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OHIO PROBATE LAW IN 2024

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Ohio's body of probate case law seemed to have a bit of a slow year in 2024. In total, there were about 65 cases, which includes attorney discipline cases that involved probate-related alleged misconduct and does not include adoption cases. While the decisions may not be as earth-shattering as prior years, 2023 had about 68 cases and 2022 saw a similar mid-60s total; so, the case count has been consistent. Let's review a few of the decisions from 2024.

Probably the most-anticipated case was the Supreme Court's *In re Application for Correction of Birth Record of Adelaide*, concerning the ability for a transperson to update their birth certificate gender marker.[1] Unfortunately, this case turned out to be a bit of a nothingburger as the Court couldn't reach a majority at all. In multiple concurring opinions, the Supreme Court justices were split on whether they would affirm the lower court and whether they would even reach the merits of the matter. The Second District decision held that the applicant could not "correct" their birth certificate because it was accurately recorded at the time of their birth; they were seeking an "amendment" and the statute didn't grant probate court that power.[2] With no clear majority from the Ohio Supreme Court, the Second District's decision remains undisturbed.

A topic often top of practitioner's mind is attorney's fees. In the probate court, attorney's fees are subject to court approval and are often the subject of hearings. In a Sixth District matter, the probate court properly found the defendant concealed over $225,000 of assets from his father's estate and awarded damages plus 10%.[3] In addition, the probate court awarded attorney's fees but did so before holding a hearing. The case was remanded for a hearing on the fees. In *Daddario v. Rose*, decided near the end of the year, the probate court did hold a hearing on attorney's fees and awarded about $300,000.[4] The probate court in that matter heard testimony from attorneys involved in the litigation, but the appellant complained there was no expert opinion or report regarding attorney's fees. The appellate court upheld the award of fees and stated no report was necessary because the attorneys testified as lay witnesses. In the Eighth District, the appellate court substantially reduced a large attorney fee award; the award of fees was based on a finding of contempt and therefore only the time concerning the contempt proceedings could be granted as fees—not the time spent on the entirety of the litigation.[5]

The Supreme Court was busy with four probate-related disciplinary cases this year. Probate practice seems uniquely positioned for potential ethical concerns when we are dealing with attorney-fiduciary access to assets, conflicts of interest when representing multiple clients, clients with diminished capacity, and the list goes on. In 2024, one attorney was publicly reprimanded for notarizing a false

jurat where the signor was not present.[6] In another matter, an attorney under a deadline to avoid a citation hearing forged waivers of partial accounting.[7] The Supreme Court issued a six-month stayed suspension conditioned on no further misconduct, noting that the attorney admitted to the conduct, cooperated with the disciplinary board, and submitted 34 letters in support of good character. Another probate practitioner, however, was permanently disbarred after misappropriating funds from estates and trusts and selling estate property to his wife's company without disclosing the conflict (among other violations and a prior suspension).[8] Lastly, a probate judge was publicly reprimanded for making comments on their court's Facebook page in response to the son of a ward under guardianship in their court.[9] The judge deleted the post, apologized for the conduct, cooperated with disciplinary counsel and turned over control of the page to another court staff member. Social media is ubiquitous these days, and apparently has even found its way to probate court; even probate practitioners must post with caution.

Many clients want to avoid probate, and a transfer-on-death designation affidavit (TODDA) is an important tool to do so. In a Fifth District case, the decedent prepared her own TODDA and had it notarized at the bank.[10] When she visited the auditor to record the document, however, she had to make changes to it and complete a legal description. After her death, the estate beneficiaries argued the TODDA was invalid because it was edited after it was notarized and the probate court agreed to void the TODDA. The appellate court reversed finding that the notary is only verifying the identity of the signor, not the contents of the document, and that nothing in the TODDA statute prevented the edits after the notarization.

