

**Trust and Estate  
Legislative and Litigation Update**

**Current through January 2011**

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## KEY OHIO LEGISLATION

### I. STATUTES ENACTED BY THE 128<sup>TH</sup> GENERAL ASSEMBLY (2009-2010)

#### A. *Trust and Estates Amendments re Savings Statute; Termination of Guardianship; Revocation of Trust Provisions Upon Divorce.*

**Sub. S.B. 106**

**Sponsor: Buehrer**

**Effective: 3/24/10**

##### *BILL SUMMARY*

- Excludes from the application of the savings statute certain specified estate and trust proceedings that have limitation periods.
- Modifies the saving statute in wrongful death actions by providing that if a judgment for a plaintiff is reversed or the plaintiff fails otherwise than upon the merits, the plaintiff or the plaintiff's representative if the plaintiff dies and the cause of action survives may commence a new wrongful death action within one year after the date of reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the applicable period of limitations, whichever occurs later
- Increases from \$10,000 or less to \$25,000 or less the amount of an estate of a ward that the court may terminate upon application by the guardian, for which the court may distribute the estate assets without a guardianship, and for which the court may authorize the settlement of claims of minors or adult incompetents without the appointment of a guardian.
- Modifies the residence requirements for a guardian by generally requiring a guardian to be a resident of this state instead of a resident of the county.
- Provides that the termination of a marriage revokes any trust provision that confers a beneficial interest on the former spouse.
- Modifies the definition of "qualifying transfer" in the definition of "resident" for purposes of the Ohio income tax on trusts.

#### B. *Transfer-on-Death of Real Estate*

**S.B. 124**

**Sponsor: Faber**

**Effective: 12/28/09**

##### *BILL SUMMARY*

- Change the transfer on death (TOD) designation instrument from a deed to an affidavit.
- Allows an individual who owns real property or any interest in real property as a survivorship tenant to execute a transfer on death designation affidavit.

- Allows an individual who together with the individual's spouse owns real property or an interest in real property as tenants by the entireties (pursuant to a deed recorded between February 9, 1972, and April 3, 1985) to execute a transfer on death designation affidavit.
- Allows an individual who together with the individual's spouse owns real property or an interest in real property as tenants by the entireties (pursuant to a deed recorded between February 9, 1972, and April 3, 1985) to execute a transfer on death designation affidavit.
- Provides that the act does not affect any deed that was executed and recorded prior to the effective date of the act and does not affect any transfer on death beneficiary designation made pursuant to R.C. 5302.22 as it existed prior to the effective date of the act.
- Also makes changes to the provisions of the Mortgage Loan Law (R.C. 1321.51 to 1321.60) and the Mortgage Brokers Law (R.C. 1322.01 to 1322.12).

***C. Increase Estate Tax Credit***

**H.B. 61**

**Sponsor: Hottinger**

**Introduced: 3/4/09**

**Status: Assigned to House Ways and Means Committee**

***BILL SUMMARY***

- Increases the existing estate tax credit from \$13,900 to \$15,575 beginning July 1, 2009. This would exempt from taxation estates valued at \$366,250 or less.
- Increases the credit thereafter in proportion to consumer price inflation every year beginning in 2010.
- Requires all estate tax revenue to be distributed to the municipal corporations and townships where estate assets are located. Currently the revenues are distributed 80% to the local government and 20% to the state General Revenue Fund.
- Authorizes municipal corporations and townships to exempt from the estate tax any estate assets located in the municipal corporation or township, and authorizes electors residing in those political subdivisions to propose the exemption by initiative.
- Authorizes subdivisions where a local estate tax exemption has been enacted to repeal the exemption, and authorizes electors to repeal the exemption by initiative.

***D. Accountant-Client Testimonial Privilege***

**Sub. S.B. 80**

**Sponsor: Seitz**



**Introduced 3/12/09**

**Status: Report by Senate Judiciary Civil Justice Committee 5/7/2009**

*BILL SUMMARY*

- Creates a testimonial privilege, subject to specific exceptions, for communications between an accountant and the accountant's client.
- If the client is deceased and the client's surviving spouse or the executor or administrator of the client's estate expressly consents to the accountant's testifying, the accountant may testify or may be compelled to testify concerning a communication or advice to the deceased client.
- The bill also provides that, insofar as the provisions of the accountant-client privilege are similar to the attorney-client privilege that the accountant-client testimonial privilege be construed, interpreted and applied in a manner consistent with the attorney-client privilege.

*E. Probate Modernization*

**H.B. 395**

**Sponsor: Bacon**

**Introduced: 12/14/2009**

**Status: Assigned to Civil & Commercial Law Committee**

*BILL SUMMARY*

- Replaces outdated terminology and makes numerous gender neutralizing, grammatical, and other technical changes throughout the Probate Code.
- Authorizes a judge to appoint a nonprofit corporation to serve as guardian of a person and to appoint a public agency to serve as a guardian of the estate or of a person.
- Reduces from three years to one year the period in which a beneficiary named in a will knows of its existence and intentionally conceals or withholds it, thus preventing any testate or intestate property or right from passing to the beneficiary and reduces the time to offer an oral will for probate from six months to three months after the testator's death.
- Generally authorizes a fiduciary having funds belonging to a trust to invest them in savings accounts in, or certificates or other evidences of deposits issued by, a credit union located in and organized under the laws of Ohio.
- Generally expands the authority for additional investments made by a fiduciary to include securities of corporations organized and existing under the laws of any foreign government or state or bonds or other interest-bearing obligations of any foreign government if they may be lawfully sold in Ohio and investment is made only in those securities as

would be acquired by prudent persons who are seeking a reasonable income and the preservation of their capital.

- Provides that it is within the court's discretion, upon application, notice to interested persons, and a hearing, to allow the personal use of trust property by the fiduciary.
- Permits the fiduciary or the attorney for an estate to petition the court for authority to purchase property of the estate if specified requirements are met.
- Reduces the time within which an executor or administrator of an estate must collect the assets and complete the administration of that estate from 13 months to six months after the date of appointment unless an extension of the time to file a final and distributive account is authorized and provides that for good cause shown the court may grant an extension of the time to file the inventory and accounts.

***F. Adult Adoption***

**H.B. 411**

**Sponsor: Martin**

**Introduced: 1/19/2010**

**Status: Report by House Civil & Commercial Law Committee 5/26/10**

***BILL SUMMARY***

- Permits the adoption of an adult if the adult is the child of the petitioner's spouse and consents to the adoption.

***G. Omnibus Probate Law Bill***

**Sponsor: Seitz and Schiavoni**

**Introduced: 4/27/10**

**Status: Report by Senate Judiciary Civil Justice Committee 6/2/10**

***BILL SUMMARY***

- Declares an emergency due to the repeal of the federal estate tax and federal generation-skipping transfer tax adversely affecting wills and trust instruments that did not deal with such repeal and includes provisions to specifically address and mitigate these effects.
- Enacts the Uniform Power of Attorney Act in Ohio, including:
  - Provides that a power of attorney created under the act is durable unless it expressly provides that it is terminated by the incapacity of the principal.
  - Provides for the process for the nomination of a guardian and provides that, except for good cause shown or disqualification, the

court must make its appointment in accordance with the principal's most recent nomination.

- Amends the anti-lapse statute for wills and enacts an anti-laps statute for trusts.
- Modifies the Ohio Trust Code, including:
  - Adds a provision to modify a trustee's duties with respect to life insurance policies held as trust assets.
  - Allows a trustee of a first trust who has power, other than absolute power, under the terms of the first trust to make distributions of principal to one or more current beneficiaries to exercise that power by distributing all or any part of the principal subject to the power, and all or any income that is not otherwise required to be distributed, to the trustee of a second trust [decanting].
  - Provides that a certification of trust may establish the identity of the trustee and any succession of trustees.

## KEY OHIO CASE LAW

### I. ADOPTION

- A. *In the Matter of the Adoption of: Jori Marie Law (2006)*  
2006-Ohio-600, 2006 Ohio App. LEXIS 550  
Decided February 13, 2006**

**Issue:** Did the probate court err in determining that the consent of the father (who had been declared incompetent) through his guardians was required?

**Holding:** No. The father's consent was clearly required under R.C. 3107.06(B)(3) as an Administrative Order Establishment of Paternity, stated that the father was the biological father of the child and that a parent-child relationship existed between the two.

- B. *In the Matter of the Adoption of W.K.M. (2006)*  
166 Ohio App.3d 684, 2006-Ohio-2326, 852 N.E.2d 1264  
Decided May 5, 2006**

**Issue:** Is the father's consent to an adoption required where the domestic relations court found that no child support was due from the father due to his incarceration?

**Holding:** Yes. R.C. 3107.07(A) provides that a parent's consent to adoption is not required if the parent has failed without justifiable cause to provide for the maintenance and support of the child for at least one year prior to the filing of the adoption petition. The domestic relations court's order relieving the father of his duty of support was justifiable cause under to have failed to pay.

- C. *In the Matter of the Adoption of J.M.N., D.M.N. (2008)*  
2008 WL 3990828 (Ohio App. 2 Dist.), 2008 Ohio 4394  
Decided August 29, 2008**

**Issue:** Can a mother avoid termination of her parental rights based on failure to provide support with the justification that she was unaware of a court order requiring her to pay child support?

**Holding:** No. The duty to provide support "is born with the child; a judicial decree merely attaches a dollar sign." The general statutory duty to provide support to a minor child under R.C. § 3103.03 obliges a parent to do so.

### II. ATTORNEYS

- A. *Office of Disciplinary Counsel v. Kelleher (2004)*  
102 Ohio St.3d 105, 2004-Ohio-1802, 2004 Ohio Lexis 887  
Decided April 28, 2004**

**Issue:** Does DR 5-101(A)(2), which prohibits a lawyer from preparing a dispositive instrument for an unrelated person that benefits a member of the lawyer's family, contain an exception for unrelated persons who are treated as family members?

**Holding:** No. When a lawyer prepares a dispositive instrument for an unrelated person that benefits a member of the lawyer's family, the appropriate sanction is a one year suspension with six months stayed.

**B. *Disciplinary Counsel v. Johnson (2007)***

**113 Ohio St.3d 344, 2007-Ohio-2074**

**Decided May 16, 2007**

**Issue:** Whether an attorney who is found to have charged clearly excessive fees in recovering funds, while also pursuing a course of action that had no reasonable hope of recovery violated DR 1-102(A)(6) and 2-106(A)?

