



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Final Analysis

Aida S. Montano

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132nd General Assembly  
(As Passed by the General Assembly)

**Reps.** Cupp and Rezabek, Seitz, Riedel, Manning, Anielski, Ashford, Blessing, Brown, Craig, Dever, Ginter, Green, Hambley, Holmes, Leland, Miller, Perales, Rogers, Wiggam, Wilkin

**Sens.** Coley, Bacon, Brown, Dolan, Gardner, Hackett, Huffman, Kunze, McColley, Obhof, O'Brien, Peterson, Sykes, Tavares, Terhar, Thomas, Williams, Wilson, Yuko

**Effective date:** March 22, 2019

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## **ACT SUMMARY**

### **Coroner's duties**

- Specifies the coroner's duties with regards to a deceased person, including notifying the person who has been assigned the rights of disposition for the deceased person of the death, and the disposition of the deceased person's property, including a firearm.
- Requires the person who receives the deceased person's possessions from the coroner to deliver them to the executor or administrator of the deceased person's estate or to any other person legally entitled to any of them.

### **Persons prohibited from benefiting from another's death**

- Disqualifies a person who is convicted of involuntary manslaughter that is not a proximate result of a felony aggravated vehicular homicide or vehicular homicide offense from in any way benefiting by the death of the victim of that offense.

### **Wills and trusts**

- Provides that if a will incorporates a trust instrument only in the event that a bequest or device is ineffective, the trust instrument must be deposited in the probate court not later than 30 days after the determination that the bequest or device is ineffective.

- Specifies terms that must be used if a testator intends to incorporate a trust instrument in a will.
- Specifies that a will's compliance with the law of the jurisdiction in which the testator was physically present at the time of its execution applies to determine the admissibility of a will to probate in Ohio.
- Specifies that the exception to the antilapse provisions for wills and trusts only applies to multigenerational class gifts.
- Allows for the creation of a trust for the benefit of a minor beneficiary if the minor is entitled to money or property whether by settlement for personal injury or damage to tangible or intangible property, inheritance, or otherwise.
- Provides a procedure for certain eligible persons to file an application with the probate court to release the decedent's medical and medical billing records for the limited purpose of deciding whether or not to file a wrongful death, personal injury, or survivorship claim.
- Specifies that a provision in the terms of a trust, except a testamentary trust, that requires the arbitration of disputes, other than disputes of the validity of all or part of a trust instrument, is enforceable and unless otherwise specified, the arbitration is presumed to be binding.
- Relocates the provisions regarding determining the validity of a will before the testator's death and creates a procedure for determining the validity of a trust.
- Specifies that the probate division of the common pleas court has exclusive jurisdiction to render declaratory judgments regarding the validity of a will or trust, but may transfer the proceeding to the general division of the common pleas court.
- Generally prohibits a person from contesting the validity of a trust as to facts decided if the trust was submitted to the probate court by the settlor during the settlor's lifetime and was declared valid by the court.
- Allows a person to contest the validity of a trust described in the preceding dot point if the person should have been named a party defendant in the action in which the trust was declared valid and was not named a defendant and properly served in that action.
- Provides that authenticated copies of wills "of persons not domiciled in this state," executed and proved according to the laws of any state or territory, relative to

property in Ohio, may be admitted to record in the probate court of a county where a part of that property is situated.

- Permits nonelderly, disabled applicants or Medicaid recipients or their spouses to establish their own special needs trust on or after December 13, 2016.

### **Fiduciaries and guardianship services**

- Provides that any communication between an attorney and a client who is acting as a fiduciary is privileged and protected from disclosure to third parties to whom the fiduciary owes fiduciary duties to the same extent as if the client was not acting as a fiduciary.
- Eliminates a requirement that the probate court approve a transfer of funds received by a fiduciary in the fiduciary's name as such fiduciary to the fiduciary's attorney for deposit in an interest on lawyer's trust account (IOLTA) and allows such a transfer if nominal in amount *or* if to be held for a short time.
- Allows for the creation of the county probate court guardianship services fund, the multicounty probate court guardianship services fund, and the county or multicounty guardianship services board.

### **Courts**

- Provides a uniform process to determine that a person is an indigent litigant for purposes of collecting additional fees in a civil action, paying for special court projects, furnishing security for costs, or other purposes, and provides for the waiver of certain court costs and fees for indigent litigants.
- Prohibits a juvenile court from exercising jurisdiction in certain cases to determine custody or child support if certain conditions apply relating to whether or not the child's parents are married or are parties to a pending divorce, dissolution of marriage, annulment, or legal separation.
- Provides that the act's prohibition on juvenile court jurisdiction does not affect the authority, in certain cases, to grant custody of a child to a relative or place a child in kinship care.
- Permits a juvenile court to transfer jurisdiction over a support or custody action or order to a domestic relations court if certain conditions apply relating to whether or not the child's parents are married; are parties to a pending divorce, dissolution, annulment, or legal separation; or are subject to both support and protection orders.



