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Ohio Appellate Practice Before and After Polikoff: Are Things Really All That Much Clearer?

Michael L. Buenger

OHIO APPELLATE PRACTICE BEFORE AND AFTER *POLIKOFF*: ARE THINGS REALLY ALL THAT MUCH CLEARER?

by

MICHAEL L. BUENGER*

> Accordingly, in the interests of justice, clarity, and judicial economy, we find that it is time to abandon the balancing test and return to the method of determining what constitutes a special proceeding that was in use prior to *Amato*. We believe a more exacting method of analysis practiced by our juristic predecessors will result.†

INTRODUCTION

Perhaps no topic in Ohio appellate practice is more confusing than determining what constitutes a final, appealable order in a special proceeding. While those who do not regularly appear before the state's appellate courts may liken deliberations on this matter to the old medieval question of how many angels can sit on the head of a pin, the issue of what precisely is an order affecting a substantial right[1] entered in a special proceeding[2] is complex and critically important. The ability of a litigant to obtain immediate review of a trial court order may hinge on an appellate court resolving the difficult question of whether the proceeding from which the order emanated constituted a special proceeding under Ohio law.

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* BA, *cum laude*, University of Dayton, 1983; JD, *cum laude,* St. Louis University School of Law, 1989. Court Administrator, Second District Court of Appeals of Ohio.

† Polikoff v. Adam, 616 N.E.2d 213, 217 (Ohio 1993).

1. A substantial right is defined as a legal right that is entitled to the enforcement or protections of the law. *See In re* Will of Thomas, 84 N.E.2d 294 (Ohio Ct. App. 1948). *See also* Bell v. Mt. Sinai Med. Ctr., 616 N.E.2d 181, 184 (Ohio 1993) ("An order which *affects* a substantial right has been perceived as one which, if not immediately appealable, would foreclose appropriate relief in the future."). For further discussion on the *Bell* decision, *see infra* note 129; *In re* Irvine's Guardianship, 52 N.E.2d 536 (Ohio Ct. App. 1943); *See also* Chef Italiano Corp. v. Kent State Univ., 541 N.E.2d 64, 67 (Ohio 1989) (A substantial right is "'a legal right entitled to enforcement an protection by law'. . . . A court order which deprives a person of a remedy which he would otherwise possess deprives a person of a substantial right.").

2. The General Assembly has never defined the term "special proceeding." However, the supreme court recently defined a special proceeding as a proceeding not recognized at common law or equity and which was specially created by statute. Polikoff v. Adam, 616 N.E.2d 213, 217 (Ohio 1993). *See infra* text accompanying note 72 and following.

The Supreme Court of Ohio, recognizing the difficulty in determining finality in a special proceeding has, like the appellate courts, struggled to articulate clearer guidelines and a more precise standard for resolving the question. The supreme court's most recent attempt to provide guidance in this area is *Polikoff v. Adam.*[3] However, rather than laying a foundation for clearer guidelines leading to a more consistent jurisprudence, the *Polikoff* decision further confuses the question of what is a special proceeding, forecloses examination of some types of orders requiring immediate appellate review because of their effect, and elevates the form of the underlying action over the substantive rights of the litigants affected by a trial court order.[4]

I. THE FINAL ORDER RULE

A. Ohio's Unique Perspective

The difficulty in determining whether an order or judgment is appealable is complex due to the very precise language of Article IV, Section 3 of the Ohio Constitution[5] and the imprecise definition of a final order contained in section 2505.02, of the Ohio Code.[6] While the constitutional provision expressly limits the appellate jurisdiction of courts of appeals to reviewing judgments and final orders, the statute is hardly a hallmark of clarity and precision in defining precisely what is a final order.[7] Consequently, courts have resolved questions of finality on a case-by-case basis thereby producing what appears at times to be a confusing trail of decisions on what constitutes an

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3. 616 N.E.2d 213 (Ohio 1993).

4. *See* Indiana Ins. Co. v. Carnegie Constr. Co., 632 N.E.2d 579 (Ohio Ct. App. 1993)

> "Thus, while we believe that the proceeding at bar was in substance an independent judicial inquiry of insurance coverage issues in the nature of a declaratory judgment action, it was not in form an action specially created by statute and thus not a special proceeding pursuant to the explicit holding of *Polikoff*. . . . Instead, this court is forced to elevate form over substance in holding that the order herein is not a final appealable order merely because the proceeding in which it was issued was not titled a declaratory judgment action."

Id. at 582. *See infra* text accompanying notes 97-103.

5. *See infra* text accompanying note 11.

6. OHIO REV. CODE ANN. § 2505.02 (Anderson 1991) defines a final order as:

> An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

7. The very broad and arguably simple Ohio rule contrasts sharply with the more sophisticated jurisdictional statutes of other states. *See infra* notes 16-18.

order affecting a substantial right,[8] or even what comprises a special proceeding.[9] What seems like a non-final order in one context, may be a final order in the context of a special proceeding.[10]

To appreciate the impact of the *Polikoff* decision, it is important to understand Ohio's somewhat unique perspective on final, appealable orders. The Ohio Constitution states, in relevant part:

> Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse *judgments or final orders of the courts of record inferior to the court of appeals within the district* and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.[11] [emphasis added].

Under the Ohio Constitution and various enabling statutes,[12] the appellate jurisdiction of courts of appeals is strictly limited to reviewing judgments and final orders.[13] This is the "final order rule."

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8. *See* discussion *supra* note 1.

9. *Compare* Amato v. General Motors Corp., 423 N.E.2d 452 (Ohio 1981) with Polikoff v. Adam, 616 N.E. 2d 213 (Ohio 1993) (overruling *Amato*).

10. There are several examples of this. An order to compel discovery in a common law tort action for medical malpractice is not immediately appealable. *See* Cotterman v. Lowe, Miami App. No. 93-CA-48, unreported (Jan. 1994) (discussed *infra* notes 103 & 110); *but cf.* Niemann v. Cooley, Nos. C-920470 & C-920457, 1994 WL 19103 (Ohio Ct. App.) (Jan. 26, 1994). On the other hand, a similar order entered in a declaratory judgment action or on an application for prejudgment interest may be immediately appealed because such actions are special statutory proceedings. *See infra* text accompanying note 115 and following.

11. OHIO CONST. art. IV, § 3(B)(2).

12. OHIO REV. CODE ANN. § 2501.02 (Anderson 1991) states that in addition to the original jurisdiction conferred by OHIO CONST. art. IV, § 3, appellate courts have jurisdiction:

> Upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court or appeals within the district, including the finding, order, or judgment of a juvenile court that a child is delinquent, neglected, abused, or dependent, for prejudicial error committed by such lower court.

13. Except for certain appeals by a prosecuting attorney, the "final order rule" requires that all appeals involve final orders. The supreme court by rule allows prosecuting attorneys to appeal orders in a criminal case that (1) sustain a motion to suppress evidence, or (2) sustain a motion for return of property. Ohio R. Crim. P. 12(J). In either event, the prosecuting attorney must certify that the trial court's order "has rendered the state's proof with respect to that charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed." *Id.* One could argue that Ohio R. Crim. P. 12(J) is at odds with Ohio Rev. Code Ann. § 2505.02 (Anderson 1991) which allows for appeals from judgments and final orders only. However, an order granting either type of motion is in effect a final order because it deprives the state of evidence needed to effectively proceed with its case-in-chief. If the state were forced to proceed to trial without the suppressed evidence and the trial ultimately resulted in an acquittal, then any appeal by the state would be purely advisory.

Ohio's perspective on finality differs substantially from many of its neighbors. In Ohio, the requirement of finality before appeal is so strong that there is arguably no appeal of an interlocutory order.[14] An order appealed to an appellate court can only meet the requirements of Section 2505.02 of the Ohio Code by falling within the definition of a judgment or final order.[15] By contrast, several of Ohio's neighbors allow appeals of interlocutory orders. Indiana, for example, empowers its appellate courts to review several types of interlocutory orders including orders that involve substantial questions of law, the resolution of which will lead to a more orderly disposition of the case and orders for which remedy by appeal after final judgment is not practicable.[16] Michigan and Pennsylvania vest their appellate courts with some discretion to grant leave to appeal certain types of interlocutory orders.[17]

The constitutional ban on double jeopardy would prohibit the state from retrying the defendant even if the order suppressing evidence were reversed on appeal. *See generally* State v. Caltrider, 331 N.E.2d 710 (Ohio 1975).

14. *But see* discussion *supra* note 13.

15. *See* Ohio Nat' Life Ins. Co. v. Struble, 76 N.E. 2d 420 (Ohio Ct. App. 1947):

> A final decree is one which determines and disposes of the whole merits of the cause before the court or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination: so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for further decision.

Id. at 453 (citing Teaff v. Hewitt, 1 Ohio St. 511 (1853)). *See also* Cleveland, Columbus & Cincinnati Highway, Inc. v. Public Util. Comm'n. of Ohio, 49 N.E.2d 759 (Ohio 1943).

16. IND. R. APP. P. 4 states that interlocutory appeals may be taken in the following cases: (1) for the payment of money or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidence of debt, documents or things in action; (2) for the delivery of the possession of real estate; (3) from orders granting, refusing to grant, or dissolving or refusing to dissolve preliminary injunctions; (4) from orders on writs of habeas corpus; (5) from orders transferring or refusing to transfer a case under Trial Rule 75; and (6) from any other interlocutory order if the trial court certifies and the appellate court finds (a) the appellant will suffer substantial expense, damage or injury if determination of the propriety of the order waits until after a final judgment, or (b) the order involves a substantial question of law the determination of which will lead to the orderly disposition of the case, or (c) remedy by appeal after final judgment is not practicable.

17. MICH. COMP. LAWS ANN. § 600.308 (West Supp. 1993) provides for appeals as of right from: (1) all final judgments except those arising from violations of traffic ordinances, and (2) judgments from orders of the probate court as provided in Section 861. Other appeals may be taken with leave of the appellate court in the following circumstances: (1) from the circuit court when the appeal involves (a) an order, judgment or sentence by the probate court under section 863(1) and (2), (b) a final order or judgment of the district court appealed to the circuit court, (c) an order of the municipal court, and (d) a conviction for a traffic violation from the recorder's court of the city of Detroit if entered before September 1, 1981; or (2) an order of the probate court certified under Section 863(3); or (3) certain final judgments or orders from the recorder's court of the city of Detroit; or (4) such other judgments or interlocutory orders as the Supreme Court of Michigan may provide for by rule.