**Holding:** Yes. The attorney was suspended from the practice of law in Ohio for 1 year, with the last six months converted into a probation period, and ordered to pay \$50,000 in restitution.

**C. *Disciplinary Counsel v. Kramer (2007)***

**113 Ohio St.3d 455, 2007-Ohio-2340, 866 N.E.2d 498**

**Decided May 30, 2007**

**Issue:** What is the appropriate sanction for an attorney who committed professional misconduct while associated with a company that sold insurance and services related to living trusts to his clients?

**Holding:** The attorney received a stayed six month suspension. This holding is in keeping with a number of other decisions regarding lawyers running afoul of ethical standards by participating in sales transactions through which companies offer living-trust agreements, usually targeting older customers, and then profit by also selling insurance.

*Comment:* This case cites numerous cases where the court has decided along these same lines:

a. *Cincinnati Bar Assn. v. Kathman* (2001), 92 Ohio St.3d 92, 2001-Ohio-157, 748 N.E.2d 1091, in which the lawyer merely facilitated the process through which lay personnel filled in the blanks on boilerplate forms made available by the marketing company. Kathman received a six-month actual suspension.

The court distinguished Kramer from *Kathman* in that Kramer exercised his independent professional judgment and expertise for his client's protection.

b. *Columbus Bar Assn. v. Fishman* (2002), 98 Ohio St.3d 172, 2002-Ohio-7086, 781 N.E.2d 204, in which the lawyer superficially reviewed lay personnel in performing the same ministerial function as *Kathman*, and also consciously set up his clients for sales presentations of insurance products. Fishman received a one-year suspension.

c. *Cleveland Bar Assn. v. Sharp Estate Serv.* (2005), 207 Ohio St.3d 219, 2005-Ohio-6267, 837 N.E.2d 1183 held that sales agents who explained the legal consequences of specific decisions relating to living trusts or estate plans had practiced law without a license, inasmuch as the agents had advised other persons how to best secure their legal rights.

d. *Disciplinary Counsel v. Wheatley* (2005), 207 Ohio St.3d 224, 2005-Ohio-6266, 837 N.E.2d 1188, in which the lawyer prepared living trusts that relied upon client information and choices obtained by nonlawyers and by using Sharp's (above) boilerplate forms language and software. Primarily because Wheatley did not readily acknowledge the established impropriety of his misconduct and had again affiliated with a vendor of living trusts, he received a six-month actual suspension.

H.B. 38, effective 9/15/04 amended R.C. 4705.7 regarding the unauthorized practice of law in Ohio in response to trust mills.

**D. *Disciplinary Counsel v. Taylor* (2008)  
120 Ohio St.3d 366, 2008-Ohio-6202  
Decided December 4, 2008**

**Issue:** What is the appropriate sanction for an attorney who disregarded professional standards for executing wills, powers of attorney, and deeds in an attempt to achieve what he believed to be his clients' wishes?

**Holding:** The attorney received a one-year suspension, all stayed on conditions, including monitored probation.

**E. *Columbus Bar Association v. American Family Prepaid Legal Corp.* (2009)  
123 Ohio St.3d 353, 2009-Ohio-5336  
Decided October 14, 2009**

**Issue:** Did Respondent conduct the unauthorized practice of law by selling memberships in a prepaid legal services plan that offered estate plans for individuals by direct sales that were reviewed by licensed attorneys?

**Holding:** Yes. American Family's sales agents, in the guise of selling prepaid legal plans, advised prospects on the benefits of its estate-planning tools. After signing up the prospect, the agents obtained sensitive financial information from the customer and delivered the agreement and the information to the Ohio office. The resident attorney (a virtual captive of American Family) sent a letter to the customer and the customer's information to the California home office for document preparation. The resident attorney rarely, if ever, communicated with the customer; if he did, he communicated by telephone. Non-attorneys in another state prepared the documents and said documents were delivered by non-attorneys. And it is no defense, as some respondents claim, that they (1) disclosed to customers that the layperson was not an attorney and could not give legal advice or (2) obtained powers of attorney executed by the customers

### III. CHARITIES

**A. *U.S. Bank v. Hospice of Cincinnati, The Christ Hospital AND State of Ohio v. American Cancer Society* (2006)  
2006-Ohio-1222, 2006 Ohio App. LEXIS 1097 (1st Dist., Hamilton County)  
Decided March 17, 2006**

**Issue:** Where a named charitable beneficiary ceases to provide services for which a bequest is made, does it cease to exist for purposes of a beneficiary designation?

**Holding:** Yes. The court ruled that a named charitable beneficiary ceases to exist when it stops providing the services identified in the bequest and, subsequently, turns the services over to another entity. In applying a corporate law analysis, the court reasoned that a “successor” entity would be one to whom business interests were transferred (i.e. assets, liabilities, etc.). In this case, no such business interests were transferred and the primary beneficiary was not in existence. Accordingly, the assets must pass to the contingent beneficiary.

#### IV. CLAIMS AGAINST ESTATES

**A. *In re Estate of Mason (2006)*  
109 Ohio St.3d 532, 2006-Ohio-3256, 849 N.E.2d 998.  
Decided July 12, 2006**

**Issue:** When does a legatee’s interest in an estate convert from an equitable interest to a legal interest?

**Holding:** A legatee’s interest in an estate is a contingent equitable interest until there is an order of distribution from the probate court, or until the fiduciary holds a definite amount ready to distribute to the legatee

**B. *Sowers v. Luginbill (2008)*  
175 Ohio App.3d 745; 2008 Ohio 1486 (3<sup>rd</sup> Dist., Van Wert County)  
Decided March 31, 2008**

**Issue:** Is an injured party a subsequent creditor, such that trust property from a pour-over will would not be subject to her claim, where they have sued the negligent motorist prior to that motorist's death?

**Holding:** No. The death properly decided her status because it (1) was a time certain giving settlors an expectation as to their rights and duties and enabling counsel to give clear advice on creditor rights, (2) promoted the vesting of property rights after a settlor's death, absent a claim filed prior thereto, and the prompt filing of creditor claims, and (3) promoted judicial economy, as it was a definite time upon which to make a decision.

**C. *Estate of Macias (2009)*  
2009 WL 498075 (Ohio App. 2 Dist.), 2009-Ohio-891  
Decided February 27, 2009**

**Issue:** Is a claim based on personal services rendered by one family member to another, without an express contract between them, valid?

**Holding:** Yes, if a family relationship does not exist between the caregiver and the person receiving services. A close relationship, by blood or marriage, is not alone sufficient to establish a family relationship.

## V. DESCENT AND DISTRIBUTION

- A. *Byrd v. Trennor* (2004)  
157 Ohio App.3d 358, 2004-Ohio-2736, 811 N.E.2d 549 (2nd Dist., Clark Cty)  
Decided May 28, 2004

**Issue:** Does the statute of descent and distribution (R.C. 2105.06) violate the Equal Protection Clause of the Fourteenth Amendment because it treats illegitimate children of deceased fathers and illegitimate children of deceased mothers differently?

**Holding:** No. There is a significant possibility that the father of an illegitimate child may be unaware of that child's existence (a much smaller possibility in the case of the mother). By requiring that assertions of the existence of a father-child relationship be made during the life of the father, the intestate succession statute serves the important state interest of enabling the father to make the decision whether to make a will with knowledge of the consequences of that decision.

- B. *Albrecht v. Treon* (2008)  
Slip Opinion No. 2008-Ohio-2617  
Decided January 23, 2008

**Issue:** Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing?

**Holding:** No. Although a decedent's next of kin does possess a right to attend to the proper preparation and burial or cremation of the body, nothing in the U.S. Constitution, the Ohio Constitution, Ohio Statutes, or common law establishes a protected right in autopsy specimens in Ohio. Therefore, the next of kin does not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

## VI. DIVORCE DECREES AND ESTATE PLANNING

- A. *Cosby v Cosby* (2002)  
96 Ohio St.3d 228, 2002-Ohio-4170  
Decided August 28, 2002

**Issue:** May a court impose a constructive trust upon the State Teachers Retirement System ("STRS") survivor benefits of a surviving spouse in favor of a former spouse who claims entitlement based on an award of retirement benefits in a divorce decree?

**Holding:** No. The court ruled that a constructive trust is an inappropriate remedy that is contrary to the statutory mandate of the STRS to pay survivor benefits to a qualified surviving spouse when no retirement benefits have vested.



**B. *Klan v. Klan* (2006)  
2006-Ohio-1738, 2006 Ohio App. Lexis 1598 (8th Dist., Montgomery County)  
Decided April 6, 2006**

**Issue:** Whether a divorce nullifies the designation of an ex-spouse as beneficiary of an individualized retirement account?

**Holding:** No. R.C. 1339.63 (now 5815.33) did not apply as the IRA contract was entered into prior to May 31, 1990 (the effective date of the statute), and the divorce settlement agreement made no reference to retirement accounts. Consequently, the ex-spouse was entitled to inherit from the decedent's IRA. Had the designation been made after May 31, 1990, the law would nullify such designation of death benefits payable under a contract were the marriage terminated after the designation was made and not otherwise addressed in the divorce decree.

**C. *Estate of Hohler v Hohler* (2009)  
185 Ohio App.3d 420, 2009 Ohio 7013  
Decided December 31, 2009**

**Issue:** Whether a surviving spouse's statutory right to waive her deceased husband's attorney-client privilege (2317.02(A)) should be limited by public policy considerations when the surviving spouse seeks to waive her deceased husband's attorney-client privilege with respect to the prenuptial agreement entered into between the two of them?

**Holding:** No. The lower court had no right to limit the surviving spouse's statutory right pursuant to public policy.

## VII. ESTATES

**A. *Adams v. Adams* (2003)  
2003 Ohio 3703, 2003 Ohio App. LEXIS 3346 (12th Dist, Warren County)  
Decided July 14, 2003**

**Issue:** Are proceeds payable pursuant to an annuity contract included in a decedent's probate estate?

**Holding:** No. Such proceeds are treated as non-probate property, similar to life insurance. In Ohio it is still possible to effectively disinherit your spouse by arranging for your property to pass outside of probate.

**B. *Estate of Cowling v. Estate of Cowling et al.* (2006)  
109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405  
Decided May 31, 2006**

**Issue:** Is a constructive trust the appropriate remedy for assets removed from joint accounts that were then gifted during the decedent's life as well as transferred through transfer on death accounts?

