

IN THE SUPREME COURT OF OHIO

VITANTONIO, INC., et al.,

Appellees,

v.

GARY BAXTER, Executor of the estate of
William Vitantonio, Deceased,

Appellant

Case No. 06-952

On Appeal from the Lake County Court
of Appeals, Eleventh Appellate District

MERIT BRIEF OF APPELLANT GARY BAXTER, EXECUTOR OF ESTATE OF WILLIAM
VITANTONIO, DECEASED

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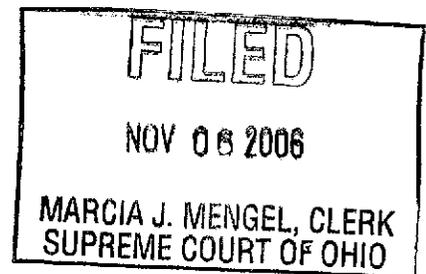


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STATEMENT OF FACTS

William Vitantonio died on July 24, 2000. The Appellant, Gary Baxter, was appointed as executor of the estate. William Vitantonio had been a minority shareholder of Vitantonio, Inc. and a majority shareholder of Wickliffe Floral, Inc. Under a stock purchase agreement, following his death, Vitantonio, Inc. tendered payment to the estate to purchase the shares owned by William Vitantonio. On November 7, 2000, the executor refused the tender.

On July 23, 2001, one day short of the year anniversary of the death of William Vitantonio, the Appellees presented a claim to the executor based on, among other issues, the refused tender. At the time, R.C. 2117.06(B) provided that claims could be filed within one year of the date of death¹. The claim was promptly rejected on August 17, 2001.

The Appellees, pursuant to R.C. 2117.12, filed a complaint in the Common Pleas Court of Lake County, Ohio, on October 12, 2001, just prior to the expiration of the two month period within which such a complaint must be filed.

On June 26, 2003, almost two years after the complaint was filed, and three years after the death of Vitantonio, the Appellees dismissed the complaint. Just short of one year later on June 17, 2004, the Appellees refiled their complaint. In refileing, the Appellees relied on R.C. 2305.19, the savings statute.

Relying on *Barnes v. Anderson* (1984), 17 Ohio App.3d 142; and *Peltz v. Peltz* (Geauga County 1997) 96-G-2026, the trial court granted a motion to dismiss on December 13, 2004.

An appeal was taken to the Court of Appeals for the 11th Appellate District which reversed the trial court's decision on March 31, 2006. The court of appeals noted that this Court in *Allen*

¹That time limit has since been shortened to six (6) months.

v. McBride, 105 Ohio St.3d 21, 2004-Ohio-7112, overturned *Alakiotis v. Lancione* (1966), 12 Ohio Misc. 257, which had served as the basis for *Barnes, supra*. This appeal has been taken from the judgment of the court of appeals.

Since the court of appeals decision, the legislature has adopted R.C. 2107.76, which states that a will contest is not subject to R.C. 2305.19.

ARGUMENT

Proposition of Law I:

R.C. 2305.19, the savings statute, does not apply to actions on rejected claims against an estate.

R.C. 2305.19, Ohio's saving statute, provides in pertinent part as follows:

In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

In contrast, however, R.C. 2117.12, titled "Action on Rejected Claim Barred," provides as follows.

When a claim against an estate has been rejected in whole or in part but not referred to referees, or when a claim has been allowed in whole or in part and thereafter rejected, **the claimant must commence an action on the claim**, or that part of the claim that was rejected, **within two months after the rejection** if the debt or that part of the debt that was rejected is then due or within two months after that debt or part of the debt that was rejected becomes due, **or be forever barred from maintaining an action on the claim** or part of the claim that was rejected.... (Emphasis applied).

This appeal asks this Court to examine the tension between the expedited process contemplated for the treatment of claims and the extended time seemingly granted by the savings

statute. It is submitted that the provisions of the savings statute run contrary to the speed contemplated in a probate matter, and, therefore, should not apply. This argument is bolstered by the legislature's recent adoption of R.C. 2107.76(B) which specifically provides, "Section 2305.19 of the Revised Code does not apply to an action permitted by Section 2107.71 of the Revised Code to contest the validity of a will."

A. The Probate Process

The legislative scheme for handling a decedent's estate contemplates an accelerated process. Each step of the process provides remarkably short time periods for activity. The legislature has acted, in recent history, to further shorten those time periods.

As an example, R.C. 2117.06 calls for presentation of claims against an estate within six months from the date of death. Claims which are not promptly presented are "forever barred" as to all parties. It is critical to note that the six month period begins from the "death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during the six month period." Emphasis is placed on the prompt disposition of claims such that an estate need not be "open" before the time period begins to run. Similarly, the appointed fiduciary must respond to the claims "within thirty days after their presentation." It is also informative to note that the six month period had been shortened by the legislature from a one year period suggesting, again, the preference for an expedited process.

Similar short time periods appears elsewhere. R.C. 2107.19 provides the fiduciary with only two weeks, after probate of the will, to notify interested parties of the probate and an action to contest the will, pursuant to 2107.76 must be brought within three months after the fiduciary has filed a certificate indicating that all interested parties have been served with a notice of probate of the will. Again, this time period was reduced from four months to three in 2001, and as of June

15, 2006, even third parties who are not entitled to notice of probate of the will are limited by the three period within which to contest the will.

The fiduciary is given only three months within which to file an inventory, pursuant to R.C. 2115.02, and R.C. 2109.301 contemplates the filing of a final and distributive account of an estate within six months after the fiduciary has been appointed. This period of time, likewise, was shortened from nine months in 2001.

The statutory scheme dictated by the legislature demands speed and efficiency. Dissenting from the Lake County Court of Appeals decision in *In Re Estate of Kelsey*, 165 Ohio App. 3d 680, 2006-Ohio-1171, Judge O'Neill noted that there are "at least three overarching principles that govern the administration of probate estate. The first is that the general powers of the probate court are limited by statute.... The second principle is that the state of Ohio seeks to 'facilitate the orderly administration of estates.' The third and final principle is that the law favors speedy settlement of estates." (Citations omitted). This Courts Superintendence Rules, Sup. R. 78 (A), (B), (C) and (D) impose strict time limits and reporting requirements on fiduciaries and attorneys dealing with decedent's estates and dictate that the citation process shall be utilized to ensure compliance, imposing that process on both the fiduciary and the attorney of record.

The policy considerations for such an expedited process are clear. Failing prompt activity by the fiduciary, beneficiaries are deprived of the benefit of their distributive share, a surviving spouse may be in need of funds, claims against the decedent will pend and estate tax calculations will remain unsettled and the taxes unpaid.

Everything about the probate process suggests that estates are to be open for a short period of time, dealt with efficiently, and distributed promptly.

Even so, the legislature has provided reasonable periods of time for claimants against an estate to present the claim, have the claim acted upon, and, if necessary litigate the issue. As noted above, R.C. 2117.06 allows six months after the date of death for presenting a claim while R.C. 2117.07 may shorten that period if the fiduciary actually provides the notice to the potential claimant. The burden then shifts to the fiduciary to respond to the claim within thirty days pursuant to R.C. 2117.06(D).

The statute under consideration in this case, R.C. 2117.12, then requires the rejected claimant to “commence an action on the claim, or that part of the claim that was rejected, within two months after the rejection ... or be forever barred from maintaining an action on the claim or part of the claim that was rejected.” The language is even stronger than that typically found in a statute of limitation. For instance, R.C. 2305.10 provides that an action for bodily injury “shall be brought within two years after the cause of action accrues.” The additional admonition “or be forever barred” bolsters the policy advanced by the legislature. Prompt disposition in the probate process is inconsistent with the application of R.C. 2305.19 so as to allow the refile of an action on a rejected claim.

R.C. 2117.12 provides a very specific time limit, two months, which has been specified for filing the action on the claim. In *Stull v. Jentes* (1985), 24 Ohio App.3d 127, 128, the court noted that “the statutory purpose of requiring all suits on rejected claims to be brought within two months of the rejection is to facilitate the administration of estates and permit them to be settled and disposed without delay.” (Citations omitted.)

Application of the savings statute flies in the face of this purpose. Rather than provide speedy disposition of the estate, use of the saving statute, in this case, has allowed the Appellees

nearly three years to file their action after rejection of the claim. This is not consistent with the probate process.

B. Savings Statute

This Court has, on various occasions, examined the application of the savings statute as applied to certain specific causes of action.

