

PROBATE UPDATE

By Magistrate Lora Lynne Stal-
naker
Probate Chair

At Spring Conference, probate CLE was offered on wrongful death settlements and exceptions to inventories and accounts. Additionally, a comprehensive case law update was presented.

The Probate Breakout Session at the Fall Conference this year will feature Judge Swift from Trumbull County and Judge Hague from Ashtabula County presenting Forfeiture of bonds in Surcharge Proceedings. I encourage you to attend what promises to be a very informative CLE and a great discussion.

If there are any probate topics that you would like to see presented at the OAM Conferences (or if you have a topic you would like to present), please do not hesitate to contact me by e-mail at lstalnaker@lakecountyoohio.org or telephone at 440.350.2781.

LEGISLATION

The following is a summary of recently passed and pending legislation. For more information, including a more in-depth analysis and status of the legislation, visit www.legislative.state.oh.us.

Enacted Legislation

SUBSTITUTE HOUSE BILL 160 became effective on June 20, 2008, clarifying and modifying the law relating to disclaimer under the Ohio Trust Code. The Bill specifically states that the intention of the act is to clarify and declare that the amendments to the disclaimer statute are to construe the law as it existed prior to the enactment of the bill. The law permits a guardian of the estate or a personal representative of a deceased person, whether authorized or not by the instrument, with the consent of the Probate Court, to disclaim the succession to any property or interest in property that the ward or deceased, if living, may have disclaimed. Additionally, a disclaimant must deliver, file, or record the disclaimer prior to accepting any benefits of the disclaimed interest and at any time (eliminating reference to the nine-month period) after the latest of three specifically described dates, including the date on which the disclaimant attains 18 (instead of 21) years of age or is no longer an incompetent.

HOUSE BILL 372 exempts from certain probate fees the estates of a decedent who died in active service as a member of the United States Armed Forces or National Guard if the death occurred while serving in a combat zone or as a result of wounds, disease, or injury incurred while serving in a combat zone. The act applies to estates for decedents who die on or after the effective date of the act, March 24, 2008 and is codified under R.C. 2101.164.

SUBSTITUTE HOUSE BILL 499 modified the Trust Code and fiduciary law, effective September 12, 2008. Highlights are as follows:

The administration of a trust is governed by the law designated in the terms of the trust to govern trust administration and, in the absence of such designation, the law of the trust's principal place of administration.

If, upon petition, the court finds that the settler and all beneficiaries consent to the modification or termination of a non-charitable irrevocable trust, that all consents, including any given by representatives, are valid, and that all parties giving consent are competent to do so, the court *must* order the modification or termination.

A provision in the terms of a charitable trust for an alternative charitable purpose prevails over the court's power to apply cy pres to modify or terminate the trust.

A trustee is permitted to furnish a beneficiary with a copy of a redacted trust instrument that includes only those provisions determined by the trustee to be relevant to the beneficiary's interest in the trust.

SENATE BILL 134, effective January 17, 2008, provides that a Memoranda of Trust be executed and acknowledged only by the trustee of the trust instead of both the trustee and settler.

Effective May 14, 2008, **AMENDED SUBSTITUTE SENATE BILL 157** authorizes a person to nominate, by a durable power of attorney or in writing, a guardian for a person's incompetent adult child. The nominee has preference in appointment over a person applying to be guardian if the nominee is competent, suitable, and willing to accept the appointment, and if the incompetent adult does not have a spouse or adult child and has not designated a guardian prior to the court finding the adult child incompetent.

Am Sub. SB 157 further removes the requirement that a guardian, other than a guardian named in a will by a parent of a minor, selected by a minor over the age of 14, or nominated in or pursuant to a durable power of attorney or a writing, must be removed on proof that the guardian is no longer a resident of this state. Instead, the act states that such guardian *may* be removed.

SENATE BILL 302, effective September 11, 2008, requires a will to be attested and subscribed by the witnesses in the conscious presence of the testator and provides that a decedent who signs a document that is a purported will sign in the conscious presence of the witnesses. Conscious presence is defined as "within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication."

Pending Legislation

HOUSE BILL 7 indicates the intent of the General Assembly to make adoption easier and to reform adoption law to ensure timely, safe, and appropriate adoptive placements, reduce adoption expenses, and generally promote adoption in Ohio.