**Holding:** Yes.

## VIII. EVIDENCE AND PROCEDURE

- A. *In re Estate of Sneed (2006)*  
166 Ohio App.3d 595 (6th Dist. Lucas County)  
Decided April 12, 2006**

**Issue:** Whether an order removing an administrator of an estate is a final appealable order?

**Holding:** Yes. Although the court had previously held that an order ruling on a motion to remove an executor from a probate estate was not final and appealable, it overruled those decisions and held that, pursuant to R.C. 2505.02(B) such an order was final and appealable.

- B. *In re Estate of Kelsey (2006)*  
165 Ohio App.3d 680 (11th Dist., Lake County)  
Decided March 10, 2006**

**Issue:** Whether res judicata applied to prevent a beneficiary from challenging the exclusion of the family Bible from the estate inventory where she did not raise the issue at the time the probate court approved the inventory?

**Holding:** No. Where the asset was improperly gifted away during the decedent's lifetime, it held a status as a concealed asset. Pursuant to R.C. 2115.16, there is no time limit for filing an exception to the exclusion of the asset from the estate where it was concealed.

- C. *Hayes v. Oakridge Home (2009)*  
Slip Op. No. 2009-Ohio-2054  
Decided May 7, 2009**

**Issue:** (1) Whether a nursing home resident's age can render an arbitration agreement executed by the resident procedurally unconscionable? (2) Whether an arbitration agreement that waives a nursing home resident's right to trial and to recover punitive damages and attorney fees is substantively unconscionable?

**Holding:** (1) No. An arbitration agreement, voluntarily executed by a nursing home resident is not rendered procedurally unconscionable solely by virtue of the resident's age. (2) No. An arbitration agreement, voluntarily executed by a nursing home resident that eliminates the right to trial and to seek punitive damages and attorney fees is not substantively unconscionable.

## IX. FEES

- A. *In re Estate of Kendall (2007)*  
171 Ohio App.3d 109, 2007-Ohio-1672, (2nd Dist., Montgomery County)  
Rendered April 6, 2007**

**Issue:** Whether the trial court improperly reduced attorney fees: (1) By not crediting one attorney's expert witness; and (2) By only crediting another attorney for work done as attorney for the estate and not work done at the request of the second attorney for the estate?

**Holding:** (1) No. Not only was the expert witness not a probate expert but the attorney's errors had made the case more complicated than necessary. (2) Yes. As the attorney's work was performed while acting as an attorney for the estate or while acting at the request of the executor, the second attorney for the estate, or both, all of its work could be considered as that of an attorney for the estate, regardless of when it was performed.

**B. *In re Estate of Johnson* (2008)  
178 Ohio App.3d 594, 2008-Ohio-5328  
Decided October 6, 2008**

**Issue:** (1) Can a law firm be ordered to repay fees paid from an estate based on the administrator's subsequent conduct and (2) Can the trial court determine that attorney fees for the trustee should not be paid out of the trust?

**Holding:** (1) No. The probate court could not disregard contingent attorney fee arrangement it had previously approved based on actions of administrator after settlement funds were distributed. (2) Yes. A trustee may expend trust funds for legal services that benefit the trust but where only the trustee personally stands to benefit from the representation, the court may order the fees returned to the trust.

## **X. FIDUCIARIES**

**A. *Wood v. U.S. Bank, N.A.* (2005)  
160 Ohio App.3d 831, 2005-Ohio-2341, (1st Dist., Hamilton County)  
Decided May 13, 2005**

**Issue:** Whether the trustee breached its fiduciary duty by failing to diversify trust assets?

**Holding:** Yes. This court held that to abrogate the duty to diversify, the trust must contain specific language authorizing or directing the trustee to retain in a specific investment a larger percentage of the trust assets than would normally be prudent."

**B. *National City Bank, Trustee of the Welker J. Smucker Trust v. Noble* (2006)  
2005 Ohio App. LEXIS 5843 (8th Dist., Cuyahoga County)  
Decided December 8, 2005)**

**Issue:** Whether the trustee breached its fiduciary duty by failing to diversify trust assets?

**Holding:** No. The language of the trust was clear that the trustee could retain investments without liability or depreciation and went further to insulate the corporate trustee providing that it had no duty to review or make recommendations without a specific request of the individual trustee. The language of the trust was sufficient to abrogate the statutory duty to diversify.

**C. *Kish v. Kish* (2006)  
2006 Ohio App. LEXIS 4605 (7th Dist., Mahoning County)  
Decided September 8, 2006**

**Issue:** Whether the trial court erred in ruling that R.C. 2109.50 (statute on concealment) is a strict liability statute?

**Holding:** No. The court determined that (1) a conveyance is not needed for a person or institution to be found guilty of concealment, (2) scienter is not an essential element of a cause of action under the concealment statute and (3) a finding of guilt under R.C. 2109.52 does not require fraudulent or criminal intent.

**D. *Levy v. Thompson* (2006)  
2006 Ohio App. LEXIS 5292 (2nd Dist., Montgomery County)  
Decided October 6, 2006**

**Issue:** Whether the attorney-in-fact under a power of attorney granted by decedent exceeded her authority when she and an annuities salesman added a “per stirpes” designation to decedent’s annuity without decedent’s consent?

**Holding:** Yes. The per stirpes designation in the annuity was void in light of the improper actions taken in creating the annuity. A general durable power of attorney does not authorize attorneys-in-fact to transfer property to themselves or to others unless the power of attorney explicitly confers this power. In this case the per stirpes designation changed the previous ownership and beneficiary designations that had been put in place earlier. Consequently, the designation was void.

**E. *In re Estate of Perry* (2008)  
2008 WL 282067 (Ohio App. 12 Dist.)  
Decided February 4, 2008**

**Issue:** Whether the trial court erred in failing to remove the executrix of the estate for alleged misappropriation of estate assets?

**Holding:** No. A trial court enjoys broad discretion in determining whether or not to remove an individual acting in a fiduciary capacity. Assuming the trial court has made an informed decision upon a consideration of all relevant facts, the court’s decision will not be reversed absent a clear showing of abuse of discretion.

**F. *In re Estate of Kirkland* (2008)  
175 Ohio App.3d 73, 885 N.E.2d 271 (Ohio App.2<sup>nd</sup> Dist.), 2008-Ohio-421  
Decided Feb. 1, 2008**

**Issue:** Whether a general power of attorney authorizes the holder of the power to transfer funds to herself as a gift?

**Holding:** Absent clear and convincing evidence that the decedent intended to make a gift, a general power of attorney does not authorize the holder of the power to make gifts to herself.

**G.** *Cundall v. U.S. Bank, N.A. et al. (2009)*  
**2009-Ohio-2523**  
**Decided June 4, 2009**

**Issue:** Whether the statute of limitations begins to run on a claim against a trustee for breach of fiduciary duty at the time the wrongdoing is (or should have been) discovered or at the time the fiduciary relationship has ended?

**Holding:** The statute of limitations begins to run on a claim against a trustee for breach of fiduciary duty at the time the wrongdoing is (or should have been) discovered in the absence of surreptitious or obscured conduct by the trustee.

**H.** *Charles A Holdren, Trustee v. Wesley L. Garrett, Former Trustee et al. (2010)*  
**2010 Ohio 6295 10<sup>th</sup> Dist**  
**Decided December 21, 2010**

**Issue:** When the statute of limitations (R.C. Section 5810.05) begin to run for breach of fiduciary duty against a former Trustee?

**Holding:** Affirmed Cundall (see above). Case is interesting as an application of the Ohio Trust Code Statute of Limitations under Cundall's reasoning.

## **XI. GIFTS**

**A.** *Masterson v. Weaver (2006)*  
**2006-Ohio-1069, 2006 Ohio App. LEXIS 976 (5th Dist., Morgan County)**  
**Decided March 8, 2006**

**Issue:** Whether a box of money left under the decedent's bed was an asset of the estate, although there was evidence presented of a note that made a gift of the money outside the will?

**Holding:** Yes. The box of money was an asset of the estate. Such a note was not evidence of a gift because intention is not enough to create a gift, there must also be a parting of dominion and control over the asset.

## **XII. GUARDIANSHIPS**

**A.** *Weaver v. Edwin Shaw Hospital (2004)*  
**104 Ohio St.3d 390, 2004-Ohio-6549, N.E.2d 1079**  
**Decided December 15, 2004**

**Issue:** Whether the disabilities of minority or unsound mind as referenced in R.C. 2305.16 can be removed only by attaining the age or majority or being declared of sound mind, or, in addition, whether they can also be removed by the appointment of a legal guardian?

**Holding:** The appointment of a legal guardian for a person within the age of minority or of unsound mind does not remove the disabilities referenced in R.C. 2305.16 and, therefore, does not commence the running of the statute of limitations.

**B. *In re Guardianship of Stein* (2004)  
105 Ohio St.3d 30, 2004-Ohio-7114, 821 N.E.2d 1008  
Decided December 30, 2004**

**Issue:** Whether a probate court exceeded its statutory authority when it appointed a guardian with the power to authorize the withdrawal of all life-sustaining support and treatment?

**Holding:** Yes. In this case, a “limited guardian” was appointed for the infant, based on the parties’ agreement. However, the probate court went beyond the treatment and directed that the guardian had the power to withdraw the life-sustaining treatment. This decision infringed on the parents’ rights which had not yet been terminated, only suspended.

**C. *Goldberg v. Maloney* (2006)  
111 Ohio St.3d 211, 2006-Ohio-5485  
Decided November 8, 2006**

**Issue:** Whether the probate court patently and unambiguously lacked jurisdiction to proceed in a concealment action founded on an alleged taking of assets occurring before death or institution of a guardianship?

**Holding:** No. The court found that concealment action pursuant to R.C. 2109.50 and 2109.52 is appropriate to determine the allegation that a person had, without authorization, withdrawn funds belonging to another, even where such dispute arises out of a contract matter. Concealment actions can be applicable to recover certain assets wrongfully concealed, embezzled, or conveyed away *before* the creation of the estate. More so, the court reasoned that a probate court may properly investigate and adjudicate all matters substantially related to the guardianship, including transactions occurring before the guardianship proceedings commenced.

