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EDITOR'S MESSAGE

The omnibus trust and estate bill (pending HB 464) will soon become heftier. The OSBA Council of Delegates at its delayed spring 2020 meeting (probably on July 24) will have on its agenda seven more proposals from the EPTPL Section, all of which if approved by the Council are expected to be added to the bill before its enactment. Those seven proposals: clarifying claims presentment procedure, correcting disinterment statutes, simplifying procedure on trust termination, facilitating electronic wills, authorizing postnuptial agreements, adding TOD for tangible personalty and correcting the perpetuities statutes. See this and prior issues of PLJO for citations to explanations of them.

For lighter reading, consider the history of PLJO and its predecessors as recorded in the initial issue of PLJO of Sept/Oct 1989 (over 30 years ago!). That issue has now also been placed on the EPTPL Section portion of the OSBA website available to all Section members.

Coverage of *Probate Law Journal of Ohio* materials begins in Westlaw database OHPRLJ with volume 11 (Sept./Oct. 2000).

ADVENTURES OF AN ONLINE NOTARY: ONE LAWYER'S QUEST FOR MASTERY IN THE EARLY DAYS OF THE COVID-19 PANDEMIC

By Elizabeth E. W. Weinewuth, Esq.

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"Everything you possess of skill, and wealth, and handicraft, wasn't it first merely a thought and a quest?"

—Rumi Jalalu'l-Din

When the Notary Public Modernization Act (S.B. 263)(the "Act") and its online notarization provisions became effective in March 2019, Ohioans were blissfully unaware of the devastating pandemic that would sweep the globe just one year later. When, in September 2019, Ohio's Secretary of State enacted regulations to implement the Act, he could not have known that just six months later Ohio's government would order all Ohioans to stay at home, to cease all non-essential business operations, and to maintain "social distancing of at least six feet from any other person."[1] Indeed, when most attorneys reviewed the process for becoming an Ohio online notary and performing online notarizations[2] in pre-pandemic 2020, the general response was a collective shrug and a "that seems like more trouble than it's worth."

How quickly things changed. As lawyers and clients alike hunkered down in makeshift home offices in March 2020, the Act now seemed a prescient piece of legislation poised to assist lawyers in keeping the business of client service rolling in these challenging times. But, practically speaking, how did it work? How quickly could one become trained and commissioned as an online notary? Would a lawyer be able to provide quick and easy notary services to clients and colleagues in the safety of their homes, just as she did as a traditional notary? This lawyer decided to find out for herself.

BECOMING AN ONLINE NOTARY

As epidemiologists confirmed in mid-March 2020 that the deadly COVID-19 virus could be transmitted before symptoms even appeared, it became clear that in-person meetings were going to be dangerous and discouraged for the foreseeable future. But clients would still need to execute powers of attorney and deeds. Colleagues would still need to swear affidavits in support of motions in litigation. Having knowledge of the Act and looking for some way to help in a chaotic time, I set out to become an online notary as quickly as possible.

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STEP 1: THE TRAINING COURSE

The first challenge in my quest: the training course. To find the training course, I simply googled "become an Ohio online notary" and found my way to the Ohio Notary Services, LLC website at becomeanohionotary.com. According to the website, Online Notary Services, LLC[3] it is the "ONLY resource in Ohio certified to provide education and testing for the new designation of 'Online Notary Public.' " It seemed I had come to the right place. A quick $250 on my credit card later and I had access to a 2-hour training video that explained the requirements and process of online notarization. The first portion of the video is a basic recitation of the statute. The second portion is a conversation between the instructor from the first section and a vendor from a technology company that provides software like that needed to perform online notarizations.

TIP: TAKE NOTES! This training course is not one you can listen to in the background while you do other work. The test that follows the course is as difficult as some portions of the bar exam, is timed, and if you do not receive an 80% or better on the first try you must wait 30 days to re-take it. There is a note-taking screen that appears next to the video and remains accessible to you during the test. Use it. If you navigate away from the test screen during the test a window pops up that tells you your navigation is being monitored (not that I tried. . .).

STEP 2: THE TEST

Immediately following completion of the 2-hour training course, I was prompted to begin a 30-question test on the material and given 90 minutes to complete the test. Not since taking the Ohio bar exam have I been so nervous. The questions were not designed for easy passage. There were true or false questions with double negatives and plenty of ambiguity. As I did when I was a law student, I made educated guesses and hoped for the best. A short time later I entered my final answer and received an exam score of 96%. Sweet relief! Onward to the next challenge.

STEP 3: THE APPLICATION

The application to become authorized as an online notary is available on the Ohio Secretary of State's website at https://www.ohiosos.gov/notary/. The cost is $20, and you must attach your certificate of completion of the Ohio Notary Services course and exam results to the application. No criminal background check is required for attorneys.

The most difficult question on the application is the request for a description of the software you will be using to perform online notarizations. There is no clear guidance regarding what information the Secretary of State is looking for in response to this question and the training course did not address this. Did they mean would I be using Skype, FaceTime, or Zoom? Something else? There was no list available regarding approved vendors or software, or even recommendations.

IMPORTANT SIDE NOTE: A THIRD PARTY-VENDOR IS REQUIRED. HERE'S WHY:

When one first hears about online notarizations, they usually understand that audio-video technology will be required to allow the notary to see and hear the person whose signature is being notarized. There are many platforms for this type of video conferencing that we are all becoming familiar with these days for both business and personal use. But online notarization requires something else.

R.C. 147.60 et seq. and O.A.C. 111:6-1-05 require two forms of third-party identity verification in addition to the notary seeing the person on their audio-video screen and seeing their driver's license presented to them through that medium. They are as follows:

Identity Proofing—R.C. 147.60(G)[4]

Signers must enter their social security number and date of birth into the software system, which then generates 5 questions for them to answer within 2 minutes. The notary does not see or record this information. The questions draw on "personal information from public and proprietary data sources" and can be difficult to answer. For example: [w]hich of the following streets have you lived on?

(a) Cherry Ave.

(b) Whiteside Ct.

(c) East Fifth St.

(d) Hopple St.

(e) None of these

The information goes back at least 30 years; not everyone remembers the name of the street of the apartment where they lived during college. If the signer fails the first time they get a new set of questions, but if they fail a second time they cannot try again for 48 hours. In addition to these hurdles, some signers are wary of entering this information into a computer program at all and uncomfortable with the process. It goes far beyond what is required for traditional in-person notarization.

Credential Analysis— R.C. 147.60(B)[5]

Once the signer passes the "20-questions" hurdle (ok, there are only 5), they must then pass a photography test. The software system asks them to enter their cell phone number, and texts them a link which guides them through the process of photographing the front and back of their drivers' license. The system then uploads that data and cross checks it with public records to confirm that it is a valid, unexpired, government-issued document. For most people, it takes more than one try to get photographs of their identification that is just right, with no glare or blurry images, so that the software will accept it. Again, this verification of the validity of the identification provided far exceeds that of in-person notarization.

◆ **Note:** Until the week before the writing of this article, the SIGNiX system required an additional step. The signer then had to take a "selfie" of themselves and the software made a determination whether the signer's "selfie" looked enough like the photograph on their driver's license to proceed with the notarization. This step was not required by Ohio's statute or regulations and was a source of extreme frustration, particularly for those whose faces and haircuts do not look the same after a month of quarantine as they do in their drivers' license photograph. SIGNiX has now eliminated this step from its program.

Having come to understand that I was going to need a third-party vendor to perform online notarizations, I was stymied. This was a hurdle I had not anticipated. Thanks to my position at a large law firm, I did what any diligent lawyer at a large law firm would do: I called my IT department. As it happened, our innovation and technology team had had their eye on implementing online notarization (albeit on the back burner) since September 2019. They had vetted several vendors, and recently signed a contract with a company called SIGNiX.

Someone who had previously been authorized as an online notary with the Secretary of State also planning to use SIGNiX informed me I could simply insert the word "SIGNiX" into the application field, which I promptly did and submitted it online. My application was approved by the Secretary of State within 24 hours, via email, and my designation on the Secretary of State's website directory of all notaries in Ohio immediately reflected that I was authorized as an online notary.[6]

PERFORMING ONLINE NOTARIZATIONS

After a brief review of the SIGNiX system instructions and obtaining my login credentials, I was ready to roll. Using a colleague as test subject, I commenced my first online notarization. The first time took over an hour as we worked through technological glitches together. But it worked! The finished product is a.pdf document that contains two electronic signatures (mine and the signer's) and an image of my notarial seal (an image that I uploaded after taking a photograph of my traditional notary seal).[7]

The process—start-to-finish—of an online notarization (when it works perfectly) is as follows:

1. The document to be notarized is sent to the online notary and modified to comply with the online notary statute.

- The document should be in word format, if possible, or someone will need to be savvy with the use of a PDF typewriter to ensure that the document conforms to the statutory requirements for the notarial certificate.
- As discussed in prior articles,[8] it is recommended that the notarial certificate state clearly whether it is a jurat certificate or acknowledgment certificate and whether an oath was administered.
- More importantly however, R.C. 147.62(A)(6) and Ohio Admin. Code § 111:6-1-04 require that the notarial certificate for an online notarization state "this certificate pertains to an electronic notarial act performed with the principal appearing online using audio-video communication." Because online notarization is still relatively new, I also include a reference to R.C. 147.60 et. seq. in my certificates to alert unfamiliar courts or other recipients of the notarized documents of the statutory authority.
- Once the document is in the proper form it must be saved as a.pdf that is under 10 MB and placed in a location that is easily accessible from a browser.

2. The document to be notarized is loaded into the SIGNiX (or other vendor) system by the online notary.

- A series of administrative tasks is required to set up the transaction such as entering the signer's name, email address, uploading the document to be notarized, and marking where on the document the document is to be signed.

3. Once the document to be notarized is prepared and the transaction created in the SIGNiX system, the online notary initiates an email to the signer that invites him or her to the transaction.

4. The online notary then initiates an invitation to a Zoom meeting (through the SIGNiX system) to be sent to the signer via email.

5. When both the signer and the notary are ready (and this can be scheduled for a later time or started immediately), they both join the Zoom meeting. The Zoom meeting is automatically recorded and the recording must continue without interruption throughout the entire transaction. (I warn my signers about this in advance so that they know any swearing—of the non-notarial kind—will be preserved for the record; in the early days of technological hurdles swearing was quite prevalent.)

6. Once the notary and the signer are both on the Zoom meeting and the signer has successfully completed the identity proofing questions and credential analysis process, they receive a notification through the SIGNiX system that takes them to an image of the document to be notarized. At this time, the notary asks the signer to share their screen with the notary on the Zoom meeting so the notary can see the document that the signer is reviewing.

7. The notary then administers the oath (if notarizing a jurat) and the signer clicks "sign" next to their pre-placed signature.

8. The SIGNiX system gives the notary access to the photograph of the signer's driver's license and asks the notary to confirm that this is the person who they are viewing on the Zoom meeting.

9. Once identity of the signer is confirmed, the notary views the document to be notarized and applies her signature and notary seal to the document in the SIGNiX system. The Zoom meeting concludes and the process is complete.

10. The notary then saves copies of the document, the Zoom recording, and updates her notary journal, which is to be maintained for five years and then delivered to the Ohio Secretary of State.

Over the next few weeks, I performed seven online notarizations for my colleagues and clients. Some took several tries and several hours each. Some took as little as 15 minutes. Technological hurdles we experienced included:

- Signer's internet speed was too slow;
- Signer's company's virtual private network (VPN) did not allow screen sharing during a recorded Zoom call (workaround was to use private email address and have them disconnect from their VPN temporarily);
- Signer was told there was insufficient information about them to generate the identity-proofing questions (isolated glitch, but no fix found);
- Signer's identification and "selfie" were deemed not to match (this has been remedied, as noted above).

THE PROS

- This process allows online notaries to provide notarization services to those who do not wish to have any personal contact or proximity with others during a time when it is extremely dangerous to do so—particularly for those in high-risk groups.
- An Ohio online notary can notarize a document for a signer who is outside of Ohio, as long as the notary herself is physically present in Ohio. This expands the usefulness of this service for those with witnesses or clients in other

parts of the country and in states that may not have laws or orders governing online notarizations.

- The online notarization process we have in place in Ohio was enacted as law before this pandemic began. Other states have issued executive orders to allow for some form of online notarization during the pandemic state-of-emergency, but whether documents notarized under these orders will be recognized and accepted remains to be seen. While cumbersome, the process we have in place is the law in Ohio and documents notarized in compliance with these statutes must be accepted.

THE CONS

- The people who are most in need of no-contact notarization services are often those who are elderly or uncomfortable with the use of technology. This process requires a computer with a webcam, a smartphone with a camera, a basic knowledge of how to navigate unfamiliar computer programs, and a good deal of patience. It requires an unexpired drivers' license and a good memory of your past addresses. This is not likely to be a workable process for most elderly people who live alone or in nursing facilities.

- The cost of the third-party vendor needed to perform online notarizations and the limitation on charges for the service make it a loss-leader for the online notary. A SIGNiX license for one online notary currently costs $250 per year and each notarization costs an additional $10 per transaction. The statute limits online notaries to a $25 charge for each notarial act. When you add the $250 training course and $20 application fee, an online notary is out-of-pocket at least $520 before he or she can perform their first online notarization (to say nothing of the hours spent in training, vetting other vendors, and on technological hiccups). It would take at least 35 online notarizations per year at $25 each to recoup those costs. While some lawyers will embark on the same quest as the author for the sake of client service—or outsource it to paralegals or administrative staff—because the process is so cumbersome, more are likely to soldier on with masks and gloves providing "drive-thru" notarization services for their clients and colleagues.

CONCLUSION

While Ohio is fortunate to have a statutory process for performing online notarizations during this unprecedented time of social distancing, the current process is too cumbersome to make it accessible and useful for most Ohioans. It remains to be seen for how long the need for no-contact notarization will be pressing, and how quickly both notaries and signers will become comfortable with the processes required by our current statute. But we are all doing our best to learn, to adapt, and to rise to the challenges of this post-pandemic world—for both our colleagues and our clients. Godspeed on your quests, fellow travelers!

ENDNOTES:

[1]Director's Stay at Home Order dated March 22, 2020.