The Bill passed in the House on May 20, 2008. It is currently in the Senate Health, Human Services & Aging Committee. Some of the salient provisions of the Bill are as follows:

Adds up to \$3,000 to the birth mother's living expenses incurred during pregnancy and up to 60 days after the child is born to the payments that may be made in connection with a child's permanent surrender, placement, or adoption.

Revises the condition under which a parent's consent is not needed for an adoption on the basis of failing for a period of one year to communicate with the child or provide for the maintenance and support for the child to require that the parent fail to *regularly communicate* with the child and *significantly* provide for the maintenance and support of the child.

The bill further provides that an interlocutory order of adoption is to become final not less than six months and not more than one year from the date of the adoptee's placement in the adoptive home rather than from the date of the order's issuance.

HOUSE BILL 139 prohibits a probate court from ordering a statutory name change if the applicant has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing identity fraud or for committing a sexually oriented offense or child-victim oriented offense for which the person must register under the Sex Offender Registration and Notification Law (SORN), unless adjudication reversed on appeal. This bill was incorporated into House Bill 111 as an amendment made on the House floor on May 21, 2008.

HOUSE BILL 173 is the Judicial Qualification and Compensation Bill and was introduced on April 24, 2007. It creates two commissions, one to make nonbinding recommendations to the Governor for the appointment of persons to fill judicial vacancies and the second to study the number of judges on trial courts and courts of appeals in relation to each court's caseload and to make recommendations to the General Assembly regarding the creation and abolition of judgeships.

"Engaged or engaging in the practice of law," is defined and the number of years of judicial experience or years of engaging in the practice of law required before a judge may take office is increased.

HOUSE BILL 255 was introduced on June 5, 2007. A majority of the provisions will be incorporated into a probate modernization bill by Representative Oelslager. Current provisions include permitting a probate judge to appoint a public agency or nonprofit agency to serve as guardian and authorizing the use of the county auditor's valuation of real property in an estate inventory.

HOUSE BILL 299 establishes procedures under which a probate court may order a person to receive assisted outpatient treatment for mental illness, including the criteria a person must meet, who may petition the probate court, and procedures if the person refuses a mental health examination. Allows the court to approve, partially approve, or amend the written assisted outpatient treatment plan, extend assisted outpatient treatment, or dismiss the case, after considering certain factors. A person who fails to participate in court-ordered assisted outpatient treatment would be subject to judicial hospitalization. The bill contains no mechanism for funding.

HOUSE BILL 482, introduced February 19, 2008, authorizes public offices to limit the number of bulk data requests, impose charges to cover the actual costs associated with bulk data requests, and charge for the cost of redacting certain information.

HOUSE BILL 564, introduced May 19, 2008, increases fees charged by the probate court.

SENATE BILL 22 authorizes the probate court in certain circumstances to civilly commit persons who are convicted of, pleaded guilty to, or been adjudicated a delinquent child for sexually violent offense or who are charged with committing a sexually violent offense but who are found incompetent to stand trial or not guilty by reason of insanity, and who, in any case, are found to be "sexually violent predators."

SENATE BILL 100 was recently amended on May 28, 2008 to extend the bill's protections to prosecutors. The Bill increases penalties for certain offenses when a judge, magistrate, or prosecutor is the victim; prohibits a person from threatening a judge, magistrate, or prosecutor; and makes the killing of a judge, magistrate, or prosecutor an aggravating circumstance for the imposition of the death penalty for aggravated murder. A similar bill was introduced in the House as House Bill 265.

SENATE BILL 165 increases, by two, the board membership of county boards of mental retardation and developmental disabilities, and requires the new members of each board to be individuals eligible to receive mental retardation and developmental disabilities services offered by the board.

SUBSTITUTE SENATE BILL 217 designates the Saturday immediately preceding Thanksgiving as "Adoption Day."



THIRD QUARTER 2008

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A CONVERSATION WITH JAMES LANDON, PROGRAM MANAGER, OHIO JUDICIAL COLLEGE

By Magistrate Ann Weatherhead
Cuyahoga County
Domestic Relations Court

Those of you who attend the Fall Conference will see a new member of the Judicial College team. James Landon joined the Judicial College in June of this year. Some of his responsibilities are those which Christy Tull used to do, including helping to facilitate Judicial College educational programming for judges and magistrates in the areas of probate, juvenile and domestic relations law. He will also manage the Guardian ad Litem Education Program through the Judicial College as well as other duties as directed. Mr. Landon was interviewed by Ann Weatherhead.

