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RECEIVERSHIP OUTLINE

1. What is a receiver?

- a) A receiver is an indifferent person between the parties to a cause, appointed by the court to receive or preserve the property or fund in litigation, and receive its rents, issues, profits, and apply or dispose of them at the discretion of the court. He is a fiduciary of the Court, appointed as an incident to other proceedings wherein certain ultimate relief is prayed. He is a trustee or ministerial officer representing the court. *Celebreeze v. Gibbs*, 60 Ohio St.3d 69, 73 n. 4, 573 N.E.2d 62 (1991), quoting Black's Law Dictionary, (6 Ed. 1990) 1268.

(1) What is the receiver's role as to a corporation to which it has been appointed?

- (a) A receiver is an officer of the court and "succeeds to the title and rights of action of the corporation itself, and takes all such rights as the corporation itself originally had, and may enforce them by the same legal remedies." *Ohio ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶53 (10th Dist.), quoting *Smith v. Johnson*, 57 Ohio St. 486, 488-89, 49 N.E. 69 (1898).

2. Who may be a receiver?

- a) Pursuant to R.C. §2735.02 no party, attorney, or person interested in an action shall be appointed receiver therein except by consent of the parties. No person except a resident of Ohio shall be appointed or act as receiver of a railroad or other corporation of Ohio. The appointment of a Florida resident, appointed receiver in Florida over real estate located in Ohio and titled in an Ohio LLC, is contrary to Ohio law. *Edelsten v. Mawardi*, 137 So.3d 459 (Fla. App., 2014).

3. What are the prerequisites for appointing a receiver?

- a) The court must have personal jurisdiction over the parties involved or over the entity placed into receivership. *Ohio ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶¶35-43 (10th Dist.). However, it is not necessary that the assets in question be within the jurisdiction of the trial court appointing the receiver. *See id.* The power of the court to confer authority on a receiver is not limited to property found within the jurisdiction of the court. *Bank v. McLeod*, 38 Ohio St. 174, 184 (1882).

- 1) In *Rogers v. Webster*, 779 F.2d 52, *6-7 (6th Cir. 1985), the fact that Mr. Webster's stock certificates were situated outside the territorial reach of the district court was immaterial because the court had jurisdiction of his

person. “Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal.” Since the district court retained personal jurisdiction over Webster, it has the power to order him to deliver his personal property to the receiver whether the property was within or without the United States.

(a) There are two exceptions:

(i) A court should not exercise its jurisdiction in this respect if it would cause substantial interference with the sovereignty of another nation, if the decree would require one to violate foreign law, or would place one of the parties at risk of double liability. *Id.* at *9.

(ii) A receiver cannot take possession of property outside the jurisdiction of the court appointing him if there are creditors having claims to the property in that jurisdiction. “The courts of that state will not permit the foreign receiver to take possession, preferring the rights of its own citizens to those of the people of another jurisdiction.” *Barbour v. Lockard*, 9 Ohio Dec. Rep. 254,*4 (S.C. 1877).

b) A receiver should not be appointed if the plaintiff has a full and adequate remedy at law. A receiver should not be appointed as a mode of granting ultimate relief absent extreme and unusual circumstances. *Hoiles v. Watkins*, 117 Ohio St. 165, 173, 157 N.E. 557 (1927) (when there was no other matter to be litigated between the parties, it was inappropriate to appoint a receiver solely to protect the interests of minority stockholders of a solvent company against the potential fraud of a majority stockholder). Accord *Soul v. Lockhart*, 119 Ohio St. 393, 400-402, 164 N.E. 419 (1928). The party requesting the receivership must show by clear and convincing evidence that the appointment is necessary for the preservation of the complainant’s rights. *Malloy v. Malloy Color Lab Inc.*, 63 Ohio App.3d 434, 437, 579 N.E.2d 248 (10th Dist. 1989). Accord *Huntington Nat’l Bank v. HPM Div.*, 10th Dist. Franklin No. 10AP-200, 2010-Ohio-6176, ¶¶17-18 (holding the appointment of a receiver improper where the receiver offered no evidence that a receiver was necessary to “protect the assets at issue or to preserve the rights of the receiver”); *Am. Enter. Bank v. Garfield Heights Prop., L.L.C.*, 8th Dist. Cuyahoga No. 98646, 2013-Ohio-2526, ¶¶11-12 (finding the appointment of a receiver proper where a mortgage provided that, in the case of foreclosure, a receiver should be appointed); *Equity Ctrs. Dev. Co. v. South Coast Ctrs. Inc.*, 83 Ohio App. 3d 643, 649-652, 615 N.E.2d 662 (8th Dist. 1992) (finding the appointment of a receiver was improper when excessive legal fees could be remedied with damages and allegations of withholding of financial data could be addressed via injunctive relief or accounting).



- (1) The Seventh District argues that the Supreme Court of Ohio's holding in *Hoiles* should be limited to situations where the motion for a receiver is made solely under the catch-all provision of R.C. 2735.01(F). *Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. Mahoning No. 04MA245, 2005-Ohio-2706, ¶¶71-76. Reconsidered in *Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. Mahoning No. 04 MA245, 2005-Ohio-3828 (holding as to this issue remained the same).

4. In what situations may a receiver be appointed?

- a) Pursuant to R.C. §2735.01 the supreme court, courts of appeals, courts of common pleas, and probate courts may appoint a receiver:
 - (1) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners/others owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property/fund/proceeds is probable, and when it is shown the property/fund is in danger of being lost or materially injured;
 - (a) Movant need only establish there is a genuine issue of material fact that the property or fund is in such danger or a reasonable person could find such danger. *Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. Mahoning No. 04MA245, 2005-Ohio-2706, ¶52.
 - (b) In an action by a mortgagee, for the foreclosure of his mortgage and sale of mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt.
 - (i) Movant only required to establish one of the two elements of R.C. §2735.01(B): either (1) the mortgaged property is in danger of being lost, removed, or materially injured, or (2) the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt. *Huntington Nat'l Bank v. PRS Invs. LLC*, 6th Dist. Lucas No. L-12-1080, 2013-Ohio-2245, ¶6.
 - (c) After judgment, to carry the judgment into effect.
 - (d) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment.