[2]*See* Forbes, Online Notaries and Beyond: An Update on Ohio's Notary Public Modernization Act, 29 PLJO 52, 29 No. 3 Ohio Prob. L.J. NL 5 (Jan/Feb 2019).

[3]According to the website, "Ohio Notary Services is a partnership of the Akron, Cincinnati, Cleveland, Dayton, Ohio State and Toledo bar associations, founded in 2019. This unique partnership harnesses 120+ years of notary public education and testing experience."

[4]" 'Identity proofing' means a process or service operating according to standards adopted by the secretary of state under section 147.62 of the Revised Code through which a third person affirms the identity of a natural person through the review of personal information from public and proprietary data sources." R.C. 147.60(G), effective Sept. 20, 2019.

[5]" 'Credential analysis' means a process or service operating according to standards adopted by the secretary of state under section 147.62 of the Revised Code through which a third person affirms the validity of a government-issued identification credential through review of public and proprietary data sources." R.C. 147.60(B), effective Sept. 20, 2019.

[6]At that time there were only 8 online notaries in all of Hamilton County. As of the date of this writing there are 66.

[7]The definition of an "electronic seal" is not particularly clear R.C. 147.60(E); none is provided by the Secretary of State upon one's authorization as an online notary.

[8]Weinewuth, Update on Notarial Certificate Requirements Following Notary Modernization Act: Statutory Revision Forthcoming, 30 PLJO 76, 30 No. 3 Ohio Prob. L.J. NL 2 (Jan/Feb 2020); Weinewuth, Ohio Notaries Take Note: Your Notarial Certificates Might Not Pass Muster Under the 2019 Notary Modernization Act, 30 PLJO 33, 30 No. 2 Ohio Prob. L.J. NL 2 (Nov/Dec 2019).

EXECUTING ESTATE PLANS DURING THE LOCKDOWN

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For many reasons, practical and otherwise, I have always preferred to be physically present when my clients execute their estate plans:

- The client may have last-minute questions for me.
- The client may need help with a beneficiary form that the client could not get to me for review ahead of time.
- The client normally needs help plodding his or her way through all the boxes on the advance directive forms.
- The client may have a last-minute change.
- I can serve as a witness.
- I can most easily observe the client's demeanor.
- I can satisfy myself one more time that the client's wishes are adequately represented in the legal documents.
- My presence conveys a sense of completing the service for which I was engaged and the solemnity of the execution.

The lockdown has certainly complicated my ability to accomplish many of these objectives. Indeed, even had the Executive Committee of the Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association been successful in causing the emergency enactment of "electronic witnessing" provisions, I would have sensed a loss at only being able to be present virtually during execution.

Several times during the lockdown I have stood, masked and gloved, in the doorway or on the attached deck of a client who was clothed with the same protection, separated by a storm door. Constantly reminding the client not to touch his or her face, we have passed one signature page at time on a clipboard through to each other. Because we can drive together, my wife and I have served as witnesses.

On one occasion, the client met us in a parking lot and we used the same technique through car windows that were opened a slit.

I do have one client who lives in a multi-unit apartment building and who is currently reviewing drafts. The tentative plan for her would be to meet me in the building lobby so that I could pass signature pages through the security door which in this case is fortunately glass.

I have not had the need to visit a nursing home or assisted living facility during the lockdown, but can only imagine the added difficulty if that were necessary particularly if the caregivers were not permitted to witness documents and one had to rely on other residents to help. But even if the caregivers were permitted to witness documents, I imagine that I would have to walk them through it step by step over whatever form of communication was available.

Imagination is unlimited in complicating the hypothetical case. If there was absolutely no way, for instance, to have two witnesses available for a will execution, perhaps one could create a dispositive estate plan consisting only of a revocable trust (which as no witness requirements) and various assignments and beneficiary forms. If any documents, such as a deed, required a notary, the services of a remote notary would have to be engaged. A trust might be more than what the client would want or need under normal circumstances, but these are exceptional times.

Similarly, bear in mind that a client who would want to execute a transfer-on-death affidavit under normal circumstances should perhaps be discouraged since one of the requirements (under R.C. 5302.22(F)) is that the affidavit be recorded during the client's life. I have experienced a delay of five weeks to get a document recorded. Perhaps the client's objective can be achieved with a deed to the trustee of a revocable trust, which is valid between the parties without recording it during life. Again, this might be more complicated than what the client would want or need under normal circumstances, but these are exceptional times.

Finally, if remote witnessing of a will was positively the only way to have an estate plan executed, one might be desperate enough to do it that way, even though it is not sanctioned legally. It would be a priority, then, to re-execute the plan once the lockdown is lifted. But at least if the client died before the lockdown is lifted, one would have an argument for the validity of the plan. The argument would be difficult because the execution would not have even complied with the "harmless error" statute, R.C. 2107.24 (by reason of division (A)(3)), but it might be better than nothing. After all, the first electronic will was probated without statutory authority.[1]

ENDNOTES:

[1] *In re Estate of Castro*, 2013 WL 12411558 (Ohio C.P. 2013).

WHO CARES ABOUT BEING SECURE? ESTATE PLANNING WITH RETIREMENT PLAN ASSETS IN A RAPIDLY CHANGING LEGAL ENVIRONMENT

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Both prior to and during the Coronavirus crisis, Congress and the Treasury Department have made several significant changes to retirement plan distribution systems. These changes should cause every estate planner to reevaluate how to treat retirement plan assets when planning for her or his clients with significant retirement plan assets.

THREE MAJOR CHANGES SINCE NOVEMBER 2019

The three major changes to retirement plan distribution law since November 2019 are, in descending order of importance:

1. The Setting Every Community Up for Retirement Enhancement Act (the "SECURE" Act) was signed into law on December 20, 2019 as part of the massive congressional budget bill (spending over $1.7 trillion). It was generally effective for our purposes starting on January 1, 2020. The SECURE Act radically alters roughly 30 years of retirement plan distribution law, potentially reducing the long-term value of retirement plan assets held at the death of an account owner ("Owner") by generally requiring these retirement plan assets be distributed within about 10 years of the death of the Owner.

2. The Coronavirus Aid, Relief, and Economic Security Act (the "CARES" Act), signed into law on March 27, 2020, is another massive bill in both spending (at least $2.2 trillion) and page count (880 pages), which "suspends" required distribution from most retirement plans for 2020, and provides a series of tax-favored rules for "Coronavirus related distributions."

3. In November 2019, the IRS published updated life expectancy tables for use in determining required distributions in proposed regulations generally expected to be effective starting January 1, 2021. These tables would replace the tables in use since 2003. The proposed regulations provide a modest increase of life expectancy, in recognition of the fact that people are living, on average, roughly two years longer than they did in 2003.

These new changes, massive as they are, layer on top of the existing laws and tools instead of supplanting them. Accordingly, a thorough understanding of pre-existing laws and regulations remains essential.

This article is not intended to be an exhaustive summary or analysis of the new rules. Rather, it is intended to provide practical guidance on how to engage in estate planning moving forward for clients with significant retirement plan assets.[1] The article uses the terms "Owner" and "client" interchangeably, while the pertinent IRS primary sources generally use the terms "employee" or "participant."

THE SECURE ACT SUMMARIZED WITH A PRACTICAL EYE

For more than 30 years, owners of retirement plan assets (401(k)s, 403(b)s, IRAs, Roth IRAs, SEPs, and the like) have planned their beneficiary designations around the basic premise that a "stretch" arrangement served to increase the after-tax value of the Owner's retirement plan assets as those assets were distributed to the named beneficiary(ies) after the Owner's death. For example, a 45-year-old daughter who inherited her mother's IRA could, under prior law, take distributions over the 39 years following her mother's death. Likewise, a four-year-old grandchild inheriting her grandmother's IRA could, under prior law, take distributions over the 79 years following her grandmother's death. The 39 years and 79 years respectively are the designated beneficiaries' remaining life expectancies. Appropriately drafted and administered trusts could stand in as individual beneficiaries, using the same lengthy life expectancies. These opportunities could leave large portions of retirement plan assets in tax-deferred (or tax-free, in the case of Roth IRAs or Roth 401(k) accounts) status for decades after the Owner's death, allowing those assets to remain invested and grow tax-deferred or tax-free—swelling the real economic value of those assets over the lifetime of the designated beneficiary.

However, the SECURE Act changed all that. Beginning with deaths in 2020, the SECURE Act wipes away the "stretch" arrangements available under previous law for all but specified niche categories of beneficiaries, discussed in more detail below. In place of those "stretch" arrangements, the SECURE Act borrows from the pre-existing "Five Year Rule" concept and requires full distribution of retirement plan accounts within a new "Ten Year Rule."

Congress held open the possibility for "stretch" arrangements, largely parallel to prior law, only for specific categories of beneficiaries. The following new special categories of beneficiaries, termed "eligible designated beneficiaries" (EDBs), remain eligible for "stretch" arrangements, with some caveats and limitations discussed in more detail below:

1. A surviving spouse of the Owner
2. A "minor child" of the Owner
3. A "disabled" or "chronically ill" beneficiary
4. A beneficiary who is less than 10 years younger than the Owner

The changes to available distribution periods following the Owner's death effectively devalue every retirement plan account significantly, to the extent the account does not pass to EDBs. See Tables 1 and 2,[2] parallel to the cases described above, for an illustration of the tremendous economic effect on the interests of the beneficiaries.

Other significant changes enacted by the SECURE Act include:

1. Increasing the age at which the Owner must begin taking required distributions—the "required beginning date" (RBD)—from roughly age 70½ to roughly age 72. This is a nod to increases in life expectancy and later retirement ages.
2. Removing the maximum age for qualified contributions to traditional IRAs, previously set at roughly age 70½. This also is a nod to later retirement ages and the fact that contributions after age 70½ were previously permitted under employer-sponsored plans.

THE CARES ACT SUMMARIZED WITH A PRACTICAL EYE

The CARES Act offers a variety of temporary Coronavirus oriented relief provisions, including:

1. *Suspension of 2020 RMDs*. A one-year "suspension" of "required minimum distributions" (RMDs) for all of 2020, which is applicable to most types of retirement plans, as to both owners and beneficiaries following an Owner's death. This provision is covered in CARES Act Section 2203. A similar temporary waiver was used as to RMDs in 2009 as part of the Worker, Retiree, and Employer Recovery Act of 2008, so a variety of existing IRS guidance from 2009 is thought to apply here. Very generally, RMDs otherwise required for 2020 are suspended and need not occur at all; they are not simply deferred into 2021. For example, a client turning age 80 in 2020 with an IRA worth $2 million at the end of 2019, subject to the Uniform Lifetime Table for RMDs, would normally have a 2020 RMD of approximately $107,000 (divisor of 18.7). In 2020, with enactment of the CARES Act, that client's RMD is "suspended" to $0. Therefore, in 2021, the same client would continue with her "normal" RMD calculations. Interestingly, retirement plan distributions currently using a Five Year Rule payout get a one-year extension, totaling six years. Distributions under the new Ten Year Rule are unaffected.

2. *Clawback of Completed "Rollovers" Made in 2020*. Notably, on April 9, 2020, the IRS issued a Notice extending an available "rollover" period for some Owners who may have taken portions of their otherwise applicable RMDs for 2020 before or around the time the CARES Act was enacted. This relief would apply to the extent an Owner took part of his RMD on or after February 1, 2020 and does not otherwise require that distribution for spending needs. In that case, the "unnecessary" distributions can be rolled back into the applicable IRA or retirement plan. The same Notice offers similar relief to a surviving spouse, as to a spousal rollover. For details, see IRS Notice 2020-23.

3. *"Coronavirus-Related Distributions" (CRDs)*. CARES Act Section 2202 (which is not an amendment to any existing tax code provisions, so is only found in the Act itself) overrides many of the normal distribution rules that would either prohibit distributions altogether or provide for penalties on distributions. To qualify for CRD treatment, the Owner, the Owner's spouse, or the Owner's dependent, must be diagnosed with Coronavirus by a test, or the Owner must experience "adverse financial consequences as a result of a laundry list of economic factors, such as job loss, or "other factors as determined by the Secretary of the Treasury." As of the date this article was submitted for publication there was no guidance from the Treasury Department on implementation of the softer CRD eligibility tests. To qualify as a CRD, the distribution from an eligible retirement plan must be taken on or after January 1, 2020 and before December 31, 2020. Eligible retirement plans include most mainstream retirement vehicles, including IRAs, Roth IRAs, and most employer-sponsored plans. The aggregate amount eligible as a CRD is $100,000. The Owner who has taken CRDs can either contribute the distributed funds back into a retire-

ment plan within three years (from the date of distribution) or he or she can spread the resulting tax over three taxable years (2020 through 2022).

NEW IRS LIFE EXPECTANCY TABLES EFFECTIVE FOR 2021 AND LATER

In recognition that, on average, we are living longer, the IRS has issued new life expectancy tables used in determining RMDs for 2021 and later. IRS Proposed Reg. 1.401(a)(9)-9. All three of the tables used in calculating RMDs were modified modestly but discernibly, compared to the current tables in use since 2003. The tables are: (a) the Uniform Lifetime Table (used during the Owner's lifetime, for most situations); (b) the Joint and Last Survivor Table (used where the Owner is married and has a spouse more than 10 years younger); and the Single Life Table (used after the Owner's death, as to a beneficiary). Assuming the proposed regulations go into effect as currently written, the more favorable tables will be effective starting at the beginning of 2021.

WHAT HAS CHANGED OR NOT CHANGED UNDER THE NEW MODIFIED RULES

LAYERING OF NEW RULES OVER THE OLD RULES

Though a variety of things have changed about the retirement plan distribution system moving forward, for the most part all of these changes layer on top of the existing law, meaning that aspects of the prior law still apply, or could apply, in a variety of situations. For example, the "old" distribution rules and tables, allowing for "stretch" IRAs at the death of an Owner, will continue in effect for niche situations, and will continue to be applicable generally as to retirement plan assets for which the Owner is already deceased and the beneficiary(ies) are living and currently receiving distributions. This means that estate planning practitioners and financial planners engaged with ongoing retirement plan distribution cases will need to understand the old rules for as long as another 80 years or so, when the Single Life Table runs its course based on the life expectancy of a very young current beneficiary!