In *Reese v. Ohio State Univ. Hosp.* (1983), 6 Ohio St. 3d. 162, this Court determined that an action brought in the Court of Claims commenced within the appropriate two year statute of limitations could be refiled, after a dismissal without prejudice and after the statute of limitations had run. This Court determined that the savings statute applied to allow refiling. The Court analyzed the matter utilizing a “new rights/new remedy” analysis and determined that the ability to bring an action in the Court of Claims was remedial and, therefore, the statute of limitations contained in the Court of Claims Act was subject to extension by the savings statute. This Court also noted that nothing contained in the Act prohibited use of the savings statute.

This Court, similarly, in *Lewis v. Connor* (1985), 21 Ohio St.3d 1, held that the savings statute applied to complaints brought to pursue appeals from the Industrial Commission. This Court using a similar analysis, determined that the appeal taken was, again, remedial, and therefore the savings statute applied. In footnote 3 to that case, this Court criticized the right/remedy dichotomy and suggested it may no longer be an appropriate distinction.

In *Osborne v. AK Steel/Armco Co.* 96 Ohio St. 3d 368, 2002-Ohio-4846, this Court held that the savings statute was likewise applicable to actions brought alleging age discrimination. This Court rejected the argument that a statute of limitations, created by a statute for a right unknown at the common law, precluded application of the savings statute and held, rather, that an action

brought under a remedial statute, provided it did not prohibit application of the savings statute, could take advantage of R.C. 2305.19.

Finally, in the case bearing most directly on this matter, this Court, in *Allen v. McBride* 105 Ohio St. 3d 21, 2004-Ohio-7112, determined that the savings statute applies to will contests. Restating the reasoning in *Osborne, supra*, this Court held that the causes of action in *Osborne* and in a will contest have been characterized both as a right and as a remedy. This Court, focused instead on “whether application of the savings statute so adversely effects the administration of the estate that the legislature could not have intended to apply the savings statute to will contest actions.” *Id.* at 25, ¶21. As noted in section A above, there are numerous adverse effects resulting from an extended estate administration.

This Court, in *Allen*, concluded with three points which, in light of recent legislative activity merit further consideration.

R.C. 2305.19 is a “broad statute of general application.” Without reference to the current version of R.C. 2107.76, it would not appear to be limited so as to avoid application to will contests.

As to this Court’s second point, R.C. 2107.76 has now been amended such that R.C. 2305.19 cannot be used in a will contest action. This appears to be the legislative response to *Allen*. The dissent in *Allen* suggested that the legislature had not originally carved out this exception as it was so well established in prior case law that an exception was not necessary. *Id.* at 29, ¶44.

Finally, this Court indicated that applying the savings statute to a will contest would require overruling *Osborne* and either overruling or limiting *Reese* and *Lewis*. At this point, however, the legislature has responded to *Allen*. Its response allows this Court to distinguish probate activities from the causes of action in *Osborne, Reese, and Lewis*. By eliminating application of the savings

statute from will contest actions, the legislature has reiterated its conviction to maintain a prompt and efficient method for administration of decedents' estates.

Unlike *Osborne, Reese, and Lewis* this Court can distinguish actions brought to enforce rejected claims. As noted above, the section authorizing the presentation of claims, R.C. 2117.06, not only provides that the claim must be presented within a proper time, but that failure to do so "forever bars" the claim. This is re-emphasized in R.C. 2117.12 which not only dictates that the action on the rejected claim must be commenced within two months of the rejection, but in the event it is not timely filed it is "forever barred." Accordingly, this Court can, without disturbing *Osborne, Reese, and Lewis* hold that the savings statute does not apply to actions on rejected claims.

As noted, the legislature has acted, in R.C. 2107.76, by specifically providing that the savings statute does not apply to an action to contest the validity of a will. It is submitted that by doing so, the legislature has indicated its recognition of the "over-arching principles that govern the administration of probate estates." *In Re Estate of Kelsey, supra.*

CONCLUSION

Procedures for administration of a decedents' estate have been crafted by the legislature to provide prompt and efficient administration and distribution of the estate for the benefit of the beneficiaries, creditors and governmental entities entitled to estate taxes. As the legislature has mandated that the saving statute will not apply to will contest actions, this Court should similarly determine that actions brought pursuant to R.C. 2117.12 should not cause estate administration to

be prolonged through the use of R.C. 2305.19, the saving statute. For these reasons Appellant urges this Court to reverse the decision of the 11th Appellate District

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of this Merit Brief of Appellant Gary Baxter, Executor of Estate of William Vitantonio, Deceased was sent by ordinary United States mail on November 3, 2006, to the following:

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Counsel for Appellant, Gary Baxter, Executor

APPENDIX

IN THE SUPREME COURT OF OHIO

VITANTONIO, INC., ET AL.,

Appellees,

v.

GARY BAXTER, Executor of the estate of
William Vitantonio, Deceased,

Appellant

06-0952

On Appeal from the Lake County Court of
Appeals, Eleventh Appellate District

Court of Appeals
Case No. 2005-L-004

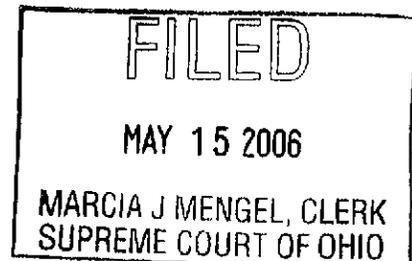
NOTICE OF APPEAL OF APPELLANT GARY BAXTER, EXECUTOR

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Notice of Appeal of Appellant Gary Baxter, Executor

Appellant Gary Baxter, Executor of the Estate of William Vitantonio, Deceased, hereby gives notice of appeal to the Supreme Court of Ohio from the judgement of the Lake County Court of Appeals, Eleventh Appellate District, entered in the Court of Appeals case No. 2005-L-004 on March 31, 2006.

This case is one of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees on May 12, 2006.



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STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

VITANTONIO, INC., et al.,

Plaintiffs-Appellants,

- vs -

JUDGMENT ENTRY

CASE NO. 2005-L-004

GARY BAXTER, EXECUTOR OF THE
ESTATE OF WILLIAM VITANTONIO,
DECEASED,

Defendant-Appellee.

FILED
COURT OF APPEALS

MAR 31 2006

LYNNE L. MAZEIKA
CLERK OF COURT
LAKE COUNTY, OHIO

For the reasons stated in the opinion of this court, appellants' assignment of error has merit. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed and remanded for further proceedings.

Donald R. Ford

PRESIDING JUDGE DONALD R. FORD

FOR THE COURT

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

VITANTONIO, INC., et al.,

OPINION

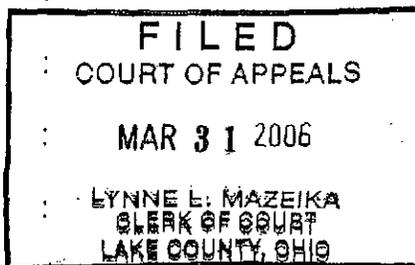
Plaintiffs-Appellants,

CASE NO. 2005-L-004

- VS -

GARY BAXTER, EXECUTOR OF THE
ESTATE OF WILLIAM VITANTONIO,
DECEASED,

Defendant-Appellee.



Civil Appeal from the Court of Common Pleas, Case No. 04 CV 001203.

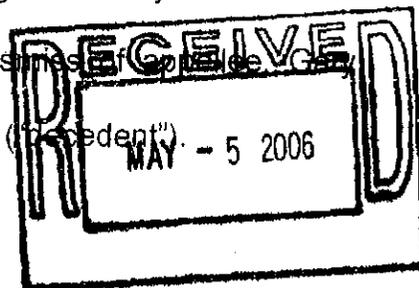
Judgment: Reversed and remanded.

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DONALD R. FORD, P.J.

{¶1} Appellants, Vitantonio, Inc., Wickliffe Floral, Inc., Gloria Vitantonio, and Louis J. Vitantonio, appeal from a December 13, 2004 judgment entry of the Lake County Court of Common Pleas, granting the motion to dismiss filed by Gary Baxter, Executor of the Estate of William Vitantonio, Deceased (Respondent).



{¶2} The decedent passed away on July 24, 2000. He had been a minority shareholder in and treasurer of Vitantonio, Inc. He was also president of and a majority shareholder of Wickliffe Floral, Inc.

