Weston Hurd LLP
Attorneys at Law

Angela G. Carlin is the Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. She focuses her practice on estate, trust and probate administration and litigation, and tax matters. Angela is the author of the Merrick-Rippner Probate Law publication which is the recognized authority in Ohio on probate law. She received the Nettie Cronise Lutes Award from the Ohio State Bar Association in 1996 as the Outstanding Woman Lawyer and for many years, she has been named as an *Ohio Super Lawyer* by Law & Politics, Inc. and a *Leading Lawyer* by Inside Business Magazine.

Karen A. Davey focuses her practice on estates, trust and probate administration. She also handles litigation in probate related matters, such as will contests, trust contests, and power-of-attorney disputes.

Jerrold L. Goldstein focuses his practice on estate planning, probate and corporate law. Jerry is also Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. He represents clients in a wide variety of matters involving probate administration, probate litigation, estate and income tax compliance, wills and trusts, business formation, contract negotiations, and commercial real estate.

Rema A. Ina is an Associate with Weston Hurd LLP. She focuses her practice on matters involving employment, estate planning, insurance coverage and defense, and workers' compensation.

Gary W. Johnson advises clients on matters involving commercial litigation, business entities creation and maintenance, land use, construction law, zoning, estate planning and probate. Gary has been recognized as an *Ohio Super Lawyer* in the area of Business Litigation by Law & Politics, Inc.

Eugene (Gene) A. Kratus advises individuals in the areas of tax, business and estate planning and counsels privately-owned businesses and their owners on corporate, tax, mergers, acquisitions and business succession issues. His estate planning practice includes implementing various estate planning techniques, ranging from modest By-Pass Trusts to the implementation of sophisticated planning with family limited partnerships, family limited liability companies, charitable trusts and private foundations.

Ludgy A. LaRochelle is an Associate with Weston Hurd LLP. He counsels entrepreneurs, small businesses, and non-profit organizations, and individuals in matters involving commercial real estate, e-commerce and Internet law, employment, estate planning, intellectual property, mergers, acquisitions and divestitures, and regulatory compliance.

Samuel J. Lauricia III focuses his practice on tax planning, at both the Federal and state level, involving corporate, partnership, individual and gift tax issues, succession planning and general corporate transactions, contracts, mergers and acquisitions. Sam has been recognized as an *Ohio Rising Star* in the area of Taxation by Law & Politics, Inc.

Shawn W. Maestle is the Chair of Weston Hurd's Appellate section and a member of the firm's Litigation section. He focuses his practice in the areas of appellate, estate planning and probate litigation.

Teresa G. Santin is an Associate with Weston Hurd LLP. She focuses her practice on matters involving business, employment, estate planning, real estate, and white collar litigation.

Joseph B. Swartz focuses his practice on estate planning, estate administration, trust administration, and income tax for individuals, estates and trusts. Joe served as chair of the Ohio State Bar Association's Labor and Employment Law section for 2010-2012 and he has been recognized as an *Ohio Super Lawyer* for Labor and Employment by Law & Politics, Inc.

Carlin Comments

Does Ohio Recognize "Virtual Adoption"? – Part 1

By Angela G. Carlin

In *Sanders v. Riley*, No. S14A1314, decided March 16, 2015, the Georgia Supreme Court upheld the equitable doctrine of virtual adoption when it reversed a trial court's judgment in favor of Curtis Riley ("Curtis"), who contended that his half-sister, Shalanda Sanders ("Shalanda"), had failed to prove an inheritance claim from their father, Clifford Riley ("Clifford"), under the equitable doctrine of "virtual adoption."

This is another case where disputes among family members may be avoided by an individual, here father Clifford Riley, if he had the basic estate planning documents: a Will, a Trust, if proper, a Durable Power of Attorney, a Health Care Power of Attorney, and a Living Will. Unfortunately, Clifford died without a Will or a Trust identifying his beneficiaries. This case also illustrates that once a child, Shalanda, has been "virtually adopted" by her adopting father, Clifford, a later relationship between the child and the child's natural or biological father does not sever the previous virtual adoption by another person.