FIVE YEAR RULE

The old Five Year Rule, calling for total distribution of all retirement plan assets within about five years of the Owner's death, is left unchanged and applies, for the most part, when any non-individual (charity; probate estate of the decedent, creditor, non-qualifying trust, etc.) is a beneficiary of retirement plan assets. Under the Five Year Rule, distributions need not be made pro-rata, but must be completed by the end of the five year period that starts on January 1 of the year following the Owner's death.

TEN YEAR RULE

A newly minted concept by the SECURE Act, the Ten Year Rule is modeled after the existing Five Year Rule, and requires total distribution of all retirement plan assets within roughly 10 years following the Owner's death, or whenever the 10-year period begins (e.g., at the death of an EDB). Under the Ten Year Rule, distributions need not be made pro-rata, but must be completed by the end of the 10-year period that starts January 1 of the year following: (a) the Owner's death; or (b) the trigger date starting the Ten Year Rule (e.g., the death of an EDB).

QCDS WITH INCREMENTAL CHANGES

The Qualified Charitable Distribution (QCD) rules, allowing for direct distributions from the custodian of an IRA to a charitable organization (excluding private foundations and donor advised funds) of up to $100,000 per year, have only changed incrementally. Interestingly, QCDs are still available starting when the Owner reaches age 70½, though, under the new law, the RBD is not until age 72. In other words, the trigger age for QCDs is now decoupled from the RBD, whereas before the change in law the ages were roughly consistent with each other. In one small change to QCDs to avoid potential abuse relating to the decoupling of the ages, the SECURE Act cuts back the ability of an Owner over age 70½ to make contributions to an IRA and then quickly make a corresponding QCD.

DESIGNATED BENEFICIARIES

The IRS definition of a "designated beneficiary" (DB) remains unchanged. A DB is an individual, or a qualified See-Through Trust (see below) for the benefit of one or more individuals.

SEE-THROUGH TRUST RULES

The existing See-Through Trust Rules were not modified by the SECURE Act. Just as before, qualified Trusts can still be treated as designated beneficiaries for retirement plan distribution purposes if:

- The Trust is valid under state law
- The Trust becomes irrevocable upon the Owner's death (Owner of the retirement plan)
- The beneficiary(ies) under the Trust are identifiable and are all individuals
- Appropriate documentation is provided to the retirement plan administrator or custodian by October 31 of the year following the Owner's death

Just as before, See-Through Trusts have two different possible flavors/iterations: Conduit Trusts and Accumulation Trusts.

CONDUIT TRUST RULES

The Conduit Trust rules remain unchanged on their face. By definition, a Conduit Trust must pay all distributions taken from the retirement plan to the DB (an individual) immediately upon receipt. Though not formally named "conduit trusts," the IRS regulations provide that a Conduit Trust automatically qualifies as a See-Through Trust, without having to examine subsequent "downstream" beneficiaries. Reg. 1.401(a)(9)-5, A-7(c)(3), Example 2. In a very literal sense, these Trusts act as a "conduit" between the IRA and the beneficiary, transmitting any distributions from the IRA directly out to the beneficiary. However, the practical implications and beneficial usage of Conduit Trusts are markedly different under the new rules compared to the old, as discussed later in this article.

Some early commentary following the SECURE Act has suggested that it may be possible, following the death of the Owner, to "toggle" a particular Trust's status from a "Conduit Trust" to an Accumulation Trust, at a set date or upon a set event (e.g., toggling from a Conduit Trust arrangement into an Accumulation Trust when a minor child of the Owner reaches the age of majority). While it is certainly possible that the IRS could issue future guidance or regulations supportive of this option, it appears to this writer that, based on the current definition we have of a Conduit Trust, a Trust capable of toggling into an Accumulation Trust would, by its nature, fail to qualify as a Conduit Trust, because the Trust offers the distinct possibility on its terms that future retirement plan distributions would not be passed out directly to the beneficiary.

ACCUMULATION TRUST RULES

Likewise, the Accumulation Trust rules remain unchanged on their face. An Accumulation Trust is any Trust permitted to retain (accumulate) retirement plan asset distributions within the Trust, and is not required by the Trust terms to distribute the retirement plan distributions out to the beneficiary immediately. However, only a subset of Accumulation Trusts qualify as DBs for purposes of the retirement plan distribution rules. An Accumulation Trust qualifies as a See-Through Trust only if all of the countable beneficiaries are identifiable individuals under the terms of the applicable trust instrument. Reg. 1.401(a)(9)-5, A-7(c)(1). Any and all trust beneficiaries are considered beneficiaries of the retirement plan assets for purposes of applying these rules, *except* that a beneficiary who is a "mere potential successor" to the trust is disregarded. Unfortunately, there is still a fair amount of ambiguity in the law about exactly who or what constitutes a "mere potential successor" beneficiary, meaning that a trust intended to qualify as a See-Through Trust as an Accumulation Trust must either: (1) make sure that all potential beneficiaries of the Trust are individuals/DBs; or (2) accept that there may be potential controversy about whether the Trust qualifies as a See-Through Trust. Again, the practical implications and productive usage of Accumulation Trusts are markedly different under the new rules compared to the old.

PLANNING IMPLICATIONS FOR OWNERS WHO ARE CURRENTLY LIVING—ACTIONS TO TAKE WITH THEIR RETIREMENT PLAN ASSETS

Owners who are currently living and who own significant retirement plan assets should consider the following:

1. CARES Relief. Owners should consider whether any of the CARES Act tax relief might be helpful to their situation.

2. QCDs. Charitably inclined owners over age 70½ should consider whether or not to use QCDs to accomplish their lifetime charitable giving objectives from existing IRAs. The economic devaluation of most retirement plan assets starting at the Owner's death, under the SECURE Act, makes QCDs comparatively more valuable than they were under prior rules. Remember that QCDs offer truly tax-free distributions, avoiding both Federal and Ohio income taxes on "income" that would otherwise be subject to both Federal and Ohio income taxes.

3. Roth Conversions. Owners who believe they are currently in lower income tax brackets than are projected for future years or, alternatively, than are projected for their intended individual beneficiaries (if driven by legacy considerations rather than personal spending needs), should consider Roth conversions of their existing retirement plan assets. Likewise, Owners who are likely subject to Federal estate taxes

could use Roth conversions to "pre-pay" future income taxes otherwise incurred by their intended beneficiaries. Doing so would serve to reduce the Owner's taxable estate, lowering exposure to Federal estate tax. Given all of the current spending by the Federal Government in connection with the COVID-19 crisis, one might reasonably suggest that the prospects of higher future taxes are a very real possibility, including: (a) higher future income rates, (b) reduced Federal and state estate and/or inheritance tax exemption amounts, and (c) higher Federal and state estate tax rates. The biggest single economic impact of the SECURE Act on retirement planning is the broad imposition of a Ten Year Rule on retirement plan distributions, which may well cause income tax bracket run-up for future beneficiaries compared to the much longer distribution periods available under the old "stretch" rules. All of these factors could serve to make broader application of Roth conversions beneficial.

4. Plan for New Distribution Tables In 2021. Owners should plan for distributions under the new, somewhat more favorable, distribution tables described earlier in this article.

PLANNING IMPLICATIONS FOR OWNERS WHO ARE DECEASED/PLANS IN DISTRIBUTION STATUS

If the Owner died before the end of 2019, and the retirement plan assets are being distributed out under some form of "stretch" treatment to a designated beneficiary, then all of the old distribution rules still apply, <u>except</u>:

- Under the old rules, the applicable distribution period continued even after the death of the initial DB. For example, if a child survived the Owner, and subsequently died after having started distributions but while 30 years of life expectancy remained under the applicable life expectancy table, the subsequent beneficiary(ies) of the deceased child's "beneficiary account" could continue the same distribution pattern, taking the remaining distributions over 30 years.
- Under the new rules, at the death of the initial DB, the required distribution period "resets" to a 10-year rule, regardless of the age of the deceased initial beneficiary or the age or identity of the subsequent beneficiary(ies). It is possible that the IRS will issue future guidance to provide for more favorable results (e.g., allow for a longer distribution period if the subsequent beneficiary is an EDB), though such a result does not appear in the SECURE Act currently.

PLANNING IMPLICATIONS FOR OWNERS AS THEY CONSIDER NAMING BENEFICIARIES

The following discusses the choice of beneficiaries primarily from the standpoint of income tax minimization. However, at the risk of stating the obvious, most owners have additional, often overriding, wishes/considerations separate and apart from income tax result. Those overriding wishes/considerations must be examined when deciding on the Owner's beneficiary designation choices.

A HIERARCHY OF BENEFICIARIES

The new distribution rules establish the following hierarchy of potential retirement plan beneficiaries, when viewed strictly from an income tax perspective. From most tax-advantaged to least, the hierarchy of potential beneficiaries under the new rules is as follows:

1. Charities. Naming one or more charities was, under the old rules, and continues to be, under the new rules, a truly tax-free arrangement. Compared to the alternatives under the new distribution rules, with most beneficiaries subject to a Ten Year Rule, naming a charity as a tax-free beneficiary is an attractive alternative for Owners who are charitably inclined. Retirement plan assets (other than Roth accounts) should probably be the first source from which to satisfy any charitable dispositions. Given the tax-free nature of this arrangement, the applicable distribution period is not generally relevant, but would be based on the Five Year Rule. From a technical perspective, a charity qualifies as neither a DB nor an EDB.

2. Surviving Spouses. Naming a surviving spouse as beneficiary continues to offer many potent tax-advantages, for the most part, parallel to the old rules. The surviving spouse qualifies as both a DB and an EDB, and may opt to:

a. Complete a "spousal rollover" of the retirement plan account, treating the Owner's former account as the spouse's own account. For all purposes, under this option, the spouse becomes the new Owner. The spouse is the only potential beneficiary with this option. Subsequent required distributions will be made starting only when the spouse (new Owner) reaches age 72 and will be computed under the highly advantageous Uniform Lifetime Table.

b. Take distributions over the spouse's life expectancy. Compared to a spousal rollover, this option is generally only used when the spouse is under age 59½, requires current distributions for current spending needs, and would be subject to penalties on distributions if he or she pursued the spousal rollover. Under this option b, at the death of the spouse, the Ten Year Rule begins as to the subsequent beneficiary(ies). Until the death of the spouse, required distributions will be made under the Single Life Table, using the "stretch" rules.

◆ **NOTE:** A See-Through Trust for the sole lifetime benefit of the surviving spouse should achieve the same distribution result as option b, but because any Accumulation Trust will have (downstream) beneficiaries other than the surviving spouse, it appears, absent helpful future IRS guidance to the contrary, that only a Conduit Trust for the sole benefit of the surviving spouse will allow for "stretch" distributions over the life expectancy of the spouse. Again, absent helpful guidance from the IRS, all other Accumulation Trusts would qualify as DBs but fail to qualify as EDBs, and therefore would be subject to a Ten Year Rule.

3. Eligible Designated Beneficiaries <u>Other than</u> Spouses. For proper analysis, this newly minted tax-advantaged category of beneficiaries is sub-divided further, as discussed below, because each category of EDBs has different potential challenges.

a. "Minor" Child(ren) of the Owner: The Owner may name a minor child (or See-Through Trust for the benefit of a minor child) as a beneficiary. The minor must be a *child of the Owner* to qualify for this category of EDB (grandchildren, nephews, nieces, etc., do not qualify). If done successfully, the "minor" child will be treated as a

DB and an EDB, until the "minor" child has "reached majority," at which point the child no longer qualifies as an EDB, and the Ten Year Rule applies. All of this means that, if successful, distributions would be computed based on the life expectancy of the child, until the child reaches majority, and then "reset" to use a Ten Year Rule thereafter. However numerous challenges/uncertainties exist at present, absent further guidance from the IRS. Those challenges/ uncertainties include:

i. Who is a "minor" child? Incredibly, Congress borrowed from a little used provision under current law that relies on a combination of current federal regulation and state laws, and under which the possible outcomes of when a "minor" ceases to be a minor include: (a) when the child reaches age 18 (based on most states' laws); (b) when the child reaches age 21 (based on state law); (c) when the child ceases to be a student working to complete a "specified course of education," and no later than age 26 (based on a current, little used, IRS regulation that is itself ambiguous). A full discussion of this issue, albeit very interesting, is beyond the scope of this article.

ii. How does this exception work where there are multiple minor children, and/or if and when one of those minor children reaches the age of majority? This is entirely uncertain/unknown, particularly when one or more trusts for the benefit of minor children are named as the beneficiary(ies). Worse, we don't even have indirect precedents to work from on this question, because the concept of an EDB is entirely new and we don't yet know how the IRS will approach this question. Again, a full discussion of this issue is beyond the scope of this article.

iii. Even if the technical points are resolved, the absolute "best case" scenario using the minor child category of EDB is that required distributions will be computed based on the minor's life expectancy using a "stretch" until said minor reaches "majority," at which time the Ten Year Rule begins. That means the child (or trust for the child) will receive all retirement plan assets by not later than age 36 or so (age 26 plus 10 years). Query as to whether that result will be acceptable to most of our Owner/clients?