- Provides that jurisdiction over a transferrable action or order must be transferred and the receiving court has exclusive jurisdiction if certain requirements are met.
- Provides that a juvenile court's ability and requirement to transfer jurisdiction under the act applies to all orders in effect, and all actions or proceedings pending or initiated, on or after the act's effective date.
- If a child is subject to a support order of a domestic relations court, requires a juvenile court to notify the domestic relations court and child support enforcement agency if the juvenile court makes certain adjudications and grants custody to a person other than one designated by the domestic relations court.
- States that nothing in the act can be construed to prevent a domestic relations court from certifying a case to a juvenile court in certain situations, and a juvenile court's consent is not required for certification.
- Defines "domestic relations matters" regarding jurisdiction of domestic relations courts.

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## CONTENT AND OPERATION

### Coroner's duties: notice of death and disposition of property

The act requires the coroner to make a *reasonable effort* to notify any known relatives of a deceased person who meets death in a specified manner, rather than requiring the coroner to notify those relatives. It removes the requirement that the next of kin, other relatives, or friends of the deceased person have prior right as to the disposition of the deceased person's body and that the coroner must make a diligent effort to ascertain those next of kin, other relatives, or friends if relatives of the deceased are unknown. Instead, the act requires the coroner to make a reasonable effort to determine the identity of the person who has been assigned the rights of disposition for

the deceased person under state law and to notify that person. After the coroner has completed the performance of the legal duties with respect to the deceased person's body, the coroner must return the body to that person.<sup>1</sup>

Continuing law requires the coroner to take charge and possession of the deceased person's moneys, clothing, and other valuable personal effects found in connection with or pertaining to the body, and to store them in the coroner's office or other suitable place. The act allows the person who has been assigned the rights of disposition for the deceased person to request the coroner to give those possessions to that person. After that person receives the deceased person's possessions, the person must deliver them to the executor or administrator of the deceased person's estate or to any other person legally entitled to any of them.<sup>2</sup>

### **Firearms**

Under continuing law, if a firearm is included in the deceased person's personal effects, the coroner must deliver the firearm to the chief of police of the municipal corporation within which the body is found, or to the county sheriff if the body is not found within a municipal corporation. The chief of police or sheriff must give the coroner a receipt for the firearm that states the date of delivery and an accurate description of the firearm. The firearm is only for evidentiary purposes.

The act allows the person who has been assigned the rights of disposition for the deceased person, rather than the deceased person's next of kin or other relative, to request that the firearm be given to that person once it is no longer needed for evidentiary purposes. The police chief or sheriff must give the firearm to that person, instead of the next of kin or other relative, who requested the firearm only if the person may lawfully possess a firearm under Ohio or federal law. The police chief or sheriff must keep a record identifying the person to whom the firearm is given, the date it was given to the person, and an accurate description of the firearm. The person to whom the firearm was given must deliver it to the executor or administrator of the deceased person's estate or to any other person legally entitled to it.<sup>3</sup>

Under the act, if the person who has been assigned the rights of disposition for the deceased person, instead of the next of kin or other relative, does not request the

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<sup>1</sup> R.C. 313.14(A)(1) with reference to R.C. 2108.70 to 2108.90, not in the act.

<sup>2</sup> R.C. 313.14(A)(2).

<sup>3</sup> R.C. 313.14(C).



firearm or is not entitled to possess it, the firearm must be used at the discretion of the police chief or sheriff.<sup>4</sup>

### **Persons prohibited from benefiting from another's death**

Continuing law generally prohibits a person from in any way benefiting by a death if: (a) the person is convicted of or found not guilty by reason of insanity of a violation of or complicity in the violation of aggravated murder, murder, or voluntary manslaughter or of a substantially equivalent law of any other state, the United States, or a foreign nation, (b) the person is indicted for a violation of or complicity in the violation of any of those offenses or laws and subsequently is adjudicated incompetent to stand trial on that charge, or (c) the person is a juvenile who is found to be a delinquent child for committing an act that, if committed by an adult, would be a violation of or complicity in the violation of any of those offenses or laws.<sup>5</sup>