Q: You spent the first 10 years of your career in the child abuse investigation field, as a caseworker for a public children services agency investigating child abuse allegations, the Executive Director of the children's advocacy center in Portage County, and eventually worked as the Education Coordinator (and as the Interim Executive Director) of the Ohio Network of Children's Advocacy Centers (ONCAC) before joining the Judicial College. The common theme is protection of children. What drew you to children's issues?

J.L.: While working as a litigation project assistant at Jones Day in Cleveland after undergraduate school, an acquaintance asked me to help with a fund-raising initiative for the new children's advocacy center in Portage County. I was immediately drawn towards the pursuit of justice for children that are sexually (or otherwise) abused (and I was also drawn away from corporate law). I soon noticed that

many of our communities are ill-prepared to investigate and prosecute these complicated and unpopular cases. Further, our treatment systems (medical and mental health and victim advocacy) are starving for more resources. All of these systems are in great need of multidisciplinary collaboration. I had the opportunity to get involved and try to unite a community around the protection of children, so I made the leap to child abuse investigation and case coordination. There were only a few children's advocacy centers in Ohio at the time, so we banded together and made the Ohio Network of Children's Advocacy Centers to try to help other communities in Ohio. I'm proud to say that there are over twenty CACs in Ohio now, and many more multidisciplinary teams working to stop child sexual abuse and severe physical abuse.

Q: Your career seems to have evolved from working in the trenches, both in investigations and advocating on behalf of children, to working to develop educational programming. Do you miss any of the more hands on aspects of your previous experiences? Is there an overlap between education and advocacy?

J.L.: There are days that I miss the field. There is something exciting about investigations and courtroom testimony, etc. However, developing policy, getting involved with legislation, and providing educational opportunities for those that are out on the streets has enabled me to feel like I am making an impact, even though I have no direct client contact. I truly believe that there is a strong overlap between education and advocacy. I believe to advocate

effectively for any position or idea, one must be able to educate the target with the most accurate information available in an effort to convince that person to join you as an advocate for the cause in question. In my new position with the Judicial College, I look forward to the opportunity to share my previous contacts and faculty with the judiciary in an effort to bring new information and insights to our judicial officers. It is exciting to be able to work with judges and magistrates in this regard.

Q: How much did you know about the Judicial College before you started working there? Once you started working for the Judicial College, did anything there surprise you because it differed from your previous expectations or impressions?

J.L. I had previous contact with Doug Stephens, Steve Hanson, Christy Tull, and Kristopher Steele, but I knew very little about the Judicial College until I was made aware of the position opening and conducted some research. I knew that the College was well respected, well organized, and that it provided educational opportunities to judges, magistrates, and court personnel. Otherwise, I knew that they worked in a beautiful building and I thought that they were paid extraordinary amounts of money. I was correct about everything but the amount of money that they were paid! (Laugh here, I'm only kidding). I can say that every day, when I walk into the main hallway on the first floor of this building, I feel proud to

work for the Court. This building is full of extremely professional people who are truly devoted to providing outstanding services, along with administrative personnel who value and trust their employees. It is a great place to work.

Q: What else should our readers know about you?

J.L.: I am married to Jamie—go ahead and make fun of us...James and Jamie. We've been married for about three years. She is an HR recruiter for Nationwide Children's Hospital. We currently have a dog named Emma and we live just north of Westerville on the north side of Columbus. We are expecting our first child in January, which is the very exciting for us, of course. I love just about every outdoor activity: fishing, camping, kayaking, cycling (road, mountain, and cruising) — you name it. I have an MBA, but just like the JD's that are reading this questionnaire, I have decided to use my powers for good. On a serious note, I have great respect for the important decisions that judges and magistrates make every day, and I am proud to have the opportunity to work with you. Thanks for having me.

Q: Are you related to Michael Landon?

J.L.: I get this question often. Actually, Michael is an imposter Landon. Born Eugene Maurice Orowitz, "Michael" picked the name "Landon" from the phone book when he began his acting career. Save that nugget for your next game of Trivial Pursuit.