◆ **NOTE:** It may be that, until better guidance is offered by the IRS on the various outstanding questions, that the preferable course of action is to forego the possibility of using a "stretch" for the benefit of minor children, and instead plan to use the new normal Ten Year Rule as the distribution period. That approach would, at least for now, significantly cut down on complexity and uncertainty, and would allow the Owner to focus instead on how to deal with payment of the associated (now-accelerated) income tax liability on the distributions as they come out of the retirement plan.

b. Disabled or Chronically Ill Beneficiaries. The beneficiary's status as either disabled or chronically ill is determined as of the date of the Owner's death. Based on the SECURE Act text, if a beneficiary becomes disabled or chronically ill later, after the Owner's death, this special category will not apply. The term "disabled" is borrowed from existing Code Section 71(m)(7) which, as a practical matter, should roughly and imperfectly correspond to a beneficiary's entitlement to Social Security Disability Benefits. The term "chronically ill" is borrowed from Code Section 7702(B)(c)(2). If successfully employed, the beneficiary (or qualified See-Through Trust for the benefit of the beneficiary) is considered both a DB and an EDB, and the full IRS "stretch" rules apply, allowing for distributions over the DB's life expectancy. On the death of the DB, the Ten Year Rule kicks in for any subsequent beneficiary(ies). At least two special advantageous rules, not detailed here, are available to trusts for the benefit of disabled or chronically ill beneficiaries that are not available to any other category of beneficiaries. Both special rules make it substantially easier to qualify the applicable Trusts as EDBs. It is likely that specially crafted Accumulation Trusts, qualifying as See-Through Trusts, will be used in this context. Alternatively, if an intended beneficiary's status is not clear (the beneficiary may not be disabled or chronically ill), the Owner could opt to forego the possibility of using a "stretch" for the benefit of the beneficiary, and instead plan to use the Ten Year Rule as the applicable distribution period. For an early comprehensive look at connected considerations to planning for a beneficiary who is disabled or chronically ill, see "Security for Disabled and Chronically Ill Beneficiaries," by Nancy H. Webber, *Trusts & Estates Magazine*, April 2020, p. 40.

c. Beneficiaries Less Than 10-Years Younger than the Owner. The last category of eligible designated beneficiaries is "an individual . . . who is not more than 10 years younger than the [Owner]" and does not fall into another category of EDB. For niche situations, such as siblings, close friends, or unmarried life partners, this exception could work nicely to produce a tax-favored result. As with the spouse, a See-Through Trust for the lifetime benefit of the intended beneficiary should qualify for "stretch" treatment, but because any Accumulation Trust will almost certainly have (downstream) beneficiaries who are not EDBs, it appears, absent helpful future IRS guidance to the contrary, that only a Conduit Trust for the sole benefit of the intended beneficiary will allow for "stretch" distributions over the beneficiary's life expectancy. Accumulation Trusts could qualify as DBs but fail to qualify as EDBs, so would be subject to a Ten Year Rule.

4. Charitable Remainder Trusts. In a hybrid category that is difficult to place or quantify without all the details in place, some clients may wish to name charitable remainder trusts as the beneficiary of retirement plan assets. On the upside, clients with charitable inclinations might combine the income tax-advantaged characteristics of these trusts with the ability to mimic "stretch" distributions to DBs, when "stretch" treatment is not otherwise available. On the downside, this technique is probably only helpful for owners with significant charitable giving intentions, won't be available actuarially to younger beneficiaries, and offers less flexibility than other alternatives. A detailed discussion is beyond the scope of this article.

5. All Designated Beneficiaries Who are Neither Spouses nor Other Eligible Designated Beneficiaries. This is the category of beneficiaries that constitutes the new normal, as most beneficiaries will likely fall into this category. The category includes all individual beneficiaries (or See-Through Trusts for their benefit) who do <u>not</u> qualify under the SECURE Act provision for special treatment as an EDB (a spouse, a minor child of the Owner, a disabled individual, a chronically ill individual, or an individual not more than 10 years younger than the Owner). Typically, this category includes, but is not limited to, beneficiaries such as (non-minor) children of the owner, grand-

children, nephews, nieces, and friends more than 10 years younger than the owner. This category should cause the beneficiary(ies) to be treated as a DB, but not as an EDB, so the Ten Year Rule should apply. Notably, a trust for any individual in this category could include either type of See-Through Trust. An Accumulation Trust is somewhat easier to use here (compared to the prior rules or for most EDB situations), because the ages of the individual beneficiaries under the terms of the Accumulation Trust are not relevant to qualification for this type of Accumulation Trust. In other words, an Accumulation Trust used in this context should qualify as a See-Through Trust, so long as the "downstream" beneficiaries are limited to individuals, no matter the individuals' ages. The biggest planning challenge with this category of beneficiary is to plan effectively for the eventual distribution of retirement plan assets within the Ten Year Rule, which presents a significant departure from the rules in effect only a few months ago.

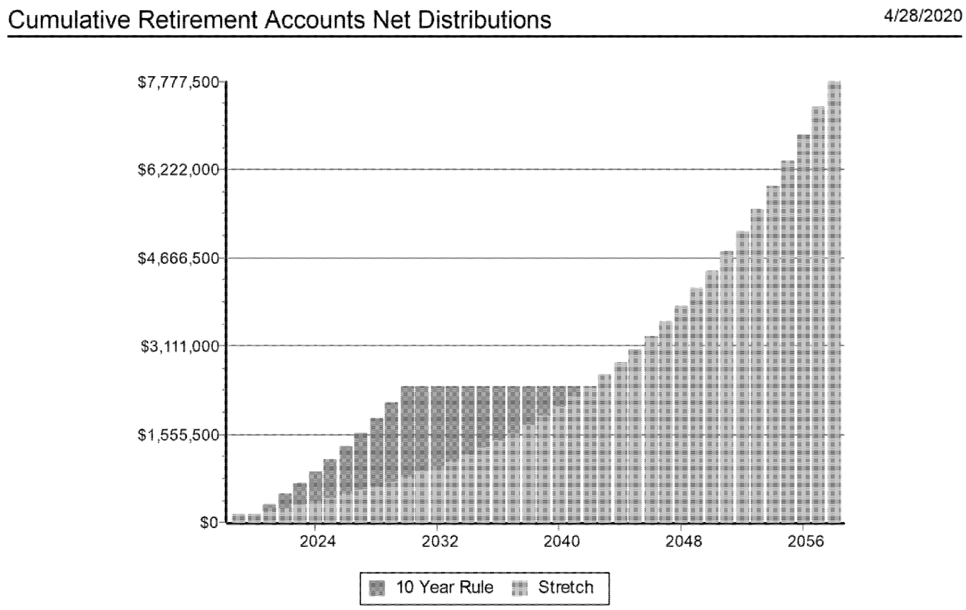
6. Hybrid Category/Situation—The Ghost Rule. If the Owner dies on or after January 1, 2020, and after his RBD (roughly age 72) then, regardless of the designated beneficiary(ies), that beneficiary(ies) may be able to take distributions over the remaining life expectancy of the Owner. Often described informally as the "Ghost Rule," this option could be helpful if: (a) the Ten Year Rule would otherwise apply and the Owner died between ages 72 and age 80 or so, yielding a remaining life expectancy under the Ghost Rule of more than 10 years; or (b) the Five Year Rule would otherwise apply and the Owner died between ages 72 and 86 or so, yielding a remaining life expectancy under the Ghost Rule of more than five years. Some ambiguity exists surrounding the Ghost Rule, because a literal reading of the current rules would apply the Ghost Rule only if a beneficiary of the retirement plan account does not qualify as a DB. Some commentators are confident that this highly technical issue will be solved by future IRS guidance, while other commentators suggest this is a real problem and pertinent trust documents should be written so that the trusts are deliberately disqualified as designated beneficiaries (for example, by failing to meet all of the qualifications for See-Through Trusts).

7. All Other Beneficiaries Not Previously Covered. For all other beneficiaries not included in the previous discussion, the least tax-favored of the beneficiaries are subject to distributions following the Five Year Rule. These beneficiaries generally include: (a) the Owner's probate estate; (b) creditors; (c) trusts which do not qualify as See-Through Trusts; and (d) organizations other than charities. As a planning point, the practical difference between this worst case scenario Five Year Rule, and the "normal" Ten Year Rule, is not nearly so different as the variance between the worst case scenario Five Year Rule and the old "stretch" rules, where distributions might be available over multiple decades. In other words, under the new rules, if the Owner's estate planning objectives are not compatible with a more tax-favored category of beneficiary, then the Owner and his advisors may be willing to forego any attempt to obtain a better tax result, opting instead for distributions under a Five Year Rule.

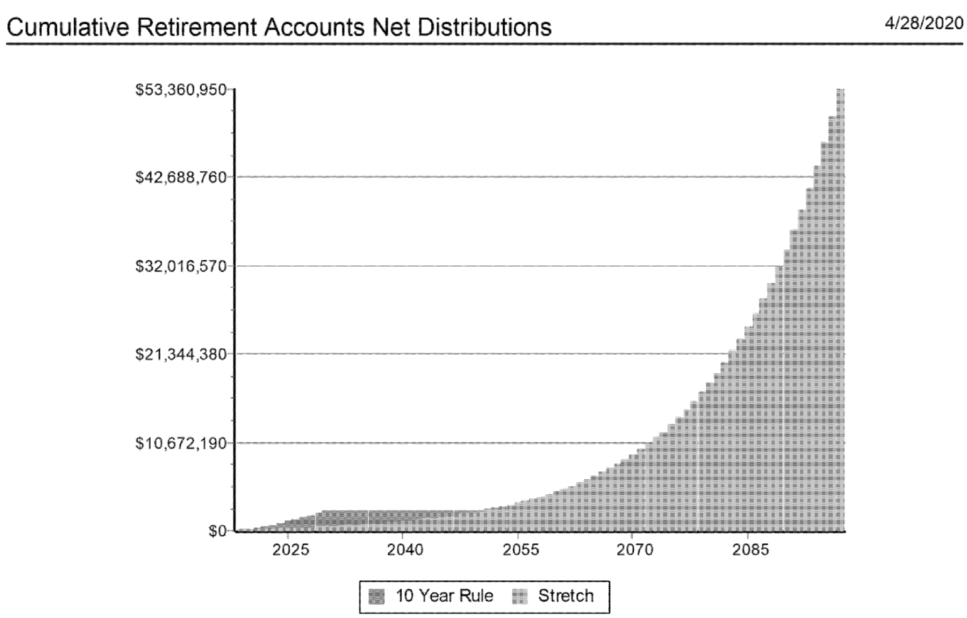
CONCLUSION

Congress and the Treasury Department have made important changes to retirement plan distribution systems. Every estate planner should reevaluate how to treat retirement plan assets when planning for her or his clients with significant retirement plan assets, particularly with clients who completed prior planning relying on the "stretch" distribution opportunities no longer available under the new rules.

Appendix Table 1: Cumulative Retirement Accounts Net Distributions (Child)



Appendix Table 2: Cumulative Retirement Accounts Net Distributions (Grandchild)



ENDNOTES:

[1]For far more detailed and nuanced discussion, see, for example, Natalie Choate's 648 page book, *Life and Death Planning for Retirement Benefits*, and her most recent 64 page analysis of the three developments discussed in this article, *Planning for Retirement Benefits: Recent Developments: CARES, SECURE, and New Life Expectancy Tables*, last updated prior to submission of this article on April 14, 2020, both of which are available directly or indirectly at: www.ataxplan.com.

[2]Cumulative Retirement Accounts Net Distributions Table 1 (Child) depicts distributions after the Owner's death to a 45-year-old child. Cumulative Retirement Accounts Net Distributions Table 2 (Grandchild) depicts distributions after the Owner's death to a 4-year-old grandchild. Both assume full use of the RMD system, comparing *cumulative* distributions from the IRA under the Ten Year Rule to a full "stretch" using the beneficiary's life expectancy. Both charts assume an IRA account starting value of $2 million and a straight annual investment return (within the IRA) of 7% per year.

WHERE THERE'S A "WILL," THERE'S A WAY: THE HARMLESS-ERROR RULE, INTERESTED-WITNESS RULE, AND IN RE ESTATE OF SHAFFER

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In re Estate of Shaffer highlights a latent ambiguity between two statutory provisions aimed at preserving the validity of a will despite improper execution. R.C. 2107.15 (the "Interested-Witness Rule") protects against the mistake that a witness to a will is also a beneficiary. R.C. 2107.24 (the "Harmless-Error Rule") allows a court to uphold a will's validity so long as the court finds it meets a lesser standard than the strict statutory requirements for making a will.

This article will review the statutory requirements to make a will, the Interested-Witness Rule, the Harmless-Error Rule, and the *Shaffer* case is important to the interplay between the Interested-Witness Rule and the Harmless-Error Rule.

HOW TO MAKE A WILL—R.C. 2107.03

With limited exceptions, wills must be in writing, signed at the end by the testator, and signed 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."[1] Historically, documents that did not meet those statutory criteria were not wills and were not effective to transfer a decedent's property when he or she passed away.

Like wind and rain on a hard stone, the General Assembly over time softened the hard edge of this rigid statute by passing laws that preserved a will's validity in circumstances where the testator did not satisfy the statute's strict requirements. The Interested-Witness Rule and the Harmless-Error Rule are two examples of statutes that ease the strict requirements to make a will.

THE INTERESTED-WITNESS RULE—R.C. 2107.15

Beneficiaries of wills sometimes sign as witnesses. When making his own will, a testator might reasonably rely on those closest to him to witness the will's signature and sign as witnesses themselves. Long ago, the trust that the testator placed in his witnesses might be the very thing that invalidates the document he intended to make his will.

Effective since 1976, the Interested-Witness Rule preserves the will's validity by voiding the gift "made to a person who is one of only two witnesses to a will."[2] Voiding the gift means the witness is no longer a beneficiary and is, therefore, "competent to testify to the execution of the will, as if the [gift] had not been made."[3]

If the witness is related to the testator, then the witness' gift is voided only to the extent it exceeds the gift the witness would have received if the testator had died without a will.

To illustrate, suppose Tom is not married and has two children, Aaron and Beth. Tom makes a will that leaves 1/3 to Aaron, 1/3 to Beth, and 1/3 to his friend Frank. If Frank is one of the two witnesses to Tom's will, the gift to him is voided (Frank would not have received a gift if Tom died without a will).

By contrast, suppose instead that Aaron (but not Beth or Frank) is one of the two witnesses to Tom's will, Aaron's gift (1/3 of the estate) is not voided because it is less than he would have received if Tom died without a will (in which case Aaron would have received 1/2 of the estate).

THE HARMLESS-ERROR RULE—R.C. 2107.24

The laws further relaxed when legislators realized would-be testators might mistakenly[4] prepare and sign their wills in a way that does not comply with Revised Code section 2107.03. To save wills that might otherwise fail for lack of statutory compliance, Ohio's General Assembly permitted a document to stand as a person's will so long as each of the following elements is satisfied by clear and convincing evidence: [5]

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 . . . in the conscious presence of two or more witnesses.[6]

One notable recent example is *In re Estate of Javier Castro*,[7] the 2013 Lorain County case where the decedent wrote his will on his brother's Samsung Galaxy tablet. In addition to being entirely electronic (which is the feature that garnered its fame), the will in Castro "lacked an attestation clause above the witnesses' signatures"[8] which led to its ultimate admission to probate under the Harmless-Error Rule instead of R.C. 2107.03.

THE RULES AND IN RE ESTATE OF SHAFFER

Standing on their own, the Interested-Witness Rule and the Harmless-Error Rule are clear. *In re Estate of Shaffer*, however, presents a set of facts where the ambiguity between the two becomes apparent.

