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RULES OF ENGAGEMENT: ETHICAL CHALLENGES FOR ESTATE PLANNERS

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Practicing law is hard, but practicing law in the estate planning and probate area is especially challenging. One reason it is challenging—and rewarding—is the variety of our work. Our clients often surprise us with the kinds of things they acquire over a lifetime. And, clients certainly never fail to challenge us with the problems and issues within their families. In order to be effective we need a broad knowledge base. We need to know well the obvious: the estate and gift tax rules, how to draft clear documents, probate court rules, the Ohio Trust Code, etc. We also need a working knowledge of real estate law, corporate law, partnership law, Medicaid rules, and litigation, among other areas. And, because we work with our clients on a very personal level we often are pop psychologists.

In addition to the demands of understanding various substantive areas of law and counseling family members to work through difficult times, estate planners also face another significant challenge: conducting our practice within the boundaries of rules of professional conduct that often are not crafted with our practice area in mind. The rules of professional conduct are often oriented toward traditional litigation or transactional practice. The application of these rules can get murky when working with estate fiduciaries and beneficiaries or working with several generations of a family with respect to their estate planning. This article will provide an overview of some of the key areas where estate planning practitioners can run into difficulties with the Ohio Rules of Professional Conduct, and will discuss the important role engagement letters can play in mitigating the chances that ethical problems will arise during the representation.

HOW COMMON ARE CLIENT GRIEVANCES?

Before I begin to discuss professional responsibility issues specifically from the estate planner's perspective, it is useful to take a step back to look at the big picture of professional responsibility for all Ohio lawyers. The Supreme Court of Ohio has the constitutional responsibility to oversee the practice of law in Ohio. Attorneys licensed to practice in Ohio are governed by the Ohio Rules of Professional Conduct (the "Rules") which were adopted by the Supreme Court of Ohio on February 1, 2007. The Office of Disciplinary Counsel investigates allegations and initiates complaints

concerning ethical misconduct of Ohio attorneys. The Board of Commissioners on Grievances and Discipline (the "Board ") is charged with administering, interpreting, and enforcing the Rules.

Among its other duties, the Board tracks the number and type of grievances filed against Ohio attorneys and judges. The following is an excerpt from those statistics over a three year period:

	2008	2009	2010
Active Registered Attorneys	42,969	42,684	43,735
Total Grievances	4,965	4,677	4,639
Dismissed After Initial Review	2,664	2,553	2,381
Opened for Investigation	2,301	2,124	2,258

Based on these statistics, each year a grievance is filed against one out of every 10 Ohio lawyers. Of the grievances filed, about one-half of are dismissed after initial review, but the other one-half are opened for further investigation. In other words, each year, in Ohio, more than five percent of Ohio lawyers are under investigation for an ethical violation.

TOP FIVE DISCIPLINARY OFFENSES OF 2010

Below is a list of the top five disciplinary offenses in Ohio in the year 2010. Taken together, these five offenses constitute 90% of all of the offenses committed by Ohio attorneys last year.

1. Neglect/failure to protect a client's interest—38%

2. Failure to maintain funds in trust—19%

3. Excessive fees—14%

4. Personal misconduct—12%

5. Misrepresentation/false statements/concealment—7%

THE OHIO RULES OF PROFESSIONAL CONDUCT

As you know, if you have practiced in the estate planning area for some time, it can be difficult to apply specific rules of professional responsibility to certain estate planning and estate administration situations. It is helpful to sometimes take a step back from the detail and look at the broad concepts that form the policy behind the Rules. The Preamble to the Rules is worth reading because it offers a high-level, aspirational statement of our duties and responsibilities as lawyers. I found the following excerpts to be particularly relevant:

> "[1] As an officer of the court, a lawyer not only represents clients but has a special responsibility for the quality of justice.
>
> [2] In representing clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client and consistent with requirements of honest dealings with others. As an evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others. . . .
>
> [4] In all professional functions a lawyer should be competent, prompt, diligent, and loyal. A lawyer should maintain communication with a client concerning

the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Ohio Rules of Professional Conduct or other law.