{¶3} On July 23, 2001, appellants presented claims against the estate of the decedent within the one-year time limit to do so prescribed by R.C. 2117.06(B).¹ Appellee rejected appellants' claims on August 17, 2001, pursuant to R.C. 2117.06(D). On October 12, 2001, within the two-month time limit set forth in R.C. 2117.12 after a claim is rejected, appellants filed an action in the Lake County Court of Common Pleas, alleging, inter alia, nonfeasance, malfeasance, negligence, and breach of fiduciary duty concerning how the decedent managed Wickliffe Floral, Inc. The complaint also alleged that the decedent failed to pay rent and utilities for his apartment that was owned by appellants. Appellee filed an answer and counterclaim.

{¶4} On June 26, 2003, appellants voluntarily dismissed their complaint. On July 2, 2003, appellee voluntarily dismissed his counterclaim.

{¶5} On June 17, 2004, pursuant to R.C. 2305.19, Ohio's savings statute, appellants refiled their complaint, which was essentially identical to their original complaint. Appellee filed a motion to dismiss pursuant to Civ.R. 12(B)(6) on July 14, 2004. On December 13, 2004, the trial court granted appellee's motion to dismiss. It is from that judgment that appellants appeal and make the following sole assignment of error:

1. At the time of appellants' presentment of claims against the estate, the time limit set forth in R.C. 2117.06(B) was one year. On April 8, 2004, R.C. 2117.06 was amended. The time limit to present claims against the estate is now six months.

{¶6} “The trial court erred to the prejudice of [appellants] in granting [appellee’s] motion to dismiss.”

{¶7} In their assignment of error, appellants posit one issue for review: “[w]hether [R.C. 2305.19], Ohio’s saving statute, is applicable to claims filed under [R.C. 2117.12].” Appellants argue that a recent Supreme Court of Ohio decision, *Allen v. McBride*, 105 Ohio St.3d 21, 2004-Ohio-7112, holding that R.C. 2305.19 applies to will contests, should be extended to claims against the estate. For the reasons that follow, we agree.

{¶8} Under Civ.R. 12(B)(6), a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted. Our standard of review of a trial court’s dismissal under Civ.R. 12(B)(6) is de novo. *Evans Property, Inc. v. Altieri*, 11th Dist. No. 2003-G-2494, 2004-Ohio-2305, at ¶11. Under de novo review, all factual allegations of the complaint must be accepted as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Id.* at ¶12. Thus, in order to grant a dismissal, it must appear beyond doubt that plaintiffs cannot prove any set of facts entitling them to relief. *Id.*

{¶9} On July 23, 2001, R.C. 2117.06(B) provided in part that, “[a]ll claims shall be presented within one year after the death of the decedent[.]” An “*** executor or administrator shall allow or reject all claims *** within thirty days after their presentation ***.” R.C. 2117.06(D). “When a claim against an estate has been rejected ***, the claimant must commence an action on the claim *** within two months [after the rejection] *** or be forever barred from maintaining an action on the claim ***.” R.C. 2117.12. In the case sub judice, it is undisputed that appellants timely presented their

claims against the estate of the decedent, and then subsequent to appellee's rejection of such claims, appellants timely commenced an action in the Lake County Court of Common Pleas.

{¶10} The issue in this appeal arose after appellants voluntarily dismissed their complaint and refiled it within the one-year time period set forth by R.C. 2305.19. R.C. 2305.19 provides in pertinent part that when a claim "fails otherwise than upon the merits," a new action may be commenced "within one year after the date of the *** failure otherwise than upon the merits ***." Appellants argue that this provision permits them to refile their claims against the decedent's estate. Appellee argues, and the trial court agreed, that Ohio's savings statute is not applicable because the two-month time limitation mandated by R.C. 2117.12 bars appellants' claims.

{¶11} The savings statute "is a remedial statute and is to be given a liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure." *Cero Realty Corp. v. Am. Manufacturers Mut. Ins. Co.* (1960), 171 Ohio St. 82, paragraph one of the syllabus. In order for the savings statute to apply, the initial action must have been filed within the applicable statute of limitations and the action must have failed otherwise than on its merits.² R.C. 2305.19(A). "A voluntary dismissal pursuant to Civ.R. 41(A)(1) constitutes a failure otherwise than upon the merits within the meaning of the savings statute." *Fryinger v. Leech* (1987), 32 Ohio St.3d 38, paragraph two of the syllabus.

2. R.C. 2305.19 was amended, effective May 31, 2004. Under the old statute, there was an additional requirement: the "failure otherwise than upon the merits" must have occurred *after* the statute of limitations had expired. However, the legislature eliminated the language that required this. Further, under the amended act, a new action may be commenced within one year after the dismissal "or *within the period of the original applicable statute of limitations, whichever occurs later.*" R.C. 2305.19(A).

{¶12} In the case at hand, the trial court based its decision to dismiss appellants' complaint on two cases decided by this court: *Barnes v. Anderson* (1984), 17 Ohio App.3d 142 and *Peltz v. Peltz* (June 27, 1997), 11th Dist. No. 96-G-2026, 1997 Ohio App. LEXIS 2826. In *Barnes*, we relied on *Alakiotis v. Lancione* (1966), 12 Ohio Misc. 257, and held that the savings statute does not apply to will contest actions. *Barnes*, paragraph two of the syllabus. In *Peltz*, we applied *Barnes* and upheld the trial court's dismissal of a second will contest action that was filed pursuant to R.C. 2305.19 after the first one had been dismissed voluntarily. *Peltz* at 7-8. Therefore, the rule of law was: if a will contest was voluntarily dismissed, a plaintiff could not refile within the one-year time limits under R.C. 2305.19, because the four-month statute of limitations set forth in R.C. 2107.76, governing will contests, prohibited the application of R.C. 2305.19.

{¶13} Although the trial court here followed the logic of *Barnes* and *Peltz*, it noted that, "[t]he Tenth District Court of Appeals in *Allen v. McBride*, 10th Dist. No. 03AP-432, 2003-Ohio-7158, at ¶23 held otherwise. The Ohio Supreme Court has accepted jurisdiction to resolve the conflict concerning the applicability of the savings statute to will contests." In fact, on December 30, 2004, seventeen days after the trial court's dismissal on December 13, the Supreme Court of Ohio released its opinion in *Allen*.

{¶14} In *Allen*, the Supreme Court overturned *Alakiotis*, "the seminal common pleas court decision" which held that R.C. 2305.19 did not apply to will contest actions, and the cases that followed it, including *Barnes* and *Peltz*. *Allen* at syllabus; ¶8-9. In doing so, the Supreme Court overturned "longstanding authority in Ohio, going back five

decades,” of “existing precedent and public policy considerations” which held “that the saving statute does not apply to will-contest actions.” *Allen*, supra, at ¶38 (O'Donnell's dissenting opinion).

{¶15} Thus, the question that we are presented with in the instant appeal is whether the holding in *Allen* should be extended to apply to claims against an estate. Appellee argues that *Allen* is not controlling because R.C. 2305.19 does not apply to claims against the estate. We disagree. After a close review of the Supreme Court's decision in *Allen*, we conclude that if the threshold requirements of R.C. 2305.19 are met, then it should apply to save claims against the estate.

{¶16} In *Allen*, the Supreme Court reviewed three of its prior decisions, *Reese v. Ohio State Univ. Hosp.* (1983), 6 Ohio St.3d 162, *Lewis v. Connor* (1985), 21 Ohio St.3d 1, and *Osborne v. AK Steel/Armco Steel Co.*, 96 Ohio St.3d 368, 2002-Ohio-4846, recognizing that these three decisions “call *Alakiotis's* ruling into question.” *Allen* at ¶10-12, 14. In all three cases, the Supreme Court held that R.C. 2305.19 was applicable to save the claim in question. In *Allen*, the Supreme Court extended its reasoning in *Reese*, *Lewis*, and *Osborne* to will-contest actions.

{¶17} First, in *Reese*, the Supreme Court held that R.C. 2305.19 was applicable to save suits against the state in the Court of Claims. *Allen* at ¶11. In *Lewis*, the Supreme Court held that R.C. 2305.19 was applicable to save workers' compensation complaints filed in the common pleas court, if the claimant had filed the original claim within sixty days after receipt of the Industrial Commission's decision denying the claim. *Id.* at ¶12. Finally and most recently, in *Osborne*, the Supreme Court held that R.C. 2305.19 applies to save age-discrimination claims. *Id.* at ¶14.

