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time before the ocean teaches you to get some.”<sup>1</sup>

By the end of 2025, one in four Ohioans will be 60 and older.<sup>2</sup> At this time nationally, there are roughly 62 million adults—roughly 18% of the total U.S. population—who are 65 and older.<sup>3</sup> By 2054, that number will increase to roughly 23% of the U.S. population with 84 million adults being 65 and older.<sup>4</sup> And during the next 20 years, these elderly Americans are expected to transfer more than \$84 trillion in combined assets upon their deaths.<sup>5</sup>

## HOW TO HELP CLIENTS AVOID (OR WEATHER) THE PROBATE LITIGATION TSUNAMI

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*The following article is based upon a panel presentation by the author and Judge Laura J. Gallagher, Cuyahoga County Probate Court; Matthew Hochstetler, Esq., David J. Simmons & Associates LLC; Julia (Schroeder) Meister, Esq., Taft Stettinius & Hollister, LLP; and Elizabeth Weinewuth, Esq., Vorys, Sater, Seymour & Pease, LLP, at the Marvin R. Pliskin Advanced Probate and Estate Planning Seminar on September 6, 2024 in Westerville, Ohio.*

A big wave of elderly Americans is coming for attorneys who practice in estates and trusts, and American surfer Laird Hamilton provides some sage advice on how to handle this force of nature.

“If you don’t understand the wave, you can’t respect it,” Hamilton said. “And if you don’t have respect, it’s only a matter of

With all this money changing hands, Ohio’s probate courts should only expect to see their adversarial litigation dockets increase. The Cuyahoga County Probate Court saw its total number of all case types increase from 11,808 in 2020 to 16,669 in 2021.<sup>6</sup> Much of this increase stemmed from the COVID-19 pandemic, during which 57,540 more Ohioans died from all causes from March of 2020 through 2022 than had died in 2017 through 2019.<sup>7</sup>

While the Cuyahoga County Probate Court’s overall case numbers have decreased to roughly the same level as before the pandemic, the sharp increase demonstrates the probate litigation tsunami that is coming.<sup>8</sup> This problem is only expected to get worse with more people turning to online tools or artificial intelligence to create estate plans.

This article will provide tips and best practices for estate and trust lawyers who will deal with this coming wave. The panel members have combined their respective experiences as a probate judge, estate planner, and probate litigators to help practitioners minimize litigation for their clients during this unprecedented time.

## WHAT KIND OF PROBATE LITIGATION WILL BE SEEN?

Probate litigation is not an easy area of law to summarize in five minutes or less.

What draws the most attention are the adversarial proceedings like will contests, breaches of fiduciary duty as power of attorney or trustee, and competing applications to serve as someone's guardian. But estate-planning issues also cause will or trust construction actions, litigation to reform, modify, or terminate trusts, or disputes in the estates themselves regarding asset inventories and accountings.

With reported cases of elder exploitation increasing, estate and trust lawyers need to be aware of this risk for their clients. Prior to the pandemic, approximately one in 10 older adults in this country experienced elder abuse.<sup>9</sup> In 2020, that number doubled to one in five—a nearly 84% increase.<sup>10</sup> In 60% of elder abuse and neglect cases, a family member is the offender.

Given these stats, estate planners should be ready to pay extra attention to any client who wants to disinherit a family member or make the distributions unequal as the chances of a challenge will increase. Estate planners need to focus on helping their clients avoid becoming part of the coming wave of probate litigation.

## TOOLS TO PREVENT PROBATE LITIGATION

Estate planners can apply various techniques to help their clients avoid litigation either before or after death.

These techniques can begin during client

intake with the attorney getting the information needed to evaluate the client's intent. Intake forms should get names and contact information for the client's children, grandchildren, and other important friends or family members. If the client has a financial advisor or accountant, this information should be procured as well. All of the client's previous estate planning documents should be obtained and evaluated.

What the client needs for his or her respective estate plan also should be considered. Likely everyone should have advanced directives and a last will and testament, but some clients might require a trust, transfer on death affidavits for real property, or business succession planning. Attorneys also need to take time to discuss non-probate designations on the clients' various assets and how these will either help carry out, or potentially frustrate, the client's intent for assets upon death.

