

## Publications

### **Client Alert: *Gehrke v. Senkiw*: Ohio Appellate Court Decision May Shorten Time to Contest the Validity of Revocable Trusts**

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The Second District Court of Appeals has issued an opinion in *Gehrke v. Senkiw*, 2d Dist. Montgomery No. 26829, 2016-Ohio-2657, which held that the validity of a revocable trust that the settlor's will incorporates by reference cannot be challenged without also challenging the settlor's will. Because the court determined that the settlor's will incorporated the settlor's trust by reference, plaintiffs' challenge to the validity of the trust only (not the will) was barred by the three-month statute of limitations applicable to will contests—not the two-year statute of limitations to contest the validity of a revocable trust made irrevocable by death.

### **Synopsis**

This case holds that a trust contest must be brought within the three-month statute of limitations period for will contests if the settlor's will incorporates the trust by reference. The court found that a trust named as the pour-over beneficiary in a will was "incorporated by reference" in the will. This case—the first to consider the statute of limitations for a challenge to a revocable trust named in a will since the Ohio Trust Code was enacted in 2007—creates some uncertainty with respect to the limitations period for revocable trust contests, which is otherwise set forth at R.C. 5806.04. That statute, which is not addressed in the court's decision, provides for a two-year statute of limitations to contest the validity of certain revocable trusts or any amendment to such trust following the death of the settlor (which can be shortened to six months if proper notice is given to beneficiaries). The statute gives no indication that this time period may, instead, be only three months, depending upon the language of the settlor's will, as the Second District's holding in this case provides.

### **Fact Summary**

Decedent died on February 10, 2014 at age 90. Her husband predeceased her; they had no children. Her next of kin were the three children of her deceased sister (Appellants). In 2008, decedent executed a will that left personal property to her nephew, Tim Gehrke, a

large specific bequest to a university, and the remainder to her revocable trust created the same day, which made charitable contributions and left the remainder of the trust to Gehrke.

In July 2013, decedent executed a new will and trust. This 2013 will left the residuary of decedent's estate to the new trust. The 2013 trust provided that \$75,000 was to be held in trust for the benefit of Gehrke, for use during his lifetime, and the residue was to be given to various individuals and charities. On August 5, 2013, the decedent executed an amendment to the 2013 trust, which changed the residuary clause to eliminate the provision for Gehrke's benefit and several other beneficiaries and left the remainder to two friends and decedent's church in equal shares. There was evidence that in 2013 decedent began to suffer from various medical conditions, including diminished mental capacity, which persisted until her death. Medical records indicated diagnoses in July and August 2013 of "severe dementia."

The 2013 will was admitted to probate on February 20, 2014. On August 5, 2014, approximately one week after the statute of limitations to contest the validity of that will had expired, Gehrke, along with his sisters, brought an action to declare that the 2013 trust and the amendment were invalid on the grounds that decedent lacked testamentary capacity and was subject to undue influence when she executed them.

## Decision

The court determined that "because the 2013 Trust was incorporated into the 2013 Will, the [Appellants] could not challenge it without also challenging the 2013 Will." The court relied upon a 1976 Supreme Court of Ohio case, *Hageman v. Cleveland Trust Co.*, which found that the language in the will in that case was sufficient to incorporate the trust by reference as permitted by statute. The appellants argued that the language in the 2013 will was not intended to incorporate the 2013 trust by reference under R.C. 2107.05, but rather designate the 2013 trust as a beneficiary of the estate, through a pour-over clause under R.C. 2107.63.

The court found that although the 2013 will might not clearly manifest an intent to incorporate the 2013 trust by reference, its language was "nearly identical" to that in the *Hageman* case. The court was, therefore, bound to follow the Supreme Court's precedent. The court also affirmed the lower court's decision to strike several affidavits of experienced estate planning attorneys that the appellants had submitted to the trial court in support of their legal argument that the language was a pour-over clause only. The court found that the trial court was entitled to perform its own legal analysis, noting, however, that such expertise may be helpful to a legislative committee should the Ohio General Assembly decide to clarify this issue—perhaps suggesting that the court believed some clarification may be indicated.

## Analysis

Because revocable trusts and wills that pour over into those trusts are common estate planning tools, disputes concerning the validity of those trusts can be as prevalent in estate disputes as will contests. When the Ohio Trust Code was enacted in 2007, it included a statute of limitations for actions concerning revocable trusts.

R.C. 5806.04 (A) provides: "actions pertaining to a revocable trust that is made irrevocable by the death of the settlor of the trust shall be commenced by the earlier of the date that is **two years** after the date of the death of the settlor of the trust or that is **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," including actions to contest the validity of the trust or any amendment to the trust made during the settlor's lifetime. (emphasis added).

Under this statute, it would appear that the appellants had either two years or six months to bring their claim, not the three months enforced by the trial court and affirmed by the Second District Court of Appeals.

But under *Gehrke v. Senkiw* (provided that the decision is not overturned on appeal), those who wish to contest the validity of a revocable trust following the death of the settlor must consult the language of any will that refers to that trust and determine whether the trust is "incorporated by reference" under R.C. 2107.05 and *Hageman*. If so, a claim must be brought within the three-month statute of limitations to contest the will—not under the time periods provided by R.C. 5806.04.

In addition, the holding that a will with language that is intended to make a revocable trust a pour-over beneficiary of the will incorporates the will by reference, requiring a will contest to challenge the validity of the revocable trust or its amendments, raises other considerations. First, it may create a situation where a party must challenge the will to challenge a trust or trust amendment but has no grounds to do so. For example, a decedent may execute a will, which names her revocable trust created the same day as the sole beneficiary, when there is no question of her capacity. But later, when her capacity is in question, she amends only the trust to change the beneficiaries of the trust. Must the challenging party also file a will contest to challenge the trust amendment? Under *Gehrke v. Senkiw*, the answer appears to be yes.

Second, it raises a question of judicial administration. A party to a will contest is entitled to a trial by jury, while a challenge or defense of a trust may be heard by a jury only in the trial court's discretion. Will the court combine the two cases for trial? If so, how?

Appellants' deadline to file a notice of appeal to the Supreme Court of Ohio is June 9, 2016. It remains to be seen whether this decision will be reviewed and upheld. In the meantime, anyone considering an action to contest an Ohio trust or trust amendment should file their claim within the three-month deadline to contest the will that names the trust, notwithstanding R.C. 5806.04.

Please contact your Vorys attorney for further updates.