- (e) When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.
 - (f) In all other cases in which receivers have been appointed by the usages of equity.
 - (i) If money alone is requested as a result of the action, no equitable remedy exists, and as such, R.C. §2735.01(F) does not apply. *ATAC Corp. v. Shetty*, 8th Dist. Cuyahoga No. 70865 and 70904, 1997 Ohio App. LEXIS 511, *12 (Feb. 13, 1997).
- b) A receiver can also be appointed to take charge of the assets if there is evidence of a fraudulent conveyance under Chapter 1336, the Uniform Fraudulent Transfer Act or under R.C. §1313.56. *See Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. Mahoning No. 04MA245, 2005-Ohio-2706, ¶¶35-36; *Sease v. Jon Smith Grain Co.*, 17 Ohio App.3d 223, 479 N.E.2d 284 (2nd Dist. 1984).
 - (1) In order to prove fraudulent conveyance, the creditor must show:
 - (a) The debtor made the transfer with the intent to hinder, delay, or defraud the creditor;
 - (b) The transferee knew of the debtor's fraudulent intent; and
 - (c) The debtor was insolvent or contemplating insolvency at the time of the transfer.
 - (2) However, because a finding of fraudulent conveyance involves numerous factual decisions, an evidentiary hearing/trial or summary judgment decision as to the existence of a fraudulent conveyance is required to appoint a receiver under R.C. §1336. *Id.* at ¶¶34-36.
- c) A receiver can also be appointed pursuant to R.C. §1707.27, in which a trial court can appoint a receiver if the court is satisfied with the sufficiency of the evidence that a violation of the Ohio Securities Act, R.C. §§1707.01-1707.45 has occurred. *Peltier v. Condo-Mobile Inc.*, 10th Dist. Franklin No. 79AP-747, 1980 Ohio App. LEXIS 13502, *24-25 (Dec. 23, 1980).
- d) A receiver can be appointed by a court of common pleas per R.C. §5119.342 to take possession of and operate a mental health and addiction services center, if a petition from the director alleges that the current conditions present a substantial risk of physical or mental harm to residents. The court must hold a hearing on the petition within five (5) days of the filing, and numerous people associated with the facility will be notified, including but not limited to: the person holding the licensing for the residential facility, the operator, the board of health, and the facility residents and their family and guardians.



- (1) Per R.C. §5123.191, the same is also true of a facility licensed by the department of developmental disabilities.
- e) A neighbor, tenant, city, town, or other organization can apply for the appointment of a receiver under R.C. §3767.41 in an action regarding a building that has been declared a public nuisance in order to enforce any local building or other code. *See City of Wauseon v. Plassman*, 6th Dist. Fulton No. F-95-022, 1996 Ohio App. LEXIS 2673 (June 28, 1996) (finding that the appointment of a receiver to abate a public nuisance is within the discretion of the trial court). A hearing must be held in order to determine the following:
 - (1) Whether the building is a public nuisance;
 - (2) Whether the owner has been afforded reasonable opportunity to abate the nuisance; and
 - (3) Whether the complaint requested the relief provided for by the statute.
- f) Pursuant to R.C. §323.49, the county treasurer can be appointed as a receiver for properties (other than private residences) that are more than six (6) months delinquent on taxes and assessments. *See Frederick v. Grandview Mem. Park, Inc.*, 11th Dist. Portage No. 97-P-0046, 1998 Ohio App. LEXIS 2894 (June 26, 1998) (appointing the county treasurer as receiver is a reasonable way to secure delinquent taxes and assessments).
 - (1) Appointment is accomplished by the county treasurer alleging the following in the petition:
 - (a) Description of the real property;
 - (b) The money has been due for more than six (6) months;
 - (c) The treasurer believes that collection can be made by the rents; and
 - (d) Any issues and income of the real property.
- g) A sheriff of the applicable county can be appointed under R.C. §2333.09 – 2333.27 as the receiver of property of a judgment debtor.
- h) A receiver can be appointed in a contentious domestic relations case in order to facilitate the equitable division of marital and separate property. *Moore v. Moore*, 6th Dist. Ottawa Nos. OT-06-005, OT-06-009, and OT-06-013, 2008-Ohio-255.
- i) Pursuant to R.C. §1125.20, 1157.20, and 1165.20, the superintendent of a financial institution can appoint a receiver.
- j) The appointment of a receiver is ancillary to the underlying action of winding up a partnership, for-profit corporation, non-profit corporation or association. *In re Estate of Philips*, 2d Dist. Montgomery No. 15816, 1996 Ohio App. LEXIS 2681, *9



(June 28, 1996). *See also* R.C. 1701.90, 1701.91, 1702.51, 1702.52, 1729.60, and 1729.61.

- k) The decision to appoint a receiver lies within the discretion of the court, however, in doing so, the court must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying relief, the ends of justice, the rights of all parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies. The appointment will not be disturbed unless there is a clear abuse of discretion. *Celebreeze v. Gibbs*, 60 Ohio St.3d 69, 63, 73 n. 3, 573 N.E.2d 62 (1991); 65 American Jurisprudence 2d (1972) 873, 874, Receivers, Sections 19, 20; *Sobieraj v. Gomersall*, 8th Dist. Cuyahoga No. 81708, 2003-Ohio-4339, ¶13; *Wells Fargo Bank N.A. v. Oditia*, 10th Dist. Franklin No. 13AP-663, 2014-Ohio-2540, ¶15 (defining an abuse of discretion as “where a trial court’s decision is ‘unreasonable, arbitrary or unconscionable.’” (*citing* *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 5 Ohio B. 481, 450 N.E.2d 1140 (1983))).

