ORIGINAL

IN THE SUPREME COURT OF OHIO

Kenneth Dale Arnott
Wanda Jo Arnott
Jonathon Scott Arnott
Bethany Jo Tolbert,

Plaintiff-Appellants,

vs.

James Wayne Arnott
Kathryn Arnott
Karen Ann (Tolbert) Carper,

Defendant-Appellees.

Case No. 10-2180
Upon an Entry Certifying A Conflict between the Fourth and Twelfth District Courts of Appeals

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MERIT BRIEF OF JAMES WAYNE ARNOTT,
KATHRYN ARNOTT AND
KAREN ANN (TOLBERT) CARPER

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STATEMENT OF THE CASE

This instant matter initiates upon a motion and entry certifying a conflict between the Fourth District Court of Appeals and the Twelfth District Court of Appeals (*Maxwell v. Fry*, Butler App. No. CA2007-11-284, 2009-Ohio-1650) on the proper standard of review to be applied in declaratory judgment actions. Specifically, in the entry certifying the question, the Fourth District summarizes:

> In *Arnott v. Arnott*, Highland App. No. 09CA25, 2010-Ohio-5392, this Court, citing the Supreme Court of Ohio's decision in *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, held that abuse of discretion was the proper standard of review for appellate review of the trial court's decision to grant or deny declaratory relief. Arnott at ¶19. But we declined to apply the same abuse of discretion standard to a purely legal issue decided within the context of the declaratory judgment, *i.e.* we applied *de novo* review to the trial court's interpretation of trust language at issue in the case. In doing so, we narrowly interpreted *Mid-American* to the issues the Court addressed in that case (the preliminary decision to grant or deny declaratory relief) and held that *de novo* review remains the appropriate standard of review for purely legal issues, even within a declaratory judgment action. Id. at ¶¶36-42.
>
> In *Maxwell, supra*, the court of appeals reviewed purely legal issues within the context of a declaratory judgment action, including the trial court's determination that the parties were tenants in common. The parties disputed the proper standard of review, but the court held that *Mid-American* had "definitively" settled that abuse of discretion was the proper standard to apply to an appeal of a declaratory judgment action. Id. at ¶16. The court then proceeded to review the trial court's legal determinations for an abuse of discretion. Id. at ¶¶17-22.

The Fourth District, upon application, certified the following question:

> What is the proper standard for appellate review of purely legal issues that must be resolved after the trial court has decided a complaint for declaratory judgment presents a justiciable question under Revised Code Chapter 2721, *i.e.* must an appellate court afford deference to a trial court's interpretation or application of the law?

STATEMENT OF FACTS

This matter originated upon the filing of a Complaint for Declaratory Judgment to Construe and Interpret the Language of the Joseph Scott Arnott Inter Vivos Trust on August 22, 2007 in the Highland County Probate Court. The Declaratory Complaint sought judicial interpretation of a provision within the trust document which gave certain beneficiaries the exclusive option to purchase parcels of farm ground. The critical language at issue concerns the trust's ambiguous pricing of the options "at a price equal to the appraised value of said tract as affixed for federal and/or state estate tax purposes." Appellant's Appendix, pg.A-11.

The trial court, after many months of the parties' procedural posturing and evidentiary proceedings, ultimately held that the use of that critical language "at a price equal to the appraised value as affixed for federal and/or state estate tax purposes" meant simply "appraised value." Appellant's Appendix, pg. A-8.

Thus James Wayne Arnott, the purchaser, Successor Trustee and primary beneficiary under the Trust, timely appealed. The assignments of error were threefold: (1) Whether there was sufficient evidence of a justiciable controversy to permit the declaratory judgment action to go forward; (2) Assuming, *arguendo,* that a declaratory action was proper, whether the trial court had properly interpreted the critical language of the trust, "at a price equal to the appraised value as affixed for federal and/or state estate tax purposes," and finally (3) Whether or not there were in fact tax implications to the trust as a result of the findings under the second assignment of error.