When Joseph I. Shaffer passed away in 2015, he was widowed[9] but was survived by two sons, Mark Shaffer and Theodore (Terry) Shaffer. He also left behind a longtime friend, Juley Norman. Over time, Juley and Joe formed a close relationship, and Joe often referred to Juley as his "meaningful other."

In 1967, when he was a resident of Pennsylvania, Joe signed an estate plan that gave all his assets to his wife (the "1967 Will"). Since his wife predeceased him, the 1967 Will gave his assets, in equal shares and in trust, to his two sons.

One night in 2006, in his home and at the beginning of a health scare, Joe signed a notecard that purported to change the testamentary disposition of his assets (the "2006 Will"). Juley and her son Zachary Norman were the only witnesses of the act, though neither of them signed the 2006 Will. That same night, after Joe gave Zachary the 2006 Will for safekeeping, Juley and Zachary took Joe to the emergency room. Joe was released a couple days later.

The 2006 Will says, in its entirety:[10]

> Dec 22, 2006/My estate is not/completely settled/All of my Sleep Network/ Stock is to go to/Terry Shaffer./Juley Norman for/her care of me is to/receive 1/4 of my estate/ Terry is to be the/executor./This is my will./ /s/ Joseph I Shaffer

After his father Joe died, Terry Shaffer applied to probate the 1967 Will in Lucas County, Ohio. Terry was appointed fiduciary of Joe's estate when the named executor declined the nomination. Several months later, Zachary Norman applied to probate the 2006 Will in Lucas County. The probate court held an evidentiary hearing to resolve the matter.

In a decision later adopted by the court, the magistrate found the 2006 Will could not be admitted to probate because it did not comply with Ohio's statutory requirements for making a will. Further, the magistrate found the 2006 Will also could not be admitted to probate under the Harmless-Error Rule because it did not meet its requirements.

Though the 2006 Will was not admitted to probate, the probate court invalidated the gift to Juley because she was one of the two witnesses whose testimony was required to admit the 2006 Will under the Harmless Error Rule.[11] Recall the Interested-Witness Rule requires the invalidation of a gift to a person who, like Juley, is one of only two witnesses to a will. The Harmless-Error Rule, by contrast, does not address whether a gift to one of only two witnesses must be invalidated.

The Sixth District Court of Appeals reversed the decision[12] and found the 2006 Will could be admitted under the Harmless-Error Rule and that the gift to Juley need not be invalidated.[13] In its analysis, the Sixth District acknowledged the Harmless-Error Rule does not require that witnesses be "competent"; that is it does not bar witnesses from being beneficiaries of wills they witness.[14] The court also noted that the Harmless-Error Rule effectively superseded the Interested-Witness Rule[15] because its adoption "shift[ed] the focus from compliance with statutory formality to a factual determination of whether of the testator intended to create a will."[16]

Ultimately, the Sixth District held, "if the probate court finds the testator truly intended to make a will, despite the failure to comply with the requirements of R.C. 2107.03 or the fact that a witness was also named as a beneficiary under the will, the court must admit the document to probate as a will."[17]

The Supreme Court of Ohio accepted the appeal[18] and heard oral arguments on March 11, 2020. It has not yet issued a ruling.

WHAT'S NEXT?

The Harmless-Error/Interested-Witness-Rule Committee is eagerly awaiting the Supreme Court's decision in this case. As chair of the committee, I welcome your input.

ENDNOTES:

[1]R.C. 2107.03.

[2]R.C. 2107.15.

[3]R.C. 2107.15.

[4]*In re Estate of Shaffer*, 2019-Ohio-234, 2019 WL 337011, *3 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[5]R.C. 2107.24(A).

[6]R.C. 2107.24(A). As used in the statute, "conscious presence" means when the signing occurs "within the range of any of the witnesses' senses." It specifically excludes witnessing by technological means by those who are remote from the signer.

[7]*In re Estate of Castro*, 2013 WL 12411558 (Ohio C.P. 2013).

[8]Gee, Beyond Castro's Table Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute, 26 PLJO 143, 26 No. 4 Ohio Prob. L.J. NL 4 (March/April 2016).

[9]Joe's wife Lorraine Shaffer passed away in 1998, and he did not remarry.

[10]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 8, 2019 WL 337011, *2 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[11]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 31-32, 2019 WL 337011, *5 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[12]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 60, 2019 WL 337011, *10 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[13]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 45, 2019 WL 337011, *8 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[14]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 44, 2019 WL 337011, *8 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[15]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 44, 2019 WL 337011, *8 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[16]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 42, 2019 WL 337011, *8 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[17]*In re Estate of Shaffer*, 2019-Ohio-234, ¶ 44, 2019 WL 337011, *8 (Ohio Ct. App. 6th Dist. Lucas County 2019), appeal allowed, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

[18]*In re Estate of Shaffer*, 156 Ohio St. 3d 1442, 2019-Ohio-2496, 125 N.E.3d 913 (2019).

ASSET PROTECTION PLANNING BASICS: USING STATE AND FEDERAL EXEMPT PROPERTY LAWS AND EXEMPTION LIKE STRATEGIES (PART 1)

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(Note: The author of this article is a former U.S. bankruptcy trustee and presented this topic at the Seventh Annual Great Lakes Asset Protection Institute at the Ohio State Bar Association headquarters in Columbus, Ohio on Dec. 2, 2019).

SUMMARY OF THE ARTICLE

The estate and business-related planning that estate planning attorneys do can have an impact upon their clients if they ever have to file bankruptcy or encounter creditor problems. This planning can also have an impact upon the bankruptcy and creditor matters of the client's heirs or beneficiaries. Having some fundamental knowledge about bankruptcy and corresponding federal and state exemption property laws is important for the estate planning attorney. Compared to the myriad of tax laws, trust laws, accounting rules and probate laws that the estate planning attorney needs to be familiar with, this area of law is not overly complicated and is straightforward.

This Article is designed to enhance the estate planning attorney's issue spotting abilities in this area of law and is also designed to provide: an overview of the origins and uses of federal exemption property laws; a review of some of the basics of federal bankruptcy law; identify the most common State of Ohio exempt property laws contained in the Ohio Revised Code Section; provide an analysis of how to protect assets through the use of exemptions and review "exemption like" asset protection planning strategies that estate planning attorneys can put in place for their clients.

OVERVIEW OF FEDERAL BANKRUPTCY LAW, THE TYPES OF BANKRUPTCY AND A BRIEF HISTORY OF BAPCPA

The federal bankruptcy regulations and laws are contained in Title 11 of the United States Code also known as the United States Bankruptcy Code. There are nine chapters contained in Title 11 (currently Chapters 1, 3, 5, 7, 9, 11, 12,13 and 15). Examples of citations to the various chapters of the federal bankruptcy code are: 11 U.S.C.A. § 362 (the automatic bankruptcy stay provisions), 11 U.S.C.A. § 522 (federal bankruptcy exemptions) and 11 U.S.C.A. § 343 (examination of the debtor provisions).

The current bankruptcy law in effect is called the Bankruptcy Abuse Prevention And Consumer Protection Act ("BAPCPA"). It was enacted on April 20, 2005, signed into law by President George W. Bush and became effective October 17, 2005 ("the effective date"). It applies to all bankruptcy cases filed after the effective date. At the time of its enactment, it was the most significant change in U.S. bankruptcy laws since the late 1970s. BAPCPA has received some criticism for its increased burdens on debtors involving such matters as having to attend and pay for the costs of a credit counseling course (fee waivers are possible) prior to the discharge in bankruptcy and for the means testing requirements. The means testing requirements for Chapter 7 bankruptcy cases were put in place to prevent perceived abuses of the bankruptcy system and to also weed out those debtors that don't meet the qualifications for Chapter 7 bankruptcy based on income, expenses, debts and family size. If a debtor does not qualify under the means test for a Chapter 7 bankruptcy, then a Chapter 13 bankruptcy would be an alternative option. The four most common types of bankruptcy cases that can be filed are the following:

- **Chapter 7**—known as "straight" bankruptcy or a "liquidation" bankruptcy;
- **Chapter 11**—is a reorganization bankruptcy primarily for businesses;
- **Chapter 13**—is a "reorganization"

bankruptcy for individuals where a plan is submitted to pay all or a portion of a debtor's debts out of current income;

- **Chapter 12**—is a reorganization bankruptcy for farmers and fisherman.

Filing bankruptcy is primarily a federal law matter. However, in the case of an Ohio resident filing for bankruptcy, there is some interplay with state law, in particular, with the exemptions that are chosen by the debtor. The right to file the type of bankruptcy (such as for example, Chapter 7, Chapter 11 or Chapter 13) is provided by the specific chapter of Title 11 of the United States Bankruptcy code. This is typically and voluntarily chosen by the debtor after consultation with the debtor's bankruptcy attorney. All matters involving bankruptcy cases are handled in federal bankruptcy court. The Petition in Bankruptcy has numerous schedules which generally include the property, debts and proposed exemptions of the Debtor. Specifically, schedule A/B of the Petition contains a detailed listing of the debtor's property, assets, financial interests, inherited interests due to a death of someone (i.e. being the beneficiary of a living trust), retirement accounts, trust interests, rights and powers and insurance interests (see for example, items 21,23, 24, 25, 31 and 32 of **Schedule A/B).** A sample of a debtor's **Schedule A/B: Property (**aka Official Form 106 A/B) can be reviewed and/or printed off in a PDF format at: https://www.uscourts.gov/forms/individual-debtors/schedule-ab-property-individuals.

Schedule C of the Petition contains the Exemptions which a debtor would be requesting. A sample of a debtor's **Schedule C: The Property You Claim as Exempt** (aka Official Form 106 C) can be reviewed and/or printed off in a PDF format at: https://www.uscourts.gov/forms/individual-debtors/schedule-c-property-you-claim-exempt-individuals.

Because Ohio is an "opt out" state, on Item 1 of Schedule C, the box referring to 11 U.S.C.A. § 522 (b)(3) is to be checked.

THE FILING OF A BANKRUPTCY PETITION WITH THE FEDERAL BANKRUPTCY COURT—CHAPTER 7—WHAT HAPPENS

For purposes of this Article, the author has chosen to review the basics of a Chapter 7 bankruptcy which is also known as a liquidation bankruptcy. The person filing the bankruptcy petition is referred to as "the debtor." This type of bankruptcy filed by an individual debtor, will eliminate most of the general unsecured debts such as credit cards and medical bills of the debtor filing bankruptcy. A chapter 7 bankruptcy starts with the filing of a Voluntary Petition in Bankruptcy with the federal bankruptcy court. The filing of the Chapter 7 petition creates a bankruptcy estate consisting of, with a few exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case" (see 11 U.S.C.A. § 541). Property of the bankruptcy estate comes under the control of the bankruptcy trustee and is generally used to pay the debtor's prepetition creditors (if there are any assets available or which have equity). At the time of filing the bankruptcy petition there is also an automatic stay issued. The automatic stay is designed to stop all collection efforts of creditors and begin to provide the Debtor some relief from creditors actions and the debts of the creditors. With the use of the Debtor's statutory exemptions and exemption planning, the Debtor can also begin his/her fresh start if granted a discharge in bankruptcy. The public policy behind the use of exemptions for the bankrupt debtor and "the fresh start" has been well defined by Congress in passing bankruptcy laws and is also well documented in the case law dealing with exemptions and exemption planning. In *In re Jones*, 318 B.R. 841, 845 (Bankr. S.D. Ohio 2005) the bankruptcy court stated that "Congress determined that an honest debtor may exempt or keep some property from the claims of creditors so that the debtor can start anew after obtaining bankruptcy relief." Similarly, *In re Robinson*, 292 B.R. 599, 606-07 (Bankr. S.D. Ohio 2003) the bankruptcy court stated: "[t]wo purposes are served by allowing debtors to exempt property from their bankruptcy estate: (1) to give the debtors a so-called 'grub-stake' to begin their fresh start and (2) to act as a safety net, so that the debtor and his family are not completely impoverished due to creditor collection action or bankruptcy such that they become wards of the state." An excellent visual example of how exemption planning works in bankruptcy is shown on the illustration attached to this Article (see Appendix A: The Bankruptcy Estate—Illustration of Exemptions).

OHIO IS AN OPT OUT STATE IN REGARD TO EXEMPTIONS—WHAT DOES THAT MEAN? HOW ARE EXEMPTIONS EXERCISED?

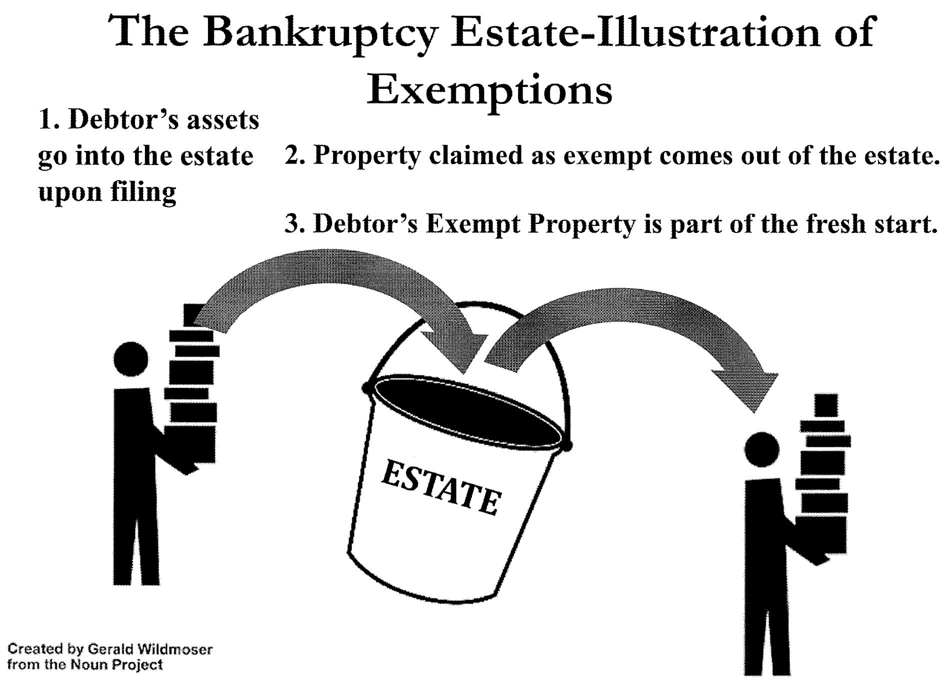
Under the U.S. Bankruptcy Code, states are given the option to "opt-out" of the federal bankruptcy exemptions under 11 U.S.C.A. § 522 and utilize their own state exemptions. In 1979, the State of Ohio chose to opt out and this is codified in R.C. 2329.662. Specifically, it states:

> **Section 2329.662—Federal exemption not authorized**
>
> Pursuant to the "Bankruptcy Reform Act of 1978," 92 Stat. 2549, 11 U.S.C. 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified in the "Bankruptcy Reform Act of 1978," 92 Stat. 2549, 11 U.S.C. 522(d).