**D. *In re Guardianship of Hughes* (2007)  
2007 WL 4445404 (Ohio App. 8 Dist.)  
Decided December 20, 2007**

**Issue:** Whether the probate court had jurisdiction to award attorneys’ fees to attorneys working on behalf of the guardianship after the ward dies and the guardianship ends?

**Holding:** Generally, the death of a ward terminates the guardian’s power and authority; however, even after a guardianship ends, “a guardian has the power...to make a proper accounting and settlement of any acts taken in regard to the ward’s assets.” Here, the award of attorneys’ fees was a part of the settling of the final accounting of the guardianship and was, therefore, within the probate court’s jurisdiction to determine.

**E. *In re Guardianship of Santrucek* (2008)  
120 Ohio St.3d 67 2008-Ohio-4915  
Decided October 2, 2008**

**See Section XV. Jurisdiction**

### **XIII. INTENTIONAL INTERFERENCE WITH EXPECTANCY OF INHERITANCE**

- A. *Firestone, et al. v. Galbreath, et al.* (1993)  
67 Ohio St.3d 87, 616 N.E.2d 202  
Decided August 11, 1993**

**Issue:** Does Ohio recognize the tort of intentional interference with expectancy or inheritance and, if the tort exists, who has the right to maintain the cause of action?

**Holding:** Yes. Any person who can prove the elements of the tort for intentional interference with expectancy of inheritance has the right to maintain the cause of action.

- B. *Brady v. Benzing* (2003)  
2003-Ohio-3354, 2003 Ohio App. LEXIS 2003 (8th Dist., Cuyahoga County)  
Decided June 26, 2003**

**Issue:** Was a prospective heir entitled to intervene in a conversion action brought by the guardian of a ward's estate so that the heir could assert tortious interference with expectancy of inheritance claims against the defendants who allegedly converted the ward's property and thus the intervenor's inheritance?

**Holding:** No. The interests of the intervenor were adequately protected by the guardian of the estate who had a fiduciary duty to recover any assets belonging to the ward.

- C. *Roll v. Edwards* (2004)  
156 Ohio App.3d 227, 2004-Ohio-767, 805 N.E.2d 162 (4th Dist., Ross Cty)  
Decided February 17, 2004**

**Issue:** Does the probate court have jurisdiction over interference with expectancy of inheritance claims, and is dismissal of an interference with inheritance claim proper by the common pleas court when a party may obtain complete relief from a pending will contest action?

**Holding:** The probate court lacks jurisdiction over interference with expectancy of inheritance claims. Claims for interference with expectancy of inheritance are not ripe in common pleas court when a will contest is pending that would afford complete relief to the aggrieved party.

- D. *In the Matter of the Estate of Goehring* (2007)  
2007-Ohio-1133, 2007 Ohio App. LEXIS 1054 (7th Dist., Columbiana Cty)  
Decided March 6, 2007**

**Issue:** Was the granting of summary judgment for the defendants in an intentional interference with expectancy of inheritance claim appropriate where the will contest had been decided on summary judgment for the defendants?

**Holding:** Yes. The determination that the will was valid resolved the tort claim as well.

- E. *Sull v. Kaim* (2007)  
2007-Ohio-3269, 2007 Ohio App. LEXIS 3035  
Decided June 28, 2007**

**Issue:** Whether plaintiffs can demonstrate an expectancy of an inheritance only if they obtain a determination that the will is valid?

**Holding:** No. There is a procedure for a testator to have a will declared valid, but there is no procedure by which a beneficiary under a will may obtain a determination that the will is valid unless another party challenges the validity of the will.

#### **XIV. JOINT AND SURVIVORSHIP ASSETS**

- A. *Landin v. Lavrisiuk* (2006)  
2005-Ohio-4991, 2005 Ohio App. LEXIS 4507 (8th Dist., Cuyahoga County)  
Decided September 22, 2005**

**Issue:** Whether joint and survivorship accounts established in the name of decedent and one of her sons should be set aside as the product of undue influence?

**Holding:** Yes. The son had a power of attorney over his mother's affairs and was thus in a fiduciary relationship, raising the presumption of undue influence, which he did not effectively rebut.

- B. *Rusnak v. Fleming* (2007)  
144 Ohio Misc.2d 99, 879 N.E.2d 865  
Decided November 1, 2007**

**Issue:** Whether a fiduciary, as surviving owner of a joint and survivorship account, is presumed to have exerted undue influence as to the account she opened as attorney-in-fact?

**Holding:** Yes. The rule the Ohio State Supreme Court articulated in *Wright v. Bloom*, which applies a presumption of validity to joint and survivorship accounts created by the non-fiduciary owner, does not apply when the fiduciary, acting as attorney-in-fact, opens a joint and survivorship account with the non-fiduciary's funds.

- C. *Mattia v. Hall* (2008)  
2008 WL 186650 (Ohio App. 9 Dist.), 2008-Ohio-180  
Decided Jan. 23, 2008**

**Issue:** Whether an executed transfer on death ("TOD") deed must be recorded prior to death to be valid?

**Holding:** Yes. Ohio Revised Code § 5302 provides that a deed conveying real estate must be properly executed *and* recorded prior to death to be valid.

- D. *In re Guardianship of Marsh* (2008)  
178 Ohio App.3d 723, 2008-Ohio-5375  
Decided October 10, 2008**



**Issue:** Is a joint tenant with right of survivorship who contributed approximately 1/3 of the purchase price of the property entitled to half of the sale proceeds?

**Holding:** Yes. R.C. 5302.20(B) provides: "If two or more persons hold an interest in the title to real property as survivorship tenants, each survivorship tenant holds an *equal share* of the title during their joint lives unless otherwise provided in the instrument creating the survivorship tenancy." (Emphasis added.) In this case nothing in the deed indicated ownership would be based on their proportional contributions, therefore mother and son were equal owners.

## XV. JURISDICTION

### A. *Gilpin v. Bank One* (2004)

**2005-Ohio-3012, 2004 Ohio App. LEXIS 2669 (12th Dist., Clermont Cty)  
Decided June 14, 2004**

**Issue:** Does the Probate Court have jurisdiction over legal malpractice claims if such claims are joined with claims for breach of fiduciary duty?

**Holding:** No. The Probate Court is a court of limited jurisdiction, and while it may hear breach of fiduciary duty claims, legal malpractice claims must be brought in the general division of the common pleas court.

### B. *Kraus v. Hanna* (2004)

**2004-Ohio-3928, 2004 Ohio App. LEXIS 3579 (11th Dist., Portage County)  
Decided July 23, 2004**

**Issue:** Does the Probate Court have jurisdiction over a declaratory judgment action concerning a claim that the estate rejected?

**Holding:** No. Actions on rejected claims must be brought in the general division of the Common Pleas Court. Permitting an estate to seek a declaratory judgment on a rejected claim in Probate Court would authorize forum shopping as the rejected claimant must proceed in the general division.

### C. *Nemcek v. Pakey* (2006)

**137 Ohio Misc.2d 1, 2006-Ohio-2059 (Trumbull County)  
Decided April 6, 2006**

**Issue:** Does a probate court have jurisdiction to make a parentage determination that the plaintiffs, a husband and wife that enlisted the assistance of a surrogate mother to bear and birth their child, are the natural and legal parents of the unborn child carried by the gestational surrogate?

**Holding:** No. There are no statutory or constitutional sections granting a probate court the authority to render a declaratory judgment action to determine parentage and to issue an order directing the hospital expecting to deliver the unborn child to designate the genetic or biological parents as the natural and legal parents of the child. Furthermore, the probate court lacks subject-matter jurisdiction to determine parentage of an unborn child that is the subject of a surrogacy agreement in a declaratory judgment action.

**D. *Swift v. Gray* (2008)  
2008 Ohio 2321  
Decided May 9, 2008**

**Issue:** Whether the Probate Court has jurisdiction over a former guardian in an embezzlement action after the ward has died and the guardianship has been terminated?

**Holding:** No. When the ward died, the court lost jurisdiction for all matters except settling a final accounting. Although a concealment action or other cause of action may be brought by the executor or administrator they may not be substituted in place of the successor guardian in a complaint filed by such guardian prior to the ward's death.

**E. *Shahroozi v. Moulton* (2008)  
Case No.: 522230A Probate Court of Franklin County, Ohio  
Decided May 23, 2008**

**Issue:** Whether nonresident co-trustees' failure to make discretionary distributions to trust beneficiary rises to the level of tortious conduct such that the court may exercise personal jurisdiction over the co-trustees in accordance with Ohio's long-arm statute?

**Holding:** No. In this case, trustees' refusal to make discretionary distributions of principal and income was supported by the terms of the trust instrument which made such actions permissive and not mandatory. Such refusal to make distributions did not, therefore, rise to the level of tortious conduct sufficient to permit an exercise of personal jurisdiction over the nonresident trustees.

**F. *In re Guardianship of Santrucek* (2008)  
120 Ohio St.3d 67 2008-Ohio-4915  
Decided October 2, 2008**

**Issue:** Does a person who has not filed an application to be appointed guardian, or who otherwise has not been made a party to the guardianship proceedings, have standing to appeal?

**Holding:** No. a person claiming an interest in a guardianship proceeding must take the necessary procedural steps to protect that claimed interest. Being related to the alleged incompetent is not enough to confer party status upon a person, nor is being served with notice of the proceeding. Additional action is required to become a party with a right to appeal (such as a motion to intervene).

## **XVI. NON-TESTAMENTARY BENEFICIARY DESIGNATIONS**

**A. *Ahmed v. Ahmed* (2004)  
158 Ohio App.3d 527, 2004-Ohio-5120, 817 N.E.2d 424  
Decided September 24, 2004**

**Issue:** Who should receive the life insurance proceeds under an ERISA-related plan where the primary beneficiary has been convicted of slaying the deceased?

**Holding:** In this case the proceeds went to the decedent's estate. The court held that ERISA preempts R.C. 2105.19 (the slayer statute) and under federal common law the slayer would be barred from receiving the proceeds and they should go to the estate.

**B. *McClain v. White* (2006)**

**2006-Ohio-3920, 2006 Ohio App. LEXIS 3882 (9th Dist. Summit County)  
Decided August 2, 2006**

**Issue:** Whether a change in decedent's life insurance was valid or the result of undue influence where one of her children, under a power of attorney, removed one of her dead sons as a beneficiary, leaving the dead son's children to contest?

**Holding:** Valid. The son with power of attorney presented evidence to show that the change in the beneficiary was valid and in accordance with decedent's intent. The grandchildren filed no evidentiary materials.