{¶18} In *Allen*, the Supreme Court quoted itself in *Osborne*: “[l]ike the court in *Lewis*, ‘we decline to hold that *Osborne* has entered the ‘twilight zone’ where dismissal of her complaint without prejudice after expiration of the limitation period of (the relevant statute) has the same effect as a dismissal on the merits, barring any further action with respect to the same claim.’” *Allen* at ¶15. Further, the Supreme Court emphatically made it clear, fully agreeing with the court of appeals, that, “*Osborne* eviscerated the rationale underpinning *Alakiotis* and the appellate decisions relying on it.” *Allen* at ¶16, quoting *Allen*, 10th Dist. No. 03AP-432, at ¶19.

{¶19} The Supreme Court recognized, as did the Tenth District, that will contests are distinguishable from age discrimination claims and workers' compensation claims, which are terminated if the complaint is dismissed. *Id.* at ¶21. “[W]hen a will contest is dismissed, [however], the administration of the will continues.” *Id.* Nevertheless, the Supreme Court extended the applicability of R.C. 2305.19 to will contest actions. It reasoned that “this distinction is not significant enough to remove the case from the ambit of *Osborne*'s analysis. *** ‘The issue before us (reduces) to whether application of the savings statute so adversely affects the administration of the estate that the legislature could not have intended to apply the savings statute to will contest actions. In the final analysis, the adverse effects are no greater than those inherent in the administration of an estate in the absence of the savings statute, and thus, we conclude the savings statute applies to plaintiff's dismissal of her will contest action.’” *Id.*

{¶20} The Supreme Court further acknowledged that “[w]ithout question, the statute of limitations for will contests *** is short.” *Id.* at ¶23. It reasoned that, “[i]n the case of an expedited estate, however, the administration of the estate may be

completed before the statute of limitations for a will contest has expired. A successful will contest, in such an instance, may require that, at least in part, the administration of the estate be undone, much as might occur if a refiled will contest complaint proved to be successful.” Id. Further, the Supreme Court noted that, “[i]ndeed, because nothing requires that an estate be held open to determine if a dismissed will contest eventually will be refiled, the failure to refile before the administration of the estate is completed arguably may preclude further action and instead become part of the risk a will contestant takes in dismissing a will contest.” Id.

{¶21} The Supreme Court concluded with three final points: “First, R.C. 2305.19 is a broad statute of general application and on its face applies to save the [will contest]. There is nothing within that statute that could even remotely be read to proscribe its application to will-contest actions.

{¶22} “Second, there is no indication within R.C. 2107.76 that the saving statute does not apply to will-contest actions. Once a will-contest claim is validly filed within the applicable (now three-month) period, that statute has been satisfied on its face, and later developments are beyond the statute’s scope. Given the generality of R.C. 2305.19 and the inapplicability of R.C. 2107.76 once a will contest is properly commenced, we determine that normal principles of statutory construction require that R.C. 2305.19 should apply to will-contest actions. ***

{¶23} “Finally, adopting the approach advocated by defendants would require that we overrule *Osborne* and would also require that we either overrule or severely limit *Reese* and *Lewis*. Given all the reasons set forth above, we decline to repudiate those cases and instead reaffirm them. Plaintiff Allen’s voluntary dismissal without prejudice

under Civ.R. 41(A)(1)(a) should not place her in the 'twilight zone' that bars any recovery, and R.C. 2305.19 operates to save her ability to pursue her claim." *Id.* at ¶¶27-29. (Citation omitted.)

{¶24} In the case at bar, we see no reason why the same rationale employed by the Supreme Court in *Allen* should not be extended to save claims against the estate.

{¶25} Appellee asserts, citing *Stull v. Jentes* (1985), 24 Ohio App.3d 127, 128, that "the statutory purpose of requiring all suits on rejected claims to be brought within two months of the rejection is to facilitate the administration of estates and to permit them to be settled and disposed of without delay." Appellee argues that "[t]o apply the savings statute in this instance would clearly frustrate the purpose of the statute by extending the period of administration of estates." However, the Supreme Court explicitly addressed this concern, albeit with regard to will contests. *Allen*, *supra*, at ¶¶20-23. Thus, we see no logical reason not to extend the reasoning to claims against the estate.

{¶26} Appellee further argues that the Supreme Court's holding in *Allen* should not apply to claims against the estate because the holding was "very narrow and limited to will contest actions." Appellee asserts that "[a]ppellants have attacked this [c]ourt's decision in *Barnes v. Anderson*, *supra*, which has been effectively overruled by the decision in *Allen v. McBride*[,] *** however, *Barnes* and *Allen* dealt with will-contest actions, which *** are distinguishable from an action against an estate which is at issue in the case at bar." Ironically, appellee argued the converse in his motion to dismiss appellants' refiled claims. In fact, appellee stated in his reply brief to appellants' opposition brief to his motion, that in moving for dismissal, he "relied primarily on the

Eleventh Appellate District decision in [*Barnes*]" and concluded that "the *Barnes* holding *** remains dispositive of the issue before this [c]ourt." We conclude that appellee's reasoning in the lower court, with respect to *Barnes* being dispositive on the issue herein, is more persuasive. As such, with the rule of law in *Barnes* now in the "twilight zone", so is appellee's argument on appeal.

{¶27} Appellee also vainly attempts to distinguish claims against the estate from will contest actions. He argues that, "[u]nlike the statutes providing remedies for age discrimination, as addressed in *Osborne v. AK Steel/Armco Steel Co.*, supra., and will contest actions, as addressed in *Allen*, the statute at issue in this case is clearly not 'remedial.'" We disagree entirely.

{¶28} First, "the Supreme Court candidly admitted it was 'unable to determine the continuing justification for the "right/remedy" dichotomy *** [and, that] [t]he trend now is to ameliorate the harsh consequences of the rule that under no circumstances can the time limitation be extended ***.'" *Allen*, 10th Dist. No. 03AP-432, at ¶15, quoting *Lewis*, supra, at 3. Further, "the distinction between a remedial statute of limitations and a substantive statute of limitations is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe. Each type of statute, after all, still falls into the category of a statute of limitations. And this is none the less true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. (***) Here the proper approach is not technical and conceptualistic. Rather, we think it should be realistic and humane." *Id.*

{¶29} In addition, while we see the obvious distinctions between workers' compensation claims and age discriminations suits as compared to will contest actions (and claims against the estate for that matter), we see no significant distinction between will contest actions and claims against the estate for the purposes of this appeal. If the Supreme Court can extend its reasoning applied in cases dealing with workers' compensation claims and age discrimination claims to will contest actions, then we cannot conclude that the same rationale should not be extended to claims against the estate.

{¶30} Just as the Supreme Court reasoned in *Allen* with respect to will contests, we conclude here that there is nothing in the savings statute that would proscribe its application to claims against the estate, nor is there anything in the presentation of claims against the estate statute that indicates the savings statute should not apply. Thus, since appellants met the threshold requirements of R.C. 2305.19, presenting their claims against the estate within the statutory time limits of R.C. 2117.06, and then subsequently commenced the initial action in the common pleas court within the time frame set forth in R.C. 2117.12, we will not send appellants' claims to the "twilight zone" simply because they voluntarily dismissed them initially.

{¶31} We are mindful of Am.Sub.H.B. No. 144, which proposes legislation to provide that the savings statute does not apply to a civil action to contest the validity of a will. We presume that this legislation is in reaction to the Supreme Court's decision in *Allen*. However, we are an error court and as such, we must abide by decisions of the Supreme Court on the application of law and logic on such issues which are in the nature of *sui generis*. In addition, at the present time, the proposed legislation is not

effective. Further, it does not address the issue that we are dealing with in the case sub
judice; i.e., whether the savings statute applies to save claims against the estate. Thus,
we will be guided by the rationale set forth in *Allen*.

{¶32} Accordingly, based upon the foregoing reasons, we conclude that
appellants' assignment of error has merit. As such, the judgment of the Lake County
Court of Common Pleas is reversed and remanded for further proceedings consistent
with this opinion.

WILLIAM M. O'NEILL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.

IN THE COURT OF COMMON PLEAS

LAKE COUNTY

FILED

2004 DEC 13 P 2:50

LYNNE L. MAZEIKA
LAKE CO CLERK OF COURT

VITANTONIO, INC. , et al.

Plaintiffs,

vs.