The act expands the above offenses by providing that a person, under the circumstances described in (a), (b), or (c) above, who commits involuntary manslaughter by causing the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony is prohibited from in any way benefiting by the death, if that involuntary manslaughter offense is not the proximate result of a felony offense of aggravated vehicular homicide or vehicular homicide.<sup>6</sup>

If a person who is prohibited from benefiting from a death because the person was adjudicated incompetent to stand trial or was found not guilty by reason of insanity files a complaint in the probate court to declare the person's right to benefit from the death, the person must be restored to that right unless the court determines, by a preponderance of the evidence, that the person would have been convicted of a violation of, or complicity in the violation of, involuntary manslaughter that is not the proximate result of a felony offense of aggravated vehicular homicide or vehicular homicide.<sup>7</sup>

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<sup>4</sup> R.C. 313.14(C).

<sup>5</sup> R.C. 2105.19(A).

<sup>6</sup> *Id.*

<sup>7</sup> R.C. 2105.19(C).



## Wills and Trusts

### Incorporation of a written trust into a will

Continuing law allows an existing document, book, record, or memorandum to be incorporated in a will by reference, if referred to as having been in existence at the time the will was executed. That document, book, record, or memorandum must be deposited in the probate court when the will is, or within 30 days after the will is, probated, unless the court grants an extension of time for good cause shown. A copy can be substituted for the original document, book, record, or memorandum if the copy is certified to be correct by a person authorized to take acknowledgements.<sup>8</sup>

The act states that, notwithstanding the provision in the preceding paragraph, if a will incorporates a trust instrument only if a bequest or devise to a trust is ineffective, the trust instrument must be deposited in the probate court not later than 30 days after the final determination that such bequest or devise is ineffective.<sup>9</sup>

The act also provides that if a testator intends to incorporate a trust instrument into a will, the testator's will must manifest that intent through the use of the term "incorporate," "made a part of," or similar language. In the absence of such clear and express intent, a trust instrument cannot be incorporated into or made a part of the will. Any language in the testator's will that only identifies a trust is not sufficient to manifest an intent to incorporate that trust instrument by reference in the will.<sup>10</sup>

The act specifies that the preceding two paragraphs apply, and must be construed as applying, to the wills of testators who die on or after the act's effective date.<sup>11</sup> The act also states that its amendment of R.C. 2107.05 as described above is intended to abrogate the holding of the Ohio Supreme Court in *Hageman v. Cleveland Trust Company* and the Ohio Second District Court of Appeals in *Gehrke v. Senkiw*.<sup>12</sup>

### Admission of will to probate

The act specifies that a will's compliance with the law in force at the time of its execution in the jurisdiction in which "the testator was physically present when" (added

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<sup>8</sup> R.C. 2107.05(A).

<sup>9</sup> R.C. 2107.05(B).

<sup>10</sup> R.C. 2107.05(C).

<sup>11</sup> R.C. 2107.05(D).

<sup>12</sup> *Hageman v. Cleveland Trust Company*, 45 Ohio St.2d 178 (1976) and *Gehrke v. Senkiw*, 2016 Ohio 2657 (2016), in Section 3 of the bill.



by the act) it was executed applies to determine the admissibility of a will to probate in Ohio.<sup>13</sup> A similar change as the clause in quotation marks is made in the law on the admission to probate of another will of a later date.<sup>14</sup>

## **Foreign wills**

The act clarifies continuing law by providing that authenticated copies of wills "of persons not domiciled in this state" (added by the act) executed and proved according to the laws of any state or territory of the United States, relative to property in Ohio, may be admitted to record in the probate court of a county where a part of that property is situated.<sup>15</sup>

## **Exceptions to antilapse provisions**

### **Wills**

Continuing law provides that, unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of the testator or the donor of a power of appointment exercised by the testator's will, and if the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the deceased devisees' surviving descendants in the manner provided in that law.

The act specifies that the excepted devise above only applies to a class that includes more than one generation.<sup>16</sup>

### **Trusts**

Continuing law provides that, unless a contrary intent appears in the instrument that creates a future interest under the terms of a trust, if a beneficiary of such future interest does not survive the distribution date by at least 120 hours; if the beneficiary is a grandparent, a descendant of a grandparent, or a stepchild, of the transferor; and if the future interest is in the form of a class gift, other than a future interest to "issue,"

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<sup>13</sup> R.C. 2107.18.

<sup>14</sup> R.C. 2107.22(A)(1)(a).

<sup>15</sup> R.C. 2129.05.

<sup>16</sup> R.C. 2107.52(B)(2)(b).



"descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of the deceased beneficiary or beneficiaries. The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least 120 hours passes to the surviving beneficiaries and the deceased beneficiaries' surviving descendants in the manner provided in that law.<sup>17</sup>

The act specifies that the excepted future interest above applies only to a class that includes more than one generation.<sup>18</sup>

### **Trust for benefit of minor**

The act allows a probate court, if a minor is entitled to money or property whether by settlement or judgment for personal injury or damage to tangible or intangible property, inheritance or otherwise, to order that all or a portion of the amount received by the minor be deposited into a trust for the benefit of that beneficiary until the beneficiary reaches age 25, and order the distribution of the amount in accordance with the trust provisions. Prior to the appointment as a trustee of such a trust, the person to be appointed must be approved by the minor beneficiary's parent or guardian, unless otherwise ordered by the probate court.<sup>19</sup>

### **Application for release of medical and medical billing records**

The act permits a person eligible to be appointed as a personal representative of an estate under Ohio law or named as executor in a will to file an application with the probate court in the county in which the decedent resided seeking the release of the decedent's medical records and medical billing records for use in evaluating a potential wrongful death, personal injury, or survivorship action on behalf of the decedent. The application must include a decedent's estate form listing the decedent's known surviving spouse, children, next of kin, legatees, and devisees, if any.

The application may be filed prior to the filing of any application for authority to administer the decedent's estate. Nothing in the act requires that an application to administer the estate be filed if no estate is needed to be administered, unless otherwise required by law. The probate court must send a copy of the application to those persons listed on the decedent's estate form unless otherwise directed by the court. Upon the filing of the application and the payment of a filing fee determined by the court, and not

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<sup>17</sup> R.C. 5808.19(B)(2)(b)(ii).

<sup>18</sup> *Id.*

<sup>19</sup> R.C. 2111.182.



earlier than ten days after the court transmits a copy of the application to those persons listed on the decedent's estate form, the court may order the requested records be released without a hearing, or with a hearing if needed. The court's order must direct all medical providers that provided medical care or treatment to the decedent to release those records to the applicant for the limited purpose of deciding whether or not to file a wrongful death, personal injury, or survivorship action. The requested records are confidential and are not available for public viewing unless otherwise provided for by law or subsequent court order.

Upon obtaining the records, and before the expiration of the applicable statute of limitations, the applicant must file a report with the court certifying that all records have been received and indicate whether an administration of the decedent's estate will be filed.<sup>20</sup>

### **Jurisdiction regarding validity of wills and trusts**

Under continuing law modified by the act, the probate division of the common pleas court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the common pleas court to issue writs and orders and to hear and determine any action that involves an inter vivos trust.<sup>21</sup> The act specifies that the probate division of the common pleas court has exclusive jurisdiction to render declaratory judgments regarding the validity of wills and trusts. However, the probate division may transfer a declaratory judgment proceeding regarding the validity of wills and trusts to the general division of the court of common pleas pursuant to the act's provision permitting such transfer upon a party's or the judge's motion.<sup>22</sup>

### **Arbitration**

Under the act, a provision in the terms of a trust, excluding a testamentary trust, that requires the arbitration of disputes, other than disputes of the validity of all or part of a trust instrument, between or among beneficiaries and a fiduciary under the trust, or a combination of them, is enforceable.<sup>23</sup> Unless otherwise specified in the terms of the trust, a trust provision requiring arbitration is presumed to require binding arbitration under the Arbitration Law.<sup>24</sup>

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<sup>20</sup> R.C. 2113.032.

<sup>21</sup> R.C. 5802.03(A).

<sup>22</sup> R.C. 5802.03(B), 5817.04(A), and 2101.24(B)(3).

<sup>23</sup> R.C. 5802.05(A).

<sup>24</sup> R.C. 5802.05(B) with reference to R.C. Chapter 2711., not in the act.

## **Actions pertaining to revocable trusts**

Continuing law provides that any of the following actions pertaining to a revocable trust that is made irrevocable by the trust settlor's death are required to be commenced by the earlier of two years after the date of the settlor's death or six months from the date on which the trustee sends the person bringing the action a copy of the trust instrument and a notice informing the person of the trust's existence:<sup>25</sup>

- An action to contest the trust's validity;
- An action to contest the validity of any amendment to the trust made during the settlor's lifetime;
- An action to contest the trust's revocation during the settlor's lifetime;
- An action to contest the validity of any transfer made to the trust during the settlor's lifetime.