**XVII. OHIO'S DEFENSE OF MARRIAGE ACT AND R.C. 2919.25 (DOM. VIOL.)**

**A. *Ohio v. Carswell* (2007)**

**2007-Ohio-3723, 2007 Ohio LEXIS 1654  
Decided July 25, 2007**

**Issue:** Whether Ohio's Domestic Violence Statute (R.C. 2919.25) is unconstitutional under *Ohio Const. art. XV, §11*, Ohio's Defense of Marriage Amendment?

**Holding:** No. The Supreme Court held that the marriage amendment did not implicitly repeal R.C. 2919.25 because the two are not clearly incompatible. R.C. 2919.25's intent was to protect persons from violence by close family members or household residents, while the Marriage Amendment's intent was to bar the creation or recognition of a legal status approximating marriage. The court found that the two did not conflict.

**B. *Fairchild v. Leach* (2008)**

**01 Ju 2542 (Unreported and non-public)  
Decided June 2008**

**Issue:** Whether a joint-custody agreement between a woman and her same-sex partner could be invalidated on constitutional grounds in light of Ohio's ban on same-sex marriage?

**Holding:** No. State law grants jurisdiction to the juvenile court to settle child custody disputes when one of the parties vying for custody is a non-parent.

## XVIII. PRIVACY IN MALPRACTICE CLAIMS

- A. *Simon v. Zipperstein* (1987)  
32 Ohio St.3d 74, 512 N.E.2d 636  
Decided August 12, 1987**

**Issue:** Whether, in the absence of fraud, collusion or malice, an attorney may be held liable in a malpractice action by a beneficiary or purported beneficiary of a will where privity is lacking?

**Holding:** No. An attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice. Privity does not extend to a beneficiary who does not have a vested interest in an estate.

- B. *Elam v. Hyatt Legal Services* (1989)  
44 Ohio St.3d 175, 541 N.E.2d 616  
Decided August 2, 1989**

**Issue:** Whether beneficiaries whose interest in estate was vested were in privity with fiduciary of estate such that attorney for fiduciary could be held liable to beneficiaries for damages arising from attorney's negligent performance?

**Holding:** Yes. Beneficiaries who were remaindermen to a life estate, had a vested interest and were therefore in privity with the fiduciary of the estate. Where such privity exists, the attorney for the fiduciary is not immune from liability arising from the attorney's negligent performance.

- C. *Arpadi v. First MSP Corporation* (1994)  
68 Ohio St.3d 453, 628 N.E.2d 1335  
Decided March 23, 1994**

**Issue:** Whether the duty owed by an attorney to exercise due care in the provision of legal services to a partnership extends to the limited partners as well?

**Holding:** Yes. In a limited partnership the general partner owes a fiduciary duty to the limited partners of the enterprise. Those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates.

- D. *Holik v. Lafferty* (2006)  
2006 Ohio App. Lexis 2482 (11<sup>th</sup> Dist., Ashtabula County)  
Decided May 26, 2006**

**Issue:** Whether a beneficiary can sue an attorney serving as administrator of an estate for legal malpractice?

**Holding:** No. There is no attorney-client relationship between the beneficiary and the administrator. In order to maintain a legal malpractice action based on negligent representation, there must be a duty or obligation to the beneficiary which was breached by the attorney in his or her capacity as an attorney. In this

case, the court found that the attorney was serving as an estate fiduciary and that the duty to the heir was as a fiduciary, not as an attorney to the beneficiary.

**E. *LeRoy v. Allen, Yurasek & Merklin* (2007)  
2007-Ohio-3608, 2007 Ohio LEXIS 1637  
Decided July 18, 2007**

**Issue:** (1) Whether the privity exception of *Simon v. Zipperstein* (1987) applies where there is a fiduciary duty owed by a majority shareholder to minority shareholders; and (2) Whether a complaint's allegations of conflict of interest and collusion were sufficient to state a valid claim for the malice exception?

**Holding:** (1) No. A private transfer of stock does not, in and of itself, implicate any fiduciary duty on the part of a majority shareholder toward minority shareholders. (2) Yes. As malice may be averred generally, a complaint's allegations of collusion and conflict of interest fall within the ambit of malice, sufficient to overcome a motion to dismiss under Civ.R. 12(B)(6).

**F. *Wanamaker v. Davis*. (2008)  
Greene App. No. 2005-CA-151, 2007-Ohio-4340  
Decided Jan. 23, 2008**

**Issue:** Does a Trustee have standing to bring a legal malpractice claim, on behalf of the estate, against an attorney who administered the estate, when the Trust is the sole beneficiary of the estate?

**Holding:** Yes. A Trustee has standing to bring a claim of legal malpractice against an attorney for the estate when the Trust is the only beneficiary of a will administered by the estate and is, therefore, in privity with the estate's executrix.

## **XIX. SPENDTHRIFT TRUSTS**

**A. *Styer v. Styer* (2006)  
2006 Ohio App. LEXIS 548 (3rd Dist., Hardin County)  
Decided February 13, 2006**

**Issue:** Whether a provision in beneficiary's father's will created a spendthrift provision by creating a purely discretionary trust, such as to prevent the court from ruling that the trustee of the trust must pay the beneficiary's child support arrearages?

**Holding:** Yes. After reviewing the language of the will, the court determined it created a spendthrift provision because the trustee had the sole discretion to make distributions as the trustee deemed appropriate. The court recognized that no specific language is needed to create a spendthrift trust. The court further noted that the trustee was not required to pay the beneficiary's child support payments as the trustee was not directed to make payments for the beneficiary's support.

**Trust Code Update:** NO CHANGE.

**B. *Great Am. Ins. Co. v. Thompson Trust* (2006)  
2006-Ohio-304, 2006 Ohio App. LEXIS 273  
Date of judgment entry on appeal January 27, 2006**

**Issue:** (1) Whether the spendthrift provision prevented the beneficiary's creditor from attaching the beneficiary's interest where the trust also contained a provision for an unconditional power to withdraw \$5,000 and five per cent of the trust at the end of each year; and (2) Whether a probate court's order allowing the trust to apply the beneficiary's distributions to the beneficiary's debt to the trust was a lien on the debtor's interest?

**Holding:** (1) No. The beneficiary's interest/right was unconditional and thus not protected by the spendthrift provision. If a beneficiary has an unconditional right to withdraw assets, the spendthrift language of the trust cannot protect against attachment. (2) No. The trust was an unsecured creditor whose right was subordinate to the creditor's secured interest. Accordingly, the order of the probate court did not change the beneficiary's interest in the trust and the priority of the creditor's secured interest.

**XX. TRUSTS**

**A. *Dater v. Charles H. Dater Foundation, Inc.* (2006)  
166 Ohio App.3d 839 (1st Dist., Hamilton County)  
Decided May 19, 2006**

**Issue:** Whether the trial court properly substituted the trustee for the beneficiary as the sole plaintiff?

**Holding:** No. The trial court erred by substituting the trustee as the sole plaintiff when the beneficiary was a real party in interest and where no transfer of interest had occurred.

**B. *Stevens, et al v. Radey* (2006)  
2006-Ohio-5579, 2006 Ohio App. LEXIS 5573 (8th Dist., Cuyahoga County)  
Decided October 26, 2006**

**Issue:** When are the heirs to a trust determined where the trust has no remainder provision or residual clause and whose purpose was accomplished without depleting the trust?

**Holding:** When a trust is properly declared but is fully performed without exhausting the trust estate, the trustee holds the surplus upon a resulting trust for the transferor or his estate. Only those heirs at law existing at the time the resulting trust came into being can be considered heirs at law.

**C. *National City Bank v. de Laville* (2006)  
170 Ohio App.3d 317, 2006-Ohio-5909, 867 N.E.2d 416 (6th Dist., Lucas Cty)  
Decided November 9, 2006**

**Issue:** Whether a trust document and settlor's antenuptial agreement should be construed together to resolve ambiguities in the trust document?

**Holding:** Yes. The decedent directed his lawyers to amend prior trust to mirror the antenuptial agreement, the antenuptial agreement directly addressed aspects of the trust and its terms, and they both had a binding effect upon the bank as successor trustee and successor party to the antenuptial agreement.

**D. *Zahn v. Zahn, et al* (2007)  
170 Ohio App.3d 111, 2007-Ohio-667, 866 N.E.2d 58 (4th Dist., Highland Cty)  
Decided January 4, 2007**

**Issue:** Did the probate court exceed its jurisdiction by ordering the successor trustee to pay the estate a sum of money sufficient to pay the balance of the wife's statutory allowance?

**Holding:** No. The probate court had concurrent jurisdiction on an action involving an inter vivos trust. Further, upon receipt of the executor's request for sufficient funds to satisfy the wife's \$40,000 statutory allowance, the plain language of the trust obligated the trustee to pay such sums to the estate.

**E. *Pack v. Osborn* (2008)  
2008 WL 162465 (Ohio), 2008 – Ohio – 0090  
Decided Jan. 17, 2008**

**Issue:** Whether the assets of a wholly discretionary trust are recognizable as an available resource in Medicaid-eligibility review?

**Holding:** No. Wholly discretionary or pure discretionary trusts are those in which a trustee has uncontrolled discretion to make distributions of income and principal, not subject to a support standard. The assets of such trusts are not counted resources in Medicaid-eligibility reviews.

**F. *Vaughn v. Huntington National Bank* (2009)  
2009 WL 342697 (Ohio App. 4 Dist.), 2009 Ohio 598  
Decided February 10, 2009**

**Issue:** Does a court err in refusing to terminate a trust where all of the beneficiaries have consented to the termination of the trust?

**Holding:** No. Where the termination of the trust would be contrary to the material purpose of the trust, the court does not err in refusing to terminate.

**G. *In the Case of James J. Stahl* (2009)  
Social Security Administration, Office of Disability Adjudication and Review  
Decided February 26, 2009**

**Issue:** Whether the James J. Stahl Trust is a countable resource or whether it falls within the exceptions for a valid Medicaid payback trust.

**Holding:** The trust does not meet all the requirements for a valid Medicaid payback trust and the trust is a resource within the meaning of the Social Security Act.

## XXI. WILL CONTESTS

- A. *Estate of Snell v. Kilburn (2005)*  
165 Ohio App.3d 352 (7th Dist., Monroe County)  
Decided December 23, 2005**

**Issue:** (1) Whether the testator had testamentary capacity despite the fact that his son was not specifically referenced in the will; (2) Whether the will was properly executed and attested; (3) Whether the trial court erred in construing the will during the pending will contest action?

