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# Zimmerman v. Zirpolo Trust: "Conflicts Of Interest" For Personal Representatives—A Closer Look

## Introduction/Summary

A parent may represent and bind the interest of their minor child, provided there is no conflict of interest between the parent and the child with respect to a particular question or dispute.<sup>1</sup> Once acting in the representative role, the parent may invoke Ohio Trust Code ("OTC")<sup>2</sup> beneficiary protections, including the right to request and receive information pursuant to [Ohio Revised Code § 5808.13](#).<sup>3</sup> For a discussion of the issue of the right to request and receive information, see the article by Professor Alan Newman, entitled, *Zimmerman v. Zirpolo Trust: The Beneficiary's Right to Information*, also published in this issue of PLJO. The purpose of this article is to closely examine the issue of the meaning of "no conflict of interest" within the context of [Ohio Revised Code § 5803.03](#).

Zimmerman<sup>4</sup> involves a parent who, while acting in the capacity of representative for her minor children, requested from the Trustee a copy of the deceased Settlor's trust, as well as a trust accounting. The parent originally was a named beneficiary to the trust, but through a subsequent trust amendment, the parent was removed as a beneficiary. Through the same trust amendment, the parent's children were added as trust beneficiaries. The Trustee refused to provide requested trust information to the parent representative, asserting the parent's prior status and subsequent removal as a beneficiary created a conflict of interest between the representative parent and the minor children. Therefore, the Trustee concluded, the parent did not qualify to serve as a representative pursuant to [Ohio Revised Code § 5803.03](#).

## Background Summary

The Patricia E. Zirpolo Trust ("Trust") was executed on March 20, 2003.<sup>5</sup> The Trust named Adrienne Monnot Zimmerman, the parent ("Appellant"), who was also the Settlor's granddaughter, as a 25% beneficiary to the Trust. On May 21, 2007, the Settlor amended the Trust ("Trust Amendment"), at which time the Appellant was removed as a beneficiary and within the same Trust Amendment, Appellant's children were added as beneficiaries.

Following the Settlor's death in April of 2008, the Trustee ("Appellee") informed the Appellant's three minor children they were Trust beneficiaries. Subsequently, Appellee's attorney provided formal notification to the minor children of their status as Trust beneficiaries, while also explaining the trust distribution pattern. During the summer of 2009, Appellee advised Appellant of the nature of the investments Appellee intended to make on behalf of the beneficiaries. Thereafter, pursuant to [Ohio Revised Code §§ 5803.03](#) and [5808.13](#), the Appellant, as representative for her minor children, requested an unredacted copy of the Trust, together with reports concerning the nature of Trust assets and disbursements made by the Appellee. The Appellee refused the request.

On June 4, 2010, the Appellant, as a representative of her minor children beneficiaries, filed a Complaint in the Stark County Probate Court ("Probate Court")<sup>6</sup> demanding production from the Appellee of an unredacted copy of the Trust, as well as a copy of the various reports concerning Trust assets. A pretrial was held on July 21, 2010, and relevant documents were provided to the Probate Court under seal. Without the benefit of an evidentiary hearing, the Probate Court entered judgment in favor of the Appellee on September 1, 2010, denying the Appellant's demand for production of the Trust and the reports. The judgment was appealed,<sup>7</sup> which initial appeal resulted in a reversal and remand to the Probate Court to set the matter for an evidentiary hearing. Following the evidentiary hearing, once again, the Probate Court denied the request for production of documents.<sup>8</sup>

### Court of Appeals

The issue relevant to this article, which issue was appealed to the Fifth District Court of Appeals ("Court of Appeals"), involved the question of whether the Appellant had a conflict of interest with her minor children, thereby precluding the Appellant from serving as their representative pursuant to [Ohio Revised Code § 5803.03](#).

[Ohio Revised Code Section 5803.03](#) provides in pertinent part:

"To the extent there is *no* conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute, all of the following apply:

"(F) A parent may represent and bind the parent's minor or unborn child if neither a guardian for the child's estate or a guardian of the person has been appointed."<sup>9</sup>

The Probate Court determined a conflict of interest did exist. The Probate Court found "...the Plaintiff does not meet the requirements of [Ohio Revised Code § 5803.03](#) as there is a conflict between her and the children. Trustee testified and the Trust document confirms that Plaintiff was disinherited by the 2007 Trust Amendment and is not a proper representative for the minor children in this case."<sup>10</sup> The court of appeals disagreed with the Probate Court, stating "...[w]e do not find Appellant's previous status as a named beneficiary, in the absence of a challenge to her removal as such, standing alone, establishes a conflict of interest with her status as representative of her children."<sup>11</sup>

### Discussion

The *Zimmerman* case brings into full relief the often difficult issue of determining the existence of an impermissible conflict of interest. The issue can be complicated by the fact that in some instances within the law a potential conflict is sufficient to be problematic, while other situations require an *actual* conflict to create an issue.<sup>12</sup> As previously referenced, [Ohio Revised Code § 5803.03](#) authorizes a parent to represent their minor child if there is "*no* conflict of interest."<sup>13</sup> What does "*no* conflict of interest" mean? Is this language, which appears to be an absolute prohibition against all levels of conflict, intended to prohibit actual and potential conflicts? The Probate Court in *Zimmerman* found itself on the front line of the initial analysis of this question.