GARY BAXTER, Executor of the
Estate of William Vitantonio, Deceased

Defendant.

DOCKETED

CASE NO. 04 CV 001203

OPINION AND JUDGMENT ENTRY

December 13, 2004

This matter is before the court to address defendant's motion to dismiss the plaintiffs' complaint pursuant to Civ.R. 12(B)(6) on the grounds that it is barred by R.C. 2117.12 which governs claims against estates. Plaintiffs Vitantonio, Inc., Wickliffe Floral, Inc. Louis J. Vitantonio and Gloria Vitantonio filed a brief in opposition arguing that R.C. 2305.19, Ohio's saving statute, is applicable to claims filed under R.C. 2117.12. Defendant filed a reply brief followed, in turn, by a surreply brief by plaintiffs.

This case arose after the death of William Vitantonio on July 24, 2000. Vitantonio's will was admitted to probate in Lake County and Gary Baxter was appointed as executor. Vitantonio was a minority shareholder and treasurer of plaintiff Vitantonio, Inc. He also was the president and majority shareholder in Wickliffe Floral, Inc. On November 4, 2000, pursuant to a stock purchase agreement, Vitantonio, Inc. tendered a payment to the Estate of William Vitantonio in return for his fifty shares. This tender was refused on November 7, 2000. On July 23, 2001, plaintiffs filed a claim against the estate which was rejected on August 17, 2001. This claim was filed within the one year time period for filing claims against an estate in accordance with R.C. 2117.06(B). Plaintiffs then filed a five count complaint (Case No. 01 CV 001602) against the estate on October 12, 2001. This complaint essentially alleged nonfeasance, malfeasance, negligence and breach of fiduciary duty concerning William Vitantonio's management of Wickliffe Floral, Inc. The complaint also alleged that William Vitantonio failed to pay rent and utilities for his apartment which was owned by Vitantonio, Inc. This complaint was filed within the two month time period after the claim was rejected in

accordance with R.C. 2117.12. The estate filed an answer and counterclaimed against plaintiff Louis J. Vitantonio essentially for mismanagement of the U Bar Lounge, another family enterprise of which William Vitantonio was a shareholder. Plaintiffs voluntarily dismissed without prejudice this complaint on June 26, 2003 which was followed by the voluntary dismissal without prejudice of the counterclaim.

On June 17, 2004, plaintiffs refiled their complaint as Case No. 04 CV 001203. Defendant thereafter moved to dismiss, claiming the complaint was barred as untimely pursuant to R.C. 2117.12. At issue is whether R.C. 2305.19, Ohio's saving statute, is applicable. The saving statute provides:

In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date.

Plaintiffs argue that since they refiled within one year and since their action failed "other than on the merits" they should be permitted to refile under R.C. 2305.19.

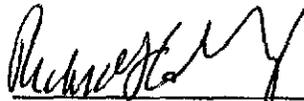
The court disagrees. The Eleventh District Court of Appeals in two cases held that R.C. 2305.19 does not apply to will contest actions. See *Barnes v. Anderson* (June 18, 1984), Ashtabula App. No. 1162, unreported at paragraph two of syllabus; *Peltz v. Peltz* (June 27, 1997), Geauga App. No. 96-G-2026, unreported at 3. See, also, *Cross v. Coney* (July 12, 2000), Highland App. No. 99CA5, unreported at 3.¹ The court of appeals reasoned that while trial courts should decide cases on their merits whenever possible, it is also true that there must be some finality in judgments and that there is a need to promptly administer estates. The court of appeals found that R.C. 2305.19 did not apply to a cause of action created by statute which is unknown to the common law and which specifically contained its own statute of limitations. This court finds the logic of *Barnes* and *Cross* equally applicable here. R.C. 2117.12 set a relatively short time period (two months) for filing a claim against an estate. Applying R.C. 2305.19 to presentment of claims against an estate would lead to unnecessary delays in

¹The Tenth District Court of Appeals in *Allen v. McBride*, 10th Dist. No. 03AP-432, 2003-Ohio-7158, at ¶ 23 held otherwise. The Ohio Supreme Court has accepted jurisdiction to resolve the conflict concerning the applicability of the saving statute to will contests.

the administration of estates, the very thing the two month limitation in R.C. 2117.12 was meant to prevent.

Defendant's motion to dismiss the plaintiffs' complaint pursuant to Civ.R. 12(B)(6) on the grounds that it is barred by R.C. 2117.12 is granted. Costs are assessed against plaintiffs Vitantonio, Inc., Wickliffe Floral, Inc., Louis J. Vitantonio and Gloria Vitantonio.

IT IS SO ORDERED.



RICHARD L. COLLINS, JR.
Judge of the Court of Common Pleas

Copies:

George C. Zucco, Esq.

Richard D. DiCicco, Esq.

Jack Kurant, Esq.

Final Appenable Order
Clerk to serve
pursuant to
Civ.R. 58(B).



Peltz v. Peltz Ohio App. 11 Dist., 1997. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Geauga County.

Robert D. PELTZ, et al., Plaintiff-Appellant, v.

Edward J. PELTZ, Individually and as Executor of the Estate of Jeanette H. Rusk, Deceased, Defendant-Appellee.

No. 96-G-2026.

June 27, 1997.

Civil Appeal From Court of Common Pleas, Probate Division Case No. 96 PC 000169.

ATTY. WILLIAM T. WHITE, WHITE & BARTKO CO., L.P.A., 1382 West Ninth Street, # 410, Cleveland, OH 44113, (For Plaintiff-Appellant).

ATTY. GARY H. ROSENTHAL, The Match Works Building, 8500 Station Street, # 280, Mentor, OH 44060, (For Defendant-Appellee).

FORD, P.J., NADER, J., O'NEILL, J.

OPINION

FORD, P.J.

*1 In this accelerated appeal, appellant, Robert D. Peltz, appeals from a judgment of the Geauga County Court of Common Pleas, Probate Division, dismissing the will contest complaint of appellant and co-plaintiff, Constance Archbold ("Archbold"), against appellee, Edward J. Peltz, individually, and as executor of the estate of Jeanette H. Rusk ("Rusk").^{FNI}

^{FNI} Archbold is not a party to the instant appeal.

Appellant, appellee, and Archbold are the sole heirs at law of Rusk, who died on January 24, 1996. Rusk's will was admitted to probate on March 4, 1996. Appellant and Archbold, as co-plaintiffs, filed a complaint on April 9, 1996, alleging that Rusk's will was invalid due to Rusk's purported lack of testamentary capacity to execute the will and appellee's procurement of the will through fraud and undue influence. The co-plaintiffs' first request for production of documents was filed on the same date. On May 10, 1996 appellee filed his answer, denying the allegations, and his affirmative defense, stating that appellant's and Archbold's omission from Rusk's will was directly influenced by their own conduct, and not appellee's.

In an order dated June 18, 1996, the trial court set the matter for pretrial on July 23, 1996. Appellee's deposition of appellant and Archbold was originally scheduled for July 9, 1996, and notice of the scheduled deposition was mailed to appellant and Archbold on June 20, 1996. On July 8, 1996, appellant and Archbold filed a motion for a protective order, contending that appellee's counsel had refused to reschedule the deposition despite knowledge of the co-plaintiffs' attorney's schedule conflict. In a judgment entry dated July 9, 1996, the trial court granted the co-plaintiffs' motion for a protective order, and ordered that the deposition "be rescheduled to a mutually convenient time." In the same entry, the court also *sua sponte* continued the pretrial from July 23, 1996, to October 22, 1996,

and ordered that the parties complete discovery by September 30, 1996, file witness and exhibit lists by October 1, 1996, and exchange expert reports by that date. The judgment further stated that “[f]ailure to comply with this pretrial order may result in the dismissal of the complaint * * * [.]”

On October 22, 1996, appellee moved the court to grant summary judgment, averring that the co-plaintiffs had not presented any evidence to support their claims concerning lack of testamentary capacity, fraud, and undue influence. Appellee also asserted that co-plaintiffs had failed to submit to oral deposition.^{FN2} On the same date, the trial court filed its judgment entry, stating the court's finding that plaintiffs and defendant had failed to comply with the court's pretrial order requiring the parties to complete discovery before the appointed date. The court also found that neither party had filed witness or exhibit lists. Accordingly, the court dismissed the case *without prejudice* for failure to prosecute. Civ.R. 41(B)(1) and (3). Appellant filed a motion for relief from judgment on November 20, 1996, which was overruled by the trial court on December 6, 1996.