The act specifies that no person may contest the validity of any trust as to facts decided if the trust was submitted to a probate court by the settlor during the settlor's lifetime and declared valid by the judgment of the court pursuant to the court's findings under the act. However, a person may contest the validity of that trust as to those facts if the person should have been named a party defendant in the action in which the trust was declared valid, as required by the act, and if the person was not named a defendant and properly served in that action.<sup>26</sup>

## **Determining validity of will or trust**

### **Overview**

The act repeals, modifies, and relocates the provisions regarding a determination that a will is valid.<sup>27</sup> The act also provides a similar procedure for determining whether a settlor's trust is valid and enforceable under its terms.

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<sup>25</sup> R.C. 5806.04(A).

<sup>26</sup> R.C. 5806.04(E) with reference to R.C. 5817.10(B)(1) and 5817.06(A).

<sup>27</sup> R.C. 2107.081, 2107.082, 2107.083, 2107.084, 2107.085 (repealed and relocated to R.C. Chapter 5817.). Note that this part of the analysis will describe only parts of former law that are essentially different from the act or will indicate if there is no comparable provision in former law.

## **Filing a complaint to determine validity of a will**

The act allows a testator to file a complaint with the probate court to determine before the testator's death that the testator's will is a valid will subject only to its subsequent revocation or modification. The right to file this complaint or to voluntarily dismiss a filed complaint is personal to the testator and cannot be exercised by the testator's guardian or an agent under the testator's power of attorney.<sup>28</sup>

A testator who wishes to obtain a validity determination as to the testator's will must file a complaint to determine the validity of both the will and any related trust. A "related trust" means a trust for which the testator is the settlor of the trust and the trust is named as a beneficiary in the will in accordance with the law permitting a testator to devise property to the trustee of an existing trust.<sup>29</sup> The complaint must be accompanied by an express written waiver of the testator's physician-patient privilege.<sup>30</sup> Failure to file such a complaint must not be construed as evidence or an admission that the will is invalid.<sup>31</sup>

Prior law did not require that the complaint be accompanied by an express written waiver of the testator's physician-patient privilege.

## **Filing a complaint to determine validity of a trust**

The act allows a settlor to file a complaint with the probate court to determine before the settlor's death that the settlor's trust is valid and enforceable under its terms, subject only to its subsequent revocation or modification. The right to file this complaint or to voluntarily dismiss a filed complaint is personal to the settlor and cannot be exercised by the settlor's guardian or an agent under the settlor's power of attorney.<sup>32</sup> "Trust" means an inter vivos revocable or irrevocable trust instrument to which at the time the complaint for declaration of validity is filed, either: (a) the settlor resides in or is domiciled in Ohio, or (b) the trust's principal place of administration is in Ohio.<sup>33</sup>

A settlor who wishes to obtain a validity determination as to the settlor's trust must file a complaint to determine the validity of both the trust and the related will. A

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<sup>28</sup> R.C. 5817.02(A).

<sup>29</sup> R.C. 5817.02(B) and 5817.01(D) with reference to R.C. 2107.63, not in the act.

<sup>30</sup> R.C. 5817.02(D) with reference to R.C. 2317.02(B), not in the act.

<sup>31</sup> R.C. 5817.02(C).

<sup>32</sup> R.C. 5817.03(A).

<sup>33</sup> R.C. 5817.01(F).

"related will" means a will for which the testator is the settlor of a trust and the will names the trust as a beneficiary in accordance with the law permitting a testator to devise property to the trustee of an existing trust.<sup>34</sup> The complaint must be accompanied by an express written waiver of the settlor's physician-patient privilege.<sup>35</sup> Failure to file such a complaint must not be construed as evidence or an admission that the trust is invalid.<sup>36</sup>

### **Where to file complaint for determination of validity of will or trust**

The act requires a complaint to determine the validity of a will or trust be filed with the probate court. The probate judge, upon the motion of a party or the judge's own motion, may transfer the proceeding to the general division of the common pleas court.<sup>37</sup>

The venue for a complaint to determine the validity of a will is either: (a) the probate court of the Ohio county where the testator is domiciled, or (b) if the testator is not domiciled in Ohio, the probate court of any Ohio county where any real or personal property of the testator is located or, if there is no such property, the probate court of any county in Ohio.<sup>38</sup>

Prior law had no provision for the probate judge to transfer the proceeding to the general division of the common pleas court. Prior law also did not provide that if the testator was not domiciled in Ohio, the complaint could be filed in the probate court of any Ohio county where the testator's *personal property* was located.<sup>39</sup>

The venue for a complaint to determine the validity of a trust is either: (a) the probate court of the Ohio county where the settlor resides or is domiciled, or (b) if the settlor does not reside or is not domiciled in Ohio, the probate court of the Ohio county in which the trust's principal place of administration is located.<sup>40</sup>

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<sup>34</sup> R.C. 5817.03(B) and 5817.01(E) with reference to R.C. 2107.63, not in the act.

