contract with the department of developmental disabilities for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent.

Ward - R.C. 2111.01(B): Means any person for whom a guardian is acting or for whom the probate court is acting pursuant to section 2111.50 of the Revised Code.

Resident Guardian – R.C. 2111.01(C): Means a guardian appointed by a probate court to have the care and management of property in this state that belongs to a nonresident ward.

Incompetent – R.C. 2111.01(D): Means any person who is so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide, or any person confined to a correctional institution within this state.

Next of Kin – R.C. 2111.01(E): Means any person who would be entitled to inherit from a ward under Chapter 2105 of the Revised Code if the ward dies intestate.

Conservator – R.C. 2111.01(F): means a conservator appointed by the probate court in an order of conservatorship issued pursuant to section 2111.021 of the Revised Code.

Parent – 2111.01(G): Means a natural parent or adoptive parent of a minor child whose parental rights and responsibilities have not been terminated by a juvenile court or another court.

Financial Harm – 2111.01(H): Means impairment of an individual's financial assets by unlawfully obtaining or exerting control over the individual's real or personal property in any of the following ways: (1) Without the consent of the individual or the person authorized to give consent on the individual's behalf; (2) Beyond the scope of the express or implied consent of the individual or the person authorized to give consent on the individual's behalf; (3) By deception; (4) By threat; (5) By intimidation; (6) By fraud; (7) By undue influence.

II. JUVENILE COURT DEFINITIONS – R.C. 2151.011

Custodian – R.C. 2151.011(B)(11): Means a person who has legal custody of a child or a public children services agency or private child placing agency that has permanent, temporary, or legal custody of a child.

Guardian – R.C. 2151.011(B)(17): Means a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111 of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and subject to the residual parental rights of the child's parents.

Legal Custody – R.C. 2151.011(B)(21): Means a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

Permanent Custody – R.C. 2151.011(B)(31): Means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations.

III. DOMESTIC RELATIONS COURT DEFINITION – R.C. 3127.01

Child Custody Determination – R.C. 3127.01(B)(3): Means a judgment, decree, or other order of a court that provides for legal custody, physical custody, parenting time, or visitation with respect to a child. "Child custody determination" includes an order that allocates parental rights and responsibilities. "Child custody determination" includes permanent, temporary, initial, and modification orders. "Child custody determination" does not include an order or the portion of an order relating to child support or other monetary obligations of an individual.

Child Custody Proceeding – R.C. 3127.01(B)(4): Means a proceeding in which legal custody, physical custody, parenting time, or visitation with respect to a child is an issue. "Child custody proceeding" may include a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, parentage, termination of parental rights, or protection from domestic violence. "Child custody proceeding" does not include a proceeding regarding juvenile delinquency, contractual emancipation, or enforcement pursuant to sections 3127.31 to 3127.47 of the Revised Code.

Physical Custody – R.C. 3127.01(B)(14): Means the physical care and supervision of a child.

IV. VENUE AND JURISDICTION

A. BETWEEN PROBATE COURTS

IN GENERAL: Proceedings for the appointment of a guardian are properly venued in the probate court in the county where the prospective ward:

a) Is a resident; or

b) Has a legal settlement at the time of the application.

Ohio Revised Code Section 2111.02(A); For more on residence *see also*: *In re Guardianship of Fisher*, 91 Ohio App. 3d 212, 632 N.E.2d 533 (3rd Dist. 1993); *In re Guardianship of Friend*, 8th Dist. No. 64018, 1993 WL 526643 (Dec. 16, 1993); *LeSueur v. Robinson*, 53 Ohio App.3d 9, 557 N.E.2d 796 (6th Dist. 1988). *In re Anderson*, 7th Dist. Monroe No. 05 MO 14, 2007-Ohio-1107, ¶ 19.

RESIDENCE: Residence means something less than one's domicile. Residence has been defined by its ordinary meaning as a place of dwelling. Residence requires actual physical presence at some abode coupled with an intent to remain at that place for some period of time. *In re Guardianship of Fisher*, 91 Ohio App. 3d 212, 632 N.E.2d 533 (3rd Dist. 1993).

LEGAL SETTLEMENT: Legal settlement means living in an area with some degree of permanency greater than a visit lasting a few days or weeks. *In re Guardianship of Fisher*, 91 Ohio App. 3d 212, 632 N.E.2d 533 (3rd Dist. 1993). The probate court had jurisdiction over a proposed ward because the ward had established a legal settlement in the county when he traveled to Ohio on a one-way ticket, changed the address on his federal Social Security benefits, and granted his daughter rights under a durable power of attorney agreement. *In re Guardianship of Thich Minh Chieu*, 12th Dist. Butler No. CA2018-05-112, 2018-Ohio-4937, ¶ 1.

MULTIPLE RESIDENCES: A person may be considered to have two residences. The 6th District Court of Appeals in Wood County held that a trial court had jurisdiction to appoint a guardian for a mentally incompetent adult, where the adult was removed from her home of over 20 years and placed in out-of-county facilities where the trial court was in the same county as the proposed ward's home. *In re Tripp*, 90 Ohio App.3d 209, 628 N.E.2d 139 (6th Dist. 1993). The court stated that under the jurisdictional requirements of R.C. 2111.02(A), the adult could be considered to have two residences; one where she intended to remain and did, in fact remain, and one where she dwelled at certain times when she stayed overnight at her home on a one-weekend-per-month basis. *Id.*

A prisoner appealed the Mahoning County Probate Court's decision to appoint a guardian over him, stating, inter alia, that because he was incarcerated in Madison County, Mahoning County lacked venue. He cited *In re Tripp*, and averred that he can inform no intent to return to his former residence in Mahoning County due to his eighty-five year prison sentence. *In re Guardianship of Goins*, 7th Dist. Mahoning No. 02 CA 163, 2003-Ohio-931, ¶ 33. The Appellate Court stated that "there is no indication that the intent must be realistic" and found that "[t]here is no indication that appellant has lived anywhere but Youngstown. Furthermore, as appellee notes, appellant still owns the home in Youngstown that he has owned for some years." *Id*.

BURDEN OF PROOF: The party asserting that a guardianship proceeding was initiated outside the county where the prospective ward is a resident or has a legal settlement bears the burden of proving that assertion. *Lacier v. Robinson*, 53 Ohio App. 3d 9, 557 N.E.2d 796 (6th Dist. 1988); In *re Guardianship of Friend*, 8th Dist. No. 64018, 1993 WL 526643 (Dec. 16, 1993).

WHEN ORIGINAL COURT RETAINS JURISDICTION: The appointing court does not lose jurisdiction over the guardianship as a result of:

a) The guardian's death; *Netting v. Strickland*, 18 O.C.C. 136, 9 Ohio Cir. Dec. 841 (1st Circuit 1899); *See generally* 53 Ohio Jurisprudence 3d (1984 Supp. 1999) Guardian and Ward.

b) The removal of the guardian or the trust property from the state; or

c) The removal of the ward from the county or state. *In re Guardianship of Kollmeyer*, 64 Ohio Law Abs. 577, 113 N.E.2d 122 (2nd Dist. 1952); *See generally* 53 Ohio Jurisprudence 3d (1984 Supp. 1999) Guardian and Ward. In these circumstances, the appointing court retains jurisdiction to appoint a successor guardian. *Netting v. Strickland,* 18 O.C.C. 136, 9 Ohio Cir. Dec. 841 (1st Circuit 1899); See generally 53 Ohio Jurisprudence 3d (1984 Supp. 1999) Guardian and Ward.

Where a guardian has been validly appointed by the probate court of one county, the probate court of another county is without authority to entertain an application for a change of guardian. *In re Guardianship of Kollmeyer*, 64 Ohio Law Abs. 577, 113 N.E.2d 122 (2nd Dist. 1952).

Guardians of minors appointed in one county cannot institute proceedings in the probate court of another county to sell real estate of their wards situated in the latter county. *Foresman v. Haag*, 36 Ohio St. 102, 1880 Ohio LEXIS 116 (1880).

B. JURISDICTIONS OVER GUARDIANSHIPS IN GENERAL

PROBATE COURT: With respect to guardianship matters and pursuant to R.C. 2101.24, the probate court has ***exclusive jurisdiction***, except as otherwise provided by law, to:

a) Appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts. R.C. 2101.24(A)(1)(e);

b) Make inquests respecting persons who are so mentally impaired as a result of a mental or physical illness or disability, as a result of intellectual disability, or as a result of chronic substance abuse, that they are unable to manage their property and affairs effectively, subject to guardianship. R.C. 2101.24(A)(1)(g);

c) To authorize the sale of lands, equitable estates, or interests in lands or equitable estates, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians. R.C. 2101.24(A)(1)(i); and

d) To direct and control the conduct of fiduciaries and settle their accounts. R.C. 2101.24(A)(1)(m).

In addition, the probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code. R.C. 2101.24(C).

JUVENILE COURT: The Ohio Revised Code provides that the juvenile court has ***exclusive, original jurisdiction***, in part, as follows:

a) To determine the **custody** of any child not a ward of another court of this state. R.C. 2151.23(A)(2); and

b) To exercise the powers and jurisdiction given the probate division of the common pleas court in Chapter 5122 of the Revised Code (concerning involuntary commitments of the mentally ill) if the court has probable cause to believe that a child otherwise within the jurisdiction of the court is a mentally ill person subject to hospitalization by court order, as defined in R.C. 5122.01. R.C. 2151.23(A)(4).

DOMESTIC RELATIONS COURT: The jurisdiction of the domestic relations court is ***mandatory*** and R.C. 3109.04(A) provides that "[i]n any divorce, legal separation, or annulment

proceeding ... the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage."

C. JURISDICTION BETWEEN PROBATE COURT AND JUVENILE COURT

Once the probate court appoints a guardian for a minor child, the juvenile court is without jurisdiction to grant custody of the minor child to another person. *In re Miller*, 33 Ohio App.3d 224, 515 N.E.2d 635 (8th Dist. 1986). Custody and visitation as well as all matters touching the guardianship remain exclusive in the probate court until such time as the guardianship is terminated. *In re Zahoransky*, 22 Ohio App. 3d 75, 488 N.E.2d 944 (8th Dist. 1985); *In re Guardianship of Smith*, 1991 Ohio App. LEXIS 479, 1991 WL 14099 (4th Dist. 1991); *In re Guardianship of Harrison*, 60 Ohio App.3d 19, 572 N.E.2d 855 (1st Dist. 1989).

The appointment—by a probate court—of a guardian for the estate of a minor for the purpose of pursuing tort claims is not barred by the exclusive jurisdiction of the juvenile court set forth in R.C. 2151.23(A)(1), where no evidence suggests that such appointment conflicts with the care, protection, or mental and physical development of the child subject to R.C. Chapter 2151. *In re Guardianship of Baby Boy Charlie*, 6th Dist. No. H-8-5, 1985 Ohio App. LEXIS 8640 (August 30, 1985).

While a probate court has jurisdiction to determine custody of a minor within a guardianship, once the guardianship is terminated, the probate court no longer has jurisdiction to determine the child's custody, and then the juvenile court has exclusive jurisdiction under R.C. 2151.23(A)(2) to determine the child's custody. *In re Guardianship of Harrison*, 60 Ohio App.3d 19, 572 N.E.2d 855 (1st Dist. 1989).

D. JURISDICTION BETWEEN PROBATE COURT AND DOMESTIC RELATIONS COURT

Ohio law requires that a parenting determination be made at the time of any divorce or legal separation. R.C. 3109.04(A). Thus, the probate court's authority is superseded by a determination of the domestic relations court regarding custody at the time of divorce or legal separation.

Before exercising its jurisdiction to appoint a guardian of a minor, the probate court must comply with the Uniform Child Custody Jurisdiction Act, R.C. Chapter 3127. *See also* 2111.06. The court must be assured that:

a) Ohio is the child's home state; OR

b) A contesting party or the child must have a significant connection with Ohio; AND

c) No other state is exercising jurisdiction over the child. R.C. 3127.22.

The court must assure itself that other proceedings are not pending. Custody decrees from other states may be filed with the court and have the same effect as similar Ohio decrees.

The Uniform Child Custody Jurisdiction Act, as adopted in Ohio, is applicable to and must be complied with in a guardianship termination proceeding.

A domestic relations court has no jurisdiction to award a guardian's personal expenses as part of the divorce decree where the guardian was appointed by the probate court. *Caudill v. Caudill*, 29 Ohio App.3d 51, 502 N.E.2d 703 (10th Dist. 1986).

A guardianship established for purpose of facilitating child support payments was valid pursuant to implicit authority granted to domestic relations court under statutes granting court equitable powers in domestic relations matters and authority to adjudicate matters in accordance with best interests of child. *In re Guardianship of Derakhshan*, 110 Ohio App. 3d 190, 673 N.E.2d 954 (11th Dist. 1996).

E. ADULT GUARDIANSHIPS

The guardianship process under Revised Code Chapter 2111 provides an orderly method to appoint a person[1] to manage the care and affairs of an incompetent person or minor person (under the age of 18). The probate court must find an adult incompetent before a guardianship may be established. Incompetence may result from dementia, delirium, mental illness, traumatic brain injury, substance abuse, stroke, developmental disabilities, intellectual disabilities, and other ailments affecting a person's ability to make decisions in their best interest. R.C. 2111.01(D).

GUARDIANSHIP OF THE PERSON: An incompetent individual is not able to care for their basic needs or make medical decisions in the best interest of their person. The term person refers to a ward's physical and mental self. A guardian of a person for a ward makes medical and placement decision for the ward.

GUARDIANSHIP OF AN ESTATE. An incompetent person with assets and money is not able to make financial decisions in the best interest of their estate. The term estate refers to property, assets, and money owned by the ward. An incompetent individual may be especially susceptible to harm from outside influences. A guardian of a ward's estate is responsible for managing and preserving the ward's estate. 53 Ohio Jur. 3d Guardian and Ward (1984). Although the appointment of a guardian of the estate shifts possession and control of the property from the ward to the guardian, title remains with the ward. *In re Stephens*, 2 Ohio Misc. 47, 30 Ohio Op.2d 325, 202 N.E.2d 458 (P.C. 1952)

[1] The probate court may appoint a person, association or corporation as guardian of an incompetent adult. This guide will focus on the court appointing a person as guardian of an incompetent adult.