Another TODDA case did find that the signor failed to follow the statute closely.[11] A husband and wife lived separate and apart for many years. Wife signed a deed transferring her half interest in jointly-owned property to Husband pursuant to an agreement between them about who would keep certain property. Husband then left this property TOD to his daughter. After Husband's death, Wife claimed she retained her dower interest in Husband's property. The probate court found that the agreement should be considered a separation agreement and that the dower was waived. The appellate court, however, reversed; the TODDA statute required the signature of wife (R.C. 5302.22(D)(3)) and the agreement between spouses could not terminate dower as it was prior to Ohio allowing postnuptial agreements.

The trust cases this past year included issues of standing, trust-code-required notices, construction, and removal. In *Pollock v. Mullins,*[12] the Second District affirmed the probate court that removed a trustee who failed to notify the beneficiaries of the trust (as required under R.C. 5808.13) and engaged in self-dealing when he determined that stock in a closely-held business would pass via probate only to *him* rather than through the trust.[13] In another case, the Tenth District found that the contingent remainder beneficiaries of a trust were entitled to receive accountings, if they requested them, and had standing to seek the removal of their step-mother, who was serving as trustee after their father's passing.[14] In another standing matter

concerning trusts, the Fifth District determined that only the Attorney General had standing to enforce a charitable testamentary trust that held real estate required to be used for a memorial park; neither the city nor the school district could bring such an action.[15] Finally, in a construction case, the court had to determine how the residue of a trust would pass when one of the beneficiaries died after the grantor.[16] In *Curtis*,[17] a mother's trust residue was to pass to her son and daughter. Unfortunately, the daughter died six weeks after the mother. The daughter's children (grantor's grandchildren) asserted they should inherit their mother's share and the probate court agreed. The appellate court reversed finding that the daughter was a vested beneficiary prior to her death and was entitled to receive her entire share as soon as the mother died; therefore, the daughter's half of the residue would pass to daughter's estate—the antilapse statute did not apply to this situation.

Speaking of the antilapse statute, last year saw the end of the *Diller* matter. Practitioners may remember that the original *Diller* involved a will that left a farm to decedent's brother and the residue to decedent's brother and sister; the brother predeceased.[18] In the original case, the appellate court found that it could not apply Ohio's then-existing antilapse statute because the definition of "devise" did not include a primary devise, like the gift of the farm; therefore, the farm would not pass to the brother's children, but rather to the residue.[19] In response, Ohio amended the statute, R.C. 2107.52, to include a primary devise. Now in 2024, the *Diller* plaintiffs sought to have the antilapse statute applied because the legislature made it retroactive to the greatest extent possible; however, under the law of the case and the statute existing at the time, the Third District still could not apply the anti-lapse statute.[20]

Arbitration clauses may not seem like a probate topic, but they came up at least twice this year. In the Eighth District, a mother unfortunately died after she escaped the nursing facility and was injured.[21] The mother's estate brought a wrongful death claim and the nursing home sought to enforce the arbitration agreement in the intake documents, which had been signed by daughter. The lower court enforced the arbitration agreement, but the appellate court reversed because there was no evidence of a power of attorney and no other evidence that daughter had mother's authority to sign for her: the facility did not produce evidence of the *principal's* actions on which it could reasonably rely to find apparent authority. In another case, a decedent made his investment accounts TOD to a church.[22] After his death, his estate beneficiaries sued to void the TOD and accused the financial institution of fraud, forgery, and undue influence. The institution sought to enforce an arbitration clause—which included indemnification of litigation/arbitration costs—against the beneficiaries and the estate. The court found that the TOD beneficiaries could not be forced to arbitrate, but the estate *could* because it stood in the decedent's shoes. Furthermore, the financial institution made a timely contingent claim in decedent's estate, which could require the estate to reimburse the institution for costs and attorney's fees.

Another pair of cases covered the topic of intentional interference with expected in-

heritance (IIEI). In the first case, the court granted summary judgment against a plaintiff claiming IIEI after the same plaintiff lost a will contest.[23] The court found that because the will—which left plaintiff $1—was found to be valid, the plaintiff could not have a reasonable expectation of inheritance. On appeal, the plaintiff unsuccessfully argued they should have been given more time for discovery but they had failed to file a motion per Civ. R. 56(F). The Eleventh District reaffirmed last year that a party cannot pursue an IIEI claim until they have exhausted probate remedies.[24] In *Vondrasek v. Heiss*,[25] the plaintiff alleged IIEI as to numerous inter vivos and non-probate transfers. Because there were still remedies that could be brought in probate court—declaratory judgment to void the transfers, concealment, or objections to inventory—the plaintiff's IIEI claim was premature and the appellate court affirmed the lower court's dismissal.