<sup>35</sup> R.C. 5817.03(D) with reference to R.C. 2317.02, not in the act.

<sup>36</sup> R.C. 5817.03(C).

<sup>37</sup> R.C. 5817.04(A).

<sup>38</sup> R.C. 5817.04(B).

<sup>39</sup> Former R.C. 2107.081(A), repealed.

<sup>40</sup> R.C. 5817.04(C).



## Contents of the complaint (will)

### Party defendants

A complaint to determine the validity of a will must name as party defendants all of the following, as applicable:<sup>41</sup>

- The testator's spouse;
- The testator's children;
- The testator's heirs who would take property pursuant to the statute of descent and distribution had the testator died intestate at the time the complaint is filed;
- The testator's "beneficiaries under the will";
- Any beneficiary under the testator's most recent prior will.

Such a complaint may name as a party defendant any other person that the testator believes may have a pecuniary interest in the determination of the validity of the testator's will.<sup>42</sup>

Former law provided that the defendants were all persons named in the will as beneficiaries, and all persons who would have been entitled to inherit from the testator under the law on descent and distribution had the testator died intestate on the date the complaint was filed.<sup>43</sup>

The act defines "beneficiary under a will" as either of the following:<sup>44</sup>

(1) Any person designated in a will to receive a testamentary disposition of real or personal property;

(2) Any person that, in a capacity other than that of executor, holds a power of appointment over estate assets, but does not include the class of permitted appointees among whom the power holder may appoint.

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<sup>41</sup> R.C. 5817.05(A) with reference to R.C. 2105.06, not in the act.

<sup>42</sup> R.C. 5817.05(B).

<sup>43</sup> Former R.C. 2107.081(A), repealed.

<sup>44</sup> R.C. 5817.01(B)(1).



"Beneficiary under a will" includes a charitable organization that is expressly designated in the will to receive testamentary distributions, but does not include any charitable organization that is not expressly designated in the will to receive distributions, but to whom the executor may in its discretion make distributions.<sup>45</sup>

### **Information contained in complaint (will)**

The complaint may contain all or any of the following statements:<sup>46</sup>

- A copy of the will has been filed with the court;
- The will is in writing;
- The will was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's express direction;
- The will was signed in the conscious presence of the testator by two or more competent individuals, each of whom either witnessed the testator sign the will, or heard the testator acknowledge signing the will;
- The will was executed with the testator's testamentary intent;
- The testator had testamentary capacity;
- The testator executed the will free from undue influence, not under restraint or duress, and in the exercise of the testator's free will;
- The execution of the will was not the result of fraud or mistake;
- The will has not been revoked or modified;
- The testator is familiar with the contents of the will.

The complaint may also contain the names and addresses of the testator and all of the defendants and, if any of the descendants are minors, their ages.<sup>47</sup>

Prior law did not list the contents of a complaint to declare a will valid.

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<sup>45</sup> R.C. 5817.01(B)(2).

<sup>46</sup> R.C. 5817.05(C).

<sup>47</sup> R.C. 5817.05(C).

## Contents of complaint (trust)

### Party defendants

A complaint to determine the validity of a trust must name as party defendants the following, as applicable:<sup>48</sup>

- The settlor's spouse;
- The settlor's children;
- The settlor's heirs who would take property pursuant to the statute of descent and distribution had the settlor died intestate at the time the complaint is filed;
- The trustee or trustees under the trust;
- The "beneficiaries under the trust";
- If the trust amends, amends and restates, or replaces a prior trust, any beneficiary under the settlor's most recent prior trust.

Such a complaint may name as a party defendant any other person that the settlor believes may have a pecuniary interest in the determination of the validity of the settlor's trust.<sup>49</sup>

"Beneficiary under a trust" means either of the following:<sup>50</sup>

(1) Any person that has a present or future beneficial interest in a trust, whether vested or contingent.

(2) Any person that, in a capacity other than that of a trustee, holds a power of appointment over trust property, but does not include the class of permitted appointees among whom the power holder may appoint.

"Beneficiary under a trust" includes a charitable organization that is expressly designated in the trust to receive distributions, but does not include any charitable

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<sup>48</sup> R.C. 5817.06(A) with reference to R.C. 2105.06, not in the act.