The Probate Court's Findings of Fact included a determination the Appellant's children were beneficiaries of the Trust as of the execution of the 2007 Trust Amendment and further, that the Appellant was a beneficiary in the original version of the Trust, but she no longer was a Trust beneficiary due to the 2007 Trust Amendment.<sup>14</sup> Applying the law to the facts, the Probate Court found "that [Appellant] does not meet the requirements of [Ohio Revised Code § 5803.03](#) as there is a conflict between her and the children. Trustee testified and the Trust document confirms that [Appellant] was disinherited by the 2007 Trust Amendment and is not a proper representative for the minor children in this case."<sup>15</sup>

The Probate Court's finding of the existence of a conflict was not supported by a citation to authority. The decision also failed to identify a logical nexus between the fact of an individual being disinherited from a trust and from that fact, the determination of the existence of a conflict which prevents that same individual from acting in a representative capacity for her minor children.

The lack of articulation of a logical nexus opens the door to further consider and speculate about the Probate Court's underlying concerns which led to the finding of the existence of a conflict of interest.

The appellate briefs may provide insight into some of the base level arguments considered by the Probate Court. The respective appellate briefs also provide insight into the arguments and interpretive struggle between Appellant and Appellee regarding the meaning of the words "no conflict of interest."<sup>16</sup>

In the appellate brief, the Appellee argued "[t]he conflict of interest the Appellant has, which prevents her from being a 'proper representative' for her minor children, is that prior to the 2007 amendment of the Decedent's Trust she was an intended beneficiary, and now she is not."<sup>17</sup> Appellee then argued, "[b]ecause the Appellant was under the impression that she was set to be a 25% beneficiary to Decedent's Trust and now she is no longer an intended beneficiary, *it would not be unreasonable to foresee even the slightest conflict of interest between the Appellant and her minor children.* Even more so, it would defy common sense to think otherwise"<sup>18</sup>

The Appellee, by arguing "foreseeability" as a factor to be considered in determining the existence of an impermissible conflict, integrates the notion of a *potential* (foreseeable) conflict as being sufficient to disqualify a parent from serving as a personal representative for their minor child. Further, by arguing "...it would not be unreasonable to foresee *even the slightest conflict,*" the Appellee advocates for "no conflict of interest" within [Ohio Revised Code § 5803.03](#) to be interpreted as providing for an absolute prohibition against any conflict, whether actual or potential, as the statutory standard.

Appellant, by contrast, directly addressed the issue of the definition of "conflict of interest." Appellant argued that "[s]ection 5803.03 does not define 'conflict of interest,' nor does any other provision of Chapter 5801, ORC, the 'Ohio Trust Code.' This seemingly simple term has many definitions."<sup>19</sup> Appellant proceeded to provide multiple definitions of "conflict of interest."<sup>20</sup> Appellant then observed, "[a]pparently, the Court found that the fact that Appellant had been 'disinherited' by Mrs. Zirpolo to be somehow a disqualifying factor for Ms. Zimmerman to adequately represent the interests of her minor children. That determination is not logical and defies common sense. If in fact Ms. Zimmerman had been 'disinherited' by Mrs. Zirpolo, by being removed as a beneficiary in Mrs. Zirpolo's Trust, then it is clear that she has no interest at all in the Patricia E. Zirpolo Trust. Given that fact, how can there be a conflict with her representing the interests of her minor children in the Trust? There cannot be any such conflict."<sup>21</sup>

As we know, the court of appeals ruled directly on the issue of whether there was a conflict of interest under the present set of facts. The court of appeals held: "We do not find Appellant's previous status as a named beneficiary, *in the absence of a challenge to her removal as such, standing alone,* establishes a conflict of interest with her status as representative of her children."<sup>22</sup>

Although the *Zimmerman* Court resolved the specific question before it, the decision likely does not conclude the larger issue. Is the language "no conflict of interest" [Ohio Revised Code § 5803.03](#) intended to include all potential conflicts as being disqualifiers for a parent wishing to serve as a representative? If potential conflicts are intended to be included as disqualifiers, is the statute intended to include remote conflicts, or only those potential conflicts which are highly likely? What will be the impact of the court of appeals language "standing alone" or, "...in the absence of a challenge..."? In *Zimmerman*, the Settlor passed away in April of 2008 and the decision by the Court of Appeals was rendered January 31, 2012. Accordingly, by the time of the *Zimmerman* decision, the statute of limitations for the Appellant to challenge the Trust Amendment had run. Would the court of appeals decision have been different if the statute of limitations pursuant to [Ohio Revised Code § 5806.04](#) had not run and the *potential* for a challenge to the Trust Amendment remained?<sup>23</sup>

The Ohio practitioner needs direction beyond *Zimmerman*. As future issues arise, and in the absence of clarification through statutory change or the further development of case law, the practitioner seeking additional guidance for the interpretation of "no conflict of interest" may look to the Official Comment to [Ohio Revised Code § 5803.03](#). The Official Comment states that for the purpose of interpreting whether representation is permissible, "[r]epresentation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute,... *A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.*"<sup>24</sup>

## Conclusion

As these issues develop, it may be worthwhile for the OSBA Estate Planning, Trust and Probate Law Section Council to take a closer look at the language "no conflict of interest" to consider whether it would be possible to clarify and narrow the nature and scope of impermissible conflicts as intended within [Ohio Revised Code § 5803.03](#).