Clifford had three children born during his marriage to Corine Riley ("Corine"): Ernestine, Curtis and Shalanda. When Shalanda was born, Curtis had not resided in the marital home for three years, during which time Corine had an affair with Roy Warren ("Roy"). The Rileys knew that Corine was pregnant with Roy's child.

After a discussion, Roy, Corine and Clifford agreed that Clifford should be Shalanda's father and Clifford put his name on Shalanda's birth certificate. There was no written agreement. A legal adoption is provided in the Georgia Code in Title 19, Chapter 8, but Clifford never attempted a statutory adoption of Shalanda.

Unfortunately, Clifford was killed by Corine who then killed herself. While Corine had a Will, Clifford had no Will, but both of them had several insurance policies. Since Ernestine had predeceased her parents, only Curtis and Shalanda collected the insurance proceeds with both signing affidavits that they were the only children and heirs of Clifford. After the affidavits were given to the insurance companies, Curtis disputed Shalanda's claim to inherit from Clifford.

Shalanda claimed her right to inherit from Clifford as a child born during his marriage to Corine, which claim would agree with Ohio law, and alternatively, under the equitable remedy of virtual adoption. However, Curtis filed a motion for partial summary judgment on this issue of virtual adoption, claiming there was insufficient evidence of an agreement by Clifford to adopt Shalanda and the required partial performance of that agreement.

The trial court granted Curtis' motion for partial summary judgment which Shalanda appealed to the Georgia Supreme Court, which reversed said decision concluding that the trial court: 1) did not view the evidence and draw reasonable inferences therefrom most favorable to Shalanda who opposed the motion; 2) misinterpreted the requirement of partial performance of the agreement to adopt; and 3) concluded erroneously that a virtual adoption by Clifford of Shalanda could be undone when Shalanda formed a relationship with her biological father, Roy, after she learned of Roy's existence.

When Shalanda turned 14, Corine introduced Shalanda to Roy and described him as her natural father explaining that it was Clifford's idea to name himself as her father on her birth certificate and for her to carry his surname. Roy began to visit Shalanda once or twice a year. In December 2011 Shalanda filed an action for determination of heirs in Clifford's estate, asserting she was a child born of the marriage of Clifford and Corine, or alternately, based on Clifford's agreement to be her legal father.

The Georgia Supreme Court held that virtual adoption has been a valid equitable remedy in Georgia for more than a century that may enforce a parol obligation by a person to adopt a child of another as his own, accompanied by a virtual, though not a statutory adoption; acted upon by all concerned parties for many years; and which may be enforced in equity after the obligor's death by decreeing that the child is entitled to the obligor's property undisposed of by Will. The Supreme Court of Georgia cited *Rhodes v. Quantrell*, 227 Ga. 761 (1971), holding that before a recovery based upon an oral contract to adopt is decreed: (1) proof of the contract must be clear, strong and satisfactorily leave no doubt as to the contract; (2) the word "adopt" is not necessary for the parties to use in their contract or agreement pertaining to the subject child; and (3) there must be proof of partial performance by the parties to the contract. The Supreme Court warned that "virtual adoption" does not result in a legal adoption or the creation of a legal parent-child relationship, and the equitable remedy may be invoked by the "virtually adopted" child only after the "virtually adopting parent" is deceased.

Weston Hurd LLP
Attorneys at Law

Angela G. Carlin is the Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. She focuses her practice on estate, trust and probate administration and litigation, and tax matters. Angela is the author of the Merrick-Rippner Probate Law publication which is the recognized authority in Ohio on probate law. She received the Nettie Cronise Lutes Award from the Ohio State Bar Association in 1996 as the Outstanding Woman Lawyer and for many years, she has been named as an *Ohio Super Lawyer* by Law & Politics, Inc. and a *Leading Lawyer* by Inside Business Magazine.

Karen A. Davey focuses her practice on estates, trust and probate administration. She also handles litigation in probate related matters, such as will contests, trust contests, and power-of-attorney disputes.

Jerrold L. Goldstein focuses his practice on estate planning, probate and corporate law. Jerry is also Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. He represents clients in a wide variety of matters involving probate administration, probate litigation, estate and income tax compliance, wills and trusts, business formation, contract negotiations, and commercial real estate.

