

No. 2017-1031

---

# In the Supreme Court of Ohio

---

APPEAL FROM THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT  
WARREN COUNTY, OHIO  
CASE NO. CA2016-08-072

---

EMBASSY HEALTHCARE,  
*Appellee,*

v.

CORA SUE BELL,  
*Appellant.*

---

## APPELLEE EMBASSY HEALTHCARE'S MOTION FOR RECONSIDERATION/CLARIFICATION

---

Under S.Ct.Prac.R. 18.02, Embassy Healthcare asks this Court to clarify and reconsider its December 12, 2018 decision finding that a creditor's claim for unpaid necessities must first be presented to the estate of a decedent under R.C. 2117.06—with the creditor opening the estate if no estate has been opened—before that creditor can pursue a claim for necessities under R.C. 3103.03.

Two reasons support this request. First, this Court in *Ohio State University Hospital v. Kinkaid*, 48 Ohio St.3d 78 (1990), found no such requirement in a case where a healthcare provider-creditor, not unlike Embassy Healthcare here, sought payment for unpaid medical-care necessities from a spouse after the decedent's death and after the time for presenting

claims to an estate expired. This Court did not require the creditor to open an estate, make a claim against that estate, be denied, and then pursue a claim under R.C. 3103.03. Second, does a “judicial finding \* \* \* that the decedent left no assets subject to probate” (Slip Opinion No. 2018-Ohio-4912, ¶ 21) absolve the creditor from this estate-opening and presentment requirement? R.C. 3103.03 imposes no such requirement under its plain terms, nor does R.C. 2117.06. Even so, that finding has been made here and, if this Court is to follow its own precedent, compels the same result this Court reached in *Kinkaid*.

**I. The Court’s bright-line rule of presenting a claim for unpaid necessities first to the estate of a decedent conflicts with *Kinkaid*.**

The facts in *Kinkaid* are similar to the facts in this case. The decedent in *Kinkaid* received medical care from Ohio State University Hospital for several weeks before his death in July 1984. Three years later—well after the then three-month time for presenting claims against an estate under former R.C. 2117.06<sup>1</sup>—the hospital sought payment for that care from the decedent’s spouse under R.C. 3103.03. No probate estate had ever been opened because there were no probate assets. *See Ohio State Univ. Hosp. v. Kinkaid*, 10th Dist. Franklin 88AP-261, 1988 WL 81819, at \*3; *see also Kinkaid*, 48 Ohio St.3d at 78 (noting that “Dean Kinkaid died leaving no estate”).

In finding that the hospital could properly pursue its claim for unpaid medical expenses under R.C. 3103.03, this Court imposed no requirement that the hospital should have first presented its claim against Kinkaid’s estate. In fact, there is no discussion about R.C. 2117.06 anywhere in that decision. Instead, this Court looked to R.C. 3103.03 as an independent statute establishing an independent claim, not against an estate, but against a

---

<sup>1</sup> *See* Am.Sub.H.B. 37, 1984 Session Laws 5-376.

spouse for unpaid necessities. Left for remand was whether that spouse, the wife, had the ability to pay those necessities provided to her husband before his death (*id.* at 80), which Embassy Healthcare has never denied is a necessary element to any necessities claim.

In contrast here, the Court's majority decision creates a bright-line rule that all claims for unpaid necessities are claims that must be first presented to a decedent's estate before pursuing a claim for necessities under R.C. 3103.03, making it "incumbent upon a creditor" to open an estate if one has not been opened or forever lose its rights to payment. *Embassy Healthcare v. Bell*, Slip Opinion No. 2018-Ohio-4912, ¶ 31. This Court imposed no such requirement in *Kinkaid*, allowing the hospital to proceed solely under R.C. 3103.03, even though the facts unquestionably establish no estate had been opened by the hospital and therefore no claim could possibly have been made as this Court now requires.