In Pennsylvania, not only are appellate courts vested by statute with broad jurisdiction to review interlocutory orders (42 PA. CONS. STAT. ANN. § 702 (1989)), the Pennsylvania

Kentucky and Michigan empower their supreme courts to determine by rule what types of interlocutory orders are subject to immediate review.[18] In Ohio, however, every order appealed must possess the characteristics of finality under Ohio Rev. Code §2505.02 and its accompanying case law as a predicate to the exercise of appellate jurisdiction.[19]

Ohio's requirement that every order be final to be appealable may derive from a view espoused very early in its history: "The nature of appeals in this state differs from appeals in many other states. The effect of an appeal, under our system, is to vacate the order, decision or decree appealed from, and to carry the cause into the appellate court, both upon the law and facts, the same as if no decision had been made. Hence, under our system, it has uniformly been held that no appeals are allowable, except from such decisions as are, in their nature, final."[20] Thus, the difference between Ohio's view of finality and that of its neighbors was not the result of happenstance, but of a systemic court structure that viewed appeals as a mechanism for *de novo* review of the action.

Rules of Appellate Procedure authorize appeals from final orders generally (PA. R. APP. P. 341), appeals from final distribution orders (PA. R. APP. P. 342), appeals from orders challenging a plea of guilty (PA. R. APP. P. 343), interlocutory appeals as of right (PA. R. APP. P. 311), and interlocutory appeals with leave of court (PA. R. APP. P. 312). Included in interlocutory appeals as of right are generally appeals from orders (1) refusing to open, vacate or strike a judgment, (2) confirming, modifying, dissolving or refusing to do so an attachment, custodianship, receivership or other matter affecting control of property, (3) changing venue in a criminal proceeding, (4) granting, dissolving, modifying an injunction or refusing to do so, (5) granting a new trial , (6) directing a partition, (7) sustaining venue of the matter or jurisdiction of the person or property, (8) changing venue in a civil proceeding, (9) that will terminate or substantially handicap a criminal prosecution, (10) overruling preliminary objections in an eminent domain case, (11) of the common pleas court or other government unit remanding a matter to an administrative agency, or (12) any other order made appealable by statute. Appeals from other types of interlocutory orders may be taken with leave of court.

18. KY. REV. STAT. ANN. § 22A.020(2) (Baldwin 1988) states that appellate courts have jurisdiction to review interlocutory orders as the supreme court may establish by rule. KY. REV. STAT. ANN. § 22A.020(4) (Baldwin 1988) allows the state to take an immediate appeal in certain criminal proceedings subject to certain conditions. KY. REV. STAT. ANN. § 22.020(5) (Baldwin 1988) allows any party aggrieved by a judgment of the circuit court in a case appealed thereto from an inferior court to seek a writ of certiorari in the Court of Appeals. Although empowered to provide for review of interlocutory orders by rule, the Kentucky Supreme Court has exercised this power with great restraint.

19. Ohio courts have long taken the position that what constitutes a final order is within the province of the judiciary. *See* Price v. McCoy Sales & Serv. Inc., 207 N.E.2d 236 (Ohio 1965); Hoffman v. Knollman, 20 N.E.2d 221 (Ohio 1939). However, by constitutional law, the legislature has the prerogative to determine what types of final orders can be appealed. *See* Klein v. Bendix-Westinghouse Co., 234 N.E.2d 587 (Ohio 1968). For a general discussion on what constitutes a final order, *see generally* WILLIAM H. WOLFF, JR. & JAMES A. BROGAN, APPELLATE PRACTICE AND PROCEDURE IN OHIO, §§ 3.01, & 3.03-3.05 (1993). Some cases listed in § 3.05 are no longer valid in the aftermath of the *Polikoff* decision.

20. Aultman, Miller & Co. v. Assignees of J.F. Seiberling Co., 31 Ohio St. 201, 204-205

Ohio's perspective on the function of an appeal, and the resulting finality requirement, may stem largely from the fact that truly independent intermediate appellate courts have existed in Ohio only since 1912. Prior to this time, appellate jurisdiction was vested in the supreme court and a variety of hybrid courts often consisting of common pleas court judges from the same counties where cases were tried.[21] Under the first constitution adopted in 1802, all judicial power was vested in the supreme court, courts of common pleas, and justices of the peace.[22] The supreme court — sitting as the highest court of a county — had original and appellate jurisdiction over common law and chancery cases, and exclusive jurisdiction over the trial of divorce, alimony and capital cases.[23] Thus, in many instances the supreme court sat as little more than a super trial court.[24] The court of common pleas was the general trial court of Ohio having original jurisdiction over all cases not otherwise within the exclusive jurisdiction of the supreme court or the justices of the peace.[25] The only review and retrial available was to the supreme court of the county in which the trial took place,[26] although courts of common pleas apparently had some limited power to review the judgments of justices of the peace. Under this court structure, conflicts in decisions between the trial courts were generally not subject to review by a higher court.[27]

(1877). *See also* Mitchell v. Crain, 161 N.E.2d 80 (Ohio Ct. App. 1958).

21. The first appellate courts in the state were the district courts which consisted of one supreme court justice and several judges of the common pleas court. The district courts were replaced by the circuit courts in 1883. The circuit courts were then replaced in 1912 with the intermediate district courts of appeals. The 1912 amendment to the constitution providing for intermediate appellate state courts is the foundation of Ohio's modern courts of appeals. *See generally* Lee E. Skeel, *Constitutional History of Ohio Appellate Courts,* 6 CLEVE. MAR. L. REV. 323 (1957).

22. *See generally id.* at 324. OHIO CONST. art. IV, § 1 now provides, "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law."

23. Skeel, *supra* note 21, at 324.

24. The first supreme court sat as a circuit court riding to each county to hear both cases within its exclusive and original jurisdiction as well as appeals from the decisions of the common pleas courts. *Id.*

25. *Id.*

26. Under the 1802 constitution, the supreme court was required to hold at least one term in each county of the state. *Id.* The county orientation of Ohio courts is still evident. OHIO REV. CODE ANN. § 2501.05 (Anderson 1991) provides, in part, "The court of appeals shall hear each cause in the county in which the cause originated, unless, for good cause shown, the court of appeals determines that the cause may be heard in another county of the district." Furthermore, the operational expenses of the courts of appeals, including compensation for constables, are paid by the counties forming the district. *See* § 2501.18 & § 2501.181. The clerk of courts of the common pleas court of a county serves as the clerk of the court of appeals for that county. *See also* § 2501.16.

27. Skeel, *supra* note 21, at 324. In fact, there was not even a requirement that reviewing

In 1851, Ohio amended the constitution to provide for nine judicial districts each having a district court comprised of one justice of the supreme court and two common pleas judges for the district. This was the first attempt at creating an intermediate appellate court. As of 1852, the jurisdiction of the district court was:

> Appeals may be taken from *all final judgments in civil cases at law, decrees in chancery and interlocutory decrees dissolving injunctions rendered by the court of common pleas, and superior and commercial courts* . . . in which said courts have original jurisdiction by any party against whom such judgment or decree shall be rendered or who may be affected thereby, to the district court *and, the cause so appealed shall be again tried, heard and decided in the district in the same manner as though said district court had original jurisdiction of the cause.* [28]

Thus, effectively, an appeal to the district court was not only an opportunity for the parties to obtain review of the lower court proceedings, but also an opportunity for a complete retrial of the action in a trial *de novo.*[29] Up until 1853, cases at law [30] could be retried to a jury and cases in equity [31] could be retried to the court.[32] After 1853, retrial on issues of fact was not available except in those cases where the litigants were not entitled to a trial by jury in the first instance.[33] Due to the *de novo* nature of review in Ohio's early district courts, it was only logical that a strong finality requirement — except in

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courts issue an opinion. Currently, under OHIO R. APP. P. 12(A), appellate courts must decide each assignment of error, unless an assignment is rendered moot by the resolution of another assignment of error, and "give reasons *in writing* for its determination." *Id.* (emphasis added).

28. Skeel, *supra* note 21, at 326 (quoting the March 1852 statute defining district court jurisdiction) (emphasis added).

29. *Id.* at 326. *See also* Lincoln Prop. Inc. v. Goldslager, 248 N.E.2d 57 (Ohio 1969) (parties to an appeal on questions of law and fact are entitled to a trial de novo and the appellate court may not remand the matter to the trial court for further proceedings but must substitute its judgment for that of the trial court in accordance with its independent findings of fact).

30. The term "cases at law" generally refers to that class of cases filed in courts of law and which contained the elements of a common law action and for which monetary damages are generally available. *See* Commonwealth S.S. Co. v. American Shipbuilding Co., 197 F. 780 (1912).

31. The term "equity case" generally refers to that class of cases filed in the courts and whose primary goal is to achieve a measure of fairness through a remedy not within the purview of the courts of law. A court of equity may depart from established legal rules in order to do justice in special cases. *See* Dayton & Union Ry. v. Pittsburgh, C. C. & St. L. Ry., 15 Ohio Dec. 795 (1900). However, an action in equity cannot be maintained where there exists an adequate remedy at law. *See* Haught v. City of Dayton, 295 N.E.2d 404 (Ohio 1973).

32. Skeel, *supra* note 21, at 326.

33. *Id.* at 326-327.

cases of injunctions — evolved. Absent finality in lower court proceedings, district courts would have to conduct multiple *de novo* trials of the same case.[34]

Several attempts were made following the formation of the district courts to create an independent intermediate appellate court system, most notably in 1883 with the creation of the circuit courts.[35] These courts were the first intermediate appellate courts presided over by judges specially elected to serve on the court. The purpose of the circuit courts was to relieve some of the backlog of cases then pending before the supreme court. However, rather than reducing appeals to the supreme court, the circuit courts actually contributed to an increase in the number of petitions in error filed in the higher court.[36] Moreover, because the circuit courts were under almost complete

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34. *Cf.* Aultman, Miller & Co. v. Assignees of J.F. Seiberling Co., 31 Ohio St. 201 (1877).

35. The circuit courts were vested with the same original jurisdiction as that possessed by the supreme court, and appellate jurisdiction as might be provided by law. In addition to special cases providing for appeal (e.g. divorce cases), the circuit courts could also hear appeals from the final orders of the courts of common pleas of which that court had original jurisdiction where the right to demand a trial of the facts by jury did not exist. The court could also hear appeals from final orders or judgments of the common pleas courts upon the filing of a petition of error. *See supra* note 32. No limitation was placed on the rights of litigants to petition the supreme court except for the need to act within the terms of that court's jurisdiction as then defined. Skeel, *supra* note 21, at 326-327. *See also* Ireland v. Cheney, 196 N.E. 267 (Ohio 1935).