F. GUARDIANSHIP PROCESS – GENERAL OVERVIEW

GUARDIANSHIP APPLICATION: The process of guardianship appointment begins either with an application by an interested party or on the probate court's own motion. R.C. 2111.02(A) & 2111.03. The application must be made in the probate court for the county in which the prospective ward resides. R.C. 2111.02(A), *In re Tripp*, 90 Ohio App.3d 209, 628 N.E.2d 139 (6th Dist. 1993).

COURT INVESTIGATORS: After the application is filed, the probate court will send a court investigator to evaluate the proposed ward. R.C. 2111.041. The investigator files a report which the probate court will review before the hearing. R.C. 2111.042.

NOTICE AND HEARING: Prior to the appointment of a guardian, the court holds a hearing on the necessity of the guardianship. Proper notice of the hearing is required on the proposed ward and in-state family members. R.C. 2111.04. The proposed guardian must appear at the hearing. R.C. 2111.02(C)(1). If the prospective ward is an alleged incompetent adult, incompetence must be proved by clear and convincing evidence. R.C. 2111.02(C)(3); *In re Gallagher*, 2 Ohio App.3d 218, 441 N.E.2d 593 (12th Dist. 1981).

During the hearing, evidence of a lesser restrictive alternative than a guardianship may be introduced, and if proven, may form the basis for a denial of the guardianship. If the prospective ward is an alleged incompetent adult, the prospective ward has the right to the following:

a) An independent attorney, at court expense if the prospective ward is indigent;

b) To an independent expert to evaluate competency; and

c) To the presence of a family member of the prospective ward's own choosing. R.C. 2111.02(C)(7).

The probate court appoints a guardian by judgment entry. The probate court then issues letters of guardianship, which state whether the guardian is responsible for the ward's person and the ward's estate, the limits of the guardian's powers, and the duration of the guardian's powers. The guardian must take and sign an oath at the time of the appointment. R.C. 2111.02(C). In the oath, the guardian promises to file an inventory, reports, and accounts; to make decisions in the best interest of the ward; to request the court's permission prior to spending the ward's money; and to obey court orders and rules.

G. Application for Appointment as Guardian

The guardianship application is for the purpose of determining the necessity of a guardianship in the first place. If the court finds a guardianship necessary, the next step is reviewing the suitability of the applicant.

In selecting the person to serve as guardian, the probate court must act in the best interest of the ward. The probate court has broad powers in appointing guardians. It is preferred that a guardian of an Ohio ward live in the state of Ohio, and ideally in the same county as the ward. However, the rules changed in 2012, and a guardian of the person of an Ohio ward may now live out of state.

A suitable applicant must submit to and pass a criminal background check. Sup.R. 66.05(A)(1). Attorney-applicants must provide a certificate of good standing from the Supreme Court of Ohio. Sup.R. 66.05(A)(1). Each guardian appointed by the court must execute an affidavit affirming that the applicant has no pending misdemeanor or felony charges or convictions, and must notify the court within 72 hours if the information in the affidavit changes. Sup.R. 66.05(A)(2). A guardian of an estate must post a bond to protect the ward's assets from misuse. R.C. 2109.04. The court must insure that no conflicts of interest exist between the

applicant and the ward. Sup.R. 66.04(D). In addition, guardians must participate in a 6-hour training course within 6 months of their appointment as guardian, and an additional 3 hours of guardianship training every year thereafter. Sup.R. 66.06 and Sup.R. 66.07.

In Ohio, it is preferable that a person serve as guardian of both the person and estate of the ward, unless the probate court decides that the interests of the ward will be better served by appointing different persons as guardian of the person and of the estate. R.C. 2111.06.

H. Essential Elements of the Guardianship Process

The Application to be Appointed Guardian of an Incompetent, Form 17.0 (Form 16.0 for a minor), must include in part, a statement of expert evaluation (for an alleged adult incompetent only), a list of the proposed ward's next of kin, the estimated value of the ward's estate, as well as information about the proposed ward.

Statement of Expert Evaluation ("SOEE"): A physician, psychiatrist or a clinical psychologist must complete the SOEE. Sup.R. 66(A), Form 17.1. In the statement of expert evaluation, the expert tells the probate court about the proposed ward's suspected mental impairments, and ultimately, whether they believe a guardianship should be established for the proposed ward.

Next of Kin: The next of kin form requires the applicant to tell the probate court the names, addresses and relationships of the proposed ward's spouse, children, and grandchildren of deceased children. For a minor, the next of kin form should include the minor's parents, guardian or custodian. For an unmarried adult without children, the next of kin form should include the adult's parents.

In addition to the SOEE and Next of Kin forms, a Guardian's Bond, Form 15.3, and the Fiduciary's Acceptance Form 15.2, should be attached to the application for guardianship if appropriate.

I. LESSER RESTRICTIVE ALTERNATIVES TO A GUARDIANSHIP

In addition to traditional guardianships, the state of Ohio provides for guardianships of a lesser degree of time or scope under R.C. 2111.02.

LIMITED GUARDIAN: A limited guardian is one in whom the probate court places a less than total group of powers. A limited guardianship may be for a specific period of time. A limited guardianship should specify the guardian's limited powers and the reasons for the guardianship.

INTERIM GUARDIAN: An interim guardianship is designed to be used when a regular guardian is temporarily or permanently removed or resigns and the ward requires immediate action.

EMERGENCY GUARDIAN: An emergency guardian is appointed when no regular guardian was ever ordered and an incompetent or minor requires immediate action because of a significant risk to their person or estate. An emergency guardianship may last no longer than 72 hours.

Emergency guardianships are rarely used because probate courts are reluctant to issue court orders without full notice to the proposed ward and the proposed ward's family. But there are situations that call for an emergency guardianship. Emergency guardianships are most often used to prevent an immediate and significant risk to a proposed ward's health. When an emergency guardianship is requested to protect a proposed ward's money, the requester must prove immediate danger to the proposed ward's fund to enable the probate court to appoint an emergency guardian of the estate.

POWER OF ATTORNEY ("POA"): A POA is a legal document which is often specific as to either finances or health care. R.C. Chapter 1337. A POA allows an individual, called the principal, to delegate to a third party, called the attorney-in-fact, the authority to become the principal's decision maker. This authority allows the attorney-in-fact to make decisions when the principal is unable to make decisions. The principal who creates a POA specifically intends for the attorney-in-fact to have the authority to act after the principal becomes injured or is found incompetent.

Only a competent person may create and sign a POA. Thus, once guardianship proceedings have begun, the proposed ward may not be competent and should not create a POA.

LIVING WILL/ADVANCED DIRECTIVES: A living will is also called an advanced directive, and is different from a POA. A living will allows a person to make their wishes known should they become terminally ill and face end of life medical treatments. Specifically, a living will provides direction regarding the use of treatments not focused on restoring health, but intended to prolong or delay the dying process. Such treatments commonly include the use of ventilators and life support machines.

PAYEE/AUTHORIZED REPRESENTATIVE: A payee or authorized representative is an individual who is authorized to receive and disburse Social Security benefit payments, Supplemental Social Security Income, or veteran's benefits payments, on behalf of a recipient. A court must find the recipient incompetent, or the payee must submit evidence to the Social Security Administration or the Veterans' Administration demonstrating the mental or physical incapacity of the recipient which impairs the recipient's ability to manage the funds.

CONSERVATORSHIP: A conservatorship provides for a type of guardian in situations where a person called the petitioner is physically unwell and mentally competent. R.C. 2111.021. In a

conservatorship, the petitioner voluntarily asks the probate court for appointment of a conservator to manage, for a definite or indefinite time, the petitioner and any or all of the petitioner's property, or both. In a conservatorship, the petitioner has broad discretion to define the type and scope of the conservator's power.

ELDERCARING COORDINATION: Eldercaring Coordination dispute resolution process during which a Eldercaring Coordinator (EC) work with elders, decision makers, family members, friends, and others who participate by court order or invitation to resolve disputes and come up with a plan in a manner that respects the elder's need for autonomy and safety in order to implement a lesser restrictive alternative than guardianship.

Incompetency Adjudication

NOTES

NOTES

Based on a review of the applicable law, a general finding of incompetency does not per se require a change in registered voting status. A specific adjudication for limiting such rights is required to affect the person's voting rights.

Article V, Section 6 of the Ohio Constitution provides that no idiot or insane person shall be entitled to the privileges of an elector. Neither the Constitution nor the Ohio Revised Code specifically define idiot or insane person for these purposes. Case law appears somewhat vague and fact specific in this area. *See Sinks v. Reese (1869),* 19 Ohio St. 306, *In re South Charleston Election Contest (1905),* 3 Ohio N.P. (N.S.) 373 and *Baker v. Keller (1968),* 15 Ohio Misc. 215.

Chapter 5122 of the Ohio Revised Code which governs hospitalization of mentally ill persons preserves the civil rights of such persons unless those rights are specifically denied in the Code or have been removed by a separate adjudication of incompetency. O.R.C. 5122.301 preserves civil rights for a mentally ill person subject to hospitalization unless a specific hearing is held to limit those rights. The rights retained by mentally ill person include, among others, the right to contract, hold a professional license, marry, obtain a divorce, make a will, and vote. R.C. 5122.301; see *Milton* at 23, 29 OBR at 375, 505 N.E.2d at 257.

Developmentally disabled persons are protected by O.R.C. 5123.83 which provides for no deprivation of any civil rights solely because of a developmental disability.

A specific finding of incompetency for the purpose of holding a driver's license is required to suspend driving privileges under O.R.C. 4510.23. Prior to enactment of this statute in 1989, driving privileges were automatically suspended upon a general finding of incompetency through guardianship proceedings.

O.R.C. 3503.21 and 3503.18 reinforce the need for a specific adjudication of incompetency for the purpose of voting.

The probate court does not conduct hearings to determine incompetency for specific purposes such as "for voting" or "for holding a driver's license" unless an appropriate motion seeking such relief is filed.

The inconvenience caused by occasionally summoning wards for jury duty must be outweighed by the constitutional and legal mandates for preserving civil rights. There should be no greater restrictions on the civil rights of those persons under guardianships than those who are provided for under durable powers of attorney.

This Page Intentionally Left Blank

Civil Commitments

Materials Prepared By
Hon. Kelly Badnell
Richland County Probate Court

NOTES

NOTES

I. Case Law

A. Burden of Proof

State v. Castrataro, 2007-Ohio-2764

Clear and Convincing evidence that the respondent is mentally ill and there is a substantial risk of harm to respondent or others.

B. Totality of the Circumstances

In re Burton 11 Ohio St.3d 147, (1984)
Totality of Circumstances test established by the Ohio Supreme Court to determine whether a person is subject to hospitalization under R.C. 5122.01(B). Factors the Probate Court is to consider:

1. Individual currently represents a substantial risk of physical harm to himself or other members of society.

2. psychiatric and medical testimony as the present mental and physical condition

3. whether the person has insight into his condition so that he will continue treatment as prescribed or seek professional assistance if needed.

4. Ground relied upon for proposed commitment.

5. Past history relevant to establish persons degree of conformity to laws, rules, regulations and values of society; and

6. If there is evidence of remission, court must consider the medically suggested cause and degree of remission the probability the person will continue treatment to maintain the remissive state should he be released from commitment.

C. Three-Part Test for Involuntary Commitment

In re TB 2006-Ohio-4789

Each part of the test must be established by clear and convincing evidence.

1. Substantial disorder of thought, mood, perception, orientation, or memory (R.C. 5122.01(A))

2. Substantial disorder must grossly impair judgement, behavior, or capacity to recognize reality or ability to meet ordinary demands of life. (5122.01 (A))

3. Hospitalized for one of the reasons set forth in R.C.5122.01(B).

D. Sufficient Evidence

In re J.L.S. 2022-Ohio-3539

Competent, credible evidence supported the probate court's determination that the appellant was a mentally ill person subject to court order under R.C. 5122.01(B)(2) because the psychiatrist testified that immediately preceding his examination, a hospital staff member warned him that appellant was explosive and that the staff was worried about appellant.

In determining whether a person is mentally ill within the meaning of R.C.5122.01(B), the court must consider the person's present mental state based on both his current or recent behavior and his prior dangerous propensities. *J.L.S.* at paragraph 15 citing *In re Burton.*

In Re Ezeh 2022-Ohio-4033

Expert testimony presented clear and convincing evidence showing Ezeh was mentally ill and represented a substantial risk of physical harm to others under 5122.01(B)(2). Ezeh had been threatening Summit Staff and Patients and refused to take medication or voluntarily agree to engage in treatment. Ezeh's violent behavior was "getting to an extreme."

In re E.S. 2023-Ohio-382

The probate court had competent, credible evidence related to E.S.'s then-present mental state or the current risk he presented to himself based on the testimony of Dr. Bates. Dr. Bates testified that appellant had paranoid delusions that caused him to not function in the community and he couldn't "take care of his basic needs right now "because his persecutory delusions caused him to strike out and increased the risk for violent behavior.

In re N.E. 2022-Ohio-1184

The affidavit in this case included facts, detailing specific events which led to appellant's emergency hospitalization. The affidavit stated that appellant destroyed property at his mother's home and caused problems in the community requiring the police to be called three times in one day. The affidavit described the delusions that appellant voiced to the police that "he died six times.". The affidavit stated his history of bipolar disorder and that he failed to take his medication for several months.

E. Insufficient Evidence

In Re D.B. 2014-Ohio-1464

While Dr. Bates opined that the appellant represented a danger to himself because he could not take care of his basic needs, the only basis Dr. Bates gave for this opinion was that the appellant heard a non-existent cough. There was no connection readily apparent between this fact and being unable to provide for his basic physical needs because of mental illness.

In re Miller, 63 Ohio St.3d 99,

The affidavit of mental illness stated that the patient had been progressively confused, delusional and paranoid. His sense of reality is altered, grandiose and at times, out of touch. Th court found these statements conclusory and held that the affidavit was insufficient under R.C. 5122.11. The affidavit must set forth facts which describe specific actions, incidents or events. The court held that because the affidavit was deficient, no probable cause existed to invoke the jurisdiction of the probate court.