- (1). Since the appointment of a receiver is an equitable remedy, not an equitable right, it is not a cause of action in itself. The appointment of a receiver is provisional to some other final determination by the trial court; it is not a mode of granting ultimate relief unless extreme and unusual circumstances exist. *Hoiles v. Watkins*, 117 Ohio St. 165, 173-174, 157 N.E. 557 (1927).

5. When must the court appoint the receiver?

- a) There is no specific time frame, however, the trial court’s appointment of a receiver three years after the trial did not violate due process. *Ohio ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶73 (10th Dist.).

6. Is an evidentiary hearing required to appoint a receiver?

- a) If the receiver is appointed pursuant to R.C. §2735.01, an evidentiary hearing is not required for such appointment where the court is sufficiently convinced that the property is in danger from review of the affidavits, attachments to those affidavits, admissions, and the inference that can rationally be drawn from those materials. *Victory White Metal Co. v. N.P. Motel Sys., Inc.*, 7th Dist. Mahoning No. 04MA245, 2005-Ohio-2706, ¶15. *See also*, *Pal v. Strachan*, 8th Dist. Cuyahoga No. 91808, 2009-Ohio-730, ¶16, *Haber Polk Kabat, L.L.P. v. Condos. at Stonebridge Owners’ Ass’n.*, 2017-Ohio-8069, ¶26 (Ct. App.), *Cawley JV, LLC v. Wall Street Recycling LLC*, 2015-Ohio-1846, 35 N.E.3d 30 (8th Dist.) (Where a court is “sufficiently convinced,” based on the parties’ admissions and any other evidentiary materials or arguments presented by the parties that the property is in danger, a decision appointing a receiver without a hearing “is not error.”), ¶8, *Gemmell v. Anthony*, 2016-Ohio-2686, 51 N.E.3d 663 (4th Dist.), *Reserve Transportation Services, Inc., v. Burbach*, 2005-Ohio-6097 (8th Dist.), *Leight v. Osteosymbionics, L.L.C.*, 8th Dist. Cuyahoga No. 105101, 2017-Ohio-5749, ¶ 35 (R.C. 2735.01 does not mandate an evidentiary hearing before appointment of a receiver).



- (1) Where the circumstances warrant it, a trial court may appoint a receiver sua sponte. *See Pal v. Strachan*, 8th Dist. Cuyahoga No. 91808, 2009-Ohio-730, ¶ 2, 12, 14-18 (trial court did not abuse its discretion in appointing receiver sua sponte without a hearing where the receiver was not appointed "contemporaneously with the filing of the complaint," but rather, after the trial court "became thoroughly familiar with the issues" based on its review of the pleadings, its review of affidavits and other evidence submitted with pretrial motions, pretrial hearings and its awareness of the failure of a business mediation process); *cf. Leight* at ¶¶30-42 (appointment of receiver, ex parte, without a hearing, was not an abuse of discretion where trial court had held several pretrials, knew the parties, understood the claims and issues and had previously ruled on discovery motions). *See also Haber Polk Kabat, L.L.P. v. Condos. at Stonebridge Owners' Ass'n.*, 2017-Ohio-8069, ¶15 (Ct. App.)
- b) While a hearing is not statutorily required, in some situations an evidentiary hearing may be necessary. *Columbia Savings v. Mentor Inn Prop. Co. Ltd.*, 11th Dist. Lake No. 93-L-007, 1993 Ohio App. LEXIS 4769 (Sept. 30, 1993) (holding an evidentiary hearing was required when the court asked for conflicting documents and then made credibility determinations); *Neece v. Nat'l Premier Protective Servs., LLC*, 8th Dist. Cuyahoga No. 89643, 2007-Ohio-5960, ¶12 (holding an evidentiary hearing was required when there was no evidence in the record that addressed the pertinent issues to appointing a receiver); *Poindexter v. Grantham*, 8th Dist. Cuyahoga No. 95413, 2011-Ohio-2915, ¶¶13-14 (distinguishing *Victory* because, though the issues were the same, no evidence was presented to the court on why a receiver should be appointed, and thus, an evidentiary hearing was necessary).

7. What are the constitutional considerations of appointing a receiver?

- a) A receiver's sale is subject to due process requirements and review. *Ohio Director of Transp. v. Eastlake Land Dev. Co.*, 177 Ohio App.3d 379, 2008-Ohio-3013, ¶33; *Hummer v. Hummer*, 8th Dist. Cuyahoga No. 96132, 2011-Ohio-3767, ¶17.

8. May the parties appeal the trial court's decision to appoint a receiver?

- a) Yes, an order appointing a receiver is a final appealable order. *See JPMCC 2004-CIBC10 7th St. Office, LLC v. URS Tower LLC*, 1st Dist. Hamilton No. C-120294, 2013-Ohio-796, ¶10; *Cunningham v. Ohio Police and Fire Pension Fund*, 175 Ohio App.3d 566, 2008-Ohio-218, ¶ 6 (8th Dist.); *Reserve Transp. Serv. v. Burbach*, 8th Dist. Cuyahoga Nos. 85874 & 85912, 2005-Ohio-6097, ¶27; *Jamestown Village Condominium Owners Assn. v. Mkt. Media Research, Inc.*, 96 Ohio App.3d 678, 689, 645 N.E.2d 1265 (8th Dist. 1994).
- b) An order removing a receiver is also a final appealable order. *See Prudential Ins. Co. of Am. v. Corporate Circle*, 103 Ohio App.3d 93, 101, 658 N.E.2d 1066 (8th Dist.