36. Skeel, *supra* note 21, at 328. At one time there was a distinction between the term "appeal" from an "error proceeding." "Appeal" in Ohio originally meant a retrial of the issues of fact in the reviewing court while an "error proceeding" meant a review of the record made in the trial court on a petition in error. *See* Lee E. Skeel, *Some Aspects of Appellate Procedure in Ohio*, 12 W. RES. U. L. REV. 645, 650 (1961) [hereinafter Skeel, *Some Aspects*]. The meaning of "appeal" was changed by the General Assembly in 1935 to mean all proceedings whereby one court reviews or retries an action determined in an inferior court, administrative agency, tribunal or commission. The General Assembly further distinguished between "Appeals on questions of law" and "Appeals on questions of law and fact." The former involved appeals solely on questions of law including the weight and sufficiency of the evidence, while the latter involved review and retrial on questions of law and fact. 1935 Ohio Laws 104, 104-130, *cited in* Skeel, *Some Aspects supra* at 651.

In the years immediately preceding the creation of the circuit courts, Ohio amended the constitution to provide for a supreme court commission. The commission was designed to help the supreme court reduce its case backlog by acting almost as an extra supreme court. Provisions for the creation of this commission still exist in the Ohio constitution. OHIO CONST. art. IV, § 22 provides, in part:

> A commission, which shall consist of five members, shall be appointed by the Governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being, with the judges of said court. A majority of the members

control of the General Assembly, the jurisdiction of the courts was not always very clear.[37] Therefore, a truly independent intermediate appellate court system did not emerge until 1912 when Ohio amended the constitution to provide for the current courts of appeals. These courts enjoyed a much greater degree of constitutional and legislative autonomy than any of its predecessors.[38] Nevertheless, the requirement of finality as a predicate to appeal remained firmly ensconced in Ohio jurisprudence, although its continued recognition had less to do with the need for finality for trials *de novo* and more to do with preventing piecemeal appeals.[39]

The modern justification for Ohio's "final order rule" is to prevent litigants from fractionalizing a cause of action. If any order of a trial court could be appealed immediately, the orderly processing of cases would cease and the appellate court system would become nothing more than a means for litigants to delay and to obstruct the ultimate resolution of a lawsuit. Under a system that allows immediate appellate review of interlocutory orders, in many instances trial courts would have to stay further proceedings and wait for a determination by the appellate court on the propriety of the order appealed.[40] Litigation would become a frenzied traffic jam with litigants controlling the processing of cases and converting the judicial system into a means for obstructing their orderly disposition.[41] Such a result is clearly undesirable. As now applied, the final order rule discourages interlocutory appeals with what

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> of said commission shall be necessary to form a quorum or pronounce a decision, and its decisions shall be certified, entered, and enforced as the judgments of the Supreme Court[.] . . . The General Assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of [each] house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction, and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

Only two such commissions have ever been created in Ohio, one in 1876 and one in 1883. *See* Skeel, *supra* note 21, at 326.

37. The authority of circuit courts — and by extension the courts of appeals — to try cases *de novo* was not very clear. As late as 1946 the supreme court held that, at least in regards to chancery cases, the intermediate appellate courts of the state had authority to conduct *de novo* trials. *See* Youngstown Mun. Ry. Co. v. City of Youngstown, 70 N.E.2d 649 (Ohio 1946).

38. Skeel, *supra* note 21, at 328.

39. *See* WOLFF & BROGAN, *supra* note 19. *See also infra* note 42.

40. In regards to appeals by the state from adverse rulings of the circuit courts in some criminal proceedings, Kentucky law mandates that such appeals shall not act to suspend further proceedings in the case. KY. REV. STAT. ANN. § 22A.020(4)(a) (Baldwin 1988).

41. It is worthwhile to question whether the orderly processing of cases is aided by such a strict view of finality, particularly after the supreme court's decision in *Polikoff*. A very sound argument can be made that allowing review of some interlocutory orders may actually aid case processing and prevent protracted and vexatious litigation. Indiana, Michigan and

is viewed as their concomitant waste of resources and interference in the orderly processing of cases in the lower courts.[42]

B. Application of the Final Order Rule

At first glance, it would seem that determining finality under Ohio law would not be a particularly complicated task. Unlike the statutes of many other states that list section-after-section of appealable orders,[43] section 2505.02 of the Ohio Code is but two short paragraphs in length.[44] The first and third types of final orders — an order determining an action and preventing a judgment, and an order vacating or setting aside a judgment — are relatively clear.[45] An example of the first type of final order is an order that adopts the verdict of a jury and enters judgment for one of the litigants.[46] In such cases, there is simply nothing left for the trial court to do because all claims against all parties have been resolved by the judgment. An example of the third type of final order is an order granting a motion for relief from judgment by vacating a prior judgment. Often, orders granting a motion for relief from judgment under Ohio Rule of Civil Procedure 60[47] or setting aside a default

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Pennsylvania have provided for appeals of several classes of interlocutory orders. Resolution of the propriety of these orders may greatly aid in disposing of appeals and their underlying cases in a more timely manner. *See supra* notes 16-17.

42. Justice Zimmerman once observed that, "The prompt and orderly disposal of litigation is an object much to be desired, and the entertainment of appeals from various orders made by the trial court during the progress of the main action is not in pursuance of such object." Squire v. Guardian Trust Co., 68 N.E.2d 312, 314 (Ohio 1946). For a general overview of the current structure of Ohio appellate courts, see 16 AKRON L. REV. 1-150 (1982)(containing a variety of articles on modern court structure and process).

43. *See supra* notes 16-17.

44. The second paragraph of OHIO REV. CODE ANN. § 2505.02 (Anderson 1991) states:

> When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

45. OHIO REV. CODE ANN. § 2505.02 (Anderson 1991).

46. Some other examples of final orders that determine an action and prevent further judgment include orders granting summary judgment to one litigant in a single claim cause of action by one plaintiff against one defendant (Whitaker-Merrell v. Carl M. Geupel Constr. Co., 280 N.E.2d 922 (Ohio 1972)), an order granting summary judgment on less than all of the claims if it contains the certification required by OHIO R. CIV. P. 54(B) (Union-Scioto Local School Dist. Bd. of Ed. v. Unioto Support Ass'n 603 N.E.2d 375 (Ohio Ct. App. 1992)), an order granting a permanent injunction (Columbia Gas Transmission Corp. v. Bennett, 594 N.E.2d 1 (Ohio Ct. App. 1990)), & (Chiaffitelli v. Price, 265 N.E.2d 306 (Ohio Ct. App. 1970)), and an order dismissing a complaint.

47. OHIO R. CIV. P. 60 allows a trial court to grant relief from a judgment. OHIO R. CIV. P. 60(a) provides that a court may correct clerical mistakes upon motion of one of the parties or on its own motion. If, however, an appeal is pending, the court may take corrective action

judgment[48] fall into this category.[49] Clear examples of the second type of final order — those affecting a substantial right in a special proceeding — are more elusive and difficult to find. Thus, the supreme court correctly perceived in *Polikoff v. Adam* that guidance and clarification were needed. Unfortunately, its efforts would appear to be less than successful.

II. PRE-*POLIKOFF*

A. *The* Amato *Rule*

Exactly what constitutes a final order in a special proceeding has never been entirely clear.[50] Consequently, Ohio courts applied section § 2505.02 of the Ohio Code and its precursors on a case-by-case basis, leading to a perceived inconsistency as to which orders were final, or even what proceedings were special. For example, at one time appellate courts held that an order granting temporary alimony during the pendency of a divorce action was appealable as an order affecting a substantial right in a special proceeding.[51]

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only with leave of the appellate court. OHIO R. CIV. P. 60(B) provides broader grounds for relief from judgment including (1) mistake, inadvertence, surprise or excusable neglect, (2) newly discovered evidence not known at the time of the trial, (3) fraud, misrepresentation or misconduct, (4) the judgment has been satisfied or released, and (5) any other reason justifying relief. Notwithstanding the power granted by OHIO R. CIV. P. 60, a trial court cannot grant relief from judgment once an appeal has been filed without a specific remand from the appellate court. *See* State, *ex rel.* Special Prosecutors v. Judges, 378 N.E.2d 162 (Ohio 1978). Furthermore, it is important to note that in Ohio a motion for reconsideration filed with the trial court after the entry of its final judgment is a civil nullity. A common mistake of many practitioners is to file a post-judgment motion for reconsideration only to find that both the motion and any order sustaining the motion have no effect. *See* Pitts v. Dept. of Transp., 423 N.E.2d 1105 (Ohio 1981).

48. *See* GTE Automatic Elec., Inc. v. ARC Indus., Inc., 351 N.E.2d 113 (Ohio 1976).

49. Other examples of orders that are appealable under the third prong of OHIO REV. CODE § 2505.02 include an order overruling a motion for relief from judgment (Colley v. Bazell, 416 N.E.2d 605 (Ohio 1980)); and an order granting a new trial (Third Nat'l Bank of Circleville v. Speakman, 480 N.E.2d 411 (Ohio 1985)).

50. *See* Missionary Soc'y of Methodist Episcopal Church v. Ely, 47 N.E. 537 (Ohio 1987) ("Our Code does not, as does the Code of New York, specify that every remedy which is not an action is a special proceeding, nor do our statutes give any definition of an action or special proceeding.") *Id.* at 538. *See also* Kennedy v. Chalfin, 310 N.E.2d 233 (Ohio 1974).

51. Taylor v. Taylor, 57 N.E.2d 931 (Ohio Ct. App. 1943) (order granting alimony pendente lite and requiring the defendant to vacate the premises is an order affecting a substantial right in a special proceeding). However, the view expressed in *Taylor,* 57 N.E.2d at 931 was not universally held. *See* Lowman v. Lowman, 129 N.E.2d 213 (Ohio Ct. App. 1955) (order for temporary alimony pendente lite is not a final order absent some showing of an abuse of discretion). In Fields v. Fields, 14 N.E.2d 7 (Ohio Ct. App. 1950), an appellate court held that the enactment of the First General Code of Ohio in 1910 took divorce proceedings out of the category of "special proceedings" and placed them in the category of general civil actions thus requiring that all orders in divorce proceedings be final orders. Prior to 1910, divorce

Likewise, appellate courts had found that an order granting, refusing to grant, vacating or refusing to vacate a temporary restraining order had many of the characteristics of an order affecting a substantial right in a special proceeding.[52] Appellate courts even had differing positions on whether a class action

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actions were specifically exempt from the application of the Code of Civil Procedure of 1854 and thus considered special proceedings. *See* SWAN & CRITCHFIELD STATUTES 1868, Vol. II, § 604. At the time of the adoption of the Code of Civil Procedure, divorce actions were instituted by filing a "petition" in the office of the clerk of the court of the proper county. *See* CURWEN 1853, 51 Laws, 378, § 3.