Therefore, the exemptions in bankruptcy which an Ohio debtor will use are those contained in R.C. 2329.66(A) etc. and the other pertinent and applicable sections of the Ohio Revised Code. *In re Storer*, 58 F.3d 1125, 1127, Bankr. L. Rep. (CCH) P 76552, 1995 FED App. 0206P (6th Cir. 1995) was a critical case which upheld a challenge to the constitutionality of the State of Ohio being able to opt out of the federal exemptions and apply their own state exemptions in bankruptcy cases. However, there are certain prerequisites to utilizing the state of Ohio exemptions and these requirements revolve around residency and domicile. In order to be able to use the state of Ohio exemptions, a debtor must be continuously domiciled in the state of Ohio for 730 Days prior to filing his/her voluntary petition in Bankruptcy. The bankruptcy trustee or creditors have 30 days from the meeting of creditors or within 30 days from amendments to Schedule C, to object to the exemptions claimed.

As has been stated previously, the Debtor has to affirmatively choose and state his/her exemptions and put them on Schedule C. This part of the bankruptcy process is critical and is not to be taken lightly by the Debtor, in particular, with reference to what assets the Debtor is trying to keep for his/her fresh start after receiving their discharge from bankruptcy. Part 2 of this Article will highlight some of the specific assets and dollar amounts that can be exempted in bankruptcy (and state related creditor matters) and how the specific tools and strategies that an estate planning attorney recommends to a client can provide additional exempt protections for a debtor in bankruptcy (and state related creditor matters).

Appendix A: The Bankruptcy Estate—Illustration of Exemptions



ESTATE RECOVERY CASE UPENDS PROBATE INSOLVENCY PROCEDURES

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INTRODUCTION

Many insolvent estates involve Medicaid beneficiaries and potential estate recovery claims. R.C. 2117.25 clearly identifies the priorities between administrative expenses, funeral expenses, debts of last illness, IRS claims and, finally, Medicaid estate recovery claims. This statute has been undermined by a recent court decision.

PROBATE COURT DECISION

A Montgomery County Probate Court decision which was affirmed by the Second District Court of Appeals significantly changes the insolvency process and renders R.C. 2117.25 moot in some circumstances. The case of *Wiesenmayer v. Vaspory*, 2019-Ohio-1805, 135 N.E.3d 1237 (Ohio Ct. App. 2d Dist. Montgomery County 2019) is instructive. Margaret Edwards had been in and out of nursing homes over a period of years. She had gone from a nursing home back to her residence then back to a nursing home. While the Medicaid application was approved, her residence had not yet been sold. A second Medicaid application had been pending for some time and ultimately, she was approved; however, the house had not yet been sold. Prior to the house being sold, Ms. Edwards passed away and the nursing home was still owed approximately $50,000. After Ms. Edwards passed away, special counsel for the Attorney General's office filed a lien against the residence. The administrator for the estate proceeded to sell the residence, and prior to sale, the State's post-death lien was discovered.

LIEN

The State's strategy to file the post-mortem lien was an aggressive effort to improve the State's estate recovery position from the eighth position under R.C. 2117.25 to the first position. The administrator asked the Montgomery County Probate Court for a ruling regarding the lien as part of his land sale proceedings. The Montgomery County Probate Court found that the lien was valid and directed that the lien be paid out of the closing proceeds. The administrator, as appropriate, moved forward with the sale and attempted to then file the necessary appeal of the Magistrate's Report with the Probate Court. The Probate Court affirmed the Magistrate's Report and the matter was appealed to the Second Appellate District.

THE APPELLATE DECISION

The Second District Court of Appeals issued a decision with three separate opinions, the majority affirming the Probate Court decision. The majority opinion found that pursuant to R.C. 2127, that the lien was appropriate and should be treated as any other lien regardless of R.C. 2117.25. The concurring opinion found as a matter of policy, that the State should be paid back first and that the nursing home's claim, as a "debt of last illness" was secondary. The concurring opinion did not address policy issues as to the funeral home, the fiduciary fees or other priority claims. The dissenting opinion followed the logic of the Pro Senior's amicus filing, finding that it was not a valid lien as it was done post death and deferred to R.C. 2117.25. After the decision was issued, the Montgomery County Probate Court denied the request of the administrator for attorney's fees to appeal the decision to the Ohio Supreme Court.

ADMINISTRATIVE PROCESSES

As the State is now permitted to jump into the first position, the first question that counsel must consider is whether they should accept representation for an insolvent estate where there is an estate recovery. In Montgomery County, there would be no guarantee that the Court would provide for payment of the attorney's fees to open the estate and to process the sale of the real estate. In most of these circumstances, the primary asset would be the residence. If the State gets paid first, there could be no monies left for attorney's fees or administrative fees or even court costs. Particularly in the Second District, an attorney should likely obtain a court order at the outset authorizing fees and making the State's lien subservient. Further, for those who are involved in guardianship proceedings and similar factual circumstances, prior to the death of the Medicaid recipient, attorneys should request a Court order prioritizing attorney's fees, and filing that order as a lien against the real estate, to combat the potential actions by subsequent State filings.

DUE PROCESS DEFICIENCIES

The State liening process as implemented in the *Wiesenmayer* case highlights the deficiencies in these actions. There is no right to appeal nor any right to a hearing as to the State's liening process. There is no avenue to challenge the amount of the lien or the process implemented by the State. Based upon the Second District decision, the State does not even have to provide proof that it filed the lien against the correct person. If there were two Margaret Edwards, with two different social security numbers and one was in a nursing home for a week on Medicaid and the other was in a nursing home for 10 years, there is no process for the administrator of either estate to challenge the lien filed by the special counsel. While this author's experience with special counsel has been uniformly positive, and while confident that should such a mistake occur, that special counsel would revise their lien or withdraw their lien should they have a case of mistaken identity, there is no process to challenge such an inaccurate lien.

GUARDIANSHIP RECOMMENDATIONS

In circumstances where there is a guardian appointed and the real estate has yet to be sold, it is imperative that the real estate be sold prior to the ward's death. Waiting until after the ward has died creates vulnerability for all those who have served the ward, including the funeral director, attorneys, guardians as well as medical providers such as the nursing home in this case.

AGGRESSIVE LIENING PROCESSES

In Montgomery County and the Second District, attorneys for medical creditors as well as the guardian should request liens be granted by the Probate Court through the guardianship or by attorneys in fact to secure payment. These open-end liens would rectify the Second District decision and protect the sanctity of R.C. 2117.25.

CONCLUSION

The ramifications of this decision will likely continue to develop. Hopefully, another case will find its way through the courts and perhaps allow the Ohio Supreme Court to clarify the issue. In the short term, however, guardians, administrators and executors must be very careful as it is expected that special counsel throughout the state will now start filing aggressive post-mortem liens.

A case summary of *Wiesenmayer* is also found at 29 PLJO 237, 29 No. 6 Ohio Prob. L.J. NL 14 (July/Aug 2019).

MORE THAN THE MONEY: OHIO'S PROPOSED BUSINESS BENEFIT CORPORATION

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In the name of "doing well by doing good," some corporations are considering certification as a "B-corp" or legal status as a "Benefit Corporation." In 2018, Bloomberg reported that Danone SA, the North American unit of Dannon yogurt had been approved as a "B-Corp."[1] Emmanuel Faber, the Chief Executive Officer of Danone SA, was attributed by Bloomberg as saying that ". . . younger consumers want to make sure that companies are working for them and not just shareholders."[2] Statements like this indicate that, for some companies, a commitment to doing good may lead to more sales.

Ohio Senate Bill 21, which, if enacted, would amend Ohio Revised Code ("R.C.") Chapter 1701 to allow for the articles of an Ohio corporation to provide for one or more beneficial purposes among the purposes for which a corporation can be formed, has been passed by the Ohio Senate and is under review by the Ohio House Civil Justice Committee. At the time of the writing of this article, the Ohio Legislature had not met for over a month due to COVID-19 health precautions. The Ohio House is expected to meet in early May. During this time, Senate Bill 21 is waiting to be voted out of the Ohio House Civil Justice Committee.[3]

The proposed changes to R.C. Section 1701.03(A)(2) would permit the purposes for which a corporation is formed to include a beneficial purpose. The proposed statutory language defines "beneficial purpose" as "seeking to have a bona fide positive effect or to reduce one or more bona fide negative effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature for the benefit of persons, entities, communities, or interests other than shareholders in their capacity as shareholders."[4] Except as otherwise provided by the articles of the corporation, inclusion of a beneficial purpose in the corporation's stated purposes would not prevent such corporation from seeking any other purposes for which the corporation is formed, including operation of the corporation for pecuniary gain or profit and distribution of net earnings, and no particular purpose of a corporation would have priority over any other purpose of the corporation.[5] Moreover, a corporation that does not have a "beneficial purpose" would not be required to operate exclusively for profit or distribution of net earnings of the corporation in all instances.[6]

In order to be effective under the proposed statutory revisions, the articles must expressly provide for a beneficial purpose.[7] The proposed statutory language states that "[a] statement of purpose in the articles that includes any purpose or combination of purposes for which individuals lawfully may associate themselves, ***without*** the express provision of a beneficial purpose, does not establish a beneficial purpose as a purpose of the corporation."[8]

Although not contained in the version of the bill passed by the Ohio Senate, a protection for existing Ohio publicly traded corporations exists in proposed amendments to Senate Bill 21. Specifically, a corporation may not amend its articles to include a beneficial purpose if: (a) the corporation has issued and outstanding shares listed on a national securities exchange or regularly quoted in an over-the-counter market and (b) the initial articles of the corporation did not include a beneficial purpose.[9]

The proposed Ohio benefit corporation statute would allow a corporation to prioritize its purposes. Specifically, the proposed statutory changes to R.C. Chapter 1701 provide that the articles may set forth "any priority or other method for balancing the purposes for which the corporation is formed."[10]

Unless a corporation is already using the words "benefit" or "b-" prior to the effective date of the proposed amendments to R.C. Chapter 1701, only a benefit corporation satisfying the requirements of the proposed statute would be permitted to use the word "benefit" or "b-" in its name as prefix to "company," "co.," "corporation," "corp," "incorporated," or "inc."[11]

The proposed statutory language provides that at the annual shareholder meeting (or at any meeting in lieu thereof) a benefit corporation is required to provide to its shareholders "any written statement or report required by the articles, regulations, or a written agreement of the benefit corporation concerning the beneficial purposes of the benefit corporation and the activities of the benefit corporation toward those beneficial purposes and related provisions set forth in the corporation's articles."[12] If a close corporation agreement (under R.C. § 1701.591(C)(12)), dispenses with a shareholder meeting, such written statements or reports must be delivered to each shareholder of the benefit corporation on or before the last date that the annual shareholder meeting otherwise could have been held.[13] In addition, upon shareholder request, the benefit corporation would be required to send such written statements and reports to the requesting shareholder.[14] The failure to provide such written statements or reports exposes the benefit corporation, and potentially its offices to a monetary penalty of one hundred dollars plus 10 dollars per day per shareholder making the request for any such written statements or reports.[15]

An Ohio benefit corporation would not owe a duty to a beneficiary of the beneficial purpose of the benefit corporation (based solely on the status of that person being a beneficiary).[16] If a benefit corporation fails to seek, achieve, or comply with a beneficial purpose, the benefit corporation is not liable for damages.[17] However, the proposed statutory language does provide for equitable relief, including injunction and specific performance, if the benefit corporation fails to seek, achieve, or comply with its beneficial purpose. An action to require a benefit corporation to comply with a beneficial purpose set forth in its articles may be brought only by such benefit corporation or in a derivative action by any of the following: (1) a director of the benefit corporation; (2) persons who (in the aggregate) hold more than 25% of the outstanding voting shares, unless the articles and regulations provide for a lesser proportion; (3) persons who (in the aggregate) hold shares whose value is at least $2 million if the benefit corporation is listed on a national securities exchange or regularly quoted over-the-counter market; and (4) any other person that the corporation's articles or regulations may authorize to bring an action for equitable relief.[18]

The proposed revisions to R.C. Chapter 1701 also set forth some safeguards and standards for directors of benefit corporations. The proposed statutory language specifically states that a director does not have a duty to a person who is a beneficiary of a beneficial purpose of a benefit corporation based solely on the status of that person being a beneficiary.[19] In addition, a director may consider the beneficial purposes set forth in the corporation's articles when determining what is in the best interests of the corporation.[20] Furthermore, a director is required to consider any priority among the purposes provided in the corporation's articles and is required to consider any other method for balancing the purposes of the corporation that is set forth in such articles.[21]

Although enactment of benefit corporation legislation has been added to the list of everything else that COVID-19 has put on the sidelines, it is anticipated that when the Ohio legislative body is able to convene and attend to its routine business, the revisions to R.C. Chapter 1701 will, in some form, be enacted to provide for benefit corporations in Ohio.

