

subpart, a grantor shall be treated as holding any power or interest held by—

- (A) any individual who was the spouse of the grantor at the time of the creation of such power or interest, or
- (B) any individual who became the spouse of the grantor after the creation of such power or interest, but only with respect to periods after such individual became the spouse of the grantor.

- (2) **Marital status.**—For purposes of paragraph (1)(A), an individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

REVISITING THE PROBATE PRACTITIONER'S OXYMORON: COMPARING AND CONTRASTING THE PROBATE CODE WITH THE OHIO RULES OF SUPERINTENDENCE

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This article updates an article authored by James J. Lanham and Matthew R. Hochstetler in the May/June 2012 *Probate Law Journal of Ohio* titled “Conflicting Redun-

dant Laws: The Probate Practitioner’s Oxymoron (Reconciling Supreme Court Probate Rules and the Revised Code).”²

This is our decade reminder that probate practitioners must not only consult the Ohio Revised Code and local probate rules. The Ohio Supreme Court’s *Ohio Rules of Superintendence for the Courts of Ohio* (the “Rules”), Sup. R. 50 to 79 also direct probate procedures, sometimes contrary to the related Revised Code provisions. This article highlights some of those additional or contrasting Rules of particular interest that modify the Code sections.

Rules that are listed as “ADDITION TO CODE” do not conflict with the Revised Code, but rather provide additional requirements to the statutory provisions. Rules listed as being in “CONFLICT WITH CODE” deviate somewhat from the Revised Code. The Rules should be reviewed along with the concurrent statutes to understand all requirements for given procedures.

One court characterized the Rules in this bifurcated system of administering probate as “purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual[s].”³ That same court, however, went on to say that an injured minor ward’s right to have a current medical condition report submitted before an injury settlement may be approved is a protected right under Sup. R. 68(B). A review of Sup. R. 66.01 to 66.09 (creating significant additional guardianship procedures) likewise tends to refute the characterization of the Rules as internal housekeeping without creating rights.

Keep in mind that there are two substantial Rule exceptions built into the Rules:

1. Sup. R. 76 provides that “Upon application, and for good cause shown, the probate division of the court of common pleas may grant exception to Sup. R. 53 to 79.” If you have a situation that requires deviation from the Rules, you have an opportunity for your probate judge to waive the Rule in question.
2. Sup. R. 5 of the Rules for Superintendence for the Courts of Ohio allows your probate court to make changes to the Rules (if consistent with the Supreme Court’s Rules) which must be filed with the Supreme Court. Always look to your local rules for deviations or expansions to the Supreme Court Rules.

HIGHLIGHTS FROM SUP. R. 50—79:

Sup. R. 50: ADDITION TO CODE: A separate case must be filed for each beneficiary of a wrongful death trust, each ward, each adoptee, and each person requesting a name change.

Sup. R. 51: To share with your probate judge—Attorneys may not submit nonstandard probate forms which “shall” be rejected, but no court shall require the modification of a standard form as a routine matter.

Sup. R. 52: In the Sup. R. 52 print requirements for standard probate forms, Rule 52(M)(2)(e) allows the court to accept for filing nonstandard computer-generated forms for the receipts and disbursements attached to a standard account form or the schedule of assets attached to a standard inventory and appraisal form. *In re Brady*,⁴ held that minor clerical errors including

the omission of a header from one standard form and an incorrect type style in a footer, were not significant and only rose to the level of harmless error.

Sup. R. 55: CONFLICT WITH CODE: Provides that confidential mental illness records may be accessed by approval of the judge. Compare R.C. 5122.31 providing additional exceptions to a court order for mental illness disclosures, e.g., if disclosure is provided for in the Revised Code or federal law, or, approval by the chief clinical officer for medical records being released to a parent or guardian of the patient, or, release to insurance company, or, release to the patient, or exchange of records among providers, etc.