52. *See* Wioland v. Mayflower Motors, Inc., 75 N.E.2d 443 (Ohio Ct. App. 1947) (order dissolving temporary restraining order in an action for specific performance is a final order); Chicago, St. L. & P.R. Co. v. City of Hamilton, 2 Ohio Cir. Dec. 259 (1888) (an order of the court of common pleas dissolving a temporary injunction is reviewable before the final disposition of the case in that court), Robert Mitchell Furniture Co. v. Cleveland S., C. & St. L. Ry. Co., 7 Ohio N.P. 640 (1899) (position that an order dissolving a temporary restraining order is too narrow a limitation on the concept of final order in a special proceeding and thus such an order is immediately reviewable). *Cf.* Burke v. Railway Co., 17 N.E. 557 (Ohio 1888) (motion to dissolve temporary injunction is a final order entered in a special proceeding); Hersch v. Home Sav. & Loan Co., 17 N.E.2d 377 (Ohio App. 1938) (order dissolving temporary restraining order issued to prevent defendant from evicting plaintiff is an appealable final order). The Supreme Court finally resolved the issue of the appealability of orders affecting temporary injunctions in Petrus v. Petrus, 199 N.E.2d 579 (Ohio 1964), holding that such orders were not final and overruling its earlier decision in *Burke,* 17 N.E. at 557.

More recent Ohio cases have followed the principles of *Petrus,* 199 N.E.2d at 579 holding that orders granting temporary restraining orders or preliminary injunctions, or refusing to grant such orders are not appealable final orders. *See* State *ex rel.* Tollis v. Cuyahoga Cty. Ct. App. 532 N.E.2d 727 (Ohio 1988) (court of appeals is without jurisdiction to consider an appeal from a preliminary injunction because such orders are not final); Refreshment Serv. Co., Inc. v. City of Cleveland, 406 N.E.2d 1115 (Ohio 1980) (order granting a preliminary injunction not a final order); Van Camp v. Riley, 476 N.E.2d 1078 (Ohio App. 1984) (order granting a temporary injunction not a final order).

There is one recognized exception to the rule that temporary restraining orders and preliminary injunctions are not appealable. In International Diamond Exch. Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc., 591 N.E.2d 881, 884 (Ohio App. 1991), the Second District Court of Appeals of Ohio held that injunctive orders constituting a prior restraint on free speech are immediately appealable. The court held:

> Although there is nothing in the opinion of [*State ex rel.*] *Tollis* [*v. Cuyahoga Cty. Ct. App.* 532 N.E.2d 727 (Ohio 1988)] to suggest that a situation like the one in the case before us, involving a prior restraint on speech, is distinguishable, we nevertheless conclude that a preliminary injunction that constitutes a prior restraint upon the exercise of the right of free speech is a different situation that requires, as an incident of the First Amendment to the United States Constitution, an immediate appellate forum for the review of any such injunction. Socialist Party of America v. Skokie, 432 U.S. 43 (1977).

Id.

There may be some question in the post-*Polikoff* era as to whether temporary restraining orders and preliminary injunctions are *not* immediately appealable. Such proceedings are arguably special statutory remedies given that they are provided for in OHIO REV. CODE ANN. § 2727.02 (Anderson 1991), inclusive sections and OHIO R. CIV. P. 65(A).

certification was appealable.[53] Perceiving the potential for developing an inconsistent jurisprudence on the finality of orders entered in special proceedings, the supreme court sought to articulate a clearer standard for resolving the issue. The case that provided that opportunity was *Amato v. General Motors Corp.*[54]

Amato involved an appeal from an order certifying a class action suit against General Motors for breach of warranty. The class included all residents of Ohio who had purchased a 1977 Oldsmobile. The trial court refused to certify a dealer class, finding that the requirements of commonality and typicality had not been met.[55] On appeal, the appellate court held that an order both certifying one class and refusing to certify another class was not a final order under Ohio Rev. Code §2505.02.[56] General Motors appealed to the supreme court.

After discussing the applicability of Ohio Civ. R. 54(B)[57] to the case, the court reached the threshold question: Is an order to certify a class under Ohio Civ. R. 23 an order affecting a substantial right in a special proceeding? The answer was yes. The majority reasoned that although the term "special proceeding" had not been defined by the General Assembly, a review of the

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53. *Compare* Roemisch v. Mutual of Omaha Ins. Co., No. 73-CA-16, (Ohio Ct. App. Nov. 6, 1973) (unreported Miami App.) (order denying class certification not a final order) *with* Miles v. N.J. Motors, 291 N.E.2d 758 (Ohio Ct. App. 1972) (order dismissing class action aspects of a complaint is appealable because the members of the class are left without an adequate legal remedy). Subsequent to dismissing *Roemisch,* the Miami County Court of Appeals sustained a motion to certify a conflict to the Supreme Court of Ohio. That court ruled that an order determining that an action may not be maintained as a class action is a final order under the "death knell" theory. Roemisch v. Mutual of Omaha Ins. Co., 314 N.E.2d 386 (Ohio 1974). *See also* Portman v. Akron Sav. & Loan Co., 353 N.E.2d 634 (Ohio Ct. App. 1975) (an order denying class certification is a final order under OHIO REV. CODE § 2505.02 and appealable under the "death knell" doctrine); Polimeros v. National Account Sys., Inc., 343 N.E.2d 138 (Ohio Ct. App. 1975) (an order certifying a class but not providing any procedures to be followed in prosecuting the action is not a final order). *See also Amato,* 423 N.E.2d at 452.

54. *Amato,* 423 N.E.2d at 452.

55. To maintain an action as a class action, OHIO R. CIV. P. 23 requires a showing that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class members.

56. Amato v. General Motors Corp., No. 39645, (Ohio Ct. App. May 30, 1980) (unreported Cuyahoga App.).

57. OHIO R. CIV. P. 54(B), like its federal counterpart, enables a trial court to issue a final judgment on one or more but fewer than all of the claims of all of the parties upon an express determination "that there is not just reason for delay." The effect of this "magic language" is to convert an interlocutory judgment into a final judgment that can be appealed notwithstanding the pendency of other claims in the trial court.

court's prior case law indicated that two principles guided the determination of whether an order affected a substantial right in a special proceeding. Justice Holmes, writing for the court, stated:

> . . . from our cases discussing what is or is not a special proceeding, we are able to glean certain principles relating to special proceedings. First and foremost, this court has been most reluctant to allow interlocutory review of rulings made by a trial [court] during the pendency of litigation by holding that such rulings were made in special proceedings. (Citation omitted)
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> . . .
>
> The second principle, derived from our cases, is that in the small class of orders deemed to have been made in special proceedings. ". . . [a] prime determinant of whether a particular order is one made in a special proceeding is the practicability of appeal after final judgment." [58]

Using these principles as guidance, the supreme court fashioned what came to be known as the two-pronged *Amato* balancing test. Before accepting jurisdiction over a seemingly interlocutory order, an appellate court had to find (1) that the order affected a substantial right, and (2) that the impact of the order was such that review after final judgment was not practicable and the waste of judicial resources in accepting an interlocutory appeal was comparatively slight.[59] If the order appealed met the requirements of the test, it was deemed a final order subject to immediate review.

In creating the *Amato* test, the supreme court sought to balance the traditional notion of "final orders" with the reality that some interlocutory orders simply defied effective review *after* final judgment. The court admonished appellate courts to remain faithful to the general rule against reviewing interlocutory orders.[60] Yet the court also recognized that exceptions to the rule not only existed but had to be judicially recognized, albeit under a fiction of finality due to the constitutional and statutory provisions defining appellate jurisdiction. Thus, in the case of a class action certification, "it [was] not at all certain that judicial resources [were] wasted by allowing immediate review" but that clearly "a prompt review of an order certifying a class may conserve judicial resources by allowing reversal of orders which improperly certify class actions."[61]

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58. *Amato,* 423 N.E.2d at 452 (citation omitted).

59. *Id.*

60. *Id.* at 455. *See also* Lonigro v. Lonigro, 561 N.E.2d 573 (Ohio Ct. App. 1989).

61. *Amato,* 423 N.E.2d at 456.

B. The Advantage of Amato

The advantage of the *Amato* test was in its flexibility. Armed with the *Amato* test, appellate courts had broader discretion in examining certain types of interlocutory orders that could cause irreparable harm if the litigants were forced to wait until after the final judgment for appellate review. At the same time, the test provided appellate courts with some discretion in determining what types of orders could be immediately examined. If an appellate court determined that the importance of conserving judicial resources outweighed the need for immediate appellate review, or that no substantial right was affected, the order was not entered in a special proceeding and was not immediately appealable.[62]

Two areas of law were immediately affected by *Amato:* (1) certain otherwise interlocutory discovery orders, and (2) certain orders in domestic relations cases. These new classes of interlocutory appealable orders generally shared a common characteristic: waiting until after the final judgment to review the order was impractical because no effective relief could be offered if the order were ultimately found to be erroneous.[63]

In the discovery area, orders that compelled the disclosure of certain types of confidential or privileged information were appealable notwithstanding the appellate courts' aversion to becoming enmeshed in discovery disputes. Generally, Ohio appellate courts avoid reviewing discovery orders on the basis that interlocutory review creates unnecessary appeals, allows litigants to harass one another by using the appellate process to delay or deter a trial, and results in appellate courts becoming involved in the housekeeping affairs of trial courts.[64] However, certain orders required the disclosure of information that was either legally privileged or strictly confidential. Appellate courts rationalized that an immediate appeal of such orders was necessary because once a party complied and released the information, any harm in the trial court's order could not be undone on appeal after final judgment. Thus, under *Amato*, an order compelling disclosure of a patient's file in a medical malpractice action was reviewable as an order affecting a substantial right entered in a special proceeding.[65] Also, an order compelling the disclosure of a confidential informant in a criminal proceeding was immediately

62. *See discussion infra* note 96.

63. *See* Galbreath v. Galbreath, No. 89AP-13, 1989 WL 65389, at *2 (Ohio Ct. App. June 13, 1989).

