PROBATE LAW JOURNAL OF OHIO

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EDITOR'S MESSAGE

The General Assembly is now in summer recess. When they resume session, the OSBA sponsored biennial trust and estate omnibus bill will be introduced. It will contain as its nucleus all or most of the five items already approved by the OSBA Council of Delegates, listed in the Legislative Scorecard of this issue of PLJO. In addition, three more items have since been approved by the EPTPL Section Council, and if they are approved by the Council of Delegates at its next meeting (perhaps this fall) they will also be added to that bill: clarification of requirements for electronic wills (see Brucken and Gee article in the March/April issue), clarification of requirements for presenting claims (see Weinewuth article in the May/June issue), and TOD treatment for tangible personal property (see Harris article in the May/June issue).

This issue takes you to the 2019 annual meeting of the Ohio fellows of the American College of Trust and Estate Counsel. Six of its presentations are published in this issue (and one was in the May/June issue) for the benefit of all Ohio T&E practitioners.

PLISKIN SEMINAR NOTICE

The annual *Marvin R. Pliskin Advanced Probate and Estate Planning Seminar* sponsored by the Ohio State Bar Association Estate Planning, Trust and Probate Law Section, will be held on **Friday, September 13, 2019** at Embassy Suites by Hilton Dublin, 5100 Upper Metro Place, Dublin OH 43017. The program runs from 8:30 a.m. to 4:30 p.m. and lunch will be provided. Professor David M. English, of the University of Missouri, in Columbia, Missouri, who served as the Reporter for the Uniform Law Commission drafting committee for the Uniform Trust Code, will be a special guest speaker and will provide an update on the "Top 40 Cases" under the UTC as adopted around the country. Alan Acker will again enlighten attendees about Selected Features of Fiduciary Income Taxations and IRS (Fasten Your Seatbelts; It's Going to be a Bumpy Ride).

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Other expert faculty will present on topics including: How Can I Make Gifts to Minors: Let me Count the Ways; When It Rains It Pours: HB 595 and Other 2019 Ohio Estate, Trust and Probate Law Updates; Navigating the Current Charitable Planning Landscape; and Till Divorce Do Us Part: Status of Marital Agreements in Ohio and New Developments. The day will wind up with back to back presentations on What is a Fiduciary to Do? The Evolving Role of Fiduciaries in Family Disputes and The Good, the Bad, and the Ugly: What Recent Court Cases Tell Us About Duties Imposed on Fiduciaries. For CLE credit information, the agenda, details and registration, and special hotel rate information, see https://www.ohiobar.org/osba-catalog/the-marvin-r.-pliskin-advanced-probate-and-estate-planning-seminar-f427a85a//.

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CMBA SEMINAR NOTICE

The 46th annual Cleveland Estate Planning Institute will be **Friday October 25, 2019** at the Cleveland Metro Bar Conference Center, 1375 E. Ninth St., Cleveland, from 8 a.m. to 4:15 p.m. The agenda and list of speakers will be available by the time of this publication, and may be viewed at the website clemetrobar.org. Registration is online at the website or by phone 216-696-3525, ext. 4002 (Kari Burns).

ADDRESSING THE RISKS ASSOCIATED WITH POWER OF ATTORNEY DOCUMENTS FROM THE PERSPECTIVE OF A FINANCIAL INSTITUTION

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Often, financial institutions are criticized for not accepting the authority of an agent under a power of attorney document. However, just as often, financial institutions can be challenged when following the instructions of such an agent. Lawyers and their clients tend to believe that financial institutions act arbitrarily in their acceptance or refusal of power of attorney documents.

This article will attempt to describe, from the perspective of the financial institution, the issues that arise in reviewing power of attorney documents and actions taken at the direction of an agent under such a document.

For clarification purposes, the power of attorney document will be referred to as "POA"; the creator of the power of attorney document will be referred to herein as "principal"; the person to whom the authority has been given under the power of attorney document will be referred to as "agent" and for simplicity purposes the financial institution will be referred to as "bank." Also, the authors wish to

restrict their comments to analysis of power of attorney documents presented to the wealth management division of a bank, not to the retail or commercial divisions of a bank.

BACKGROUND AND HISTORY OF POA LEGISLATION

POAs are a very common planning tool for financial decision making. While they can provide much needed flexibility if properly executed and correctly utilized, they are also subject to challenges on a variety of grounds. The two most common types of challenges that are brought with respect to POAs are challenges to the validity of the POA itself and challenges to the actions taken by the agent.

Sometimes both challenges are asserted simultaneously. The first challenge pertains to the competency of the principal in the execution of the POA-was the principal coerced or unduly influenced in executing the POA and naming the particular agent? The second challenge pertains to the authority of the agent under the POA terms and also, if the authority exists, whether the actions were in the best interests of the principal.

While the concept of a POA was established under common law as a contract of agency, a "durable" power of attorney is a creature of statute. In 1954, Virginia became the first state to enact a durable power of attorney law. At present, all states have laws authorizing the execution of durable POAs but these laws are not identical and, in some instances, may contain significant differences.

For instance, some states have adopted laws that provide that a POA is, by default, durable unless the document states otherwise but other states follow the more common rule that a POA will only be durable (survive the incapacity of the principal) if that is specifically stated in the POA.

Further complicating the review of POAs is the fact that some may be drafted as springing or conditional POAs that only become effective upon the happening of a specific condition. POAs may also be drafted as general or limited in the authority given the agent.

Uniform laws have been promulgated in an effort to create some uniformity among the states in the enactment of laws pertaining to the establishment and authority of POAs.

The original Durable Power of Attorney Act, last amended in 1987, was followed by all but a few jurisdictions. However, despite initial uniformity, the majority of the states enacted non-uniform provisions to deal with specific matters that were not addressed in the original Act.

The areas of divergence included the authority of multiple agents; as well as later appointed fiduciaries or guardians of the principal; the impact of dissolution of the principal's marriage to the agent; the agent's authority to make gifts and standards for agent conduct.

In 2006, the Uniform Law Commission promulgated an entirely new act: the Uniform Power of Attorney Act (UPOAA) which has been enacted in 26 states and introduced in 2019 in Mississippi.

While UPOAA has been enacted in Ohio, many banks operate in multiple states and must therefore create internal procedures to accomplish review of POAs that have been created in any one of the 50 states and the District of Columbia.

UPOAA contains two sections that have attempted to address the problem of third parties refusing to accept the authority of an agent. Sections 119 and 120 of UPOAA provide protection from liability for persons that in good faith accept an acknowledged POA and also provide sanctions against third parties that refuse to accept an acknowledged POA unless the refusal meets limited statutory exceptions.

In exchange for the mandated acceptance of an agent's authority, these sections do not require third parties that deal with an agent to investigate the agent or the agent's actions.

Ohio's UPOAA did not adopt Sections 119 and 120 so banks reviewing POAs drafted pursuant to Ohio law have neither the obligation to accept an acknowledged POA but also not the statutory protections afforded by the Act in accepting such a POA.

In establishing POA review procedures banks

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must be able to identify the states in which required acceptance is part of the law.

Further complicating the review process is the fact that there may be other laws in a given state which also impact the authority granted an agent in a POA.

For instance, in Ohio, under the Ohio Trust Code, an agent can only act on behalf of a principal who is the settlor of a trust if authority is granted in both the POA and the trust agreement (O.R.C. 5806.02(E)).

Finally, of particular concern in the wealth management context is the fact that terms used within POAs may not always cover the types of accounts established on the fiduciary side of a bank.

So for instance, in Michigan which has not adopted UPOAA or a statutory form POA, there is no statute which defines the term "banks and other financial institutions" if used within a POA.

So if a POA drafted under Michigan law is presented to a trust officer at a bank in an attempt to authorize the agent to access the principal's investment account administered by the bank that authority may not be extended to the agent unless that type of an account is specifically identified in the POA.

A SAMPLING OF RECENT CASES INVOLVING AGENTS ACTING BADLY

CASE #1: TENNESSEE FARMERS LIFE REASSURANCE CO. V. ROSE, 239 S.W.3D 743 (TENN. 2007)

Brenda Langley purchased a $50,000 life insurance policy in 1999 and designated her three children and one grandchild as the beneficiaries of the policy. In August 2002, Mrs. Langley executed a durable power of attorney appointing her sister Linda Rose as her POA agent.

Under the terms of the power of attorney document, the POA agent had the authority to: "transact all insurance business on my behalf. . ."

In October 2002, Linda Rose completed a change of beneficiary form for the policy removing Mrs. Langley's children and grandchild and naming herself as the sole beneficiary of the policy.

Mrs. Brenda Langley died in March 2003 and five days later Mrs. Rose filed a claim for the proceeds.

In July 2003 Mrs. Langley's children also filed a claim for the insurance proceeds.

Due to the competing claims, Tennessee Farmers filed an interpleader action to determine the proper beneficiaries of the insurance policy.

In the lawsuit, Mrs. Langley's children asserted that their mother did not have the capacity to execute the power of attorney or alternatively had been coerced into executing the power of attorney naming Mrs. Rose as the POA agent.

They also filed for summary judgment on the grounds that the POA document did not grant the POA agent the authority to change the beneficiaries of the life insurance policy.

The trial court granted the summary judgment and the appellate court affirmed.

The Supreme Court of Tennessee agreed to review whether the POA document authorized Mrs. Rose to change the beneficiaries of the life insurance policy.

The Supreme Court focused exclusively on whether the POA document terms were controlled by the Uniform Durable Power of Attorney Act under Tennessee law or whether the document terms were to be interpreted without reference to the Act.

The Court determined that the Langley POA document did not mention any provisions of the Act or clearly express an intention to adopt the language contained in the Act.

The Court therefore concluded that the POA document was to be interpreted without reference to the Tennessee Act and therefore Mrs. Rose did hold the authority to change the beneficiaries of the insurance policy.

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CASE #2: WEST EX REL. HARVEY V. REGIONS BANK, 75 U.C.C. REP. SERV. 2D 181 (TENN. CT. APP. 2011)

Robert West's first wife died in 2001 and a few years later, at the age of 82, he married Clara West, age 72, who had three adult sons.

Robert West had no children of his own but he was close to a nephew, James West.

By 2007, both Mr. and Mrs. West needed assistance handling their financial affairs and they each executed powers of attorney naming her three sons and his nephew as their attorneys-in-fact.

James West consulted with an attorney friend who suggested that it would be better if James West served alone as POA agent for his uncle.

The attorney drafted a new POA document and he and James West took it to Robert West who signed the document.

In June 2007, two days after it was signed, James West started to transfer Robert West's assets to himself.

When he presented the POA document to Regions Bank where Robert West had bank accounts held in his individual name and in joint name with Clara West, the Bank required James West to execute an "affidavit of continued validity."

The affidavit had an indemnity provision in which James West agreed to indemnify the Bank from any claims related to the use of the POA document.

In addition to transferring bank accounts, James West sold Robert West's AT&T stock and endorsed the check representing the sale proceeds as Robert West's POA agent and then deposited the funds into his own business account.

James West also surrendered a life insurance policy issued to Robert West and deposited the proceeds into his business account.

In total, James West liquidated and transferred approximately $367,000 of Robert West's assets.

On October 27, 2007, Robert West died leaving Clara West with significantly less funds for her support-his assets having been transferred and liquidated by James West.

In January 2008, Janet Harvey was appointed as conservator of Mrs. West and as administrator of Robert West's estate.

Janet Harvey then filed a complaint against James West and Regions Bank in which she alleged that James West had breached his fiduciary duty as POA agent and had misappropriated Robert West's assets and that Regions Bank had enable and abetted James West's wrongful actions.

In particular, the complaint alleged that the Bank knew or should have known that James West's actions were suspicious and should have required inquiry or investigation.

The Bank filed an action for summary judgment relying upon a Tennessee statute which provides that banks may recognize the authority of a power of attorney and no bank shall be liable for damages for making payments pursuant to the statute.

The trial court granted the Bank's summary judgment but the conservator appealed and the appellate court determined that the trial court erred in granting the summary judgment.

The appellate court relied upon a Tennessee UCC statute providing that a bank could be held liable for accepting checks made payable to a principal that are deposited by a fiduciary into the fiduciary's personal account.

The appellate court remanded the case to the trial court to address the issue of whether the Bank acted in a commercially reasonable manner.

WHAT CAN BE LEARNED FROM THESE CASES TO ASSIST IN DEVELOPING A PROCESS FOR EFFECTIVE YET EFFICIENT REVIEW OF POAs?

In the *Tennessee Farmers*[1] case, the POA agent used the insurance company's own beneficiary change form to effect the change in beneficiaries on the life insurance policy. The review of the agent's authority under the POA apparently did not raise any questions or concerns by the insurance com-

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pany when the change form was submitted. The insurance proceeds however, had not been distributed by the time the insurance company received the subsequent request for the proceeds from Mrs. Langley's children.

The case summary does not indicate whether the insurance company had an internal process that might have flagged the account because of the change in beneficiary designation that occurred six months before the insured's death.

Even though the Tennessee Supreme Court ultimately determined that Mrs. Langley's sister did hold the authority under the POA to change the beneficiaries on the life insurance policy, the matter was remanded to the lower court so that the agent's actions could be reviewed to determine whether Mrs. Langley had been coerced into designating her sister as her POA agent or whether the agent had been acting in the best interests of Mrs. Langley and not in self-interest when she submitted the change in beneficiary form.

In the *West*[2] case, Regions Bank had an internal process in which it required agents presenting POA documents to execute an "affidavit of continued validity." This form, prepared by Regions Bank, sought to shift the responsibility for unauthorized actions taken by a POA agent on to the agent and it further required that the agent indemnify the Bank for any claims related to the use of the POA.

In the lawsuit, Regions Bank also sought summary judgment by referring to a Tennessee statute (T.C.A. Section 45-2-707) which relieves a bank from liability for damages by reason of any property withdrawn by a POA agent if the POA authorizes the agent to access a depositor's bank account.

It appears from the case summary that the Tennessee Appellate Court believed that Regions Bank had assisted the agent in withdrawing and converting the principal's funds and wanted to hold Regions Bank accountable for the loss of funds. The means by which that accountability was applied was through the use of the UCC statute and the deposit of the proceeds on the sale of Robert West's AT&T stock.

COMMON SITUATIONS INVOLVING THE USE OF A POA

The following represent five common fact patterns in which a POA is presented to officers in a wealth management division of a bank.

SITUATION #1:

Jane Morgan is the principal of an investment management account at bank and wishes to add her husband, John, who is her POA agent to the account.

She anticipates that he may add or withdraw from the account, establish investment objectives for the account and terminate the account in the event she loses capacity.

At the moment Jane has full capacity but wants to add her husband now in case something happens to her in the future.

While this is a common situation and does not appear to pose any problems at present, what if the husband contacts the bank and directs withdrawal of the assets while the principal is still competent? Is the bank required to seek confirmation of the request from the principal?

SITUATION #2:

John Morgan contacts the bank and advises that his wife, Jane has suffered a stroke and is unable to handle her affairs.

He indicates that he holds a POA for his wife and would like to now direct all transactions pertaining to her investment management account.

He has told bank that he plans to withdraw all the funds and move them into an account in his name so they can attempt to shield the funds from nursing home costs.

This is also a common situation but differs in that the POA agent, not the principal is presenting the POA. If the POA is governed under a state in which UPOAA has been enacted then an investment management account administered in the wealth management division of a bank will fall within the definition of "banks and financial institutions"

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regarding the authority of the POA agent. If this is not the case however, the bank will have to determine whether the agent holds the authority to direct actions with respect to the investment management account.

Should the bank be concerned that the agent intends to move the principal's funds into an account in his name alone? Under UPOAA, agents who are related to the principal (ancestor, spouse, or descendant) are authorized to create an interest in the principal's property in the agent but if the POA was created in a jurisdiction that has not adopted UPOAA will this same rule apply?

Should the bank be concerned about or address John's comment that he intends to shield Jane's funds from nursing home costs? If Jane is presently in a nursing home, could it be a creditor seeking payment for Jane's expenses?

SITUATION #3:

Sally Morgan who is Jane Morgan's daughter contacts the bank and advises that she is the POA agent for her mother under a more recent POA document.

Bank knows that Sally is not the daughter of John Morgan and that John and Sally do not get along.

On review of the POA document provided by Sally, bank determines that it is dated after the POA document submitted by John and that it revokes all prior POA appointments made by Jane.

Sally also wants to move all the funds in the investment management account into an account in her name and directs bank to not tell this to John Morgan.

Family dynamics and family dissension is not uncommon.

Under UPOAA a later drafted POA document only revokes prior executed documents if the later document specifically provides for revocation of prior documents.

Should the bank have a protocol for reviewing apparent conflicting authority of POA agents? When unique family issues are known, how are these handled by the bank?

If Sally has asked that bank not provide any information to John, is bank required to comply?

Section 114 of UPOAA provides that an Agent has a duty to keep a record of all receipts, disbursements, and transactions made on behalf of a principal but no affirmative duty to inform anyone else about actions taken.

In addition, if the Agent acts in good faith, he/she is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan. So if Sally removes all the funds and then uses them for the benefit of Jane, she will not be held liable to John if all the funds are disbursed and nothing is left for John once Jane dies.

SITUATION #4:

Jane Morgan has established her own revocable trust and has named bank as her trustee.

John Morgan informs bank that Jane has suffered a stroke and he serves as her POA agent.

He tells bank that he plans to change the beneficiaries of Jane's trust and will remove Sally Morgan as a beneficiary.

UPOAA Section 201 contains a list of Agent authority that requires a specific grant in the POA document.

The ability to create, amend, revoke or terminate an inter vivos trust is one of those authorities that requires a specific grant.

Assume that the authority is provided in the POA document.

If the bank has been informed as to the agent's intentions (to remove an estranged beneficiary) does the bank have any ability to refuse to accept the modification?

At what point should a third party (bank) challenge the actions of the agent?

What if bank is not informed about the estrangement between John and Sally and receives the

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proposed modification from John removing Sally as a beneficiary?

Can or should bank question changes in beneficiary designations as a matter of course?

SITUATION #5:

Jane Morgan became the trustee of the Andrew Morgan trust established by her father when he died.

Bank is managing an investment management account for Jane Morgan as trustee of the Andrew Morgan trust.

John Morgan informs bank that Jane has suffered a stroke and can no longer handle her financial affairs and he, John, will now direct bank with respect to the Andrew Morgan trust because he is the POA agent for Jane.

UPOAA Section 201 (7) requires a specific grant to an agent of the authority to exercise fiduciary powers that the principal has authority to delegate.

The analysis therefore requires that the POA document specifically authorize the agent to exercise Jane's fiduciary authority (that of trustee of her father's trust) and that her father's trust or the law governing that trust authorizes her, as trustee, to delegate her trustee authority.

DEVELOPING A REVIEW PROCESS THAT IS EFFECTIVE AND EFFICIENT

From the public's perspective when a principal's funds are wrongfully withdrawn and the principal or family members suffer from the financial loss, someone should be held accountable. Too often, the funds cannot be recovered from the wrongdoer-the agent who may have exceeded authority or who acted contrary to the best interests of the principal.

As a result, many look to the financial institution for recovery of the funds.

From the bank's perspective however, the institution is not a guarantor of a principal's assets and acceptance of the authority of a POA agent, although fraught with potential risks, may even be legally required.

A bank could try to take the position that it will not accept any POA and not allow any agent to act with respect to accounts held in the wealth management division. However, by doing so it could put the bank at a disadvantage in the market, from a business development and public relations perspective.

One option that banks and other organizations have adopted is the use of internally prepared POA documents provided to clients in the wealth management division. One advantage is that the document can be easily updated to incorporate changes in the relevant state laws so the form stays current. However, a disadvantage is that for situations where the principal is incapacitated, they would not be able to sign the bank's form. In addition, as mentioned previously, certain states have enacted statutes requiring banks and other third parties to accept acknowledged POAs unless they can identify specific statutory exceptions to acceptance of the POA.

An alternative to preparing its own form would be for a bank to develop internal processes and procedures to review externally drafted POAs. Perhaps a checklist could be created that would prompt the reviewer to address certain key aspects of the Power of Attorney document.

A basic review should include, but not be limited to the following: 1) has the principal signed the POA document? 2) does the POA document meet state law requirements that were in place at the time of its execution? 3) is this a springing POA or a durable POA? 4) has the agent's identity been confirmed? 5) does the agent have the authority to act with respect to a specific matter set forth in the POA? 6) has any prior POA been revoked? 7) Are there multiple POA agents listed and if so can they act independently or are they to act successively? 8) What is the date of execution of the POA and does it revoke prior POA documents? 9) Does the bank have copies of prior documents and have the POA agents changed from those in prior documents?

CONCLUSION

Effective and efficient review of POA documents presented to a bank is not an easy process.

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The bank must balance the need to ensure the validity of the document itself, as well as the authority and appropriateness of the agent's actions against the public's need to act expeditiously when presented with a POA document.

Banks often operate in multiple jurisdictions and must address differences in states' laws. In addition, the dynamics of each family situation vary and may be known to some degree by bank personnel who may be required to consider this information in evaluating the actions of the POA agent.