Sup. R. 57: ADDITION TO CODE: Adds failure to inform the court of address changes as a reason to remove fiduciaries to the Code removal provisions in R.C. 2109.24 (habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct) or R.C. 2109.06 (failure timely furnish bond) or R.C. 2109.18 (failure to file bond after release of sureties) or R.C. 2109.19 (failure to indemnify surety upon surety’s application alleging fiduciary waste or unfaithful administration), or R.C. 2109.31 (failure to honor citation), or R.C. 2109.53 (judgment against fiduciary for concealment or embezzlement). **WATCH OUT FOR SUP. R. 57’s** provision that the failure of a winning party to submit a proposed judgment entry within 7 days after judgment may result in dismissal.

Sup. R. 59: ADDITION TO CODE: Applicant’s attorney must first search the R.C. 2107.07 prescribed index of wills before filing a will for probate. **CONFLICT WITH CODE:** Failure to file the Certificate of Service of Notice of Probate of Will (Standard

Probate Form 2.4)⁵ within two months of the executor's appointment is subject to removal proceedings. R.C. 2107.19(A)(4) states that the penalty is not removal, but rather is a citation per R.C. 2109.31 resulting in removal only if the citation is ignored.

Sup. R. 60: ADDITION TO CODE: Notice of an application for appointment of administrator shall be served at least seven days prior to the date set for hearing. The probate court shall serve by certified mail the spousal citation and summary of rights required by R.C. 2106.02 to the surviving spouse “**within 7 days of the initial appointment of the administrator or executor**, unless a different time is established by local court rule.” (Emphasis added.)

Sup. R. 61: CONFLICT WITH CODE: Without special application to the court, a fiduciary may compensate an appraiser for services with a reasonable amount agreed upon between the fiduciary and the appraiser, provided the compensation does not exceed the amount allowed by local court rule. If no local rule exists, the compensation shall be subject to court approval. In contrast, R.C. 2115.06 requires the fiduciary to pay the appraiser based upon the appraiser's training, qualifications, experience, time reasonably required, and the value of the property appraised.

Sup. R. 62: ADDITION TO CODE: R.C. 2117.11 provides the method to reject a creditor's claim without involving the probate court. Sup. R. 62 requires the fiduciary to file with the court a copy of any claim rejection when a claim has been filed with the court pursuant to R.C. 2117.06 of the Revised Code.

Sup. R. 63: CONFLICT WITH CODE:

Sup. R. 63 provides that except for good cause shown, an order of sale to sell personal property shall not be granted prior to the filing of the inventory. R.C. 2113.40 permits a sale “at any time after the appointment of an executor or administrator.” (There is no such rule in the Code or Rules if there is a power of sale in the will. See R.C. 2113.39, but check local rules in the applicable county).

Sup. R. 64: ADDITION TO CODE: Provides significant additions to the requirements in R.C. 2109.30 to 2109.303 for accounts, including filing closing statements for real estate sales, permitting receipts by agents for beneficiaries if a copy of a recorded POA is submitted. **BIG ADDITION TO CODE:** The Rule requires “the manager of the safe deposit box department of the financial institution leasing the safe deposit box” to certify the contents of the box for the account.

Sup. R. 65: ADDITION TO CODE: Adding to the Chapter 2127 land sale procedures,⁶ the Rule requires filing title evidence “prepared by a title company licensed by the state of Ohio, an attorney's certificate, or other evidence of title satisfactory to the court.” Must also give notice to all defendants of time and place of sale by regular mail at least 3 weeks prior to the public sale. A closing statement must be filed in private land sales.