[5] Lawyers play a vital role in the preservation of society. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."

SCOPE OF THE RULES

In addition to the broad aspirational statements above, the Preamble to the Rules also describes the scope of the rules. The Preamble acknowledges that the practice of law, like any "worthwhile human activity," cannot be completely defined by bright-line rules. The Rules contemplate a system where lawyers are given guidance to employ their best professional judgment. Compliance with professional rules is enforced primarily through voluntary compliance and peer and public opinion. The disciplinary system is intended to be used for enforcement only when necessary.

"[14] The Ohio Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules. . . .

[16] Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law."

REPRESENTING MULTIPLE PARTIES SUCH AS SPOUSES OR FAMILY MEMBERS OF DIFFERENT GENERATIONS

Many of the Rules describe a lawyer's obligation in an individual relationship between one lawyer (or firm) and one client. They describe our ethical duties to that one client and the ways in which we should deal with conflicts in situations where the client's position is adverse to another person or another client. One of the most common ethical issues facing estate planners is the representation of multiple parties, such as joint representation of spouses for estate planning, representation of family members of different generations, or representation of more than one beneficiary of an estate or trust. Estate planning attorneys have often criticized the Rules (and their predecessor, the Code of Professional Responsibility) because the Rules often do not adequately address the generally non-adversarial nature of an estate planning engagement or an estate or trust administration.

The American College of Trust and Estate Counsel (ACTEC) determined there was a need

for more practical guidance on the professional responsibilities of lawyers practicing in the estate and trust area. In response, in October 1993, ACTEC published its Commentaries to the Model Rules. The Commentaries, now in their Fourth Edition, offer important, practical guidance, and I will refer to the Commentaries often in this article.

Ohio Rule 1.7 provides guidance on when a lawyer may initiate or continue representation of multiple clients when there is a risk of a conflict of interest between the two clients. Such representation creates a conflict of interest if either the representation "will be directly adverse" to another current client or "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." The ACTEC Commentary on MPRC 1.7 provides:

> "It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. *In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations.* The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them: Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family." Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests." (emphasis added)

Representing both a husband and wife is the most common situation encountered by estate planners and tax professionals. They key to meeting our ethical obligation is client education. Chances are, the couple is unaware that different forms of representation are available depending upon the specific facts. After reviewing the facts the attorney should explain the differences between joint representation, separate but concurrent representation, and separate representation. If the husband and wife agree joint representation is appropriate, it is important the attorney clearly explains at the beginning of the representation that, as between spouses, there are "no secrets" and that the attorney will not preserve confidences revealed in the course of the representation.

Ohio Rule 1.7(b)(2) requires, when a conflict exists between clients, that the "affected client gives *informed consent*, *confirmed in writing*." The most effective method of explaining the conflict issue and obtaining informed consent by the affected client is by a well drafted engagement letter. The engagement letter will set forth the rules that govern your representation of the married couple, including, perhaps most importantly, how you will handle confidential information. Does your engagement letter say you "will" disclose secrets, or does it say you "may" disclose secrets? If a husband calls to tell you he wants to create a new trust for the benefit of a "special friend", be sure that you are ready to follow through on the terms of your engagement letter. We should define the rules in our engagement letters while thinking of the hard cases, not the easy ones.

The potential conflict of interest between spouses is usually the easiest conflict to spot, the easiest to explain and the easiest to obtain a waiver. However, all too often we fail to deal with this issue in our engagement letters or otherwise, and we open ourselves up to potential grievances down the road.

MULTIGENERATIONAL REPRESENTATION

It is also common for estate planning attorneys to represent more than one generation of the same family or to represent business entities that may be owned by more than one generation of the same family. In many cases it is appropriate for the attorney to do so. Unfortunately, most attorneys are even less compliant with Rule 1.7 when representing multiple generations than we are when representing spouses. I believe this may be due to the more subtle way the multigenerational representation develops. For example, it is common for a client we have represented for many years to ask us to help a child develop his or her estate plan. The request is very natural and innocent, but it creates a potential for conflicts of interest for the attorney. Conflicts of interests may also develop when the planning for the parents includes lifetime gift giving to one or more generations below the parents, because it can lead to a situation where the lawyer is representing multiple clients.