To some extent individuals and their attorneys can assist in the review process by providing copies of POA documents, drafted while the principal is alive and competent, to the bank's wealth management division at which the principal has accounts.

An internal review can then be undertaken when it is still possible to make changes to the POA document if necessary.

ENDNOTES:

[1]*Tennessee Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743 (Tenn. 2007).

[2]*West ex rel. Harvey v. Regions Bank*, 75 U.C.C. Rep. Serv. 2d 181 (Tenn. Ct. App. 2011)<.

THE POSTNUPTIAL AGREEMENT RENAISSANCE—CAN OHIO EMERGE FROM THE DARK AGES?

By Susan L. Racey, Esq. and Joseph M. Ferraro, Esq.

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OHIO REVISED CODE 3103.06: OHIO'S PROHIBITION ON POSTNUPTIAL AGREEMENTS

> ***A husband and wife cannot, by any contract with each other, alter their legal relations,***[1] *except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.*[2] [Emphasis added.]

Ohio's strict prohibition on postnuptial agreements (agreements made *after* entering marriage) is quite simply a relic of a bygone era. No matter how fair or reasonable an agreement is, how free it is from undue influence, fraud, mistake, or duress, or how much it could benefit a family or relationship, if the agreement is entered into by spouses while they are married and alters their legal relations, it is invalid.[3] Ohio also prohibits spouses from amending an existing premarital agreement after entering marriage, regardless of how stale it is in light of changed circumstances, how ambiguous its provisions are, or how many errors it contains. Instead, spouses are stuck with outdated agreements and the uncertainty that a court may not honor them. In this regard, premarital agreements are the last true irrevocable documents in Ohio. Even irrevocable trust agreements can be modified by a private settlement agreement or decanting—two concepts that have been game-changers for Ohio estate planners in assisting clients in improving outdated trust agreements. Despite this progress, Ohio's laws on marital agreements have been stuck in the dark ages.

Tracing its roots back to 1887,[4] R.C. § 3103.06 is unique. In fact, only four other states—Iowa, Maine, Nebraska, and New Jersey—currently disallow postnuptial agreements. The obvious trend among states in recent years has been to permit postnuptial agreements, which has been driven by the surge of second (or third) marriages, the strive for gender equality, and the concept of freedom to contract with respect to property rights, among many other factors. Ohio, which has been a frontrunner in modernizing its laws in many areas (e.g., asset protection, the trust code, trust decanting, private settlement agreements, transfer on death designations for property, planning for digital assets, etc.), now needs to join the postnuptial agreement renaissance.

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CHANGES TO OHIO LAW ARE IN MOTION

Ohio's prohibition on postnuptial agreements, and the prospect of creating new laws to allow them, have recently been the focus of the OSBA Estate Planning, Trust, and Probate Law Section Postnuptial Committee ("Postnuptial Committee"). The Postnuptial Committee is a collaboration of estate planning and family law attorneys who have spent months reviewing existing laws on marital agreements in other states, and engaging in lively discussion and debate on whether change is appropriate, and if so, how it should be accomplished. Consistent with the methodology in other states which now permit postnuptial agreements, the Postnuptial Committee has determined that Ohio law should permit postnuptial agreements (including amendments to existing premarital agreements) as soon as practical, and have begun drafting proposed language to be incorporated into the Ohio Revised Code to effectuate the change. The following have been identified as significant reasons supporting the Postnuptial Committee's determination:

1. To promote each spouse's ability to freely contract and agree to the financial aspects of their marriage;

2. To create certainty between spouses as to their rights and legal obligations;

3. To provide the ability to enter into or modify agreements to fit the spouses' current situation;

4. To allow outdated and stale premarital agreements to be updated; and

5. To address issues with existing agreements such as errors and ambiguities.

The discussion, debate, and development of the law has now reached the action stage of the process—specifically, determining what to change and how. In order to do so, understanding the current state of premarital agreements in Ohio, including the issues affecting their application and enforceability, is essential.

PREMARITAL AGREEMENTS IN OHIO AND THE ISSUE OF FORESIGHT

A premarital agreement is a contract entered into prior to marriage in order to address the identification, separation, and/or division of property and support in the event of the termination of the marriage by death or failure of the marriage, such as divorce. Premarital agreements may also affect "legal relations" other than property rights, such as the right to serve as guardian, executor, or personal representative of a spouse's estate, the right to make end-of-life decisions, or the right to make decisions on final arrangements and disposition of remains. The laws governing premarital agreements in Ohio are set forth by case law.[5] Generally, in order for a premarital agreement to be valid, the agreement must satisfy the following conditions:

1. It must be in writing, signed by both parties, and must be notarized if it affects interests in real property;[6]

2. It must be entered into freely without fraud, duress, coercion, or overreaching; [7]

3. There must be a full disclosure and understanding of the nature, value, and extent of the prospective spouse's property; [8] and

4. The terms cannot promote or encourage divorce or profiteering of divorce. [9]

For a comprehensive article on premarital agreements in Ohio, see Alan S. Acker, Esq., *Prenuptial Agreements for the Estate Planning Attorney*, Ohio Probate Law Journal, Volume 21, Issue 1 (Sept./Oct. 2016).

Although premarital agreement affecting legal relations between spouses may be entered into prior to marriage, the same agreement cannot be changed after the marriage begins.[10] Also, the ability to revoke or rescind a premarital agreement is very limited.[11] This inability to make post-marital changes to a premarital agreement in order to allow the agreement to evolve with the marriage has caused uncertainty as to whether the terms of the agreement will be enforced. The uncertainties described below can be alleviated by allowing spouses to enter into postnuptial agreements and amend existing premarital agreements.

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(I.) UNCERTAINTY AS TO THE ENFORCEABILITY OF SPOUSAL SUPPORT PROVISIONS

In *Gross v. Gross*, the Ohio Supreme Court held that although the provisions of a premarital agreement regarding spousal support may generally be considered valid by meeting all of the good faith tests at the time the agreement was entered into, the provisions relating to spousal support may lose their validity by reason of changed circumstances which render the provisions unconscionable at the time of the divorce. Further, in *Vanderbilt v. Vanderbilt*,[12] the Court of Appeals for the Ninth Judicial District held that the changed circumstances that will render provisions unconscionable at the time of a divorce must not have been contemplated at the time spouses entered into the agreement.

Simply, Ohio law permits courts to change a validly executed premarital agreement with respect to the provisions for spousal support if the court finds the provisions to be unconscionable due to changed circumstances that were not contemplated at the time the agreement was made. In a way, Ohio law places engaged couples in the impossible position of having to predict the future and anticipate all potential scenarios that can occur during a marriage that may affect their property and legal rights in order to boost the future enforceability of the agreement. However, without a crystal ball, a couple is unable to foresee the challenges and changes that await them in marriage, and they often have yet to experience the scenarios that should be addressed in their premarital agreement.

(II.) UNCERTAINTY AS TO A POTENTIAL DISTRIBUTIVE AWARD IN A DIVORCE

Another factor that creates uncertainty for couples with or without existing premarital agreements in a divorce is an Ohio court's power to make a distributive award to one spouse from the other spouse's separate property or income.[13] This is a different concept from spousal support (i.e., alimony). An Ohio court may make a distributive award of separate property to (a) facilitate, effectuate, or supplement a division of marital property, or (b) in lieu of a division of marital property to achieve equity between the spouses, if the court determines that a division of the marital property in kind or in money would be impractical or burdensome.[14] Several Ohio courts have held that distributive awards may not violate an existing premarital agreement;[15] however, the concern is that if equity so requires, a court will find a way to avoid concluding that the distributive award violates the agreement.

(III.) POSTNUPTIAL AGREEMENTS (AND AMENDMENTS TO PREMARITAL AGREEMENTS) CAN REMOVE THESE UNCERTAINTIES

By allowing married couples to enter into postnuptial agreements or amend their existing premarital agreements from time to time to adjust to their current circumstances, a couple can determine for themselves what is fair and equitable, as opposed to a court. In addition, the more recent that a marital agreement has been entered into prior to the failure of the marriage, the more likely that a court will not find an unanticipated change in circumstances that justifies a court determination that the agreement has lost its validity as to spousal support or that a distributive award will not violate the agreement.

PROPOSED LAW PERMITTING POSTNUPTIAL AGREEMENTS IN OHIO

Currently, two sections of Title 31 of the Ohio Revised Code address a husband and wife's ability to contract with each other. As previously discussed, R.C. § 3103.06 specifically prohibits a husband and wife from entering into a contract with the other that alters their legal relations, including amending existing premarital agreements. On the other hand, R.C. § 3103.05 does permit a husband or wife to enter into an agreement with each other for purposes other than altering their legal relations, for example, allowing one spouse to sell a car to the other spouse.

The EPTPL Section Postnuptial Committee has determined that change is needed and Ohio law should be changed to permit spouses to contract with each other to alter their legal relations in the event of death and/or divorce, including permitting spouses to amend existing premarital agreements.

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Like premarital agreements, postnuptial agreements would be required to be in writing and subject to a higher degree of good faith negotiations and disclosure to be valid. As of June, 2019, the Committee has drafted the following proposed revisions to R.C. § 3103.06 and R.C. § 3103.05 to effectuate such change:

> Proposed R.C. § 3103.05. Contracts. Spouses may enter into any agreement or transaction with each other, or with any other person, which either might if unmarried; subject, in agreements or transactions between spouses, to the general rules which control the actions of persons occupying confidential relations with each other; and to the extent an agreement alters the legal relations between the spouses, such agreement shall comply with requirements of section 3103.06.
>
> Proposed R.C. § 3103.06. Contracts Affecting Marriage. Spouses may by agreement do one or more of the following:
>
> (A) Alter their legal relations with each other;
>
> (B) Modify or terminate any written agreement affecting their legal relations with each other, whether such agreement was entered into by the parties prior to or during the marriage; and
>
> (C) Agree to an immediate separation and make provisions for the support of either of them and their children during the separation.
>
> An agreement entered into pursuant to this section shall be in writing.

YOUR INPUT CAN MAKE A DIFFERENCE

Your input (whether you are in favor of change or not) is not only encouraged, but also critical to determining whether Ohio law should be changed, and if so, how. If you have comments or questions, please contact Susan L. Racey, chair of the Postnuptial Committee, at sracey@tuckerellis.com or (216) 696-3651.

ENDNOTES:

[1]Spouses alter their legal relations by either restricting or expanding their legal rights and obligations. Although there are many, a few examples of a spouse's rights and obligations include the duty to support; dower rights; the right to elect against the will, take an intestate share, and administer the estate of a deceased spouse; and rights upon divorce, annulment, dissolution, or legal separation such as an equitable division of marital property, spousal support, and distributive award.

[2]RC 3103.06.

[3]Except that, under RC 3103.06, spouses may enter into an agreement immediately prior to their separation for the support of either of them and their children during such separation, and a writing after marriage is valid if shown to be a memorandum of an oral agreement reached prior to marriage. *In re Weber's Estate*, 170 Ohio St. 567, 11 Ohio Op. 2d 415, 167 N.E.2d 98 (1960).

[4]Revised Statutes of Ohio § 3113 (1887).

[5]*See Juhasz v. Juhasz*, 134 Ohio St. 257, 12 Ohio Op. 57, 16 N.E.2d 328, 117 A.L.R. 993 (1938) (holding that an agreement voluntarily entered into is valid when the provisions are fair and reasonable under all surrounding facts and circumstances, and although the provisions for one spouse may be wholly disproportionate, such spouse will be bound by voluntarily entering into the contract after full disclosure or with full knowledge); *Hook v. Hook*, 69 Ohio St. 2d 234, 23 Ohio Op. 3d 239, 431 N.E.2d 667 (1982) (holding that an agreement must meet certain minimum levels of good faith and will be set aside as invalid if it is not fair and reasonable under the circumstances).

[6]RC 1335.05.

[7]*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

[8]*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

[9]*Gross v. Gross*, 11 Ohio St. 3d 99, 464 N.E.2d 500, 53 A.L.R.4th 139 (1984).

[10]*See, e.g.*, *Hoffman v. Dobbins*, 2009-Ohio-5157, 2009 WL 3119635 (Ohio Ct. App. 9th Dist. Summit County 2009).

[11]*See, e.g.*, *Dalgarn v. Leonard*, 41 Ohio Op. 506, 55 Ohio L. Abs. 149, 87 N.E.2d 728 (Prob. Ct. 1948), judgment aff'd, 55 Ohio L. Abs. 405, 90 N.E.2d 159 (Ct. App. 2d Dist. Franklin County 1949)

[12]*Vanderbilt v. Vanderbilt*, 2014-Ohio-3652, 2014 WL 4179486 (Ohio Ct. App. 9th Dist. Medina County 2014).

[13]RC 3105.71(A)(1).

[14]RC 3105.71(E).

[15]*See, e.g.*, *Calloway v. Calloway*, 2003-Ohio-267, 2003 WL 152850 (Ohio Ct. App. 5th Dist. Stark County 2003) (finding that a premarital agreement would have been a valid defense to any award requested); *Carmen v. Carmen*, 2012-Ohio-3255, 2012 WL 2928563 (Ohio Ct. App. 8th Dist. Cuyahoga County 2012) (finding that the premarital agreement specifically addressed how to handle separate property and supplants the statute for distributive awards); and *Radcliffe v. Radcliffe*, 1994 WL 151679 (Ohio Ct. App. 2d Dist. Montgomery County 1994) (reversing a trust court's granting of a distributive award because the premarital agreement contained an "expression of intent to

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supersede" the statute for distributive awards).

ESTATE PLANNING BEFORE, DURING AND AFTER DIVORCE

By Erika L. Haupt, Esq.

Roetzel & Andress, A Legal Professional Association
Columbus, Ohio
Based on presentation by the author at the 2019 Ohio ACTEC meeting.

"Marriages come and go, but divorces are forever."

Nora Ephron

Legal advisors are trained to be logical and methodical, setting aside emotion to solve problems. Marriage and divorce are neither logical nor methodical. On the contrary, entering into marriage and ending a union are based primarily on emotion, which is usually the antithesis of logic. The drama associated with divorce often overshadows essential estate planning that must be timely addressed to ensure our clients are protected. Waiting until the emotion stabilizes and logic returns is waiting too long.

MARRIED CLIENTS: WHOM DO YOU REPRESENT?

When you represent spouses jointly, all communications between either husband or wife are confidential as to third parties but not as between husband and wife. Rule 1.6(a) of the Ohio Rules of Professional Conduct states:

> A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.[1]
>
> Consider the ACTEC Commentary on rule 1.7 of the Model Rules of Professional Conduct: *Joint or Separate Representation*. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly. Representing a husband and wife is the most common situation. In that context, attempting to represent a husband and wife separately while simultaneously doing estate planning for each, is generally inconsistent with the lawyer's duty of loyalty to each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them. See generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6 at page 1059 (2014 ed). In other contexts, however, some experienced estate planners undertake to represent related clients separately with respect to related matters Such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining *informed consent*) and MRPC 1.0(b) (Terminology) (defining *confirmed in writing*). The writing may be contained in an engagement letter that covers other subjects as well.
>
> Example 1.7-1. Lawyer (*L*) was asked to represent Husband (*H*) and Wife (*W*) in connection with estate planning matters. *L* had previously not represented either *H* or *W*. At the outset *L* should discuss with *H* and *W* their estate planning goals and the terms upon which *L* would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Assuming that the lawyer reasonably concludes that there is no actual or potential conflict between the spouses, it is permissible to represent a husband and wife as joint clients. Before undertaking such a representation, the lawyer should elicit from the spouses an informed agreement in writing that the lawyer may share any information disclosed by one of them with the other. *See* ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).[2]

When representing spouses, you should clearly address the conflict in the engagement letter and ask spouses to waive the conflict at the time of engagement. The *ACTEC Engagement Letters: A Guide for Practitioners* provides as follows:

> Waiver of Potential Conflicts of Interest. It is common for spouses to employ the same firm to assist them in planning their estates, as you have requested us to do. Please understand that, because we will represent the two of you jointly, it would be unethical for us to withhold information form either of you that is relevant and material to the subject matter of the engagement. Accordingly, by agreeing to this form of representation, each of you authorizes us to disclose to the other information that one of you shares with us or that we acquire from another source which, in our judgment, falls into this category.
>
> We will not take any action or refrain from taking an action (pertaining to the subject matter of our

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> representation of you) that affects one of you without the other's knowledge and consent. Of course, anything either of you discusses with us is privileged from disclosure to third parties, unless you authorize us to disclose the information or disclosure is required or permitted by law or the rules governing our professional conduct.[3]

The engagement letter should also explain what happens if a conflict arises between spouses. The ACTEC sample engagement letter for representation of spouses states:

> If a conflict of interest arises between you during the course of your planning or if the two of you have a difference of opinion on any subject, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other. Furthermore, we cannot advocate one of your positions over the other if there is a disagreement as to your respective property rights or interests or as to other legal issues. By signing this letter, you waive potential conflicts of interest that can arise by virtue of the fact that we represent the two of you together.[4]

If a conflict between husband and wife later arises, the engagement letter should state whether you will withdraw from representation of both spouses or if you will withdraw from representation of one spouse and continue to represent the other spouse. In the latter instance, the engagement letter should state that the signatures of both spouses constitute consent of the future representation of only one spouse. If communication is received from one spouse only, consider the relevance or significance of the information and proceed accordingly. You may take no action if is determined the communication is irrelevant or insignificant, but encourage the communicating spouse to provide the information to the other spouse. However, if the information reflects serious adversity between the spouses, withdraw from representation.

Consider also addressing the effect of the termination of the marriage in the engagement letter. Does the joint representation terminate upon the issuance of a court order terminating the marriage or providing that the spouses are legally separated or does the representation terminate upon the filing of an action to terminate the marriage or legally separate? The latter is obviously the less the complicated for the attorney.

The engagement letter may also address representation following the termination of the marriage or legal separation. For example, the spouses may affirmatively authorize the revision of planning documents without notice to the other should the marriage terminate or they legally separate.

REPRESENTATION OF CLIENTS GOING THROUGH A DIVORCE

May an attorney represent both husband and wife during divorce proceedings? Rule 1.7 of the Ohio Rules of Professional Conduct states:

> (a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:
>
> (1) adverse to another current client;
>
> (2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.
>
> (b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:
>
> (1) the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) each affected client gives *informed consent*, *confirmed in writing*; and
>
> (3) the representation is not precluded by division (c) of this rule.
>
> (c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:
>
> (1) the representation is prohibited by law;
>
> (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.[5]

But should an attorney represent both spouses going through a divorce? While it may be technically possible to represent spouses going through a divorce with the proper consents, it creates land mines for the legal advisor. Divorcing spouses maintain spousal rights to each other's estates on death. If advice is given to one spouse that would adversely affect the spousal rights of the other

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spouse, are both spouses being diligently represented? Is it really possible to compartmentalize advice to clients with adverse interests? Given the potential exposure and the high emotions associated with divorce, the benefits of representing both spouses seem to pale in comparison to the risk.

AFTER THE DIVORCE: REPRESENTING EACH SPOUSE

It is possible to represent a former spouse after representing both spouses if the other spouse consents in writing to the representation and waives (a) any harm arising from the use of information gained while the attorney was representing both spouses, (b) any future conflict of interest, and (c) Rules 1.7 and 1.9 of the Ohio Rules of Professional Conduct. Revising revocable documents should not be materially adverse to the former spouse. However, if there are obligations that extend beyond death, not addressing payment could be considered materially adverse.