1995); *Neighbors v. Thistle Down Co.*, 26 Ohio App. 324, 326, 159 N.E. 111 (8th Dist. 1926).

- (1) The court's ruling on appointing or removing a receiver must be appealed within 30 days. App.R. 4. *See also Hartley v. Hartley*, 9th Dist. Medina No. 03CA0094-M, 2004-Ohio-4956, ¶12 (where a party fails to timely challenge the appointment of a receiver, he is precluded from later challenging the appointment or the authority granted to the receiver); *JPMCC 2004-CIBC10 7th St. Office, LLC v. URS Tower LLC*, 1st Dist. Hamilton No. C-120294, 2013-Ohio-796, ¶9.
- c) However, an order denying a motion to remove a receiver does not constitute a final appealable order because it does not affect the substantive rights of the parties and in no manner adjudicates any of the issues. *See Indus. Credit Co. v. Ken Ray Corp.*, 1955 Ohio App. LEXIS 772, *5, 127 N.E.2d 33 (8th Dist. 1955); *Prudential Ins. Co. of Am. v. Corporate Circle*, 103 Ohio App.3d 93, 101, 658 N.E.2d 1066 (8th Dist. 1995); *Jamestown Village Condominium Owners Assn. v. Mkt. Media Research, Inc.*, 96 Ohio App.3d 678, 692, 645 N.E.2d 1265 (8th Dist. 1994); *DCR Mortg. IV SUB I, LLC v. Hines Invs., LLC*, 5th Dist. Fairfield No. 11-CA-24, 2011-Ohio-5091, ¶11.
 - (1) The appointment of a receiver may not be vacated pursuant to Civ.R.60(B)(3). *Crouser v. Crouser*, 39 Ohio St.3d 177, 182, 529 N.E.2d 1251 (1988). Accord *Hummer v. Hummer*, 8th Dist. Cuyahoga No. 96132, 2011-Ohio-3767, ¶12.

9. Who has standing to challenge or defend an order appointing a receiver?

- a) Standing to Challenge: In order to have standing to challenge the appointment of a receiver, a party must be aggrieved by the order by having a present interest in the subject matter of the litigation and being prejudiced by the order, and have an "immediate and pecuniary" interest in the dispute. *Haber Polk Kabat, L.L.P. v. Condos. at Stonebridge Owners' Ass'n.*, 2017-Ohio-8069, ¶15 (Ct. App.) (citing *Midwest Fireworks Mfg. Co. v. Deerfield Twp. Bd. of Zoning Appeals*, 91 Ohio St.3d 174, 177, 2001-Ohio-24, 743 N.E.2d 894 (2001), *Willoughby Hills v. C. C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26, 1992-Ohio-111, 591 N.E.2d 1203 (1992), *Ohio Contract Carriers Assn. v. Pub. Util. Comm.*, 140 Ohio St. 160, 161, 42 N.E.2d 758 (1942)).
 - (1) As winning bidders at private auction of 14 of 21 residential properties that were the subject of a dispute between the parties, appellants had standing to challenge the trial court's appointment of a receiver to conduct a public auction of the 21 disputed properties. *TD Ltd., L.L.C. v. Dudley*, 12th Dist. Butler No. CA2014-01-009, 2014-Ohio-3996, ¶ 16, fn. 2.
 - (2) Where the state sought forfeiture of a seized vehicle as proceeds of drug trafficking in civil forfeiture proceeding, drug trafficker had standing to challenge the forfeiture by virtue of his "equitable interest" in the vehicle



even though he lacked legal ownership evidenced by a certificate of title at the time of the seizure). *In re \$449 United States Currency, 1st Dist. Hamilton No. C-110176*, 2012-Ohio-1701, ¶ 24-30

- (3) Law firms had standing to challenge the appointment of a receiver because the firms had an equitable interest in the real property that was the subject of the parties' dispute and the broad powers granted to the receiver with respect to that property; the firms had a charging lien against proceeds of a settlement, including the former client's condominium units, pursuant to the contingency fee agreement. *Haber Polk Kabat, L.L.P. v. Condos. at Stonebridge Owners' Ass'n*, 2017-Ohio-8069, ¶20 (Ct. App.).

b) Standing to Defend:

- (1) The majority opinion is that the receiver cannot defend his own appointment. In *Haber Polk Kabat, L.L.P. v. Condos. at Stonebridge Owners' Ass'n*, 2017-Ohio-8069, ¶15 (Ct. App.), the Court struck the receiver's motion to dismiss an appeal of the appointment of the receiver, as well as the receiver's response brief and a reply in support of his motion to dismiss, because it found the receiver lacked standing; the Court invited a receiver under such circumstances to participate in such proceedings as an amicus curiae and to comply with App.R. 17. 2017-Ohio-8069, ¶14 n.5 (Ct. App.).

10. Can a receiver be appointed to a solvent corporation?

- a) Yes, R.C. §2735.01 should be interpreted liberally, allowing appointment of receivers for a variety of reasons such as fiscal mismanagement by corporate officers demonstrated by their failure to know amounts of gross revenue being generated or expenses being incurred. *Ohio ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶¶62-68 (10th Dist.). *But see Hoiles v. Watkins*, 117 Ohio St. 165, 180, 157 N.E. 557 (1927) (Courts must use caution and reluctantly appoint receivers for corporations which are currently functioning and solvent, especially when the motion for appointment of a receiver is made solely under §2735.01(F). The court should only displace the board of directors upon the clearest evidence of an absolutely necessity for protection of the creditors, stockholders, and other parties concerned).