Before agreeing to accept such representation a careful attorney should analyze the scope of the representation with an eye for conflicts of interest. Rules 1.7 and 1.8 would encourage the attorney to go through the following analysis:

1. Identify the Client.

- Are the clients the first generation? The second generation? Both generations? Other?

- In which capacity will you represent the client? Individually, as fiduciary, as corporate officer, or as member of a limited liability company?

- What duties does each party owe to other family members? How do these duties impact your representation?

2. Consider Conflicts of Interest.

- Are there any past, present or likely future events that may cause a conflict?

- Discuss with the clients how they want you to respond if a conflict arises.

After the analysis described above, if appropriate to proceed with the representation, prepare an engagement letter addressing the following elements:

- A detailed description of the scope of the engagement

- A listing of all clients

- A description of all identified potential conflicts

- A description of how the attorney will deal with confidential information

- An explanation of the differences between Separate and Joint Representation

- What will happen if the attorney or a party terminates the engagement?

    - "noisy" withdrawal (describing the nature of the conflict that prompted withdrawal)

    - "silent" withdrawal (withdrawal without stating reasons)

- Obtain the signed consent of all parties involved in the potential conflicts

PROMPTNESS AND DILIGENCE

As noted, supra, neglect of a client matter or failure to protect a client's interest is by far the single greatest reason grievances are filed against Ohio lawyers. In fact, more grievances are filed for this than for the next two most common reasons combined. Most would agree

the most common complaint against lawyers is the lack of communication by the lawyer. The second greatest complaint is the length of time it takes to conclude some legal matters. Ohio Rule 1.3 states, "A lawyer shall act with *reasonable* diligence and promptness in representing a client." We all know clients can become frustrated when an estate planning matter or estate administration matter takes too long to complete. Comment 2 to Rule 1.3 states: "A lawyer must control the lawyer's work load so that each matter can be handled competently." A part of handling a matter competently is handling it in an appropriate time-frame without undue delay.

The ACTEC Commentaries to the Model Rules also provide important guidance for how to avoid problems in the areas of promptness and diligence:

> "*Timetable.* Whether the representation relates to inter vivos estate planning or the administration of a fiduciary estate, it is usually desirable, early in the representation, for the lawyer and client to establish a timetable for completion of various tasks. Insofar as consistent with providing the client with competent representation, the lawyer should adhere to the established schedule and inform the client of any revisions that are required, whether attributable to the lawyer or to circumstances beyond the lawyer's control. The client or others may be seriously disadvantaged if the lawyer fails, within a reasonable time, to provide the client with the agreed legal services. In such cases the client may be harmed and intended beneficiaries may not receive the benefits the client intended them to have.
>
> *Avoiding Misunderstandings as to Scope of Representation.* The risk that a client will misunderstand the scope or duration of a representation can be substantially reduced or eliminated if the lawyer sends the client an appropriate engagement letter at the outset of the representation. Where the lawyer has served a client in a variety of matters, the client may reasonably assume that the representation is active or that the client may reactivate the representation at any time. A lawyer in these circumstances should clarify with the client the scope of the representation and the expectations of the client.
>
> *Planning the Administration of a Fiduciary Estate.* The lawyer and the fiduciary should plan the administration of an estate or trust in light of the fiduciary's obligations to the courts, tax authorities, creditors and beneficiaries. The lawyer and fiduciary may subsequently decide to accelerate or delay some planned payments or distributions in order to improve the tax position of the fiduciary estate or of its beneficiaries. The lawyer's obligation to be diligent includes the duty to advise the fiduciary competently regarding the tax and nontax impact of sales, distributions and other administrative actions. In connection with the administration of an estate or trust it is appropriate for the lawyer and the fiduciary to consider the circumstances of the beneficiaries and to communicate with them regarding the fiduciary estate. However, the lawyer and the fiduciary should adhere to their general duties, including the duty to act impartially with respect to the beneficiaries."