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### Footnotes

- 1 [R.C. § 5803.03\(F\)](#). The representation is further conditioned upon the absence of an appointment of a guardian of the child's person or estate.
- 2 [R.C. 5801.01, et seq.](#)
- 3 [R.C. 5808.13](#). Duty to inform and report.
- 4 [Zimmerman v. Zirpolo Trust, 2012-Ohio-346, 2012 WL 346657](#) (Ohio Ct. App. 5th Dist. Stark County 2012).
- 5 For a complete statement of facts, see [Zimmerman v. Zirpolo Trust, 2012 Ohio 346 - 348](#).
- 6 The Complaint was filed in the Stark County Court of Common Pleas, Probate Division, Stark County, Ohio, Case No. 209161.
- 7 [Zimmerman v. Zirpolo Trust, 2012-Ohio-346, 2012 WL 346657](#) (Ohio Ct. App. 5th Dist. Stark County 2012).
- 8 See, Judgment Entry, Stark County Court of Common Pleas, Probate Division, Case No. 209161, dated May 31, 2011.
- 9 [R.C. 5803.03](#). (Emphasis added.)
- 10 See, Judgment Entry, Stark County Court of Common Pleas, Probate Division, Case No. 209161, dated May 31, 2011, page 4.
- 11 [Zimmerman, 2012 Ohio 346, 348](#).
- 12 Consider a juvenile matter in which the court must determine whether or not to appoint a guardian ad litem for a minor. The court must appoint a guardian ad litem when: "[t]he interests of the child and the interests of the parent may conflict." Therefore, a potential conflict is enough to require the appointment of a GAL. In Re: K.J.F., A minor child, [In re K.J.F., 2004-Ohio-263, 2004 WL 102847](#) (Ohio Ct. App. 2d Dist. Clark County 2004). By contrast, within the criminal arena, if the issue was not raised at the trial level, an actual conflict of interest must be demonstrated on appeal by a criminal defendant wishing to argue that their defense trial attorney had a conflict of interest, which conflict adversely affected the attorney's performance. [State v. Worrell, 2007-Ohio-7058, 2007 WL 4554455](#) (Ohio Ct. App. 9th Dist. Summit County 2007).
- 13 [R.C. § 5803.03](#). (Emphasis added.)
- 14 Stark County Court of Common Pleas, Probate Division, Stark County, Ohio, Case No. 209161, Judgment Entry dated May 31, 2011, page 2.
- 15 Stark County Court of Common Pleas, Probate Division, Stark County, Ohio, Case No. 209161, Judgment Entry dated May 31, 2011, page 4. (Emphasis added.)
- 16 I would like to thank Attorney J. Sean Keenan, Counsel for Appellant, for providing me with copies of the appellate briefs.
- 17 See, Appellee's Brief, page 5.
- 18 See, Appellee's Brief, pages 5, 6. (Emphasis added.)
- 19 See, Appellant's Brief, page 5.
- 20 Appellant provided the following definitions for "conflict of interest": "A real or seeming incompatibility between one's private interests and one's public or fiduciary duties...(Black's Law Dictionary Seventh Ed. 1999). "Conflict of interest" on part of attorney, existence of which will violate a defendant's Sixth Amendment right to effective assistance of counsel, bespeaks a situation in which regard for one duty tends to lead to disregard of another;..." (Ohio Jur.3rd Words & Phrases). The circumstance of a public officeholder, business executive, or the like, whose personal interests might benefit from his or her official

actions or influence . . . : 2. The circumstance of a person who finds that one of his or her activities, interests, etc., can be advanced only at the expense of another of them. (Random House Dictionary of the English Language, Second Ed. Unabridged, 1999).

21 See, Appellant's Brief, page 6.

22 *Zimmerman v. Zirpolo Trust*, 2012 Ohio 346, 348. (Emphasis added.)

23 R.C. 5806.04. Statute of Limitations for actions concerning certain revocable trusts; distributions of property. For revocable trusts which are made irrevocable by the death of the Settlor of the trust, an action to contest the validity of the trust, or any amendment to the trust that was made during the lifetime of the Settlor, the statute of limitations to commence an action to challenge those instruments (among other potential challenges) is the earlier of two years from the death of the Settlor, or six months from the date on which the trustee sends the person bringing the action a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed under this division for commencing an action.

24 R.C. § 5803.03. See, Official Comment, paragraph 1. (Emphasis added.)

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