Importantly, this Court did not overrule or otherwise limit *Kinkaid*; it thus remains good law. It did, however, attempt to distinguish *Kinkaid* by appearing to absolve a creditor of the need to open an estate if there is a "judicial finding" that there are no estate assets for a probate estate to be opened. *Id.* at ¶ 21. Yet, the bright-line rule it later creates makes no such exception. It leaves both the courts below and the creditor/debtor litigants before them confused on how to proceed in future cases. Are creditors entitled to follow *Kinkaid* when no estate is opened and the time for presenting a claim against the estate has passed as the hospital was allowed to do in *Kinkaid*? Or must they follow this case and engage in the futile act (as the dissent rightly notes)<sup>2</sup> of forcing open an estate (likely naming the creditor as administrator), present the claim to the administrator, and have that claim denied by the

---

<sup>2</sup> *Embassy Healthcare*, Slip Opinion No. 2018-Ohio-4912, ¶ 39 (DeWine, J., dissenting).

self-same creditor for insufficient assets? Then and only then can the creditor pursue a claim under R.C. 3103.03. Surely, this Court could not have intended this costly and wasteful unintended consequence of its holding.

And just what constitutes a “judicial finding” of no assets that would absolve a creditor of opening an estate—if that is in fact this Court’s intent? Requiring a judicial finding implies that there would need to be potentially time-consuming and costly discovery and associated litigation directed against the decedent’s survivors almost immediately after the loss of a loved one. The unintended consequence to loved ones of requiring this expedited inquiry so soon after the death to preserve a creditor’s claims appears harsh, stressful, and unfair to the bereaved survivors. Yet this is necessarily what this Court’s holding entails.

Simply put, *Kinkaid* remains good law under this Court’s December 12 decision and yet both cannot stand without some clarification and guidance by this Court.

**II. Even if this Court intended for a “judicial finding” of no probate assets to be an exception to this new bright-line rule, that finding has been made here.**

If this Court intends for this case and *Kinkaid* to co-exist so that a judicial finding of no probate assets sufficiently allows a creditor to follow *Kinkaid* instead of *Embassy Healthcare*, then that finding has been made here. As in *Kinkaid*, no probate estate was opened for Robert Bell’s estate. To this day, no probate estate has been opened. The Twelfth District Court of Appeals made a “judicial finding” to this effect in its opinion below.

Embassy operates a nursing home where Bell’s late husband, Robert, stayed beginning in early 2014. Robert passed away in May 2014 and no estate was opened.

*Embassy Healthcare v. Bell*, 2017-Ohio-1499, 89 N.E.3d 40, ¶ 2 (12th Dist.).

It is axiomatic that a probate estate is typically opened only when there is a probate estate from which probate assets can be distributed. *See generally* R.C. 2113.07. If no estate is ever opened, it is possible and reasonable to conclude that there are no probate assets and thus, potentially, no estate to distribute. But just because no estate is opened does not mean there are not significant assets transferred outside of the probate process. Surely this Court appreciates the reality that the vast majority of assets, from bank accounts to real property, are often transferred outside the probate process. That, in fact, is the point of good estate planning. Yet, this Court now holds that a creditor's claim for necessities is tied to the probate claim process even though there is no certainty that the process will find any assets subject to probate. And this still does not dispositively resolve the question of whether the decedent was "unable" to pay for his or her necessities, which will require yet another legal action under R.C. 3103.03.

Notwithstanding the practical complications and costs engendered by the Court's *Kinkaid* exception created here, Embassy Healthcare nonetheless *satisfied that exception*. Indeed, the Twelfth Appellate District's unrefuted judicial finding that no estate was opened is no different from this Court's judicial finding that "Dean Kinkaid died leaving no estate" (*Kinkaid*, 48 Ohio St.3d at 78) and the Tenth Appellate District's finding in the underlying action that Dean Kinkaid had no probatable assets (*Kinkaid*, 10th Dist. Franklin 88AP-261, 1988 WL 81819, at \*3)—both of which the Court relied upon in its opinion in this case. *See Embassy Healthcare*, Slip Opinion No. 2018-Ohio-4912, ¶ 21. Thus, even if a judicial finding of no estate assets is a distinguishing factor so that *Kinkaid* can be followed, that judicial finding was made here by the Twelfth Appellate District in its opinion below. It has been undisputed in this Court and the courts below that no estate has ever been opened.

Even after this Court’s decision in this case, *Kinkaid* remains good law. Without an estate ever being opened—a fact judicially acknowledged—this case is no different from *Kinkaid* and compels the same result even if it is this Court’s intent to create a “judicial finding of no assets” exception to *Kinkaid*.