These commentaries provide a number of insights for how managing client expectations at the beginning of a representation can go a long way toward avoiding complaints regarding the timing of a matter. Give the client a reasonable estimate as to how long it will take to complete an estate planning matter. Also, be clear about the scope of your representation, so the client knows exactly what items you will complete, and which items are outside the scope of representation. In estate administration, provide the client a timeline of the various

important dates for court and tax filings. Clients have many surprising misperceptions about the probate process, and when they finally are learning about it by going through an estate administration, it is usually during an emotional and difficult time in their lives. Providing this information in a letter they can refer to throughout the administration process will help reduce anxiety about the duration of estate administration and the steps involved. Of course, as is discussed below, maintaining regular communication throughout the process is necessary to help reinforce the timelines established in the engagement letter.

CLIENT COMMUNICATION

Few attributes are more important to success as an attorney than clear and regular communication with clients. Rule 1.4, in a nutshell, requires we promptly inform the client when a decision requires the client's informed consent, that we regularly consult with the client, and that we keep the client informed of the status of the legal matter. What does it mean to keep a client informed of the status of an estate planning matter? The ACTEC Commentaries to Rule 1.4 offer insightful, practical guidance to estate planners.

> *"Encouraging Communication; Discretion Regarding Content.* Communication between the lawyer and client is one of the most important ingredients of an effective lawyer-client relationship. In addition to providing information and counsel to the client, the lawyer should encourage communications by the client. More complete disclosures by a client may be encouraged if the lawyer informs the client regarding the confidentiality of client information. The nature and extent of the content of communications by the lawyer to the client will be affected by numerous factors, including the age, competence, and experience of the client, the amount involved, the complexity of the matter, cost controls and other relevant considerations. The lawyer may exercise informed discretion in communicating with the client.
>
> In order to obtain sufficient information and direction from a client, and to explain a matter to a client sufficiently for the client to make informed decisions, a lawyer should meet personally with the client at the outset of a representation. If circumstances prevent a lawyer from meeting personally with the client, the lawyer should communicate as directly as possible with the client. In either case the elements of the engagement should be confirmed in an engagement letter.
>
> Effective personal communication is necessary in order to ensure that any estate planning documents that are prepared by a lawyer are consistent with the client's intentions of the person who executes them, a lawyer should not provide estate planning documents to persons who may execute them without receiving legal advice.

The ACTEC Commentaries also discuss how the attorney's duty to communicate can change depending upon the different phases of the representation. The ACTEC Commentaries discuss Active, Dormant, and Terminated Representation.

"*Communications During Active Phase of Representation.* The need for communication between the lawyer and client is reflected in Rules respecting the lawyer's duties of competence and diligence. The lawyer's duty to communicate with a client during the active period of the representation includes the duty to inform the client reasonably regarding the law, developments that affect the client, any changes in the basis or rate of the lawyer's compensation, and the progress of the representation. The lawyer for an estate planning client should attempt to inform the client

to the extent reasonably necessary to enable the client to make informed judgments regarding major issues involved in the representation. In addition, the lawyer should inform the client of any recommendations that the lawyer might have with respect to changes in the scope and nature of the representation. The client should also be informed promptly of any substantial delays that will affect the representation. For example, the client should be informed if the submission of draft documents to the client will be delayed for a substantial period regardless of the reason for the delay.

Dormant Representation. The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally end the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request the lawyer may retain the original documents executed by the client. Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet, or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs.

Termination of Representation. A client whose representation by the lawyer is dormant becomes a former client if the lawyer or the client terminates the representation. The lawyer may terminate the relationship in most circumstances, although the disability of a client may limit the lawyer's ability to do so. Thus, the lawyer may terminate the representation of a competent client by a letter, sometimes called an "exit" letter that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted."