REMODELED RAMADA PLAZA TO HOST 2008 FALL CONFERENCE

By Magistrate Mark A. Huberman,
Fall Conference Chair

By now you should have already received your program and registration materials for the 2008 Fall Conference, which will once again be taking place at the Ramada Plaza Hotel and Conference Center. The hotel is on Sinclair Road in Columbus. The conference will run from Wednesday, September 24, to Friday, September 26.

As previously reported, the hotel changed owners shortly after last year's conference and returned to its previous affiliation with the Ramada Corporation. As a condition of the new branding, the new owners were required to renovate the sleeping rooms. Not only have the rooms been renovated, but the owners have gone far beyond that and are now in the process of renovating the entire facility, nearly all of which is scheduled to be completed by the time our conference opens.

The accommodations will now finally match the excellent food and staff service, all of which should make for an excellent conference.

Perhaps most importantly, the entire program has been developed in conjunction with the Ohio Judicial College, and as a result, attendees of the full program will be able to obtain 13.75 hours of Judicial College CLE credit, thereby fully satisfying the 10 hour reporting period requirement. You

can even satisfy your Ethics, Professionalism and Substance Abuse requirements as well.

If for any reason you have not received your registration materials, you can download them from the OAM Web site by clicking on the link for "Fall Conferences."

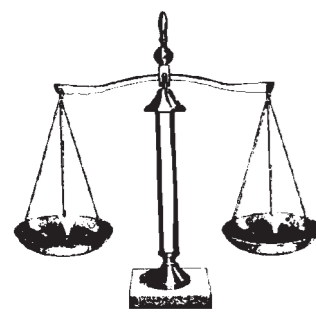
See you shortly!

BOARD ELECTION AT-LARGE POSITIONS

By Magistrate Carol Hargreaves
Lucas County
Domestic Relations Court
Nominating Committee Chair

Interested in serving as a board member? This year's elections will be held at the Fall Conference annual meeting and are for the "At-Large" seats. If you wish to run for a board seat, just fill out the application form and return it to Magistrate Carol Hargreaves, Lucas County Domestic Relations Court, 429 North Michigan Avenue, Toledo, Ohio 43620, fax it to 419-213-6861, or e-mail it to Tom Shutt at Tshutt@Clarycommunications.com.

Other ways to serve? Practice area chairs also sit on the board. If you cannot attend the annual meeting, fill out the proxy and have your vote counted.



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FALL CONFERENCE TO FEATURE SPEAKER ON AUTISM

By Magistrate Thomas Freeman
Summit County
Common Pleas Court

On September 25, at the Fall Conference, Chris Filler, of the Ohio Center for Autism will discuss the characteristics of youth with ASD, its implications to the court process and tips for magistrates and others involved with these youth.

Autism is a developmental disability that significantly affects verbal and nonverbal communication and social interaction. Characteristics often associated with autism include engagement in repetitive activities and stereotyped movements, resistance to environmental change in daily routines and unusual responses to sensory experiences. Autism Spectrum Disorders include autism and related disorders such as Asperger Syndrome, Rhett Syndrome, childhood disintegrative disorder and pervasive development disorder-not otherwise specified.

Youth with Autism Spectrum Disorders (ASD) are a rapidly growing population with reported incidence rates of 1 in 150. In some areas of the country the

reported rates are even higher. While some of these youth have corresponding intellectual disability, many do not. However these young people with ASD still have great difficulty socializing, understanding social norms, expressing their emotions, understanding other's intentions, and dealing with unpredictable or confusing environments.

When these youth enter the juvenile justice system, they may need to be approached and handled differently. Interviews must be structured and supported in order that accurate information is obtained. The court process may be misunderstood, even when the youth with ASD responds or offers explanations. If the youth must spend time in a detention center, the staff should be aware of potential triggers for behavioral incidents. Magistrates also may determine that these youth will require specific diversion programs or interventions to prevent recurrence of the offenses.

Chris Filler's presentation will be the Thursday afternoon segment for Juvenile Court.

NEW FORECLOSURE LAWS TAKE EFFECT

By Attorney Richard McNellie
Carlisle, McNellie, Rini,
Kramer and Ulrich.
Cleveland, Ohio

Several changes to the state's foreclosure laws will take effect on September 11, 2008. The full text of the provisions is set forth in House Bill 138, which can be found at the website for the Ohio Legislature. Here are some of the more important highlights.