F. Mootness on Appeal Addressed

In re P.A. 2018-Ohio-2314

Appellant's discharge from commitment does not render this appeal moot. An adjudication of mental illness carries a stigma and can have adverse consequences that significantly impact a person's life; accordingly, this court reviews commitment orders even if those orders have expired or the individual had been discharged.
(See also *In re R.T.* 2019-Ohio-618.)

In re Ezeh 2022-Ohio-4033

A reviewing court may consider evidence outside of the record to determine whether a case is moot. *Andrew v. Dennis* 2022-Ohio-2567. Ezeh, after his release from Summit, continued to be subject to court-ordered outpatient treatment. Ezeh is still subject to court-ordered treatment based on the same mental-illness affidavit that subjected him to his treatment at Summit. Accordingly, Ezeh's appeal if not moot.

Steele v. Hamilton County Community Mental Health Bd. 2000-Ohio-47

The court noted that the appellant was voluntarily taking antipsychotic medication and recognized that an argument could be made that the issue of forced medication could be moot. The court noted that appellant had not been released from Lewis Center treatment facility and should appellant refuse medication in the future, it was reasonable to expect

that he would again be subject to an action for forced medication, given his mental illness. Thus, the issue is one that is capable of repetition, yet evading review, and as such is not moot.

G. Forced Medication Orders

Steele v. Hamilton County Community Mental Health Bd. 2000-Ohio-47

A court may issue an order permitting hospital employees to administer antipsychotic drugs against the wishes of an involuntarily committed mentally ill person if it finds by clear and convincing evidence, that:

(1) The patient does not have the capacity to give or withhold informed consent regarding his/her treatment.

(2) It is in the patient's best interest to take the medication. In other words, the benefit of the medication outweighs the side effects, and

(3) No less intrusive treatment will be as effective in treating the mental illness.

II. Civil Commitment Hearings

A. Situations Warranting a Hearing

1. Emergency Hospitalization Situations

Any psychiatrist, licensed clinical psychologist, licensed physician, health officer, parole officer, police officer, or sheriff may take a person into custody and transport them to a hospital to be examined by a mental health professional, if.

a. There is reason to believe that the person is a mentally ill person subject to court order under R.C. 5122.01(B) and

b. That person represents a substantial risk of physical harm to self or others if allowed to remain free pending an examination.

2. Non-Emergency Situations

Affidavit filed (pursuant to R.C 5122.11) regarding a person residing in the community, not hospitalized, may be found mentally ill and subject to court order prior to being taken into custody.

a. Initial Hearing shall be held within 5 court days from the day on which respondent is detained or an affidavit is filed, whichever occurs first, or within 10 calendar days from the day of detention or the affidavit is filed. (R.C. 5122.14(A) and (B))

b. If the court finds the person to be mentally ill and subject to court order, the court may issue an interim order of detention ordering any police officer or sheriff to take the person in to custody. (R.C. 5122.10)

B. Hearing Process

1. Affidavit is filed by hospital (emergency) or member of the community. (non-emergency)

2. Initial Hearing – to determine if whether person is mentally ill person subject to court order. R.C. 5122.05 (C) (3). The initial hearing must be held within 5 court days from the day on which the person was detained, or an affidavit is filed, whichever occurs first. R.C. 5122.141(B).

2. Pre-Screener Investigation within 2 business days of filing of affidavit.

3. Court reviews affidavit for probable cause. If the court determines there is probable cause a detention order and notice of hearing are issued. If the person is not at the hospital already, an order to convey to the hospital for an Independent Expert Evaluation to be conducted. Some court a appoint an independent expert evaluator, if the person is unable to obtain one. R.C. 5122.01(P) This is likely in a non-emergency case.

4. Appointment of counsel for respondent.

5. Full Hearing R.C.5122.15.

6. Continuance of an initial or full hearing may be continued for no more than 10 calendar days from the day on which the person was first detained or the affidavit is filed, whichever occurs first. R.C. 5122.141.(B).

7. Closed hearings. The hearing shall be closed to the public. For good cause shown, the court may admit persons who have a legitimate interest in the proceedings, but the respondent may object. R.C. 5122.15(A)(5) & (6).

C. Potential Outcomes of Hearing

1. At the conclusion of the initial hearing or full hearing, if the court does NOT find that the Respondent is a person with a mental illness subject to court order, then the respondent

will be immediately discharged and expunge all record of the proceedings. R.C. 5122.0141(C) and R.C. 5122.15(B).

2. At an initial hearing, if the court does find that the Respondent is a person with a mental illness subject to court order, then the court may issue an interim order of detention ordering the police officer or sheriff to take the person into custody and transport them to a hospital or other place defined in R.C. 5122.17.

3. An initial hearing may be waived by the respondent or their counsel. If the person has not been discharged, then a mandatory full hearing shall be held within 30 days after the original involuntary detention. If the full hearing is not held in this time period, then the respondent shall be immediately discharged. R.C. 5122.141.

4. At the conclusion of the full hearing, if the court does find that the Respondent is a person with a mental illness subject to court order, the court shall order the commitment of the respondent for treatment for a period not to exceed 90 days. R.C. 5122.15(C).

5. Court can order inpatient or outpatient treatment for any one of the four criteria in R.C. 5122.01(B)(1)-(4). A court can *only* order *outpatient treatment* if the respondent meets on the five criteria in 5122.01(B)(5). Outpatient treatment (A.O.T.) cannot include forced medication.

D. Appeals

1. Magistrates Decision – 14 days to file an objection to magistrate's decision. The Court would have 10 days to rule on the objection. R.C.5122.15(J). The Order takes effect immediately and is a final appealable order. R.C. 5122.15(J) & (K).

2. Respondent has the right to appeal to court of appeals within 30 days. (Ohio App. R. 4(A). required to perfect appeal must file Notice of Appeal with the trial court and court of appeals, with docketing statement. A request for transcript must be filed with probate court for a transcript of the hearing. Ohio App. R. 9. The record (transcript and exhibits) must be transmitted to the court of appeals within 40 days of the date of the filing of the noticed of appeal, or 20 days if the court of appeals has an accelerated calendar. Ohio App. R. 10. The clerk of the trial court shall prepare the certified copy of the docket and journal entries, … and transmit the record to the court of appeals within the 40-day time period. Ohio App. R. 10(B).

E. 90 Day Review process

After the initial 90-day period, If the mental health treatment team reports to the courts that the respondent should continue to receive treatment, then a full hearing must be held. R.C.

5122.15(H). Additional court orders for continued commitment after the initial 90 days, can be for two years. The full hearing is mandatory and cannot be waived.

Once a court order for continued commitment is order for 2 years, the respondent may request a new, full hearing every 180 days. If hearings are not requested every 180 days, a hearing will occur automatically at least every 2 years.

F. How Can Civil Commitment Orders End.

1. After a court orders a person to receive treatment, the person can agree to get the treatment. If the hospital or agency accepts the voluntary treatment, then the court order can end. R.C.5122.15(H)

2. When a continued commitment order has been issued, and the respondent is involuntarily committed for 2 years, a full hearing may be requested by the respondent. If the court finds that the person is no longer a person with mental illness subject to court order under R.C. 5122.01(B), then the court may dismiss the case. R.C. 5122.15(H)

MENTAL HEALTH COMMITMENTS FROM MUNICIPAL COURT

HONORABLE DIXIE PARK
STARK COUNTY PROBATE COURT

A. Purpose of Outpatient Commitment

- The Mental Health Act of 1988 allows for the commitment of persons who are deemed to be mentally ill and subject to court ordered treatment to the MHRSB. The purpose of Outpatient Commitment (OPC), also known as Assisted Outpatient Treatment, is to treat these individuals in the least restrictive environment consistent with their needs. The law permits the use of outpatient commitment as a community-based, least-restrictive alternative to hospitalization for those persons who may otherwise be subject to inpatient hospitalization.

Massillon State Hospital

B. OVERVIEW/DESCRIPTION

i. What is Outpatient Commitment (OPC)/ Assisted outpatient treatment(AOT)?

Community-based/outpatient mental health services pursuant to court order to adults with severe mental illness who have a prior history of repeated hospitalizations or arrest. It is a tool for assisting those individuals most at risk for the negative consequences of not receiving treatment.

B. OVERVIEW/DESCRIPTION cont'd

- Those most in need:

  OPC laws have been shown to reduce hospitalization, arrest and incarceration, homelessness and violent acts associated with mental illness.

B. OVERVIEW/DESCRIPTION cont'd

- OPC RECIPIENT CHARACTERISTICS:
- Majority have schizophrenia or severe bipolar disorder
- 97% had been previously hospitalized
- 47% had co-occurring substance abuse disorder
- 47% did not adhere to needed medication regimen

B. OVERVIEW/DESCRIPTION cont'd

iii. How does Outpatient Commitment Work?

Probate Court orders Outpatient Commitment if, upon completion of a hearing, the court finds by clear and convincing evidence that the respondent is a mentally ill person subject to court order, the court shall order the respondent for a period not to exceed ninety days to any of the following:

B. OVERVIEW/DESCRIPTION cont'd

a. A hospital operated by the department of mental health and addiction services if the respondent is committed pursuant to section 5139.08 of the Revised Code;
b. A nonpublic hospital
c. The veterans' administration or other agency of the Unites States government;
d. A board of alcohol, drug addiction, and mental health services or agency the board designates;
e. Receive private psychiatric or psychological care and treatment;
f. Any other suitable facility or person consistent with the diagnosis, prognosis, and treatment needs of the respondent.

C. SOURCES OF REFERRALS

- Court referrals-Municipal/Common Pleas
- Heartland
- Agencies/Community
- Guardianships

D. Statutory Criteria ORC 5122.111

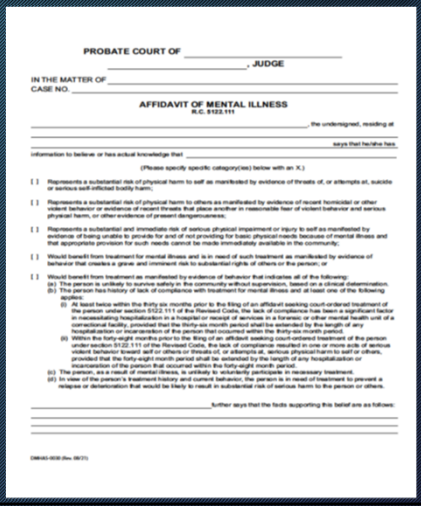
- Would benefit from treatment as manifested by evidence of behavior that indicates all of the following:
- (a) The person is unlikely to survive safely in the community without supervision, based on a clinical determination.
- (b) The person has history of lack of compliance with treatment for mental illness and **at least one** of the following applies:
- (i) At least twice within the thirty six months prior to the filing of the affidavit, the lack of compliance has been a significant factor in necessitating hospitalization in a hospital or receipt of services in a forensic or other mental health unit of a correctional facility, provided that the thirty-six month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the thirty-six month period.

D. Statutory Criteria cont'd

- (ii) Within the forty-eight months prior to the filing of the affidavit seeking court-ordered treatment of the person, the lack of compliance resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others, provided that the forty-eight month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the forty-eight month period.
- (c) The person, as a result of mental illness, is unlikely to voluntarily participate in necessary treatment.
- (d) In view of the person's treatment history and current behavior, the person is in need of treatment to prevent a relapse or deterioration that would be likely to result in substantial risk of serious harm to the person or others.

D. Procedures –Municipal Court

- Process begins when trial court judge or prosecutor files the Affidavit as provided in ORC 5122.111 with certificate of examination from licensed physician or clinical psychologist
- SB2 allows evaluation of defendant's mental condition at the time of the offense to be conducted through electronic means



PROBATE COURT OF _____
_____, JUDGE

IN THE MATTER OF _____
CASE NO. _____

AFFIDAVIT OF MENTAL ILLNESS
R.C. 5122.111

_____, the undersigned, residing at _____
_____ says that he/she has information to believe or has actual knowledge that _____

(Please specify specific category(ies) below with an X.)

[ ] Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;

[ ] Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior or evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;

[ ] Represents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence of being unable to provide for and of not providing for basic physical needs because of mental illness and that appropriate provision for such needs cannot be made immediately available in the community;

[ ] Would benefit from treatment for mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or the person; or

[ ] Would benefit from treatment as manifested by evidence of behavior that indicates all of the following:
(a) The person is unlikely to survive safely in the community without supervision, based on a clinical determination.
(b) The person has history of lack of compliance with treatment for mental illness and at least one of the following applies:
(i) At least twice within the thirty-six months prior to the filing of an affidavit seeking court-ordered treatment of the person under section 5122.111 of the Revised Code, the lack of compliance has been a significant factor in necessitating hospitalization in a hospital or receipt of services in a forensic or other mental health unit of a correctional facility, provided that the thirty-six month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the thirty-six month period.
(ii) Within the forty-eight months prior to the filing of an affidavit seeking court-ordered treatment of the person under section 5122.111 of the Revised Code, the lack of compliance resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others, provided that the forty-eight month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the forty-eight month period.
(c) The person, as a result of mental illness, is unlikely to voluntarily participate in necessary treatment.
(d) In view of the person's treatment history and current behavior, the person is in need of treatment to prevent a relapse or deterioration that would be likely to result in substantial risk of serious harm to the person or others.

_____further says that the facts supporting this belief are as follows:
_____
_____
_____

D. Procedures and Forms

- Affidavit of Mental Illness and Certificate of Examination filed with Defendant's reports in Probate Court no later than Wednesday at noon
- Discharge postponed- Muni Court can detain Defendant for 10 days until the probate hearing is held
- Probable Cause determination
- Order of Detention
- Judgment Entry Appointing Counsel
- Notice to Respondent
- Notice of Hearing
- Order of Continuance
- Hearing held – Order of inpatient or outpatient treatment for 90 days depending on evidence presented and boxes checked on Affidavit. Status Conference hearing scheduled.