The execution of the client's documents should be taken seriously, especially if disinheritance is occurring. Attorneys should have a checklist to ensure the same execution procedure is done every time, that the client has reviewed and understood his estate planning documents, and that the client understands how these assets will be distributed upon death.

Attorneys also should discuss and understand their clients' health at the time of signing and whether they suffer from any conditions that could cause someone to question the clients' capacity or susceptibility to undue influence. After the execution is done, attorneys should encourage clients to meet with their family members to discuss their estate plans and why they

made their respective decisions. Attorneys also should follow up with their clients annually to see if circumstances have changed that could create problems after the clients die.

When disinheritance occurs, no-contest provisions can dissuade challenges if used properly. For example, a no-contest provision that disinherits someone who is not getting anything under the document will do little to prevent a challenge. But if challenging means the person could lose \$30,000 to \$60,000—the likely cost of a challenge depending on the economics of the estate/trust—this could prevent the person from incurring attorney’s fees with the chance of receiving nothing.

If the client wants more certainty than a no-contest clause can provide, pre-mortem probate statutes like Chapter 5817 of the Ohio Revised Code<sup>11</sup> should be considered. These actions allow the client to file a declaratory-judgment lawsuit to have a will and/or trust deemed valid prior to death. Such actions force a party withstanding to either raise issues of capacity or undue influence before the client is even dead.

## THE VIEW FROM THE PROBATE BENCH

As probate judges often are the finders of fact in estate and trust disputes, their views on probate litigation are instructive regarding how to help clients avoid the problem.

One of the crucial issues probate judges see is that the public is not well educated in the probate process. The Cuyahoga County Probate Court has instituted a

Great Estates Program to offer information and assistance to residents who want to transfer property outside of probate, and the court has a resource center to answer questions about estates, guardianships, and other probate proceedings.

Another problem probate courts see is parties struggling to separate their emotions from the legal realities of the situation. For example, the plaintiff who was disinherited might be unable to accept the decision despite the evidentiary record missing medical support to establish susceptibility to undue influence or lack of capacity. Attorneys should provide their clients with contact information for grief counselors to ensure the clients’ feelings do not prolong legal proceedings.

Finally, probate courts are offering more mediation resources with probate magistrates or experienced probate attorneys serving as mediators. Sometimes clients need an outside voice to provide perspective on the situations they face to help them make decisions that lead to settlement instead of further litigation costs.

## WHAT CAN BE LEARNED FROM OTHER CULTURES?

Many other countries use forced-heirship laws to prevent probate disputes.

Forced-heirship laws are commonplace in European countries like France, Spain, and Italy, and other countries like Japan and Saudi Arabia.<sup>12</sup> In France, the law requires that 50% to 75% of a decedent’s assets be distributed to the decedent’s children—depending on how many children the decedent has.<sup>13</sup>

This legal concept does exist in the

United States in limited ways. For example, in Ohio, you cannot disinherit your spouse from your estate by leaving everything to a friend as the spouse can choose to elect against the will and has various rights pursuant to Chapter 2106 of the Ohio Revised Code.<sup>14</sup> The federal government's Employee Retirement Income Security Act ("ERISA") also prevents an employee from naming someone besides a spouse to receive a 401k or pension without the spouse's consent.<sup>15</sup>

By no means is forced heirship a perfect fix to prevent probate litigation in the United States. Some laws in other countries that require decedents to leave assets to their children do cause litigation about pre-death gifting or other transfers that could be used to circumvent the forced heirship laws.

In the United States, many assets will be distributed via non-probate designation and/or the respective state's intestacy law as only 32% of Americans have done a last will and testament.<sup>16</sup> While that number is the average and tends to increase as the person ages—81% of people who are 72 and older have a will<sup>17</sup>—more and more will rely on online resources or artificial intelligence because estate planners will struggle to handle the coming wave or the costs will leave many unable to afford counsel.

This is why, with the probate litigation tsunami on its way, estate and trust attorneys will be the first line of defense to help their respective clients try to find high ground and avoid this big wave or learn to surf.

## ENDNOTES:

<sup>1</sup>*The best surfing quotes of all time*, <https://www.surfertoday.com/surfing/the-best-surfing-quotes-of-all-time>.