Rule 1.9 of the Ohio Rules of Professional Conduct provides as follows:

> (a) Unless the former client gives *informed consent, confirmed in writing*, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a *substantially related matter* in which that person's interests are materially adverse to the interests of the former client.
>
> (b) Unless the former client gives *informed consent, confirmed in writing*, a lawyer shall not *knowingly* represent a person in the same or a *substantially related matter* in which a *firm* with which the lawyer formerly was associated had previously represented a client where both of the following apply:
>
> (1) the interests of the client are materially adverse to that person;
>
> (2) the lawyer had acquired information about the client that is protected by Rules 1.6 and 1.9(c) and material to the matter.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former *firm* has formerly represented a client in a matter shall not thereafter do either of the following:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally *known*;
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.[6]

The *ACTEC Commentaries* provide an example of how Rule 1.9 of the Model Rules of Professional Conduct affects subsequent representation:

> Example 1.9-1. Lawyer (*L*) represented Husband (*H*) and Wife (*W*) jointly in connection with estate planning matters. Subsequently *H* and *W* were divorced in an action in which each of them was separately represented by counsel other than *L*. *L* has continued to represent *H* in estate planning and other matters. Because *W* is a former client, MRPC 1.9 imposes limitations upon *L*'s representation of *H* or others. Thus, unless *W* gives informed consent, confirmed in writing, MRPC 1.9(a) would prevent *L* from representing *H* in a matter substantially related to the prior representation in which *H*'s interests are materially adverse to *W*'s, such as an attempt to modify or terminate an irrevocable trust of which *W* was a beneficiary. However, after the marital dissolution is final, amending H's estate plan to remove W as a beneficiary, consistent with state law and the dissolution decree, should not be considered a conflict. Also, under MRPC 1.9(c), *L* could not disclose or use to *W*'s disadvantage information that *L* obtained during the former representation of *H* and *W* in estate planning matters without *W*'s informed consent, confirmed in writing. For example, *L* could not use on behalf of one of *W*'s creditors information that *L* obtained regarding *W*'s financial condition or ownership of property. Subject to these limitations, it is possible that L could represent H and W concurrently with respect to their now separate estate plans.[7]

ESTATE PLANNING PRIOR TO DIVORCE

Certain actions are prohibited upon the filing of a complaint for divorce. In Ohio, the court of jurisdiction will issue a mutual temporary restraining order enjoining each spouse from taking certain actions. For example, in the Franklin County, Ohio Domestic Relations Court, upon the filing of a complaint for divorce, legal separation or annulment, the plaintiff shall prepare and sign a mutual temporary restraining order, which shall be served upon the defendant, who may thereafter move to modify or vacate the order. If such a motion is filed, it shall be set for hearing.[8] Each spouse is prohibited from, among other things, disposing of assets

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of either spouse, including real and/or personal property, household furniture, furnishing and automobiles; directly or indirectly changing beneficiaries, borrowing from, terminating or reducing insurance policies on the life of either spouse; and withdrawing, transferring ownership of, spending or disposing of bank accounts, brokerage accounts, pension plans, stocks or bonds.[9] Accordingly, prior to the filing for divorce, a client should consider terminating joint tenancies, changing IRA and life insurance beneficiary designations, designating new fiduciaries and revising her estate plan. However, when representing both spouses, you cannot assist one spouse with the transfer of assets or changing of beneficiary designations in anticipation of divorce. Even when only representing one spouse, you should not assist a client who is contemplating a divorce or in the middle of divorce proceeding to transfer marital property without first seeking advice from the client's divorce attorney.

Often when representing spouses, the attorney recommends transferring an asset from one spouse to another as part of the estate planning process: Is that a gift? Most premarital agreements allow for gifts between spouses and may provide that assets transferred between spouses are, in fact, gifts that are recharacterized as the separate property of the donee-spouse. If assets are transferred for tax planning purposes (e.g., maximizing the use of the generation-skipping transfer tax credit) or for asset protection (e.g., transferring assets away from a spouse in a litigation-prone profession), are those transfers gifts that will be considered the separate property of the donee? Because you never know if or when spouses will terminate their marriage, it is important to document in writing the reasons behind each recommendation to transfer assets between spouses.

ESTATE PLANNING AND RELATED ISSUES DURING DIVORCE

A. THE FILING OF AN ACTION FOR DIVORCE, DISSOLUTION, ANNULMENT OR LEGAL SEPARATION AFFECTS FINANCIAL POWERS OF ATTORNEY AND HEALTH CARE DIRECTIVES.

Pursuant to Section 1337.03(B)(3) of the Ohio Revised Code, an agent's authority under a power of attorney terminates when "[a]n action is filed for the divorce, dissolution, or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides. . .."[10] If a client has not named an alternate health care agent and, as a result of Section 1337.03(B)(3) of the Ohio Revised Code, no agent is appointed, Section 2133.08 would give the client's spouse the priority behind a guardian to consent to withhold or withdraw life-sustaining treatment.[11] Therefore, it is important for a divorcing spouse to execute new financial and health care directives as soon as possible following the filing of an action terminating the marriage or for legal separation.

B. THE SETTLEMENT OR SEPARATION AGREEMENT MAY HAVE ADVERSE INCOME, GIFT, AND ESTATE TAX CONSEQUENCES.

The proposed settlement or separation agreement could benefit from a review by an estate planning attorney. Often, income, gift, and estate tax consequences are not addressed during negotiation. Consider, for example, potential gifts made by or between divorcing spouses. Pursuant to Section 2513(a)(1) of the Internal Revenue Code of 1986, as amended, gifts may be split in the year of a divorce, provided the gifts are made prior to the termination of the marriage and neither party remarries during the year.[12] If a transfer is incident to the divorce, and pursuant to a written agreement entered into before the end of the marriage, the transfer will not be a gift as long as the divorce occurs within three years beginning on the date one year before the agreement and either of the following is satisfied: (i) the transfer is between former spouses in settlement of marital or property rights; or (ii) the transfer provides a reasonable allowance for the support of children of the former marriage.[13]

With respect to income, the Tax Cuts and Jobs Act of 2017[14] ("2017 Tax Act") significantly affected the income tax treatment of spousal support. Prior to the 2017 Tax Act, spousal support payments were includable in the income of the recipient and deductible by the payor. For settlement agreements signed after December 31, 2018, spousal support payments are not income of the recipient or deduct-

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ible by the payor. Unlike other tax law changes under the 2017 Tax Act that are scheduled to sunset on December 31, 2025, the taxation of spousal support payments is permanent. The change may have an impact on how settlement agreements are structured.

Income tax changes under the 2017 Tax Act, may also make a spousal support trust more popular. A spousal support trust is an irrevocable trust to which the payor transfers property after the divorce in lieu of making payments directly to the recipient. The transfer of the assets is not a gift if made pursuant to a settlement agreement within the proper time period after the termination of the marriage. The income from the trust is excluded from the payor-spouse's income, which effectively restores the deductibility eliminated by the 2017 Tax Act. The recipient-spouse includes income she receives, with the trust paying tax on any excess income. At the recipient-spouse's death, the trust assets may revert to the payor-spouse.

Premarital agreements signed prior to the effective date of the 2017 Tax Act are not grandfathered. If a premarital agreement signed before the 2017 Tax Act requires the payment of spousal support, payments will not be deductible to the payor-spouse. For couples in states like Ohio that do not recognize postnuptial agreements, the 2017 Tax Act could significantly affect the financial arrangement of divorcing couples who intended something completely different when they negotiated their premarital agreements.

The 2017 Tax Act also affects the taxation of certain grantor trusts. Under certain circumstances, a grantor of a trust may be treated as a substantial owner of a trust for income tax purposes, which results in all items of income, gain or loss to be reported to the grantor and not to the trust or the trust beneficiaries.[15] Prior to the 2017 Tax Act, Internal Revenue Code Section 682 provided that, after a divorce, income paid to an ex-spouse from a grantor trust would be taxed to the ex-spouse and not to the grantor of the trust. However, Internal Revenue Code Section 682 was repealed as part of the 2017 Tax Act. Now, after a divorce, the grantor of a grantor trust continues to pay income tax on the trust income, even though the divorced spouse receives that income.

Consider the effect of the repeal of Section 682 on certain trusts used in estate tax planning. A lifetime qualified terminable interest property ("QTIP") trust qualifies for the marital deduction when funded if all income from the trust will be distributed to the spouse of the grantor during such spouse's lifetime.[16] In order to qualify for the marital deduction, termination of the marriage cannot affect a spouse's income interest. If a lifetime QTIP is drafted as a grantor trust, the repeal of Section 682 means the divorced grantor spouse will pay income tax on the income distributed to her ex-spouse.

Similarly, a spousal lifetime access trust ("SLAT") may be drafted as a grantor trust. If there is a divorce, grantor continues to pay income tax on the SLAT income, even if it is distributed to the ex-spouse. Unlike a lifetime QTIP trust, however, a SLAT may provide that divorce terminates an ex-spouse's income interest.

Income generated from trusts may be considered when determining spousal support. Even though a trust would otherwise be separate property for property division purposes, an Ohio court may nevertheless take it into account when awarding spousal support. Section 3105.18(c)(1) of the Ohio Revised Code states that, "[i]n determining whether spousal support is appropriate or reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support,. . .the court shall consider. . .[t]he income of the parties, from all sources. . .."[17] If a client has an expectation of entitlement to either income or principal from a trust, a judge may consider it when determining spousal support. Such a review should be considered when planning for the descendants of clients. If asset protection or wealth preservation is a client's primary goal, consider eliminating the absolute right to income and/or principal, even subject to standards, upon divorce.

Divorce may disqualify a qualified personal residence trust ("QPRT"). In many cases, estate planning documents or state law address a spouse's continuing interest in a trust on divorce. However, Internal Revenue Code Section 2702 and the applicable regulations thereunder do not authorize the inclusion of divorce provisions in a QPRT agree-

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ment that would allow the grantor the option to remain in the residence or give up the home as part of the divorce settlement. "Often, prior to a couple becoming divorced, one of the parties elects to move out of the primary residence. Depending on whether that person is the grantor of the QPRT, a series of consequences related to the ultimate success or failure of the previously established QPRT may inadvertently have been put into motion."[18]

On separation, do you have a valid QPRT? A residence is "held for use as a personal residence" as long as it is not occupied by one other than the spouse or dependent of the grantor ("third party").[19] As long as the grantor-spouse has the legal right to return to the residence and it is not occupied by a third party, the QPRT is a valid QPRT during separation. However, a separation agreement addressing the rights of the grantor-spouse in the QPRT may affect the validity of the QPRT. If the grantor is required to vacate the residence, sell the residence or permit someone other than the grantor's spouse and/or dependents to live in the residence, the cessation date of the QPRT is triggered. If the grantor of the QPRT has no legal right to return to the residence, the QPRT converts to a grantor retained annuity trust ("GRAT"). The annuity payments could be made with in-kind transfers or the QPRT residence may be sold.

Another option may be to rent the residence to a third party or to the ex-spouse in order to fund the annuity payments. If the ex-spouse wishes to remain in the QPRT residence but is not the grantor, she may pay rent as part of the overall settlement agreement.

If a sale is required by the settlement agreement, it may be beneficial as part of the settlement agreement if the grantor is permitted to remain in the residence until it sells to avoid in-kind payments or a fire sale to make GRAT payments.

C. THE SETTLEMENT AGREEMENT SHOULD TAKE INTO ACCOUNT TRUSTS THAT DO NOT OR CANNOT TERMINATE AS A RESULT OF DIVORCE.

Certain trust interests are not automatically terminated on divorce. Pursuant to section 5815.31 of the Ohio Revised Code:

> [u]nless the trust or separation agreement provides otherwise, if, after executing a trust in which the grantor reserves to self a power to alter, amend, revoke, or terminate the provisions of the trust, a grantor is divorced, obtains a dissolution of marriage, has the grantor's marriage annulled, or, upon actual separation from the grantor's spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, the spouse or former spouse of the grantor shall be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall be revoked. If the grantor remarries the grantor's former spouse or if the separation agreement is terminated, the spouse shall not be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall not be revoked.[20]

Section 5815.31 of the Ohio Revised Code does not apply to a trust in which the grantor does not reserve the power to alter, amend, revoke, or terminate the trust, which would include irrevocable life insurance trusts, spousal lifetime access trusts, lifetime QTIP trusts, GRAT with a back-end marital trust, etc.

In certain trust agreements, a provision terminating a spouse's interest on divorce may be included. If it is impossible to address divorce in a trust agreement because of marital deduction requirements or split-interest trust qualifications, or if divorce is simply not addressed in an irrevocable trust agreement, the settlement agreement should take the continuing beneficial interests into account when dividing assets or determining spousal support.

PLANNING AFTER DIVORCE

A. PREPARE NEW REVOCABLE DOCUMENTS.

Even though Section 5815.31 of the Ohio Revised Code treats an ex-spouse as having predeceased the grantor for purposes of a revocable trust,[21] restate the trust. Despite Sections 2107.33(B) and (C) treating an ex-spouse as having predeceased

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the testator for purposes of a will,[22] prepare a new will. Prepare new financial and health care powers of attorney if alternates agents were not identified in powers executed prior to the filing of an action for divorce or legal separation.

B. ENSURE CONSISTENCY AMONG THE DIVORCE DECREE, SETTLEMENT AGREEMENT, AND THE POST-DIVORCE ESTATE PLAN.

Review the obligations under the divorce decree and settlement agreement to ensure the client's estate plan takes into account those obligations. While a surviving ex-spouse is a creditor of the deceased spouse with respect to outstanding post-divorce obligations, requiring the ex-spouse to file a complaint to enforce a judgment is an unnecessary expense that can easily be avoided by requiring an executor or trustee to fulfill the decedent's obligations to the ex-spouse.

C. UPDATE BENEFICIARY DESIGNATIONS.

Section 5815.33(B)(1) of the Ohio Revised Code provides as follows on divorce, dissolution or annulment:[23]

> Unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, and subject to division (B)(2) of this section, if a spouse designates the other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designates the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment. [24]

A "beneficiary" is defined as "a beneficiary of a life insurance policy, an annuity, a payable on death account, an individual retirement plan, an employer death benefit plan, or another right to death benefits arising under a contract."[25]

In *Egelhoff v Egelhoff*,[26] the U.S. Supreme Court held that a state of Washington statute providing that the designation of a spouse as the beneficiary of nonprobate assets was revoked upon divorce was preempted by the ERISA requirement that plan fiduciaries shall administer ERISA plans in accordance with the documents governing the plan. Because the plan documents listed the ex-wife of the decedent as the plan beneficiary, the ex-wife was entitled to the plan benefits. In *Kennedy v. Plan Administrator for Dupont Savings and Investment Plan*,[27] the divorce decree ordered that the ex-wife was divested of all claims to her ex-husband's pension plan. The ex-husband did not change the beneficiary by the time of his death. The U.S. Supreme Court held that, absent a valid qualified domestic relations order, the plan administrator must follow the beneficiary designation form in effect at the date of the decedent's death. However, the Court by footnote did not express an opinion as to whether the decedent's estate could have brought an action to recover the plan proceeds after the benefits were distributed to the ex-wife.[28]

The Sixth Circuit Court of Appeals in *Central States, Southeast & Southwest Areas Pension Fund v. Howell*,[29] held that a court has the discretion under the doctrine of equity to impose a constructive trust on ERISA plan benefits in accordance with state law. Similarly, in *Crites v. Anthem Life Insurance Co.*,[30] the decedent and his ex-spouse entered into a separation agreement adopted by the trial court whereby each party released rights as a beneficiary to the other party's life insurance. The decedent did not change the beneficiary designation on an employer-sponsored life insurance policy governed by ERISA. As of the date of his death, decedent's ex-wife was the primary beneficiary and his children were the contingent beneficiaries. The Third District Court of Appeals held that there was no question the ex-spouse was the named beneficiary and, per *Egelhoff*, the policy proceeds should not be paid to the ex-spouse and not directly to the contingent beneficiaries.[31] It further held that the trial court did not err in imposing a constructive trust on the proceeds for the benefit of decedent's children.[32]

However, in *Aetna Life Ins. Co. v. Schilling*,[33] the Ohio Supreme Court held that Section 1339.63 of

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the Ohio Revised Code, amended by and renumbered as Section 5815.33, did not apply to a certain life insurance policy. Section 1339.63 became effective on May 31, 1990, 20 days before the decedent-insured's death. The beneficiary of the decedent's 1975 life insurance policy was his wife, from whom he was divorced in 1977. The Ohio Supreme Court held that Section 1339.63, as applied to contracts entered into before the effective date of the statute, violates Section 28, Article II of the Ohio Constitution.[34]

Rather than relying on state law, which may not result in the intended distributions in all cases, it is best to proactively review all beneficiary designations immediately upon the termination of the marriage or legal separation.

D. PLAN FOR MINOR CHILDREN.

If assets could pass to minor children, is it appropriate for the surviving parent who is the ex-spouse of the decedent to have any involvement in the management and/or of assets for the minor children? Should the ex-spouse as guardian for minor children have any right to act on behalf of the children? For example, should the ex-spouse as guardian have the right to remove the trustee of a trust?

E. USE AN OHIO LEGACY TRUST IN LIEU OF A PREMARITAL AGREEMENT FOR FUTURE MARRIAGE(S).

Chapter 5816 of the Ohio Revised Code establishes the Ohio Legacy Trust, which is an irrevocable trust with at least one qualified trustee, is governed by Ohio law, and has a spendthrift provision applicable to the interests of any beneficiary in the trust property, including any interests of a transferor in the trust property.[35] A qualified trustee is a person who is not a transferor and, if a natural person, is an Ohio resident, or, if a corporation, is authorized to administer Ohio trusts.[36] In addition, some or all of the trust property must be in the custody of the qualified trustee in Ohio, the qualified trustee must maintain records in Ohio, and the qualified trustee must arrange for the preparation of income tax returns.[37]

Section 5816.05 of the Ohio Revised Code includes permissible rights of the grantor, including the power to veto a distribution, the reservation of an income interest, a lifetime or testamentary limited power of appointment, the right to receive principal in the discretion of the trustee, a 5x5 principal withdrawal right, the power to remove and replace a trustee or trust advisor, the power to use trust property, the ability in the trustee's discretion to receive reimbursement for income taxes, and the power to veto distributions.[38] The transfer to an Ohio Legacy Trust cannot make the grantor insolvent and creditor protection is not afforded to current creditors, to avoid child support or to avoid spousal support for transfers made after a marriage. Pursuant to Section 5816.13:

> [n]o beneficiary or other person shall be considered to have a property interest in any property of a legacy trust to the extent that the distribution of that property is subject to the discretion of one or more qualified trustees or advisors, either acting alone or in conjunction with any other person, including any person authorized to veto any distributions from the legacy trust.[39]

Accordingly, assets held in an Ohio Legacy Trust are not subject to division if the marriage terminates and the trust was funded prior to the marriage. As a result, the Ohio Legacy Trust can serve the same purpose as a premarital agreement without any involvement by the prospective spouse, including what some clients feel are uncomfortable conversations regarding finances.

While assets transferred to an Ohio Legacy Trust prior to divorce are not be subject to division on divorce and a claim may not be made against the trust assets for the payment of spousal support, a domestic relations court may consider the grantor's absolute right to income or principal when awarding spousal support. If retention of income is important to the grantor and the income generated is significant enough to be a factor in determining spousal support, consider at least subjecting the distributions to an ascertainable standard or, upon divorce, the agreement could provide that the grantor's right to income and/or a 5x5 withdrawal right terminates.

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F. USE LESSONS LEARNED DURING THE DIVORCE WHEN PLANNING AFTER THE DIVORCE.

For post-divorce planning, take into account the following:

- What is a spouse's income on divorce may take into account beneficial interests regardless of whether those assets are separate or marital property.
- The flexibility we give a spouse over trust property may cause that property to be considered the spouse's by a domestic relations court.
- To the extent possible, plan for divorce or legal separation in irrevocable documents.
- If conflicts cannot be waived or ethical concerns prohibit you from advising a client during settlement negotiations, recommend that an estate planning attorney review the settlement agreement for income, gift and estate tax issues.
- While a divorced spouse is treated as having predeceased her former spouse under Ohio Revised Code sections 5815.31 and 2107.33(c), her relatives are not. Many "ultimate disaster" clauses in trust agreements distribute ½ of trust assets to the heirs of a spouse under the statute of descent and distribution. Draft to contemplate divorce and address the classes of people who are treated as having predeceased the grantor upon divorce.

ENDNOTES:

[1]Ohio R. Prof. Cond. 1.6(a).

[2]ACTEC Commentaries, 5th Ed., 102-03 (2016).

[3]ACTEC Engagement Letters: A Guide for Practitioners, 3rd Ed., 11-12 (2017).

[4]ACTEC Engagement Letters: A Guide for Practitioners, 3rd Ed., 12 (2017).

[5]Ohio R. Prof. Cond. Rule 1.7.

[6]Ohio R. Prof. Cond. Rule 1.9.

[7]ACTEC Commentaries, 5th Ed., 139-40 (2016).

[8]Franklin Cty. Dom. Ct. R. 43(A).

[9]Franklin Cty. Dom. Ct. R. 43(C).

[10]RC 1337.03(B)(3) (emphasis added).

[11]RC 2133.08.

[12]I.R.C. 2513(a)(1).

[13]I.R.C. 2516.

[14]Tax Cuts and Jobs Act of 2017, Pub.L. 115-97.

[15]26 U.S. Code Subpart E.

[16]I.R.C. 2056(b)(7).

[17]RC 3105.18(c)(1).

[18]Craig M. Stephens and Elizabeth H. Hutchins, *Who Gets Hurt in Divorce? The Kids and the QPRT: A Practical Guide to Problems with Divorce and QPRTs*, 26th Annual Southern Region ACTEC Meeting 3-4 (2012).

[19]Treas. Reg. 25.2702-5(c)(7)(i).

[20]RC 5815.31 (emphasis added).

[21]RC 5815.31.

[22]RC 2107.33(B) and 2107.33(C).

[23]Note RC 5815.33(B)(1) does not apply to legal separation.

[24]RC 5815.33(B)(1).

[25]RC 5815(A)(1).

[26]*Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264, 25 Employee Benefits Cas. (BNA) 2089 (2001).

[27]*Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662, 45 Employee Benefits Cas. (BNA) 2249, 2009-1 U.S. Tax Cas. (CCH) P 50383 (2009).

[28]*Kennedy,* 555 U.S. at 299-300, fn. 10.

[29]*Central States, Southeast & Southwest Areas Pension Fund v. Howell*, 227 F.3d 672, 679, 25 Employee Benefits Cas. (BNA) 1015, 2000 FED App. 0336P (6th Cir. 2000).