D. Procedures –OPC Checklist

- If inpatient treatment is ordered, OPC hearing prior to release*
- If outpatient treatment was requested and expected to be ordered, AOT Monitor and ACT Team meet with Respondent prior to the hearing and review the **OPC Checklist**:

1-Individual is unlikely to survive safely in the community without supervision

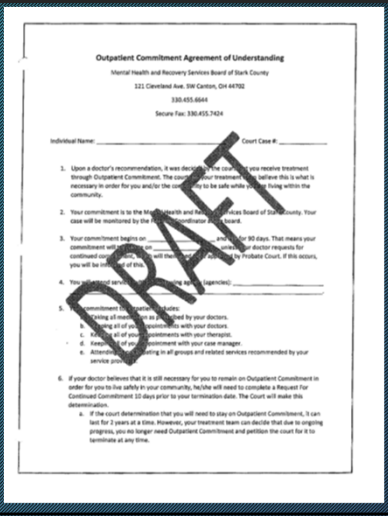
2-Individual has a history of lack of compliance with treatment which has led to one of the following statutory criteria:

a. Two hospitalizations or forensic services within the past 36 months OR b. One or more acts of violence, threats or attempts on others in 48 months

D. Procedures – OPC Checklist cont'd

3. Individual previously failed in attempts to live in the community
4. Individual has capacity to cooperate with the involuntary community treatment
5. Individual expresses an interest in living in the community
6. Individual has demonstrated a benefit from treatment in the past
7. Treatment recommendations have been considered and can be delivered in an outpatient setting, addresses the individual's needs and are necessary to sustain community living. Services recommended can be monitored by service providers. Service providers are capable of ensuring participation, along with court oversight

E. OUTPATIENT COMMITMENT AGREEMENT OF UNDERSTANDING



Outpatient Commitment Agreement of Understanding

Mental Health and Recovery Services Board of Stark County

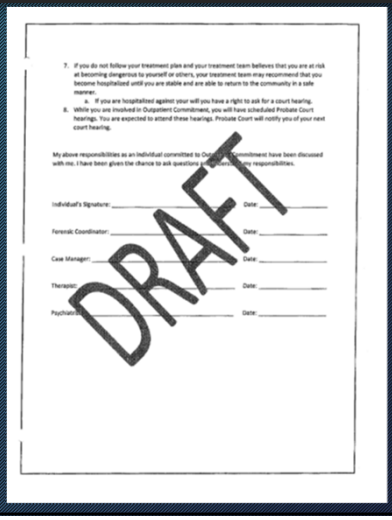
121 Cleveland Ave. SW Canton, OH 44702

330.455.6644

Secure Fax: 330.455.7424

Individual Name: _____ Court Case #: _____

DRAFT



DRAFT

F. Ongoing Outpatient Commitment

1. Status Conferences once a month or more, if needed, to confirm
- Individual is taking medications as prescribed by a physician
- Individual is reporting to service providers at scheduled times
- Individual is actively participating in all services recommended by treatment

  providers (i.e. individual and/or group therapy, day treatment programs, vocational programs, etc.)
- Individual is complying with recommended medical treatment, lab work, drug tests, etc. in the requested amount of time
- CM is working to actively engage individual in services recommended

F. Ongoing Outpatient Commitment cont'd

- 2. Formal review at least once a month and when significant clinical changes occur
- OPC Monthly Update Reports include
  a. Adherence with ISP/court recommendation
  b. Response to treatment
  c. Potential risk factors
  d. Appropriateness of continued OPC; a recommendation for more restrictive setting; or recommendation to terminate commitment
  e. Date commitment will expire

G. Petition for Outpatient Commitment While Individual is in the Community

An *Affidavit for Mental* Illness AND *Certificate of Examination* will be completed by the treating psychiatrist and faxed to the OPC Monitor.

1. Include the individual's insight into their illness, along with his/her likelihood of following through with court ordered treatment.
2. Provider shall also include proposed treatment recommendations and the most recent assessment.

Once all information is included, the OPC Representative will fax information to Probate Court.

F. Care and Treatment Planning

i. An individual will continue with services from the service provider/agency from whom they are currently receiving services. If the individual is not currently linked to services, the linkage will occur once they have been committed through Probate Court. The individual may, where appropriate, elect the agency with whom they would like to connect. (Coleman, CommQuest, Phoenix Rising

ii. The *Outpatient Commitment Agreement* is discussed and signed by the individual and all parties involved. If the individual is hospitalized during the OPC court proceedings, the service provider agency will complete this during/prior to the discharge from involuntary hospitalization.

This Page Intentionally Left Blank

Attorney Fees

NOTES

NOTES

1. ATTORNEY FEES

I. STATUTORY LAW - OHIO REVISED CODE

A. FURTHER ALLOWANCE - COUNSEL FEES (R.C. 2113.36)

1. **Fees fixed through Employment:** When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expense of administration.
2. **Fees fixed through the Court:** The court may fix the amount of fees.
3. **Fees fixed through the Will:** The will may also fix the fees; however, the attorney may renounce all claims to the compensation in writing within four months of appointment.

B. DISTRIBUTION OF MONEY RECEIVED (R.C. 2127.38(A))

1. **Sale of Real Estate:** The Probate Court shall determine what fees are reasonable for services performed by attorneys for the fiduciary in connection with the sale of real estate.

C. ADMINISTRATION COSTS OF PURPORTED WILL (R.C. 2107.75)

1. **Determination of Fees:** In defense of a questionable Will, the court shall allow as part of the costs of administration such amounts to the fiduciary and attorney as the trial court finds to be reasonable. The court shall order the amounts allowed to be paid out of the estate of the decedent.

II. PROBATE COURT SUPERINTENDENCY RULES

A. COUNSEL FEES (SUP. R. 71)

1. **Fees in all Matters:** Attorney fees in all matters shall be governed by Rule 1.5 of the Ohio Rules of Professional Conduct.
2. **Final Account**: Attorney fees for the administration of estates shall not be paid until the final account is prepared for filing unless otherwise approved by the Court upon application and for good cause shown.

3. **Written Application:** Attorney fees may be allowed if there is a written application which sets forth the amount requested and will be awarded only after proper hearing, unless otherwise modified by local law.
4. **Application Hearing**: The Court may set a hearing on any application for allowance of attorney fees regardless of the fact that the required consents of the beneficiaries have been given.
5. **Delinquent Accounts:** Except for good cause shown, attorney fees shall not be allowed to attorneys representing fiduciaries who are delinquent in filing the accounts required by section 2109.30 of the Revised Code.
6. **Notice of Application Hearing:** If a hearing is scheduled on an application for the allowance of attorney fees, notice shall be given to all parties affected by the payment of fees, unless otherwise ordered by the Court.
7. **Filing of Application:** An application shall be filed for the allowance of counsel fees for services rendered to a guardian, trustee, or other fiduciary. The application may be filed by the fiduciary or attorney. The application shall set forth a statement of the services rendered and the amount claimed in conformity with the Fees in All Matters section of this rule.
8. **No Minimum or Maximum Fees:** There shall be no minimum or maximum fees that automatically will be approved by the court.
9. **Fee Contract:** Prior to a fiduciary entering into a contingent fee contract with an attorney for services, an application for authority to enter into the fee contract shall be filed with the court, unless otherwise ordered by local court rule. The contingent fee on the amount obtained shall be subject to approval by the Court.

B. EXECUTOR'S AND ADMINISTRATOR'S COMMISSIONS (SUP. R. 72)

1. **Additional Compensation:** Additional compensation for extraordinary services may be allowed upon an application setting forth an itemized statement of the services rendered and the amount of compensation requested. The court may require the application to be set for hearing with notice given to interested persons in accordance with Civil Rule 73(E).

2. **Deny or Reduce Commissions**: The court may deny or reduce commissions if there is a delinquency in the filing of an inventory or an account, or if, after hearing, the court finds that the executor or administrator has not faithfully discharged the duties of the office.
3. **Aggregate Compensation:** The commissions of co-executors or co-administrators in the aggregate shall not exceed the commissions that would have been allowed to one executor or administrator acting alone, except where the instrument under which the co-executors serve provides otherwise.
4. **Counsel Compensation:** Where counsel fees have been awarded for services to the estate that normally would have been performed by the executor or administrator, the executor or administrator commission, except for good cause shown, shall be reduced by the amount awarded to counsel for those services.

C. GUARDIAN'S COMPENSATION (SUP.R. 73)

1. **Local Rules of Court:** Guardian's compensation shall be set by local rules of court.
2. **Itemization of Expenses:** A guardian shall itemize all expenses relative to the guardianship of the ward and shall not charge fees or costs in excess of those approved by the probate division of a court of common pleas.
3. **Additional compensation:** Additional compensation for extraordinary services, reimbursement for expenses incurred and compensation of a guardian of a person only may be allowed upon an application setting forth an itemized statement of the services rendered and expenses incurred and the amount for which compensation is applied. The probate division of a court of common pleas may require the application to be set for hearing with notice given to interested persons in accordance with Civ.R. 73(E).
4. **Co-guardians:** The compensation of co-guardians in the aggregate shall not exceed the compensation that would have been allowed to one guardian acting alone.
5. **Denial or reduction of compensation:** The probate division of a court of common pleas may deny or reduce compensation if there is a delinquency in the filing of an

inventory or account, or after hearing, the court finds the guardian has not faithfully discharged the duties of the office.

D. PROBATE DIVISION OF THE COURT OF COMMON PLEAS-CASE MANAGEMENT IN DECEDENT'S ESTATE, GUARDIANSHIP, AND TRUSTS (SUP. R. 78)

1. **Filing Time Period**: Each fiduciary shall adhere to the statutory or court-ordered time period for filing the inventory, account, and, if applicable, a guardian's report. The citation process set forth in section R.C. 2109.31 shall be utilized to ensure compliance. The attorney of record and the fiduciary shall be subject to the citation process. The court may modify or deny fiduciary commissions or attorney fees, or both, to enforce adherence to the filing time periods.
2. **Application to Extend Time:** If a decedent's estate must remain open more than six months pursuant to section R.C. 2109.30l(B)(1), the fiduciary shall file an application to extend administration (Standard Probate Form 13.8). An application to extend the time for filing an inventory, account, or guardian's report, shall not be granted unless the fiduciary has signed the application.
3. **Status Report:** The fiduciary and the attorney shall prepare, sign, and file a written status report with the court in all decedent's estates that remain open after a period of thirteen months from the date of the appointment of the fiduciary and annually thereafter. At the court's discretion, the fiduciary and the attorney shall appear for a status review.
4. **Attorney Citations:** The court may issue a citation to the attorney of record for a fiduciary who is delinquent in the filing of an inventory, account, or guardian's report to show cause why the attorney should not be barred from being appointed in any new proceeding before the court or serving as attorney of record in any new estate, guardianship, or trust until all of the delinquent pleadings are filed.
5. **Filing of Exceptions**: Upon filing of the exceptions to an inventory or to an account, the exceptor shall cause the exceptions to be set for a pretrial within thirty days. The attorneys and their clients, or individuals if not represented by an attorney, shall appear at the pretrial. The trial shall be set as soon as practical after pretrial. The court may dispense with the pretrial and proceed directly to trial.

III. LOCAL RULES – EXAMPLES FROM CUYAHOGA COUNTY

A. CUYAHOGA COUNTY LOC.R. 71.1 - ATTORNEY FEES FOR DECEDENT'S ESTATE

Loc.R. 71.1(A) Court's Authority to Determine Attorney Fees. Attorney fees for the administration of a decedent's estate shall be reasonable and beneficial to the decedent's estate. Attorney fees are governed by the Rules of Professional Conduct and the Rules of Superintendence adopted by the Supreme Court of Ohio. The Court has the ultimate responsibility and authority to determine attorney fees in a decedent's estate as required by such Rules.

(B) Attorney fees for the administration of a decedent's probate estate shall ordinarily be paid at the time the fiduciary's Final Account or Certificate of Termination is prepared for filing with the Court. The Court may, upon application and for good cause shown, approve an Application for Partial Payment of Attorney Fees prior to the time the fiduciary's Final Account is filed with the Court. The basis for approving partial payment of attorney fees may include, for example, that the payment of attorney fees provides an income tax benefit to the estate; that the estate is involved in protracted litigation; or that the administration of the estate is extended because of circumstances beyond the fiduciary's and the attorney's control. Generally, the Application should state the total amount of the attorney fees and any anticipated extraordinary fees that may be requested for the complete administration of the decedent's probate estate. Ordinarily, partial attorney fee requests should not exceed 50% of the total of the attorney fees estimated to be requested for the complete administration of the decedent's probate estate.

(C) No application for fees, no itemization for services rendered, no consents from heirs or residuary beneficiaries of the probate estate or all other parties affected by payment of said fees are required where counsel's fee is $3,000 or less and is consistent with the attached schedule of compensation.

(D) Ordinary Fees. Attorney fees for the administration of a decedent's estate computed in accordance with the schedule of compensation set forth below shall be approved without a separate application for attorney fees as follows: where consents to the specific dollar amount are provided from all heirs whose shares are affected by said fees; or where an itemization of services consistent with the requested fees is attached. Such schedule however, is not to be considered or represented to clients as a schedule of minimum or maximum attorney fees to be charged.

(1) Appraised value (when not sold) or gross proceeds (when sold) of personal property included on the inventory; gross proceeds of sale of real estate under power of sale in Will, purchased by election of surviving spouse at appraised value or sold by judicial proceedings and amount of estate income for which the fiduciary accounts:

(a) For the first $100,000 at a rate of 4.5%;

(b) From $100,001 to $400,000 at a rate of 3.5%;

(c) For $400,001 and above at a rate of 2.5%

(2) Appraised value of real estate transferred to heirs or devisees by affidavit or certificate of transfer when no sale is involved at a rate of 1%.

(3) On all other property not included in this rule:

(a) If a federal estate tax return is not required, 1.5% of all such property.

(b) If a federal estate tax return is required, 2.5% of all such property.

(E) Except as set forth above, ordinary fees that are not in accordance with the schedule of compensation set forth above shall not be approved without a separate application for attorney fees, including an itemization of services rendered. The application shall also include consents from the heirs to the specific dollar amount. A hearing is required if consents from all the heirs are not received, or if the Court determines that a hearing is otherwise necessary to determine reasonableness of the requested attorney fees.