Sup. R. 66: ADDITION TO CODE: Rule 66(A) requires an expert's opinion to be filed with guardianship applications or a statement that the prospective ward has refused to submit to an examination. The court in *In re Guardianship of Calvey*,⁷ held that Rule 66 does not provide penalties for failing to comply with Rule 66(A). Courts have discretion to deviate as necessary to the

orderly and efficient exercise of jurisdiction. *Contra*, see *Matter of Guardianship of Weimer*,⁸ where the Second District enforced requiring an expert evaluation. But isn't an expert evaluation hearsay? Ohio's Tenth District Court held that **hearsay rules don't apply to guardianship proceedings**, so expert evaluations are admissible as evidence.⁹

Sup. R. 66 also prohibits an application to expend funds until the guardian's inventory is filed and provides that parents must be financially unable to provide the items for which the amount of care and support is sought by a guardian.

Sup. R. 66.01 to 66.09: ADDITION TO CODE: Some of the newest rules significantly affect guardianship proceedings. **NOTE IN PARTICULAR SUP. R. 66.02** which permits the court to wave these rules for good cause shown if the guardian is related by consanguinity or affinity. Courts may be amenable to this where a parent has raised a disabled child, then seeks guardianship at the 18th birthday.

Sup. R. 66.03: ADDITION TO CODE: Your probate court must provide procedures to review and deal with complaints respecting the guardianship. The court in *In re Guardianship of Carpenter*, 2016-Ohio-3389, 66 N.E.3d 272 (Ohio Ct. App. 3d Dist. Marion County 2016) held that Sup. R. 66.03 provides an avenue for a ward to challenge a guardian's decisions.

Sup. R. 66.04: ADDITION TO CODE: Provides that the court must always consider a limited guardianship ahead of a plenary guardianship. R.C. 2111.02(B)(1) only requires a limited guardianship when "the probate court finds it to be in the best interest of an incompetent or minor."

Sup. R. 66.06 and 66.07: ADDITION TO CODE: Provide the education requirements for guardians. DON'T FORGET THAT SUP. R. 66.02 permits excusing the education requirements if the guardian is related and the court is convinced of good cause to waive!

Sup. R. 66.08 and 66.09: ADDITION TO CODE: These Rules include requirements for the guardian to meet with the ward before a hearing, report abuse, report address changes, to file an annual plan, to file a list of the ward's important legal papers, to meet at least quarterly with the ward, and to preserve the ward's relationships. The mandate to preserve the ward's relationship is useful when a guardian cuts off visitation without cause, but the case law also indicates that the Rule is not violated where the guardian demonstrates harm from a visitation, such as causing stress.¹⁰

Sup. R. 67: CONFLICT WITH CODE: For amounts of \$25,000 or less, Rule 67 allows distributions for minors outside of a guardianship to a regulated bank account. R.C. 2111.05 allows such bank deposits AND permits payments of such assets "to the natural guardian of the minor, to the person by whom the minor is maintained, to the executive director of children services in the county, or to the minor's own self."

Sup. R. 68: CONFLICT WITH CODE: Sup. R. 68 permits minors' injury settlements under \$25,000 to be paid to the parents or custodian of the child while R.C. 2111.18 permits the settlement to be paid to "any suitable person." ADDITION TO CODE: The application to settle minor's claims shall be accompanied by a current statement of an examining physician in respect to the injuries sustained, the extent of recovery, and the permanency of any

injuries. The application shall state what additional consideration, if any, is being paid to persons other than the minor as a result of the incident causing the injury to the minor. The application shall state what arrangement, if any, has been made with respect to counsel fees. Counsel fees shall be subject to approval by the court. This rule creates substantive rights.¹¹

Sup. R. 70: ADDITION TO CODE: The application to settle and distribute wrongful death and survival funds requires a statement of facts proposing the allocation to the wrongful death claim and to the survival claim, and detail the attorney's fees. The fiduciary must provide notice of the hearing and a copy of the application to all interested persons who have not waived notice of the hearing.

Sup. R. 71: ADDITION TO CODE: Estate attorney's fees can't be paid until the final account is prepared unless the court approves earlier payment for good cause shown.