The Fourth District reviewed Assignment of Error No. (1) under an abuse of discretion standard.[1] As to the second assignment of error, the Fourth District agreed with James Wayne

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[1] James Wayne Arnott, Successor Trustee and primary beneficiary argued for a dual

Arnott, conducted an independent review of the trust language, and held that the trial court's interpretation required the disregard the remaining language "as affixed for federal and/or state estate tax purposes." In so doing, the Fourth District reasoned that although there had been no abuse of discretion by the trial court's finding that a declaratory action would lie, the same court's construction of that critical trust language would be reviewed under the *de novo* standard, as the construction of trust language was akin to the interpretation of wills:

> Again, the parties dispute the standard of review. James argues that we are faced with a legal issue here, akin to the interpretation of wills, and our review is *de novo*. Citing *Mid-American*, Kenneth contends our review is abuse of discretion, even when reviewing legal issues. Kenneth also cites *Hamblin v. Daugherty*, Medina App. No. 08CA0009-M, 2008-Ohio-5306, for an example of a case where the court adopted an abuse of discretion standard when reviewing legal determinations within a declaratory judgment action.
>
> As we stated in Section I of the opinion, in *Mid-American* the Court reaffirmed its prior holding that the standard of review for dismissal of a declaratory judgment action is abuse of discretion. The language used by the Court in Mid-American was broad: "[w]e therefore reaffirm that declaratory judgment actions are to be reviewed under an abuse-of-discretion standard." Id. at ¶14.
>
> * * *
>
> [W]e do not read *Mid-American* to mandate abuse of discretion review of legal issues within a declaratory judgment action. In other words, no court has the discretion to commit an error of law. And in fact, the issue in *Mid-American* was whether the court erred in dismissing an action for declaratory judgment, *i.e.*, whether the grounds for declaratory judgment (discussed in Section I of this opinion) were satisfied. The Court did not address whether the trial court, after exercising its discretion to proceed with declaratory judgment, correctly applied the substantive law.
>
> And thus we agree with the concurring opinion in *Hamblin*. A trial court's determination of purely legal issues is never one of degree of discretion. Regardless of whether the action is styled as one for declaratory relief, the trial court must correctly apply the law. See also, *State v. Thompson*,

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standard, *i.e.*, an abuse of discretion standard for the factual determinations and a *de novo* standard for the legal determinations.

> Montgomery App. No. 22984, 2010-Ohio-1680, (Fain, J., concurring). Accordingly, we review the trial court's interpretation of the option clause *de novo*.

Appellant's Appendix, pg. A-23-25.

The parties are now on appeal upon a motion and entry certifying that conflict regarding the appropriate standard of review to be applied when construing legal matters within the context of a declaratory judgment action.[2]

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: A trial court's factual determinations made when finding a justiciable controversy sufficient to permit a declaratory action to go forward are reviewed under an abuse of discretion standard; a trial court's interpretation or application of the law necessary within that declaratory relief are reviewed under a *de novo* standard.

The Declaratory Judgment Act was created to provide an avenue for the declaration of a right, status or legal relationship.

As a declaratory judgment is a creature of statute, any review of the propriety of a declaratory judgment action should be first analyzed according to the Declaratory Judgment Act. The Act's prevailing purpose is to provide a cause of action for the declaration of a right, status or other legal relationship. See, Ohio Revised Code §2721.02, et seq. "A declaratory judgment action provides a means by which parties can eliminate uncertainty regarding their legal rights and obligations. *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶8, citing *Travelers Indemn. Co. v. Cochrane* (1951),155 Ohio St. 305, 312. The purpose

2 There are statements of fact and evidentiary arguments interspersed throughout the Appellants' Merit Brief which are not factually accurate nor critical to the briefing ordered in this case. The fact that Appellees are not acknowledging any statements or arguments which are not directly related to the certified conflict question at bar, is not intended to indicate that the Appellees in any way agree with the statement or do not have a counter-argument to present.

of a declaratory judgment action is to dispose of "uncertain or disputed obligations quickly and conclusively," and to achieve that end, the declaratory judgment statutes are to be construed "liberally." *Id.*, citing *Ohio Farmers Indemn. Co. v. Chames* (1959),170 Ohio St. 209, 213. A declaratory judgment action may be brought even before any contract breach. R.C. 2721.04. *Quality Care Transport v. ODJFS*, 2010-Ohio-4763, 2009 CA 113, 2009 CA (OHCA2).

The declaration of a right of a right, status or legal relationship acts as a threshold to future legal action.