(F) In determining the reasonableness of the requested attorney fees, the court shall consider the following: the prior experience of the attorney; the complexity of the matter presented; any special problems that may have presented themselves during the representation; the time spent by the attorney; and, for estate cases, the amount of assets and income available for the payment of attorney fees.

(G) Release of Assets. Attorney fees for release of assets from administration shall be the greater of $750 or 2.5% of all such property. Any fee greater than this amount requires an itemization of services rendered.

(H) Extraordinary Fees. In addition to attorney fees for ordinary services, the attorney for the fiduciary upon application may be allowed further reasonable attorney fees for any extraordinary service. An extraordinary service may vary depending upon many factors including the size of the decedent's estate. Extraordinary services include but are not limited to:

(1) Involvement in a will contest, will construction, a proceedings for determination of beneficiaries, a contested claim, elective share proceeding, apportionment of estate taxes, or any other adversarial proceeding or litigation by or against the estate;

(2) Representation of the personal representative in an audit or any proceedings for adjustment, determination or collection of taxes;

(3) Tax advice on post mortem tax planning;

(4) Purchase, sale, lease or encumbrance of real property by the fiduciary or involvement in zoning, land use, environmental or other similar matters;

(5) Representation regarding carrying on the decedent's business or conducting other commercial activity by the fiduciary;

(6) Fiduciary or attorney compensation disputes;

(7) Proceedings involving ancillary administration of assets not subject to administration in this state.

Dual Role of Attorney and Fiduciary. Where the fiduciary is also the attorney for the estate, or if the attorney for the estate is associated with the fiduciary's law firm, reasonable attorney fees shall be rebutably presumed to be one-half of the schedule of compensation amount if a full fiduciary fee is claimed. Likewise, fiduciary fees shall be rebutably presumed to be one-half of the executor computation worksheet if a full attorney fee is claimed. This paragraph shall not apply if the fiduciary fee or attorney fee is waived.

(J) Fixed or Contingency Fees. Except as otherwise required under Sup. R. 71, where the attorney on application to the court prior to or during administration requests a fixed or contingent fee, the court, if it deems appropriate and after notice to the interested parties, may fix a reasonable fixed fee for services beneficial to the administration of the estate or may approve a contingency fee under appropriate circumstances. Notice to the trustee of a testamentary or inter vivos trust shall be deemed notice to all beneficiaries of such trust. Nothing in this rule is intended to permit a contingency fee for estate administration services.

(K) When a Hearing on Attorney Fees is Not Necessary. Upon administration of a decedent's estate, a hearing on attorney fees is not required in any of the following cases:

(1) Pursuant to Section (C) above;

(2) Payment of an attorney fee is included in a Certificate of Termination filed by a fiduciary who is also a sole beneficiary of a solvent estate;

(3) If the attorney fees are consistent with the schedule of compensation and all of the interested parties whose share will be charged with the payment of any part of the fee, consent in writing to the specific dollar amount to be paid, and such consent instrument is filed with the account which claims credit for the fee paid; provided however, a guardian may consent for his ward; the fiduciary of a deceased beneficiary's estate may consent on behalf of the deceased beneficiary; and a testamentary trustee or inter vivos trustee may consent on behalf of all trust beneficiaries;

(4) The computation form for ordinary compensation contains a calculation which reflects that the attorney fees taken are within guidelines contained in Local Rule 71.1(D) subject to the conditions therein. An itemized record of the attorney fees must accompany the computation form when filed without consents, except for Section (C) above.

(L) Interested Party. For purposes of this rule, an interested party is on who has a direct pecuniary interest in the payment of an attorney fee charged for the administration of a decedent's estate.

(M) General Provisions. Notwithstanding anything herein to the contrary, if by reason of the application or the percentages to values of assets, disparity or injustice results and whether or not consents have been submitted, filed, or are otherwise not necessary, such disparity or injustice may be reviewed and adjusted by the Court on the Court's own motion with respect to any account reflecting such compensation or upon exceptions to such an account filed by an interested party.

B. CUYAHOGA COUNTY LOC.R. 71.2 - COUNSEL FEES

In connection with Settlement of Claims for Wrongful Death, Conscious Pain and Suffering, Claims for Personal injuries to Persons under Guardianship, and Settlement of Personal Injuries to Minors under section 2111.18 of the Revised Code.

Loc.R. 71.2. In cases where representation is on a contingent basis, counsel will be allowed fees on the amount obtained in accordance with the following schedule:

$33^{1/3}$% of the first $100,000.00;

30% of the amount over $100,000.00.

Upon written application additional compensation may be granted if the applicant demonstrates and the court is satisfied that extraordinary services have been rendered.

C. CUYAHOGA COUNTY LOC.R. 71.3 - ATTORNEY FEES FOR GUARDIANSHIPS, TRUSTS, AND ADOPTIONS

Loc.R. 71.3(A). (A) The following provisions apply to attorney fees allowed as part of the expense for administering a guardianship or trust or in connection with an adoption proceeding:

(1) Attorney fees shall be based upon the actual services performed and the reasonable value of the services.

(2) All applications for attorney fees shall set forth an itemized statement of the services performed, the date services were performed, the time spent in rendering the services, and the rate charged per hour.

(3) In determining the reasonableness of the requested attorney fees, the court shall consider the following: the prior experience of the attorney; the complexity of the matter presented; any special problems that may have presented themselves during the representation; the time spent by the attorney; and, for guardianship and trust cases, the amount of assets and income available for the payment of attorney fees.

(4) Any services provided by "paralegals" must be performed under the supervision of a licensed attorney who must verify such supervision on the application.

(B) The following provisions shall apply wherein an attorney is serving as the guardian:

(1) Paragraphs (A)(1) through (4) of this rule shall apply.

(2) The attorney/guardian may seek guardian's compensation pursuant to Local Rule 73.1 or attorney fees in accordance with this section, but not both.

(3) In addition to the factors set forth in Paragraphs (A)(1) through (4) of this rule, the court shall also consider the amount of non-legal time expended by the attorney/guardian in managing the guardianship estate.

(C) The following provisions shall apply wherein an attorney is serving as the trustee:

(1) Where the trustee is also the attorney for the trust, or if the attorney for the trust is associated with the trustee's law firm, reasonable attorney fees shall be rebutably presumed to be one-half of the schedule of compensation amount, if a full trustee fee is claimed.

(2) Trustee fees shall be rebutably presumed to be one-half of the trustee computation worksheet if a full attorney fee is claimed. Section C shall not apply if the trustee fee or attorney fee is waived.

IV. OHIO RULES OF PROFESSIONAL CONDUCT RULE 1.5

A. Fees and Expenses in General

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) Whether the fee is fixed or contingent.

B. Communications with the Client

(b) The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in *writing*.

C. Contingent Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law.

(1) Each contingent fee agreement shall be in a *writing* signed by the client and the lawyer and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial,

or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement shall clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

(2) If the lawyer becomes entitled to compensation under the contingent fee agreement and the lawyer will be disbursing funds, the lawyer shall prepare a closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under the agreement. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyer's fees with a lawyer not in the same *firm*, as required in division (e)(3) of this rule. The closing statement shall be signed by the client and lawyer.

D. NON-ALLOWABLE CHARGES

(d) A lawyer shall not enter into an arrangement for, charge, or collect any of the following:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support, or property settlement in lieu thereof;

(2) A contingent fee for representing a defendant in a criminal case;

(3) A fee denominated as "earned upon receipt," "nonrefundable," or in any similar terms, unless the client is simultaneously advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.

E. DIVIDING FEES

(e) Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

(1) The division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;

(2) The client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

(3) Except where court approval of the fee division is obtained, the written closing statement in a case involving a contingent fee shall be signed by the client and each lawyer;

(4) The total fee is reasonable.

F. DISPUTES AMONG LAWYERS

(f) In cases of a dispute between lawyers arising under this rule, fees shall be divided in accordance with the mediation or arbitration provided by a local bar association. When a local bar association is not available or does not have procedures to resolve fee disputes between lawyers, the dispute shall be referred to the Ohio State Bar Association for mediation or arbitration

V. CASE LAW RELATING TO ATTORNEY FEES

A. JURISDICTION

Jurisdiction to fix reasonable fees and to reduce attorney's fees as penalty for failing to adhere to the guidelines lies with the Probate Court. The Appellate court may review the proceedings and attorney fees set by the Probate Court and remand the case to the Probate Court for further proceedings, or reverse the Probate Court's decision if it is unreasonable, unconscionable, or arbitrary. *In re Testamentary Trust of Manning,* 7th Dist. No. 05 MA 2, 2005-Ohio-4764.

The Probate Court has jurisdiction to determine a reduction of attorney fees or fiduciary fees, pursuant to Sup.R. 78, when an accounting or other required documents are not filed in the required time period. *In re Estate of Maceyko*, 7th Dist. No. 04 MA 111, 2004-Ohio-6511.

B. PARTY COMPROMISE ON ATTORNEY FEES

The Probate Court has exclusive jurisdiction to set attorney fees. A compromise figure of attorney fees between the parties is not binding on the court. The criteria are reasonableness and benefit to the estate. *In re Estate of Cercone*, 18 Ohio App.2d 26, 246 N.E.2d 578 (7th Dist. 1969).

C. BURDEN OF PROOF

The burden of proof is on the attorney to introduce into the record sufficient evidence of services performed and a reasonable value for such services. *In re Estate of Verbeck*, 173 Ohio St. 557, 184 N.E.2d 384 (1962).

D. BENEFIT TO THE ESTATE

The court shall determine the amount of fees based on reasonableness as an estate expense, regardless of the fiduciary contract. Reasonableness is measured by the value and benefit to the estate, not to the fiduciary or other party. *In re Estate of Bancroft*, 163 N.E.2d 68 (10th Dist. 1959).

When two of fourteen heirs hired an attorney to represent them in an estate, that attorney performed services which were beneficial to the estate itself. Although this attorney was not hired by the administrator, equity entitles him to reasonable fees for services performed which benefited the estate itself. *In Re Keller*, 65 Ohio App. 3d 650, 584 N.E.2d 1312 (8th Dist. 1989).

The probate court has discretion to determine the allocation of estate funds for attorney fees on behalf of the fiduciary. In its discretion, the probate court must consider many factors including the time and labor of the attorney for the prevailing party. *Estate of Zeichmann v. Kohler*, 41 Ohio App. 3d 214, 535 N.E.2d 374 (8th Dist. 1987).

Fees which are reasonable must be reasonable both from the standpoint of the attorney rendering the services and from the standpoint of the estate of which payment is being made. The ultimate determination of reasonableness must take into consideration all the factors relating to reasonableness of the fees in a particular case. The facts and circumstances vary so much from case to case that it is impossible to set forth an iron-clad rule other than the one that reasonable value must be substantiated by the evidence in each case. *In re Estate of Love*,1 Ohio App.2d 571, 206 N.E.2d 39 (10th Dist. 1965).

Time alone is not the dispositive factor in a determination of reasonableness of fees. *Swanson v. Swanson*, 48 Ohio App.2d 85, 355 N.E.2d 894 (8th Dist. 1976).

E. FEES IN A WILL CONTEST

In a will contest action, neither the beneficiaries of a defeated Will nor their attorneys are entitled to compensation under section R.C. 2107.75, which applies only to the fiduciary and the fiduciary's attorney. *Re Estate of Zonas*, 42 Ohio St.3d 8, 536 N.E.2d 642 (1989).

F. ATTORNEY FEES AND FIDUCIARY FEES

A fiduciary who is an attorney may perform his own legal services, and shall be allowed a reasonable compensation for services so rendered. *In re Estate of Cramer*, 46 Ohio L. Abs. 521, 69 N.E.2d 204 (P.C. 1946).

A fiduciary seeking both an attorney fee and a broker's commission must demonstrate that he properly acted in a dual capacity, and that he actually performed extraordinary services as a broker which would justify any additional fees. *Ollick v. Rice*, 16 Ohio App.3d 448, 476 N.E.2d 1062 (8th Dist. 1984).

The burden of proving the reasonableness of attorney fees rests on the executor of the estate, and where the executor and the attorney are the same person, the value of the services provided by the attorney and their reasonableness must be demonstrated on the record by the executor. Where the attorney is also the fiduciary, a fee will not be reasonable if the attorney bases his fee for non-legal work on his normal legal-service rate. The court emphasized that it is important to keep separate records in such a case. *In re Estate of Secoy*, 19 Ohio App.3d 269, 484 N.E.2d 160 (2nd Dist. 1984).

G. EXTRAORDINARY ATTORNEY FEES

The probate court abused its discretion by summarily denying a motion for extraordinary fees and not engaging in a complete review of the need for the extraordinary fees. The probate court must elucidate reasonable and ordinary fees before dismissing a request for extraordinary attorney fees. *Estate of Brunger*, 11th Dist. Portage No. 2018-P-0003, 2018-Ohio-4474.

H. GUARDIANSHIP

A ward cannot bind her guardianship estate to obligations based on contract unless ratified by the guardian. The probate court shall determine what constitutes a necessary service when there exists debts of the ward to the attorney. A three-part test was established to determine if payment of attorney fees from guardianship estate is merited. A court applying this test determines whether (1) the attorney acted in good faith; (2) whether the services performed were in the nature of necessities; and (3) whether the attorney's actions benefited the guardianship. *In re Guardianship of Allen*, 50 Ohio St. 3d 142, 552 N.E.2d 934 (1990).

Grandparents who unsuccessfully sought termination of guardianship and custody of grandchildren were not entitled to legal expenses from grandchildren's estate. Absent a specific

demonstration that the actions were beneficial to the estate or ward, a guardian may not be reimbursed for legal expenses incurred in proceedings relating solely to determine whether the guardian may serve. *In re Guardianship of Wonderly*, 10 Ohio St.3d 40, 461 N.E.2d 879 (1984).

The burden of proving the reasonableness of attorney fees rests on the executor of the estate, and where the executor and the attorney are the same person, the value of the services provided by the attorney and their reasonableness must be demonstrated on the record by the executor. Where the attorney is also the fiduciary, a fee will not be reasonable if the attorney bases his fee for non-legal work on his normal legal-service rate. The court emphasized that it is important to keep separate records in such a case. *In re Estate of Secoy*, 19 Ohio App.3d 269, 484 N.E.2d 160 (2nd Dist. 1984).