**Holding:** (1) Yes. Although not mentioning one's heirs when executing a will raises an issue of material fact, the evidence did not support that the testator lacked capacity. (2) Yes. R.C. 2107.03 requires only that a will be attested by two witnesses who saw the testator sign his name or heard him acknowledge his signature. There is no requirement that there be an actual attestation clause, that the signatures of the witnesses be on the same page as the testator or that the pages be numbered or that the attestation clause be dated. (3) No. A probate court has exclusive jurisdiction to construe and determine the validity of wills. There is no statutory authority to prevent a probate court from construing a will while a will contest action is pending.

- B. *Tomasik v. Tomasik (2006)*  
111 Ohio St.3d 481, 2006-Ohio-609  
Decided December 6, 2006**

**Issue:** Whether the three month limitations period of R.C. 2107.76 (2001) applied to will contestants, decedent's nieces and nephews, who were not entitled to receive notice of the filing of the will under R.C. 2107.19?

**Holding:** No. The statute of limitations on will contests unambiguously applies to only those individuals who were entitled to receive notice of the filing of the will.

- C. *Knowlton v. Schultz (2008)*  
179 Ohio App.3d 479; 2008-Ohio-5984 (1<sup>st</sup> Dist., Hamilton County)  
Decided November 21, 2008**

**Issue:** (1) Whether a rebuttable presumption of undue influence was warranted against attorney who was not a beneficiary of the will; (2) Whether testimony of testator's longtime friend was admissible under state of mind exception to hearsay rule; and (3) Whether methods of handwriting expert for testator's estate were sufficiently reliable to meet the admissibility threshold?

**Holding:** (1) No. Although attorney's law firm was one of the trustees of the trust the presumption of undue influence did not attach to the attorney who was not a beneficiary of the will. (2) No. Testimony offered by the friend as to a conversation that she had with the testator in which he told her he was unhappy with the attorney's representation and called him a "crook" was properly excluded under Evid.R. 403 as the danger of unfair prejudice outweighed its probative value. The conversation occurred 2-3 years after the will was executed and was



only marginally relevant as it was unrelated to the will. (3) Yes. The handwriting expert, with many years experience, testified fully about her methods using standard procedures.

## **XXII. WRONGFUL DEATH**

- A. *In re Estate of Svetichan (2003)*  
2003-Ohio-7044, 2003 Ohio App. LEXIS 6388 (7th Dist. Mahoning County)  
Decided December 16, 2003**
- Issue:** Did the probate court's establishment of a wrongful death trust for a mature 19 year old constitute an abuse of discretion?
- Holding:** Yes. In light of the testimony as to the beneficiary's maturity and the court's willingness to distribute over \$120,000 outright to the beneficiary, the imposition of a trust upon the remaining \$300,000 of the wrongful death proceeds constituted an abuse of discretion.
- B. *The State ex rel. WBNS TV, Inc. v. Dues, Judge, et al. (2004)*  
101 Ohio St.3d 406, 2004-Ohio-1497, N.E.2d 1116  
Decided April 14, 2004**
- Issue:** Whether a television station was entitled to sealed wrongful death settlement figures submitted to and considered by a probate court?
- C. *In re Estate of Perez (2006)*  
2006-Ohio-2841, 2006 Ohio App. LEXIS 2665 (5th Dist., Stark County)  
Decided June 5, 2006**
- Issue:** Did the probate court err when it denied appellant's motion to vacate pursuant to Civ.R. 60(B) without holding a hearing on the motion?
- Holding:** Yes. A probate court abuses its discretion in denying a hearing where the grounds for relief from judgment are sufficiently alleged and are supported by evidence that would warrant relief from judgment.
- D. *Presley v. Fraley (2009)*  
2009-Ohio-1558 (10<sup>th</sup> Dist., Franklin County)  
Decided March 31, 2009**
- Issue:** Whether there is a rational basis for the Ohio savings statute for wrongful death actions, R.C. 2125.04, to distinguish between plaintiffs who dismiss their actions prior to the running of the statute of limitations and those who dismiss after the statute of limitations has lapsed?
- Holding:** No. The challenged provision of R.C. 2125.04 is arbitrary and violates the plaintiff's right to equal protection under the law.
- E. *Toledo Bar Association v. Rust (2010)*  
124 Ohio St. 3d 305; 2010 Ohio 170; 921 N.E.2d 1056  
Decided January 28, 2010**
- Issue:** Is it a violation of ORPC 3.1 to file a wrongful death claim on behalf of an estate when you (as the lawyer filing the claim) do not represent the estate

or the estate's fiduciary and you have actual knowledge that the estate's fiduciary objects to such a claim being filed?

**Holding:** No. The Court found that respondent initiated the wrongful-death action in good faith and that he had an arguable basis in law fact that was not frivolous for filing the claim. Because lawyers may advance such claims in attempting to extend, modify, or reverse existing law, we hold that respondent committed no ethical impropriety and dismiss the complaint against him.

## **SELECTED STATE AND FEDERAL CASES**

### **XXIII. ADEMPMENTION**

- A. *Bolte v. Robertson (2006)*  
941 So.2d 920 (Ala.)  
Decided April 28, 2006**

**Issue:** Whether mortgage payments made on the property, which was sold before testator's death, were the property of the devisee, rather than part of the residuary estate by ademption?

**Holding:** Yes. The mortgage and the remaining indebtedness constitute "right, title, and interest" in the subject property that passed to the specific devisee.

- B. *In the Matter of the Estate of Lewis (2007)*  
731 N.W.2d 19 (Iowa)  
Decided May 16, 2007**

**Issue:** Did the sale of residence that was specifically devised by testator's attorney-in-fact cause ademption of the bequest?

**Holding:** No. The sale did not cause ademption to the extent that there were specifically identifiable proceeds in the estate at the time of death.

### **XXIV. ASSISTED SUICIDE / PAIN MANAGEMENT / RIGHT TO DIE**

- A. *Gonzales v. Oregon (2006)*  
546 U.S. 243, 126 S.Ct. 904, 163 L.Ed. 2d 748  
Decided January 17, 2006**

**Issue:** Whether the Attorney General has permissibly construed the Controlled Substances Act, 21 U.S.C. § 801 et seq., and its implementing regulations to prohibit the distribution of federally controlled substances for the purpose of facilitating an individual's suicide, regardless of state law purporting to authorize such distribution?

**Holding:** The CSA does not allow the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure.

**B. *Jeb Bush, et al. v. Michael Schiavo, Guardian of Theresa Schiavo (2004)*  
2004 Fla. LEXIS 1539, 29 Fla. L. Weekly S.515,  
Supreme Court of Florida No. SC04-925  
Decided September 23, 2004**

**Issue:** Is the Act passed by the Florida legislature and signed into law by Governor Jeb Bush in 2003, intended to give the Governor authority to issue a one-time stay to prevent the withholding of nutrition and hydration from Theresa Schiavo, constitutional?

**Holding:** No, the law is not constitutional, on the following grounds: First, the Act resulted in an executive order that effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary. Second, the Act is unconstitutional on its face because it delegates legislative power to the Governor, by failing to provide any standards or criteria for the Governor to follow in deciding whether to issue or lift a stay, making the Governor's decision unreviewable. The court also rejected arguments that the Act protects those who cannot protect themselves, noting again the lack of criteria for issuance or lifting of a stay and the lack of any requirement to consider the patient's wishes, and further noting the detailed protections already available under Florida law for those who are adjudicated incompetent.

**XXV. CLAIMS AGAINST ESTATE**

**A. *Steen and Berg Co. v. Berg (2006)*  
713 N.W.2d 87 (N.D.)  
Decided April 25, 2006**

**Issue:** Whether a corporate buy-sell agreement is a claim against an estate so as to fall within the non-claim statute?

**Holding:** Yes. Therefore, the action brought by the corporation to specifically enforce a buy-sell agreement requiring the estate to sell decedent's shares of stock was untimely.

**B. *In re Estate of Buonanno (2006)*  
909 A.2d 494 (R.I.)  
Decided November 10, 2006**

**Issue:** Whether a company's petition to file a claim out of time against decedent's estate, for indemnification for the clean-up of a chemical contamination site, was foreclosed by the distribution of the estate?

**Holding:** Yes.

**C. *Zoldan v. Zohlman (2009)*  
2009 FL 0514.090  
Decided May 13, 2009**

**Issue:** What is the proper valuation method to value an interest in a limited partnership?

**Holding:** The fair market value is the proper method in this case.

## XXVI. DESCENT AND DISTRIBUTION

**A. *Sieh v. Sieh* (2006)**

**713 N.W.2d 194 (Iowa)**

**Decided March 17, 2006 (rehearing denied April 19, 2006)**

**Issue:** (1) Whether, as a matter of first impression, assets of inter vivos trust were property possessed by decedent during marriage and thus were subject to his surviving spouse's statutory share; and (2) Whether statutory provisions governing notice to creditors, heirs, spouse, and beneficiaries to contest validity of revocable trusts barred surviving spouse's election to take against the will?

**Holding:** (1) Yes. Because decedent had full control of the assets of the inter vivos trust at the time of his death, including the power to revoke the trust, the trust assets were property possessed by the decedent during the marriage and thus subject to the spouse's statutory share. (2) No. It was not necessary to file a claim in the trust or bring a separate action involving the trust as, pursuant to her election to take against the will, the district court had authority to decide whether her statutory share embraced the trust assets by ruling in the estate proceedings.

**B. *In re the Estate of Jotham* (2006)**

**722 N.W.2d 447 (Minn.)**

**Decided October 12, 2006**

**Issue:** Whether the limitations period governing action to establish nonexistence of father-child relationship governs attempts to rebut statutory presumption of paternity in action to establish intestate's heirs.

**Holding:** Yes. A probate action to determine intestate's heirs was not "appropriate action" to rebut statutory presumption of intestate's paternity more than three years after child's birth.

**C. *In re Estate of Blodgett* (2006)**

**147 P.3d 702 (AK)**

**Decided November 17, 2006**

**Issue:** Whether son convicted of criminally negligent homicide in the death of his father could obtain benefits devised to him under his father's will.