11. What if the receiver begins his duties before executing a bond?

- a) R.C. §2735.03 requires a receiver to execute a bond with a surety approved by the court before the receiver enters upon his duties. However, if the receiver never posts the bond, the court may order the posting of a bond nunc pro tunc to comply with the correct procedure, and in such case, the bond and the receiver's rights and duties (such as the right of possession) related back to the date of appointment. *Cadle Co. No. 2 v. Rendezvous Realty*, 8th Dist. Cuyahoga Nos. 63565, 63724, 1993 Ohio App. LEXIS 4261, *4-5 (Sept. 2, 1993); *In re Charles F. Johnson, Inc.*, 1936



Ohio Misc. LEXIS 1018, 22 Ohio Law Abs. 534 (1936). The improper qualifications of a receiver does not render the appointment order void and also does not affect the jurisdiction of the trial court to go forward in the underlying case. *Carr v. Acacia Country Club Co.*, 8th Dist. Cuyahoga No. 97989, 2012-Ohio-4723, ¶26.

- (1) If the party designated as a receiver fails to qualify, by not taking a bond or oath, the court may appoint another person by interlocutory order. *Stiver v. Stiver*, 63 Ohio App. 327, 328, 26 N.E.2d 595 (12th Dist. 1939); *Zeigler v. Trio Realty Group, LLC*, 5th Dist. Stark No. 2011CA00008, 2011-Ohio-5515, ¶19.
- (2) The amount of the bond is not set by statute, and instead, is committed to the sound discretion of the trial court. See *Metro. Sav. Bank v. Papadelis*, 9th Dist. Medina No. 2380-M, 1995 Ohio App. LEXIS 4038, *12 (Sept. 13, 1995); *Fifth Third Bank v. Q.W.V Properties, LLC*, 12th Dist. Butler No. CA2010-09-245, 2011-Ohio-4341, ¶31.

12. What if the receiver begins his duties before taking an oath?

- a) The same principle that applies to bonds also applies to oaths. Once an oath is taken, it relates back to the date of the receiver's appointment and all common law and statutory rights are conferred upon the receiver on the date of appointment, despite the receiver's failure to take his or her oath. *Starr v. Dotsikas*, 8th Dist. Cuyahoga No. 73201, 1998 Ohio App. LEXIS 3639, *11-12 (Aug 6, 1998).

13. May the court have ex parte conversations with receivers?

- a) Yes. Canon 2.9(A)(3) of the Code of Judicial Conduct permits Courts to "consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities . . . provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter." Receivers are not parties to the litigation and are "court personnel" and therefore permitted to have communications with the Court. *In re Disqualification of McGee*, 127 Ohio St.3d 1230, 2009-Ohio-7203, ¶5, citing, *Starr v. Dotsikas*, 8th Dist. Cuyahoga No. 73201, 1998 Ohio App. LEXIS 3639, *18-19 (Aug. 6, 1998). "We note that a receiver performs his duties under the control of the court which appointed him . . . Therefore, ex parte communications between a court and its appointed receiver fall within the 'court personnel' exception to the prohibition against ex parte communication." *Starr*, at *19.

14. What may a receiver do?

- a) Pursuant to R.C. §2735.04(B) a receiver may:
 - (1) Bring and defend actions in his own name as receiver;



- (2) Take and keep possession of property;
 - (a) However, where a receiver has been appointed for a company and authorized to take possession of the property, he does not, by the order of appointment, become invested with the legal title to promissory notes payable to such company. *Miller Brothers Star Shoes Co. v. Griffiths*, 11 Ohio App. 277, 279-280 (8th Dist. 1919). See also *Cadle Co. No. 2 v. Rendezvous Realty*, 8th Dist. Cuyahoga Nos. 63565 and 63724, 1993 Ohio App. LEXIS 4261, *5 (Sep. 2, 1993).
- (3) Collect rents and other obligations, and compromise demands;
 - (a) Receivership Fee Schedule for Collection of Rents can be found in Cuyahoga County Common Pleas Court Local Rule 26. For further information in compensation see ¶17 of this outline.
- (4) Enter into contracts, including, but not limited to contracts of sale, lease, or, so long as existing lien rights will not be impacted, contracts for construction and for the completion of construction work;
- (5) Make transfers of property;
 - (a) A receiver may sell property free and clear of liens by private sale pursuant to a written contract between the receiver and the prospective purchaser, by private auction, by public auction, or by any other method that the court determines is fair to the owner of the property and all other parties with an interest in the property, is reasonable under the circumstances, and will maximize the return from the property to the receivership estate, taking into account the potential cost of holding and operating the property. Ohio Rev. Code Ann. § 2735.04(D)(1)(a).
- (6) Execute deeds, leases, or other documents of conveyance of real or personal property;
- (7) Open and maintain deposit accounts in the receiver's name; and
- (8) Do any acts respecting the property as the court authorizes.
 - (a) The Ohio Supreme Court has interpreted this statute as “enabling the trial court to exercise its sound discretion to limit or expand a receiver’s powers as it deems appropriate.” *Celebreeze v. Gibbs*, 60 Ohio St. 3d 69, 74, 573 N.E.2d 62 (1991). Accord *Wells Fargo Bank, N.A. v. Oditia*, 10th Dist. Franklin No. 13AP-663, 2014-Ohio-2540, ¶15; *Huntington National Bank v. Motel 4 BAPS, Inc.*, 191 Ohio App.3d 90, 2010-Ohio-5792, ¶8 (8th Dist.). Additionally, R.C. Chapter 2735 does



not contain any restrictions on what the court may authorize when it issues orders regarding receivership property. *Motel 4 BAPS, Inc.* at ¶19. See also *United States Bank, N.A. v. Gotham King Fee Owner, L.L.C.*, 8th Dist. Cuyahoga No. 98618, 2013-Ohio-1983, ¶29 (finding the trial court's authorization of the sale of receivership property, given prior court approval, to comport with due process due to the minimal restrictions placed on the trial courts).