1. Section 323.47 (B) was amended to provide that real estate taxes payable from Judicial Sale Proceeds will also include a portion of the current year's taxes that are a lien but undetermined to be estimated by the county treasurer;

2. Section 2323.06 was added to the code which provides that a court may at anytime during a foreclosure require mediation and in doing so require the mortgagee to appear at said mediation in person.

3. Section 2329.17 (B) has been added to the code to permit inspection of the property prior to the judicial sale by the subject municipal corporation or township;

4. Section 2329.91 (B) has been added which codifies many county local rules and makes the practice uniform throughout the state by requiring the filing of a preliminary and final judicial title report in all residential foreclosure actions;

5. Section 2329.26 has been amended to provide that a judicial sale date must be not less than 3 weeks rather than 30 days from the date of the first publication;

6. Section 2329.271 has been added to the code which provides that a corporate purchaser at sheriff's sale, depending on the location of its principal place of business provide the name of a person (a natural person employed by the purchasing entity at its principal place of business for out of state purchasers) at the principal place of business of the purchaser who has been designated by the purchasing entity to receive notices and inquiry regarding the subject property. This information will be part of the public record;

7. Section 2329.272 has been added to the code and provides that the officer conducting a judicial sale may hold an open house at the subject property prior to the sale and that the cost of that open house will be deducted from sale proceeds;

8. Section 2329.30 of the code has been amended to provide for the contempt proceedings should the purchase price for the property remain unpaid for

30 days subsequent to confirmation; and, in conjunction therewith Section 2329.31 requires that the balance of the purchase price including the amount due from a lien holder be paid to the Sheriff within 30 days of the confirmation of the sale;

9. Section 2329.39 of the code has been amended to provide that a judicial sale shall be confirmed within 30 days subsequent to the return of the order of sale by the selling officer;

10. Section 2329.36 has been amended to provide that the deed conveying the property at a judicial sale shall be prepared by the attorney that caused the writ to be issued within 7 days after the confirmation of sale; and that the sheriff shall record the sheriff's deed 14 days after the purchase price has been paid;

11. Section 2703.41 has been added to decrease the amount of time necessary for service by publication from 6 weeks to 3 weeks and to delete any requirement that the legal description of the subject property be included in the ad but rather that the property be described by address and permanent parcel number; and,

12. Section 2703.26 of the code was amended to establish the date of Lis Pendens as being the date that the subject complaint is filed rather than the date of service of process.

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NEW FIREARMS NOTICE FOR DOMESTIC VIOLENCE CPOS AND CIVIL STALKING CPOS

By Coleen Dailey
Domestic Relations Chair
Columbia County
Common Pleas Court

With the passage of HB 562, there is yet another requirement for a court to comply with when issuing a civil protection order. The requirement applies in both civil and criminal court if the offense is a misdemeanor. Courts are now required to notify each respondent or defendant that the issuance of a civil protection order or conviction of a misdemeanor, "crime involving violence in which you are or were a spouse, intimate partner, parent or guardian of a victim or were involved in another similar relationship with the victim," may make it unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition pursuant to fed-

OHIO BAR ASSOCIATION PROPOSES SPOUSAL SUPPORT GUIDELINES

By Magistrate Steve Weithman
Delaware County

On August 1, 2008, Barbara B. Porzio and Mark Edward Stone presented a seminar on the issue of spousal support at a Supreme Court seminar at Sawmill Creek. Next year, the Ohio State Bar Association will be pushing the state legislature for adoption of its proposed statute on spousal support guidelines.

The statute would mandate specific amounts and durations of spousal support. The amount of compensatory spousal support would depend on the duration of the marriage. For marriages of five to 10 years, the percentage is 20 to 30% of the difference in income generating capacities of both spouses. For marriages of 10 to 20 years, the percentage is 30 to 40%. For marriages of 20 to 25 years, the percentage is 35 to 45%. For marriages of 25 years or

more, the percentage is 40 to 50%.

Looking at the spousal support cases decided so far in 2008, in only four cases did the actual award exceed the minimum amount of the Ohio Bar proposal. In *Long v Long* (6/20/08), the trial court ordered spousal support in the total amount of \$76,000.00. The minimum bar formula was for \$71,149.00. In *Dunlap v Dunlap*, the trial court and appellate court ordered \$7,200.00. The minimum bar formula was for \$0.00. In *Slobody v Slobody*, the trial court and appellate court ordered \$108,000.00. The minimum bar formula was for \$100,392.00. In *Hutta v Hutta*, the trial court awarded \$931,968.00. The minimum bar formula was for \$699,720.00.