Prof.Cond.R. 1.5(a) prohibits a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee. The Supreme Court of Ohio has previously denounced as a clearly excessive fee charging legal fees for non-legal services. For example, attorney rates for administrative tasks, including picking up mail, depositing checks, paying bills, and arranging for lawn care, house cleaning, and the delivery of necessities result in a clearly excessive fee. *Dayton Bar Assn. v. Parisi*, 131 Ohio St.3d 345, 2012-Ohio-879, 965 N.E.2d 268.

VI. CUYAHOGA COUNTY PROBATE COURT SAMPLE FORMS

A. Cuyahoga County Computation of Attorney Fees Worksheet

B. Cuyahoga County Computation of Trustee Fees Worksheet

C. Cuyahoga County Computation of Executor or Administrator Fee

D. Cuyahoga County Computation of Guardian Fees

COURT OF COMMON PLEAS
PROBATE DIVISION
CUYAHOGA COUNTY, OHIO

In the Matter of the Estate of

Case No. _____

_____

COMPUTATION OF ATTORNEY FEES

	Value	Fee
A. Appraised value (when not sold) or gross proceeds (when sold) of personal property included on the inventory; gross proceeds of sale of real estate under power of sale in Will, purchased by election of surviving spouse at appraised value or sold by judicial proceedings and amount of estate income for which fiduciary accounts:	$ _____	
1) For the first $100,000 at a rate of 4%	($4,000 maximum)	$ _____
2) From $100,001 to $400,000 at a rate of 3%	($9,000 maximum)	$ _____
3) For $400,001 and above at a rate of 2%		$ _____
B. Appraised value of real estate transferred to heirs or devisees by affidavit or certificate of transfer when no sale is involved at a rate of 1%.....	$ _____	$ _____
C. Release of Assets from Administration:		
Greater of $500 or 1.5% of all such property	$ _____	$ _____
D. On all other property not included in A through C above:		
1) If a federal estate tax return is not required, 1% of all such property.....	$ _____	$ _____
2) If a federal estate tax return is required, 2% of all such property	$ _____	$ _____

For attorney fees in excess of above, file an application with the Court (see Probate Court Local Rule 71.1).

An itemized record of attorney fees must accompany the computation when filed without consents (see Probate Court Local Rule 71.1).

TOTAL VALUE & FEE $ _____ $ _____

APPROVED:

_____ Fiduciary

_____ Attorney For Estate

NOTICE: The attorney fees contained in this schedule are NOT to be considered or represented to clients as a schedule of minimum or maximum fees to be charged.

1178967.1

PROBATE COURT OF CUYAHOGA COUNTY, OHIO
Anthony J. Russo, Presiding Judge
Laura J. Gallagher, Judge

IN RE TRUST OF _____ **CASE NUMBER** _____

COMPUTATION OF TRUSTEE FEES
(Local Rule 74.1)

This Account Covers: One Year **OR** Two Years

I. Fair market value of the Trust principal as determined by Trustee as of the anniversary date of appointment in the FIRST YEAR covered by this account

Total Principal: _____		
$12.00 per thousand of the first $1,000,000.00	*$12.00 x* _____	**FEE:**
$ 7.50 per thousand of the next $2,000,000.00	*$ 7.50 x* _____	**FEE:**
$ 5.50 per thousand of the next $2,000,000.00	*$ 5.50 x* _____	**FEE:**
$4.50 per thousand of the balance	*$ 4.50 x* _____	**FEE:**

II. Fair market value of the Trust principal in the SECOND YEAR covered by this account

Total Principal: _____		
$12.00 per thousand of the first $1,000,000.00	*$12.00 x* _____	**FEE:**
$ 7.50 per thousand of the next $2,000,000.00	*$ 7.50 x* _____	**FEE:**
$ 5.50 per thousand of the next $2,000,000.00	*$ 5.50 x* _____	**FEE:**
$4.50 per thousand of the balance	*$ 4.50 x* _____	**FEE:**

III. Distribution from the Trust Principal

There may be allowed an amount equal to 1% of the fair market value of any distribution from the principal of the Trust property	*$ .01 x* _____	**FEE:**

..... **TOTAL FEES ALLOWABLE IN COMPUTATIONS I, II AND III ABOVE**	**TOTAL FEES:**
= (The trustee may charge a minimum fee of $1,500 per year)	

Revised: February 2006
Effective: April 3, 2006

PROBATE COURT OF CUYAHOGA COUNTY, OHIO
Anthony J. Russo, Presiding Judge
Laura J. Gallagher, Judge

ESTATE OF _____, **DECEASED**

CASE NO. _____

COMPUTATION OF EXECUTOR OR ADMINISTRATOR FEE

I	Personal Property Per Inventory plus Gross Proceeds of Real estate sold under Authority of Will	
	Income Received	
	Total Above	
	4% of first $100,000	
	3% of next $300,000	
	2% of $ _____ balance	
	Total Fees for Above	
II	Value of Real Estate not Sold	
	1% of Real estate not Sold	
III	Non-Probate Property Subject to Ohio Estate Tax (except J&S)	
	1% of Above	
	RECAPITULATION	
	Fees allowable on Item I	
	Fees Allowable on Item II	
	Fees allowable on item III	
	Total Fees Allowable	
	Total Fees Taken on Prior Account	
	Total Fees taken on this (Partial/Final) Account	

Note: use this form to photocopy additional forms to be included with each account

ComputationOfExecutor.pdf

PROBATE COURT OF CUYAHOGA COUNTY, OHIO
Anthony J. Russo, Presiding Judge
Laura J. Gallagher, Judge

IN THE MATTER OF THE GUARDIANSHIP OF _____

CASE NUMBER _____

COMPUTATION OF GUARDIAN FEES

(Local Rule 73.1)

GUARDIANSHIP ESTATES

This Account Covers: ☐ One Year **OR** ☐ Two Years

I. Income received, not including a conversion of assets, covered in this account.

	Total Income:	**FEE:**
10% of the gross rental income from real estate	_____ x.10	_____
3% of the remaining income	_____ x.03	_____

II. Expenditures, not including any guardian's fees or distributions, covered in this account.

	Total Expenditures:	**FEE:**
3% of the total expenditures where the total expenditures are **LESS THAN** $200,000.00	_____ x.03	_____

III. Fair value of the guardianship principal (inventory value or balance on hand from last account).

	Total Principal:	**FEE:**
$2.50 per thousand of the total principal x_____ yr (s)	_____	_____

TOTAL FEES allowable in computations I, II and III above . . . . . =
(The Guardian may charge a minimum fee of $500.00 per year)

TOTAL FEE:

Revised: Applications Filed After March 1, 2011

This Page Intentionally Left Blank

Other/General

NOTES

NOTES

Court Procedures

Ohio Rules of Civil Procedure and Probate Court

The Ohio Rules of Civil Procedure apply to probate practice, except as otherwise provided or to the extent that they would be clearly inapplicable.

Ohio Civil Rule 1: Scope of rules, applicability, construction, exceptions

(A) Applicability. These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) Construction. These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) Exceptions. These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925 of the Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in adoption proceedings under Chapter 3107 of the Revised Code, (8) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

(D) Court orders regarding physical appearance. As used in these rules, any option to use live two-way video and audio technology shall not be construed to limit the power of a court to order that a party, attorney, or witness physically appear at a proceeding without the use of live two-way video and audio technology.

[Effective: July 1, 1970; Amended: July 1, 1971; July 1, 1975; July 1, 2015; July 1, 2023.]

Applicability:

- Civil Rule 1 is clearly a rule of inclusion rather than exclusion... to the extent that the issue in question is procedural in nature, the Civil Rules should apply unless they are clearly inapplicable. A civil rule is clearly inapplicable only when its use will alter the basic statutory purpose for which the specific procedure was originally provided for in the special statutory action. *Price v. Westinghouse Electric Corp.*, 70 Ohio St. 2d 131 (Ohio 1982).
- Part (D) was recently added in order to address the ramifications of the global pandemic and provide new definitions relating to physical and remote appearances. This assists in ensuring standardized use by courts.

Statutory proceedings:

Will Contests:

- Historically, will contests were created as a special statutory cause of action and have been recognized as such by the courts. *Fletcher v. First National Bank o Zanesville,* 167 Ohio St. 211 (Ohio 1958); *Andes v. Shippe,* 165 Ohio St. 275 (Ohio 1956).
- Currently, the Ohio Revised Code provides that the Rules of Civil Procedure govern all aspects of a will contest action, except as otherwise provided in sections 2107.71 to 2107.77 of the Revised Code. RC. §2107.72(A).

Adoption:

- Ohio courts have held adoption to be a special statutory proceeding within the meaning of Civil Rule 1. *In re Rabatin,* 83 Ohio App. 3d 836 (Ohio Ct. App. 11th Dist. 1992) (Statute providing that decrees of adoption are uncontestable after one year was applicable rather than the rule of civil procedure); *Hoffert Vrable,* 1983 WL 5258 (Ohio Ct. App. 1st Dist. 1983) (court assumes that adoption is a special statutory proceeding).

Eminent Domain:

- Land appropriation proceedings brought under Revised Code sections 163.01 to 163.22 governed by the law applicable in civil actions and the rules of civil procedure, including but not limited to the rules of discovery, except as otherwise provided in those sections.

- The rules of civil procedure are applicable to land appropriation proceedings except to the extent that they would, by their nature, be clearly inapplicable. *Cleveland Electric Illuminating Co. vs. Astorhurst Land Co.,* 18 Ohio St. 3d 268 (Ohio 1985).

Civil Commitments:

- Revised Code Section 5122.11 provides the procedure for judicial commitment.

Wrongful Death:

- An action for wrongful death is a purely statutory action providing for damages for the beneficiaries as defined by the wrongful death statute, R.C. 2125.01 et. seq. *In re Estate of Robertson*, 159 Ohio App.3d 297 (Ohio Ct. App. 7th Dist. 2004).

Ohio Civil Rule 53: Magistrates

I. MAGISTRATE POWERS UNDER CIVIL RULE 53

AUTHORITY: The authority of a magistrate is derived from the court that made the appointment. A magistrate is an agent of the court and if the court has no authority to act, then a magistrate cannot act.

Ohio Civil Rule 53(C) empowers a magistrate appointed by the court to:

a) Determine any motion in any case;

b) Conduct the trial of any case that will not be tried to a jury;

c) Preside over the trial of any case that will be tried to a jury with the unanimous written consent of the parties;

d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized bylaw; and

e) Exercise any other authority specifically vested in magistrates by statute and consistent with Civ. R. 53.

GENERAL POWER: A magistrate's general powers under Civ.R. 53 include the power to:

a) Regulate all proceedings in hearings in which the magistrate is presiding;

b) Issue subpoenas for the attendance of witnesses and the production of evidence;

c) Rule on the admissibility of evidence;

d) To put witnesses under oath and examine them;

e) To call the parties to the action and examine them under oath;

f) Obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, as well as issue an attachment for the alleged contemnor and set the type, amount, and any conditions of bail pursuant to Crim.R. 46;

g) Impose by written order appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

PROCEEDINGS REFERRED TO MAGISTRATE:

a) A court may refer a particular case or matter or may refer a category of cases and matters to a magistrate by a specific or general order of reference or by rule. Civ.R. 53(D)(1)(a).

b) A court may limit or specify a magistrate's powers by:

i) Directing the magistrate to determine only particular issues;

ii) Directing the magistrate to perform particular responsibilities;

iii) Directing the magistrate to receive and report evidence only; fixing the time and place for beginning and closing any hearings; fixing the time for filing any Magistrate's Decision on the matter or matters referred. Civ.R. 53(D)(1)(b).

II. MAGISTRATE'S ORDER

A magistrate may enter orders without judicial approval if it is necessary to regulate the proceedings and the order is not dispositive of a claim or defense of a party. Civ.R. 53(D)(2)(a)(i).

A Magistrates Order shall be:

a) In writing;

b) Identified as a Magistrate's Order in the caption;

c) Signed by the magistrate;

d) Filed with the clerk; and

e) Served by the clerk on all parties or their attorneys. Civ.R. 53(D)(2)(a)(ii).

MOTION TO SET ASIDE MAGISTRATE'S ORDER: Any party may file a motion with the court to ***set aside*** a Magistrate's Order, but the pendency of the motion does not stay the effectiveness of the Magistrate's Order unless the magistrate or court order to stay the effectiveness of the Magistrate's Order. Civ.R. 53(D)(2)(b). The motion to set aside a Magistrate's Order:

a) Shall state the moving party's reasons with particularity; and

b) Shall be filed no later than ten (10) days after the Magistrate's Order is filed.

III. MAGISTRATE'S DECISION

Proceedings before a magistrate shall comply with all statutes and rules applicable to the court appointing the magistrate. Proceedings heard by a magistrate must be recorded in a manner approved by the court, unless otherwise provided by law.

A Magistrate's Decision respecting any matter referred must be:

a) Be in writing;

b) Identified as a Magistrate's Decision in the caption;

c) Signed by the magistrate;

d) Filed with the clerk;

e) Served by the clerk on all parties or their attorneys no later than three days after the decision is filed; and

f) Must be approved or adopted by the court. Civ.R. 53(D)(3)(a)(iii).

A Magistrate's Decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. Civ.R. 53(D)(3)(a)(ii). If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law. *Id.*

OBJECTIONS TO A MAGISTRATE'S DECISION: Written objections must be filed within fourteen (14) days of the filing of the Magistrate's Decision. Civ.R. 53(D)(3)(b)(i). If any party timely files objections, any other party may file written objections no later than ten (10) days after the first objections are filed. *Id.*

If a timely request is made for findings of fact and conclusions of law, the time for filing objections begins when the magistrate files a decision that includes findings of fact and conclusion of law. *Id.*

The objections to a Magistrate's Decision must be specific and state with particularity all grounds for objection. Civ.R. 53(D)(3)(b)(ii).

An objection to a finding of fact must be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. Civ.R. 53(D)(3)(b)(iii).

A party must object to the magistrate's finding of fact or conclusions of law in order to file an appeal on the court's adoption of the magistrate's findings of fact or conclusion of law. Civ.R. 53(D)(3)(b)(iv).