<sup>49</sup> R.C. 5817.06(B).

<sup>50</sup> R.C. 5817.01(A)(1).



organization that is not expressly designated in the trust to receive distributions, but to whom the trustee may in its discretion make distributions.<sup>51</sup>

### **Information contained in complaint**

The complaint may contain all or any of the following statements:<sup>52</sup>

- A copy of the trust has been filed with the court;
- The trust is in writing and was signed by the settlor;
- The trust was executed with the intent to create a trust;
- The settlor had the legal capacity to enter into and establish the trust;
- The trust has a definite beneficiary or is one of the following:
  - A charitable trust;
  - A trust for the care of an animal as provided in the law permitting the creation of a trust for the care of an animal;
  - A trust for a noncharitable purpose as provided in the law permitting the creation of a trust for a noncharitable purpose.
- The trustee of the trust has duties to perform;
- The same person is not the sole trustee and sole beneficiary of the trust;
- The settlor executed the trust free from undue influence, not under restraint or duress, and in the exercise of the settlor's free will;
- The execution of the trust was not the result of fraud or mistake;
- The trust has not been revoked or modified;
- The settlor is familiar with the contents of the trust.

The complaint may also contain the names and addresses of the settlor and all of the defendants and, if any of the defendants are minors, their ages.

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<sup>51</sup> R.C. 5817.01(A)(2).

<sup>52</sup> R.C. 5817.06(C) with reference to R.C. 5804.08 and 5804.09, not in the act.



## Service of process

Service of process, with a copy of the complaint and the will, and a copy of the related trust, if applicable, and service of process, with a copy of the complaint and the trust, and a copy of the related will, if applicable, must be made on every party defendant named in the filed complaint, as provided in the applicable Rules of Civil Procedure.<sup>53</sup>

Former law specified that service of process had to be made on every party defendant named in the complaint to declare a will valid by the following methods:<sup>54</sup>

- By certified mail or other personal service permitted by the Rules of Civil Procedure if the party was an inhabitant of, or was found in, Ohio;
- By certified mail, with a copy of the summons and complaint, to the party's last known address or any other valid personal service permitted by the Rules of Civil Procedure if the party was not an inhabitant of, or was not found in, Ohio;
- By publication according to Civil Rule 4.4 if the party's address was unknown, if all methods of personal service under the preceding dot point were attempted without success, or if the interest of the party was unascertainable in the will or in the testator's estate if the will was declared invalid.

There was no provision in prior law for service of a copy of a related trust to a will.

## Hearing

After a complaint to determine the validity of a will or trust is filed, the court must fix a time and place for a hearing. Notice of the hearing must be given to the testator or settlor, as applicable, and to all party defendants, as provided in the applicable Rules of Civil Procedure. The hearing is adversarial in nature and must be conducted pursuant to the laws on the determination of questions of fact and declaratory relief, except as otherwise provided in the act's enacted R.C. Chapter 5817.<sup>55</sup>

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<sup>53</sup> R.C. 5817.07.

<sup>54</sup> Former R.C. 2107.082 repealed.

<sup>55</sup> R.C. 5817.08 with reference to R.C. 2101.31 and 2721.10, not in the act.



"Court" means the probate court of the county in which the complaint to declare the validity of a will or trust is filed or the general division of the common pleas court to which the probate court transfers the proceedings.<sup>56</sup>

### **Burden of proof**

The testator or settlor has the burden of establishing prima facie proof of the execution of the will or trust, as applicable. A person who opposes the complaint has the burden of establishing one or more of the following:<sup>57</sup>

- The lack of testamentary intent or the intent to create a trust, as the case may be;
- The lack of the testator's testamentary capacity, or the settlor's legal capacity to enter into and establish the trust;
- Undue influence, restraint, or duress on the testator or settlor;
- Fraud or mistake in the execution of the will or trust;
- Revocation of the will or trust.

A party to the proceeding has the ultimate burden of persuasion as to the matters for which the party has the initial burden of proof.<sup>58</sup>

Prior law had no provision comparable to the act's provisions above.

### **Validity of a will or trust**

The court must declare the will valid if it finds all of the following:<sup>59</sup>

- The will was properly executed pursuant to the law on execution of wills or under any prior law of Ohio that was in effect at the time of execution.
- The testator had the requisite testamentary capacity, was free from undue influence, and was not under restraint or duress.
- The execution of the will was not the result of fraud or mistake.

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<sup>56</sup> R.C. 5817.01(C).

<sup>57</sup> R.C. 5817.09(A).

<sup>58</sup> R.C. 5817.09(B).