For the rest of the cases, the comparison of the actual amount awarded to the minimum amount of the Ohio Bar and the maximum amount can be quite outstanding:

Case Name	Actual Award	Ohio State Bar, minimum	Ohio State Bar, maximum
Schroeder	\$ 71,400.00	\$120,155.00	\$231,713.00
Schalk	54,000.00	135,369.00	263,595.00
Burns	16,500.00	83,620.00	144,003.00
Long	76,000.00	71,149.00	137,216.00
Lewis	288,000.00	937,020.00	1,807,110.00
Dunlap	7,200.00	0.00	0.00
Heller	96,000.00 per year	114,176.00 per year to \$239,978.00 per year if SubS included	142,720.00 per year to \$299,973.00 per year if SubS included
Slobody	108,000.00	100,392.00	200,784.00
Ruiz-Bueno	33,600.00 per year	40,600.00 per year	50,571.00 per year
Nemeth	60,000.00	204,547.00	398,002.00
Hutta	931,968.00	\$699,720.00 - \$1,739,371.00 if K-1's included	\$1,349,460.00 - \$3,354,498.00 if K-1's included

VERIFY E-MAIL ADDRESS AND PRACTICE AREA

By Magistrate Mark A. Huberman,
Email and Web Site Support

As most of you are aware, earlier this year, the association began e-mailing messages to over 480 members on a regular basis and this has proved to be a great vehicle for communication. However, the key to its continued effectiveness is that we have your correct and current e-mail address.

If you have not been receiving our e-mails, please let us know and we will add you to the list. If you have been receiving the e-mails, but would prefer that we use a different e-mail address for you, just let us know.

You can check your listing by click-

ing on the proper link on the OAM Web site which is located at www.ohiomagistrates.org under the main link entitled "Member Services."

Please e-mail any needed changes to us at info@ohiomagistrates.org.

Finally, our goal for 2008 is to be in a position to permit Practice Area Chairs to directly communicate by e-mail with the Magistrates in their particular practice areas. To do that effectively, we need to know your preferred practice area or areas. The classification is readily apparent for Municipal Court Magistrates as well as DR, Juvenile and Probate Magistrates whose courts operate as Special Divisions. However, for those of you who work in Family Courts, or those who combine dockets, we need to know your area of emphasis and/or interest.

Once again, please e-mail your preference(s) to us at info@ohiomagistrates.org.

Thanks for your cooperation.

7TH DISTRICT REPORT

By Magistrate Mark A. Huberman

There have been no changes in the Magistrate corps of the Seventh District since my last report. As previously indicated, with the action of Judge Mark Belinky of the Mahoning County Probate Court in paying the OAM memberships for all four of his magistrates, all 30 magistrates of the eight counties which comprise the Seventh District are now members of the association. Although there are two contested judicial races this fall, it is not anticipated that any current magistrates will find their positions in jeopardy.

BUSINESS VALUATION IN THE DIVORCE — RECOGNIZING FAIR MARKET VALUE

By Grover Rutter
CPA/ABV, CVA, BVAL

This article is intended to provide you with a better understanding of the Fair Market Value Standard that is used for the valuation of businesses in divorce cases. Hopefully, it will assist you in recognizing the linchpins of fair market value arguments.

True fair market value can be determined only by the ultimate sale of a subject property on the open market. However, in the **divorce scenario** an actual sale of the business interest is generally not contemplated. Therefore, in determining the fair market value of the business, the positions of the **hypothetical seller** and the **hypothetical buyer** must be considered.

The Fair Market Value Standard of value actually requires a minimum of two (though there can be many more) valuation indications which create a simple range of values. At least one indication of value must come from the seller's perspective and another indication of value must come from the buyer's perspective.

Where is the authority for the foregoing statement? Let's take a look at the classic definition of Fair Market Value. This definition of Fair Market Value is found in Revenue Ruling 59-60:

"The amount at which property would change hands between a willing seller and a willing buyer when neither is under compulsion and when both have reasonable knowledge of the relevant facts."