[30]*Crites v. Anthem Life Ins. Co.*, 2014-Ohio-1682, 58 Employee Benefits Cas. (BNA) 1231, 2014 WL 1572364 (Ohio Ct. App. 3d Dist. Defiance County 2014).

[31]*Crites*, 2014-Ohio-1682, ¶ 14.

[32]*Crites*, 2014-Ohio-1682, ¶ ¶ 14-15. Consider also *Smoot v. Smoot*, 2015-1 U.S. Tax Cas. (CCH) P 60688, 115 A.F.T.R.2d 2015-1485, 2015 WL 2340822 (S.D. Ga. 2015), in which the decedent's ex-wife was the beneficiary of deferred compensation, an IRA, a 401(k) plan and an annuity. The estate sought recovery of estate taxes attributable to the assets received by the ex-wife as a result of the decedent's death. The decedent's will required contribution for such estate taxes. However, pursuant to Georgia law, "[a]ll provisions of a will made prior to a testator's final divorce. . .in which no provision is made in contemplation of such event shall take effect as if the former spouse had predeceased the testator. . .." Ga. Code. Ann. § 53-4-49. The United States District Court for the Southern

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District of Georgia, Brunswick Division, held that because the Georgia Code is unambiguous, the decedent's estate had no right of estate tax recovery from decedent's ex-wife as to assets she received other than life insurance proceeds.

[33]*Aetna Life Ins. Co. v. Schilling*, 67 Ohio St. 3d 164, 1993-Ohio-231, 616 N.E.2d 893 (1993) (rejected by, *In Re: Proceeds of Jackson National Life Insurance Company*, 2016 WL 6806359 (M.D. Fla. 2016)).

[34]*Aetna*, 67 Ohio St. 3d at 168. See also *In re Estate of Holycross*, 112 Ohio St. 3d 203, 2007-Ohio-1, 858 N.E.2d 805 (2007).

[35]RC Chap. 5816.

[36]RC 5816.02(S).

[37]RC 5816.02(S).

[38]RC 5816.05.

[39]RC 5816.13.

TOP 10 ASSET PROTECTION MISTAKES ESTATE PLANNERS MAKE[1]

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1. INTRODUCTION

Asset protection issues affect many different areas of legal practice, such as corporate law, family law, and bankruptcy law. However, asset protection planning is an often overlooked (or at least underutilized) strategy in the area of trusts and estates. Estate planners who do not at least discuss asset protection with their clients are neglecting an important planning tool. This article will explore 10 asset protection mistakes that are commonly made in estate planning practice, and will provide a basic overview of techniques that can be used to overcome those mistakes.

2. MISTAKE #1: NOT DISCUSSING ASSET PROTECTION PLANNING WITH CLIENTS.

a. Clients are concerned about asset protection. In general, clients have worked hard to accumulate their assets. They hear horror stories about people losing substantially all of their assets in lawsuits and divorces, and they realize it could happen to anyone.

i. Divorce rate >50%. With the national divorce rate hovering around 50%, married clients often worry about the financial risks associated with divorce. They could be required to relinquish a significant portion of their assets in the form of alimony or child support. They dread the possibility of having their assets controlled by an ex-spouse who may use the assets for the benefit of a new spouse and step-children. Clients want to ensure that their assets will be preserved for their own descendants and family members.

ii. Proliferation of lawsuits. Clients are well aware of the litigious society around them. From spilled coffee[2] to a lost pair of pants,[3] people will sue over just about anything. Believing that even the smallest infractions could lead to shocking liability and judgments, clients desire to protect their nest egg from greedy plaintiffs.

iii. High risk occupations: Some occupations are riskier than others. Physicians, attorneys, business owners, real estate developers (due to personal guarantees), realtors, and other professionals are frequent targets for lawsuits. In general, individuals in high risk occupations are concerned about losing their hard-earned assets to satisfy a professional judgment or settlement.

b. Attorney needs to be an advisor; not just take directions. The role of an estate planner is far greater than simply taking instructions and preparing estate planning documents to match. The prudent estate planner is obligated to consider the whole picture of the client's needs. Many different factors go into developing a well-rounded estate plan. Clients hire lawyers because they don't know what they don't know. They need a trusted advisor to recognize and avoid their potential pitfalls.

[1]This article is based on a presentation made at the Ohio Fellow ACTEC meeting in May 2019. The topics, but not the material, are based on a webinar presented by Steve J. Oshins to the Ultimate Estate Planner in 2015.

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c. Not discussing asset protection planning hurts clients and hurts attorney's business. Attorneys who fail to discuss or consider asset protection planning are missing out on a tremendous opportunity to bring value to their clients. From a client's perspective, the attorney who drafts a few documents and sends them on their way is easily forgettable. However, the attorney who demonstrates concern for the totality of a client's circumstance will quickly become a trusted advisor. When an attorney exceeds expectations by raising flags and providing advice on significant issues such as asset protection, a more solid relationship is formed with the client. The client will think of that attorney when other legal questions arise in the future, or when their friends and family members ask them for a referral. With estate planning lawyers in abundance, a savvy attorney will distinguish himself by engaging his clients in asset protection conversations.

3. MISTAKE #2: NOT USING CHARGING ORDER PROTECTION.

a. Charging order protection defined: "A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor."[4]

b. Charging order protection is good but it is not perfect. While charging order protection offers some assurance to LLC members, it does have its flaws. Its application is somewhat limited because creditors cannot get funds from a charging order until a distribution is made from the LLC. Most creditors would rather settle than place a lien on an entity that may or may not make a distribution. However, creditors are not the only ones who experience limitations under a charging order: the debtor-member cannot access the funds either. Judges frequently issue overly broad charging orders which prohibit distributions not only to the debtor-member, but to the other members as well, even if they are not subject to the charging order. Furthermore, judges often prohibit the debtor-member (and the debtor-member's spouse is also a member) from taking constructive distributions from the LLC in the form of loans, salaries, or other compensation.[5]

c. A charging order is the exclusive remedy against LLC membership interests for judgment creditors in Ohio as provided in O.R.C. § 1705.19. Ohio's charging order statute specifically prohibits equitable remedies.[6] The charging order is a judgment creditor's only remedy against LLC membership interests in Ohio.

d.When forming new entities, advise clients to use charging order protected entities. Corporations do not provide charging order protection.[7] Consider converting a corporation to a limited liability company to obtain charging order protection. Although limited partnerships and limited liability companies are both protected by Ohio's charging order statute, limited liability companies are now used almost exclusively. Limited partnerships are somewhat outdated and cumbersome, and they require a general partner. Limited liability companies provide more flexibility in terms of structure, taxation, and asset protection.

4. MISTAKE #3: USING SINGLE MEMBER LLCS RATHER THAN MULTI-MEMBER LLCS.

a.Purpose of Charging Order. The main purpose of a charging order is to protect the interests of non-debtor owners in LLCs and limited partnerships. Without charging order protection, the debtor-member's creditors would be able to obtain voting rights in the entity. The charging order only gives creditors an economic interest, not voting powers. The theory of charging order protection is that it is unfair to require any non-debtor members to have to be in business with the creditors of the debtor-member. This general theory applies to entities with multiple owners. Thus, to take advantage of the charging order protection, clients should be advised to establish multi-member LLCs.

b.Single-member LLCs can be pierced. Because charging order protection offers protection over the interests of non-debtor LLC members, courts have consistently held that there is no need for charging order protection in single-member LLCs.[8] The theory of protecting other non-debtor

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members does not exist. Therefore, there is no charging order protection for single member LLCs, because the only interest at stake is the interest of the sole-member debtor.

c. Ohio's legislative exception for single-member LLCs

i. In many states, charging order protection is only offered for multi-member LLCs. However, Ohio's statute allows charging order protection even for single-member LLCs.

ii. Text of statute:

> The provisions of §§ 1705.01 to 1705.52 and § 1705.61 of the Ohio Revised Code apply to all limited liability companies formed under this chapter whether the limited liability company has one or more members or whether it is formed by a filing under § 1705.04 of the Revised Code or by merger, consolidation, or conversion.[9]

d. Only use in states that specifically provide charging order protection to single-member LLCs. While there are some exceptions to the multi-member rule, such as Ohio's statute, most states only permit charging order protection for multi-member LLCs. As a general rule, single-member LLCs do not qualify for charging order protection unless the state's charging order statute specifically includes single-member LLCs.

i. "All collection is local."[10] It is likely that if a creditor obtains a judgment against a debtor-member, the local court enforcing the judgment or charging order will apply the law of the jurisdiction in which the collection action takes place, *not* the jurisdiction in which the entity was formed.[11]

ii. Do not form a single member Ohio LLC for a non-Ohio client. Based on the foregoing, non-Ohio clients may not receive Ohio's charging order protection by forming an Ohio LLC. The location of the debtor and the assets will control the creditor's collection process, not the location of the entity's organization.

iii. Risk: Ohio client moves to or is sued in a jurisdiction that doesn't provide charging order protection to single member LLC. The risk of establishing a single-member LLC in Ohio is that the Ohio client might later move out of state or might get sued in another jurisdiction which does not provide charging order protection to single-member LLCs. In order to eliminate this risk, Ohio clients should be advised to establish multi-member LLCs whenever possible.

5. MISTAKE #4: FAILING TO USE DOMESTIC ASSET PROTECTION TRUSTS TO PROTECT CLIENTS' ASSETS.[12]

a. Definition: A Domestic Asset Protection Trust ("DAPT") is a U.S. self-settled irrevocable trust in which the grantor is a permissible beneficiary.

b. 18 states allow DAPT's. Eighteen states have adopted DAPT statutes, including Alaska, Delaware, Hawaii, Indiana Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming (with Connecticut pending). For an excellent resource that compares 39 of the most important features of the DAPT legislation, see the comparison chart published by ACTEC Fellow David Shaftel.[13]

c. 17 out of 18 states have statutory exception creditors. In general, creditors are barred from piercing a properly established and administered DAPT. However, some states have created statutory exceptions for certain creditors, such as divorcing spouses and preexisting tort creditors.[14] In these states, the exception creditors may gain access to DAPT funds in order to satisfy their claims against the grantor. The Ohio Legacy Trust statute creates exceptions for divorcing spouses and for the payment of spousal or child support.[15] Thus, in Ohio, no creditor may pierce a properly established DAPT unless the creditor is a divorcing spouse or is an individual or government agency seeking the collection of spousal or child support from the grantor.

d. The statute of limitations varies by state. In each state where DAPT's are permitted, creditors are given a statute of limitations for bringing claims to challenge the grantor's transfer of assets into a DAPT. The statute of limitations varies by state and ranges from 18 months to four years. Ohio has the shortest statute of limitations, at 18

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months! Indiana, Nevada and Hawaii have a two-year statute; South Dakota and Utah have a three-year statute; and all the other DAPT states have a four-year statute of limitations.

e. Planning for the Ohio client. Historically, the top four states for asset protection planning have been Nevada, Alaska, South Dakota, and Delaware. With the introduction of its Legacy Trust Act in 2013, Ohio has quickly risen in the national rankings of DAPT statutes. With the shortest statute of limitations and relatively limited exception creditors, Ohio can now easily compete with the top states for asset protection planning. Steve Oshins, a nationally known estate planning attorney, publishes an annual DAPT ranking chart.[16] Ohio is currently ranked third, behind only Nevada (no exception creditors or solvency affidavit) and South Dakota (no solvency affidavit). With Ohio's enactment of the Legacy Trust Act, the client conversation regarding DAPT's has become much easier with Ohio clients. Ohioans are no longer forced to look outside of Ohio. Questions remain whether residents of jurisdictions which have not implemented DAPT legislation can enjoy the protection offered when implementing DAPT in another state.

f. DAPT's are misunderstood and often underutilized. Many planners do not fully understand the capabilities of DAPT's, and often shy away from using them out of fear they won't work. In our practice, a small segment of my client base are candidates for DAPT planning. No client should be advised that any asset protection planning strategy is bullet-proof. However, most strategies will create additional barriers for a creditor to overcome. The planner's objective should be to put the client in a better position with the asset protection structure than they were without the structure.

6. MISTAKE #5: USING STAGGERED DISTRIBUTION TRUSTS.

a. Definition: A staggered distribution trust is a trust that makes mandatory distributions to the beneficiaries at staggered ages or grants the beneficiary the right of withdrawal at staggered ages.[17]

b. Typical scenarios: A staggered distribution pattern that is commonly used by estate planners is to distribute 1/3 of the trust assets when a beneficiary reaches age 25, half the balance at age 30, and the remaining balance to be distributed at age 35. This distribution pattern subjects the trust assets to beneficiary's divorcing spouse and creditors.

c. Why do so many attorneys use staggered distribution trusts? Many estate planning attorneys use staggered distribution trusts by default, because most trust forms have staggered distributions built in. Because staggered distribution trusts are so abundant and so widely used, many estate planners do not realize that it is possible to draft a trust to do so much more than what they are currently doing.

d. Why are staggered distributions a problem? If a beneficiary is entitled to a mandatory distribution, the beneficiary's creditor can simply wait for the distribution and then attack the beneficiary's funds. If the trustee fails to make a mandatory distribution, the beneficiary's creditor can access the trust regardless of a spendthrift provision.[18] If, instead of a mandatory distribution a beneficiary has a power to withdraw, the same result occurs.[19]

e. Alternative: An alternative to staggered distribution trusts is to draft the trust to continue for the beneficiary's lifetime. Below are options ranging from simplest (and least protective) to more complex (and most protective):

i. Beneficiary as sole trustee.[20] When a beneficiary is a trustee with authority over distributions, the beneficiary's creditor can generally compel distributions to the maximum extent that the beneficiary has authority to make distributions. For tax purposes if the beneficiary is the sole trustee, distributions should be limited to an ascertainable standard. If distributions are limited to an ascertainable standard, the beneficiary is treated as if (s)he is not a trustee.[21] Some planners have concern that even with the statutory protection provided by Ohio law, a creditor could successfully argue that the beneficiary has "dominion and control" of the trust assets.[22] Therefore, the drafting attorney should incorporate a plan of resignation into the trust document if a creditor issues arises.

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ii. Safer Drafting Approach: Appoint a Distribution Trustee. To avoid the possibility of having a court order a beneficiary serving as trustee from making a distribution to the beneficiary's creditor, the trust could bifurcate the trustee roles. The trust could allow the beneficiary to serve as administrative trustee under Ohio Revised Code § 5815.25 and appoint an independent party to serve as distribution trustee. The Distribution Trustee would be independent for tax purposes, which would permit wholly discretionary distributions under Ohio Revised Code § 5801.01(Y). This structure would eliminate the concern that a beneficiary-trustee could be forced to make distributions.

iii. Safest Drafting Approach: Require an Independent Trustee. If the beneficiary has a known creditor issue, it may be best to require an independent trustee (whether an individual or corporate fiduciary). To provide flexibility, the beneficiary (or a Trust Protector) could be given the right to remove and replace the trustee.

7. MISTAKE #6: FAILING TO USE DYNASTY TRUSTS.

a. Definition: A dynasty trust is an irrevocable trust that is not subject to estate taxes for as long as state law allows and remains in trust for multiple generations.

b. Not just for estate tax savings. While the primary purpose for a dynasty trust is to take advantage of tax savings, dynasty trusts can also be used for asset protection and divorce protection for as many generations as state law permits. Grantors may use lifetime trusts for generations beyond their own children. The estate planner may draft in powers of appointment to provide flexibility for the trust beneficiaries in the future.

c. Rule Against Perpetuities limitations. Once again, Steve Oshins has compiled his own subjective ranking system for state dynasty trust laws.[23]

i. Tier 1 States. The Rule Against Perpetuities applies to dynasty trusts. Generally, the Tier 1 asset protection states (Alaska, Delaware, Nevada, and South Dakota) have favorable Rule Against Perpetuities statutes. In order to take advantage of the laws from one of these states, an out-of-state practitioner must utilize a trustee or a co-trustee residing in the applicable state.

ii. Ohio. In Ohio, the Rule Against Perpetuities is 21 years after the lives in being at the creation of the interest,[24] but the grantor of a dynasty trust may opt out of the statutory rule.[25] The grantor of a dynasty trust in Ohio may create an irrevocable trust that is perpetual, potentially lasting for hundreds of years with no specified end date. In order to opt-out, the trustee (or someone who can direct the trustee) must have the authority to sell all trust assets or terminate the trust.[26]

8. MISTAKE #7: USING TRUSTS WITH DISTRIBUTION STANDARDS ("SUPPORT TRUSTS") RATHER THAN DISCRETIONARY TRUSTS.

a. Definition: A discretionary trust gives the trustee sole & absolute discretion in making distributions to the beneficiaries.

b. Definition: A Support Trust gives the trustee ascertainable standards for making distributions to the beneficiaries; the most common support standards are health, education, maintenance, and support ("HEMS"). Support Trusts rely on strong spendthrift provisions to protect the trust assets from a limited class of creditors.

c. Support Trusts come with statutory and judicially created exception creditors. In most states, Support Trusts can be pierced by making the spendthrift provision unenforceable. Depending on state law, spendthrift provisions are often unenforceable as to alimony and child support payments, necessary services and supplies rendered to the beneficiary, claims by the United States or a state, and services rendered or materials furnished to preserve or benefit the beneficial interest in the trust.

d. Discretionary trusts generally protect the trust assets from all creditors. In contrast to the Support Trusts that are commonly used, discretionary trusts give trustees sole and absolute discretion in making distributions, and therefore are generally enforceable against the claims of all

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creditors. Because the trustee is not required to make any distributions to the beneficiaries, not even for support, the trustee may choose to retain the assets in trust. In so doing, the trustee may protect the assets from attachment by the beneficiary's creditors. Additionally, discretionary trusts are distinguished from Support Trusts in that they operate without having to rely upon the trust's spendthrift provisions.

e. Ohio's Framework. The Ohio Trust Code generally protects a beneficiary's interest in a trust unless the trust requires a mandatory distribution to the beneficiary or grants the beneficiary of right of withdrawal.[27]

i. Ohio's statutory exception creditors. Most trusts will include a spendthrift provision. The spendthrift provision generally prohibits the beneficiary from voluntarily or involuntarily assigning the beneficiary's interest in the trust. Ohio's spendthrift protection also generally protects the trust from the beneficiary's creditors.[28] A spendthrift provision is generally unenforceable against either of the following:

> (a) The beneficiary's child or spouse who has a judgment or court order against the beneficiary for support, but only if distributions can be made for the beneficiary's support or the beneficiary is entitled to receive mandatory distributions under the terms of the trust; or
>
> (b) A claim of this state or the United States to the extent provided by the Revised Code or federal law."[29]

The spendthrift protection prevents the creditor from attaching present or future distributions to the beneficiary. The next question is whether the creditor can compel the trustee to make a distribution to the beneficiary (which the beneficiary would then be able to attach). The Ohio Trust Code generally provides that a creditor cannot compel a trustee to make a distribution even if the trust grants the trustee discretion to make a distribution and even if the trust provides a standard for distribution (such as "health, education, maintenance and support").[30] Similar to the exception creditors in the spendthrift statute, a court may order a distribution to satisfy a beneficiary's obligation of support to the beneficiary's child or spouse if the trust permits distributions to the beneficiary for support and the trust does not specifically exclude the child or spouse from benefiting from the trust.[31]

ii. Wholly Discretionary Trust. When the Ohio Trust Code was enacted in 2007, there was significant debate (even nationally) regarding Ohio's interpretation of trusts with any standard for distribution.[32] These interpretations were primarily in the context of whether the trust assets were considered a countable resource for a beneficiary's government benefits. These interpretations were the genesis for Ohio's Wholly Discretionary Trust statute. To obtain superior asset protection, an Ohio trust should be designed as a Wholly Discretionary Trust that complies with Ohio Revised Code § 5801.01(Y)—meaning that the trust provides no distribution standards. The Ohio Trust Code provides that no creditor (including exception creditors) can attach a beneficiary's interest in a wholly discretionary trust.[33] If designed as a wholly discretionary trust, the trust assets are even protected from the beneficiary's potential "super creditors" such as governmental agencies.