FN2. Appellee's affidavit, attached to the summary judgment motion, states that appellee had successfully prosecuted a claim on a promissory note between Clover Distributors, Inc. and Rusk, and received a cognovit note judgment against Clover Distributors in the amount of \$94,191.41. The note arose from a transaction in which Rusk and appellee transferred their respective interests in Clover Distributors to appellant. A second affidavit, from Attorney William DePalma, attested

that Rusk had executed her will with testamentary capacity.

*2 Appellant timely appealed, and raises the following single assignment of error:

“The trial court deviated from the law and committed reversible error when it denied [appellant] his basic right to trial by dismissing his case.”

As a matter of prologue, we note that appellant has failed to comply with Loc.R. 12(C)(4)(a) based on the omission of the record reference in the assignment of error. Further, appellant's differently worded versions of the assignment of error, in the table of contents and the body of the brief, derogates from Loc.R. 12(C)(4). Although the instant appeal is subject to *sua sponte* dismissal by this court under Loc.R. 12(E) for failure to comply with this rule, in the interest of justice we will summarily review appellant's assigned error.

Appellant contends that the trial court abused its discretion by dismissing his case. He also contends that the trial court committed a mistake of fact and reversible error by denying his basic right to a trial. These arguments are without merit.

The record indicates that the trial court gave appellant and Archbold proper notice of the potential dismissal through its July 9, 1996 order. Civ.R. 41(B)(1). See Ohio Furniture Co. v. Mindala (1986), 22 Ohio St.3d 99, 101, 488 N.E.2d 881. Notwithstanding the unambiguous directive, neither appellant nor Archbold provided appellee with the required lists, nor did either of them submit to oral deposition. Additionally, nothing in the record demonstrates that appellant's and Archbold's noncompliance was justified. Clearly,

appellant violated the trial court's pretrial discovery order by failing to provide witness and exhibit lists by the required date and failing to appear for the rescheduled deposition. Thus, the trial court was authorized to effect the discovery sanction by dismissing the case. Civ.R. 37(B)(2)(c) and (D).

We are not persuaded by appellant's assertion that the trial court's dismissal of his case was "meant to expedite settlement" by imposing a penalty which effectively forced "the expense and aggravation of refileing the lawsuit at a later date if settlement was unsuccessful." ^{FN3} Nothing in the record before us substantiates this contention.

FN3. In the memorandum accompanying the motion for relief from judgment, appellant stated that appellee and Archbold had reached a settlement. Appellant also asserted that no further discovery on the part of the co-plaintiffs was necessary.

By dismissing appellant's will contest action *without prejudice*, under Civ.R. 41(B)(3), the court presumably intended to adopt a lenient, accommodative attitude toward appellant, despite his failure to comply with the court's pretrial order. That goal, however, was not accomplished. In Barnes v. Anderson (1984), 17 Ohio App.3d 142, 478 N.E.2d 248, the plaintiff voluntarily dismissed a will contest action, and then unsuccessfully attempted to revive the action after the four-month statute of limitations under R.C. 2107.76 had expired. On appeal, Barnes, appellant, argued that "the probate court erred in its construction and application of R.C. 2305.19, the result of which was a denial of the opportunity of the appellant to file a second will contest

action." *Id.* at 144, 478 N.E.2d 248. In rejecting that argument, this court stated:

*3 "Alakiotis v. Lancione (C.P.1966), 12 Ohio Misc. 257 [41 O.O.2d 381], forecloses the application of R.C. 2305.19 to a case of this kind. The case holds * * *:

" 'An action to contest a will was unknown at common law and has been created by Section 2741.01, Revised Code.

" 'The six-month period established in Section 2741.09, Revised Code, for the commencement of a will contest action is a part of the right of action.

" 'The savings clause of Section 2305.19, Revised Code, for commencing a new action when a suit has failed otherwise than on the merits, is not available in regard to a will contest action.'

"(R.C. 2741.09 was repealed in 1976 and was replaced with R.C. 2107.76.)

"Inasmuch as R.C. 2305.19 does not apply, the appellant's cause of action must be viewed in light of R.C. 2107.76 * * * [.]"

Here, appellant cannot refile his will contest action because the presently applicable four-month filing period has already expired. Further, he is precluded from using the savings statute since the General Assembly intended the specific, four-month time limit set forth in R.C. 2107.76 to take precedence over the general one-year limit in R.C. 2305.19. The result of the court's action in the instant case is that appellant is time-barred from reviving his will contest action. Although the court stated that the action was dismissed "without prejudice" in fact, the case was effectively dismissed "with prejudice."

While we are mindful of appellant's quandary, it is important to recognize that this chain of events was triggered by appellant's failure to comply with the trial

court's order. We view the trial court's dismissal of the case as a discovery sanction, pursuant to Civ.R. 37, that was justifiably imposed as a result of appellant's own noncompliant, dilatory conduct. The fact that appellant cannot refile the will contest action is unfortunate, but the court's underlying decision is not without a legal basis.

Finally, appellant's argument that "[t]he trial court deviated from the law and committed a mistake of fact" is groundless. "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. * * * " (Citations omitted.) Griffey v. Rajan (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. A court of record speaks only through its journal. In re Adoption of Gibson (1986), 23 Ohio St.3d 170, 173, fn. 3, 492 N.E.2d 146. "A presumption of validity attends the trial court's action." Volodkevich v. Volodkevich (1989), 48 Ohio App.3d 313, 314, 549 N.E.2d 1237.

Civ.R. 60(B) may not be used as a substitute for an appeal. Doe v. Trumbull Cty. Children Services Bd. (1986), 28 Ohio St.3d 128, 131, 502 N.E.2d 605. "A mistake by the trial court in applying the law is not the type of 'mistake' contemplated by Civ.R. 60(B)(1) or any other section of Civ.R. 60(B), rather it is the basis for a timely appeal." McNair v. Dowler (Dec. 20, 1991), Ashtabula App. No. 90-A-1574, at 1, (Christley, J., concurring). See, also, May v. Department of Hwy. Safety (June 13, 1995), Franklin App. No. 94API12-1743, unreported, at 2, 1995 WL 360285, citing Antonopoulos v. Eisner (1972), 30 Ohio App.2d 187, 284 N.E.2d 194; Taylor v. Taylor (Mar. 27, 1987), Lawrence App. No.

1801, unreported, at 4, 1987 WL 8854; Argen v. Union Sav. Assn. (June 3, 1982), Cuyahoga App. No. 43887, unreported, at 1, 1982 WL 2371.

*4 Accordingly, the trial court did not abuse its discretion by dismissing appellant's case, and it properly overruled appellant's motion for relief from judgment. For the foregoing reasons, appellant's assignment of error is without merit, and the judgment of the trial court is affirmed.

NADER and O'NEILL, JJ., concur.

Ohio App. 11 Dist., 1997.

Peltz v. Peltz

Not Reported in N.E.2d, 1997 WL 402373
(Ohio App. 11 Dist.)

END OF DOCUMENT

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

▣ Chapter 2107. Wills (Refs & Annos)

▣ Probate

➔**2107.19 Notice of admission of will to probate**

(A)(1) Subject to divisions (A)(2) and (B) of this section, when a will has been admitted to probate, the fiduciary for the estate or another person specified in division (A)(4) of this section shall, within two weeks of the admission of the will to probate, give a notice as described in this division and in the manner provided by Civil Rule 73(E) to the surviving spouse of the testator, to all persons who would be entitled to inherit from the testator under Chapter 2105. of the Revised Code if the testator had died intestate, and to all legatees and devisees named in the will. The notice shall mention the probate of the will and, if a particular person being given the notice is a legatee or devisee named in the will, shall state that the person is named in the will as beneficiary. A copy of the will admitted to probate is not required to be given with the notice.

(2) A person entitled to be given the notice described in division (A)(1) of this section may waive that right by filing a written waiver of the right to receive the notice in the probate court. The person may file the waiver of the right to receive the notice at any time prior to or after the will has been admitted to probate.

(3) The fact that the notice described in division (A)(1) of this section has been given, subject to division (B) of this section, to all persons described in division (A)(1) of this section who have not waived their right to receive the notice, and, if applicable, the fact that certain persons described in that division have waived their right to receive the notice in accordance with division (A)(2) of this section, shall be evidenced by a certificate that shall be filed in the probate court in accordance with division (A)(4) of this section.