The run-of-the-mill topics of estate administration and guardianship saw very little action in 2024. Several appellate courts addressed removals of guardians. The probate court properly removed a sister as her brother's guardian and trustee when she failed to follow settlement agreements related to prior litigation among family members.[26] The court properly denied a mother's request to remove her child's guardian because the guardian was actively visiting the ward and seeking a "less restrictive" environment for the ward.[27] Relatedly, the Ninth District affirmed a denial of a mother's application to become daughter's guardian because daughter had a guardian in place and mother did not show reasons for removing the existing guardian.[28] On the estate side, the probate court properly dismissed objections to an account where the beneficiary complained about personal property distribution: the court found that the beneficiary failed to participate in the distribution process despite being notified and the fiduciary properly relied on the beneficiary's actions (or non-actions).[29] The Twelfth District affirmed the denial to reopen the estate because the next-of-kin seeking to be appointed was in litigation over decedent's non-probate transfers and sought to be the estate fiduciary only to obtain information to use against the recipient of the non-probate transfers.[30] The appointment would have created a conflict of interest. Finally, in an estate that had a subsequent executor appointed, both the first and second executor entered purchase agreements for the same piece of property.[31] The probate court initially entered an order approving the second contract, but when the party to the first contract brought the conflicts to the court's attention, the court granted a Civ. R. 60(B) motion to vacate the order. The appellate court affirmed the vacation of the order so the probate court could sort out the issues of two fiduciaries entering contracts for the same property.

While this past year didn't have many monumental decisions, the probate courts remain as active as ever. There's no reason to doubt that 2025 will likewise give us another 65 cases to shape Ohio's probate law. Stay tuned.

ENDNOTES:

[1]*In re Application for Correction of Birth Record of Adelaide*, 2024-Ohio-5393,

2024 WL 4820472 (Ohio 2024).

[2]*In re Application for Correction of Birth Record of Adelaide*, 2022-Ohio-2053, 191 N.E.3d 530 (Ohio Ct. App. 2d Dist. Clark County 2022), appeal decided, 2024-Ohio-5393, 2024 WL 4820472 (Ohio 2024).

[3]*Minshall v. Estate of Minshall*, 2024-Ohio-3428, 2024 WL 4100945 (Ohio Ct. App. 6th Dist. Erie County 2024).

[4]*Daddario v. Rose*, 2024-Ohio-5882, 2024 WL 5132353 (Ohio Ct. App. 5th Dist. Stark County 2024).

[5]*McMahon v. Cooke*, 2024-Ohio-2170, 2024 WL 2858714 (Ohio Ct. App. 8th Dist. Cuyahoga County 2024).

[6]*Disciplinary Counsel v. Billingsley*, 175 Ohio St. 3d 58, 2024-Ohio-222, 239 N.E.3d 236 (2024).

[7]*Mahoning County Bar Association v. Macala*, 175 Ohio St. 3d 416, 2024-Ohio-3158, 244 N.E.3d 15 (2024).

[8]*Disciplinary Counsel v. Port*, 2024-Ohio-5566, 2024 WL 4896545 (Ohio 2024).

[9]*Ohio State Bar Association v. Winkler*, 175 Ohio St. 3d 407, 2024-Ohio-3141, 244 N.E.3d 8 (2024).

[10]*Estate of Ortiz v. Cicconetti*, 2024-Ohio-1958, 245 N.E.3d 822 (Ohio Ct. App. 5th Dist. Stark County 2024).

[11]*Pettitt v. Schaffner*, 2024-Ohio-5180, 2024 WL 4603124 (Ohio Ct. App. 10th Dist. Franklin County 2024).

[12]*Pollock v. Mullins*, 2024-Ohio-3423, 2024 WL 4100411 (Ohio Ct. App. 2d Dist. Montgomery County 2024).