9. MISTAKE #8: FAILING TO TAKE ADVANTAGE OF GIFT TAX EXEMPTION USING THIRD-PARTY DISCRETIONARY TRUSTS.

a. Definition: A third-party discretionary trust is an irrevocable trust set up for the benefit of someone other than the grantor (for example, a trust for the benefit of the grantor's spouse and descendants).

b. The federal gift tax exemption opens up huge opportunities. In 2019, the applicable exclusion amount has increased to $11.4 million. The exclusion amount is scheduled to be reduced in the year 2026. This presents a transfer tax planning opportunity. However, it can also be used as a valuable asset protection tool. The grantor may transfer assets to a discretionary trust for the benefit of his spouse or descendants, the grantor may retain the power to fire and hire trustees, and the grantor's spouse or descendants may elect to support the grantor using the transferred assets. Grantors typically make transfers to third-party

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trusts within the federal gift tax exemption limits for tax purposes. As an added benefit, the grantor can receive tremendous asset protection benefits as well. A grantor's transfer of assets to an irrevocable trust for the benefit of a third party is the strongest asset protection strategy he could utilize. There is virtually no way of challenging the transfer unless it was a fraudulent conveyance. In many cases, the client will establish trusts for the benefit of children or grandchildren. A married couple may consider creating trusts for each other to take advantage of exclusion amount and allow all future growth to escape transfer tax. However, the married couple must be cautious to avoid the Reciprocal Trust Doctrine.[34]

10. MISTAKE #9: FAILURE TO TAKE ADVANTAGE OF STATE LAW EXEMPTIONS. HERE ARE SOME EXAMPLES OF ASSET CLASSES THAT ARE EXEMPT FROM CREDITOR CLAIMS IN OHIO:

a. Traditional IRA's, Roth IRA's, 529 Plans, and 529A Plans. Ohio exempts any contributions to IRA's or 529 Plans which are less than or equal to the federal contribution limits in any given year. Ohio also exempts any contributions which are within the federal limits for rollovers.[35]

b. Inherited IRA's and 529 Plans. Ohio exempts any interests received by the debtor in an inherited IRA or 529 Plan.[36]

c. Homestead. Ohio exempts up to $125,000 (indexed to $145,425 as of April 1, 2019)[37] of equity per debtor in real property used as a personal residence.[38]

d. Life insurance and Annuities. Ohio exempts all contracts and interests of the debtor relating to life insurance (and annuities).[39] Ohio's protection of life insurance, including cash value, is particularly strong. In *Huntington National Bank v. Winter*,[40] the court held that the insured's creditor could not reach the cash value of the policy even though the funding of the policy was deemed a fraudulent transfer. However, Ohio's protection only applies if the beneficiary is the insured's spouse, children or dependents (or a trust for their benefit).[41] Therefore, you should be cautious in other family situations and insurance used for buy-sell arrangements. Even though the statute includes "annuities," case law has indicated that commercial non-qualified annuities offer no protection![42]

11. MISTAKE #10: FAILURE TO TAKE ADVANTAGE OF ERISA-PROTECTED RETIREMENT PLANS.

ERISA protects 100% of certain qualifying retirement assets from creditor claims.[43] Qualified plans include profit sharing (defined contribution) plans and pension (defined benefit) plans. Cash balance plans have become very popular for individuals with high and predictable income because the contribution limits are greater than traditional defined contribution plans. Such plans are protected from most creditors, with the exception of divorcing spouses and the IRS. In order to qualify for ERISA, a retirement plan must have at least one non-spouse/non-owner employee participating.[44] The asset protection afforded by ERISA-qualified plans can sometimes be even more valuable than the income tax deferral associated with the plans.

12. BONUS—MISTAKE #11: FAILURE TO AVOID PROBATE IN OHIO.

Clients are often interested in avoiding probate because of the extra time, hassle, and estate administration expenses involved. While these are important considerations, it is perhaps even more significant to note that Ohio residents can eliminate most of their debts and obligations after death by simply planning for probate avoidance.

a. The Six-Month Period. Ohio has a unique statute which requires creditors to properly present their claims within six months of the decedent's death or be forever barred.[45] Proper presentment essentially requires a creditor to present its claim to the executor or administrator of the decedent's estate in writing.[46] Presentment to any person other than a court-appointed executor or administrator is invalid.[47] Thus, so long as the decedent's probate estate is not opened until the Six-Month Period has expired, a creditor's only

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chance of presenting a valid claim is to file its claim (and thereby open an estate) in the probate court. There are a few exceptions to the Six-Month Period: Expenses of administration, the family allowance, taxes, secured debts, Medicaid debts, contingent claims, and fraudulent transfers.[48]

b. Creditor claims do not extend beyond a decedent's probate estate. Creditor claims only affect a decedent's probate estate. In general, assets transferred outside of probate after a decedent's death are not subject to creditor claims.[49] A wise estate planner will assist his client in avoiding probate, not only to save time and expenses, but to shield his assets from creditors after death.

ENDNOTES:

[2]*Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, 1995 WL 360309 (N.M. Dist. Ct. 1994), vacated, 1994 WL 16777704 (N.M. Dist. Ct. 1994).

[3]*Pearson v. Chung*, 961 A.2d 1067 (D.C. 2008).

[4]Uniform LLC Act § 503(a).

[5]Kleinberger, Daniel S. *What Is a Charging Order and Why Should a Business Lawyer Care?* American Bar Association Business Law Today, March 6, 2019, available at: https://businesslawtoday.org/2019/03/charging-order-business-lawyer-care/.

[6]RC 1705.19(c).

[7]RC 1308.02(A), UCC 8-103 ("A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security"); RC 1308.32(A), UCC § 8-112 (stating general rule that "[t]he interest of a debtor in a certificated security may be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy"); and RC 1308.02(C), UCC § 8-103 (stating general rule that, unlike corporate stock, "[a]n interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets. . .," thereby exempting most LLC and partnership interests from run-of-the-mill attachments).

[8]*In re Albright*, 291 B.R. 538, 50 Collier Bankr. Cas. 2d (MB) 1 (Bankr. D. Colo. 2003); *In re A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho 2006); *Olmstead v. F.T.C.*, 44 So. 3d 76, 2010-1 Trade Cas. (CCH) ¶ 77079 (Fla. 2010).

[9]RC 1705.031.

[10]Credit: Jay Adkisson.

[11]New Times Media, LLC v. Bay Guardian Company, Inc., C.A. No. 10-72-GMS-LPS. (D. Del. May 11, 2010); American Institutional Partners, LLC v. Fairstar Resources, Ltd., C.A. No. 10-489-LPS (D.Del., Mar. 31, 2011). *But see Wells Fargo Equipment Finance, Inc. v. Retterath*, 928 N.W.2d 1 (Iowa 2019) holding the opposite.

[12]The details regarding Ohio's DAPT legislation, planning and implementation are beyond the scope of this article. To learn more about the Ohio Legacy Trust, please see the materials published by the Ohio Bar Association for the Great Lakes Asset Protection Planning Institute for the years 2013-2018.

[13]See https://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf.

[14]Del Percio, Leah. "An Overview of the Asset Protection Spectrum," *Yeshiva University Benjamin N. Cardozo School of Law Alumni Quarterly, Fall 2014: Trusts & Estates Edition* (2014), available at: https://cardozo.yu.edu/overview-asset-protection-spectrum.

[15]RC 5816.03(c).

[16] https://docs.wixstatic.com/ugd/b211fb_8281d9df73e7457998ad5605a5e9f060.pdf

[17]RC 5805.06.

[18]Ohio Revised Code § 5805.05(B).

[19]Ohio Revised Code §§ 5805.06(B)(1) and (A)(1).

[20]The trust could provide that the beneficiary can appoint herself as sole trustee at a certain age. Another option using the same approach would be to allow the beneficiary to appoint herself as a co-trustee at a certain age to serve with the existing trustee and then at a later age appoint herself as sole trustee.

[21]RC 5805.04(F).

[22]Restatement (Third) of Trust at Section 60, comment g.

[23]See https://docs.wixstatic.com/ugd/b211fb_d38b3f0515334559a585cace40a53321.pdf.

[24]RC 2131.08(A).

[25]RC 2131.09(B).

[26]RC 2131.09(B).

[27]*See supra* notes 21 and 22

[28]RC 5805.02.

[29]RC 5805.02(B).

[30]RC 5805.04(B).

[31]RC 5805.04(D).

[32]For a detailed review of the history of the interpretation of Ohio trusts in this context and best practices for drafting Wholly Discretionary Trusts, see Richard E. Davis, Ohio Trust Code Manual, 4th Edition, Reference Manual Volume No. 18-400,

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Chapter 11 (Ohio State Bar Association).

[33]RC 5805.03.

[34]Domingo P. Such, III, Esq., Deborah V. Dunn, Esq., and Mitchell A. Meneau, "A New Era of Spousal Trust Planning: An Old Concern Arises with Reciprocal Trusts," *Tax Management Estates, Gifts, and Trusts Journal*, Vol. 43, No. 1, p. 38 (01/11/2018).

[35]RC 2329.66(A)(10)(c).

[36]RC 2329.66(A)(10)(e).

[37]See http://www.ohiojudges.org/Document.ashx?DocGuid=a3fc30dd-e1fe-4d1d-b85f-9b3de8738710.

[38]RC 2329.66(A)(1).

[39]RC 2329.66(A)(6)(b); RC 3911.10.

[40]*Huntington Natl. Bank v. Winter*, 2011-Ohio-1751, 2011 WL 1378727 (Ohio Ct. App. 1st Dist. Hamilton County 2011).

[41]RC 3911.10.

[42]See *In re Quintero*, 253 B.R. 832 (Bankr. N.D. Ohio 2000), *In re Andrews*, 301 B.R. 211 (Bankr. N.D. Ohio 2003), *In re Domanski*, 362 B.R. 824 (Bankr. N.D. Ohio 2006).

[43]For a thorough discussion of the nuances of the application of ERISA in the area, see Edwin P. Morrow III, "Asset Protection Planning for Qualified Retirement Plans" National Association of Estate Planning Councils (2015).

[44]See, e.g., *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 2004-1 C.B. 773, 541 U.S. 1, 124 S. Ct. 1330, 158 L. Ed. 2d 40, 42 Bankr. Ct. Dec. (CRR) 177, 50 Collier Bankr. Cas. 2d (MB) 1603, 32 Employee Benefits Cas. (BNA) 1097, Bankr. L. Rep. (CCH) P 80056, 2004-1 U.S. Tax Cas. (CCH) P 50200 (2004).

[45]RC 2117.06(B) and (C).

[46]RC 2117.06(A). Stay tuned. In light of *Wilson v. Lawrence*, 150 Ohio St. 3d 368, 2017-Ohio-1410, 81 N.E.3d 1242 (2017), the Estate Planning, Trust and Probate Law Section Council of the Ohio Bar Association has a committee that has proposed a change to the statute that would extend the manner in which a claim may be properly presented to include presentment to the attorney for the fiduciary **or** filing with the Probate Court.

[47]See Hochstetler, Matthew R., "Claims Against Estates: Essentials and Exceptions," *Probate Law Journal of Ohio*, Vol. 29, Is. 3, Pg. 71-76, 29 No. 3 Ohio Prob. L.J. NL 13 (Jan./Feb. 2019).

[48]Hochstetler, Matthew R., "Claims Against Estates: Essentials and Exceptions," *Probate Law Journal of Ohio*, Vol. 29, Is. 3, Pg. 73-74, 29 No. 3 Ohio Prob. L.J. NL 13.

[49]See Michael J. Thacker, "Ohio Creditors' Claims in the Context of Probate and Non-Probate Transfers" *Probate Law Journal of Ohio*, Vol. 26, Is. 6, Pg. 259-263, 26 No. 6 Ohio Prob. L.J. NL 8 (Jul./Aug. 2016).

INTRODUCTION-PLANNING FOR CLIENTS BELOW THE EXEMPTION AMOUNT

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Estate planning for an Ohio married couple certainly has been revolutionized in the past several years. The Ohio estate tax was repealed, effective January 1, 2013. The federal estate tax has been made largely irrelevant for most people, because of the significant increases in the amount of the applicable exclusion amount, commonly referred to as the estate tax exemption amount. For a decedent who dies in 2019, the amount of property which can pass estate-tax free is $11.4 million; for a married couple, this means that a grand total of $22.8 million can be passed on to their heirs before there are any estate tax worries. (At least until 2026, when the applicable exclusion amount is scheduled to be reduced to $5 million, adjusted for inflation to that date.)

So what does that leave for the estate planner to talk about with their client? Well, actually, quite a lot! The estate planner should view this as a liberating development, which allows for a greater focus on core estate planning issues of concern to the client. The increased exemption amounts, and the elimination of the Ohio estate tax altogether, allow for much greater flexibility in developing an overall plan for the client. There also is an increased emphasis on income tax planning for the

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client, particularly in looking for income tax basis adjustment opportunities.

The three parts of this article which follow this introduction (in three separate sections) have been developed from a joint presentation by Ken Coyne, Bob Dunn and Lisa Monihan at the May 2019 meeting of the Ohio Fellows of the American College of Trust and Estate Counsel. Their presentations focused on special considerations presented at three separate stages of a family's life: a younger couple, a middle-aged couple, and an elderly couple.

PLANNING FOR YOUNGER CLIENTS BELOW THE EXEMPTION AMOUNT

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Based on presentation by the author at the 2019 Ohio ACTEC meeting.

HYPOTHETICAL SCENARIO-YOUNG MARRIED COUPLE

Cathy and Rick seek estate planning counsel. Cathy is 33 and Rick is 35. They have two minor children. You also represent Cathy's parents, Harry and Louise. Cathy and Rick have assets consisting of:

– Residence:	$ 350,000
– Rick's 401(k)	$ 110,000
– IRA	$ 85,000
– Joint Checking	$ 10,000
– Vanguard Account	$ 180,000
– Rick – Term Life Insurance	$1,000,000
– Cathy – Term Life Insurance	$ 500,000

Cathy, who is one of five children, expects to inherit approximately $750,000 from Harry and Louise.

Estate planning for a typical young couple necessarily requires the planner to address basic planning needs, evaluate broad planning considerations, and identify and assess specific issues and opportunities that confront young clients.

Cover the Basics. First, basic planning needs should be addressed for your clients.

Guardians. A primary impetus for many young clients seeking planning advice is the clients' minor children. Nominating a guardian to care for minor children, as well as providing financial resources to the children/guardian are chief goals. A guardian may be nominated in a writing signed by the client in the presence of two witnesses or before a notary public.[1] The nomination may be in a Will,[2] a Durable Power of Attorney,[3] or another writing. A valid nomination will be considered by the court in proceedings to appoint a guardian.[4] The nominated guardian of the estate of a minor has preference in appointment over a person selected by a minor.[5] But, the nominated guardian of the person does not have preference, and the court may appoint the nominee, a person selected by the minor, or another person.[6] In many instances, the clients may consider monetary support for the guardian by specific bequest or providing in a trust that the guardian may receive direct financial support. For example, a guardian could receive discretionary distributions for home renovations or to purchase a vehicle to accommodate (additional) children in the guardian's home. An important consideration for many clients is whether to bifurcate duties between a guardian of the person and trustee. Bifurcation acknowledges people have different skills and strengths and that, when working together, optimal care can be provided to children. It also acknowledges that a guardian will have an influx of responsibilities on top of existing responsibilities, and that it may be difficult to manage both care and the prudent investment of assets for the child. Bifurcation creates a built-in system of checks and balances which will prevent dissipation of funds. It will also address an inherent conflict that a guardian may have if the guardian's own children do not have a financial nest egg resulting from the clients' unfortunate premature death.

Lifetime Directives. Lifetime directives should be executed for young clients. It is more likely that a disabling event will affect young clients-short or long term-than a premature death. Therefore, ensuring health care directives and a financial power of attorney are in place is important.

Representation. Another basic matter to address is confirming the *planner's client*. It is very common for young couples to be referred to the

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planner by existing clients of an older generation. Planners will often represent multiple generations within one family and, in some instances, multiple clients-i.e. siblings and their spouses-within one generation. Discussions with clients setting forth the terms of the representation, including sharing of information among all clients, is imperative at the outset of representation.

Taking the Long View. Second, planning for young clients requires analyzing broad and significant planning considerations-even though transfer taxes may not be remotely visible on the clients' financial horizon.

Children's Inheritance. The clients will necessarily have to make fundamental decisions regarding their children's inheritance. They must determine the form and timing of inheritance. Certainly, outright bequests to minor children should be avoided to remove the inheritance from the public nature of guardianships as well as the likely increased administrative costs. For the same reasons, testamentary trusts should be avoided. Uniform Transfers to Minors Act ("UTMA") accounts can be used to hold assets and may be appropriate in some circumstances. But, assets must be distributed to a child by the time he or she turns 25.[7] And, if assets exceed $25,000, a court may need to authorize the transfer.[8] While guardianships and UTMA accounts provide simplicity and oversight, neither provides the client the benefit of long-term control and flexibility.

A trust arrangement for the clients' children may provide considerable benefit. Trust assets may be protected from claims of potential future unknown creditors, including (ex)spouses, plaintiffs, or other third parties. Trust assets will be managed by a trustee with fiduciary duties to act in the child's interest.[9] Retaining assets in trust for even some duration may help to foster financial stewardship.

Possible Subsequent Spouses. Inheritance for spouses must also be assessed and may result in an awkward discussion. Most clients' first instinct will be to leave all assets outright to the surviving spouse, especially in a world with de facto repeal of transfer taxes. Thoughts to the contrary may raise issues of trust and confidence, however misplaced. But, with younger clients, the chance of the survivor remarrying, or at least having a second significant other, if the first spouse dies at a young age are significant-if not very likely. Planning for this reality should be discussed.

Funding a trust arrangement for the survivor and children may provide significant benefit to the "first family." A trust arrangement will place a fence around some or all of the family's wealth, while still allowing access and control for the family. The survivor could be the trustee and/or trust protector. Assets, depending on applicable state law, could be protected from the claims of creditors of the surviving spouse *and* children. And, importantly, a funded trust could serve as a "built-in" premarital agreement without the strife usually associated with actually entering one. In short, a "QTIP-type" trust may be implemented for completely non-tax reasons. And, while basis planning is de rigueur, it may very likely not be appropriate to simply rely on making the trust eligible for a QTIP election to obtain a subsequent basis step-up. Rather, granting independent trustees certain powers (discussed below) may be more appealing.

The goal of permitting descendants to be beneficiaries of the trust during the spouse's overlife may exceed any potential drawbacks resulting from not being able to make the QTIP tax election. The trust could allow an independent trustee to distribute assets to the survivor in the independent trustee's absolute discretion and to expand a limited power of appointment granted to the survivor to include creditors of the survivor's estate. Such discretion and authority provide ways to address a possible subsequent basis step-up. Also, to the extent assets are held in trust during the spouse's overlife, it may be advisable that children also have access to trust assets. If one spouse were to die, the trust could exist for a very long time, and the assets could not be directly accessed by children until after the survivor's death if children were not also beneficiaries of the trust. And, if something were to happen to the survivor, such as an incapacity event, it may be important for the trustee to be able to distribute assets to children directly. So, the children could receive much needed support, even when the survivor is still living.

Choice of Trustee. Trustee succession should

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also be considered in any trust arrangement for children and a surviving spouse. Just because the survivor can be the trustee does not mean he or she should be the sole trustee. The survivor will suddenly be a single parent with enormous emotional stress. Adding significant investment and fiduciary obligations may not be advisable. Moreover, clients may like the check and balance of a co-trustee or a disinterested professional trustee. There is not a single right answer in this assessment or any of the assessments in developing a trust arrangement for a surviving spouse and children. However, weighing the various considerations will likely yield the right result for each client-and also provide fulfillment for the planner in that the planner will help to arrive at a planning solution without a tax element driving the discussion.

Specific Planning Opportunities. Third, specific opportunities and issues should be identified and assessed for young clients.

Retirement Assets. Qualified Retirement Plan ("QRPs") assets are often a significant portion of younger clients' wealth. Even if the value of the QRPs or its percentage of the asset portfolio is not significant, QRPs are subject to substantial growth, particularly compared to other asset types, because of the clients' young ages, the ability to defer income tax and generate growth on pre-tax dollars, and the opportunity to earn additional compensation via employer contributions. Therefore, regardless of the *current* value of the clients' QRPs, the planner should treat QRPs as a significant asset requiring attention and planning. It is likely that special rules pertaining to surviving spouses for QRPs will make naming the surviving spouse as primary beneficiary of QRPs the most advisable action. The clients' trust can be named as contingent beneficiary which will avoid guardianship involvement and outright distribution of QRPs to a child in early adulthood. But, the planner should ensure the trust will be eligible for so-called stretch pay out by being deemed a "see-through trust."[10]

Future Inheritances. Additionally, younger clients often have older relatives from whom they might inherit or for whom they may serve as fiduciaries. Younger clients may also be donees of powers of appointment. Being prepared for an eventual inheritance influx, as well as any fiduciary relationship, is an important part of the overall picture of the clients' plan and should be reviewed.

Insurance Needs. Planners should also work closely with clients' financial advisors to assist the young clients in comprehensive planning. Life insurance is one of the simplest ways to supplement lost income, childcare expenses, and provide for financial stability for a surviving spouse and children. Term life insurance is likely very inexpensive for young clients. Therefore, adequacy of life insurance should be reviewed. Disability insurance, which likewise gives clients a safety net, should be assessed. It is important to note that employer-provided insurance may not be adequate to meet clients' needs, may not be transferable, and may not continue after termination of employment when health is not optimal.