IV. COURT'S ACTION ON MAGISTRATE'S DECISION

The court may adopt, reject or modify a magistrate's decision. Civ.R. 53(D)(4)(e). A Magistrate's Decision becomes effective when the court adopts the decision. Civ.R. 53(D)(4)(a).

If the court adopts a Magistrate's Decision during the fourteen (14) days permitted for parties to file objections, the timely filing of objections operate as an automatic stay of judgment until the court rules on those objections and vacates, modifies, or adheres to the judgment previously entered. Civ.R. 53(D)(4)(e)(i).

A court may adopt or reject a Magistrate's Decision with or without modification regardless if objections are filed. Civ.R. 53(D)(4)(e).

If no objections are filed, the court may adopt a Magistrate's Decision when there are no defects in the conclusion of law or findings of fact. Civ.R. 53(D)(4)(c).

If objections are filed, a court may adopt, reject, or modify the Magistrate's Decision. Civ.R. 53(D)(4)(d). In addition, the court may hear additional evidence, return the matter to the magistrate with instructions or hear the matter itself. *Id.*

The court can adopt the Magistrate's Decision within the fourteen (14) day objection period or issue an interim order if immediate relief is justified. Civ.R. 53(D)(4)(e).

Ohio Civil Rule 65: Injunctions

(A) Temporary restraining order; notice; hearing; duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and so far as upon information and belief, shall state that he believes this information to be true. Every temporary restraining order granted without notice shall be filed forthwith in the clerk's office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for one like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be set forth in the order of extension. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(B) Preliminary injunction.
(1) Notice. No preliminary injunction shall be issued without reasonable notice to

the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (B) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(C) Security. No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.

The party obtaining the order or injunction may deposit, in lieu of such bond, with the clerk of the court granting the order or injunction, currency, cashier's check, certified check or negotiable government bonds in the amount fixed by the court.

Before judgment, upon reasonable notice to the party who obtained an injunction, a party enjoined may move the court for additional security. If the original security is found to be insufficient, the court may vacate the injunction unless, in reasonable time, sufficient security is provided. No security shall be required of this state or political subdivision, or agency of either, or of any officer thereof acting in his representative capacity.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability as well as the liability of the party obtaining the order or injunction may be enforced by the court without jury on motion without the necessity for an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(D) Form and scope of restraining order or injunction. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise.

(E) Service of temporary restraining orders and injunctions. Restraining orders which are granted ex parte shall be served in the manner provided for service of process under Rule 4 through Rule 4.3 and Rule 4.6; or in manner directed by order of the court. If the restraining order is granted upon a pleading or motion accompanying a pleading the order may be served with the process and pleading. When service is made pursuant to Rule 4 through Rule 4.3 and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.

Restraining orders or injunctions which are granted with notice may be served in the manner provided under Rule 4 through Rule 4.3 and Rule 4.6, in the manner provided in Rule 5 or in the manner designated by order of the court. When service is made pursuant to Rule 4 through Rule 4.3 and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.
[Effective:July 1, 1970.]

Applicability:

- Probate courts are empowered to grant injunctive relief in tuberculosis cases. Ohio Revised Code, Title III, Chapter 339. The Revised Code provides the proper procedures for both standard (non-emergency) detention orders and emergency detention orders.

- Individuals diagnosed with active tuberculosis must complete the entire treatment regime prescribed by a physician including medication, recommendations for the management of the disease and instructions on precautions to prevent its spread. RC. §339.82 (A).
    - Individuals who rely exclusively on spiritual treatment in lieu of medical treatment may be quarantined or isolated in a place approved by the tuberculosis control unit to safely protect the community. RC. §339.89

Non-Emergency Tuberculosis Detention Orders:

- If an individual fails to comply with the treatment regime, the county or district tuberculosis control unit may issue and order compelling the individual to comply. RC. 339.84. If the individual fails to comply with the order, the county or district tuberculosis control unit may apply to the probate court for an injunction prohibiting the individual from continuing to violate the unit's order. If the unit believes the failure to comply involves an immediate danger to the public health, the unit may request that the court issue an injunction without granting the individual an opportunity for a prior hearing or that the court hold an expedited hearing on the matter. RC. §339.85.

- If a probate court issues an injunction under RC. §339.85 and the individual failures to comply, the county or district tuberculosis control unit may petition

the probate court to issue an order granting the unit authority to detain the individual for examination or treatment. RC. §339.86(A).

- The request must contain the name of the individual, the purpose of making the request for detention, an individualized assessment containing a description of the circumstances and behavior of the individual that constitutes the basis for making the request, a recommendation for length of detention, and a recommendation of a hospital or other place to be used for the detention. RC. §339.86(A).
- The probate court may issue an order for detention for an initial period of not more than 180 days. At the end of the initial detention period, the court shall review the case and may extend the order for subsequent periods of not more than ninety days, reviewing the case at the end of each subsequent period of detention. When the court receives satisfactory evidence that the individual subject to the order no longer has active tuberculosis, the court shall terminate the order for detention. RC. §339.86(B).
- The individual has a right to counsel at any point during the above-outlined proceedings, including the right to have counsel provided if the probate court determines that the individual is indigent. RC. §339.86(C).

Emergency Tuberculosis Detention Orders:

- When a tuberculosis control unit has reasonable grounds to believe that an individual who has, or is suspected of having, active tuberculosis poses a substantial danger to the health of other individuals, the tuberculosis control unit may issue an emergency detention order directing a sheriff or other place to be examined and treated for tuberculosis. R.C. §339.87 (A).

- Not later than the third business day of such emergency detention, the tuberculosis control unit must petition the probate court for a detention order under R.C. §339.86(B). If a request is not filed in that time, the individual must be immediately released and cannot be again detained unless the control unit first obtains a court order. R.C. §339.87(B).

Ohio Civil Rule 73: Probate Division of the Court of Common Pleas

(A) Applicability

These Rules of Civil Procedure shall apply to proceedings in the probate division of the court of common pleas as indicated in this rule. Additionally, all of the Rules of Civil Procedure, though not specifically mentioned in this rule, shall apply except to the extent that by their nature they would be clearly inapplicable.

(B) Venue

Civ.R. 3(C) shall not apply to proceedings in the probate division of the court of common pleas, which shall be venued as provided by law. Proceedings under Chapters 2101. through 2131. of the Revised Code, which may be venued in the general division or the probate division of the court of common pleas, shall be venued in the probate division of the appropriate court of common pleas.

Proceedings that are improperly venued shall be transferred to a proper venue provided by law and division (B) of this rule, and the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in an improper venue.

(C) Service of summons

Civ.R. 4 through 4.6 shall apply in any proceeding in the probate division of the court of common pleas requiring service of summons.

(D) Service and filing of pleadings and papers subsequent to original pleading

In proceedings requiring service of summons, Civ.R. 5 shall apply to the service and filing of pleadings and papers subsequent to the original pleading.

(E) Service of notice

In any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court, and the statute providing for notice neither directs nor authorizes the court to direct the manner of its service, notice shall be given in writing and may be served by or on behalf of any interested party without court intervention by one of the following methods:

(1) By delivering a copy to the person to be served;

(2) By leaving a copy at the usual place of residence of the person to be served;

(3) By United States certified or express mail return receipt requested, or by a commercial carrier service utilizing any form of delivery requiring a signed receipt, addressed to the person to be served at the person's usual place of residence with instructions to the delivering postal employee or to the carrier to show to whom delivered, date of delivery, and address where delivered, provided that the certified or express mail envelope or return of the commercial carrier is not returned showing failure of delivery;

(4) By United States ordinary mail after a returned United States certified or express mail envelope or return of the commercial carrier shows that it was refused;

(5) By United States ordinary mail after a United States certified or express mail or commercial carrier envelope is returned with an endorsement stating that it was unclaimed or a similar endorsement indicating the item was unclaimed, provided that the United States ordinary mail envelope is not returned by the postal authorities showing failure of delivery;

(6) By publication once each week for three consecutive weeks in some newspaper of general circulation in the county when the name, usual place of residence, or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained; provided that before publication may be utilized, the person giving notice shall file an affidavit which states that the name, usual place of residence, or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained;

(7) By other method as the court may direct.

Civ.R. 4.2 shall apply in determining who may be served and how particular persons or entities must be served.

(F) Proof of service of notice; when service of notice complete

When service is made through the court, proof of service of notice shall be in the same manner as proof of service of summons.

When service is made without court intervention, proof of service of notice shall be made by affidavit. When service is made by United States certified or express mail or by commercial carrier service, the return receipt which shows delivery shall be attached to the affidavit. When service is made by United States ordinary mail, the prior returned certified or express mail or commercial carrier envelope which shows that the mail was refused or unclaimed shall be attached to the affidavit. Service of notice by United States ordinary mail shall be complete when the fact of mailing is entered of record except as stated in division (E)(5) of this rule. Service by publication shall be complete at the date of the last publication.

(G) Waiver of service of notice

Civ.R. 4(D) shall apply in determining who may waive service of notice.

(H) Forms used in probate practice

Forms used in proceedings in the probate division of the courts of common pleas shall be those prescribed in the rule applicable to standard probate forms in the Rules of Superintendence. Forms not prescribed in such rule may be used as permitted in that rule.

Blank forms reproduced for use in probate practice for any filing to which the rule applicable to specifications for printing probate forms of the Rules of Superintendence applies shall conform to the specifications set forth in that rule.

No pleading, application, acknowledgment, certification, account, report, statement, allegation, or other matter filed in the probate division of the courts of common pleas shall be required to be executed under oath, and it is sufficient if it is made upon the signature alone of the person making it.

(I) Notice of Filing of Judgments

Civ.R. 58(B) shall apply to all judgments entered in the probate division of the court of common pleas in any action or proceeding in which any party other than a plaintiff, applicant, or movant has filed a responsive pleading or exceptions. Notice of the judgment shall be given to each plaintiff, applicant, or movant, to each party filing a responsive pleading or exceptions, and to other parties as the court directs.

(J) Filing with the court defined

The filing of documents with the court, as required by these rules, shall be made by filing them with the probate judge as the *ex officio* clerk of the court. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

(1) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.

(2) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.

(3) Any document filed electronically that requires a filing

fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

Effective Date: July 1, 1970
Amended: July 1, 1971; July 1, 1975; July 1, 1977; July 1, 1980; July 1, 1996; July 1, 1997; July 1, 2001; July 1, 2012; July 1, 2023

Applicability:

- Under this rule, the Rules of Civil Procedure apply to proceedings as indicated by this rule, and shall apply except to the extent that they would be clearly inapplicable. Exceptions and applications to practice are listed in this rule.

- The usual venue rule (Civ. R. 3(B)) does not apply to proceedings in the probate division of the court of common pleas. See Civ. R. 73(B). Such proceedings are venued as provided by law, except that proceedings which may be venued in the general division or the probate division are venued in the probate division under Civ. R. 73(B). Proceedings that are improperly venued must be transferred, and the court may assess costs including reasonable attorneys' fees, to the time of transfer against the party who commenced the action in the improper venue.
    - Where an action to contest a will is mistakenly docketed in the general division of the court of common pleas rather than the probate division of that court, prejudicial error is committed if the court dismisses the complaint instead of transferring the action to the docket of the probate division, pursuant to a motion of the complainant. *Siebenthal v. Summers,* 56 Ohio App. 2d 168 (Ohio Ct. App. 10th Dist. 1978).

- Under Civ. R. 73, the usual rules regarding service of summons apply to any proceeding in the probate division.

Minor Settlements & Wrongful Deaths and Trusts

Materials Prepared by:

Hon. Jan Michael Long
Pickaway County Probate/Juvenile Court

MINOR'S SETTLEMENTS

Question: I just settled a personal injury case on behalf of my client, Johnny Minor, age 12. Does Probate Court have to review and/or approve the settlement? Why?

The simple answer is Yes! Any distribution, irrespective of the amount, (including a jury verdict) to a minor as compensation for any type of personal injury claim MUST be approved by Probate Court. Ohio Revised Code §2111.18 directs that exclusive jurisdiction lies with Probate Court to authorize a full and final release of the tortfeasor on behalf of a minor.

Question: Is there a pre-printed, court approved form I can pick up at the Probate Court application counter?

Yes! The forms (#22.0-22.4) can be picked up in Rm. 121, Old Courthouse, 1 Lakeside Ave. For your convenience, these forms are also now available online at http://probate.cuyahogacounty.us

The packet will include the following:

1. #22.0 – Application to Settle a Minor's Claim
2. #22.1 – Waiver and Consent to Settle a Minor's Claim
3. #22.2 – Entry Approving Settlement of a Minor's Claim
4. #22.3 – Verification of Receipt and Deposit
5. #22.4 – Report of Distribution of a Minor's Claim

Question: What should my application to approve settlement to a minor include?

Think of the application as a packet. The packet must contain enough information that will allow the Court to evaluate the case and determine if the settlement is in the best interest of the minor. Also, it is important to remember that your client is the minor, not the parent.

The Settlement Packet contains basically four elements: (1) The Application (#22.0), (2) the medical reports, (3) a complete list of the medical and case expenses, and (4) the Judgment Entry (#22.2)

The Packet
(Sup. R. 68)

(1) The Application to Approve Minor Settlement. An application for settlement of a minor's claim shall be brought by the guardian of the estate. If there is no guardian appointed and the court dispenses with the need for a guardian, the application shall be brought by the parents of the child or the parent or other individual having custody of the child. Additional information concerning the application is as follows:

a. Captioned In re minor's name (one minor per application)

b. Attached to the preprinted form must be the required narrative statement containing the following:

- Description of the occurrence;
- The injury or damage;
- A current statement of an examining physician in respect to the injuries sustained, the extent of recovery, and the permanency of any injuries.
- State what additional consideration, if any, is being paid to the persons other than the minor as a result of the accident causing the injury to the minor.
- What arrangement, if any, has been made with respect to counsel fees.

c. The attorney must type his or her name, address, phone number, and registration number on the application.

d. The application must be signed by the parent(s) or guardian(s) as applicant and the attorney.

Note: It is a good idea to have a separate <u>settlement statement</u> in the packet that summarizes any and all deductions. Itemize your case expenses and have the parents or guardian sign it so the Court knows they have reviewed it and approve.