ATTORNEY FEES

Clients and lawyers are free to bargain for any kind of fee (hourly, flat, contingent or a blend of any or all of these) and for this reason attorney fees are subject to contract law. But because we are in a special position of trust with clients, the Rules impose certain duties.

Rule 1.5, which deals with attorney fees and expenses, is long and complicated but at its core it requires that attorneys charge reasonable fees after taking into account all the factors noted in the Rule. Those factors include the time and labor required, the complexity of the matter, the skill required and the experience, reputation and ability of the lawyer.

Again, the ACTEC Commentaries offer practical guidance that is particularly helpful to estate planning and probate practitioners.

The ACTEC Commentary to Rule 1.5 states, ". . . unless the lawyer has regularly represented the client on the same basis or rate, the lawyer must advise the client of the basis upon which the legal fees will be charged and obtain the client's consent to the fee arrangement. The rule also requires a lawyer to inform the client, preferably in writing, before or within a reasonable time after commencing the representa-

tion, of the extent to which the client will be charged for other items, including duplicating expenses and the time of secretarial or clerical personnel. Any changes in the basis or rate of the fee or expenses shall be communicated to the client."

CONCLUSION: WRITE ENGAGEMENT LETTERS

This article touches on just a few of the many ethical issues estate planners face on a daily basis. The underlying theme is to remind Ohio estate planning and probate practitioners that we have an opportunity to better serve our clients as well as an opportunity to better protect ourselves from violating the Rules of Professional Conduct by the regular use of comprehensive engagement letters. Engagement letters can be used to manage client expectations about the scope of the engagement, the cost of legal services, the time-line for completion of such services, and to identify and deal with potential conflicts of interests, among other issues. I recommend that you visit www.actec.org and click on Publications. Under Publications you will find the ACTEC Commentaries so often mentioned in this article and the ACTEC Model Engagement Letters. I believe you will find each of the publications immensely helpful and, perhaps best of all, they are free.

CASE SUMMARIES

KOGUT V. MARCELL

Headnote: Joint and survivorship accounts

Citation: 2012-Ohio- 183 (App. 5th Dst. 2012)

Summary: Mother left son and daughter, and had joint and survivorship accounts with the daughter. Probate court awarded the accounts to the estate, and appellate court affirmed. First, the signature cards could not be found, so all daughter had was bank records in both names (with no survivorship stated). Second, *Wright v. Bloom* was not applicable because mother had dementia and lacked capacity to create survivorship interests.

Wright v. Bloom, 69 Ohio St. 3d 596, 1994-Ohio-153, 635 N.E.2d 31 (1994), held that the survivorship feature of joint and survivorship accounts was conclusive but with certain exceptions. Well, here are two of the exceptions: lack of proof of survivorship, and lack of capacity. Given bank practices today and our aging population, the exceptions may be overcoming the rule.

ZIMMERMAN V. ZIRPOLO TRUST

Headnote: Information to beneficiaries

Citation: 2012-Ohio-346 (App. 5th Dst. 2012)

Summary: Trust created for three great-grandchildren, now minors, with distribution to them at later ages. Their mother (who had been the beneficiary but was removed by a trust amendment) acting on behalf of her children gave the trustee a request for a full copy of the trust agreement and a trust report under RC 5808.13. The trustee declined, the mother sued, and the trial court agreed the information need not be given, but the appellate court ordered it given. There were two legal issues:

1. The mother had been the trust beneficiary under a prior version of the trust, and the trustee and trial court found that she thus had a conflict of interest with her children (who became the beneficiaries by the trust amendment that removed her) and could not represent them under RC 5803.03. The appellate court noted that there would be a conflict only if the mother was contesting the trust amendment that removed her and inserted them, which she was not, so there was no conflict. It also noted that RC 5808.13 does not provide an exception for a conflict of interest even if there were one.