64. Nelson v. Toledo Oxygen & Equip. Co., 588 N.E.2d 789 (Ohio 1992), discussed *infra* note 89 and accompanying text.

65. Humphry v. Riverside Methodist Hosp., 488 N.E.2d 877 (Ohio 1986), discussed *infra* notes 89-94 and accompanying text.

reviewable.[66] And, an order compelling deposition testimony of a physician concerning privileged communications under Ohio Rev. Code §2317.02(B) was a final order.[67]

In the domestic relations area, several orders affecting child custody and privileged communications became appealable under the *Amato* test. An order requiring a custodial parent to execute an authorization allowing the inspection of her social worker's file was reviewable because the order forced the parent to waive her right to social worker-client privilege.[68] Likewise, some child custody orders were considered final because, "the child's interest in obtaining even an inconclusive appellate disposition of [the issue of permanent custody] is sufficiently overwhelming to justify our assumption of appellate jurisdiction under the test set forth in *Amato*." [69]

In each of these examples, appellate courts reviewed traditionally interlocutory orders and found that prejudicial error in the trial court's order could not effectively be corrected on review after final judgment.[70] *Amato*

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66. State v. Port Clinton Fisheries Inc., 465 N.E.2d 865 (Ohio 1984).

67. Hollis v. Finger, 590 N.E.2d 784 (Ohio Ct. App. 1990). *See also* Doe v. Univ. of Cincinnati, 538 N.E.2d 419 (Ohio Ct. App. 1988) (order compelling hospital to disclose the name of a blood donor infected with HIV is final notwithstanding the absence of a physician-patient privilege).

68. Voss v. Voss, 574 N.E.2d 1175 (Ohio Ct. App. 1989).

69. Shull v. Shull, No. 89-CA-89, 1990 WL 115983 (Ohio Ct. App. July 31, 1990). Examples of other orders in a domestic relations action that appellate courts found immediately appealable included an order compelling one party to pay the prospective attorneys fees of another party (DeWerth v. DeWerth, Nos. 63320 & 63429, 1993 WL 35588 (Ohio Ct. App. Feb. 11, 1993)), an order compelling one party to sell assets to pay for the attorneys fees of the other party (Oatey v. Oatey, 614 N.E.2d 1054 (Ohio Ct. App. 1992)), and an order denying a natural parent the right to withdraw a previously executed adoption consent (*In re* Adoption of Sarah Ruth Brandt, No. 85-12-102, 1986 WL 7907 (Ohio Ct. App. July 14, 1986)).

70. Examples of other final orders under the *Amato* test include an order dissolving a law partnership in a manner contrary to the terms of the partnership agreement (Tillberry v. Body, 493 N.E.2d 954 (Ohio 1986)), an order denying a petition to be represented by out-of-state counsel (Guccione v. Hustler Magazine, Inc., 477 N.E.2d 630 (Ohio 1985)), an order granting a motion to disqualify counsel in a civil proceeding (Russell v. Mercy Hosp. 472 N.E.2d 695 (Ohio 1984)), an order granting a defendant's request for a polygraph test at state's expense (State *ex rel* Leis v. Kraft, 460 N.E.2d 1372 (Ohio 1984)), an order collaterally imposing sanctions for frivolous conduct (Shaffer v. Mease, 584 N.E.2d 77 (Ohio Ct. App. 1991)), an order relating to possession of property in a forcible entry and detainer action (Skillman v. Browne, 589 N.E.2d 407 (Ohio Ct. App. 1990)), an order overruling a defendant's motion to dismiss a subsequent criminal charge brought by indictment of the grand jury when the defendant and state previously entered a plea bargain arrangement in which the defendant pleaded guilty to lesser charges in exchange for dismissal of the same criminal charge that formed the basis of the grand jury indictment (State v. Parsons, No. 2345, 1988 WL 28103 (Ohio Ct. App. March 3, 1988)), an order to compel an attorney to produce documents upon which he has a lien for payment (Foor v. Huntington Nat. Bank, 499 N.E.2d 1297 (Ohio Ct. App. 1986)), an order overruling exceptions to an inventory because the order withheld certain

provided a quasi-discretionary appeal based upon the exigency of the circumstances and the substantial rights of the parties affected by a trial court order.[71]

III. THE *POLIKOFF* DECISION

The great advantage of the *Amato* test was also perceived to be its great weakness. Because the test provided appellate courts with some flexibility and discretion in deciding which interlocutory orders to review, the test was perceived as encouraging an inconsistent jurisprudence on the issue of what constituted a special proceeding.[72] As the perceived inconsistencies grew, the supreme court found a need to make a more definitive statement on the subject. The opportunity to refine *Amato* came in *Polikoff*.

A. Polikoff

Polikoff v. Adam involved a shareholder derivative suit brought by several shareholders against the TRW Corporation and its board of directors. The shareholders alleged that TRW and one of its principal segments, Information Systems and Services, a credit reporting agency, violated the Fair Credit Reporting Act[73] by secretly rating consumers' creditworthiness and then distributing inaccurate and misleading credit information.

At trial, TRW moved to dismiss the complaint asserting that the plaintiffs had not complied with rule 23.1 by first demanding that the board of directors bring the action themselves or by pleading that such a demand would have been futile.[74] The trial court denied the motion to dismiss and TRW

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liquid assets from the estate which could be dissipated before review after final judgment (Sheets v. Antes, 470 N.E.2d 931 (Ohio Ct. App. 1984)).

71. *Amato's* quasi-discretionary appeal from some interlocutory orders basically provided the type of discretionary appeal several other states provide for by statute. *See supra* notes 14-15.

72. *Polikoff*, 616 N.E.2d at 215. *See also* Stewart v. Midwestern Indemn. Co., 543 N.E.2d 1200, 1203-04 (Ohio 1989) (Douglas, J., dissenting).

73. 15 U.S.C. § 1681a–1681t.

74. OHIO R. CIV. P. 23.1 provides:

> In a derivative action brought by one or more legal or equitable owners of shares to enforce a right of a corporation, the corporation having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. *The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and, if necessary, from the shareholders and the reasons for his failure to obtain the action or for not making the effort.* The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation.

appealed. The court of appeals dismissed TRW's appeal for lack of jurisdiction finding that an order overruling a motion to dismiss is not a final order under section § 2505.02 of the Ohio Code.[75] TRW then appealed to the Supreme Court of Ohio arguing that the trial court's order overruling its motion to dismiss affected a substantial right in a special proceeding and was thus immediately appealable.

In examining whether the order TRW appealed was entered in a special proceeding, the supreme court observed that the application of the *Amato* balancing test had become increasingly inconsistent.[76] The court stated:

> This court's decisions in *Humphry v. Riverside Methodist Hosp.* (citation omitted) *Nelson v. Toledo Oxygen & Equip. Co.* (citation omitted); and *Dayton Women's Health Center v. Enix* (citation omitted), represent additional examples of the reasons it is necessary for us to return to a more predictable and exacting method of determining what constitutes an order that is entered in a special proceeding. In these cases, the *Amato* balancing test was applied to lead to the following disparate conclusions: a discovery order compelling the disclosure of confidential information was a special proceeding and immediately appealable (*Humphry*); an order determining that an action shall or shall not be maintained as a class action was entered in a special proceeding (*Dayton Women's Health Ctr.*); and an order compelling the production of documents allegedly subject to the work-product exemption was not made in a special proceeding and was not a final appealable order (*Nelson*). The court's application of the balancing test varied with each case, proving that it is impossible to ensure the objective application of subjective criteria.[77]

In order to clarify what constituted a "special proceeding," the court examined the term in its historic context. The court noted that the Code of Civil Procedure adopted in 1853 abolished the distinction between actions at law and suits in equity and substituted in their place one form of action called a "civil action."[78] Historically, this form of action encompassed those lawsuits that, before the adoption of the Code of Civil Procedure, were denominated as actions at law or suits in equity.[79] Any proceeding not obtained in an action or by a suit was a special proceeding or special statutory remedy. Thus,

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> The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders in such manner as the court directs. [emphasis added].

75. Polikoff v. Adam, Cuyahoga App. Nos. 63513, 63514, 63515 & 63516.

76. *Polikoff,* 616 N.E.2d at 215.

77. *Id.* at 217. Justice Resnick, writing for the majority, argued that *Amato* produced great ambiguity resulting in many attorneys filing unnecessary appeals.

78. *See generally id.* at 216.

79. *Id.* at 215-16 (citing William Watson & Co. v. Sullivan, 5 Ohio St. 42 (1855)).

where the code conferred a right and authorized a party to enforce that right not by filing an action but by the filing a special application to a court for a judgment or order to enforce the right, the proceeding was a special proceeding.[80] The court concluded that because shareholder derivative suits originated over one hundred years earlier as suits in equity, they were not special proceedings.[81]

Relying on the perceived historical status of special proceedings, the court rejected the *Amato* balancing test as inconsistent and prone to subjective application.[82] In its place the court articulated what it believed was a more objective, historical-based test for determining whether an order was entered in a special proceeding.

> Hence, we determine that orders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02. *Amato* is therefore overruled.[83]

Turning to the nature of the relief sought, the court noted that the action was not initiated by a special petition but by filing a lawsuit in the court of common pleas. The plaintiffs were not seeking to obtain a remedy conferred by statute nor did the proceedings involve an independent judicial inquiry.[84] Furthermore, any error in the trial court's decision overruling TRW's motion to dismiss for failure to comply with Ohio Civ. R. 23.1 could be preserved throughout the litigation and reviewed on appeal after final judgment.[85] Thus,

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80. *Polikoff,* 616 N.E.2d at 216 (citing In re Estate of Wycoff, 142 N.E.2d 660, 663-64 (Ohio 1957)); *See also Missionary Soc. of M.E. Church*, 47 N.E. at 537.

81. *Polikoff,* 616 N.E.2d at 217-18.

82. *Id.* It is interesting to note that for years there existed in Ohio an "abuse of discretion appeal" applicable to some types of interlocutory orders. The genesis for this abuse of discretion appeal was in Webster v. Pullman Co., 200 N.E. 188 (Ohio Ct. App. 1935). In that case, an appellate court concluded that an order granting a motion for new trial could be reviewed immediately on a theory of abuse of discretion. The court concluded that review of the order after the second trial "would be utter folly and its result an unjustifiable judicial mandate which denied one a fair trial in the first instance and subjected the litigants to needless expense." This remained the law in Ohio until the supreme court's decision in *Klein,* 234 N.E.2d at 587. In that case, the supreme court rejected an appeal from an order compelling the production of a coin-operating dry cleaning machine for inspection. The court found that interlocutory discovery orders were not appealable holding, "The incongruity of the doctrine which arose from this confusion becomes apparent when it is realized that the result of the doctrine is to make all discretionary orders falling within the doctrine appealable, whether final or interlocutory. . . . We therefore put to rest the concept that abuse of discretion will, of itself, render final an otherwise interlocutory order." *Id.* at 590.

83. *Polikoff,* 616 N.E.2d at 218.

84. For a discussion on the meaning of the term "independent judicial inquiry," *see infra* text accompanying notes 104-07.