(2) The Supporting Medical Records

a. Accident/police report (if available)

b. Emergency room reports (if available)

c. Current medical evaluation. This includes diagnosis and/or prognosis for future recovery. [Keep it simple. We don't need the client's entire medical file.]

(3) Complete List of Medical Bill and Case Expenses

a. If medical bills are to be paid from the gross settlement, then the attorney must supply the Court with a current statement of outstanding bills.

b. Case expenses can be totaled on the application, however, you must supply the Court with an itemization so we can see how you arrived at your total.

(4) The Judgment Entry

If the net to the minor is less than $25,000, the Court has three (3) options for the distribution pursuant to O.R.C. §2111.18. These options are as follows:

Option (1): Order funds delivered to the natural guardians (parents) to be used in their discretion for the care and maintenance of the minor,*

Option (2): Order the funds delivered to the person by whom the minor is maintained;

Option (3): Order the funds delivered to the minor himself.

*Note: Sup. R. 67 Court Policy: If the net to the minor is more than $3,000, but less than $10,000, then the Judgment Entry should order the funds deposited into a restrictive bank account until the child reaches the age of 18 or until further order of the Court. The Judgment Entry must also state the bank and the specific branch where the funds will be deposited.

Remember!! It is the responsibility of the attorney to see that the funds are deposited in accordance with the Judgment Entry and return to the Court, PROOF OF DEPOSIT WITHIN 7 DAYS OF THE ENTRY! (Sup. R. 67 and Form #22.3)

Question: How do I have a Guardian appointed?

Either parent or the custodian of the minor can apply to be guardian of the minor's estate. The Court does not favor co-guardians. The Guardianship application can be obtained at the application counter, room 121, and filled out prior to the hearing on the Settlement.

Question: Should I have the Guardian appointed before the hearing on the Settlement?

The guardianship and the settlement application can be heard at the same time. (Exception: If the minor is 14 or over, then personal service on the minor for the appointment of his or her guardian is required. A minimum of seven (7) days notice is required. This seven (7) day waiting period cannot be waived. File the Guardianship application a week before you expect to have a hearing on the settlement.

Question: Will my client need to post a bond? How much?

All guardians are bonded for two (2) times the net amount to the minor. If the bond ordered is excessive or your client does not expect to access the funds during the minority, then consider filing a Motion to Deposit Funds in Lieu of Posting Bond. That motion can only be granted upon the presentation of a temporary receipt of the depository.

Question: Are my attorney fees subject to Court review and approval?

Yes! Sup. R. 68. The Court is not bound by any previous contractual agreement you made with the minor's parents.

Question: Now that I have my packet ready, what do I do next?

Proceed to Probate Court, 1 Lakeside Ave., Room 121, (Index Department). The Index Department will not give you a case number yet, however, they will make sure there is no other pending application or existing Guardianship. Index will direct you and your clients to room 254 to see a Magistrate.

Question: Do I need to bring my clients with me and do I need to make an appointment?

The injured minor and the applicant must be present at the hearing.

No appointment is necessary. It is first come, first served. The application can be set for a specific hearing date in the future if you want to insure that a Magistrate will be available or if the case is complex and may require some extra review and discussion.

Question: What will take place during the hearing? Can't I just send my law clerk?

This is a court proceeding where testimony may be required.* The attorney must attend. The hearings are somewhat informal, however, BE PREPARED! Expect the Magistrate to question the parents and the minor. Know the facts of the case and the insurance parameters of the tortfeasor. Make sure you have reviewed the application and settlement sheet with your client before you being the hearing. The Court will want to know the total settlement to all injured parties.

*Note: If you are unsure of the procedure, stop in the Court the day before you bring your clients in and ask one of the Magistrates to review your documents informally. This will save you much embarrassment in front of the clients.

Question: The Magistrate concluded the hearing and stamped the application "Heard and Granted." Can I cash the check?

The application is not approved until a Judge reviews it and signs it. Once the Magistrate has initialed the Judgment Entry and marked your application "Heard and Granted" you can take the packet back to Index for a case number and then to Room 135 (Cashiers) to pay the appropriate Court costs. After a Judge signs the Judgment Entry, you can arrange to have a certified copy mailed to your office.

Updated: 11/20/2023

COUNTY LOC. R. 68.1 SETTLEMENT OF INJURY CLAIMS OF MINORS

Settlements of a minor's claim are separate proceedings in this court and shall proceed under a separate case number other than that assigned to the guardianship, if any.

COUNTY LOC. R. 68.2 REQUIREMENTS FOR FILING SETTLEMENT OF MINOR'S CLAIMS

A hearing on the application for settlement of a minor's claim will not be scheduled until the following are filed with the court:

1. A copy of the minor child's birth certificate.
2. Unless otherwise dispensed with by the court, as required by Sup. R. 68, a current statement of an examining physician in respect to the injuries sustained, the extent of recovery, and the permanency of any injuries.
3. A narrative statement in support of the proffered settlement setting forth a description of the occurrence and any other proposed or actual settlements resulting from the same occurrence to persons other than the minor.
4. A list of unreimbursed medical and other expenses and proposed payees.
5. A copy of any attorney fee agreement.
6. A written itemization of suit expenses.

COUNTY LOC. R. 68.3 STRUCTURED SETTLEMENTS OF MINOR'S CLAIMS

In the event that parties involved in claims for injuries to minors desire to enter into a structured settlement, defined as a settlement wherein payments are made on a periodic basis, the following rules shall apply:

A. The application shall include a signed statement from one of the following independent professionals, specifying the present value of the settlement and the method of calculation of that value; an actuary, certified public accountant, certified financial planner, chartered life underwriter, chartered financial consultant, or an equivalent professional.

B. If the settlement is to be funded by an annuity, the application shall include a signed statement by the annuity carrier or the broker procuring the policy stating:
   1. The annuity carrier is licensed to write annuities in Ohio.
   2. The annuity carrier's ratings from at least two of the following organizations, which meet the following criteria:
      (a) A.M. Best Company: A++, A=, or A;
      (b) Duff & Phelps Credit Rating Company (Claims Paying Ability Rating): AAA, AA+, or AA;
      (c) Moody's Investors Service (Financial Strength): AAA, AA+ or AA;
      (d) Weiss Research Inc.: A+ or A.

C. In addition to the requirements of Paragraph (B) above, an annuity carrier must meet any other requirement the court considers reasonably necessary to assure that funding to satisfy periodic payment settlements will be provided and maintained.

SALE/TRANSFER OF STRUCTURED SETTLEMENTS

I. Introduction

Since October, 2000, the common pleas court has become the forum for the sale for future payments on previously approved structured settlements. The clear intent of the statute set forth at Ohio Revised Code Section 2323.58 through ORC 2323.587 is to attempt to ensure that the payee (seller) is protected from themselves and from opportunistic transferees (purchasers). The overriding concern is that the sale must be in the best interests of the seller (payee).

These provisions set forth the duties and obligations of all parties. The company purchasing the right to receive payments must disclose the costs and benefits of the transfer to the seller or the annuity payee. The Probate Court must find that the sale is fair and in the best interests of the seller and that individual's dependents. If both of these requirements are met, the application may be approved and the transfer of rights is permitted. The result of the court approval is that the issuer of the annuity is no longer obligated to the original payee, but subsequent to the approval only to the purchaser.

II. Jurisdiction: Ohio Revised Code 2323.584 (A)

The Application for the sale of a structured settlement shall be filed in the probate division of the court of common pleas of the county in which the payee resides, except that if the structured settlement agreement was approved by a court of common pleas or other Ohio state court, the application shall be filed in the Ohio state court that approved the structured settlement agreement.

III. Disclosure Statement: R.C. 2323.582

A. Not less than 10 days prior to the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a disclosure statement. This disclosure statement must be in boldfaced type of the minimum of 14 points in and must include the criterion set forth in RC 2323.582.

1. The amounts and due dates of the structured settlement payments that would be transferred;

2. The aggregate amount of payments to be transferred;

3. The discounted present value of the payments described in division (A) of this section, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities," and the amount of the applicable federal rate used in determining the discounted present value;

4. The gross advance amount;

5. An itemized listing of all applicable transfer expenses, other than attorneys' fees and related disbursements payable in connection with the transferee's application for approval of the transfer, and the transferee's best estimate of the amount of any such fees and disbursements;

6. The net advance amount;

7. The effective annual interest rate, which shall be disclosed as follows: "On the basis of the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are transferring to us, you will, in effect, be paying interest to us at a rate of _____ per cent per year";

8. The aggregate amount of any penalty or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee;

9. That the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee;

10. That the payee has the right to seek and receive independent professional advice regarding the proposed transfer and should consider doing so before agreeing to transfer any structured settlement payment rights.

B. Pursuant to R.C. 2323.586, compliance with R.C. 2323.582 the sole responsibility of the transferee.

IV. Procedure: ORC 2323.584(B)

A. Hearing: The court shall hold a timely hearing on the application.

The payee shall appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing in person.

B. Not less than 20 days prior to the hearing, the transferee shall file with the court and shall serve on all interested parties, including a parent or other guardian or authorized legal representative of any interested party who is not legally competent, in the manner prescribed in the Rules of Civil Procedure for the service of process, a notice of the proposed transfer and the application for its approval in advance.

1. The notice shall include all of the following:

a. A copy of the application;

b. A copy of the transfer agreement; and

c. A copy of the disclosure statement provided by the transferee pursuant to section 2323.582 of the Revised Code;

d. The payee's name, age, and county of residence and the number and ages of each of the payee's dependents;

e. A summary of both of the following:

- Any prior transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, within the four years preceding the date of the transfer agreement and any proposed transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, applications for approval of which were denied within the two years preceding the date of the transfer agreement;
- Any prior transfers by the payee to any person or entity other than the transferee or an affiliate, or an assignee of the transferee or an affiliate, within the three years preceding the date of the transfer agreement and any prior proposed transfers by the payee to any person or entity other than the transferee or an affiliate, or an assignee of a transferee or affiliate, applications for approval of which were denied within the one year preceding the date of the current transfer

agreement, to the extent that the transfers or proposed transfers have been disclosed to the transferee by the payee in writing or otherwise are actually known to the transferee.

f. A notification of the time, date, and place of hearing;

g. Notification that any interested party may support, oppose, or otherwise respond to the application, either in person or by counsel, by submitting to the court a written response containing the interested party's support of, opposition to, or comments on the application or by participating in the hearing;

h. Notification of the manner of filing a written response to the application and the time within which the response is required to be filed, which time shall be not less than fifteen days after the service of the transferee's notice, in order for the court to consider it.

V. Validity: O.R.C. 2323.581

A. No direct or indirect transfer of structured settlement payment rights shall be effective, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to a transferee or assignee of structured settlement payment rights, unless the transfer has been approved in advance in a final order of a court of competent jurisdiction based on express findings by the court of all of the following:

1. The transfer is in the best interest of the payee, taking into account the welfare and support of the payee’s dependents.
2. The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received that advice or knowingly waived in writing the opportunity to seek and receive that advice.
3. The transfer does not contravene any applicable statute or order of any court or other government authority.

VI. After the Transfer: O.R.C. 2323.583

A. Following a transfer of structured settlement payment rights pursuant to sections 2323.58 to 2323.585 of the Revised Code, all of the following apply:

1. The structured settlement obligor and the annuity issuer may rely on the court order approving the transfer in redirecting periodic payments to an assignee

or transferee in accordance with the order approving the transfer and shall, as to all parties except the transferee or an assignee designated by the transferee, be discharged and released from any and all liability for the redirected payments. That discharge and release shall not be affected by the failure of any party to the transfer to comply with sections 2323.58 to 2323.585 of the Revised Code or with the court order approving the transfer.

2. The transferee shall be liable to the structured settlement obligor and the annuity issuer, as follows:

   a. For any taxes incurred by the structured settlement obligor or annuity issuer as a consequence of the transfer, if the transfer contravenes the terms of the structured settlement;

   b. For any other liabilities or costs, including reasonable costs and attorneys' fees, arising from compliance by the structured settlement obligor or annuity issuer with the court order approving the transfer or from the failure of any party to the transfer to comply with sections 2323.58 to 2323.585 of the Revised Code.

3. Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees.

4. Any further transfer of structured settlement payment rights by the payee may be made only if the transfer complies with all of the requirements of sections 2323.58 to 2323.585 of the Revised Code.

VII. Immunity- Waiver- Illegal Transfers: O.R.C. 2323.585

A. No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on a failure of the transfer to comply with any of the requirements of sections 2323.581 to 2323.584 of the Revised Code.

B. No provision of this section or section 2323.581, 2323.582, 2323.583, or 2323.584 of the Revised Code may be waived by any payee.

C. No provision of this section or section 2323.581, 2323.582, 2323.583, or 2323.584 of the Revised Code authorizes any transfer of structured settlement payment rights in contravention of applicable law or implies that any transfer under a transfer agreement that was entered into prior to the effective date of this amendment is valid or invalid.

D. Any transfer agreement entered into on or after the effective date of this amendment by a payee who resides in this state shall provide that disputes under the transfer agreement, including any claim that the payee has breached the agreement, are to be determined in and under the laws of this state. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

E. No transfer of structured settlement payment rights shall extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for both of the following:

1. Periodically confirming the payee's survival;
2. Giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee's death

F. If the payee cancels a transfer agreement, or if the transfer agreement otherwise terminates, after an application for approval of a transfer of structured settlement payment rights has been filed and before it has been granted or denied, the transferee shall promptly request dismissal of the application.

The Supreme Court of Ohio

JUDICIAL COLLEGE

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE
SHARON L. KENNEDY

JUSTICES
PATRICK F. FISCHER
R. PATRICK DEWINE
MICHAEL P. DONNELLY
MELODY J. STEWART
JENNIFER BRUNNER
JOSEPH T. DETERS

DIRECTOR
CHRISTY TULL

TELEPHONE 614.387.9445
FACSIMILE 614.387.9449
supremecourt.ohio.gov

Supreme Court of Ohio Bench Cards and Toolkits:

https://www.supremecourt.ohio.gov/courts/services-to-courts/court-services/bench-cards/

The Supreme Court *of* Ohio
Judicial College