<sup>2</sup>*State in need of more doctors trained to treat dementia patients*, Sidney Daily News (March 16, 2020), <https://www.sidneydailynews.com/2020/03/16/state-in-need-of-more-doctors-trained-to-treat-dementia-patients/>.

<sup>3</sup>U.S. centenarian population is projected to quadruple over the next 30 years, Pew Research Center (Jan. 4, 2024), <https://www.pewresearch.org/short-reads/2024/01/09/us-centenarian-population-is-projected-to-quadruple-over-the-next-30-years/#:~:text=There%20are%20currently%20roughly%2062,estimated%2023%25%20of%20the%20population>.

<sup>4</sup>U.S. centenarian population is projected to quadruple over the next 30 years, Pew Research Center (Jan. 4, 2024), <https://www.pewresearch.org/short-reads/2024/01/09/us-centenarian-population-is-projected-to-quadruple-over-the-next-30-years/#:~:text=There%20are%20currently%20roughly%2062,estimated%2023%25%20of%20the%20population>.

<sup>5</sup>*The Greatest Wealth Transfer in History Is Here, With Familiar (Rich) Winners*, New York Times (Published May 14, 2023, Updated May 23, 2023), <https://nytimes.com/2023/05/14/business/economy/wealth-generations>.

<sup>6</sup>Cuyahoga County Probate Court statistics.

<sup>7</sup>*What the numbers tell us about COVID-19 in Ohio after 3 years, 40,000-plus deaths and millions of vaccines*, [Cleveland.com](https://www.cleveland.com/datacentral/2023/03/what-the-numbers-tell-us-about-covid-19-in-ohio-after-3-years-40000-plus-deaths-and-millions-of-vaccines.html) (March 6, 2023, 1:53 p.m.), <https://www.cleveland.com/datacentral/2023/03/what-the-numbers-tell-us-about-covid-19-in-ohio-after-3-years-40000-plus-deaths-and-millions-of-vaccines.html>.

<sup>8</sup>Cuyahoga County Probate Court statistics.

<sup>9</sup>*Elder Abuse: The Hidden Epidemic*, Home Healthcare Now (November-December 2023), <https://pubmed.ncbi.nlm.nih.gov/41111111/>.



[nih.gov/37922132/#:~:text=Elder%20abuse%20is%20a%20major,increase%20\(Liu%2C%202022\).](https://pubmed.ncbi.nlm.nih.gov/37922132/#:~:text=Elder%20abuse%20is%20a%20major,increase%20(Liu%2C%202022).)

<sup>10</sup>*Elder Abuse: The Hidden Epidemic, Home Healthcare Now* (November-December 2023), [https://pubmed.ncbi.nlm.nih.gov/37922132/#:~:text=Elder%20abuse%20is%20a%20major,increase%20\(Liu%2C%202022\).](https://pubmed.ncbi.nlm.nih.gov/37922132/#:~:text=Elder%20abuse%20is%20a%20major,increase%20(Liu%2C%202022).)

<sup>11</sup>R.C. 5817.01 et seq. (Determining validity of will or trust).

<sup>12</sup>*Property abroad? Beware of forced heirship rules*, Osbornes Law, <https://osborneslaw.com/blog/property-abroad-beware-of-forced-heirship-rules/>.

<sup>13</sup>*Property abroad? Beware of forced heirship rules*, Osbornes Law, <https://osborneslaw.com/blog/property-abroad-beware-of-forced-heirship-rules/>.

<sup>14</sup>R.C. 2106.01 et seq. (Rights of surviving spouses).

<sup>15</sup>*Retirement Benefits, Professional Perspective—Spousal Consent Requirements Under a Qualified Retirement Plan*, Bloomberg Law, <https://www.bloomberglaw.com/external/document/X34LHKL4000000/retirement-benefits-professional-perspective-spousal-consent-req.>

<sup>16</sup>*Wills & Estate Planning Stats, Facts & Ruminations*, <https://www.plannedgiving.com/legacy-box/wills-and-estate-planning-statistics/#:~:text=Ouch.,made%20plans%20for%20their%20legacy.>

<sup>17</sup>*Wills & Estate Planning Stats, Facts & Ruminations*, <https://www.plannedgiving.com/legacy-box/wills-and-estate-planning-statistics/#:~:text=Ouch.,made%20plans%20for%20their%20legacy.>

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