◆ **Practice Tip:** *For long term estates (litigation, IRS challenges, etc.), make periodic applications for partial fees.*

The court may set attorney's fee hearings even though beneficiaries have consented to fees. For delinquent accounts, the attorney's fees "shall not be allowed" except for good cause shown. "There shall be no minimum or maximum fees that automatically will be approved by the court." **Keep in mind that local rules approving fee ranges were presumably approved by the Supreme Court per R.C. 2101.04 and per Sup. R. 5 of the Rules for Superintendence.**

Sup. R. 72: ADDITION TO CODE: Executor and Administrator commissions may

be reduced or denied if the inventory or account is delinquent. Co-Executors or Co-Administrators must split the statutory commission (unless a will provides otherwise for Co-Executors). NOTE—the Revised Code never authorizes Co-Administrators but Sup. R. 72 clarifies that Co-Administrators may be appointed.

Sup. R. 73: ADDITION TO CODE: Specific rules for compensating a guardian shall be set by local rule. Co-Guardians must split the fee that would have been allowed to one guardian alone (which makes clear that co-guardians are permitted to be appointed although not specifically authorized in Code Chapter 2111¹²).

Sup. R. 74: CONFLICT WITH CODE? Rule 74 states that a "Trustee's compensation shall be set by local rule." This Rule should certainly be reconciled with R.C. 5807.08 which provides for reasonable trustee fees under the circumstances. Sup. R. 74 seems to be intended for testamentary trusts while the Code provision seems to apply to all other trusts.

Sup. R. 76: A GOOD RULE TO REMEMBER: "Upon application, and for good cause shown, the probate division of the court of common pleas may grant exception to Sup. R. 53 to 79."

Sup. R. 77: ANOTHER GOOD RULE TO REMEMBER: "Failure to comply with these rules may result in sanctions as the court may direct."

Sup. R. 78: CONFLICT WITH CODE: R.C. 2109.301 sets forth numerous extension permissions to keep an estate open longer than six months. Note that subparts (a) through (f) appear to be AUTOMATIC in the Code given that subsection (g) is the

only provision that is “subject to court approval.” R.C. 2901.301(B) provides:

(B)(1) Every administrator and executor, within six months after appointment, shall render a final and distributive account of the administrator’s or executor’s administration of the estate unless one or more of the following circumstances apply:

- (a) An Ohio estate tax return must be filed for the estate.
- (b) A proceeding contesting the validity of the decedent’s will pursuant to section 2107.71 of the Revised Code has been commenced.
- (c) The surviving spouse has filed an election to take against the will.
- (d) The administrator or executor is a party in a civil action.
- (e) The estate is insolvent.
- (f) The decedent’s will provides that a posthumously born child or heir, which includes a child or heir born through the use of assisted reproductive technologies as defined in section 5801.12 of the Revised Code, shall inherit under the will as provided in section 2107.34 of the Revised Code.
- (g) For other reasons set forth by the administrator or executor, subject to court approval, it would be detrimental to the estate and its beneficiaries or heirs to file a final and distributive account.

Sup. R. 78(B) requires ALL extension reasons to be approved by application to the court. **ADDITION TO CODE:** Sup. R. 78 expands R.C. 2109.31(B)(4) to require an estate status report at 13 months after appointment of the fiduciary and annually thereafter in addition to filing the mandatory statutory account. Sup. R. 78 expands R.C. 2115.16 to include a pretrial within 30 days after inventory exceptions are filed unless dispensed by the court.

Sup. R. 79: CONFLICT WITH CODE: Sup. R. 79 authorizes alternate dispute resolution without requiring adoption of local rules by the probate court. R.C. 2101.163

requires probate courts to adopt local rules in order to permit alternate dispute resolution.