### **III. Conclusion**

The Court’s December 12 decision needs both clarification and reconsideration for that decision to coexist with *Kincaid*. Without guidance by this Court, courts and litigants will be confused which law to follow and how to follow it.

Embassy Healthcare respectfully asks this Court to clarify and reconsider its decision.

Respectfully submitted,

/s/ Susan M. Audey

Susan M. Audey (0062818)  
TUCKER ELLIS LLP  
950 Main Avenue, Suite 1100  
Cleveland, OH 44113-7213  
Tel: 216.592.5000  
Fax: 216.592.5009  
[susan.audey@tuckerellis.com](mailto:susan.audey@tuckerellis.com)

Daniel A. Friedlander (0011909)  
(Counsel of Record)  
Jeffrey Sobeck (0080076)  
WELTMAN, WEINBERG & REIS CO., LPA  
323 West Lakeside Ave., Suite 200  
Cleveland, OH 44113  
Tel: 216.685.1169  
Fax: 216.363.6913  
[dfriedlander@weltman.com](mailto:dfriedlander@weltman.com)  
[jsobeck@weltman.com](mailto:jsobeck@weltman.com)

*Attorneys for Appellee Embassy Healthcare*

**PROOF OF SERVICE**

A copy of the foregoing was served on December 21, 2018 per S.Ct.Prac.R. 3.11(C)(1) by electronic mail to:

Miriam H. Sheline  
Pro Seniors, Inc.  
7162 Reading Rd., Suite 1150  
Cincinnati, OH 45237  
[msheline@proseniors.org](mailto:msheline@proseniors.org)  
*Attorney for Appellant Cora Sue Bell*

Rebecca Steinhauser  
Heather Hall  
Advocates for Basic Legal Equality, Inc.  
525 Jefferson Avenue, Suite 300  
Toledo, OH 43606  
[rsteinhauser@ablelaw.org](mailto:rsteinhauser@ablelaw.org)  
[hhall@ablelaw.org](mailto:hhall@ablelaw.org)  
*Attorneys for Amicus Curiae*  
*Advocates for Basic Legal Equality, Inc.*

Katherine B. Hollingsworth  
Thomas Mlakar  
The Legal Aid Society of Cleveland  
1223 West Sixth Street  
Cleveland, OH 44113  
[khollingsworth@lasclev.org](mailto:khollingsworth@lasclev.org)  
[tmlakar@lasclev.org](mailto:tmlakar@lasclev.org)  
*Attorneys for Amicus Curiae*  
*The Legal Aid Society of Cleveland*

Andrew D. Neuhauser  
Michael F. Harrington  
Southeastern Ohio Legal Services  
255 2nd Street NE, Suite D  
New Philadelphia, OH 44663  
[aneuhauser@seols.org](mailto:aneuhauser@seols.org)  
[mharrington@seols.org](mailto:mharrington@seols.org)  
*Attorneys for Amicus Curiae*  
*Southeastern Ohio Legal Services*

Cathlene Beck  
Scott E. Torguson  
The Legal Aid Society of Columbus  
1108 City Park Avenue  
Columbus, OH 43206  
[cbeck@columbuslegalaid.org](mailto:cbeck@columbuslegalaid.org)  
[storguson@columbuslegalaid.org](mailto:storguson@columbuslegalaid.org)  
*Attorneys for Amicus Curiae*  
*The Legal Aid Society of Columbus*

John M. Petit  
Community Legal Aid Services  
50 South Main Street, Suite 800  
Akron, OH 44308  
[jpetit@communitylegalaid.org](mailto:jpetit@communitylegalaid.org)  
*Attorney for Amicus Curiae*  
*Community Legal Aid Services*

Margaret M. Murray  
Murray & Murray Co., L.P.A.  
111 East Shoreline Drive  
Sandusky, OH 44870  
[mmm@murrayandmurray.com](mailto:mmm@murrayandmurray.com)  
*Attorney for Amicus Curiae*  
*The Ohio Association for Justice*

*/s/ Susan M. Audey*  
\_\_\_\_\_  
*One of the Attorneys for Appellee Embassy  
Healthcare*