[13]*Pollock v. Mullins*, 2024-Ohio-3423, 2024 WL 4100411 (Ohio Ct. App. 2d Dist. Montgomery County 2024).

[14]*Collins v. Flannery*, 2024-Ohio-5822, 2024 WL 5087679 (Ohio Ct. App. 10th Dist. Franklin County 2024).

[15]*Johnstown v. Smith*, 2024-Ohio-5128, 2024 WL 4579650 (Ohio Ct. App. 5th Dist. Licking County 2024).

[16]*Curtis v. Edsell*, 2024-Ohio-3420, 2024 WL 4100549 (Ohio Ct. App. 2d Dist. Montgomery County 2024).

[17]*Curtis v. Edsell*, 2024-Ohio-3420, 2024 WL 4100549 (Ohio Ct. App. 2d Dist. Montgomery County 2024).

[18]*Diller v. Diller*, 2021-Ohio-4252, 182 N.E.3d 370 (Ohio Ct. App. 3d Dist. Mercer County 2021), appeal dismissed as improvidently allowed, 171 Ohio St. 3d 99, 2023-Ohio-1508, 215 N.E.3d 541 (2023).

[19]*Diller v. Diller*, 2021-Ohio-4252, 182 N.E.3d 370 (Ohio Ct. App. 3d Dist. Mercer County 2021), appeal dismissed as improvidently allowed, 171 Ohio St. 3d 99, 2023-Ohio-1508, 215 N.E.3d 541 (2023).

[20]*Diller v. Pennucci*, 2024-Ohio-1244, 240 N.E.3d 399 (Ohio Ct. App. 3d Dist. Mercer County 2024).

[21]*Caston v. Woodlands of Shaker Heights*, 2024-Ohio-2267, 2024 WL 2974641 (Ohio Ct. App. 8th Dist. Cuyahoga County 2024).

[22]*Hogg v. Grace Community Church*, 2024-Ohio-1729, 2024 WL 1987792 (Ohio Ct. App. 12th Dist. Fayette County 2024). Earlier in the litigation, the financial institution at issue did not respond to the suit and was defaulted out. The court, however, still had the power to compel discovery even from a defaulted party. *See, Hogg v. Grace Community Church*, 2022-Ohio-3516, 202 N.E.3d 36 (Ohio Ct. App. 12th Dist. Fayette County 2022).

[23]*Haddad v. Maalouf-Masek*, 2024-Ohio-1983, 2024 WL 2499981 (Ohio Ct. App. 8th Dist. Cuyahoga County 2024).

[24]*Vondrasek v. Heiss*, 2024-Ohio-3061, 2024 WL 3756546 (Ohio Ct. App. 11th Dist. Geauga County 2024).

[25]*Vondrasek v. Heiss*, 2024-Ohio-3061, 2024 WL 3756546 (Ohio Ct. App. 11th Dist. Geauga County 2024).

[26]*In re Guardianship of Dwyer*, 2024-Ohio-2544, 2024 WL 3286694 (Ohio Ct. App. 1st Dist. Hamilton County 2024).

[27]*In re Guardianship of Hyde*, 2024-Ohio-1878, 2024 WL 2229952 (Ohio Ct. App. 1st Dist. Hamilton County 2024), appeal not allowed, 175 Ohio St. 3d 1444, 2024-Ohio-3313, 241 N.E.3d 219 (2024).

[28]*In re Guardianship of P. S.*, 2024-

Ohio-1310, 2024 WL 1507650 (Ohio Ct. App. 9th Dist. Wayne County 2024).

[29]*Estate of Rismiller*, 2024-Ohio-1704, 2024 WL 1956175 (Ohio Ct. App. 2d Dist. Darke County 2024).

[30]*In re Estate of Welch*, 2024-Ohio-32, 2024 WL 81285 (Ohio Ct. App. 12th Dist. Clinton County 2024).

[31]*Matter of Estate of Winkelmes*, 2024-Ohio-288, 2024 WL 323210 (Ohio Ct. App. 5th Dist. Muskingum County 2024).