- b) Pursuant to R.C. §2735.05 a receiver may conduct an examination of the corporation similar to a Rule 2004 exam in bankruptcy proceedings by requiring any person, officer, or director of a corporation or member of a partnership to attend and submit to an examination of its property, trade, dealings with others, accounts, and debts due or claims from it and as to all other matters concerning the property and estate of the person, partnership, or corporation for which such receiver has been appointed.
- c) Pursuant to R.C. §2715.23, when required, the receiver shall report his proceedings to the court, and hold all money collected by him, and property which may come into his hands, subject to the order of the court.
- d) In Cuyahoga County, pursuant to Local Rule 26, a receiver must file an inventory of all property and assets in his possession within 30 days of taking possession and further file quarterly reports. The failure to timely file a report is grounds for removal without compensation and may render the receiver ineligible for any subsequent appointment. Loc.R. 26(B); *Hummer v. Hummer*, 8th Dist. Cuyahoga No. 96132, 2011-Ohio-3767, ¶22.

15. Must the court give interested parties notice before ordering a receiver to sell real property?

- a) Pursuant to R.C.2735.04(D)(2), any sale of real property shall be made only after:
 - (1) An application is made by the receiver or the first mortgage holder that requests that the receiver be granted the authority to sell the specific real property and sets forth the specific offer for sale that the receiver desires to accept (with the identity of the buyer and the proposed terms of the sale) or the proposed procedures for the conduct of the sale;
 - (2) At least ten days' prior written notice, sent by certified mail, to:
 - (a) all of the owners of the real property;
 - (b) all parties to the action; and
 - (c) and all other persons with a recorded or filed lien encumbering the real property to be sold.



- (i) Includes persons identified in a preliminary judicial report or a commitment for an owner's policy of title insurance previously filed with the court pursuant to Section 2329.191 of the Revised Code or, if not previously filed, in a preliminary judicial report or a commitment for an owner's policy of title insurance filed with the application of the receiver for authority to sell the real property that otherwise complies with the requirements of R.C. 329.191.
- (3) An opportunity is given for a hearing at which all of the parties and persons to whom the notice is given may be heard. If no such party or person objects to the proposed sale or requests a hearing within the period provided, the court may proceed without a hearing; and
- (4) The court issues an order of sale of the real property that sets forth the required procedure for or the terms of the sale.
 - (i) The order of sale is the final appealable order with respect to the matters contained in the order.

16. When and how must a preliminary judicial report be filed?

- a) The requirements of filing a preliminary judicial report are laid out in R.C. 2329.191.
- b) When selling residential real estate consisting of one to four single-family units, a preliminary judicial report must be filed within 14 days of application to sell.
- c) When selling residential real estate consisting of more than four single-family units or of commercial real estate, either a preliminary judicial report or a commitment for an owner's fee policy of title insurance must be filed within 14 days of application.
- d) Preliminary Judicial Report:
 - (1) The preliminary judicial report shall be effective within 30 days prior to the request, and shall include at least all of the following:
 - (a) A legal description of each parcel of real estate to be sold at the judicial sale;
 - (b) The street address of the real estate or, if there is no street address, the name of the street or road upon which the real estate fronts together with the names of the streets or roads immediately to the north and south or east and west of the real estate;



- (c) The county treasurer's permanent parcel number or other tax identification number of the real estate;
 - (d) The name of the owners of record of the real estate to be sold;
 - (e) A reference to the volume and page or instrument number of the recording by which the owners acquired title to the real estate;
 - (f) A description of the record title to the real estate; however, easements, restrictions, setback lines, declarations, conditions, covenants, reservations, and rights-of-way that were filed for record prior to the lien being foreclosed are not required to be included; and
 - (g) The name and address of each lienholder and the name and address of each lienholder's attorney, if any, as shown on the recorded lien of the lienholder.
- e) Commitment for an owner's fee policy of title insurance:
- (1) The commitment shall have an effective date within 14 days prior to the request, and shall contain at least all of the information required in a preliminary judicial report (see ¶16).
- f) Prior to submitting any order or judgment entry to a court that would order the sale of the residential real estate, the party submitting the order or judgment entry shall file with the clerk of the court of common pleas a final judicial report that updates the state of the record title to that real estate from the effective date of the preliminary judicial report through the date of lis pendens and includes a copy of the court's docket for the case.

17. How does the receiver get paid?

- a) The receiver generally gets compensated out of the assets of the estate. *Castlebrook v. Dayton Prop. Ltd. P'ship*, 78 Ohio App. 3d 340, 351, 604 N.E.2d 808 (2d Dist. 1992).
- b) May the court allow the receiver's fees to be paid from the proceeds of mortgaged property sold by the receiver?
 - (1) Yes, the receiver's fees can be paid from the proceeds of the property (and will not be made subordinate to the mortgagee's lien) when the mortgagee acquiesces and participates fully in the receivership proceeding. *Press & Plate Co v. Cincinnati Freie Presse Co.*, 72 Ohio App. 35, 36, 40-41, 48 N.E.2d 870 (1st Dist. 1943). Accord *Dir. of Trans. of Ohio v. Eastlake Land Dev. Co.*, 177 Ohio App. 3d 379, 2008-Ohio-3013, ¶41 (8th Dist.).