(4) The notice of the admission of the will to probate required by division (A)(1) of this section and the certificate of giving notice or waiver of notice required by division (A)(3) of this section shall be given or filed by the fiduciary for the estate or by the applicant for the admission of the will to probate, the applicant for a release from administration, any other interested person, or the attorney for the fiduciary or for any of the preceding persons. The certificate of giving notice shall be filed not later than two months after the appointment of the fiduciary or, if no fiduciary has been appointed, not later than two months after the admission of the will to probate, unless the court grants an extension of that time. Failure to file the certificate in a timely manner shall subject the fiduciary or applicant to the citation and penalty provisions of section 2109.31 of the Revised Code.

(B) The fiduciary or another person specified in division (A)(4) of this section is not required to give a notice pursuant to division (A)(1) of this section to persons who have been notified of the application for probate of the will or of a contest as to jurisdiction or to persons whose names or places of residence are unknown and cannot with reasonable diligence be ascertained, and a person authorized by division (A)(4) of this section to give notice shall file in the probate court a certificate to that effect.

(2003 H 51, eff. 4-8-04; 2001 H 85, eff. 10-31-01; 1994 H 208, eff. 6-23-94; 1990 H 346, eff. 5-31-90; 1953 H 1; GC 10504-23)

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

Chapter 2107. Wills (Refs & Annos)

Will Contest Action

→2107.76 Contest of will within three months; exceptions; rights not affected

(A) No person who has received or waived the right to receive the notice of the admission of a will to probate required by section 2107.19 of the Revised Code may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than three months after the filing of the certificate described in division (A)(3) of section 2107.19 of the Revised Code. No other person may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will more than three months after the initial filing of a certificate described in division (A)(3) of section 2107.19 of the Revised Code. A person under any legal disability nevertheless may commence an action permitted by section 2107.71 of the Revised Code to contest the validity of the will within three months after the disability is removed, but the rights saved shall not affect the rights of a purchaser, lessee, or encumbrancer for value in good faith and shall not impose any liability upon a fiduciary who has acted in good faith, or upon a person delivering or transferring property to any other person under authority of a will, whether or not the purchaser, lessee, encumbrancer, fiduciary, or other person had actual or constructive notice of the legal disability.

(B) Section 2305.19 of the Revised Code does not apply to an action permitted by section 2107.71 of the Revised Code to contest the validity of a will.

(2006 H 144, eff. 6-15-06; 2001 H 85, eff. 10-31-01; 1994 H 208, eff. 6-23-94; 1990 H 346, eff. 5-31-90; 1978 H 505; 1976 S 466)

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

Chapter 2109. Fiduciaries (Refs & Annos)

Accounts

➔2109.301 Accounts of executors or administrators; requirements; final and distributive account; certificate of termination of estate

(A) An administrator or executor shall render an account at any time other than a time otherwise mentioned in this section upon an order of the probate court issued for good cause shown either at its own instance or upon the motion of any person interested in the estate. Except as otherwise provided in division (B)(2) of this section, an administrator or executor shall render a final account within thirty days after completing the administration of the estate or within any other period of time that the court may order.

Every account shall include an itemized statement of all receipts of the administrator or executor during the accounting period and of all disbursements and distributions made by the executor or administrator during the accounting period. In addition, the account shall include an itemized statement of all funds, assets, and investments of the estate known to or in the possession of the administrator or executor at the end of the accounting period and shall show any changes in investments since the last previous account.

Every account shall be upon the signature of the administrator or executor. When two or more administrators or executors render an account, the court may allow the account upon the signature of one of them. The court may examine the administrator or executor under oath concerning the account.

When an administrator or executor is authorized by law or by the instrument governing distribution to distribute the assets of the estate, in whole or in part, the administrator or executor may do so and include a report of the distribution in the administrator's or executor's succeeding account.

In estates of decedents in which none of the legatees, devisees, or heirs is under a legal disability, each partial accounting of an executor or administrator may be waived by the written consent of all the legatees, devisees, or heirs filed in lieu of a partial accounting otherwise required.

(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) 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.

(2) In estates of decedents in which the sole legatee, devisee, or heir is also the administrator or executor of the estate, no partial accountings are required. The administrator or executor of an estate of that type shall file a final account or final and distributive account or, in lieu of filing a final account, the administrator or executor may file with the court within thirty days after completing the administration of the estate a certificate of termination of an estate that states all of the following:

(a) All debts and claims presented to the estate have been paid in full or settled finally.

(b) An estate tax return, if required under the provisions of the Internal Revenue Code or Chapter 5731. of the Revised Code, has been filed, and any estate tax has been paid.

(c) All attorney's fees have been waived by or paid to counsel of record of the estate, and all executor or administrator fees have been waived or paid.

(d) The amount of attorney's fees and the amount of administrator or executor fees that have been paid.

(e) All assets remaining after completion of the activities described in divisions (B)(2)(a) to (d) of this section have been distributed to the sole legatee, devisee, or heir.

(3) In an estate of the type described in division (B)(2) of this section, a sole legatee, devisee, or heir of a decedent may be liable to creditors for debts of and claims against the estate that are presented after the filing of the certificate of termination described in that division and within the time allowed by section 2117.06 of the Revised Code for presentation of the creditors' claims.

(4) Not later than thirteen months after appointment, every administrator and executor shall render an account of the administrator's or executor's administration, unless a certificate of termination is filed under division (B)(2) of this section. Except as provided in divisions (B)(1) and (2) of this section, after the initial account is rendered, every administrator and executor shall render further accounts at least once each year.

(2003 H 51, eff. 4-8-04; 2001 H 85, eff. 10-31-01)

R.C. § 2115.02

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

Chapter 2115. Executors and Administrators--Inventory (Refs & Annos)

General Provisions

→2115.02 Inventory; appraisal

Within three months after the date of the executor's or administrator's appointment, unless the probate court grants an extension of time for good cause shown, the executor or administrator shall file with the court an inventory of the decedent's interest in real estate located in this state and of the tangible and intangible personal property of the decedent that is to be administered and that has come to the executor's or administrator's possession or knowledge. The inventory shall set forth values as of the date of death of the decedent. If a prior executor or administrator has done so, a successor executor or administrator need not file an inventory, unless, in the opinion of the court, it is necessary.

Any asset, the value of which is readily ascertainable, is not required to be appraised but shall be included in the inventory.

(1996 H 391, eff. 10-1-96; 1992 H 427, eff. 10-8-92; 1988 S 228; 1975 S 145; 1970 S 185; 1953 H 1; GC 10509-41)

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

Chapter 2117. Presentment of Claims Against Estate (Refs & Annos)

Claims of Creditors

➔2117.06 Presentation and allowance of creditor's claims; procedure

(A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:

(1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:

(a) To the executor or administrator in a writing;

(b) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;

(c) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within the appropriate time specified in division (B) of this section. For purposes of this division, if an executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.

(2) If the final account or certificate of termination has been filed, in a writing to those distributees of the decedent's estate who may share liability for the payment of the claim.

(B) Except as provided in section 2117.061 of the Revised Code, all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period. Every claim presented shall set forth the claimant's address.

(C) Except as provided in section 2117.061 of the Revised Code, a claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties, including, but not limited to, devisees, legatees, and distributees. No payment shall be made on the claim and no action shall be maintained on the claim, except as otherwise provided in sections 2117.37 to 2117.42 of the Revised Code with reference to contingent claims.

(D) In the absence of any prior demand for allowance, the executor or administrator shall allow or reject all claims, except tax assessment claims, within thirty days after their presentation, provided that failure of the executor or administrator to allow or reject within that time shall not prevent the executor or administrator from doing so after that time and shall not prejudice the rights of any claimant. Upon the allowance of a claim, the executor or the administrator, on demand of the creditor, shall furnish the creditor with a written statement or memorandum of the fact and date of the allowance.

(E) If the executor or administrator has actual knowledge of a pending action commenced against the decedent

prior to the decedent's death in a court of record in this state, the executor or administrator shall file a notice of the appointment of the executor or administrator in the pending action within ten days after acquiring that knowledge. If the administrator or executor is not a natural person, actual knowledge of a pending suit against the decedent shall be limited to the actual knowledge of the person charged with the primary responsibility of administering the estate of the decedent. Failure to file the notice within the ten-day period does not extend the claim period established by this section.