ENDNOTES:

[1]Chasan, *Danone Looking to Make World Better One Cup of Yogurt at a Time* (April 12, 2018), *available at* https://www.bloomberg.com/news/articles/2018-04-12/danone-looking-to-make-world-better-one-cup-of-yogurt-at-a-time. B Lab, a nonprofit organization, issues B-Corp certification. In order to be certified by B Lab, companies must "create value for non-shareholding stakeholders, such as their employees, the local community, and the environment." (Suntae Kim, Matthew J. Karlesky, Christopher G. Myers & Todd Schifeling, *Why Companies are Becoming B Corporations*, Harv. Bus. Rev. (June 17, 2016), *available at* https://hbr.org/2016/06/why-companies-are-becoming-b-corporations.) The B-Corp certification involves, among other things, a company (1) completing a B Impact Assessment, requiring a minimum score of 80 across all impact areas; (2) creating, amending, or re-incorporating its organizational documents to reflect the B Corp Legal framework; and (3) undergoing a verification process and satisfying transparency requirements. (Certification, https://bcorporation.net/certification (last visited May 3, 2020).) There are over 2,500 Certified B-Corps in more than 50 countries. (About B Corps, https://bcorporation.net/faq-categories/about-b-corps (last visited May 3, 2020).)

[2]Chasan, *Danone Looking to Make World Better One Cup of Yogurt at a Time* (April 12, 2018).

[3]Senate Bill 21 was passed out of the Ohio House Civil Justice Committee on May 12, 2020.

[4]Am. S.B. No. 21, 133rd Gen. Assem., 2019 OH S.B. 21 (NS) [hereinafter Benefit Corporation Bill] (amending R.C. 1701.01 to R.C. 1701.01(GG)). All references herein to Am. S. B. No. 21, are to the version passed by the Ohio Senate in 2019.

[5]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.03 to add R.C. 1701.03(A)(2)).

[6]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.03 to add R.C. 1701.03(A)(3)).

[7]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.03 to add R.C. 1701.03(A)(4)).

[8]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (emphasis added).

[9]AM1580 to Am. S.B. No. 21.

[10]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.04 to add R.C. 1701.04(B)(3)).

[11]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.01 to add R.C. 1701.05(A)(2)).

[12]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.01 to add R.C. 1701.38(A)(3)).

[13]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.591(M)).

[14]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. § 1701.38(C)).

[15]R.C. 1701.94(A)(6) and R.C. 1701.94(B).

[16]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (enacting R.C. 1701.96(A))

[17]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (enacting R.C. 1701.96(B)).

[18]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (proposed R.C. 1701.96(C)).

[19]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.59 to add R.C. 1701.59(D)(3)).

[20]Benefit Corporation Bill, 2019 OH S.B. 21 (NS) (amending R.C. 1701.59(F)).

[21]Benefit Corporation Bill, 2019 OH S.B. 21 (NS).

DISINTERMENT VS RIGHT OF DISPOSITION STATUTE

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I. BACKGROUND

The Ohio Revised Code was amended to provide specific statutes assigning the right of disposition (burial or cremation) to certain persons. R.C. 2108.70 to 2108.90. A person may sign a written declaration naming persons who have the right of disposition for his/her body upon death. R.C. 2108.72. If there is no such declaration, then there is a detailed statutory order of priority assigning the right of disposition. R.C. 2108.80. The statute has many other details providing for rights and obligations with respect to dispositions. The situation below summarizes the problem related to the disinterment statute:

> Joe Smith is a widower age 74. He remarries to Gloria Swanson. Both have children from a prior marriage. Immediately after they get married, Joe signs a Declaration assigning rights of disposition to his son, Fred. He dies nine months later residing in Montgomery Co. Ohio. Fred arranges for a funeral and burial in Woodhill Cemetery in Greene Co. next to Joe's first wife. However, immediately after the funeral service but before burial, Gloria files an action in Mont. Co. Probate pursuant to R.C. 2108.82. She has purchased two lots for her and Joe in Calvary Cemetery in Montgomery Co. and wishes for him to be buried there. The Court decides in favor of Fred since he has been assigned the right of disposition pursuant to R.C. 2108.70(b). Fred has Joe buried in Woodhill Cemetery in Greene Co. The Court's decision is based on the factors set forth in R.C. 2108.82.
>
> One day after the burial, Gloria files an application with the cemetery (not Court) for disinterment. Fred responds by filing an application opposing this disinterment in the Greene Co. Probate Court. The Court, following R.C. 517.23(a) and the *Swing* case, holds that Frobose and other case law is controlling in its decision and that the provisions of the disposition statute are not applicable. The Court does not consider Joe's Declaration assignment to Fred and grants an order of disinterment according to the wishes of Gloria.

II. IN RE DISINTERMENT OF SWING

In *In re Disinterment of Swing*,[1] the decedent, John Swing Jr., died on 3/14/07 and was cremated with his cremains being delivered to his parents, John Swing Sr. and Jean Swing. Michael Swing III, is the decedent's son and was a minor at the time of his death and at the time of the present litigation. Decedent's son had requested on a few occasions from his grandparents that his father's cremains be delivered to him. They denied this request. Jean Swing passed away in September 2009 and the decedent's cremains were placed in her casket.

In October 2012 the decedent's son, by his mother on his behalf, filed an application for disinterment. The Lucas County Probate Court granted the son's application for disinterment finding that, as the sole heir-at-law, the son was entitled to his father's cremains.

The decedent's father filed an appeal alleging the following assignments of error:

1) the Probate Court committed reversible error by failing to follow the equitable disinterment principles enunciated in the *Frobose*[2] decision.

2) The Probate Court committed reversible error by ignoring the legal rights of the father to possess the cremains

of decedent to which he was entitled under the right of disposition statute R.C. 2108.81.

The Court of Appeals held that the governing statute in this case was the disinterment statute.[3] The Court held that in determining a request for disinterment the Court should apply the equity standard which involves consideration and weighing of several factors as set forth in the *Frobose* decision. The Court then analyzed each factor with respect to the facts of this case and upheld the Probate court's decision.

The Court then went on to analyze the provisions of R.C. 2108.81 which lists those persons entitled to dispose of the decedent's cremains. At the time of decedent's death, his parents did have the right of disposition since the son was a minor. The appellee argued that the right of disposition was extinguished at that time and that any other interpretation of the statute would expand the right of disposition into a right of perpetual re-disposition. The Court held that the right of disposition under the statute does not preclude the Probate Court from granting an application for disinterment where the equities weigh in favor of doing so. The *Swing* Court stated that R.C. 2108.81 does not nullify the equitable standard in the *Frobose* decision.

The *Frobose* Court stated:

> These equitable factors include, but are not limited to (1) the degree of relationship that the party seeking reinterment bears to the decedent, (2) the degree of relationship that the party seeking to prevent reinterment bears to the decedent, (3) the desire of the decedent, (4) the conduct of the person seeking reinterment, especially as it may relate to the circumstances of the original interment, (5) the conduct of the person seeking to prevent reinterment, (6) the length of time that has elapsed since the original interment, and (7) the strength of the reasons offered both in favor of and in opposition to reinterment.[4]

III. ANALYSIS

The problem with the Court's decision is first that it simply ignores a new statutory scheme which provides for the proper disposition of the decedent's body in accordance with a written declaration or statutory order of priority. The Court chose instead to rely on prior case law under the disinterment statute. The disinterment statute does not cross reference the disposition statute or in any way clarify its relationship to the disposition statute. These two statutes obviously govern the same issue (where and how the body is disposed of) and should in some way be coordinated. The inconsistency that can arise is that the authorized representative under the disposition statute can make a disposition of the body and then, some time period later, another person could file for disinterment with a different decision under a different standard set forth in the disinterment statute and case law. Thus, according to the *Swing* Court, we have two different standards of law applying to determine the disposition of a person's body. Of course, the priority person under the disposition statute does not necessarily have the final decision on disposition. The disposition statute, R.C. 2108.82, does provide for a procedure for any other person to file a motion in Probate Court for a different disposition. This statute lists specific factors for the Probate Court's determination on the issue of disposition. The *Swing* Court ignored the factors set forth by the legislature and instead relied on prior case law.

Another way to frame this issue is to ask the question: At what point in time do the provisions of the disposition statute apply? Initially, of course it applies immediately following death. However, over the course of time the persons named in the statute or declaration may pass away and a new person would become the priority person for a decision on disposition i.e. re-disposition or disinterment. Certainly, circumstances could change where it may be appropriate or desired by family members to make a change in the disposition. The disposition statute should continue to apply indefinitely into the future. The statute refers to the right to direct disposition as applying "after death." R.C. 2108.70(b)(1). There is no limitation that the statute is void after the first decision on disposition. Thus, there is a right of perpetual re-disposition contrary to the argument by the appellee in the *Swing* case. A disinterment is a re-disposition. Whether you use the term "disposition" "re-disposition" or "disinterment," they are all referring to the same thing i.e., a decision at some point in time relating to where a body is interred or disposed of. Therefore, at any point in time in the future, the Court should then consider the provisions of the disposition statutes, specifically R.C. 2108.82 at a hearing on disinterment. The re-disposition argument asserted by Appellee in the *Swing* case is not a correct interpretation of the statutes since: 1) there is no language in the disposition statute supporting such argument; 2) a decision on burial, disinterment or other re-disposition is a decision on the same issue just at different points in time; the governing law should not be different at the time shortly after death or two or 20 years later.

In order to resolve this conflict and clarify the relationship between these two statutory provisions, the Ohio State Bar Association has approved a legislative amendment to R.C. 517.23, R.C. 517.24, R.C. 517.25 and R.C. 2108.82.

ENDNOTES:

[1]*In re Disinterment of Swing*, 2014-Ohio-5454, 26 N.E.3d 827 (Ohio Ct. App. 6th Dist. Lucas County 2014).

[2]*In re Disinterment of Frobose*, 163 Ohio App. 3d 739, 2005-Ohio-5025, 840 N.E.2d 249 (6th Dist. Wood County 2005).

[3]*In re Disinterment of Swing*, 2014-Ohio-5454, 26 N.E.3d 827 (Ohio Ct. App. 6th Dist. Lucas County 2014).

[4]*In re Disinterment of Frobose*, 163 Ohio App. 3d 739, 2005-Ohio-5025, ¶ 16, 840 N.E.2d 249, 252 (6th Dist. Wood County 2005).

UNIFORM FIDUCIARY INCOME AND PRINCIPAL ACT UNDER STUDY FOR ADOPTION IN OHIO

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The Uniform Fiduciary Income and Principal Act ("UFIPA") was approved by the Uniform Law Commission (the "ULC") in 2018 and is currently under study by the Ohio Principal and Income Act Committee (the "Committee") of the Ohio State Bar Association Estate Planning, Trust and Probate Law Section Council for possible adoption in Ohio. UFIPA is a new version of the Uniform Principal and Income Act ("UPIA") which last received a wholesale revision in 1997 (the "1997 Act").

Historically, beneficiaries of many trusts were either entitled to receive distributions of income earned by the trust or a share of the trust principal. In this context, the allocation of trust receipts and disbursements between income and principal could have a significant effect on relative interests of the beneficiaries. The UPIA provided a set of rules to assist trustees in making these allocations.

The distinction between income and principal has become less important in many cases over the last several decades with the advent of modern portfolio theory and its emphasis on investing for total return and the increased use of trusts with more flexible terms that provide discretion to trustees to distribute both income and principal.

The 1997 Act, a version of which has been adopted in virtually all of the states, including Ohio, was promulgated by the ULC to provide needed updates to address the trend toward investment for total return further encouraged by the Uniform Prudent Investor Act promulgated by the ULC in 1994 and the significant changes in the design and use of trusts that had occurred since the prior revision of the UPIA adopted in 1962. UFIPA is a further modernization of the UPIA implemented to address and reflect continued change in the design and use of trusts.

UFIPA makes several notable changes to the 1997 Act including the adoption of a new name. The name of the act was changed to the Uniform Fiduciary Income and Principal Act to differentiate the act from its predecessors, to avoid confusion with the related Uniform Prudent Investor Act (with which it shared an acronym), and with the addition of the word "Fiduciary," to emphasize that the primary applications of the act will be in contexts marked by the role of a fiduciary such as trusts and estates.[1]

Probably the most significant change made by UFIPA is the expansion of the power to adjust that was incorporated as part of the 1997 Act. The power to adjust was incorporated as part of the 1997 Act as a compliment to the Uniform Prudent Investor Act to enable trustees to select investments using the standards of a prudent investor without the constraint of having to realize a particular portion of the portfolio's total return in traditional trust accounting income such as interest, dividends and rents. Under § 104 of the 1997 Act, a trustee is given the authority to adjust from income to principal and from principal to income if the following preconditions are met: (1) the trustee invests and manages the trust as a prudent investor; (2) the terms of the trust express the amount that may or must be distributed to a beneficiary by referring to the trust's income; and (3) the trustee determines that it is "unable" to comply with the requirement of the 1997 Act that the trustee administer the trust impartially, based upon what is fair and reasonable to all of the beneficiaries.

UFIPA eliminates these three preconditions to the power to adjust replacing them instead with the precondition that the fiduciary determine that the exercise of such power will "assist" the fiduciary to administer the trust or estate impartially. The former requirement of "impossibility" is replaced with the more relaxed standard of "assistance" thereby avoiding the possible anomaly of trusts created with broader discretion over distributions not being able to take advantage of the flexibility of the power to adjust and giving trustees with flexible trusts that could have accomplished impartial administration by accumulating income or invading principal the alternative of making an adjustment between income and principal. An alternative that is preferred by some trustees in order to allow them to continue to distribute income to income beneficiaries and not invade principal which can be viewed as more dramatic.

UFIPA retains the list of required factors to be considered by the fiduciary in determining whether, and to what extent, to exercise the power to adjust, with some refinements, and provides that such factors are also to be considered in connection with the exercise of the fiduciary's unitrust authority (discussed below).[2] UFIPA also continues to include the prohibition of exercise of the power to adjust when exercise or possession of the power might produce negative tax results. Included in the list of negative tax results are those previously provided for, such as loss of the estate or gift tax marital deduction and loss of the charitable deduction, and a few notable additions, such as loss of grandfathered or exempt status for Generation-Skipping Transfer Tax purposes and the making of a taxable gift by the beneficiary or the fiduciary.[3]

While the 1997 Act did not state the trust accounting periods to which the exercise of the power to adjust would apply—suggesting a year by year application, UFIPA explicitly allows for application of the exercise over multiple years allowing for the announcement of a commitment to a long-term strategy of adjustments thereby providing predictability and reassurance to the beneficiaries.[4] UFIPA also clarifies that a description of the trustee's exercise of the power to adjust must be communicated to the beneficiaries either in the annual trustee's report or a less formal communication at least annually.[5]

UFIPA further expands the power to adjust by adding the power to convert to a unitrust - that is, the power to say that income is going to be a given percentage of the value of the trust assets each year or some other period instead of income in the usual sense.[6] The 1997 Act did not allow conversion to a unitrust largely out of concern of running afoul of federal tax law regarding marital and charitable deduction qualification. However, subsequent to the 1997 Act, these concerns were resolved by Treasury Regulations under I.R.C. § 643(b) which were proposed in 2001 and finalized in 2003 (the "2003 Treasury Regulations") that provide for the allocation of amounts between income and principal to be respected if local law provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust. The 2003 Treasury Regulations include as an example of such "reasonable apportionment," a state statute defining income as a unitrust amount of between 3% and 5% of the fair market value of the trust assets.[7] Many states, including Ohio, have included unitrust provisions, or provided for similar adjustments, under their state's version of the UPIA utilizing the safe harbor provided for in the 2003 Treasury Regulations (the "Safe Harbor").