Rema A. Ina is an Associate with Weston Hurd LLP. She focuses her practice on matters involving employment, estate planning, insurance coverage and defense, and workers' compensation.

Gary W. Johnson advises clients on matters involving commercial litigation, business entities creation and maintenance, land use, construction law, zoning, estate planning and probate. Gary has been recognized as an *Ohio Super Lawyer* in the area of Business Litigation by Law & Politics, Inc.

Eugene (Gene) A. Kratus advises individuals in the areas of tax, business and estate planning and counsels privately-owned businesses and their owners on corporate, tax, mergers, acquisitions and business succession issues. His estate planning practice includes implementing various estate planning techniques, ranging from modest By-Pass Trusts to the implementation of sophisticated planning with family limited partnerships, family limited liability companies, charitable trusts and private foundations.

Ludgy A. LaRochelle is an Associate with Weston Hurd LLP. He counsels entrepreneurs, small businesses, and non-profit organizations, and individuals in matters involving commercial real estate, e-commerce and Internet law, employment, estate planning, intellectual property, mergers, acquisitions and divestitures, and regulatory compliance.

Samuel J. Lauricia III focuses his practice on tax planning, at both the Federal and state level, involving corporate, partnership, individual and gift tax issues, succession planning and general corporate transactions, contracts, mergers and acquisitions. Sam has been recognized as an *Ohio Rising Star* in the area of Taxation by Law & Politics, Inc.

Shawn W. Maestle is the Chair of Weston Hurd's Appellate section and a member of the firm's Litigation section. He focuses his practice in the areas of appellate, estate planning and probate litigation.

Teresa G. Santin is an Associate with Weston Hurd LLP. She focuses her practice on matters involving business, employment, estate planning, real estate, and white collar litigation.

Joseph B. Swartz focuses his practice on estate planning, estate administration, trust administration, and income tax for individuals, estates and trusts. Joe served as chair of the Ohio State Bar Association's Labor and Employment Law section for 2010-2012 and he has been recognized as an *Ohio Super Lawyer* for Labor and Employment by Law & Politics, Inc.

Carlin Comments

Does Ohio Recognize "Virtual Adoption"? – Part 2

By Angela G. Carlin

Unlike the trial court in *Sanders v. Riley*, the Georgia Supreme Court viewed the evidence in a light favorable to Shalanda Sanders ("Shalanda") in granting her claim to a portion of Clifford Riley's ("Clifford") estate since Clifford listed himself as her father on Shalanda's birth certificate after the agreement with her biological parents, Roy Warren ("Roy") and Corine Riley ("Corine") that Clifford would raise Shalanda (as was described by Roy in his affidavit filed in the proceeding which was corroborated by Corine), that Clifford visited the marital home and supported the three children, that Shalanda listed Clifford as her father in her wedding invitations, and coordinated and paid for Clifford's funeral listing herself as his daughter on his death certificate.

Upon these facts, the Georgia Supreme Court found sufficient evidence to support the existence of an unwritten agreement for Clifford to adopt Shalanda.

The trial court had held that Shalanda could not establish a virtual adoption because she could not demonstrate a "severance" of her parent-child relationship with her biological father, Roy. In reversing the trail court's decision, the Georgia Supreme Court held that the trial court failed to cite any authority to the effect that once a child's status has changed as part of a virtual adoption, the child can be "un-adopted" simply by developing a relationship later in life with a biological parent, just as a child who is legally adopted does not become un-adopted by developing a relationship later in life with a biological parent.

Had Clifford provided for Shalanda in a Will, she would not have had to establish her virtual adoption on the basis of an agreement, although not written, that Clifford would be her legal father.

Does Ohio recognize virtual adoption of a child resulting from an agreement between individuals as to the rearing of a child without any Court involvement as in the *Sanders v. Riley* case?

Adoption was unknown to common law. Statutes with mandatory procedures created valid adoption but required the exercise of judicial power vested in state courts. *In re Adoption of Peters*, 113 Ohio App. 173 177 NE 2d 541(1961). In Ohio statutory adoption provisions are provided in Ohio Revised Code Chapter 3107.