Other Interesting Considerations. Health Savings Accounts ("HSAs") and Section 529 Accounts ("529 Plans") are tax-favored investments and are likely desirable for young clients. Under the 2018 tax reform legislation, 529 Plans became more appealing. Planners should discuss HSAs and 529 Plans with young clients and their financial team. Successor donor and beneficiary designations for the accounts should be confirmed. Certainly, planning for digital assets will be an important part of young clients' planning. Student debt may also be a consideration in planning. Another unique aspect of planning for young clients is the potential use of Assisted Reproductive Technologies ("ARTs"). An assessment of ARTs is beyond the scope of this article. But, planners should be cognizant of ARTs' place in young clients' lives and the resulting implications in an estate plan.[11]

Conclusion. Finally, planners often hear that estate planning is diminishing and can be characterized as a transaction with less importance in a world with the de facto elimination of transfer tax. But, young clients who already have the forethought to seek estate planning advice will have needs and goals that evolve and change-which presents an opportunity for the planner to introduce a paradigm of a long-term relationship that must be revisited as life events impact young clients.

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ENDNOTES:

[1]RC 2111.121(A).

[2]See RC 2107.03.

[3]RC 1337.28; see RC 1337.25.

[4]RC 2111.121(A).

[5]RC 2111.02(D)(1).

[6]RC 2111.02(D)(1).

[7]RC 5814.09(c).

[8]RC 5814.02(E)(3).

[9]RC 5808.01.

[10]Qualifying a trust as a "conduit" trust or an "accumulation" trust permitting the oldest trust beneficiary to be deemed a Designated Beneficiary for QRP purposes is beyond the scope of the article. Also, the pending Secure Act could significantly alter the planning options in this landscape. Nonetheless, the planner should carefully consider QRPs for the young couple.

[11]See RC 5801.12.

FLEXIBILITY AND CORE PRACTICES: CONSIDERATIONS IN ESTATE PLANNING FOR MIDDLE AGED CLIENTS BELOW THE EXEMPTION AMOUNT

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INTRODUCTION

When working with clients whose overall assets fall below the increased estate tax exemption amount, attorneys should give consideration to ensure flexibility in the overall planning and to give careful focus on the client's core estate planning documents when working with clients in this changing tax landscape. Below is a discussion of these important considerations.

HYPOTHETICAL SCENARIO: MIDDLE AGED COUPLE WITH TOTAL ASSETS BELOW THE EXEMPTION AMOUNT

We will explore these considerations through the use of a hypothetical. Assume that Husband ("H") and Wife ("W") ages 48 have been married 20 years and have three children ("C") ages 18, 15, and 13. It is a first marriage for both and their assets total approximately $13 million. These include the following:

Asset	Value
Home	$1,000,000
H's Retirement	$1,500,000
W's Retirement	$1,500,000
Joint Brokerage (stocks, bonds)	$5,000,000
W's Gifts and Inheritance from Parents ("Inheritance")	$4,000,000
Total	**$13,000,000**

Their total assets are well below the combined exemptions of $22.8 million. H and W have typical wishes for devolution of their estate: They would like the other to benefit in the event of death and then have the property pass down to C with distributions by way of separate trusts for C's benefit. H and W are fine with C having a right of withdrawal, at certain ages, over C's trust.

THE IMPORTANCE OF FLEXIBLE PLANNING: PORTABILITY AND ITS ALTERNATIVES

With the increased exemptions and given the make-up of the assets, the core planning becomes much more important. Attention should be given to income tax planning and overall flexibility. H and W desire to attain a step-up in basis on the assets at each of their deaths. Under the present scenario H and W could have a joint trust with each possessing a general power of appointment during their lives over the property contributed. H and W could rely on portability at the first death.

If the assets were largely in one spouse's name (e.g. W's gifts are inheritance), H and W could still rely on portability but might consider utilizing planning that would provide flexibility for use of the marital deduction and ultimate step-up in basis upon the death of the survivor. For example, if W wanted H to benefit during his lifetime from her "Inheritance" she could, at death, utilize a single trust that would qualify for QTIP treatment. The fiduciary could make a QTIP election or not and would have the power to divide the trust, thereby allowing use of the exclusion amount if it made

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sense. Alternatively, a disclaimer technique could be used for H, allowing him "to wait and see" whether it makes sense under the laws in effect at the time to disclaim to a credit shelter trust. Another technique would be to utilize a Clayton QTIP trust and if the QTIP election is not made (within 15 months after death), the amount not elected for QTIP treatment will pass to the credit shelter trust.

W, however, may want to be sure the Inheritance is not diverted from her lineal descendants at her death. She could leave the Inheritance to a credit shelter trust at her death, of which H and C are beneficiaries. There could be sprinkle powers among the beneficiaries. Because there could be substantial appreciation of the assets within the credit shelter trust, it may be desirable to try and attain an adjusted basis in those assets at H's subsequent death. A trust protector could have the power to distribute principal to H for tax reasons and to provide H with a general power of appointment (e.g., to the creditors of H's estate).

If W, during her lifetime, wants to ensure she is able to use some of the higher exemptions and is concerned perhaps about a subsequent decrease in the exemptions, W could make a completed gift of all or part of the Inheritance to an irrevocable trust of which H would be a beneficiary. Given that the use of the exemption will not be clawed back at her death, this could allow W to use her increased exemption, yet still retain some benefit in the future if necessary. Again, flexibility within the trust agreement could be built-in so that a trust protector could make distributions for tax reasons (in addition to typical discretionary standards), to provide powers of appointment, and generally modify or terminate the trust if beneficial.

BACK TO BASICS: A FOCUS ON THE CORE ESTATE PLAN

H and W should also focus on the basics of their planning. Titling of assets within a revocable trust or other manner to avoid a probate estate should be given strong consideration. For example, should the home be (or remain) titled as joint tenants with rights of survivorship? Should the home be titled in the revocable trust? Providing certainty for funding of trusts through proper beneficiary designations cannot be discounted. With H and W's retirement assets, it is likely each will want the other to be the primary beneficiary to provide the greatest flexibility; however, do not ignore the contingent beneficiary designation. With young children, H and W will likely want their trust to be the contingent beneficiary for the benefit of C. Careful attention should be given so that the trust qualifies as a designated beneficiary and that distributions may be stretched out over C's life expectancy.[1]

Focusing on the client's powers of attorney is important. Do the client's advanced directives reflect their wishes with regard to health care and end-of-life decisions? Should the agent under a general durable power of attorney have "hot" powers? H and W may want their agent to have the power to disclaim assets, create or modify a trust, add property to a trust, and make gifts that are beneficial for tax purposes. Careful attention to these basic—yet essential, documents is more important than ever.

CONCLUSION

By focusing on flexibility and giving careful consideration to the planning basics, estate planners working with clients below the exemption amount will create greater opportunities to protect the client's assets and provide real value for families. As such, attorneys will need to embrace such flexibility in drafting and implementing documents and not overlook the importance of the basic, yet essential, documents that comprise a well-thought-out estate plan.

ENDNOTES:

[1]With potential changes in retirement plan distributions under the SECURE Act (H.R. 1994 "Setting Every Community Up for Retirement Enhancement Act"), careful consideration will need to be given to naming a trust as a beneficiary of retirement benefits.

PLANNING FOR ELDERLY CLIENTS BELOW THE EXEMPTION AMOUNT

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HYPOTHETICAL SCENARIO: ELDERLY COUPLE WITH TOTAL ASSETS BELOW THE EXEMPTION AMOUNT

Our hypothetical couple, John and Mary, are ages 86 and 80, and they have been married for 55 years. Their four children's lives, however, are a bit more complicated. The kids range in age from 50 to 39. The eight grandchildren are ages 25 to two. One child has no children; two children are on second marriages**.** One child is gay, with a long-term significant other and two children through the use of assisted reproductive technology. One child has creditor and long-term substance abuse problems.

Combined net worth is $15,000,000, including the following:

- $5,000,000 in cash and marketable securities. Income tax basis of the securities is $2,000,000.
- $3,000,000, or 20% of the overall value, of stock in the family company, from which John is mostly retired; the kids own the rest of the stock, in equal shares, but only two of them are working in the company
- $2,000,000 vacation home in South Carolina
- $1,000,000 primary residence in Ohio
- $2,000,000 in traditional IRAs
- $1,000,000 in museum-quality art and other high-end tangible personal property

An additional resource for Mary is a trust established by her parents, worth $2,000,000, with an income tax basis of $200,000. The trust has a cooperative independent trustee. It is a pure discretionary trust which names Mary and her descendants as beneficiaries of income and principal. Mary has been receiving all of the trust income but she does not really need it. Mary has a limited testamentary power of appointment over the assets of the trust. If the power is not exercised, the trust property is distributed outright to Mary's lineal descendants, per stirpes.

Two key concepts which should apply to planning for this couple are flexibility and income tax basis planning issues. John and Mary's total assets are well below the 2019 combined estate and gift tax exemptions of $22.8 million, but their assets would be in excess of exemptions after the increased applicable exclusion amounts expire in 2026. Plus, their asset values could increase between now and the death of the survivor of John and Mary. So the gross estate of the survivor could exceed the combined exemption amount. Like planning for younger client couples, core planning issues are still important to cover.

Confirmation of Current Capacity and Lack of Undue Influence. For better or worse, two sad facts facing the aging client are the risk of diminished capacity and the risk that the client could be unduly influenced by someone during the planning process. It is incumbent on the attorney to be alert to these possibilities and to take adequate steps to ensure that these factors are not present during the planning process.

Planning for Incapacity or Diminished Capacity. A standard financial durable power of attorney as well as a health care power of attorney should be recommended for John and Mary. Careful thought should be given to inclusion of some or all of the "hot powers" that can be added to a financial power of attorney under Ohio Revised Code Chapter 1337. If either John or Mary becomes incapacitated and then there is another tax law change, or if the planned sunset of the increased exemption actually does become effective, it could be very important for a trusted person to have the powers to implement appropriate changes to the estate plan. A discussion of end-of-life decisions also could be very helpful, so that the family understands John and Mary's specific wishes on life-sustaining treatment and comfort care.

Is It Safe Just to Leave Everything to the Surviving Spouse, and Rely on a Surviving Spouse's Disclaimer to Make any Post-Mortem Adjustments to the Plan? Maybe, but you might not want to count on it to work. First, if

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the surviving spouse is incapacitated it might be difficult to obtain a disclaimer. Second, even if not incapacitated, sometimes a surviving spouse is reluctant to make a disclaimer because he or she may be confused or worried about the uncertainties of the future. Third, the fact that a disclaimer must be made within nine months after the date of death may not provide a surviving spouse with adequate time to make the right decision.

Are Simple Wills Good Enough? Can We Get Rid of Those Trust Agreements? Possibly, but this probably is not a good plan even for the first spouse to die. Most people are more interested than ever in probate avoidance. With thoughtful advance planning, a pour over will which passes very little probate property to an *inter vivos* trust which has been funded during lifetime probably still is the best approach. A fallback position would be to counsel John and Mary on how to fill out each beneficiary designation form, each TOD and POD designation or affidavit, so that all of these assets pass to the trust at death. The use of trusts is still preferred, to ensure that testamentary intentions are adequately expressed and implemented, as a better and more flexible way to ensure that John and Mary's testamentary intentions are carried out in the right way. Provisions in a trust agreement can account for untimely orders of death, the need for spendthrift protections, the need to provide for minor or immature beneficiaries, and the like.

Simple Wills Only Address Post Mortem Issues for John and Mary. A simple will, combined with beneficiary designations, only deals with the disposition of property after death. For elderly clients like John and Mary, planning for their own incapacity should be even more important to them than what happens to their property after they are gone. Financial powers of attorney are helpful, but financial institutions are increasingly reluctant to accept them just when they are needed most, when a person who no longer has the capacity to take care of something oneself. Use of a funded, revocable trust is a preferable alternative for John and Mary to use for incapacity planning as well as for their estate planning.

Keeping Assets in the Family. Even without any current estate tax worries, how important is it to John and Mary to ensure that some property ultimately gets passed on to the grandchildren? Keeping a trust arrangement as a part of the overall estate plan for John and Mary could be important if John and Mary can answer "yes" to any of the following questions": Do they have concerns about their children's divorces and ex-spouses trying to obtain a share of the inheritance? Are they worried that a child's creditor could reach the assets? Are these concerns greater for the family company stock, or the art, or the vacation home, than they are for the "ordinary" marketable securities? What about the trust established by Mary's parents? Should Mary exercise her power of appointment to extend the terms of the trusts, instead of allowing the trust assets to be distributed outright to the children at her death?

Retirement Account Assets. Do the IRA accounts of John and Mary have currently effective beneficiary designations that still reflect their wishes? It is common for the surviving spouse to be named as the primary beneficiary. If John or Mary were to die, would the surviving spouse still need the income provided by the IRA distributions? Perhaps these distributions could be re-directed to children or grandchildren who might be in a lower income tax bracket than the surviving spouse would be. Alternatively, if John and Mary want to make any charitable gifts, the most income-tax efficient way to make a charitable gift is to designate the charity or charities as beneficiary of the IRAs.

Digital Information and Assets. Do not assume that, just because John and Mary are elderly, they have not embraced the digital world. My 96 year-old mother-in-law has a Facebook account, emails regularly with her grandchildren, and has most of her bills sent to her by email! Make sure that you ask the clients about whether any of their bills or account statements are delivered electronically rather than in paper form. No matter what the age of the client, it is important to ask them about online photo albums, music files, email accounts, financial accounts, social media accounts, online subscriptions and the like. Consider adding special provisions to the will or trust instruments to specify who is to manage or inherit such assets, or whether such accounts should be deleted, terminated or destroyed.

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Business Ownership. Should the remaining 20% of the family company be divided among the children on an equal share basis, or should these shares be directed to the two children who are actively involved in the business? If the children who are active in the business should receive the shares, should an equalizing distribution of other assets be made to the other children? Should special consideration (including a premium or a discount) be given on the valuation of these shares, in terms of any equalization? Should any special instructions be added to deal with conflicts which might arise when the children who are active in the business disagree with the other children over how the business should be run? Is there an existing shareholder agreement? When was the last time it was updated?

Review All the Definitions and Trust Agreement Terms.

Do the trust terms defining family relationships refer only to traditional nuclear families with two married heterosexual parents, or refer only to descendants born "in lawful wedlock"? This may no longer reflect the intentions of John and Mary, if they wish to include their gay child's partner and the grandchildren who were born with assistance of artificial reproductive technology ("ART"). Additionally, one or more of their grandchildren may have a child or children without benefit of marriage. Do John and Mary want to exclude a great grandchild from an inheritance because their parents did not get married?

Do John and Mary know if any of their other children have had (or intend to have) children by means of ART? What about the grandchildren? Should they consider extending the time period for when the class of descendants is determined, possibly to the full five years of extra time permitted under recently enacted Ohio Rev. Code Sec. 5801.12, to include posthumously born grandchildren or more remote descendants?

What about provisions for blended families? If a child has stepchildren, should the step grandchildren be included as beneficiaries? Should they be included at the request or discretion of the child, or perhaps should a power of appointment be granted to the child, which would allow the child to decide on this issue at some point in the future? What if a stepchild is adopted by John and Mary's child?

Does the trust definition of "health" include assistance for mental as well as physical health, for the payment of health insurance premiums, and possibly also for the payment of long-term care insurance premiums? Is the definition broad enough to permit distributions to help with substance abuse recovery issues and a recurring need for treatment in a rehab facility?

Review the tax definitions and terms in the current wills and trust documents. If John and Mary have not had their estate planning updated in several years, the tax terms may need to be updated from references to "unified credit" to "applicable exclusion amount." Some older estate plans include a formula clause directing the establishment of a generation-skipping trust for grandchildren when the GST exemption was only $1,000,000, or $3,500,000, or even $5,000,000. If this provision is left unmodified in the current plan, does this divert too much property to the grandchildren, to the economic disadvantage of the children?

These same questions could be asked about a formula division clause for the creation of traditional A-B Trusts; if the surviving spouse is not named as the primary beneficiary of the B Trust, does this divert too much property away from the surviving spouse at the death of the first spouse? If it is still desirable to rely on formula clause language to create trusts for the primary benefit of grandchildren or children like the GST Trust or the B Trust, should the plan include a maximum dollar amount of property which could be allocated to these trusts?

How Clear is Your Crystal Ball? Should you greatly simplify the wills and trust documents and remove all the tax-driven formula clause division language, and all references to A-B Trusts and tax-driven allocations, because you think these provisions no longer will be necessary to implement good estate planning for John and Mary? Certainly, John and Mary would be happier reading the terms of a simplified trust document that is not full of complicated, technical tax terms. Or do you think it would

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be more appropriate to include provisions which would accommodate a future change in the tax law which might include a more modest exemption amount? Should you discuss this choice with John and Mary or just use your own best judgment? With younger clients, you can tell them to come back in for revised planning if there is a change in the law. With clients already in their 80's, is it reasonable to count on them being able to come in and revise their estate plans if the increased exemption amounts actually do sunset in 2026, or if there is a new tax law enacted sometime between now and then?

BUILD EXTRA FLEXIBILITY INTO THE PLAN.

Consider the use of a disinterested trustee. A disinterested trustee could be granted a power to distribute trust property for any purpose and in any amount. This provision could allow the trustee to administer the trust according to the trustee's best judgment about the settlor's wishes. It also would allow the trustee to decant the trust property to a new trust, with different terms, if another change in the law occurs which makes the current terms of the trust undesirable from a tax or trust administration standpoint.

Consider whether beneficiaries should be granted limited testamentary powers of appointment. Limited powers of appointment offer great appeal to John and Mary if they are weighing the choice between an outright distribution to a child or a continuing trust for the benefit of a child, since it would allow the child to direct the disposition of the trust property at the child's later death. Consider the scope of the power and how broadly or narrowly the class of permissible appointees should be. For example, if spouses of lineal descendants are included within the class of permissible appointees, should the power be limited to the grant of a lifetime income interest in the property?

Consider provisions for a trust protector who could grant, or withhold, general powers of appointment. If the large applicable exclusion amount does become permanent, it might be that very few, if any, of John and Mary's beneficiaries will have taxable estates when they die. A trust protector could grant general powers of appointment to the children, to cause the trust property to be included in their taxable estates for purposes of obtaining an income tax basis step-up at their deaths. Additionally, a trust protector's powers would not have to be limited to granting powers of appointment. A trust protector could be authorized to make other amendments to the trust instrument as well, including adding other beneficiaries or changing the administrative provisions of the trust.

Consider, in the alternative, whether the trust instrument should give the beneficiaries a formula general power of appointment ("GPOA"), which is self-adjusting. If drafted properly, a GPOA would only be granted if the beneficiary has available exemption amount and, it would include an ordering rule to which the GPOA will apply. In this manner, the beneficiary would be granted a testamentary GPOA over assets with the lowest basis (which would benefit the most from a stepped-up basis) first, so that a GPOA is not "wasted" on high basis assets.

Consider whether a beneficiary should be granted a lifetime power of appointment, in addition to a testamentary power of appointment, to add to the flexibility of the trust provisions. If a suitable trustee has broad discretion to make distributions, a lifetime limited power of appointment probably is not necessary, but it could be viewed as desirable by John and Mary, or by their children.

Planning for the portability election. Remember that the executor can make an election under I.R.C. § 2010(c) to allow the surviving spouse to utilize the decedent's unused applicable exclusion amount at his or her later death. Relying on the portability of the first spouse's applicable exclusion amount might be adequate to ensure that there is plenty of exemption available at the death of the survivor of John and Mary, so that no federal estate tax is payable at the death of either spouse. This might also be optimal from an income tax basis planning perspective, because if all of the couple's assets are included in the surviving spouse's estate for estate tax purposes, then all of the assets can get the benefit of the basis adjust-

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ment to the date of death valuation at the second spouse's death. But the analysis cannot stop there-remember that portability does not apply to the GST tax exemption, so further consideration must be given to the amount of property that John and Mary may wish to set aside in generation-skipping trusts for the benefit of their children with remainder interests passing to grandchildren or more remote descendants.

How Much GST Planning Should Be Done? It used to be a good idea to keep the trust property out of the taxable estates of the trust beneficiaries for as long as possible. For some families, that is still the case. But competing goals may be present for John and Mary-a generation-skipping trust which keeps the property out of the taxable estate of the child will not receive a stepped-up income tax basis at the death of the child. Under the current tax law, John and Mary each have an $11.4 million applicable exclusion amount in 2019, and each of their children (and each child's spouse) has the same amount of exemption as well. It may be that getting the stepped-up income tax basis at the deaths of the surviving spouse and each child outweighs the benefits of keeping the trust property out of the estate tax system for as long as possible. All of these considerations will merit a good discussion with John and Mary, to lay out the pros and cons of each approach, so that they can make an informed decision on what they feel is best for them.

QTIP-able Trust Approach. A single QTIP-able Marital Trust for the benefit of the survivor of John and Mary could provide a lot of flexibility to the plan. The executor can wait as long as 15 months after the first spouse's date of death (nine months for the due date of the filing of the federal estate tax return, plus the six months of the available extension for the filing of the return) to decide how much (if any) of the trust property will be elected for QTIP treatment. Particularly with an elderly couple, the luxury of this additional time to see how things settle out after the first spouse's death could be very important. Additionally, if a QTIP election is made for some of the trust property, then a reverse QTIP election under Treas. Reg. § 26.2652-2 also could be made to allocate some or all of the first spouse's GST exemption amount to the trust.