- (a) “Acquiesces and participates fully” in the receivership proceeding means that one uses the machinery of the receivership proceeding to secure the sale of the mortgaged assets. If a mortgagee asks that the receiver be removed or objects to the actions of the receiver, it has not acquiesced or participated in the receivership proceedings. *Dir. of Trans. of Ohio v. Eastlake Land Dev. Co.*, 177 Ohio App. 3d 379, 2008-Ohio-3013, ¶¶41-43 (8th Dist.).
- c) How is the receiver’s compensation determined?
 - (1) Determining the amount and measure of compensation is left to the sound discretion of the trial court. Typically, receivers are entitled only to compensation “as is reasonable in view of the interest involved, the amount of skill necessary to conduct the business, and the time and labor given to the business.” *Nozik v. Mentor Lagoons, Inc.*, 11th Dist. No. 97-L-004, 1998 Ohio App. LEXIS 3013, *3-4 (July 2, 1998); *Strauss v. Strauss*, 8th Dist. Cuyahoga No. 95377, 2011-Ohio-3831, ¶74; *National City Bank v. Semco*, 3d Dist. Marion No. 9-09-10, 2009-Ohio-3319, ¶11.
 - (a) The trial court cannot order a specific rate of compensation and subsequently reduce the rate without adequate explanation for its new determination that the rate is unreasonable. *National City Bank v. Semco*, 3d Dist. Marion No. 9-09-10, 2009-Ohio-3319, ¶¶10-11.
 - (b) However, if the court determines that the appointment of the receiver was “improper or invalid,” the party who asked for the appointment may be required to pay the costs associated with the receiver instead of the receivership fund, should special circumstances exist. *Dyczkiewicz v. Tremont Ridge Phase 1 L.P.*, 8th Dist. Cuyahoga No. 97909, 2012-Ohio-5173, ¶39; *Carr v. Acacia Country Club Co.*, 8th Dist. Cuyahoga No. 97989, 2012-Ohio-4723, ¶15.
 - (i) Special circumstances occur when: “[T]here has been an irregular or unauthorized appointment of a receiver, or where a party has received benefits from the receivership in excess of the amount required to be paid, or where an action has unjustly been maintained without right.” *Dyczkiewicz v. Tremont Ridge Phase 1 L.P.*, 8th Dist. Cuyahoga No. 97909, 2012-Ohio-5173, ¶40 (citing *Richey v. Brett*, 112 Ohio St. 582, 587, 148 N.E. 92 (1925)). See *Crawford v. Hawes*, 2d Dist. Montgomery Nos. 25179 and 25180, 2013-Ohio-3173, ¶¶17-18.
- d) Will the receiver’s attorney’s fees be paid?
 - (1) Yes, but the court will only award attorney’s fees to a receiver when the legal services to be performed are necessary to produce, preserve, or protect the



receivership estate. Further, the court will only award attorney's fees when presented with evidence to properly conclude the time expended and the fees assessed were reasonable in accordance with the Rules of Professional Conduct (Rule 1.5). *Liberty Folder Co. v. Anderson*, 89 N.E.2d 500, 501 (2d. Dist. 1949); *National City Bank v. Semco*, 3d Dist. Marion No. 9-10-42, 2011-Ohio-172, ¶¶21, 28-29 (attorney's fees incurred defending the reasonableness of the receiver's hourly rate were not performed for the protection of the receivership estate and would not be paid by the court or out of the receivership estate); *Carr v. Acacia Country Club Co.*, 8th Dist. Cuyahoga No. 97989, 2012-Ohio-4723, ¶¶34-35 (finding that limited attorney's fees for receiver's counsel were proper given the fact that "counsel had performed services that were in the interest of the receivership").

18. How do the costs of administering the receivership estate get paid?

- a) Administrative expenses - those costs necessary to preserve the value of the assets or property held in the receivership - are payable out of the corpus of the property in the custody of the receiver. *P.M.D. Corp v. Hyland-Helstrom Enterprises, Inc.*, 63 Ohio App.3d 681, 683 (10th Dist. 1990). Accord *Ohio v. Tokmenko*, 112 Ohio App. 42, 43 (8th Dist. 1960); *Brown v. Winterbottom*, 98 Ohio St. 127, 133 (1918). However, if expenditures are "unusual or substantial" the receiver must "apply to the court for authority to make them, and notice should be given to interested parties, thus giving them an opportunity to be heard." *American Savings Bank Co. v. The Union Trust Co.*, 124 Ohio St. 126, 132, 177 N.E. 199 (1931). Accord *Wilkins v. Boken, Inc.*, 8th Dist. Cuyahoga No. 64230, 1993 Ohio App. LEXIS 6202, *16-19 (Dec. 23, 1993) (holding a commission fee which represented 26% of the sale price was not an administrative cost of the receivership necessary to preserve the value of the assets).
 - (1) Encumbered assets will be applied to the administrative expenses of the receivership if the court determines that the owner of the lien acquiesced in and took part of the receivership proceedings. *Press & Plate Co v. Cincinnati Freie Presse Co.*, 72 Ohio App. 35, 36, 48 N.E.2d 870 (1st Dist. 1943); *Ohio Dept. of Taxation v. Tokmenko*, 112 Ohio App. 42, 45-46, 165 N.E.2d 804 (8th Dist. 1960); *Dir. of Trans. v. Eastlake Land Dev. Co.*, 177 Ohio App.3d 379, 2008-Ohio-3013, 894 N.E.2d 1255, ¶¶41-43 (8th Dist.) ("A mortgagee who did not ask for the receivership cannot be charged with the payment of any part of the receiver's fees, and is liable only for that portion of the expenses it would have incurred had it instituted foreclosure itself.").
 - (2) A receiver is entitled to be reimbursed out of the proceeds of the receivership estate for the premium on the bond which he was required to furnish. See *McPherson v. Gillespie & Co.*, 30 Ohio Dec. 352, 357, 165 N.E.2d 804 (8th Dist. 1915).