CONCLUSION: One wonders if there is a constitutional issue with our Supreme Court effectively amending substantive procedures enacted by the legislature. Article II of the Ohio Constitution provides that the “legislative power of the state shall be vested in the general assembly.”¹³ One court noted that the separation-of-powers doctrine “requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government.”¹⁴ Former U.S. Secretary of State Alexander Haig once noted that “The warning message we sent the Russians was a calculated ambiguity that would be clearly understood.”¹⁵ Perhaps our bifurcated probate procedures were intended to be clearly understood. But irrespective of any constitutional conflicts, life would be less confusing for probate judges and practitioners alike if Sup. R. 50 to 79 of the *Rules for Superintendence for the Courts of Ohio* were incorporated into the Revised Code so only one source of procedure is required in each case.

ENDNOTES:

¹I am grateful for the assistance of Mary E. Baker, currently a second-year student at The Ohio State University Moritz College of Law, Nicholas A. Baker, CPA, currently a second-year student at The Ohio State University Moritz College of Law, and Joseph K. Zahn, currently a second-year student the University of Akron School of Law.

²Conflicting Redundant Laws: The Probate Practitioner’s Oxymoron(Reconciling Supreme Court Probate Rules And The Revised Code), 22 PLJO 5, 22 No. 5 Ohio

Prob. L.J. NL 13 (May/June 2012).

³*In re Guardianship of Matyaszek*, 159 Ohio App. 3d 424, 2004-Ohio-7167, ¶ 91, 824 N.E.2d 132, 148 (9th Dist. Summit County 2004).

⁴*In re Brady*, 2005-Ohio-287, 2005 WL 174773 (Ohio Ct. App. 8th Dist. Cuyahoga County 2005).

⁵Rules of Superintendence, Std Prob Forms Rule 51, Form 2.4 (Oh St Sup Rule 51, Form 2.4).

⁶R.C. 2127.01 et seq.

⁷*In re Guardianship of Calvey*, 2020-Ohio-4221, 2020 WL 5049166 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020), appeal not allowed, 160 Ohio St. 3d 1496, 2020-Ohio-5634, 159 N.E.3d 284 (2020).

⁸*Matter of Guardianship of Weimer*, 2019-Ohio-4295, 2019 WL 5295574 (Ohio Ct. App. 2d Dist. Montgomery County 2019).

⁹*In re Guardianship and Conservatorship of Stancin*, 2003-Ohio-1106, 2003 WL 953840 (Ohio Ct. App. 10th Dist. Franklin County 2003).

¹⁰*Matter of Guardianship of Bernie*, 2019-Ohio-334, 2019 WL 422451 (Ohio Ct. App. 12th Dist. Butler County 2019), appeal not allowed, 155 Ohio St. 3d 1469, 2019-Ohio-2100, 122 N.E.3d 1294 (2019).

¹¹See *In re Guardianship of Matyaszek*, 159 Ohio App. 3d 424, 2004-Ohio-7167, 824 N.E.2d 132 (9th Dist. Summit County 2004), *supra*.

¹²R.C. 2111.01 et seq. (Guardians; Conservatorships).

¹³Ohio Const. Art. II, § 1.

¹⁴*O'Neal v. State*, 2020-Ohio-506, ¶ 28, 146 N.E.3d 605, 614 (Ohio Ct. App. 10th Dist. Franklin County 2020), appeal allowed, 160 Ohio St. 3d 1418, 2020-Ohio-4811, 154 N.E.3d 97 (2020) and appeal allowed, 160 Ohio St. 3d 1418, 2020-Ohio-4811, 154 N.E.3d 98 (2020) and judgment aff'd, 2021-Ohio-3663, 2021 WL 4851010 (Ohio 2021).

¹⁵ https://www.brainyquote.com/quotes/alexander_haig_126012 (last accessed 11/1/2021).

CASE SUMMARIES

CARROLL V. HILL

Headnote: Jurisdiction

Citation: *Carroll v. Hill*, 2021 WL 4076994 (N.D. Ohio 2021)

Plaintiff claimed to be the illegitimate daughter of decedent. She sued in federal court to invalidate his will and redistribute the assets of his estate to her as his intestate heir. The will had been probated and the estate administered in Ohio 20 years earlier, with no record of plaintiff as heir or beneficiary.