Clayton contingent QTIP Election. Even more flexibility could be offered by the option to make a contingent Clayton QTIP election, whereby the surviving spouse's right to receive all of the income from the trust property is contingent on the executor's making of the QTIP election (based on the decision in *Estate of Clayton v. Commissioner*, 976 F. 2d 1486 (5th Cir. 1992); *See also* Treas. Reg. § 20.2056(b)-7(d) & 7(h)). If the executor makes the QTIP election over a portion of the trust property, the surviving spouse must receive all of the income from that portion of the trust, but different trust provisions could apply to the non-QTIP-elected portion of the trust, so that perhaps the surviving spouse only receives discretionary amounts of income or principal from the non-elected portion. Like the ordinary QTIP election, if the trust instrument is properly drafted, the decision on the Clayton election determination could be made up to 15 months after the death of the first spouse.

Basis, Basis, Basis. Because of the generous $11.4 million estate and gift tax exemptions, income tax planning likely is significantly more important to John and Mary than estate tax minimization. You might view this as turning a lot of traditional estate planning on its head.

Lifetime Gifts. John and Mary certainly have enough gift tax exemption amounts to enable them to make significant lifetime gifts to their children or grandchildren. Indeed, some of John and Mary's children could really use some financial assistance. From an economic standpoint, this couple probably could afford to make significant gifts without a negative impact on their current lifestyle. Some planners might even urge that John and Mary should take advantage of these large exemption amounts now before the sunset occurs in 2026.

But most of John and Mary's assets have a very low income tax basis. If they sell the assets to make cash gifts to the kids, John and Mary will have a big capital gains tax bill. If they make gifts of the low-basis assets directly to the kids, the kids take the assets with the basis of the donor and the kids would have a big capital gains tax bill when they

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sell the assets. If John and Mary retain the low basis assets until their deaths, these assets would receive a stepped-up basis, and they could be passed on to the kids with a much higher income tax basis.

If John and Mary want to make current gifts to the kids, they might consider raising cash for the gifts by borrowing against the value of the assets. Interest rates are low; the low basis assets could be pledged as security for the loan. The loan could be paid off at John and Mary's deaths, when the assets (which then would have a stepped-up basis for income tax purposes) can be sold and no capital gains would be realized. The estate planner should approach this topic with caution, however-a discussion about going into debt to make gifts to the children could be a hard sell for John and Mary. Many elderly couples have long since paid off their mortgages and all of their other debts, and it could be uncomfortable for them to consider going into debt at this time of their lives, especially for the purpose of making gifts.

General powers of appointment. As mentioned earlier, consider granting general powers of appointment, or authorizing a trust advisor to grant such powers, in any continuing trusts for the children or grandchildren. A general testamentary power of appointment which includes the property in the estate of the power holder will allow the assets subject to the power to be stepped-up to date of death value.

Look carefully at the trust established by Mary's parents. Several planning options might exist for this trust. First, if Mary does not need the current income from this trust, perhaps Mary would be willing to suggest to the trustee that some or all of the current income could be distributed to the children, instead of to Mary.

Second, if Mary dies before 2026 when the increased exemption amounts are set to expire, Mary will have "extra" applicable exclusion amount which will otherwise go unused. Could the trust established by her parents be decanted into a new trust which gives Mary a general testamentary power of appointment over the trust property? Finding a way to include these low basis trust assets in Mary's taxable estate could provide for those assets to receive a basis step-up at Mary's death, and avoid a big capital gains tax bill.

Consider triggering the Delaware Tax Trap for Mary's parents' trust. Triggering the Delaware Tax Trap might be another way to get a general power of appointment treatment, and therefore estate tax inclusion and a basis step-up, for the assets held in the trust established by Mary's parents. Under I.R.C. § 2041(a)(3), if a beneficiary exercises a non-general power of appointment to create another power of appointment, which under the applicable local law could be validly exercised so as to postpone the vesting of any estate or interest in the property for a period ascertainable without regard to the date of the creation of the first power, the beneficiary is deemed to possess a general power of appointment. So, Mary could cause her parents' trust assets to be included in her taxable estate if she exercises her limited power of appointment to create a new trust which includes terms granting the beneficiary of the new trust a general power of appointment. Planning to trigger the Delaware Tax Trap should include a careful review of the savings statute in the Ohio Rule Against Perpetuities. A detailed discussion is beyond the scope of this article, but Ed Morrow has written extensively on this technique. *See* http://ssrn.com/abstract=2436964 or http://dx.doi.org/10.2139/ssrn.2436964.

Conclusion. It is easy to see that an estate planning attorney still has plenty to discuss with an elderly estate planning client. Income tax and basis planning still offer the attorney to provide tax savings value to the family. Flexibility in writing a plan which can accommodate changed circumstances is critical, since the elderly client may not have another estate planning overhaul opportunity.

HOW TO RESTRUCTURE A TRUST THAT WAS WELL-INTENDED, BUT IS LESS APPEALING IN AN ERA OF HIGH GIFT AND ESTATE TAX EXEMPTIONS

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Based on presentation by the author at the 2019 Ohio ACTEC meeting.

I. OVERVIEW OF CURRENT ESTATE PLANNING ENVIRONMENT.

For decades, estate planning lawyers have created credit shelter trusts for many of our married clients. This common estate planning tool serves two important purposes: A credit shelter trust holds the portion of the settlor's assets that may pass to future generations free of the federal estate tax and a marital deduction trust is established to provide for the settlor's surviving spouse. We have become skilled at creating many different versions and permutations of this dual trust arrangement.

Many, or most, of the credit shelter trusts we created for our married clients were drawn up when the amounts excluded from the federal gift and estate tax were in the $600,000-$1,000,000 per person range. At that point in time, utilizing each person's applicable exclusion amount was central to estate planning. In the current estate planning environment, the priorities in planning have changed. The amount excluded from the federal gift and estate tax is $11,400,000 per person and $22,800,000 per married couple in 2019[1]. Additionally, the exclusion is now portable, meaning that if a person's property is transferred at death, and unused exclusion remains, the unused exclusion may be transferred to his or her surviving spouse. Because of both an increase in the applicable exclusion amount and the portability of the exclusion, we, and our clients, are questioning whether the credit shelter trusts we created years or decades ago are still the most appropriate estate planning tool.

II. AN ARRAY OF ESTATE PLANNING OPTIONS.

Because we used to prepare some version of a credit shelter trust for many, or most, of our married clients, there are many of these documents in existence. It is common for a client to die with a credit shelter trust in place that the client and the surviving spouse do not need in order to transfer all of their assets to their children free of the federal gift and estate tax. Once the client has died, and the credit shelter trust is irrevocable, options are limited.

While both spouses are alive, it is important for us to work with them on finding a very flexible estate planning solution, that allows for adapting to new developments in the federal estate tax laws and for incorporating more income tax planning into the estate plan. We can leave credit shelter trusts in place, and perhaps modify them in certain ways. We can build flexibility into the documents, so that the family's decision of whether to use a credit shelter trust when the first spouse dies is deferred. We can amend and restate the credit shelter trusts to replace them with simpler documents drawn up primarily for non-tax reasons. We can replace two credit shelter trusts with one joint trust for a married couple.

III. LEAVING CREDIT SHELTER TRUSTS IN PLACE.

Credit shelter trusts provide for the division of trust assets into two trusts, the credit shelter portion, which is sometimes referred to as "the bypass trust" and the marital deduction portion. The by-pass trust is funded first, with the maximum amount that may pass free of federal estate tax. The remainder, if any, is allocated to the marital deduction side.

Because the by-pass trust is funded first, with the maximum amount that may pass free of federal estate tax, all of the trust assets could end up in this one fund. Many credit shelter trusts were executed a long time ago, when the client anticipated funding two trusts, not just one. We must determine the client's intent in a case like this.

Because the applicable exclusion amount is so high, many clients like the idea of simply owning their assets jointly, with the right of survivorship. Ultimately, the surviving spouse will own all of the assets outright. Before we advise our clients to tear up their credit shelter trusts, execute simple wills, and/or title their assets jointly, we have to consider some of the advantages of leaving existing credit shelter trusts in place.

1. If existing credit shelter trusts remain in

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place, the by-pass trust preserves and utilizes the deceased spouse's applicable exclusion amount and the exemption from the generation-skipping transfer tax ("GST")[2]. Portability will not preserve the deceased spouse's GST exemption.

2. The by-pass trust that remains in place, as compared with transferring assets out-right, provides asset protection for the surviving spouse.

3. Very importantly, the by-pass trust provides protection against changing the deceased spouse's estate plan. For example, a person influencing the surviving spouse cannot redirect trust assets away from the deceased spouse's children.

4. If the married couple are relatively young, the by-pass trust can appreciate substantially during the surviving spouse's lifetime, and will not be subject to federal estate tax at the surviving spouse's death.

5. In some cases, illiquid assets, such as stock, can be divided between credit shelter and marital deduction trusts. It may be possible to claim valuation discounts at the death of the second spouse for lack of marketability and lack of control.

6. Leaving existing credit shelter trusts in place, rather than transferring assets out-right, provides the flexibility to adjust to future changes in the federal estate tax laws. The applicable exclusion amount could be lowered in the not-to-distant future. The clients would have credit shelter trusts already in place.

7. The by-pass trust that remains in place may allow the trustee to distribute both income and principal to the Settlor's lineal descendants, in addition to the surviving spouse. This sprinkling power can be very important to some families.

IV. REVOKING CREDIT SHELTER TRUSTS AND GIVING PROPERTY TO SPOUSE OUTRIGHT.

A plan to revoke credit shelter trusts and simply give property to a surviving spouse outright is very appealing. Outright transfers simplify the administration process and offer many benefits:

1. After the first spouse dies, the surviving spouse retitles assets in the survivor's name or in the name of the survivor's trust.

2. The surviving spouse has no additional income tax returns to file; he or she files only a personal income tax return.

3. When property is transferred outright to the surviving spouse, the surviving spouse owes no fiduciary duties to the trust beneficiaries, and is not required to account to them.

4. No beneficiary can interfere with the surviving spouse's enjoyment of the assets.

5. The surviving spouse is free to make gifts to persons or charities during the surviving spouse's lifetime or at death.

6. When property is transferred outright to the surviving spouse, appreciated assets that would have been in the credit shelter trust get a step-up in basis at the first and second deaths.

If a married couple decides to leave property outright to each other, then they will rely on only the applicable exclusion amount, from the federal gift and estate tax, of the second to die or they will use the portability option to take advantage of both spouses' exclusions. There are problems with relying exclusively on portability:

1. The GST exemption of the first spouse to die, unlike the applicable exclusion amount, cannot be used by the surviving spouse.

2. The assets owned outright by the surviving spouse are exposed to his or her creditors.

3. After the first spouse has died, the appreciation in the value of the assets that would have been part of the first spouse's credit shelter trust will be included in the surviving spouse's gross estate.

V. MAKING ADJUSTMENTS TO CREDIT SHELTER TRUSTS.

We never know what the United States Congress will do. The Tax Cuts and Jobs Act of 2017, which created the applicable exclusion amounts of

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$11,400,000 per individual and $22,800,000 per married couple in 2019, will sunset in 2026. Thus, there could be a reversion to lower exclusion amounts in the future. The argument can be made that, for many of our clients, leaving existing credit shelter trusts in place is prudent. We can keep credit shelter trusts in place, but adjust them for the purpose of adding flexibility.

VI. AMENDING AND RESTATING CREDIT SHELTER TRUSTS, AND RESTRUCTURING THEM.

An important option is to postpone, for as long as possible, the decision about whether to fund the credit shelter trust of the first spouse to die. We won't know the extent of our client's assets, and the applicable estate tax laws, until the time of our client's death. Therefore, delaying the decision of whether to fund a credit shelter trust until the last minute, when we have all of the relevant information, may be a wise thing to do.

The single fund QTIP trust is good estate planning option, for many reasons, including for delaying the decision of whether to fund a credit shelter trust until the last minute. The trust agreement is drawn up without the typical language dividing the trust assets into two funds, the credit shelter portion and the marital deduction portion. Rather, the trust provides for the surviving spouse with a single fund QTIP-friendly trust, *i.e.,* all income must be distributed to the surviving spouse, and the principal cannot be distributed to anyone but the surviving spouse during his or her lifetime.[3] After the first spouse has died, the Executor of the estate will decide whether to make a QTIP election for a portion, or all, of the trust. Thus, the single fund can be divided, after the first spouse has died, into a credit shelter portion (QTIP election has *not* been made) and a marital deduction portion (QTIP election has been made).

A single fund QTIP trust is an excellent option because it is relatively easy for clients to read and understand. Clients reading through the document can see that the surviving spouse will receive all of the income of the trust, and principal if needed, and then the assets will pass to their children.

This particular type of trust works well regardless of what happens with the federal estate tax. The trust provides financial support to the surviving spouse for life, and it also states who will receive the trust assets after the second spouse has died. This trust arrangement gives both spouses confidence—that the survivor will be provided for and that the children of the first to die will inherit from their parent.

To create even more flexibility, a QTIP-friendly trust can be set up with an independent trustee given the authority to decide whether to keep non-QTIP property in trust or to distribute it outright to the surviving spouse.

A similar option to the single fund QTIP trust is to allow the surviving spouse to fund a credit shelter trust with disclaimed property.[4] Thus, the question for the surviving spouse is whether to take assets outright or to disclaim the property, allowing it to pass to a credit shelter trust. This decision is made after the first spouse has died, and the family is able to consider, with their advisors, the federal estate tax laws applicable at the time.

The surviving spouse has to be careful not to accept the benefits of property prior to deciding to disclaim any interest. If the surviving spouse has a non-general power of appointment not limited by an ascertainable standard, the disclaimer is not qualified. The disclaimer alternative can feel risky to a person who is married to someone who is not the parent of his or her children. There is always a chance that the surviving spouse will opt to take the assets outright and give whatever remains, in the end, to the survivor's family only.

An alternative for restructuring trusts is to keep the standard credit shelter trust in place, but make the trust more flexible to allow for basis planning and future changes in the law. By "basis planning" I am referring to planning to achieve a step up in basis of trust assets to their fair market value, as of the time of death of the second spouse to die, or as of the time of death of both the first spouse to die and again at the time of death of the second spouse to die.[5] The goal is to minimize income taxes on capital gains for our clients when the federal estate tax is not applicable to their estates.

Use of a "Clayton QTIP" is one option for creat-

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ing flexibility. This option is based on the decision of *Estate of Clayton v. Commissioner*,[6] which held that to the extent a QTIP election is not made, the non-elected property may pass to a separate trust, according to the terms of the governing instrument, and this separate trust does not have to meet the definition of a QTIP trust. In the typical scenario utilizing this option, the trust agreement includes a formula providing that to the extent a QTIP election is not made, the trust assets pass to a traditional credit shelter trust. The credit shelter trust may sprinkle income and principal among the surviving spouse and the descendants of the first spouse to die. The trust agreement, therefore, allows the clients to choose between a QTIP trust (basis step up[7]) and a credit shelter trust (estate-tax-free appreciation of assets).

Use of a general power of appointment is another alternative for creating flexibility. To guarantee a step up in basis at the time of death of the second spouse to die, the trust document may grant the surviving spouse a testamentary general power of appointment over the assets left in trust for the surviving spouse's benefit. Alternatively, the document may grant a contingent formula general power of appointment to ensure that estate tax liability is not triggered. A more flexible alternative is to allow an independent trustee or trust protector to grant a testamentary general power of appointment to the surviving spouse (or another trust beneficiary) after considering the estate and income tax issues applicable to the trust administration.

There are risks, however, associated with granting a general power of appointment to the surviving spouse. Clients have to be comfortable with the possibility that a surviving spouse may shift assets away from the family of the first spouse to die. Granting a testamentary general power of appointment, to be exercised only with the consent of a specified non-adverse party, may be an arrangement that is easier for some clients to accept.[8]

The liberal use of limited powers of appointment provides flexibility in a document. Giving an independent trustee broad discretion to make distributions to beneficiaries also adds flexibility. For example, an independent trustee with broad authority could make distributions from a credit shelter trust, funded at the death of the first spouse to die, to the surviving spouse for the purpose of achieving a step up in basis at his or her death. As with a person who has been given the authority to grant a general power of appointment, the drafter of the trust agreement should consider using broad exculpatory language to protect the independent trustee.

A planning strategy focused on achieving a step-up in basis rather than avoiding estate taxes is triggering the Delaware tax trap (by exercising a limited power of appointment to appoint assets into a trust that grants a beneficiary a presently exercisable general power of appointment). Triggering the Delaware tax trap is not a commonly used strategy, and it can be difficult for clients to understand, but it may provide an effective method for achieving a step up in basis when other options are not available.

Another option for creating flexibility is to give an independent trustee or trust protector the authority to modify a trust because of changes in the tax laws. This could include making changes that would provide greater income tax benefits to the trust beneficiaries if the clients' focus is on income tax savings rather than estate tax savings.

VII. *POST MORTEM* MODIFICATIONS TO TRUST.

If a client dies with a credit shelter trust in place that the client does not need for federal estate tax purposes, then there are still options, *post mortem*, for creating flexibility and greater income tax benefits for the family.

Decanting can be a valuable tool under the right circumstances. Decanting involves a transfer by a trustee, without court approval, of trust property from an existing irrevocable trust to a new trust. It may be possible to decant to a new trust that confers a general power of appointment on a trust beneficiary, thereby creating tax benefits for the family.

The Ohio decanting statute[9] authorizes decanting under limited circumstances, carefully delineated in the statute. The statute balances flexibility

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for trustees and beneficiaries, with respect for the settlor's intent and choices.

A similar result may be achieved by means of a judicial or non-judicial modification or a private settlement agreement, according to the provisions of the Ohio Trust Code. [10] Under § 5804.16 of the Ohio Trust Code, a court may modify the terms of a trust to achieve the settlor's tax objectives. On the question of whether a state court decision would be binding on the IRS, the United States Supreme Court has held that when estate tax liability turns on the nature of a property interest under state law, the IRS is not bound by the decision determining the property interest, unless the highest court of the state has decided the issue.[11] Revenue Ruling 73-142 has clarified this holding by stating that a state court decision, made during a decedent's lifetime rather than after death, and which extinguishes certain property rights of the decedent, is binding on the IRS.[12]

Under Ohio common law, the trustee, beneficiaries, and any other interested parties may agree, privately, to modify some terms of a trust. [13]

VIII. REPLACING CREDIT SHELTER TRUSTS WITH JOINT TRUST.[14]

For a long time, most estate planning attorneys have preferred to create two trusts for a married couple, rather than one "joint" trust. Although one trust seemed simpler in theory; in reality, the administration of a joint trust in Ohio was, historically, complex. It was often difficult to determine which trust assets were part of the estate of the first spouse to die and, therefore, challenging to make certain the federal estate tax exclusions of both spouses were utilized.

Now that the federal estate tax applies to very few people, estate planning attorneys are taking a closer look at joint trusts. Many have concluded that now that dividing assets between spouses, and planning to use two exclusions from the federal estate tax, are no longer factors in many estate plans, client-friendly joint trusts are emerging as a good solution for some married couples.

A typical joint trust makes income and principal available to both spouses for their lifetimes. The joint trust is a revocable trust, so while both settlors are alive, either may revoke the arrangement and withdraw the property he or she contributed to the trust. While both settlors are alive, they may, acting together, amend the trust or withdraw property. The document may provide that after one spouse has died, the survivor may, acting alone, amend the trust. Alternatively, the trust for the survivor may become irrevocable at the death of the first spouse. A testamentary general power of appointment may be granted to the first spouse to die for the purpose of attempting to achieve a step up in basis for the entire trust when the first spouse dies.

There are numerous advantages to using joint trusts:

The probate process is avoided at the death of each spouse. The division of assets between the spouses is not necessary. Assets can be held in trust for the surviving spouse, rather than transferred outright. Joint trusts can be drafted to provide a step up in basis at the death of the second spouse or, alternatively, at the deaths of both spouses. Many married clients are familiar with the concept of owning property jointly and find the operation of joint trusts easier than credit shelter trusts to understand.

There are disadvantages as well, and the estate planner must consider, in each case, whether a joint trust is a good option for a particular married couple.

The ability of one spouse to make decisions separately about his or her own property - to buy, sell, change investments, or change an estate plan - without the consent of the other spouse is adversely impacted by the terms of a typical joint trust. In scenarios other than stable first marriages, this point must be carefully considered.

If a testamentary general power of appointment is granted to one or both of the spouses, then the level of trust between the spouses becomes a critical issue. If the spouses have the ability to transfer assets away from the joint trust, and outside of the agreed upon plan, clients may be anxious about whether their children will receive their

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inheritance. If the clients have children from previous relationships, then a separate trust for each spouse may be more effective.

If the surviving spouse's interest in the joint trust becomes an irrevocable trust after the death of the first spouse to die, then literally all of the survivor's assets may be held in an irrevocable trust. Some survivors may resist this lack of flexibility.

IX. CONCLUSION.

Freedom from the focus on utilizing two exclusions from the federal estate tax has opened up many options for creating estate plans for married couples. The new challenge is to find the most effective plan for each client.