85. *Polikoff,* 616 N.E.2d at 218.

the court concluded that TRW appealed a non-final order.[86]

Under the objective-historical test announced in *Polikoff*, whether an order is entered in a special proceeding depends upon (1) the historical nature of the proceedings with particular reference to an action's status at the time of the adoption of the Code of Civil Procedure, or (2) the involvement of an independent judicial inquiry in issuing the order. The requirement that the order affect a substantial right remains in effect.[87] Strictly read, *Polikoff* stands for the proposition that an order entered in a proceeding that would have been recognized as an action at law or a suit in equity is an order entered in a civil action and can only be reviewed after the final judgment.[88] On the other hand, an order that affects a substantial right in a proceeding that involves either a statutory proceeding or an independent judicial inquiry is an order entered in special proceeding and can be immediately appealed notwithstanding the pendency of other related matters in the trial court. Therefore, after *Polikoff* the ability of a litigant to obtain immediate review of an order depends largely upon the historic status of the underlying action, not the practicability of obtaining effective review on appeal after final judgment.[89]

B. Problems with Polikoff's *Objective-Historical Test*

Several problems exist with the *Polikoff* decision. First, contrary to the supreme court's perception, it is not all that clear that *Amato* produced a radically discordant jurisprudence. The supreme court in *Polikoff* pointed to *Humphry v. Riverside Methodist Hosp.*,[90] *Nelson v. Toledo Oxygen & Equip. Co.*,[91] and *Dayton Women's Health Center v. Enix*[92] as examples of the inconsistency resulting from use of the *Amato* balancing test. However, given the facts in each of these case, the decisions are not really all that inconsistent. *Humphry* stood generally for the proposition that an order compelling disclo-

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86. Arguably the result in *Polikoff* was correct. Orders overruling motions to dismiss are generally not considered final orders because they do not affect a substantial right and in effect prevent a judgment. The nature of the underlying action was not a special proceeding because, as the court noted, shareholder derivative suits evolved over one hundred years ago in equity courts. *Polikoff*, 616 N.E.2d at 217-18. Thus, the facts in *Polikoff* presented no close question of finality — the order was clearly not final. The court could have overruled the jurisdictional motions and dismissed the appeal without ever needing to completely redefine appellate practice and procedure with regards to special proceedings.

87. *See Bell*, 616 N.E.2d at 182.

88. *Polikoff*, 616 N.E.2d at 213-14.

89. *See also infra* note 100 and accompanying text.

90. 488 N.E.2d 877 (Ohio 1986).

91. 588 N.E.2d 789 (Ohio 1992).

92. 555 N.E.2d 956 (Ohio 1990).

sure of privileged or confidential information was immediately appealable.[93] *Nelson* stood for the proposition that an order compelling disclosure of work-product — communications not recognized as privileged in Ohio Rev. Code §2317.02 — was not reviewable until appeal after final judgment.[94] *Enix* stood for the proposition that an order determining that an action should or should not proceed as a class action was an order entered in a special proceeding, a decision consistent with *Amato*.[95]

In each of these examples, the factor that determined whether the appellant could maintain an immediate appeal was a finding by the appellate court that *effective* review after final judgment was either available (*Nelson*) or not available (*Humphry* and *Enix*). Although this determination was somewhat subjective, there is little evidence that the decisions of reviewing courts were markedly inconsistent. In the post-*Amato*, pre-*Polikoff* era, appellate courts did not rush to review interlocutory orders thereby producing wild fluctuations in appellate jurisprudence. Rather, appellate courts declined to review many interlocutory orders proffered for review on *Amato*-type arguments opting to follow the general principle that review should take place after final judgment.[96] For example, in applying the *Amato* test to discovery disputes,

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93. *Humphry*, 488 N.E.2d at 877.

94. *Nelson*, 588 N.E.2d at 789.

95. Several problems resulting from the *Dayton Women's Health Ctr.* decision were later corrected in an amendment to OHIO R. APP. P. 4. In *Dayton Women's Health Ctr.*, 555 N.E.2d at 956, the supreme court held that because orders certifying a class are final orders in a special proceeding, the appellant's failure to appeal that order in a timely manner divested the appellate court of jurisdiction to hear the appeal notwithstanding the pendency of other proceedings before the trial court. OHIO R. APP. P. 4 was amended by the addition of section (B) to provide litigants with the option of appealing such an order either within thirty days of its entry on the journal of the trial court or after the trial court issues its final judgment disposing of all of the claims of all of the parties.

96. Examples of other types of orders found not appealable under *Amato* include an order compelling disclosure of work product information (Nelson, 588 N.E.2d 789), an order vacating an arbitration award and that orders the parties to select new arbitrators and conduct new arbitration proceedings (Stewart v. Midwestern Indem. Co., 543 N.E.2d 1200 (Ohio 1989)); an order temporarily suspending the license of a person accused of driving while under the influence (Columbus v. Adams, 461 N.E.2d 887 (Ohio 1984)); an order overruling a motion to disqualify counsel (Bernbaum v. Silverstein, 406 N.E.2d 532 (Ohio 1980)); an order compelling the release of internally generated performance evaluations for operator of hazardous waste facility (State *ex. rel* Celebrezze v. Cecos Int'l, Inc., 583 N.E.2d 1118 (Ohio Ct. App. 1990)); an order granting a preliminary injunction (Arthur Young & Co. v. Kelly, No. 87AP-800, 1987 WL 17806 (Ohio Ct. App. Sept. 29, 1987)); an order compelling the release of trade secrets (Klaban v. Chiefs, Inc., No. CA 91-02-022, 1991 WL 99622 (Ohio Ct. App. June 10, 1991) *but cf.* Kuhn & Co. v. Genslinger, No. 12786, 1992 WL 157717 (Ohio Ct. App. July 8, 1992)); order compelling pre-trial production of hospital incident report (Schuette v. Flora, No. 7-92-8, 1993 WL 93627 (Ohio Ct. App. March 31, 1993) (citing State *ex rel.* Children's Med. Ctr. v. Brown, 571 N.E.2d 724 (Ohio 1991)); order overruling motions to compel a psychological evaluation of custodial parent and prohibiting her from moving the

appellate courts rather consistently reviewed only those orders that compelled the disclosure of legally privileged information or the disclosure of information that would invade a non-party's substantive right to privacy.[97] Thus, similar cases having similar facts were generally decided along similar lines regardless of the nature of the underlying action. This may not be the case in the post-*Polikoff* era.

Second, rather than being a simple and clear test for determining what constitutes a special proceeding, the analysis required by *Polikoff* is complex and prone to produce inconsistent results because of fine distinctions in jurisprudential history and the nature of the court proceedings involved in the underlying action. The supreme court stated in *Polikoff* that orders entered in *actions* that were recognized at common law or in suits in equity, and that were not specially created by statute, were not orders entered in a special proceeding.[98] Yet the court also intimated that a statutory proceeding involving adversarial hearings on issues of fact and law and which ultimately results in a judgment is not a special proceeding.[99] Therefore, in determining whether an order is appealable under *Polikoff*, courts and litigants must examine (1) the historical nature of the proceedings, (2) if historically a special proceeding, the adversarial nature of the proceedings, (3) whether the trial court's decision constitutes a judgment, and (4) whether the trial court's decision *affects* a substantial right.[100] Given the complex analysis required by *Polikoff*,

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minor children to Florida (Ashworth v. Powers, No. 90-CA-103, 1991 WL 233917 (Ohio Ct. App. Nov. 8, 1991)); order imposing sanctions for violation of discovery order (*In re* Estate of Maddox, No. 50106, 1986 WL 1731 (Ohio Ct. App. Feb. 6, 1986)); order imposing sanctions on attorney for bad faith pleadings under OHIO R. CIV. P. 11 (Moskovitz v. Mt. Sinai Med. Ctr., Nos. 60464 & 61166, 1991 WL 191849 (Ohio Ct. App. Sept. 26, 1991)); divorce decree that defers consideration of child support (Tismo v. Tismo, No. 1917, 1990 Wl 127064 (Ohio Ct. App. Aug. 28, 1990)); order overruling motion for stay of execution of a judgment (In the Matter of Megan Nicole Spriggs, No. 89-CA-1803, 1990 WL 54871 (Ohio Ct. App. Apr. 24, 1990)); order overruling motion to strike or limit a demand for a jury trial under OHIO REV. CODE § 4121.80(D) (Hayes v. Goodson TSI, Inc., No. 89-CA-34, 1990 WL 51510 (Ohio Ct. App. Apr. 19, 1990)); and an order overruling motion to dismiss for failure to join an indispensable party (Banc Ohio Nat'l Bank v. Rubicon Cadillac, Inc., 462 N.E.2d 1379 (Ohio 1984)). These examples are, by no means, all inclusive.

97. *See Doe,* 538 N.E.2d at 419 . *See also Humphry*, 488 N.E.2d at 877.

98. *Polikoff,* 616 N.E.2d at 218.

99. *Id.* "The underlying action can be distinguished from a special proceeding in that it provides for an adversarial hearing on the issues of fact and law which arise from the pleadings and which will result in a judgment for the prevailing party." *Id.*

100. As noted, the supreme court held in *Bell,* 616 N.E.2d 181, that an order *affecting* a substantial right has general been perceived to be an order not capable of correction on appeal after final judgment. Thus, under the *Polikoff* test as applied in *Bell*, one must not only look to the historical and adversarial nature of the trial court proceedings, but also measure the impact of the trial court's judgment on the rights of the litigants. Notwithstanding the overruling of *Amato* in *Polikoff,* it would appear that the supreme court resurrected some aspects of the balancing test in *Bell.*

litigants cannot rely merely upon the historical nature of an action, but must also closely examine the very nature of the trial court proceedings.[101] Thus, several types of special statutory proceedings may not, upon further investigation, fit the definition of a special proceeding articulated in *Polikoff,* notwithstanding their apparent facial consistency with the principles of the rule.[102] The *Polikoff* test requires a multi-prong analysis that appears so subtle in its distinctions that it is likely to produce great confusion over what orders are appealable in what types of proceedings.[103]

Finally, in *Polikoff,* the supreme court opened the door to further confusion by stating that a special proceeding may involve an "independent judicial inquiry"[104] without defining precisely what it meant by this term. The absence of a clear definition has left appellate courts scrambling to understand this newest requirement of a special proceeding. For example, in *Stevens v. Grandview Hosp.*,[105] the Second District Court of Appeals concluded that an interlocutory order disqualifying counsel in a common law medical malpractice action involved "an independent judicial inquiry" constituting a special proceeding. Acknowledging that *Russell v. Mercy Hosp.*[106] was suspect in light of *Polikoff,* the court nevertheless concluded, "We are not prone, however, to apply the syllabus of *Polikoff* in such a sweeping fashion that it renders all orders in suits that were recognized at common law as not being final

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101. *See Indiana Ins. Co.,* 632 N.E.2d at 579 (order declaring the rights and obligations of the parties is not a final order because the action was not denominated as a declaratory judgment action notwithstanding having all of the characteristics of such an action).