The ruling implies that the value perceptions of the seller and the value perceptions of the **buyer must** be considered when determining fair market value.

Yet another definition of *Fair Market Value* can be found in the Glossary of Terms as jointly developed by representatives of the American Institute of CPAs, the American Society of Appraisers, Canadian Institute of Chartered Business Valuators, the Institute of Business Appraisers and the National Association of Certified Valuation Analysts. According to that Glossary's definition, **Fair Market Value** is:

"The price, expressed in terms of cash equivalents, at which a property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting in arms length in an open and unrestricted market, when neither is under compulsion to buy nor to sell, and when both have reasonable knowledge of the relevant facts."

Based upon the foregoing definitions, fair market value is a *concept of price range*, with actual fair market value falling somewhere within the range of opposing values perceived by the seller and the buyer. The seller tries to justify the highest values (yet may sell for a lower price) while the buyer justifies the lowest values (while willing to buy for a higher price); thus, establishing the negotiated fair market value.

Unfortunately, Revenue Ruling 59-60 provides fodder for judicial confusion pertaining to the fair market value standard. The ruling provides, in part:

A strict reading of this section of the Ruling might indicate that a valuator must pick one specific method and stick to it (thus, avoiding the use of any averaging method). *However, such an exclusive approach (picking just one value) would exclude active consideration of other pertinent factors—primarily factors associated with both, the value perceptions of buyer(s) and the seller.* In short, there will always be more than just one opinion of value in an arm's length negotiating process. And those varying opinions of value must be reconciled by the parties to the negotiation in order to arrive at an actual fair market value (the negotiated value). The use of averaging methods in the reconciliation of the valuation results (in hypothetical fair market val-

uation) is generally acceptable and may be used' although some valuator may argue against the use of averaging the range of values.

As an active business valuator and intermediary, I actually sell businesses for my clients. I have observed that the sellers (and their advisors) of a business will generally approach the valuation differently than the buyers (and their advisors) approach the same business valuation. Each side (the seller and the buyer) may use valuation methods that specifically support their perceptions of value. Table 1 provides just some (but not all) of the valuation methodology considerations:

The seller's calculations of value (generally the higher values) and the buyer's calculations of value (the lower values) effectively establish a range of value. The actual negotiated value will fall somewhere within that range of values. Because the hypothetical fair market value is **hypothetical**, the valuator cannot assume a transaction will not be made. It is the valuator's job (in hypothetical fair market valuations) to determine what would be a reasonable and defensible value by both the seller AND the buyer. The use of an averaging method can be a useful tool in reconciling the differing values as perceived by buyers and sellers.

Fair market value is negotiated by two opposing parties, each striving to achieve separate and independent economic outcomes. In the negotiation process, sellers, buyers and the professional advisors of each are likely to use **many valuation methods** in arriving at the final negotiated value. Generally some weight is afforded to each method, based upon its merit and relevance. When valuator render opinions of hypothetical fair market value in divorce cases, they should only do so

after making some of the same considerations that buyers and sellers would make in an actual transaction.

The Problem with Some Valuation Conclusions

The foregoing discussions point to a relevant fact often neglected by business valuers in their valuation presentations to the courts. Valuators often crunch numbers and arrive at some conclusion of value—without ever considering the underlying objectives of each, the buyer **and** the seller. The valuator should consider within his or her work, likely valuation conclusions of a seller as well as the likely valuation conclusions of a buyer. Only then (in accordance with the definitions of Fair Market Value) can the valuator reconcile to the hypothetical fair market value conclusion.

Attorneys, Magistrates, Judges and CPAs also often forget that the determination of Fair Market Value requires two willing and able participants, each with an opposing view of value.

When hearing testimony about valuation methodologies and valuation conclusions, Magistrates may be able to establish whether or not the opined conclusions comply with the Standard of Fair Market Value by asking some (or all) of the following questions:

Questions about a Buyer's Perspectives

Did you consider the potential objectives of a hypothetical buyer of this business?

If so, can you identify the hypothetical buyer's objectives?

Did you consider the risks associated with this business that a hypothetical buyer might perceive?

What are some of the risks you considered (negatives)?

How did those risks (negatives) affect your valuation conclusions?