**Holding:** No. No manifest injustice resulted from the application of Alaska's unique slayer statute.

**D. *In re Estate of Kingsbury* (2008)**

**2008 ME 79, 96 A.2d 389 (Maine)**

**Decided May 6, 2008**

**Issue:** Does the probate court have authority to order a decedent's personal representative to submit to genetic testing, and if the representative will not submit, to order that the decedent be exhumed for the purposes of establishing the decedent's heirs?

**Holding:** Yes. The probate court has authority to decide all matters relating to the determination of the heirs of the decedent's estate and may take any action necessary to resolve such disputes properly before it.

- E. *In the Matter of the Estate of Ranftle (2009)***  
**Surrogate's Court: New York County File No. 4585-2008 (N.Y.)**  
**Decided January 26, 2009**

**Issue:** Who is entitled to receive process as a distributee of the estate where the decedent had married his same-sex partner in Canada, had no children and his parents had predeceased him?

**Holding:** As the marriage was valid under the laws of Canada, the decedent's same-sex partner was the decedent's surviving spouse and sole distributee.

- F. *Taylor v. Taylor (2009)***  
**--- So.2d ---, 2009 WL 186155 (Fla.App. 1 Dist.)**  
**Decided January 28, 2009**

**Issue:** Is a general relinquishment of "all rights" or equivalent language in a premarital agreement sufficient to waive all rights generally afforded to surviving spouses?

**Holding:** Yes. under section 732.702(1) Florida Statutes (1995), the right of election of a surviving spouse, the rights of the surviving spouse as intestate successor or as a pretermitted spouse, and the rights of the surviving spouse to homestead exempt property and family allowance, or any of them, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party. Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, includes rights of the surviving spouse.

## **XXVII. ESTATES**

- A. *Brockelman v. Western Surety Co. (2000)***  
**11 Mass.L.Rptr. 623, 2000 WL 1273438 (Mass.Super.2000)**  
**Decided June 6, 2000**

**Issue:** Can a surety bond company be held liable for: (i) an administratrix's failure to render timely accountings for an ancillary estate, and (ii) for waste or neglect committed by the administratrix acting in her personal capacity and not as administratrix?

**Holding:** A surety bond company is liable in Massachusetts for any default of an administratrix in not accounting for assets received before as well as after the execution of the bond. A surety bond company is only liable in Massachusetts for the actions of an administratrix acting in her capacity as administratrix and not for actions she took in her personal capacity.

- B. *Sexton v. Cornett (2006)***  
**271 Va. 251, 623 S.E.2d 898 (Va.)**  
**Decided January 13, 2006**

**Issue:** Whether widow was entitled to include insurance proceeds and retirement benefits in the augmented estate or to seek contribution for her elective share from the beneficiaries of those assets.

**Holding:** No. The life insurance and retirement benefits were both administered by the Virginia Retirement System and were protected by statute.

**C. *Huaman v. Aquino* (2006)  
272 Va. 170, 630 S.E.2d 293  
Decided June 8, 2006**

**Issue:** Whether personal injury action was a chose in action “owned” at the moment of testator’s death, and thus the settlement proceeds derived from the action passed under the personal property clause of her will, rather than the residuary clause.

**Holding:** Yes.

**D. *In re Estate of Chrisp* (2009)  
276 Neb. 966, 759 N.W.2d 87 (Neb.)  
Filed January 2, 2009**

**Issue:** Whether the assets from a premarital trust must be included in the augmented estate for calculating a surviving spouse's elective share?

**Holding:** No. Only the decedent's transfers to others during the marriage are included in the augmented estate for calculating the surviving spouse's elective share.

**E. *In re Estate of James Brown* (2009)  
Nos. 08-CP-02-1647, 07-CP-02-0122, & 08-CP-02-00872 (S.C. C.P.)  
Decided May 26, 2009**

**Issue:** Whether the Court should approve the proposed settlement agreement although it differed substantially from the last will and irrevocable trust of the decedent?

**Holding:** Yes. There is a good faith controversy regarding charges of undue influence with respect to the will and trust and the effect of the agreement on interested persons is just and reasonable.

## **XXVIII. PRIVACY IN MALPRACTICE CLAIMS**

**A. *Texas - Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.* (2006)  
192 S.W.3d 780 (Tex. 2006)**

**Issue:** Can the Personal representative of a decedent’s estate bring an action against decedent’s estate planning attorney for alleged malpractice committed during decedent’s lifetime?

**Holding:** Yes. “The legal representative of a decedent stands in that person’s shoes for the purpose of being able to maintain a malpractice action against the

decedent's estate planner where improper advice or negligent estate planning has resulted in a loss [by the estate]."

Moral: Estate planners are now subject to potential malpractice actions brought by the personal representative of their client's estate.

- B. *New York - Estate of Paul Schneider v Vicotr M. Finmann, et al.* (2010)  
2010 NY Slip Op 05281  
Decided June 17, 2010**

Applied same reasoning and reached same holding as Belt v Oppenheimer above.

## **XXIX. EVIDENCE AND PROCEDURE**

- A. *Campbell v. Harmon* (2006)  
271 Va. 590, 528 S.E.2d 308 (Va.)  
Decided April 21, 2006**

**Issue:** Whether executor had standing to bring action to compel an accounting for the administration of the trust during beneficiary's lifetime?

**Holding:** Yes. Cause of action to compel an accounting survived decedent's death pursuant to survival statute.

- B. *In re Estate of Burger* (2006)  
587 Pa.164, 898 A.2d 547 (Penn.)  
Decided May 25, 2006**

**Issue:** Does an heir have standing to bring a will contest action where a will provides for alternate distribution of residuary bequests should they fail due to beneficiary's death, but is silent on failure due to any other reason?

**Holding:** No. The anti-lapse statute would preclude the creation of an intestate interest and thus the heir did not have standing for a will contest on the basis of undue influence.

- C. *Barbee v. Johnson* (2008)  
660 S.E.2d 135, 2008 WL 2444540 (N.C.App.)  
Decided November 14, 2007**

**Issue:** Whether the trial court erred in granting defendants' motion for summary judgment when there arguably remained a genuine issue of material fact as to whether plaintiff's deceased spouse was mentally competent at the time she signed a lease document on his behalf?

**Holding:** The court found the testimony provided by plaintiff's witnesses, that plaintiff's spouse "tended to fluctuate" between periods of lucidity and confusion, was sufficient to remove any genuine issue of material fact when coupled with the testimony of a notary public, present at the signing, who "expressed no concern that [plaintiff's spouse] failed to appreciate what she was doing."

- D. *Leff v. Fulbright & Jawarski, LLP* (2009)  
2009 NY Slip Op 31445**

**Decided June 30, 2009**

**Issue:** Does dual representation in the preparation of separate estate plans establish privity or “near privity” such as to allow a beneficiary to bring a malpractice claim against an attorney for negligence in the preparation of her husband’s will?

**Holding:** No. New York law imposes a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client.

**XXX. FEES**

- A. *In re Estate of Damon (2006)*  
109 Hawai’i 502, 128 P.3d 815 (Hawaii)  
Decided February 16, 2006 (amended Feb. 28, 2006)**

**Issue:** Whether party who is a current income beneficiary and measuring life of trust is entitled to attorneys fees in action to determine distribution of trust upon termination of the trust?

**Holding:** No. Party had no standing in this case to pursue the action.

- B. *In re Estate of Funk (2006)*  
221 Ill.2d 30, 849 N.E.2d 366 (Ill.)  
Decided April 20, 2006**

**Issue:** Whether payments to executor’s counsel violated Federal Insolvency Statute and, if they did, would counsel or executor be responsible for payment to United States?

**Holding:** Payments to executor’s counsel did not violate the statute and, even if they did, the executor, rather than counsel, would be responsible for payment to United States.

- C. *In re Marshall (2006)*  
14 Misc.3d 1201(A), 831 N.Y.S.2d 360 (N.Y.)  
Decided December 4, 2006**

**Issue:** Whether the court should approve \$3,044,056 in fees for a three month time period.

**Holding:** No. The court reduced the fees to \$2,223,284.

**XXXI. JOINT AND SURVIVORSHIP ASSETS**

- A. *Russ ex rel. Schwartz v. Russ (2007)*  
2007 WL 1892471 (Wis.)  
Decided July 3, 2007**

**Issue:** What is the appropriate procedure for reconciling a conflict between the presumption of donative intent created by a joint checking account established prior to the execution of a POA, and the presumption that a transfer of funds from



such joint account by an agent acting under a POA, but for the agent's own use, creates a presumption of fraud, unless the POA explicitly authorizes self-dealing?

**Holding:** When these two conflicting and inconsistent presumptions coincide, the circuit court is free to make a determination based on the facts and the credibility of the witnesses. The approach taken by the lower court (reformation based on mutual mistake and equitable estoppel) should not be undertaken in future cases.

**B. *Barboza v. McLeod* (2006)  
447 Mass. 468, 853 N.E.2d 192 (Mass.)  
Decided August 18, 2006**

**Issue:** (1) Whether the law of a joint account's situs governs ownership of the proceeds of the joint bank account, where the decedent established the joint account in another State and died in Massachusetts; (2) Whether the decedent intended a gift to the defendant of an interest in the joint bank account.

**Holding:** (1) California law applied to determine whether the proceeds of the joint account are non-probate assets belonging to the defendant; (2) plaintiffs failed to establish by clear and convincing evidence that the decedent did not intend the proceeds of the joint account to go to the defendant on her death.

**C. *In re Estate of Joseph Collins Lieberman* (2009)  
Nos. 02-07-0451 & 02-7-0452 cons., 2009 Ill. App. LEXIS 320 (Ill. App. Ct.)  
Decided May 28, 2009**

**Issue:** What standard of care must guardians adhere to when investing their wards' assets?

**Holding:** A guardian is subject to the prudent-person standard when investing wards' assets. Under Illinois law, the "prudent-investor" standard applies only to a guardian's decision to invest in common trust funds or mutual funds.

## **XXXII. JURISDICTION**

**A. *In re Estate of Karabagui* (2005)  
2005 WL 3549525 (Cal.App. 2 Dist.) (Calif.)  
Decided December 29, 2005**

**Issue:** Does the state have the authority to apply the state's inheritance law to foreign property owned by an Iranian national who died intestate in the state after entering the United States on a tourist visa a few years earlier?

**Holding:** Yes. The judgment rested on a finding by the trial court that the decedent was domiciled in the state when he died.