Contained within the Declaratory Judgment Act is the clear recognition that the declaration of rights, status or legal relationship may involve future relief sought by a litigant, as the Act anticipates that further proceedings would flow from that determination. See, *eg.*, §2721.02, "* * * courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed." (emphasis added) In some cases, then, subsequent action to the declaratory relief is anticipated, and would seem to suggest more relief that a mere declaration of rights or legal status. That "further relief" commonly involves determination of coverage for the parties to an insurance contract, language construction, and in the federal court, constitutional law construction and application.

However, the determination of that "legal status" is by its very nature, subject to a *de novo* review. See, generally, *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 613 N.E.2d 591 (Ohio 1993), wherein an administrative body's determination of legal status brought under a declaratory action was properly subject to an independent determination of the uncontested facts as applied to the law:

> Andrews recognized that even Before R.C. 119.12 was amended to require reviewing courts to make the hybrid inquiry described above, courts were to determine "the rights of the parties in accordance with the statutes and law

> applicable." *Andrews, supra*, 164 Ohio St. at 280, 58 O.O. at 53, 131 N.E.2d at 393. Under R.C. 119.12, a reviewing court is obligated to determine whether the agency's decision is "in accordance with law." An agency adjudication is like a trial, and while the reviewing court must defer to the lower tribunal's findings of fact, it must construe the law on its own. To the extent that an agency's decision is based on construction of the state or federal Constitution, a statute, or case law, the common pleas court must undertake its R.C. 119.12 reviewing task completely independently. * * * We find that the courts below properly limited their review to this purely legal question.

The Declaratory Judgment Act is designed to provide a cause of action wherein a claimant can sue for the interpretation of contractual language, including testamentary trust language.

A large number of cases which arise under the auspices of the Declaratory Judgment Act involve insurers or insureds operating under a contract of coverage. Once an action is filed for the determination of coverage or no-coverage, however, the legal matter most commonly decided upon a dispositive motion. See, for example, *Basha v. Ghalib*, 2007-Ohio-3999, Nos. 07AP-963, 07AP-964 (OHCA10), wherein a lawsuit filed under the Declaratory Judgment Act was decided upon a motion for summary judgment.[3]

In the case of *Allstate Ins. Co. v. Campbell*, 2010-Ohio-6312, 128 Ohio St.3d 186, 942 N.E.2d 1090 (Ohio 2010), this Court reviewed the granting of motions for summary judgment raised in declaratory judgment actions regarding the insurance company's obligation to defend an action which fell under the intentional-acts exclusionary provision. At no point did the Court apply the deferential standard of review to the lower court's determination, but made an independent analysis of the contractual language and the substantive law which guided in its interpretation:

> We hold that as applied to an insurance policy's intentional-act exclusion, the doctrine of inferred intent is not limited to cases of sexual molestation

3 The Tenth District Court of Appeals reviewed the grant of the motion for summary judgment de novo.

> or homicide. Nevertheless, the doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused by that act are intrinsically tied so that the harm necessarily results from the act. Because the doctrine of inferred intent does not apply to the circumstances of this case, we further hold that under the Allstate, Erie, and Grange policies, the trier of fact must conduct a factual inquiry on remand to determine whether the boys intended or expected the harm that resulted from their intentional actions. We thus affirm the court of appeals' judgment that the trial court erred in granting the motions for summary judgment of Allstate, Erie, and Grange.

Similarly, the beneficiary under a will, trust or other testamentary document can have his or her rights or status declared by the provisions outlined in Revised Code §2721.03, "* * * any person interested under a * * *will * * * <u>may have determined any question of construction</u> or validity arising under the instrument, * * * <u>and obtain a declaration of rights, status, or other legal relations under it.</u> [4] And in Revised Code §2721.05, any interested person may file an action to "determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings." See, *Zuendel v. Zuendel*, 63 Ohio St.3d 733, 590 N.E.2d 1260 (Ohio 1992):

> R.C. 2721.03 and 2721.05, taken together, allow one responsible for the administration of an estate or personally interested in the administration of an estate to bring a declaratory judgment action in the probate court if a controversy exists with respect to the construction (meaning) or effect of a will's contents. Further, these statutes provide the probate court with jurisdiction when a justiciable dispute arises with respect to duties related to the administration of the estate. Thus, in determining whether appellants'declaratory judgment action regarding the validity and enforceability of the March 1989 agreement between Stephen and Mark and David Zuendel was properly before the probate court, the primary question is whether the agreement is related to the administration of the testator's estate.

