

# SANTEN & HUGHES



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The Center at 600 Vine

## ABOUT US

Something about our firm that you may not know is that we place a priority on our attorneys becoming owners (partners) in the Firm. All of our 16 attorneys are partners or have senior counsel status. Why is this? Because we believe that “owning a piece of the rock” promotes long term continuity and stability.

It works because we are very selective initially in hiring only the best attorneys. Then we demand a lot in terms of intensity of practice, good communications with other firm members and clients, and an emphasis on using the team approach. Each attorney must develop specific areas of expertise, and be dedicated to providing the highest quality service to our clients in an efficient and timely manner.

Each of us earns the right to be a partner every day, and we respect each other for those efforts. As a result, we are a cohesive group of attorneys who truly enjoy practicing together.

## RECOGNITIONS

**Bill Santen** was recognized by the Great Oaks Joint Vocational School District for his outstanding contributions over the years.

**Chuck Meyer** was selected to participate in Class 34 of the Leadership Cincinnati USA program sponsored by the Cincinnati Chamber of Commerce. It is an intensive 10 month program designed to work with people, who are already leaders in their organizations and professions, to assume greater community-wide responsibility for shaping the future of our Region.

**John Holschuh** was recognized by Cincinnati Mayor Mark Mallory proclaiming June 23, 2010 as “John D. Holschuh, Jr. Day” for his work as President of the Cincinnati Bar Association and President of the Cincinnati Bar Foundation. John is serving this summer as a faculty member for the National Institute of Trial Advocacy at UC College of Law.

**Sarah Tankersley** was elected to the Board of the Ohio Assoc. for Justice, 2010-2011.

**Katrina Farley** presented a lecture to the American Association of Individual Investors in Montgomery in March 2010 on current issues concerning estate planning.

**Deepak K. Desai** was appointed Committee Chairman for Pack 773 of the Dan Beard Council Trailblazer District for 2010-2011.

**Andrew Weisenberger** presented a lecture to the Northern Kentucky Estate Planning Council on current issues with federal estate, gift and generation-skipping transfer taxes.

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## LEGAL PERSPECTIVES

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### Noncompetition Agreements in Ohio

By: *Edward S. Dorsey, Esq.*

Noncompetition agreements are contracts whereby a person promises not to enter into competition with a particular business. They are often used by employers with their employees. They are also used to keep the seller of a business from going into competition with the purchaser of that business. There is a mistaken perception by the public that such agreements are unenforceable.

Noncompetition agreements are restraints on trade, i.e., they restrict free enterprise by limiting the types of employment or business opportunities in which a person may engage. Generally, the law resists enforcing restraints on trade because they may restrict economic growth. Thus, if an employer has its employees sign noncompetition agreements solely for the purpose of restricting its employees from accepting employment elsewhere, the courts of Ohio are unlikely to enforce the agreements because they are an unreasonable restraint on trade.

On the other hand, Ohio courts have acknowledged that there are times when noncompetition agreements are enforceable because they do more than restrict the employee from accepting employment elsewhere. Thus, if a noncompetition agreement protects an employer from unfair competition by a former employee, Ohio courts are likely to enforce the agreement even though it restricts the employee's ability to earn a living. For example, Ohio courts will likely prevent an employee, who has knowledge of the employer's trade secrets (secrets that arguably give it a competitive advantage in the market place), from taking those trade secrets to work for a competitor. Similarly, where a salesperson has been the main contact between the employer and a customer, and has developed goodwill with the customer at the expense of the employer, Ohio courts are likely to find that the salesperson may lawfully be restricted from going to work for a competitor and "stealing" the customer.

Although numerous Ohio cases have held that the courts have the power to "reform" overbroad noncompetition agreements so that they are enforced only to the extent of the employer's legitimate business interests, courts are often reluctant to use this power. They may view an overbroad agreement as an indication that the employer is trying to overreach its legitimate interest by unnecessarily restricting its former employee's ability to earn a living.