(F) This section applies to any person who is required to give written notice to the executor or administrator of a motion or application to revive an action pending against the decedent at the date of the death of the decedent.

(G) Nothing in this section or in section 2117.07 of the Revised Code shall be construed to reduce the periods of limitation or periods prior to repose in section 2125.02 or Chapter 2305. of the Revised Code, provided that no portion of any recovery on a claim brought pursuant to that section or any section in that chapter shall come from the assets of an estate unless the claim has been presented against the estate in accordance with Chapter 2117. of the Revised Code.

(H) Any person whose claim has been presented and has not been rejected after presentment is a creditor as that term is used in Chapters 2113. to 2125. of the Revised Code. Claims that are contingent need not be presented except as provided in sections 2117.37 to 2117.42 of the Revised Code, but, whether presented pursuant to those sections or this section, contingent claims may be presented in any of the manners described in division (A) of this section.

(I) If a creditor presents a claim against an estate in accordance with division (A)(1)(b) of this section, the probate court shall not close the administration of the estate until that claim is allowed or rejected.

(J) The probate court shall not require an executor or administrator to make and return into the court a schedule of claims against the estate.

(K) If the executor or administrator makes a distribution of the assets of the estate pursuant to section 2113.53 of the Revised Code and prior to the expiration of the time for the presentation of claims as set forth in this section, the executor or administrator shall provide notice on the account delivered to each distributee that the distributee may be liable to the estate if a claim is presented prior to the filing of the final account and may be liable to the claimant if the claim is presented after the filing of the final account up to the value of the distribution and may be required to return all or any part of the value of the distribution if a valid claim is subsequently made against the estate within the time permitted under this section.

(2004 S 80, eff. 4-7-05; 2003 H 51, eff. 4-8-04; 2003 H 95, eff. 9-26-03; 2002 S 281, eff. 4-11-03; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 2001 H 85, eff. 10-31-01; 1996 H 350, eff. 1-27-97 [FN1]; 1990 H 346, eff. 5-31-90; 1988 S 228; 1984 H 37; 1983 H 291, S 115; 1982 H 379; 1975 S 145; 1969 H 363; 131 v H 580; 127 v 701; 1953 H 1; GC 10509-112)

R.C. § 2117.12

Baldwin's Ohio Revised Code Annotated Currentness

Title XXI. Courts--Probate--Juvenile

^ Chapter 2117. Presentment of Claims Against Estate (Refs & Annos)

^ Rejection of Claims

➤ **2117.12 Action on rejected claim barred**

When a claim against an estate has been rejected in whole or in part but not referred to referees, or when a claim has been allowed in whole or in part and thereafter rejected, the claimant must commence an action on the claim, or that part of the claim that was rejected, within two months after the rejection if the debt or that part of the debt that was rejected is then due, or within two months after that debt or part of the debt that was rejected becomes due, or be forever barred from maintaining an action on the claim or part of the claim that was rejected. If the executor or administrator dies, resigns, or is removed within that two-month period and before action is commenced on the claim or part of the claim that was rejected, the action may be commenced within two months after the appointment of a successor.

For the purposes of this section, the action of a claimant is commenced when the complaint and praecipe for service of summons on the executor or administrator, or on the distributee who received the presentation of the claim as provided in division (A)(2) of section 2117.06 of the Revised Code, have been filed.

(2003 H 51, eff. 4-8-04; 1953 H 1, eff. 10-1-53; GC 10509-133)

➔2305.10 Product liability, bodily injury or injury to personal property; when certain causes of action arise

(A) Except as provided in division (C) or (E) of this section, an action based on a product liability claim and an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues. Except as provided in divisions (B)(1), (2), (3), (4), and (5) of this section, a cause of action accrues under this division when the injury or loss to person or property occurs.

(B)(1) For purposes of division (A) of this section, a cause of action for bodily injury that is not described in division (B)(2), (3), (4), or (5) of this section and that is caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(2) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to chromium in any of its chemical forms accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(3) For purposes of division (A) of this section, a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(4) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to diethylstilbestrol or other nonsteroidal synthetic estrogens, including exposure before birth, accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(5) For purposes of division (A) of this section, a cause of action for bodily injury caused by exposure to asbestos accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(2) Division (C)(1) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(3) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the accrual of the cause of action, has not expired in accordance with the terms of that warranty.

(4) If the cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues.

(5) If a cause of action relative to a product liability claim accrues during the ten-year period described in division (C)(1) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, an action based on the product liability claim may be commenced within two years after the disability is removed.

(6) Division (C)(1) of this section does not bar an action for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

(7)(a) Division (C)(1) of this section does not bar an action based on a product liability claim against a manufacturer or supplier of a product if all of the following apply:

(i) The action is for bodily injury.

(ii) The product involved is a substance or device described in division (B)(1), (2), (3), or (4) of this section.

(iii) The bodily injury results from exposure to the product during the ten-year period described in division (C)(1) of this section.

(b) If division (C)(7)(a) of this section applies regarding an action, the cause of action accrues upon the date on which the claimant is informed by competent medical authority that the bodily injury was related to the exposure to the product, or upon the date on which by the exercise of reasonable diligence the claimant should have known that the bodily injury was related to the exposure to the product, whichever date occurs first. The action based on the product liability claim shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(D) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

(E) An action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, as defined in section 2305.111 of the Revised Code, shall be brought as provided in division (C) of that

section.

(F) As used in this section:

(1) "Agent orange," "causative agent," and "veteran" have the same meanings as in section 5903.21 of the Revised Code.

(2) "Ethical drug," "ethical medical device," "manufacturer," "product," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(3) "Harm" means injury, death, or loss to person or property.

(G) This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to April 7, 2005.

(2006 S 17, eff. 8-3-06; 2004 S 80, eff. 4-7-05; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 [FN1]; 1984 H 72, eff. 5-31-84; 1982 S 406; 1980 H 716; 1953 H 1; GC 11224-1)

R.C. § 2305.19

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)

Miscellaneous Provisions

➔**2305.19 Saving in case of reversal**

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(B) If the defendant in an action described in division (A) of this section is a foreign or domestic corporation, and whether its charter prescribes the manner or place of service of process on the defendant, and if it passes into the hands of a receiver before the expiration of the one year period or the period of the original applicable statute of limitations, whichever is applicable, as described in that division, then service to be made within one year following the original service or attempt to begin the action may be made upon that receiver or the receiver's cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of any of those agents or officers of the receiver with the person having charge of the office or place of business. If that corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no regular ticket or freight agent of the receiver, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on that defendant corporation.

(2004 H 161, eff. 5-31-04; 1953 H 1, eff. 10-1-53; GC 11233)

Sup. R. Rule 78

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Superintendence for the Courts of Ohio (Refs & Annos)

Probate Division

→Sup R 78 Probate division of the court of common pleas--case management in decedent's estates, guardianship, and trusts

(A) Each fiduciary shall adhere to the statutory or court-ordered time period for filing the inventory, account, and, if applicable, guardian's report. The citation process set forth in section 2109.31 of the Revised Code shall be utilized to ensure compliance. The attorney of record and the fiduciary shall be subject to the citation process. The court may modify or deny fiduciary commissions or attorney fees, or both, to enforce adherence to the filing time periods.

(B)(1) If a decedent's estate must remain open more than six months pursuant to R.C. 2109.301(B)(1), the fiduciary shall file an application to extend administration (Standard Probate Form 13.8).

(2) An application to extend the time for filing an inventory, account, or guardian's report, shall not be granted unless the fiduciary has signed the application.

(C) The fiduciary and the attorney shall prepare, sign, and file a written status report with the court in all decedent's estates that remain open after a period of thirteen months from the date of the appointment of the fiduciary and annually thereafter. At the court's discretion, the fiduciary and the attorney shall appear for a status review.

(D) The court may issue a citation to the attorney of record for a fiduciary who is delinquent in the filing of an inventory, account, or guardian's report to show cause why the attorney should not be barred from being appointed in any new proceeding before the court or serving as attorney of record in any new estate, guardianship, or trust until all of the delinquent pleadings are filed.

(E) Upon filing of the exceptions to an inventory or to an account, the exceptor shall cause the exceptions to be set for a pretrial within thirty days. The attorneys and their clients, or individuals if not represented by an attorney, shall appear at the pretrial. The trial shall be set as soon as practical after pretrial. The court may dispense with the pretrial and proceed directly to trial.