The fact that Revised Code §2721.05 also permits a declaratory judgment action to question the administration of a decedent's estate, including the construction of a will, suggests

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4 . See, *Corron v. Corron*, 40 Ohio St.3d 75, 531 N.E.2d 708 (Ohio 1988), *Pack v. Osborn*, 2008-Ohio-90, Nos. 2006-1207, 2006-1343 (OHSC)

that this particular subsection involves more than a mere declaration of rights, status or legal relationship. If this statute mandates a declaratory action as the proper action for the interpretation of a will or testamentary trust, then it must also mandate that interpretation of testamentary trusts or wills is reviewed according to well-established precedent.

The interpretation of contractual language is never one of degree or discretion, as no court has the right to commit an error of law.

For the appellate review of wills and testamentary trusts, "it is a widely accepted standard that the interpretation of wills and trusts is a question of law, and thus, when determining intent and interpreting the terms of a testamentary trust, appellate courts apply a *de novo* standard of review." *Summers v. Summers* (1997), 121 Ohio App.3d 263, 267, 699 N.E.2d 958 (4th Dist.), citing *McCulloch v. Yost* (1947), 148 Ohio St. 675. In *Lincoln Properties v. Goldslager* (1969), 18 Ohio St.2d 154, syllabus, this Court explained the importance of an appellate court's independent review of the facts as applied to the law:

> A trial *de novo* is an independent judicial examination and determination of conflicting issues of fact and law, notwithstanding the evidence before the appellate court consists of the record of the proceeding the lower tribunal. Parties to an appeal on questions of law and fact are entitled to a trial *de novo*, and the appellate court must determine the facts and give judgment disposing of the issues of law and fact as if no trial had been had in the lower tribunal. In an appeal on questions of law and fact, a Court of Appeals is without power to remand the cause the to the inferior court for further proceedings tantamount to a new trial, but is required to substitute its independent judgment for that of the inferior court and to grant final judgment in accordance with its findings on the evidence before it (emphasis added).

As a matter of practice, an originating tribunal's ruling in a declaratory judgment action is reviewed in accordance with the substantive law raised within.

This Court entertained the appeal of a testamentary trust case which had originated as a declaratory judgment action in the case of *National City Bank v. Beyer*, 2000-Ohio-126, 89 Ohio St.3d 152, 729 N.E.2d 711 (Ohio 1999). The matters on appeal stemmed from National City Bank filing a declaratory action in the Court of Common Pleas of Huron County, Probate Division. The defendants filed answers and counterclaims which asked the court to construe the trust in their favor, sought indemnity equal to the amount of the trust assets against NCB in the event that the court construed the trust language in favor of the estate of Katherine Beyer and New Jersey, and finally sought a refund of trustee fees and expenses. In affirming the holding of the Sixth District, this Court reiterated the rule of law as it pertains to the interpretation of a trust:

> The fundamental rule in the construction of a trust is to ascertain the intent of the settlor. *Domo v. McCarthy* (1993), 66 Ohio St.3d 312, 314, 612 N.E.2d 706, 708. In determining the intent of a testamentary trust, we must look to the testator's intent as evidenced in his or her will. This court has used the following guidelines to interpret a testamentary trust:
>
> 1. In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator.
> 2. Such intention must be ascertained from the words contained in the will.
> 3. The words contained in the will, if technical, must be taken in their technical sense, and if not technical, in their ordinary sense, unless it appear[s] from the context that they were used by the testator in some secondary sense.
> 4. All parts of the will must be construed together, and effect, if possible, given to every word contained in it.

Ohio Natl. Bank of Columbus v. Adair (1978), 54 Ohio St.2d 26, 30, 374 N.E.2d 415, 417-418, quoting *Townsend's Executors v. Townsend* (1874), 25 Ohio St. 477, syllabus.

The Tenth District applied the same rule of law to contested trust language in the case *Holdren v. Garrett*, 2011-Ohio-1095, 09AP-1153 (OHCA10), a declaratory

judgment action. The *Holdren* case arose out of a revocable inter vivos trust which was funded with real property, consisting primarily of a family farm. The Trustor's wife was the income beneficiary for her lifetime, and the appellant and his sisters were designated as the beneficiaries after the Wife's death. The trust agreement included a clause providing the appellant with a two-year option to purchase the farm from the Trust. The interpretation of the option clause was the crux of the dispute between the beneficiaries; the appellant sought to exercise the option within two years after the Wife's death, and the sister responded by asserting that the option to purchase the farm had expired two years after the Trustor's death.