Defendants who received the estate assets objected that plaintiff lacked standing since paternity had never been (and could not now after death be) established, and that the judicially created probate exception to federal court diversity jurisdiction precluded the action. The court agreed. The case is an excellent primer on the lack of federal jurisdiction in probate matters.

DOCZI V. BLAKE

Headnote: Claims

Citation: *Doczi v. Blake*, 2021-Ohio-3433, 2021 WL 4449535 (Ohio Ct. App. 4th Dist. Meigs County 2021)

Plaintiff and decedent had an automobile accident in which decedent died. Within the required time plaintiff filed a claim against decedent's estate, by letter from his lawyer to the executor. The letter was claimed to be defective as claim in that it stated the address of plaintiff's attorney, not of plaintiff-claimant, and did not state any specific amount for the claim. Apparently the claim was rejected, as plaintiff filed suit

on it in the general division. That court held that the claim was defective under the strict requirements of *Wilson v. Lawrence* because it did not give the *claimant's* address, and did not rule on absence of a dollar amount for the claim; it granted summary judgment to the estate on all claims. On appeal, reversed in part. Grant of summary judgment to the estate for failure of proper presentment of the claim was proper, but the case should proceed for any recovery from the decedent's insurer only under the exception in R.C. 2117.06(G) for such insured claims.

WHITE V. WHITE

Headnote: Jurisdiction

Citation: *White v. White*, 2021-Ohio-3488, 2021 WL 4477455 (Ohio Ct. App. 11th Dist. Lake County 2021)

Decedent created a revocable trust for the post-death benefit of her 10 children. Shortly before her death she amended it to change trustees and distribution. After her death things fell apart, and several beneficiaries filed an action in the probate court to remove the trustees, require an accounting, etc. They voluntarily dismissed that action, and refiled in the general division. It approved a final trust report and ordered distribution of the trust. A daughter appealed, arguing that the general division lacked jurisdiction over the trust. Affirmed on appeal, as under R.C. 2101.24(B) the probate court has only concurrent jurisdiction over inter vivos trusts, and no other statute abrogates the full common law jurisdiction over such trusts of the general division.

WISEHART V. WISEHART

Headnote: Jurisdiction

Citation: *Wisehart v. Wisehart*, 2021-Ohio-3649, 2021 WL 4736583 (Ohio Ct. App. 12th Dist. Preble County 2021)

Decedent's intervivos trust contained a half interest in a farm. One son who owned the other half interest was trustee, and the current beneficiaries were the other children. The trust instrument provided that the trustee could be changed by the beneficiaries, and they appointed a second son to serve with the first son as co-trustee. That second son/plaintiff now sued in the general division to restrain attempted sale of the farm by the first son as co-trustee and for an accounting. The trial court granted summary judgment to plaintiff, affirmed on appeal.

The second son/defendant, once an attorney and now representing himself in this case, seems to have been a "denier" who denied that the dispute was justiciable, that the court had jurisdiction and that plaintiff was a trustee.

MONTEFIORE HOME V. FIELDS

Headnote: Powers of attorney

Citation: *Montefiore Home v. Fields*, 2021-Ohio-3734, 2021 WL 4900919 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021)

Decedent lived at plaintiff home, and her bills were paid by defendant (plaintiff's god-daughter) under a power of attorney. There was an unpaid balance of over \$22,000 due after death, for which plaintiff sued defendant personally. The trial court held for defendant, affirmed on appeal.

Claims were made under the Uniform

Fraudulent Transfer Act R.C. 1336.04 and 1336.05, and the Uniform Power of Attorney Act R.C. 1337.092(B). The UFTA claim was for funds transferred by decedent to defendant; the court did not find sufficient evidence these were gifts to her rather than reimbursement of expenses of decedent. The UPAA claim was for funds disbursed without authority, and the court did not find sufficient evidence of lack of authority for their disbursement.