**B. *Marshall v. Marshall* (2006)  
547 U.S. 293, 126 S.Ct. 1735, 164 L.Ed.2d 480  
Decided May 1, 2006**

**Issue:** (1) Whether the probate court exception was applicable to deprive bankruptcy court of jurisdiction over widow's claim that her stepson tortiously

interfered with her expectancy of inheritance or gift from her deceased husband and (2) Whether the ruling of a Texas probate court that it had exclusive jurisdiction over all of widow's claims against stepson could deprive federal district court of jurisdiction over widow's tort claim against stepson asserted in her bankruptcy proceeding?

**Holding:** (1) No. The tort claim does not involve the administration of an estate, the probate of a will, or any other purely probate matter. (2) No. Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort.

**C. *In re Estate of Colburn* (2006)  
909 A.2d 214 (Maine)  
Decided November 2, 2006**

**Issue:** Whether the probate court lacked authority to order son to repay money he received from corporation prior to appointment as co-personal representative.

**Holding:** The probate court lacked jurisdiction.

**XXXIII. IN TERROREM CLAUSES**

**A. *Russell v. Wachovia Bank, N.A.* (2006)  
370 S.C. 5, 633 S.E.2d 722 (S.C.)  
Decided July 24, 2006**

**Issue:** Is a no-contest clause unenforceable because beneficiaries had probable cause to challenge the estate plan?

**Holding:** No. Bona fide inquiry whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself. Vexatious litigation instituted by a disappointed heir, however, is not bona fide inquiry.

**B. *Harrison v. Morrow* (2007)  
2007 WL 1953896 (Ala.)  
Decided July 6, 2007**

**Issue:** Whether a will contest application was within the purview of the will's in terrorem provision such that it would result in forfeiture of applicants' shares of estate.

**Holding:** No. In this case the court held that the wording of the clause dealt with disputes regarding distribution, rather than disposition, and that the will contest challenged the disposition, rather than the distribution of the assets.

**XXXIV. POWER OF ATTORNEY**

**A. *In re Estate of Kurrelmeyer* (2006)  
179 Vt. 359, 895 A.2d 207 (Vt.)  
Decided March 3, 2006**

**Issue:** Whether the testator's power of attorney authorized attorney-in-fact to create a trust on his behalf and to add assets to the trust?

**Holding:** Yes. Delegation of authority to create a trust through a durable general power of attorney does not violate public policy as a matter of law. The court did remand, however, to determine if the attorney-in-fact had breached their fiduciary duty.

**B. *In re Estate of Ferrara* (2006)  
7 N.Y.3d 244, 852 N.E.2d 138, 819 N.Y.S.2d 215 (N.Y.)  
Decided June 29, 2006**

**Issue:** Whether an agent acting under color of a statutory short form power of attorney that contains additional language augmenting the gift-giving authority could give gifts to himself in furtherance of the principal's alleged wishes to give agent all of his assets?

**Holding:** No. An agent, even with enhanced gift-giving authority must make gifts pursuant to those enhanced powers in the principal's best interest.

**C. *Jones v. Brandt* (2007)  
645 S.E.2d 312 (Va.)  
Decided June 8, 2007**

**Issue:** Whether a power of attorney implicitly authorized the attorney-in-fact to change CD's POD beneficiary?

**Holding:** Yes.

**XXXV. TRUSTS**

**A. *United Bank, Inc. v. Blosser* (2005)  
218 W.Va. 378, 624 S.E.2d 815 (W.Va.)  
Filed November 29, 2005**

**Issue:** Whether bank trustee had properly construed and administered trust by removing provision giving preference to settlor's family in the award of scholarships?

**Holding:** Yes. Any expenditure from trust in the form of a scholarship giving a preference to one of settlor's blood relatives would have been a prohibited "taxable expenditure," and thus it was proper that trustee removed trust provision giving preference to settlor's blood relatives.

**B. *Barker v. Barker* (2006)  
2006 Mass. LEXIS 544 (Mass.)  
Decided September 14, 2006**

**Issue:** Whether an irrevocable trust should be reformed to conform to the settlor's intent following a drafting mistake?

**Holding:** Yes.

- C. *Carter v. Carter* (2006)**  
**143 Idaho 373, 146 P.3d 639 (Idaho)**  
**Decided September 26, 2006**
- Issue:** Whether decedent's mischaracterization of property that was placed in the trust as separate property defeated the trust.
- Holding:** No. The trust was valid and the wife could withdraw her ½ interest in the community property.
- D. *U.S. Trust Company, N.A. v. Attorney Gen. Mass.* (2006)**  
**447 Mass.523, 854 N.E.2d 1231 (Mass.)**  
**Decided October 12, 2006**
- Issue:** Whether reformation of a trust to avoid federal income tax was permissible.
- Holding:** No. In this case it was contrary to the intent of the settlor.
- E. *In re Heller* (2006)**  
**6 N.Y.3d 649, 849 N.E.2d 262, 816 N.Y.S.2d 403 (N.Y.)**  
**Decided May 4, 2006**
- Issue:** Whether trustees were barred from electing unitrust status because they were also remainder beneficiaries?
- Holding:** No. A trustee's status as a remainder beneficiary does not in itself invalidate a unitrust election made by the trustee, and that trustee may elect unitrust status retroactively to the effective date of the unitrust statute.
- F. *In re White Intervivos Trusts* (2007)**  
**248 S.W.3d 340 (Tex. App.—San Antonio 2007, no pet. h.)**  
**Decided Nov. 14, 2007**
- G. *In re Mergenhagen* (2008)**  
**50 A.D.3d 1486, 856 N.E.S.2d 389**  
**Decided April 25, 2008**
- Issue:** Whether the trustee of two irrevocable family trusts should be removed for acting in derogation of his duties as trustee?
- Holding:** Yes. A trustee owes a duty of undivided loyalty to the trust which prohibits the trustee from placing himself in a position of potential conflict with his duty to the trust.
- H. *Bilafer v. Bilafer* (2008)**  
**161 Cal.App.4th 363, 73 Cal.Rptr.3d 880 Cal.App. 1 Dist., 2008**  
**Decided March 26, 2008**
- Issue:** Does the Settlor of an irrevocable trust have standing to bring a suit to correct drafting errors in the trust instrument when the Settlor does not possess a direct pecuniary interest in the trust?
- Holding:** Yes. A Settlor does have standing to petition to reform an irrevocable trust when drafting errors defeat his dispositive intent. In addition, a trial court has

equitable power to reform an irrevocable trust where a drafting error defeats the Settlor's intentions.

**I. *Fleet National Bank v. Hunt* (2008)**

**944 A.2d 846 (R.I.)**

**Filed: April 7, 2008**

**Issue:** (1) Whether adult adoptees can inherit from the lineal ancestors of their adoptive parents when the trust itself directs the trustee to apply Rhode Island's intestacy laws for purposes of distributing the trusts assets; and (2) whether adult adoptees are excluded from the definition of "issue" as used in a trust agreement?

**Holding:** (1) Yes; and (2) Yes.

**J. *Reid v. Temple Judea* (2008)**

**994 So.2d 1146, 2008 WL 2356814 Fla.App. 3 Dist.,2008.**

**June 11, 2008**

**Issue:** Whether a Trustee, acting solely in her capacity as Trustee, has standing to bring an action for reformation of a Trust, based upon her claim that, due to a scrivener's error, the Trust as written did not reflect the Settlor's intent?

**Holding:** Yes. In cases involving a determination of the Settlor's true intent, a Trustee is an "interested person," and an "interested person" has standing to seek reformation of a Trust in the State of Florida.

**K. *Spado v. Probate Appeal***

**Connecticut Superior Court Case #FST-CV06-4000-68-S**

**Pending**

**Issue:** Whether adult adopted by same-sex partner qualifies as a grandchild entitled to take under a trust?

**Holding:** The status of this case was pending awaiting the decision of Maine's highest court as to whether the adoption should be annulled. In July 2009 that court held in *In re Adoption of Patricia S.* 2009 ME 76, that the adoption was valid under Maine's adoption laws existing at the time of the adoption in 1991. The Connecticut case is now currently proceeding.

**L. *KENTUCKY - JP Morgan Chase Bank, N.A., v. Longmeyer* (2009)**

**275 S.W.3d 697**

**Issue:** Does a fiduciary (Trustee/Trust Advisor/Trust Financial Advisor) have an obligation to inform beneficiaries when they have been removed as beneficiaries?

**Holding:** Yes. The Trustee has an absolute and affirmative duty to inform beneficiaries of their removal as beneficiaries. The Court rejected the argument that the revocability of the trust negated the duty to disclose the changes to the charitable beneficiaries.

**XXXVI. WILL CONSTRUCTION, FORMALITIES, EXECUTORS,  
BENEFICIARIES**

**A. *In re Estate of Seefeldt (2006)*  
720 N.W.2d 647, 2006 SD 74 (S.D.)  
Decided August 9, 2006**

**Issue:** Whether cash flow basis for appraisal of land describing the price at which testator's sons could exercise option to purchase land was appropriate?

**Holding:** No. Testator intended the terms "value and "appraised value" to mean fair market value.

**B. *Bernard v. Foley (2006)*  
39 Cal. 4th 794 (Supreme Court of California)  
Decided August 21, 2006**

**Issue:** Whether close personal friends of a dependent elder who at the end of her life provided her with personal care, including healthcare, are "care custodians" for the purposes of statutory provisions that presumptively disqualify care custodians as beneficiaries of testamentary transfers from dependant adults to whom they provide such services?

**Holding:** When an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian for purposes of the statutory scheme at issue, notwithstanding that the service relationship between the individuals arose out of a preexisting personal friendship rather than a professional or occupational connection.

**C. *In re Estate of Miller (2006)*  
143 Idaho 565, 149 P.3d 840 (Idaho)  
Decided December 19, 2006**

**Issue:** Whether testator's will was invalid because one of the witnesses signed the will after the testator's death?

**Holding:** No. Under the statute there was no time required for witnesses to sign and the court refused to imply a "reasonable time" as other courts do.

**D. *In re Estate of Denman (2008)*  
270 S.W.3d 639 (Tex. 2008)  
Decided August 27, 2008**

**Issue:** What is sufficiently specific language referencing the generation-skipping transfer tax to prevent a charge to the property constituting the transfer?

**Holding:** A mere reference to "transfer taxes" in a will is insufficient to comply with I.R.C. §2603(b).