In construing the language of the Trust within the declaratory judgment action, the Tenth District employed the following standard of review:

> The interpretation of a written instrument like a trust is a matter of law. See *In re Estate of Davis* (1996), 109 Ohio App.3d 181, 183, 671 N.E.2d 1302. The trustor's intention is determined by considering the language used in the trust, reading all the provisions of the trust together. *Mumma v. Huntington Natl. Bank of Columbus* (1967), 9 Ohio App.2d 166, 169, 38 O.O.2d 183, 223 N.E.2d 621. Generally, when the language of the instrument is not ambiguous, a court may ascertain the trustor's intent from the express terms of the trust itself. *Davis*, 109 Ohio App.3d at 183, 671 N.E.2d 1302. A court presumes that the trustor used the words in the trust according to their common, ordinary meaning. *In re Trust of Brooke* (1998), 82 Ohio St.3d 553, 557, 697 N.E.2d 191.

<u>This Court's decision in *Mid-American v. Heasley* mandates an abuse of discretion review upon a lower court's decision to either hear or dismiss a declaratory action only.</u>

The statement of the law which brought forward the motion and entry for a certified conflict is found in this Court's decision in *Mid-American Fire & Cas. Ins. Co. v. Heasley* (2007), 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E. 2d 142:

> This court has previously addressed the question of the appropriate standard of review for a declaratory judgment action. We have held that "[t]he

> granting or denying of declaratory relief is a matter for judicial discretion, and where a court determines that a controversy is so contingent that declaratory relief does not lie, this court will not reverse unless the lower court's determination is clearly unreasonable." *Bilyeu v. Motorists Mutual* (1973), 36 Ohio St.2d 35, 303 N.E.2d 871, syllabus. Relying on our decision in that case, courts throughout Ohio have adopted an abuse-of-discretion standard for reviewing declaratory judgment actions.

In the case *sub judice*, the trial court recognized that to be entitled to declaratory judgment three elements must be present: (1) a real controversy between the parties, (2) a controversy which is justiciable in character, and (3) a situation where speedy relief is necessary to preserve the rights of the parties. *Burger Brewing Co. v. Liquor Control Comm.* (1973), 34 Ohio St.2d 93, 97, 296 N.E.2d 261, 264; *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128, 130, 339 N.E.2d 626, 628; *Williams v. Akron* (1978), 54 Ohio St.2d 136, 144, 374 N.E.2d 1378, 1383. The Court found that these factors were satisfied.

The Fourth District reviewed these findings, and found no abuse of discretion, citing this Court's ruling in *Mid-American v. Heasley*. However, the Fourth District also limited the abuse of discretion review to the initial determination of whether a declaratory action would lie.

Once determining that the grounds were satisfied for a declaratory action to be heard, the Court is bound by the rule of law for the pleadings and motions that are raised within that action. See, eg., *Basha v. Ghalib*, 2007-Ohio-3999, Nos. 07AP-963, 07AP-964 (OHCA10), *Allstate Ins. Co. v. Campbell*, 2010-Ohio-6312, 128 Ohio St.3d 186, 942 N.E.2d 1090 (Ohio 2010), *National City Bank v. Beyer*, 2000-Ohio-126, 89 Ohio St.3d 152, 729 N.E.2d 711 (Ohio 1999).

In keeping with the Appellee's Proposition of Law, the Appellees suggest that once a trial court has exercised its discretion in either granting or denying a declaratory action the leave to go forward, then determinations made within that controversy are to be reviewed in accordance with the legal standard appropriate to the situation. In the case of a purely legal question like the

instant matter, *de novo*.

This Court has the opportunity to correct a conflict of laws within the Declaratory Judgment Act as that Act pertains to actions brought by a victim of childhood sexual abuse.