Table 1—Valuation Method Considerations of Buyers and Sellers

Valuation Method	Who Might Use	Possible Reasons for Use
Discounted Flow Method	Buyers	Buyers will more likely use this methodology. The method places a subjective value on projected future cash flows from the business. And, most buyers are, in fact, only buying the business because of the projected future cash flows.
Adjusted Asset Method	Buyers and sometimes sellers	Buyers who look at higher profit businesses (with low asset bases) always tend to look at the underlying asset values in their negotiations. Buyers will try to greatly discount the value of goodwill associated with the intangible earning ability of the company, by citing the low value of tangible assets. Sellers, on the other hand, might look to this method to value their underperforming business (where the earnings do not provide a very good return on the assets). In that instance, of course, the buyers become very interested in the lack of value associated with the lack of cash flow.
Capitalization of Excess Earnings Method	Both Buyers and Sellers may use	This method may provide a good view of the business value to both the buyer and the seller. It measures estimated values of underlying tangible assets AND attempts to quantify the value of cash flows in excess of a reasonable return on the net assets of the business. Of course, sellers will generally use lower risk assessments (when developing capitalization rates) than the buyers will use.
Direct Market Data Method—Multiple of Revenues	Sellers	Sellers generally love to apply some sales multiple to their company's revenues. It is easy, and sellers more often tend to think of company values in terms of sales volumes. This method, while considered by sellers in pricing their businesses, is generally not given the same thought or weight by the buyers, because the buyers are more interested in the "earnings" or "benefit streams" than they are about revenues.
Direct Market Data Method—Multiple of Earnings	Buyers	Buyers may place a larger emphasis on actual earnings of a business than they place on sales or revenues.

¹ Paragraph 801.9 of Guide to Business Valuations by Jay E. Fishman, Shannon P. Pratt, J. Clifford Griffith and D. Keith Wilson (published by Practitioners' Publishing Company, Tenth Edition): "mathematical weightings are often used and accepted by courts for a variety of valuation engagements."

Did you consider rates of return that a hypothetical buyer might require to purchase the business?

How did you determine those rates of return?

Have you considered what other buyers have paid for similar businesses?

Which valuation method(s) might be used by the Buyer of this business? Why?

Questions about a Seller's Perspectives

Did you consider the potential objectives of the hypothetical seller of this business?

If so, can you identify the hypothetical seller's objectives?

Did you calculate the seller's actual return on equity?

If yes, does the annual return compare favorably with benchmark data for this company?

If this company's annual return-on-equity was to compare better than, or worse than industry benchmark data—how does that affect the value of this business?

Did you consider the benefits associated with a hypothetical owner's (seller's) ownership of this business?

If so, what would be some of the benefits of such ownership?

What are the positive considerations about this business that would add value (make it more valuable)?

Questions about Final Conclusion of Value

How many methodologies or methods did you use in arriving at your conclusion of value?

How many of those methodologies might be favored by the seller? The buyer?

How did you reconcile the indications of value into a final indication of value?

Do you believe your conclusion of value would be reasonably indicative of an arms-length transaction between a buyer and seller?

Did you do a "proof" or "sanity check" on your final conclusion of value (does it make economic sense as of the valuation date)?

If you did perform a "proof" or sanity check, can you explain your procedure and why it makes relevant economic sense?

The foregoing list of questions is certainly not all inclusive. However, the questions do provide some basis for determining whether or not the conclusion of value opined, meets the requirements of the Fair Market Value Standard.

About the Author

Grover Rutter is a practicing business valuator and business intermediary in Findlay, Ohio. He is licensed as a Certified Public Accountant in Ohio, and also holds the following business valuation designations/credentials: Certified Valuation Analyst (National Association of Certified Valuation Analysts); Accredited Business Valuator (American Institute of CPAs); Business Valuator Accredited in Litigation Support (Institute of Business Appraisers).

As a business intermediary he has valued and sold dozens of businesses for clients throughout the United States. He has also valued hundreds of businesses for purposes of divorce, gift tax, estate tax, buy/sell arrangements and ownership disputes. Grover's business valuation articles have been published in numerous professional journals including American Journal of Family Law, Ohio Lawyer, Ohio Lawyer Weekly, Value Examiner, IBA Quarterly Review, IBBA Quarterly Update and the AICPA FOCUS Newsletter of the Forensic and Valuation Services Section.

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Grover Rutter will be present this topic at the Fall Conference, in the Thursday afternoon session of the Domestic Relations practice area.