ENDNOTES:

[1]I.R.C. § 2010(c)(3).

[2]I.R.C. § 2631.

[3]I.R.C. § 2056(b)(7).

[4]Ohio Rev. Code § 5815.36.

[5]I.R.C. § 1014.

[6]*Estate of Clayton v. C.I.R.*, 976 F.2d 1486, 92-2 U.S. Tax Cas. (CCH) P 60121, 70 A.F.T.R.2d 92-6262 (5th Cir. 1992). *See also* Treas. Reg. § 20.2056(b)-7(d) & 7(h).

[7]I.R.C. § 1014.

[8]Consider using broad exculpatory language to protect the person who has been given the authority to grant a general power of appointment.

[9]Ohio Rev. Code § 5808.18.

[10]Ohio Rev. Code § 5801.10 & Chap. 5804.

[11]*C.I.R. v. Bosch's Estate*, 1967-2 C.B. 337, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886, 67-2 U.S. Tax Cas. (CCH) P 12472, 19 A.F.T.R.2d 1891 (1967).

[12]1973-1 C.B. 405.

[13]Acker, *Fixing Broken Trusts: The Ohio Trust Code had made this Harder, but it's all Better Now,* 23 PLJO 257 (July/Aug. 2013).

[14]Eilers, *Two Trusts for Better Administration,* 28 PLJO 40 (Sept./Oct. 2017); Swift & Seils, *The "Basis" for Using a Joint Trust in Ohio,* 26 PLJO 91(Jan./Feb. 2016); Whitehair, *Income Tax Planning: Problems with Joint Trusts,* 26 PLJO 20 (Sept./Oct. 2015); Brucken, *Why Joint Trusts?,* 25 PLJO 185 (Mar./Apr.2015).

REVISITING OHIO'S HARMLESS ERROR STATUTE—SAVING GRACE OR UNINTENDED LOOPHOLE?

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In 2006, the Ohio legislature passed RC 2107.24, the "harmless error" statute aimed to provide an equitable mechanism to admit a will to probate that otherwise failed to meet the stringent execution formalities in RC 2107.03. When the Lorain County Probate Court precedentially admitted to probate a deliberately drafted, executed, witnessed and preserved will prepared on an electronic tablet in *In re Estate of Castro*, 2013 WL 12411558 (Ohio C.P. 2013), it relied on RC 2107.24[1] as one of its bases for doing so.

Castro is a perfect example for how RC 2107.24 was *intended to be used*. After all, the statute intended to focus solely on errors in execution, still requiring clear and convincing evidence that (1) the decedent prepared the document purporting to be a will, (2) the decedent intended the document to be a will and (3) the decedent signed that document at the end in front of two witnesses. The testator in *Castro* took methodical steps to draft a will and execute it in compliance with all of the formalities in RC 2107.03, other than by writing it on paper. Reasonable practitioners would conclude RC 2107.24 served its purpose in that instance.

However a recent case out of the Sixth District Court of Appeals, *In re Estate of Shaffer*,[2] raises the specter that the statute can be used as a loophole for a negligent testator or devious beneficiary to circumvent the statutory formalities that every other Ohio citizen is required to follow. This article explores the complicated facts in *Shaffer* and the implication of this decision on electronic wills and the future use of RC 2107.24.

FACTS OF IN RE ESTATE OF SHAFFER.

Joseph Shaffer was a sophisticated businessman, known to keep his affairs private and apparently averse to acknowledging his own mortality. He had

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two sons, including Terry Shaffer who was involved in Mr. Shaffer's business venture. Mr. Shaffer also had a long-time companion, Juley Norman. Juley lived in close proximity to Mr. Shaffer and grew closer to him after her husband, who had been treated by Mr. Shaffer, passed away. They spoke multiple times a day, spent considerable time together, traveled and spent holidays together and served as consultants for their respective businesses.

In 2006, 78-year-old Mr. Shaffer found himself amid what he believed was a medical emergency. Before he presented for medical treatment, he wanted to memorialize his last wishes. He summoned Juley, who was with her son, Zachary Norman, to his home. Juley testified Mr. Shaffer asked for some paper. On that paper, Mr. Shaffer wrote the following:

> *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./*

He signed the document *Joseph I Shaffer*. Juley testified that he read the document out loud to her and asked her what she thought. He gave the document to Zachary for safekeeping. Mr. Shaffer then submitted himself to the hospital and was released two days later after treatment.

Mr. Schaffer recovered and survived for six years after this hospitalization. Witnesses testified that Mr. Shaffer refused to discuss his estate planning or the document with a legal professional, insisting that it was sufficiently executed, primarily because he had prior estate planning done in Pennsylvania where he claimed witnesses were not required to validate a Will. Mr. Shaffer, on at least two occasions, brought up the document to Zachary, referring to it as his "Will." Mr. Shaffer never consulted with an attorney regarding the "Will" and did not complete any additional estate planning prior to his death, purportedly because it made him uncomfortable to discuss such matters, even though he had access to and regularly consulted with attorneys on other business matters. Nor did Mr. Shaffer discuss this "Will" with his two sons at any time after its 2006 execution. Mr. Shaffer unexpectedly passed away in 2015.

After Mr. Shaffer's death, Terry Shaffer filed Mr. Shaffer's 1967 Will for probate and was appointed as his Executor. Subsequently, Zachary filed an Application to Probate the 2006 document as Mr. Shaffer's Last Will and Testament arguing that even if the document did not comply with the requirements set forth in RC 2107.03, it should be admitted under Ohio's harmless error statute, RC 2107.24. An evidentiary hearing was held.

THE PROBATE COURT DETERMINES THE 2006 "WILL" IS INVALID.

Testimony was presented by Terry and Juley. The probate court determined the 2006 document was not executed pursuant to the requirements in RC 2107.03, which required two witnesses to sign the document contemporaneous with the testator. Under RC 2107.24, the probate court found that Zachary as proponent of the 2006 document failed to carry his burden of clear and convincing evidence under RC 2107.24 because: 1) Mr. Shaffer had not referenced his prior will in the 2006 document or to the witnesses; 2) the language of the 2006 document is contradictory because Mr. Shaffer wrote his estate was "not completely settled" and yet he devised "all" of his property; 3) Mr. Shaffer prepared the document while he was in the midst of a health crisis and may not have been able to form a clear intent; 4) Zachary himself questioned Mr. Shaffer as to the validity of the document and yet no one at the hospital was asked to witness the 2006 document; 5) the 2006 document did not mention Mr. Shaffer's other son or indicate how the remainder of his estate would be distributed.[3] Importantly, the probate court held that RC 2107.24 does not revoke the requirement of RC 2017.03 of attestation and subscription. Rather, the probate court determined the purpose of RC 2107.24 is to provide for admission of nonconforming wills due to inadvertent mistake in execution or unusual circumstances warranting a remedy—not for cases where the testator was ignorant of the law.[4]

THE SIXTH DISTRICT COURT OF APPEALS REVERSES.

The Sixth District Court of Appeals reversed, finding that the 2006 document was intended by

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the testator to be his Last Will and Testament, proven by clear and convincing evidence. Its opinion relies heavily on the policy argument that RC 2107.24 is consistent with the modern trend in non-probate transfers, which do not require the stringent formalities of the execution of a will. *See* Milligan, *The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court* [sic], 36 St. Mary's L. J. 787, 797-803 (2005); Glover, *Minimizing Probate-Error Risk*, 49 U. Mich. J.L. Reform 335, 346 (2016). The Sixth District concluded that RC 2107.24 "shifts the focus from compliance with statutory formality to a factual determination of whether of the testator intended to create a will." *Id*., ¶ 42. The Court went further, concluding that ignorance of the law is tantamount to an inadvertent mistake, stating: "RC 2017.24 simply addresses wills which do not meet the formal standards of RC 2107.03. The General Assembly could have, but did not, limit the reason for the failure to inadvertent mistakes in execution or unusual circumstances rather than mere ignorance of the law." *Id*., ¶ 58.

IS RC 2107.24 A SAVING GRACE OR A LOOPHOLE?

If RC 2107.24 is merely an exercise to determine a testator's intent, what is the purpose of RC 2107.03? Does it matter if a testator even tries to comply with Ohio law in memorializing her final wishes? The probate court's assertion in *Shaffer* that "the purpose of RC 2107.24" is to remedy an "inadvertent mistake in execution or unusual circumstances" rather than "cases where the testator was ignorant of the law" was rejected by the Court of Appeals. However, that assertion is supported by the expressed intent by the committee proposing the legislation that created RC 2107.24. *See* Dykes and Andrewsen, *Harmless Error in Will Execution*, 2003 PLJO 36 (Nov/Dec 2003). Dykes and Andrewsen discuss an example where there was an error in execution only, in that one of the present witnesses to the will mistakenly forgot to sign the document in a flurry of other document execution activity. This practical example as the basis for the need for the harmless error statute demonstrates, at least, an intention to remedy a mistake in execution rather than to provide further leniency to an ignorant or grossly negligent testator. Moreover, RC 2107.24 specifically provides for the recovery of fees from an attorney who participated in a negligent execution. *See* RC 2107.24(B).

Can both propositions co-exist in light of RC 2107.03? It seems that if the Ohio legislature took deliberate measures *not* to relieve a testator from the requirements of RC 2017.03—as long as they were the result of inadvertent mistake—the purpose of the statute was *not* to allow the admission of a document to probate that was the result of the testator's *negligence* and *ignorance*. Yet in *Shaffer,* the Sixth District did just that.—The Court considered extrinsic evidence, but still overlooked the fact that the testator did nothing for over several years after to validate his document appropriately, even after the legitimate suggestion that the document should be submitted to an attorney for legal review. Is that truly the equitable outcome the legislature intended in enacting RC 2107.24?

SHAFFER AS A CASE FOR THE ENACTMENT OF AN OHIO STATUTE GOVERNING ELECTRONIC WILLS.

The proposed enactment of an electronic will statute is founded in the reality that our lives are increasingly paperless and driven by biometrics and electronic communication. While it carries substantial risk in increased litigation and potential for malfeasance, it is likely an inevitability. One use of RC 2107.24 under current Ohio law is for the admission of an electronic will, as in the *Castro* case. Compared to *Shaffer*, though, *Castro* was an easy decision. The evidence in *Castro* unequivocally demonstrated a deliberate, conscientious process by which the testator complied with RC 2107.03, albeit on an electronic format rather than paper. There was no dispute between family and friends as to the credibility of the document or that it was intended to operate as a Last Will and Testament and there was substantial compliance with the formalities. While RC 2107.24 was used to admit the document to probate, it is reasonable to view *Castro* and *Shaffer* as evidence in favor of creating a separate Ohio electronic will statute rather than deciding electronic wills under RC 2107.24.

This is because of the dangers apparent in the

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Shaffer decision. Under *Shaffer's* reasoning, what is to stop a nefarious person from using document editing software to affix a decedent's signature to an electronically prepared will and, in cahoots with someone else, seek to admit the same to probate as witnesses to its validity? What *Shaffer* teaches us is that RC 2017.24 is further clarification is needed from the legislature. The statute was *not* expressly intended to function as the gateway for the admission of an electronic will. In this regard, the outcome of *Shaffer* makes the case for the enactment of a separate statute governing the execution and admission of electronic wills to probate, which would serve to provide clarity for practitioners and reduce the likelihood of litigation and consequently inconsistent case law.

An earlier article in this Journal opines that RC 2107.24 is actually more restrictive than RC 2107.03 "since RC 2107.24(A) mandates the will be signed in the conscious presence of the witnesses whereas RC 2107.03 also permits a testator the choice to later acknowledge his signature before witnesses." Gee, *Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the World and Re-visiting Ohio's Harmless Error Statute,* 2016 PLJO 149, 150 (March/April 2016). This assumes that the testator knew and attempted to execute his or her will pursuant to Ohio law. Thus, an electronic wills statute could focus on substantial compliance with the formalities but for the chosen medium. This would eliminate the seeming stroke of luck in *Shaffer* there were two witnesses present at the time Mr. Shaffer decided to write out his wishes.

THE SUPREME COURT WILL REVIEW IN RE ESTATE OF SHAFFER—BUT NOT DIRECTLY ON THE ISSUE OF THE APPLICATION OF RC 2107.24.

Perhaps the most interesting twist in the case is the Sixth District's holding as to Juley Norman's testimony and her ability to take as a beneficiary under the document she sought to prove. Under RC 2107.03, attestation and subscription by two competent witnesses in the testator's conscious presence are required to make a valid Will. A competent witness is one that is disinterested. RC 2107.15 provides that if a devise or bequest is made to a person who is one of only two witnesses to a will, the devise or bequest is void. The most such an individual can benefit under that circumstance is to the extent they would have benefitted in the prior will or through an intestate share. However, under RC 2107.24, there is no requirement that the witness be "competent" or disinterested. The Sixth District held that the requirement of proof by clear and convincing evidence supplants the requirement that the witness to the non-conforming will be disinterested. Does this open the possibility of admitting a will witnessed by an interested individual under RC 2107.24, rather than RC 2017.03? Isn't this a clear path to circumvent the statutory formalities? It turns out this is a question the Ohio Supreme Court is interested in as well. The Ohio Supreme Court has accepted certification on the following proposition of law: **Ohio's Voiding Statute applies equally to wills executed in compliance with RC 2107.03 and wills submitted pursuant to RC 2107.24. If the will is witnessed by a devisee, either by the devisee's signature or the devisee's testimony, the bequest to the interested witness is void. Stay tuned.**

ENDNOTES:

[1] http://www.chroniclet.com/news/2013/06/25/Judge-rules-that-a-will-written-and-signed-on-tablet-is-legal.html

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

[3] *In re Estate of Shaffer*, 2019-Ohio-234, ¶ 16, 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).

[4] *In re Estate of Shaffer*, 2019-Ohio-234, ¶ 17, 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).

CASE SUMMARIES

North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust

Headnote: Trust income tax

Citation: *North Carolina Department of Reve-*

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nue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 (2019) (decided June 21, 2019)

The U.S. Supreme Court has now decided the important Kaestner case on the North Carolina trust income tax. It affirmed the lower courts' holdings that the tax could not be assessed against the trust on its accumulated income (which was all of its income, as none was distributed). The NC statute taxed the trust because its beneficiaries lived in NC. They did not receive any income, had no right to demand it and distribution of the income was at the discretion of the trustee both as to timing and as to amounts distributed to any or all of the several beneficiaries. The settlor (now dead) did not live or die in NC, there had never been a NC trustee and the trust had never been administered in NC. Indeed, the beneficiaries did not live in NC when the trust was created, but later moved there and lived there in the taxable years at issue.

The Court noted that its decision was a narrow one, good for that trust and tax statute only. It indicated that the tax would be sustained (under prior cases) if the beneficiary had the unilateral right to withdraw from the trust. It also noted that it was not deciding other cases where beneficiary residence is only one of two or more factors generating the tax (such as the residence of the settlor or of the trustee and the place of administration).

The Ohio statute taxes the trust only if it has at least one Ohio resident as a beneficiary, if he is one to whom income is paid or could in the discretion of the trustee be paid and, differing from the NC statute, if the settlor is an Ohio resident or was an Ohio resident when the trust became irrevocable and could be a taxpayer. This is the sort of statute on which the Court stated that it now expressed no opinion. It appears to your author that the case highlights the possible invalidity of the Ohio statute, but does not require it.

There is a Minnesota case pending in the Court and the Minnesota statute is like the Ohio statute. If the Court accepts and decides it, next year, and if it invalidates that tax, we may then consider the prospect of the invalidity of the Ohio income tax as to accumulated trust income, including capital gains.

Bogar v. Baker

Headnote: Specific bequests

Citation: *Bogar v. Baker*, 2019-Ohio-1762, 2019 WL 2060312 (Ohio Ct. App. 7th Dist. Mahoning County 2019)

Decedent farmer's will left his farm to his brother, and the residue to others. The farm gift was of decedent's "real estate at [location] together with all contents of said real estate." The issue was whether the farm equipment passed to the brother as such contents or passed with the residue. The probate court without hearing held for the residue, and was reversed on appeal where the bequest was determined to be latently ambiguous and the case was remanded for taking evidence. On remand, the attorney who represented decedent and drafted the will (who also represented a residuary beneficiary personally and as executor of the estate) testified that decedent intended the quoted language as passing only the household contents and not the farm equipment. On appeal again, the brother urged that the lawyer's testimony should have been excluded because of a conflict of interest. However, the appellate court held that an attorney may testify on behalf of his own client. Indeed, here it was the brother who called the attorney as a witness, and at trial neither side had moved to disqualify him.

Wiesenmayer v. Vaspory

Headnote: Medicaid

Citation: *Wiesenmayer v. Vaspory*, 2019-Ohio-1805, 2019 WL 2067123 (Ohio Ct. App. 2d Dist. Montgomery County 2019)

This case determined priority between the state's Medicaid lien and the nursing home's claim. The sequence of events was as follows: Decedent moved to the nursing home, she received Medicaid benefits, she died, the state recorded its lien, a special administrator was appointed, the nursing home timely filed its claim with the special administrator, decedent's home was sold in a land sale action, and the issue was the disposition of the proceeds of that action between the state and the nursing home. The probate court held the lien had priority and awarded the sale proceeds to the state, and

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was affirmed on appeal. The nursing home objected that the lien was not recorded until after death. The probate court found that the imposition of the post-mortem lien was permissible and allowed the state to improve its position, undermining ORC Section 2117.25 (which provides that the state's claim priority was below that of administrative costs, funeral home and medical expenses). The Court of Appeals affirmed that reasoning. A dissent argued that the state's lien was invalid because it was not recorded until after death.

Hodge v. Callinan

Headnote: Malpractice

Citation: *Hodge v. Callinan*, 2019-Ohio-1836, 2019 WL 2082245 (Ohio Ct. App. 12th Dist. Warren County 2019)

Decedent left a condominium, that was sold by the attorney who served as administrator in a court land sale action. The heirs sued the attorney for malpractice in the sale, claiming the price was inadequate. The trial court held the sale was properly approved by the court and could not now be questioned. The heirs claimed that the attorney had refused to give them their shares of the sale proceeds until they signed approvals of it, but the court held that did not constitute illegal coercion by the attorney. The court further applied RC 5815.16, the anti-Arpadi statute, finding that the attorney had not represented the heirs and had no duty to them. Summary judgment for the attorney, affirmed on appeal.

Montefiore Home v. Fields

Headnote: Powers of Attorney

Citation: *Montefiore Home v. Fields*, 2019-Ohio-1989, 2019 WL 2233646 (Ohio Ct. App. 8th Dist. Cuyahoga County 2019)

Decedent died a resident of plaintiff home. Defendant held her power of attorney, assisted in moving her to the home and represented to the home that defendant would act under the POA to marshal her assets to pay plaintiff's bills. Instead, defendant emptied her bank accounts. After the death, plaintiff sued defendant personally, on three theories: promissory estoppel, based on her representation that she would pay the bills under the POA; fraudulent transfers of decedent's funds under the POA; and personal liability for misuse of the POA. Defendant countered that she had not signed the admission agreement with the home, but the court noted that suit was not brought under it. Note also that suit was against defendant personally, not against decedent's estate.

Defendant defended pro se, and the trial court granted her motion for summary judgment. The appellate court recognized that none of her defenses responded to plaintiff's claims, and reversed.

Estate of Jenkins

Headnote: Estate accounts

Citation: *In re Estate of Jenkins*, 2019-Ohio-2112, 2019 WL 2317171 (Ohio Ct. App. 8th Dist. Cuyahoga County 2019)

Decedent left several daughters, who fought over her modest estate. The probate court removed the daughter appointed as executor and appointed an outside lawyer as administrator. On exceptions to the administrator's final account, a daughter claimed decedent had won $250,000 in the Ohio lottery some years before her death, so there must have been additional bank accounts holding some of it that were not accounted for. The bank wanted almost $1,000 to produce almost six years of account statements, the estate had no remaining funds and the beneficiaries would not advance funds, so the administrator had not undertaken that search. The exceptions objected to omission of such additional funds, but were overruled for lack of any evidence of them. The appellate court affirmed.

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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)		
Abolish dower	HB 209	Intro. 4-18-19
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)		

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		
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		Ohio BAR of 10-17-94
See EPTPL Section Report, *Waiver of Filing of Inventory and Accounts OSBA Reform Proposal*, 28 No. 2 Ohio Prob. L.J. NL 1 (Nov/Dec 2017)		
Guardianship estate planning authority		Spring 2019*

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See Thakur, *Proposal: Authorizing "Estate Planning" For a Ward by a Guardian*, 29 PLJO 141 (May/June 2019)	
Spousal vehicle transfer	Spring 2019*
See Lanham, *EPTPL Section Proposes to Amend RC 2106.13(A)*, 29 PLJO 152 (May/June 2019)	
Creditor rights after lapse of power to withdraw	Spring 2019*
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)	
Changing nomination of future trustees	Spring 2019*
See Brucken, *Ohio Trust Code Amendments*, 29 PLJO 139 (May/June 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 our Customer Service Dept. at 800-362-4500.

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