By seeking a clarification of the scope of this Court's ruling in *Mid-American*, this Court has the opportunity to address a conflict in the appropriate standard of review, legislatively enacted into the Declaratory Judgment Act, section 2721.21, which gives a cause of action to an individual who would be otherwise precluded from bringing an action against a predator for childhood sexual abuse because of the expiration of the statute of limitations. According to that legislation, the prosecuting attorney may seek a finding that the alleged assailant would have been liable for assault or battery based on childhood sexual abuse but for the expiration of the statute of limitations, and seek an order requiring that person to register as a sexual offender for a period of six years. The review of that court's determination is based upon the civil "preponderance of the evidence" standard:

> (D) If the court finds by a preponderance of the evidence in an action brought pursuant to this section that the defendant would be liable for assault or battery based on childhood sexual abuse but for the expiration of the limitation period under section 2305.111 of the Revised Code, the court shall enter a judgment with that finding against the defendant and shall order that the defendant be listed on the civil registry maintained by the attorney general pursuant to section 3797.08 of the Revised Code. The court shall notify the defendant of the defendant's obligations under sections 3797.02, 3797.03, and 3797.04 of the Revised Code.

However, had the action sexual offender registration requirement been brought *within* the statute of limitations, the Court would be required to review that determination according to the much higher "manifest weight of the evidence" standard: "Because sex-offender-classification proceedings under R.C. Chapter 2950 are civil in nature, a trial court's determination in a sex-offender-classification hearing must be reviewed under a civil manifest-weight-of-the-evidence

standard and may not be disturbed when the judge's findings are supported by some competent, credible evidence." *State v. Wilson,* 2007-Ohio-2202, 113 Ohio St.3d 382, 865 N.E.2d 1264 (Ohio 2007).

The legislature seems to have enacted a standard of review substantially lower (a finding by the preponderance of the evidence is reviewed for an abuse of discretion) for cases which were brought outside the applicable statute of limitations for child sexual molestation[5]. However, for an action brought within twelve years of the child's reaching the age of majority, a reviewing Court would have to apply the "manifest weight of the evidence" standard, which implies much more than a mere abuse of discretion, but gives the Appellate court the mandate to review the record for, clear, competent evidence. Ergo, older cases are reviewed more deferentially than the more timely-brought actions. This dichotomy defies reasonable explanation.

As it happens, no cases appear in the public record as of this writing wherein the post-statute of limitations sex offender registration was challenged on appeal, therefore there has not been a forum to challenge the apparent conflict between the appropriate standards of review.

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5 Revised Code 2305.111(C): An action for assault or battery brought by a victim of childhood sexual abuse based on childhood sexual abuse, or an action brought by a victim of childhood sexual abuse asserting any claim resulting from childhood sexual abuse, shall be brought within twelve years after the cause of action accrues. For purposes of this section, a cause of action for assault or battery based on childhood sexual abuse, or a cause of action for a claim resulting from childhood sexual abuse, accrues upon the date on which the victim reaches the age of majority. If the defendant in an action brought by a victim of childhood sexual abuse asserting a claim resulting from childhood sexual abuse that occurs on or after the effective date of this act has fraudulently concealed from the plaintiff facts that form the basis of the claim, the running of the limitations period with regard to that claim is tolled until the time when the plaintiff discovers or in the exercise of due diligence should have discovered those facts.

Where the declaratory action is granted and a right, status, legal relationship or contractual language is judicially determined, the Court's decision is, by its very nature, a legal decision and must be reviewed *de novo*.

To find the contrary, that is to say, if all legal and factual determinations within a declaratory action are to be reviewed under an abuse of discretion, then this court must adopt a twofold approach to appellate review to matters encased within that declaratory action, regardless of the nature of that action: In the case of a will contest (or, as in *sub judice*, a testamentary trust), the first standard would be the abuse of discretion applied by the Court of Appeals so long as the trust or will contest was raised in the context of a declaratory action; The second standard of review would be the *de novo* standard which applies to every trust or will contest action wherein it wasn't raised in the context of a declaratory action.