2. The trust agreement directed the trustee

to withhold all trust information from the beneficiaries. The appellate court held that RC 5808.13(A), that requires the trustee to respond to information requests from any beneficiary, trumped that direction. It did not cite RC 5801.04(B)(9), that provides that the trust instrument may not override the information reporting requirements of RC 5808.13(A). It also did not note that RC 5801.04(B)(8) and (9) do not bar the trust instrument from barring the request for a copy of the trust instrument under RC 5808.13(B)(1), although commentators have suggested that a request for the trust instrument cannot be barred by the trust instrument because the request can also be made under RC 5808.13(A).

It is clear that the settlor anticipated this problem and attempted to resolve it by making the trust a secret one. Whether that should be permitted is an oft debated issue. The EPTPL Section has considered modifying these notice and information provisions of the Ohio Trust Code, but has been unable to reach consensus on specific changes to them.

IN RE CHANGE OF NAME OF A. L. P.

Headnote: Change of name

Citation: 2012-Ohio-368 (App. 8th Dst. 2012)

Summary: Mother of young child filed to change his surname. Mother never married child's father, and at birth gave child her own surname. Father pays child support by court order. Now mother has married, has taken her husband's surname and applies to change child's surname to that too. Father objects. Appellate court affirms denial of change by trial court. Child has no reason to take name of mother's husband, as there is no relationship between them unless there is a stepparent adoption (that father will resist). Court remarks that mother should have thought of this when she took her husband's surname; should she have retained her maiden name to match name of child?

WHITMAN V. WHITMAN

Headnote: Accounting to beneficiary

Citation: 2012-Ohio-405 (App. 3d Dist. 2012)

Summary: Father (a lawyer) established Uniform Transfer to Minor accounts for minor son with father as custodian, and was trustee of trust established for son under will of grandfather. Father transferred the UTMA accounts to separate trusts for son with father as trustee. Father and mother were divorced. Now son attained age 21, and (apparently with some help from mother, father's ex-wife) sues for an accounting of the various funds. Father stonewalls son and court. Ultimately a forensic accountant is charged by court with reconstructing the accounts. Court ultimately found father in contempt for refusal to account, and sentenced him to three days jail time and ordered him to pay over $100,000 in attorney fees to son. This apart from father's civil liability to son. Appellate court affirmed.

This is a poster case for how not to create and administer UTMA gifts. The family relationships appeared to guarantee disaster for all and the father's disregard for his fiduciary responsibility certainly turned off the trial judge. Show this opinion to clients who appear to be casual in creation, administration and accounting for gifts to their children or grandchildren.

MAYS V. CARL L. MAYS TRUST

Headnote: Election against will

Citation: 2012-Ohio-618 (App. 6th Dst. 2012)

Summary: The Mays married with an antenuptial agreement. After he died, she filed a declaratory judgment action to avoid the agreement and elect against the will. However, she filed it 10 months after she had been appointed as executrix. The trial court dismissed her ac-

tion, and the appellate court affirmed. RC 2106.22 requires an action to set aside an antenuptial agreement to be filed within four months after the appointment, and RC 2106.01(E) requires the will election to be made within five months after the appointment, and she was late under both statutes.

Why did Mrs. Mays and her lawyer bother to file the action, and even to appeal it? Note that she was herself the executrix, so she was certainly on notice of the status of the estate.

WICKLINE V. HOYER

Headnote: Lack of capacity, undue influence

Citation: 2012-Ohio-945 (App. 10th Dist.)

Summary: Decedent left three children. One of them received $150,000 from decedent shortly before her death, and the facts raised questions of lack of capacity and undue influence. The other two children sued in the general division for intentional interference of expectancy of inheritance. The trial court granted summary judgment to the alleged wrongdoer, and the appellate court affirmed. The case belonged in the probate division, where two statutes (RC 2107.46 and 2109.50) provide for its jurisdiction and provide full remedies.

LEGISLATIVE SCORECARD

Keep this Scorecard as a supplement to your 2010 Ohio Probate Code (complete to May 14, 2010) for up-to-date information on probate and trust legislation.