Notwithstanding the principle of statutory adoption, many states have recognized that when an individual who is legally competent to adopt a child enters into a valid and binding agreement to support a child who is not his natural child, and when there is consideration supporting the agreement such as part performance but not completing a statutory or legal adoption through court proceedings, the agreement is enforceable in equity to allow the child to take the position of a statutorily adopted child under certain circumstances. This doctrine permitting such a result is known as "virtual adoption" or "equitable adoption." Such results have been presented to the courts only after the death of the promisor (who dies without a Will naming such child as a beneficiary), and for the child to receive under the inheritance laws as if the adoption contract had been statutorily and legally performed. However, some courts have taken the view that adoption depends only on compliance with the adoption statutes and decline to recognize an "equitable" or "virtual" adoption based on the facts and not a court order.

If you have any questions about the topic of virtual adoption, please contact your Weston Hurd lawyer.

Weston Hurd LLP
Attorneys at Law

Angela G. Carlin is the Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. She focuses her practice on estate, trust and probate administration and litigation, and tax matters. Angela is the author of the Merrick-Rippner Probate Law publication which is the recognized authority in Ohio on probate law. She received the Nettie Cronise Lutes Award from the Ohio State Bar Association in 1996 as the Outstanding Woman Lawyer and for many years, she has been named as an *Ohio Super Lawyer* by Law & Politics, Inc. and a *Leading Lawyer* by Inside Business Magazine.

Karen A. Davey focuses her practice on estates, trust and probate administration. She also handles litigation in probate related matters, such as will contests, trust contests, and power-of-attorney disputes.

Jerrold L. Goldstein focuses his practice on estate planning, probate and corporate law. Jerry is also Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. He represents clients in a wide variety of matters involving probate administration, probate litigation, estate and income tax compliance, wills and trusts, business formation, contract negotiations, and commercial real estate.

Rema A. Ina is an Associate with Weston Hurd LLP. She focuses her practice on matters involving employment, estate planning, insurance coverage and defense, and workers' compensation.

Gary W. Johnson advises clients on matters involving commercial litigation, business entities creation and maintenance, land use, construction law, zoning, estate planning and probate. Gary has been recognized as an *Ohio Super Lawyer* in the area of Business Litigation by Law & Politics, Inc.

Eugene (Gene) A. Kratus advises individuals in the areas of tax, business and estate planning and counsels privately-owned businesses and their owners on corporate, tax, mergers, acquisitions and business succession issues. His estate planning practice includes implementing various estate planning techniques, ranging from modest By-Pass Trusts to the implementation of sophisticated planning with family limited partnerships, family limited liability companies, charitable trusts and private foundations.

Ludgy A. LaRochelle is an Associate with Weston Hurd LLP. He counsels entrepreneurs, small businesses, and non-profit organizations, and individuals in matters involving commercial real estate, e-commerce and Internet law, employment, estate planning, intellectual property, mergers, acquisitions and divestitures, and regulatory compliance.

Samuel J. Lauricia III focuses his practice on tax planning, at both the Federal and state level, involving corporate, partnership, individual and gift tax issues, succession planning and general corporate transactions, contracts, mergers and acquisitions. Sam has been recognized as an *Ohio Rising Star* in the area of Taxation by Law & Politics, Inc.

Shawn W. Maestle is the Chair of Weston Hurd's Appellate section and a member of the firm's Litigation section. He focuses his practice in the areas of appellate, estate planning and probate litigation.

Teresa G. Santin is an Associate with Weston Hurd LLP. She focuses her practice on matters involving business, employment, estate planning, real estate, and white collar litigation.

Joseph B. Swartz focuses his practice on estate planning, estate administration, trust administration, and income tax for individuals, estates and trusts. Joe served as chair of the Ohio State Bar Association's Labor and Employment Law section for 2010-2012 and he has been recognized as an *Ohio Super Lawyer* for Labor and Employment by Law & Politics, Inc.