A number of courts have previously found that the interpretation of wills remains the interpretation of wills insofar as the standard of review is concerned (*i.e.* applying the *de novo* standard), even when the offending language was challenged in the context of a declaratory action. See, *National City Bank v. Laville*, 2009-Ohio-5725, App. No. L-08-1240 (6th Dist.); *Henson v. Casey*, 2004-Ohio-5848, App. No. 04CA9, 04-LW-4834 (4th Dist.); *Peters v. Allison* (2004), 158 Ohio App.3d 223, 2004-Ohio-4143 (6th Dist.); *Carnahan v. Johnson* (1998), 127 Ohio App.3d 195, 711 N.E.2d 1093 (12th Dist.), *Summers v. Summers* (1997), 121 Ohio App.3d 263, 699 N.E.2d 958 (4th Dist.); *Lourdes College of Sylvania, Ohio v. Bishop*, 94 Ohio Misc. 2d 51 (Ohio Com. P1. 1997), 703 N.E.2d 362 (Lucas 1997); *Brown v. Moss*, Summit App. No. 19422, 99-LW-4925 (November 10, 1999), unreported; *National City Ba*nk v. Beyer; Huron App. No. H-98-006, 98-LW-4520 (November 6, 1998), unreported; *Leyshon v. Miller*, Washington App. No. 93CA37, 94-LW-1242 (October 28, 1994), unreported.

Appellee's proposition of law comports with the standard of review employed by the United State Supreme Court over the Circuit Courts.

The U.S. Supreme Court's standard of review for a federal court's initial determination on whether to hear a declaratory action is discretionary; once a declaratory action lies in the federal district, then the court applies the rule of law appropriate to the cause of action. The United States Supreme Court has held that District Courts are afforded discretion when reviewed for entertaining an action under the Federal Declaratory Judgments Act. In *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214, 63 USLW 4544 (1995) the Court reaffirmed its previous holding in *Brillhart v. Excess Ins. Co. of America,* 316 U.S. 491, and held specifically that district courts' decisions about the propriety of hearing declaratory judgment actions should be reviewed for abuse of discretion, not *de novo,* declaring that "it is more consistent with the Act to vest district courts with discretion in the first instance, because facts bearing on the declaratory judgment remedy's usefulness, and the case's fitness for resolution, are particularly within their grasp. Proper application of the abuse of discretion standard on appeal can provide appropriate guidance to district courts."

This is not to say that a reviewing Court continues to employ the deferential standard once it has been determined that a declaratory action should go forward. The Supreme Court in the case of *Miller v. Albright*, 523 U.S. 420, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) scrutinized the substantive law which was raised in the context of a declaratory action wherein the claimant sought a legal determination that she was a U.S. Citizen; a thorough, constitutional review of all the facts and law were undertaken by the highest court. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532, 63 USLW 4319 (1995), another case wherein a declaratory action was filed questioning the constitutionality of a law which was alleged to

inhibit commercial speech; the facts and their application to the substantive law was reviewed under the *de novo* standard.

CONCLUSION

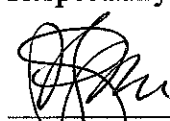
The Declaratory Judgment Act does not only serve to provide a forum for interpretation of a testamentary trust, to be sure. Participants to a contract can seek to construe language, parties to an insurance policy can seek to construe coverage, and even victims of child sexual molestation can seek a declaration that their alleged assailant is a required sexual offender registrant. Both established precedent and continuing public policy demand that those most inherent legal findings, the defining of those most inherent legal relations, be subject to the entitlement of a *de novo* review. Such has been the holding of all but one aberrant court, the Twelfth District in the *Maxwell* decision. The fact that a reviewing court may have recited and applied an inappropriate standard of review certainly does not mandate that the renegade court's decision should become precedent.

The sole issue before this Court is the question which was certified by the Fourth District Court of Appeals. Although the Appellants argue evidentiary issues and that matters of personal knowledge between a trier of fact and its litigants in a small, rural county like Highland County commonly play a role in deciding the outcome of probate cases, these arguments should not distract from the single, narrow issue which creates the certified conflict between the Fourth and Twelfth Appellate Districts. What is the appropriate standard of review in a declaratory judgment actions? The Appellees propose the following:

If a trial court has decided a complaint for declaratory judgment presents a justiciable question under Revised Code Chapter 2721, an appellate court's review is limited to whether the trial court has abused its discretion. For purely legal issues that must be resolved once that

declaratory action has leave to proceed, an appellate court need not afford any deference to the trial court's interpretation or application of the law, but rather may review the application of the substantive law *de novo*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the forgoing Brief of Appellee upon an Entry Certifying a Conflict between the Twelfth and Fourth Districts was served upon

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via ordinary U.S. Mail, postage prepaid, this 8th day of June, 2011.

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