102. For example, it has been suggested that a wrongful death action under OHIO REV. CODE ANN. § 2125.01-2125.04 (Anderson 1991), a statutory proceeding is not a special proceeding since such an action involves adversarial hearings on questions of law and fact. *See generally* Irene C. Keyse-Walker, *Deciphering* Polikoff *and the Demise of* Amato, 65 CLEVELAND BAR JOURNAL, 10 (Nov. 1993). *But see* Niemann v. Cooley Nos. C-920470 & C-920457, 1994 WL 19103 (Ohio Ct. App. Jan. 26, 1994) (a wrongful death action is a special statutory proceeding).

103. To illustrate the problem, the First District Court of Appeals has held that what determines whether an action is a special proceeding is not the historical nature of the underlying action, but either the nature of the proceeding from which the order arose or the privilege affected by the order. *See Niemann,* 1994 WL 19103. By contrast, the Second District Court of Appeals has held that it is the nature of the underlying action that determines whether the order was entered in a special proceeding. *See Cotterman,* Miami App. No. 93-CA-48, unreported & Uschold v. Community Blood Ctr., Montgomery App. No. 14349, unreported (1994). Thus, rather than providing a more consistent jurisprudence, courts applying *Polikoff* have gone in very different directions on fundamental issues of appellate jurisdiction.

104. *Polikoff,* 616 N.E.2d at 218.

105. Stevens v. Grandview Hosp., No. 14042, 1993 WL 420127 (Ohio Ct. App. October 20, 1993).

106. 472 N.E.2d 695 (Ohio 1984) (order granting a motion to disqualify counsel is a final order entered in a special proceeding).

appealable orders."[107] Relying in part on the decision in *Stevens,* the First District Court of Appeals held that an order to compel the production of privileged information involved an independent judicial inquiry.[108] But how is one to determine whether an order is appealable as the result of such an inquiry? What are the elements of an independent judicial inquiry? Is an independent judicial inquiry an inquiry into an issue tangential to the litigation but outside the scope of the matters raised in the complaint, like a motion to disqualify counsel? Or does an independent judicial inquiry involve a more narrow and exacting exercise of judicial power, for example a contempt proceeding? As is evident, instead of clarifying the issue of special proceedings, the independent judicial inquiry language of *Polikoff* may lead to an entirely new round of appeals as unsure litigants seeking to protect their appellate rights attempt to challenge trial court orders based on this newest element of a special proceeding.[109]

The absence of clear guidelines in the application of the *Polikoff* test has left appellate courts, practitioners and litigants vulnerable to a more inconsistent jurisprudence than that which the supreme court perceived to be plaguing special proceedings in the past. Although the court espoused a bright-line test in *Polikoff*, the test may not be so bright. Because it is the historic nature of the proceedings — not the exigency of the circumstances or the substantial rights of the parties — that seems to determine appealability, peculiar results are unavoidable.[110] How does one explain that an order compelling disclosure of legally privileged information in one type of proceeding may be immedi-

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107. *Stevens,* 1993 WL 420127, at *2. The validity of both *Russell* and now *Stevens* is doubtful in light of the supreme court's ruling in State *ex rel.* Keenan v. Calabrese, 631 N.E.2d 119 (Ohio 1994) ("An appeal following conviction and sentence would be neither impractical nor ineffective since any error in granting the motion [to disqualify counsel in a criminal proceeding] would, in certain circumstances, be presumptively prejudicial. Flanagan v. United States, 465 U.S. 259, 268 (1984)."). The supreme court in *Keenan* did not reach the question of whether a ruling on a motion to disqualify counsel involved an independent judicial inquiry.

108. *Niemann,* 1994 WL 19103.

109. Although litigants would not necessarily lose their right to appeal given the changes in OHIO R. APP. P. 4(B)(5), discussed *supra* at note 95, they may nevertheless file interlocutory appeals seeking a determination as to whether the order was entered in an independent judicial inquiry. *See, e.g., Stevens,* 1993 WL 420127.

110. One court has concluded that it is not the nature of the underlying action that controls but the nature of the privilege asserted that determines whether an action constitutes a special proceeding. See *Niemann,* 1994 WL 19103. *But see Cotterman,* Miami App. No. 93-CA-48, unreported ("Both cases emphasize that to constitute a final order entered in a special proceeding, the action from which the order arises must itself be in the nature of a special proceeding."). *See also Uschold,* Montgomery App. No. 14349, unreported (1994) (motion to certify the holdings in *Niemann* and *Uschold* to the supreme court as being in conflict sustained March 2, 1994).

ately reviewed,[111] while that exact same order entered in another type of proceeding can only be reviewed on appeal after final judgment?[112] The only conclusion that can be reached is that some special statutory proceedings are by nature civil actions and some statutory proceedings within civil actions are by nature special proceedings.[113] The complicated historical analysis required by *Polikoff* is neither easy to apply nor prone to produce the consistent results sought by the supreme court.[114] Indeed, *Polikoff* will mean that like appeals from orders having similar effects may be decided in vastly different ways based solely on what the appellate court believes to be the historical nature of the underlying action, the adversarial nature of the proceedings, and the character of the trial court's judgment.

C. The Discovery Dilemma

The problems with the *Polikoff* decision are perhaps best illustrated by examining its potential effects on review of interlocutory appeals of discov-

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111. *Compare Bell,* 616 N.E.2d at 181 *with Uschold,* Montgomery App. No. 14349, unreported. *See generally* discussion *infra* note 129.

112. *See infra* text accompanying notes 115-19.

113. *See* Newton v. Ohio Univ., 633 N.E.2d 593 (Ohio Ct. App. 1993). "A panel of this court recently read *Polikoff* and *Nease* [*v. Medical College Hosp.*, 596 N.E.2d 432 (Ohio 1992)], taken together, as indicating that a ruling which grants immunity pursuant to R.C. 9.86 is an order that affects a substantial right made in a special proceeding." *Id.* at 596.

114. Examples of special proceedings in the post-*Polikoff* era may include probate proceedings under OHIO REV. CODE § 2117.07 allowing for acceleration of the bar against claims by potential claimants, actions exempted under OHIO R. CIV. P. 1(C) from application of the Ohio Rules of Civil Procedure (appropriation of property, forcible entry and detainer, small claims matters under OHIO REV. CODE § 1925, uniform reciprocal support actions, commitment of mentally ill persons, and all other special statutory proceedings), and some special remedies provided for in Chapter 27 OHIO REV. CODE including contempt (§ 2705), amercement (§ 2707), arbitration (§ 2711), international commercial arbitration (§ 2712), attachment (§ 2715), garnishment (§ 2716), change of name (§ 2717), correction of defects in instruments or proceedings (§ 2719), declaratory judgments (§ 2721), enjoining or recovering illegal taxes and assessments (§ 2723), injunctions (§ 2727), lost or destroyed records (§ 2729), all the original actions including habeas corpus, mandamus, quo warranto, receivership (§ 2735), replevin (§ 2737), slander and libel (§ 2739), will contest (§ 2741), actions before the court of claims (§ 2743), and political subdivision tort liability (§ 2744). *See also* Cuyahoga Metro. Hous. Auth. v. Jackson, 423 N.E.2d 177 (Ohio 1981) (OHIO R. CIV. P. 54(B) not applicable to the special proceeding of forcible entry and detainer). However, some of these actions may not be special proceedings under *Polikoff* if the actions, although now statutory proceedings, were known at common law. An example might include a slander suit. Arguably divorce actions may now be special proceedings because such actions were specifically exempted from the Code of Civil Procedure at the time of its adoption. "Until the legislature shall otherwise provide, this code shall not affect proceedings . . . under statutes relating to dower, divorce or alimony. . . ." 1853 Ohio Laws 161, 161. *See also* State *ex rel.* Papp v. James, 632 N.E.2d 889, 894-895 (Ohio 1994)(there was no common law right to divorce therefore divorce is a specal proceeding); *Fields,* 94 N.E.2d at 9-10. *But, cf.* Fown v. Fown,

ery orders. In the past, some interlocutory discovery orders were immediately appealable under the *Amato* test.[115] The determining factor was whether the order affected a substantial right and whether the order was reviewable on appeal after final judgment.[116] Thus, as discussed earlier, *Amato* provided appellate courts with some discretion in determining which orders should be immediately reviewed because of their practical effect and which orders could await review until after final judgment.[117] An order compelling a physician to violate the physician-patient privilege was seen as so potentially injurious to the substantive rights of the patient that it required immediate appellate review.[118] On the other hand, an order compelling production of work-product was not so injurious as to be incapable of correction on review after judgment.[119]

However, after *Polikoff*, the appealability of orders compelling disclosure of legally privileged information in common law actions is in great doubt.[120] For example, in *Doe v. Univ. of Cincinnati*[121] a pre-*Polikoff* decision, an appellate court held that an order to compel a blood center to release the name of a donor whose blood was infected with the HIV virus was appealable

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No. 9-93-36, 1993 WL 542479, at *2 (Ohio Ct. App. Dec. 28, 1993) ("The fact that divorce and custody are now proceedings specifically controlled by application of the relevant statutes, does not change the fact that actions for divorce and custody were at common law.")

115. *See supra* text accompanying notes 64-67.

116. *See supra* notes 68-70 and accompanying text.

117. *See supra* text accompanying notes 61-63.

118. *Russell*, 427 N.E.2d at 695.

119. *Nelson*, 588 N.E.2d 789.