Carefully drafted noncompetition agreements will include reasonable restrictions on the length of the noncompetition period. A one year restriction may be viewed as reasonable; five years may not be, unless the noncompetition agreement is part of the sale of a business. Noncompetition agreements must also be reasonable in geographic scope. Restricting a window salesman from selling windows in Indiana is probably not reasonable if all of the salesman's work for the employer was in southwestern Ohio. The enforceability of noncompetition agreements can be enhanced by restricting the former employee from soliciting customers to whom he sold goods or services while in the employ of the former employer.

If the court decides a noncompetition agreement to be enforceable, the usual remedy is an injunction whereby the employee is prohibited by court order from violating the noncompetition agreement. Money damages may also be available, but are often difficult to prove.

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### The Importance of Proper Beneficiary Designations

By: *James J. Chalfie, Esq.*

It is important to have a well-drafted estate plan including a Will, Trust, Financial Power of Attorney, Health Care Directives, and in some cases, multiple trusts that serve different purposes or are specially designed to take advantage of different tax provisions. The point of this article is that proper beneficiary designations are critical to implementing your estate plan. Proper beneficiary designations expedite the transfer of wealth directly to the intended beneficiary instead of passing through probate proceedings or a trust. They override your Will. Mistakes in making beneficiary designations may result in unintended persons inheriting your estate. Just as we recommend that our clients periodically review their estate plans, an examination of beneficiary designations should be part of the process.

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## LEGAL PERSPECTIVES

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### **The Importance of Proper Beneficiary Designations (continued)**

*By: James J. Chalfie, Esq.*

The following property interests allow the owner to transfer the property at death to a designated beneficiary: Real Estate, Bank Accounts, Brokerage Accounts, Annuities, Life Insurance, and Retirement Accounts.

Before the enactment of statutes that allow a beneficiary designation for real estate, bank accounts and brokerage accounts, people commonly titled these assets in “joint names with right of survivorship” (JWRS). In this way they could transfer wealth to a beneficiary without probate administration. But placing property in JWRS sometimes resulted in abuse by the person on the account who had no prior interest. They sometimes withdrew funds from the account without the consent of the person who deposited them. In other cases, a joint owner withdraws funds with the consent of the depositor shortly before the depositor’s death not knowing that current law may require that those funds be returned to the estate of the depositor, not the account from which they were taken. This quirk in the law can frustrate the donor’s intent of transferring the asset to an intended beneficiary, and has led people to choose different forms of beneficiary designations: “payable on death” (POD) in the case of bank accounts, and “transfer on death” (TOD) in the case of real estate and brokerage accounts. Alternatively, if someone wants another person to provide assistance in managing their bank or brokerage accounts, that person may be designated to have a power of attorney (POA) over them. Therefore, a bank account may be both POD and POA, and a brokerage account can be both TOD and POA.

Real estate may be held either JWRS or TOD with a beneficiary designation. The TOD method is preferred because it is easily changed, doesn’t require a “joint owner” to participate in financing arrangements, and alternative beneficiary designations may be provided. Under recent legislation the TOD designation for real estate is completed by a simple affidavit. Another advantage of the TOD designation is that the intended beneficiaries are not required to sign any forms or even be given notice of the TOD establishment.

Life insurance and annuities may be owned by an individual who designates another individual or a trust as beneficiary; or ownership may be transferred to a trust in which beneficiaries are designated. In both instances, alternative beneficiary designations may be made.

Interests in retirement accounts may not generally be transferred to another individual or trust prior to death except in a divorce situation. Therefore, the beneficiary designation is critical. Individuals or trusts may be designated as beneficiaries. Important tax considerations are involved. Periodic review is essential because there has been significant tax legislation over the last several years that affects beneficiary designations.

In summary, the importance of beneficiary designations cannot be understated. Changes in circumstances and in the applicable tax consequences demand that beneficiary designations be periodically reviewed. The different tax consequences to beneficiary designations are beyond the scope of this article, and may dictate whether individuals or trusts should be named as the beneficiary. Providing alternative beneficiary designations often covers unexpected circumstances or allows for greater flexibility in reducing the overall taxes incurred in transferring wealth from one generation to the next. We suggest that you review your estate plan and beneficiary designations every five years or less.

Like the situation where physicians request that patients bring with them their prescriptions in their actual containers when scheduled for a physical examination, we like to see actual documentation of the beneficiary designations for each asset in order to verify that they have been correctly made.