Carlin Comments

Does Ohio Recognize "Virtual Adoption"? – Part 3

By Angela G. Carlin

Ohio does recognize the doctrine of "equitable adoption," however the doctrine is usually invoked where a contract or agreement for adoption has been performed for the child's benefit. *Spiegel v. Flemming*, 181 F.Supp. 185(1960). The appellate court in *Boulger vs. Unknown Heirs*, 1983 Ohio App. Lexis 13562 1983 WL 3210, affirmed the trial court's judgment that the decedent's estate escheated to the State of Ohio when she died without lineal heirs. Decedent Nettie Robertson ("Nettie") was "reared" by the appellants' parents, but there was no evidence to conclusively prove that an adoption or agreement to adopt existed between the decedent and the appellants' parents. When the decedent's natural parents died during her early childhood, she was taken in and raised by John and Nannie Robertson. Years later the Robertson's took in and raised another child, Ed Poole, who later married and had three children. The Poole heirs claimed Nettie's intestate estate (when Nettie died without a Will) on the allegation that Ed Poole and Nettie were half-brother and sister. Another set of heirs claimed Nettie's intestate property through the bloodline as great-grandchildren of Nannie Robertson's grandparents, John and Dorcas Dunlap. The Dunlap heirs admit in their brief that there is no evidence of a statutory adoption of Nettie by John and Nannie Robertson.

Since there were no attempts of a statutory adoption nor evidence of a purported contract or agreement to adopt Nettie (nor was there evidence of an adoption of Ed Poole) there was no evidence to reverse the trial court's decision. *D.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St. 2d 279, 376 N.E. 2d 578. Although the trial court also found the evidence insufficient in light of long established policy to avoid escheat if possible, the trial court still found insufficient evidence to support either the Poole's or Dunlap's claimed heirship. The appellate court refused to establish equitable adoption upon the facts in order to avoid an escheat of Nettie's estate to the State of Ohio.

In *York v. Nunley*, in 1992 (80 Ohio App 3d 697, 610 N.E. 2d 576) the Cuyahoga County Court of Appeals declined to expand the law of inheritance by adding a very limited and narrow application of "equitable adoption" where foster children had lived with the decedent for over 20 years, without having been, formally adopted. The decedent's Will did not provide for the foster children and they filed a will contest claiming that they were beneficiaries under her later Will which was now lost or destroyed, and no copies of this later Will was in evidence. The trial court dismissed the will contest and the appellate court affirmed the dismissal, because the foster children had no standing to challenge the Will as they were not "persons interested in the will" with a direct, immediate, and legally ascertainable pecuniary interest as required under R.C. 2107.71(A). The Court found that had the Will been set aside, and the estate passed under the laws of descent and distribution (applicable when there is no valid Will), the foster children would have received nothing.

In *In re Estate of Cummins* 61 Ohio Misc 2d 579, 580 N.E. 2d 866 (1991), the decedent, Rowena Cummins, had no children and was widowed for some time. The decedent devised her estate consisting of farm property in her Will to her "beloved friends," Clarence and Mary Agnes Knecht equally, who farmed decedent's property, and performed services to care for decedent, who in turn made generous monetary gifts to the Knecht family members. Clarence claimed that he was the foster child of the decedent and thus entitled to a value the farm property for estate tax purposes under the special valuation provisions of the former Ohio estate tax provision R.C. 5731.011(A)(2). In this case of first impression in Ohio, the appellate court held that Clarence was not a foster child placed in decedent's residence under the Ohio Administrative Code 5101:2-7-01 as decedent first met Clarence when he was 19 years old, and although there was a close relationship between the decedent and the Knecht family, the decedent characterized their relationship in her Will when she devised her farm to her "beloved friends," and not as a parent and child. Since Clarence was neither the natural child, the adopted child, the stepchild, nor the foster child of the decedent, his inheritance of the farm under Rowena's Will did not qualify for the special farm property value in former R.C. 5731.011. While in some jurisdictions, a relationship between a foster child and a foster parent has been held to be an "equitable adoption," this appellate court held that in Ohio adoption is "strictly statutory."

It appears that in Ohio, if there are facts as in *Sanders v. Riley*, the Georgia Supreme Court decision which include a written or oral agreement which may be proved by sufficient evidence, where a person agrees to adopt the child of another person as his own, accompanied by a virtual, though not a statutory adoption; acted upon by all concerned parties for many years; and which may be enforced in equity after the obligor's death, an Ohio Court may decree that the child is entitled to the obligor's property undisposed of by obligor's Will.

If you have any questions about the topic of virtual adoption, please contact your Weston Hurd lawyer.