120. *See* Textron Fin. Corp. v. Nationwide Mut. Ins. Co. No. 16434, 1993 WL 417005 (Ohio Ct. App. Oct. 13, 1993) (discovery order entered in a common law breach of contract action not appealable under *Polikoff*); *Cotterman* Miami App. No. 93-CA-48, unreported (discovery order entered in common law medical malpractice action is not appealable under *Polikoff*); State v. David Myers, No. 93-CA-20, 1994 WL 12470 (Ohio Ct. App. Jan. 19, 1994) (order compelling the release of grand jury minutes to defendant is not a final order in light of *Polikoff*). *See also* State v. Lambert, 632 N.E.2d 511 (Ohio 1994) (judgment of appellate court in State v. Lambert, No. 13483, 1993 WL 79273 (Ohio Ct. App. Mar. 16, 1993), that reviewed propriety of interlocutory discovery order requiring prosecuting attorney to provide discovery pursuant to local rule of trial court and finding that rule unconstitutional as in conflict OHIO R. CRIM. P. 16 vacated and appeal dismissed for want of a final order). *See also* Horton v. Addy, 631 N.E.2d 123 (Ohio 1994) (judgment of appellate court in Horton v. Addy, No. 13524, 1993 WL 15631 (Ohio Ct. App. Jan. 25, 1993), reviewing propriety of interlocutory discovery order requiring plaintiff to turn over to opposing counsel or submit to the trial court for examination certain medical records vacated and appeal dismissed for want of a final order). *See also* Garry Cramer v. Greene County Bd. of Education, Greene App. No. 94 CA 69, unreported (Aug. 12, 1994)(under *Polikoff*, an order compelling a defendant in a civil action to answer deposition questions even after he has invoked his Fifth Amendment right against self incrimination is not an order entered in a special proceeding and is thus reviewable only on appeal after final judgment).

under the *Amato* test. The court reasoned that the order invaded the donor's right to privacy and that any harm in releasing the name could not be corrected on appeal after final judgment. Immediate review was deemed necessary to protect the donor's substantive right to privacy notwithstanding the absence of a physician-patient relationship.[122]

The very same situation recently confronted an appellate court, but the outcome was vastly different. In *Uschold v. Community Blood Center,*[123] the Second District Court of Appeals dismissed a case having virtually the same facts as those confronted by the court in *Doe*. The court was asked to review a discovery order compelling a community blood center to disclose of the name of a donor whose HIV infected blood was allegedly given to the husband of the plaintiff resulting in his death. In rejecting the appeal, the appellate court stated:

> We do not, however, view discovery orders as special proceedings apart from the trial of the issues raised in the case. We acknowledge the anomaly pointed out by the Hamilton County Court of Appeals that the *Polikoff* syllabus, standing alone, would seem to require that
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> > . . . if an order compelling disclosure of privileged material were made in a wrongful death action, which is statutory, it would be made in a special proceeding, but the same order in a common law negligence action would not be.
>
> *Niemann, supra* at 10. However, this anomaly will have to resolved, if at all, by the Supreme Court or the General Assembly.
>
> We adhere to our previous decisions and conclude that the order appealed from was not entered in a special proceeding and is therefore not appealable.[124]

Assuming that the appellate court is correct in concluding that discovery orders in common law proceedings are not immediately appealable, notwithstanding the nature of the privilege asserted, attorneys and litigants against whom such orders run are left with only two choices. They can either comply with the order and produce legally privileged or confidential information resulting in potentially incalculable damage to their case, or refuse to comply with the order and risk being found in contempt of court. Clearly, neither alternative is attractive. In the former situation there may be no way

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121. 538 N.E.2d 419 (Ohio Ct. App. 1988).

122. *Id.*

123. *Uschold,* Montgomery App. No. 14349, unreported.

124. *Id.*

of undoing on appeal the prejudicial harm resulting from the disclosure of the information. Parties possessing privileged information tend not to forget the details even if an appellate court ultimately instructs them to do so. In the latter situation, litigants and their attorneys must make a deliberate choice to disregard a court order and risk being found in contempt.[125] Attorneys who recommend that their clients ignore court orders to compel discovery could face disciplinary proceedings for deliberately flaunting a court ruling.[126] The litigants could likewise face massive fines for their recalcitrance and to compel their compliance. Further, could an attorney who recommends noncompliance with a discovery order face a malpractice suit if the appellant is found in contempt as a result of that recommendation, appeals and loses the appeal?[127] Thus the court's decision in *Polikoff* creates an untenable situation for any party in a common law or equity action against whom an order to compel discovery runs.

The same situation would not confront litigants in a declaratory judgment action. Because this action is a special proceeding,[128] the only issue for resolution is whether an order to compel discovery affects a substantial right. Clearly, an order to compel disclosure of legally privileged or confidential information affects a substantial right.[129] It would be immediately appealable

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125. It is the law in Ohio that in appealing from an order finding a party in contempt and imposing a sanction the party against whom the contempt runs can also challenge the propriety of the underlying order that was violated even if the underlying order is interlocutory. *See* Smith v. Chester Twp. Bd. of Trustees, 396 N.E.2d 743 (Ohio 1979) (Where violation of a non-appealable, interlocutory order results in contempt, the appellate court can review the propriety of the interlocutory order.)

126. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(A)(1980) states:

> A lawyer *shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding,* but he may take appropriate steps in good faith to test the validity of such rule or ruling. [emphasis added].

Query whether counseling a client to ignore an order to compel discovery specifically with hopes of being found in contempt so that the order itself can be immediately appealed constitutes "tak[ing] appropriate steps in good faith to test the validity of such rule or ruling"?

127. *Cf.* McDade v. Spencer, 600 N.E.2d 371 (Ohio Ct. App. 1991).

128. *See* General Acc. Insur. v. Insurance Co. of N. Am., 540 N.E.2d 266, 271-72 (Ohio 1989).

129. A concrete example of the inconsistency inherent in applying the *Polikoff* test to discovery disputes is the supreme court's decision in *Bell,* 616 N.E.2d at 181, a case decided on the same day as *Polikoff.* In that case, the court implied that an interlocutory discovery order entered in a special proceeding could be immediately appealed if the party seeking review could establish that the order affected a substantial right. The movant sought disclosure of privileged information to proceed on a motion for prejudgment interest under OHIO REV. CODE § 1343.03(C). The court concluded that such a motion was a special proceeding because the remedy of prejudgment interest was not known at common law and is presently controlled purely by statute. However, the court also concluded that the particular discovery order appealed was not final because it did not affect a substantial right as any asserted privilege

with the party affected by the order obtaining immediate relief should the appellate court determine the order is erroneous. The attorneys and litigants against whom the order runs would not have to choose between disclosure and contempt, as *Polikoff* forces their counterparts in a common law action to do. Given this result, one must wonder whether *Polikoff's* more exacting historic test will produce a more rational jurisprudence, or simply produce a jurisprudence of more confounding irrationality.

CONCLUSION

To constitute a final order in a special proceeding, practitioners and judges must determine (1) that a substantial right is involved and (2) that the action is in the nature of special proceeding under the *Polikoff* test. Although the test seems rather straightforward, great ambiguity surrounds its application.[130] Some statutory proceedings may not be special proceedings and some

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would be protected by the trial court conducting the *in camera* examination it had already ordered. The supreme court suggested, however, that interlocutory discovery orders entered in a special proceeding could be immediately appealed if the appellant can establish that a substantial right is affected by the order. ("An order which affects a substantial right has been perceived as one which, if not immediately appealable, would foreclose appropriate relief in the future." *Bell, supra* at 63.). Thus, one can reasonably conclude in light of *Bell* that an order entered in a special proceeding that affects a substantial right (that is, cannot be remedied on appeal after final judgment) can be reviewed while that same order entered in a common law tort action cannot be immediately reviewed given the *Polikoff* test. It is interesting to note that the underlying proceeding in *Bell* giving rise to the motion was a common law action. In the aftermath of *Bell* and *Polikoff*, it is possible to have special proceedings within the context of a common law action. Theoretically, orders related to the issues surrounding the special proceeding would be immediately appealable while orders related to the common law issues could be reviewable only after the final judgment, even though all orders were entered in the same "action."

130. To clarify the appealability of orders in light of *Polikoff*, several proposals have been made to amend OHIO REV. CODE § 2505.02 and several other provisions of Chapter 25 of the Revised Code. One proposal offered by Judge Mike Fain, Second District Court of Appeals, would amend OHIO REV. CODE § 2505.02 to read as follows:

> The following are final orders that may be reviewed, affirmed, modified, or reversed, with or without retrial:
>
> (A) a judgment or order of a trial court that resolves all pending claims in the action, that terminates the action on the docket of the trial court, or that prevents a judgment;
>
> (B) a judgment or order of a trial court granting a new trial, vacating or modifying a judgment, or otherwise granting relief from a judgment;
>
> (C) a judgment or order of a trial court entered after the entry of final judgment in the action, if it affects a substantial right of a party entitled to appeal; and
>
> (D) a judgment or order of a trial court entered before the entry of final judgment in the action, if the party seeking to appeal cannot wait until the entry of final judgment in the

proceedings within a common law or equity action may be special proceedings.[131] What constitutes a special proceeding after *Polikoff* cannot be safely determined. What can be safely said is that rather than clarifying the issue, *Polikoff* has produced an atmosphere that may encourage greater inconsistency than that perceived in the aftermath of *Amato*. Further, *Polikoff* will foreclose review of several classes of orders for which there is no effective remedy on appeal after final judgment. The greatly sought after consistency in the area of final orders has proven elusive again.

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action without losing, as a practical matter, the ability to vindicate a substantial right affected by the judgment or order from which the appeal is taken.

When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

Compare with current OHIO REV. CODE ANN. § 2505.02 (Anderson 1991).

In addition to amending OHIO REV. CODE § 2505.02, two new sections would be added to Chapter 25 to (1) clarify the application of OHIO R. CIV. P. 54(B), and (2) permit interlocutory appeals in certain circumstances. Proposed new OHIO REV. CODE § 2505.021 would read as follows:

> When a civil action involves multiple claims, a judgment or order that is final with respect to one or more, but less than all, of the claims is a final appealable order if the claims resolved have been severed from the remaining claims by the trial court for purposes of appeal in accordance with Civil Rule 54(B), or otherwise in accordance with applicable rules of procedure.

Proposed new OHIO REV. CODE § 2505.022 would read as follows:

> A judgment or order of a trial court entered before the entry of final judgment in the action is a final appealable order if it affects a substantial right of a party and all of the parties and the trial court have signed an entry certifying that an immediate appeal from the judgment or order will contribute to the prompt and efficient disposition of the action. The Court of Appeals may find that a judgment or order so certified is not a final appealable order, and may dismiss the appeal, if it shall find that an immediate appeal will not contribute to the prompt and efficient disposition of the action.

For a further discussion on these proposed amendments to Chapter 25 of the Ohio Code, *see* Valita R. Kreiss, *The Murky Waters of Final Appealable Orders — Clarified by* Polikoff v. Adam*?* XLIII DAYTON BAR BRIEFS No. 6, 6 (February 1994). Compare these proposed amendments to Chapter 25 of the Ohio Code with Ind. R. App. P. 4(B) cited *supra* at note 16.

131. *See* discussion *supra* note 129. *See generally* Keyse-Walker, *supra* note 102.