Ohio's version of the 1997 Act, adopted in 2003, does not include the power to convert to a unitrust per se, but instead, includes in its power to adjust, the authority to make a so-called "safe-harbor adjustment" to increase the net trust accounting income up to and including an amount equal to 4% of the trust's fair market value, determined on the first business day of the current year.[8] If the trustee determines to make such a safe-harbor adjustment, the propriety of the adjustment is conclusively presumed. This essentially permits trustees to make a unitrust adjustment within the parameters of the Safe Harbor.

UFIPA's unitrust provisions are much broader and more flexible than most state statutes and do not limit unitrusts to the parameters of the Safe Harbor except in situations which are defined in UFIPA and built around the situations addressed in the 2003 Treasury Regulations where the trust provides a "special tax benefit."[9] Subject to the limitations applicable if the trust provides a special tax benefit, UFIPA provides the trustee with great flexibility to determine, as part of a so-called "unitrust policy," the unitrust percentage or a mechanism for determination of the unitrust percentage, how and when the assets of the trust are to be valued and the unitrust period, which can be other than a calendar year.[10]

Another significant change made by UFIPA is the addition of a governing law provision to the UPIA for the first time. It is not clear whether a law governing the allocation of principal and income would be a rule of construction which would be governed by the law of the jurisdiction where the trust was created, or a rule of administration which would be governed by the law of the principal place of administration of the trust from time to time. The allocation between income and principal does determine who gets what in many cases and accordingly could be viewed as a rule of construction. However, it is also part of the administration of the trust and could also be interpreted as a rule of administration. As a rule of construction, the trustee would not only need to look to the law of the state where the trust was created, but likely the law of that state at the time the trust was created. The drafters felt that this could be burdensome, especially in the case of increasingly common longer-term trusts. Accordingly, the ULC specified in UFIPA that it is governed by the law of the place of principal administration of the trust from time to time as if it were a rule of administration unless otherwise provided in the terms of the trust.[11]

UFIPA also notably revises the provision of the 1997 Act relating to judicial review.[12] UFIPA retains the general rule that a court will intervene only if it determines that a fiduciary decision was an abuse of discretion, but the scope of such a fiduciary decision is expanded beyond just the fiduciary's power to adjust to include the fiduciary's powers in the new unitrust provisions and any allocation or other determination regarding income and principal and the implementation of any such allocations, determinations or actions. UFIPA also noticeably replaces the remedy of ordering a fiduciary to use its own funds to make a beneficiary whole with an enumeration of available remedies that place the beneficiaries and the trust in the place that it would have occupied had there not been an abuse of the fiduciary's discretion. In so doing, the drafters seek to encourage judges to first look at remedies that will put the beneficiaries in the positions they would have occupied if there had not been an abuse of discretion.

Finally, UFIPA also retains the more traditional rules for allocating income and principal with clarifications and updates.[13]

As discussed above, UFIPA provides a comprehensive update of the 1997 Act and incorporates significant flexibility with the expanded power to adjust and broad unitrust authority. To date, UFIPA has been enacted in Utah and has been introduced in the Kansas and Tennessee legislatures. The Committee has recently undertaken its study of UFIPA for possible adoption in Ohio. Stay tuned for further developments in this area.

ENDNOTES:

[1]Although UFIPA relates primarily to the context of trusts and estates, it also applies to term relationships such legal life estates.

[2]*See* UFIPA § 201(e) for the list of required factors to be considered.

[3]*See* UFIPA §§ 102(19) and 203(e).

[4]*See* UFIPA § 203 (j).

[5]*See* UFIPA § 203 (k).

[6]*See* UFIPA § 303 which provides authority for the fiduciary to convert an income trust to a unitrust, to change the percentage or method used to calculate a unitrust amount for a unitrust and to convert a unitrust to an income trust and sets forth a road map for a fiduciary's action in this connection.

[7]Treasury Reg. § 1.643(b)-1.

[8]R.C. 5812.03(G)(3).

[9]UFIPA § 102(19).

[10]*See* UFIPA §§ 306, 307, 308 and 309.

[11]*See* UFIPA § 104.

[12]*See* UFIPA § 202.

[13]*See* UFIPA Articles 4 through 7.

LAWYER WHO CANNOT LOCATE TESTATORS MAY NOT DISCARD WILLS (NEW YORK RULING)

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The New York State ethics authority has ruled that a lawyer must keep the wills he or she possesses essentially forever. In this case, a solo practitioner had come to possess many wills from other retiring lawyers, in addition to those he had drafted and retained for his own clients. Even after attempting to contact the testators, named executors, and named beneficiaries, but unsuccessfully, the lawyer may not lawfully dispose of the wills even though some were drafted by other lawyers seven decades earlier. The wills, said the authority, are not only legal documents, but are the *property* of the testators. The lawyer at issue had been unsuccessful in trying to locate testators, named executors, and named beneficiaries through diligent search of the internet, office, and surrogate court's records.

The ethics opinion, No. 1182,[1] decided January 23, 2020, says the lawyer must retain the wills indefinitely "or act as the law may allow," leaving open the possibility that the legislature might enact a remedy which does not appear in the professional conduct rules. The opinion cites the state bar committee in New York which offers advice that lawyers can file wills with the most appropriate surrogate's court. The opinion acknowledges that some local bar associations also keep will depositories where the wills could be filed. In all cases, a thorough effort to contact the testator must be shown. In a succinct summary, the opinion says: "A lawyer may not dispose of Wills, whose testators' locations and/or circumstances are unknown. The Wills constitute *property*, and the lawyer must safeguard the Wills indefinitely unless the law affords the lawyer an avenue to file or otherwise dispose of the wills." (Emphasis added.)[2]

In Ohio, Ohio Rules of Prof. Cond. Rule 1.15(a) provides in part: "A lawyer shall hold *property* of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." (Emphasis added.) If the document of a will, whether on paper or in digital form, is property, it would seem that Ohio law is consistent with the New

York decision. Ohio Rules of Prof. Cond. Rule 1.15(d) provides in part that: "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." There is no time-limit on the lawyer's duty to keep the property. It is a fiduciary duty, according to the comments on Rule 1.15.

Open questions include: (1) As property, even if the testator is deceased, does a will pass to the testator's legatees, personal representatives, or heirs? (2) Will Ohio rule similarly?

ENDNOTES:

[1]NY Eth. Op. 1182 (N.Y.St.Bar.Assn-.Comm.Prof.Eth.), 2020 WL 469597.

[2]NY Eth. Op. 1182 (N.Y.St.Bar.Assn-.Comm.Prof.Eth.), 2020 WL 469597, at *3.

CASE SUMMARIES

Hatfield v. Heggie

Headnote: Claims

Citation: 2020-Ohio-1156, 2020 WL 1492566 (Ohio Ct. App. 6th Dist. Ottawa County 2020)

Decedent's "longtime romantic relationship" paid her funeral bill. He filed a claim for reimbursement, timely, in writing, but presented it to the attorney for the executor (who was decedent's daughter), although the daughter acknowledged receiving it. The daughter denied the claim, the friend sued and the trial court upheld the denial, apparently for lack of proper presentment. The appellate court allowed the claim, agreeing that presentment to the lawyer for the executor was sufficient.

The appellate decision does not cite *Wilson v. Lawrence*, 150 Ohio St. 3d 368, 2017-Ohio-1410, 81 N.E.3d 1242 (2017), that disallowed a claim presented to decedent's accountant and his secretary, thus questioning the effect of presentment to the attorney for the executor. The EPTPL Section of OSBA has proposed clarifying the statute to validate presentment to the attorney. See Weinewuth, Presentment of Claims against Estates: A Practical Proposal for Improvement of R.C. 2117.06 after *Wilson v. Lawrence*, 29 PLJO 153, 29 No. 5 Ohio Prob. L.J. NL 7 (May/June 2019).

Foelsch v. Farson

Headnote: Trust contest

Citation: 2020-Ohio-1259, 2020 WL 1624116 (Ohio Ct. App. 5th Dist. Knox County 2020)

Decedent left seven children, all provided for in somewhat different ways in her revocable trust and its amendments. One child contested the trust for incapacity and undue influence. The trial court granted summary judgment on the contest against plaintiff. On the counterclaim of the other children for declaratory judgment, the trial court ruled that plaintiff had forfeited her gifts under the trust by contesting it, under a trust provision voiding the gifts of contestants as if they had died leaving no children. The appellate court affirmed on all counts.

Doran v. Doran

Headnote: Trustee removal

Citation: 2020-Ohio-1583, 2020 WL 1982887 (Ohio Ct. App. 1st Dist. Hamilton County 2020)

Trust for equal benefit of six children that was to terminate (as both settlors had died) was continued thereafter for over 10 years by its trustees, who refused information on it to the beneficiaries. On their suit, the probate court removed the trustees under R.C. 5807.06(B)(3) for persistent failure of the trustees to administer the trust effectively, determining that their removal best served the interests of the beneficiaries. Affirmed on appeal as within the discretion of the probate court.

The trust was continued because it had unpaid estate taxes that it was paying in installments. There was also disagreement among the beneficiaries on the sale of trust assets and proper division among the beneficiaries.

Lomelino v. Lomelino

Headnote: Guardianship

Citation: 020-Ohio-1645, 2020 WL 1991421 (Ohio Ct. App. 2d Dist. Montgomery County 2020)

Decedent had lived in Illinois and was under guardianship there. He moved to Ohio and purchased a home in Ohio in his own name. He named two family members as TOD beneficiaries of it. Meanwhile, there was trouble in the guardianship, the Illinois court replaced the guardian and on its order the new guardian filed a document there revoking all "estate planning documents" of the ward. When the ward died, the Illinois guardian filed in the Ohio real estate records an affidavit stating that the TOD designation was revoked and void. The Ohio executor sued the TOD beneficiaries to quiet title to the home in the estate. The trial court ruled for the TOD beneficiaries, affirmed on appeal. The Illinois proceedings could not affect Ohio real estate, and the Ohio TOD statute contains nothing voiding a TOD beneficiary designation by one under guardianship, subject of course to proof of lack of capacity, undue influence, etc. which apparently was not established by the facts of this case.

SUBJECT INDEX

(Rolling 12-month index covering May 2019 to April 2020)

LEGISLATIVE SCORECARD

Keep this Scorecard as a supplement to your 2018 Ohio Probate Code (complete to October 1, 2018) for up-to-date information on probate and trust legislation.

Pending legislation

Authorize benefit corporations	SB 21	Passed Senate 3-6-19
See Vannatta, *Ohio Benefit Corporations: Beneficial or Not?* 27 PLJO 210 (May/June 2017)		
Stautberg and Speivack, More Than the Money: Ohio's Proposed Business Benefit Corporation, 30 PLJO 211 (May/June 2020)		
Abolish dower	HB 209	Passed House 10-24-19
See Brigham, *The Death of Dower*, 28 PLJO 221 (July/Aug 2018); Brinkman, *The Argument to Keep Dower in Ohio*, 28 PLJO 223 (July/Aug 2019)		
Simplify collection of unclaimed funds	HB 270	Intro. 5-30-19
Apply real estate transfer fee to transfer of controlling entity interests See Laymen, Proposal to Close Conveyance Fee Loophole for Indirect Transfers of Real Property, 28 PLJO 189 (May/June 2018)	HB 449	Intro. 12-17-19
Omnibus probate and trust law bill	HB 464	Intro. 1-9-20

Contains the following subjects: Guardianship estate planning authority Spousal vehicle transfer clarification Creditor rights after lapse of power Changing nomination of future trustees For details of each see the OSBA proposals below		
Update LLC act	SB 276	Intro. 2-11-20
See Graf, Proposed Rewrite of Limited Liability Company Act, 30 PLJO 7 (Sept/Oct 2019)		
Enacted Legislation		
Omnibus probate and trust act	HB 595	Eff. 3-22-19
Contains the following subjects: Arbitration of trust disputes Clarification of antilapse statute to class gifts Predeath validation of wills and trusts Disposition of body by Coroner Incorporation of trust instrument into will Evidence privilege of fiduciaries Validity of foreign electronic wills Use of IOLTA accounts for fiduciary funds		
Emergency act, statutes of limitations tolled	HB 197	Eff. 3-27-20
Permit remote notaries	SB 263	Eff. 3-20-19
See PLJO of Jan/Feb 2019 for material on each of the acts above.		

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

Permit waivers of inventories and accounts See EPTPL Section Report, *Waiver of Filing of Inventory and Accounts OSBA Reform Proposal*, 28 No. 2 Ohio Prob. L.J. NL 1 (Nov/Dec 2017)	Ohio BAR of 10-17-94
Guardianship estate planning authority See Thakur, *Proposal: Authorizing "Estate Planning" For a Ward by a Guardian*, 29 PLJO 141 (May/June 2019)	Spring 2019*
Spousal vehicle transfer See Lanham, *EPTPL Section Proposes to Amend RC 2106.13(A)*, 29 PLJO 152 (May/June 2019)	Spring 2019*
Creditor rights after lapse of power to withdraw See Davis, *Asset Protection Opportunities expanded by the repeal of Ohio Revised Code Section 5805.06(B)(2)*, 29 PLJO 147 (May/June 2019); Brucken, *Ohio Trust Code Amendments*, 29 PLJO 139 (May/June 2019)	Spring 2019*
Changing nomination of future trustees See Brucken, *Ohio Trust Code Amendments*, 29 PLJO 139 (May/June 2019)	Spring 2019*

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

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