- b) When the receivership estate is insolvent and there has been an irregular or unauthorized appointment of a receiver, or where a party has receiver benefits from the receivership in excess of the amount required to be paid, or where an action has unjustly been maintained without right, in all such instances, the parties who invoked the process to the court to have a receiver appointed, may be held personally responsible for expenses of the administration. *Richey v. Brett*, 112 Ohio St. 582, 586-588, 148 N.E. 92 (1925); *Dyczkiewicz v. Tremont Ridge Phase 1 L.P.*, 8th Dist. Cuyahoga No. 97909, 2012-Ohio-5173, ¶¶39-40; *Fifth Third Bank v. Dayton Lodge, LLC*, 2d Dist. Montgomery No. 25531, 2013-Ohio-5755, ¶¶44-48. However, if the receiver has sufficient corpus in his or her possession with which to pay the expenses, they must be paid out of that corpus, looking to the parties who invoked the receivership process is a last resort upon insolvency. *Ohio Dept. of Taxation v. Tokmenko*, 112 Ohio App. 42, 43-44, 165 N.E.2d 804 (8th Dist. 1960).
- c) Any funds that are expended by or on behalf of the receiver, including receivership fees, fees for professionals assisting the receivership, and those expended in entering into or performing contracts, shall be taxed as court costs or otherwise treated as an administrative expense of the action.
- d) The court may require an additional deposit to cover funds that would be expended by the receiver under a contract of sale, lease, or construction only from the parties who have requested or expressly consented to the receiver incurring those expenses. Ohio Rev. Code Ann. § 2735.04(C).

19. What happens when one or both of the parties want to sue the receiver?

- a) A party who opposed the receiver can appeal the appointment of the receiver. “An order challenging the appointment of a receiver must be appealed within 30 days of its issuance.” *Hummer v. Hummer*, 8th Dist. Cuyahoga No. 96132, 2011-Ohio-3767, ¶8; *Jamestown Village Condominium Owners Assn. v. Mkt. Media Research, Inc.*, 96 Ohio App. 3d 678, 689, 645 N.E.2d 1265 (8th Dist. 1996).
- b) If the receiver has not faithfully discharged his duties in his fiduciary capacity, used ordinary care in administering assets, or obeyed the orders of the court, the receiver can be held liable. If a party desires to file suit against a receiver for actions taken in his official capacity regarding the receivership estate, leave of court is required. Whether or not to grant a party leave to proceed in an action against a receiver is a matter that is left to the sound discretion of the trial court. See *Huntington Nat. Bank v. Weldon F. Stump & Co., Inc.*, 6th Dist. Lucas No. L-06-1398, 2008-Ohio-2096, ¶20; *Hummer v. Hummer*, 8th Dist. Cuyahoga No. 96132, 2011-Ohio-3767, ¶¶20-23; *PNC Bank N.A. v. Kidz Real Estate Group, LLC*, 6th Dist. Lucas No. L-11-1303, 2013-Ohio-1357, ¶¶11-12.
 - (1) The Ohio Supreme Court has found that a receiver can be sued in his official capacity with satisfaction of judgments against him being obtained “only from the fund in his hands as receiver as directed by the court appointing



him.” *Murphy v. Holbrook*, 20 Ohio St. 137, 142-143 (1870). Accord *PNC Bank N.A. v. Kidz Real Estate Group, LLC*, 6th Dist. Lucas No. L-11-1303, 2013-Ohio-1357, ¶11.

- (2) The First District has found that if a receiver exceeds the authority granted by the court or fails to use ordinary care, he may be sued in a personal capacity. *INF Ent., Inc. v. Donnellon*, 133 Ohio App.3d 787, 789, 729 N.E.2d 1221 (1st Dist. 1999). Accord *Wagner v. A.C.Strip, ESQ.*, 5th Dist. Licking No. 11-CA-82, 2012-Ohio-4954, ¶47. See generally *Hummer v. Hummer*, 8th Dist. Cuyahoga No. 96132, 2011-Ohio-3767, ¶23.

20. What if the parties do not abide by a receivership order?

- a) The court can hold a party who willfully violates the order in civil contempt in an effort to bring such party into compliance with the order. *U.S. Bank Nat’l Assoc. v. Golf Course Mgmt. Inc.*, 12th Dist. Clermont No. CA2008-08-078, 2009-Ohio-2807, ¶¶13-16 (defendants held in contempt when they failed to comply with an order giving receiver access to their property, assets, and information relating to the operation of their business).

21. What if a third party purchases property without knowledge of the receivership?

- a) If a corporate officer sells real estate to a bona fide purchaser who does not know of the receivership, the purchaser has priority over the receiver and is entitled to possession. See *Cadle Co. No. 2 v. Rendezvous Realty*, 8th Dist. Cuyahoga Nos. 63565, 63724, 1993 Ohio App. LEXIS 4261, *5 (Sept. 2, 1993); *In re Ackermann*, 82 F.2d 971, 972 (6th Cir. 1936). Accordingly, when a corporate officer negotiates a draft or note, and it is unknown to the purchaser that the corporation is in receivership, the endorsee becomes a bona fide holder of the instrument in due course and is entitled to the amount thereof. *Miller Broker Star Shoes Co. v. Griffiths*, 11 Ohio App. 277, 279-80 (8th Dist. 1919).
- (1) A bona fide purchaser is a purchaser who takes in good faith, for value and without notice of prior equitable rights. *Wayne Bldg. & Loan Co. v. Yarborough*, 11 Ohio St.2d 195, 200-01 228 N.E.2d 841 (1967). *Carter-Jones Lumber Co. v. Fairways at Boulder Creek—Portage County, LLC*, 11th Dist. Portage No. 2011-P-0049, 2012-Ohio-1888, ¶22.

22. What standing does a receiver have once appointed?

- a) No standing to defend a challenge of their appointment (See ¶9 above).
- b) The Receiver is authorized but not required to defend actions against the Property or the Defendants and may incur expenses to defend such actions to the extent that he believes, in his sole discretion, it will protect and preserve the Property. *Yidi v.*



Jhb Hotel, No. CV-15-850496, 2015 Ohio Misc. LEXIS 22762, at *12 (Ct. Com. Pl. Sep. 2, 2015).