<sup>59</sup> R.C. 5817.10(A)(1) with reference to R.C. 2107.03, not in the act.



The judge of the court who rendered the judgment must deliver the will to the proper probate court upon the testator's death, for probate, and cause the judgment to be brought before that court after the testator's death.<sup>60</sup>

After the testator's death, unless the will is modified or revoked after the court's declaration, the will has full legal effect as the instrument of disposition of the testator's estate and must be admitted to probate upon request.<sup>61</sup> The court must declare the trust valid if it finds all of the following:<sup>62</sup>

- The trust meets the requirements of the law for the creation of a trust.
- The settlor had the legal capacity to enter into and establish the trust, was free from undue influence, and was not under restraint or duress.
- The execution of the trust was not the result of fraud or mistake.

Unless the trust is modified or revoked after the court's declaration, the trust has full legal effect.<sup>63</sup>

Former law required that any declaration of validity of a will be sealed in an envelope along with the will and filed by the probate judge or the judge's designee in the probate court offices. The filed will was available during the testator's lifetime only to the testator. If the testator removed a filed will from the judge's possession, the declaration of validity no longer had any effect.<sup>64</sup>

Under the act, the court may, if it finds the will or trust to be valid, attach a copy of the valid document to the court's judgment entry, but failure to do so does not affect the determination of validity of the will or trust.<sup>65</sup>

### **Impact of the validity of the will or trust**

Unless the will or trust is modified or revoked, and except as otherwise described below, no person may contest the validity of a will or trust that is declared valid in a proceeding under R.C. Chapter 5817.<sup>66</sup>

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<sup>60</sup> R.C. 2107.08 and 2107.09(B).

<sup>61</sup> R.C. 5817.10(A)(2).

<sup>62</sup> R.C. 5817.10(B)(1) with reference to R.C. 5804.02, not in the act.

<sup>63</sup> R.C. 5817.10(B)(2).

<sup>64</sup> Former R.C. 2107.084(B), repealed.

<sup>65</sup> R.C. 5817.10(C).



The failure to name a necessary defendant regarding the validity of a will or trust is not jurisdictional. A declaration of a will's or trust's validity is binding upon all defendants who were named or represented, and properly served, notwithstanding the failure to name a necessary defendant. However, if a person is one who should have been named a party defendant in the action in which the will or trust was declared valid and if the person was not so named and properly served in that action, that person (after the testator's death in the case of a will) may contest the validity of a will or trust declared valid.<sup>67</sup>

In determining whether a person was a party defendant and properly served in an action to declare a will or trust valid, the representation rules of the law on representatives apply and a person represented in the action under those rules is bound by the declaration of validity even if, by the time of the testator's death, or challenge to the trust, the representing person has died or would no longer be able to represent the person to be represented in a proceeding under R.C. Chapter 5817.<sup>68</sup>

### **Modification or revocation of a will**

After a declaration of a will's validity, the will may be modified by a later will or codicil executed according to the laws of Ohio or another state, and the will may be revoked under the law on revocation of a will or other applicable law. The revocation by a later will, or other document, of a will that has been declared valid does not affect the will or the prior declaration of its validity if the later will or other document is found by a court of competent jurisdiction to be invalid due to the testator's lack of testamentary capacity, or undue influence, restraint, or duress on the testator, or otherwise. The amendment by a later codicil of a will that has been declared valid does not affect the will or the prior declaration of its validity except as provided by the codicil. However, the codicil is not considered validated under R.C. Chapter 5817, unless its validity is also declared as provided in that Chapter.<sup>69</sup>

Former law provided that a testator could revoke or modify a will declared valid by filing a complaint in the probate court in possession of the will and asking that the will be revoked or modified. The complaint had to name as parties defendant the persons who were parties defendant in a previous action declaring the will valid, the persons who were named in any modification as beneficiaries, and the persons who

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<sup>66</sup> R.C. 5817.11(A).

<sup>67</sup> R.C. 5817.11(B) and (C).

<sup>68</sup> R.C. 5817.11(D) with reference to R.C. Chapter 5803., not in the act.

<sup>69</sup> R.C. 5817.12 with reference to R.C. 2107.33.

would have been entitled because of the revocation or modification, to inherit from the testator under the law on descent and distribution had the testator died intestate on the date the complaint was filed. Service of the complaint and process were made on these parties by the methods authorized in a complaint to declare the previous will valid.<sup>70</sup>

Under prior law, unless waived by all parties, the court was required to conduct a hearing on the validity of the revocation or modification requested. If the court found that the revocation or modification was valid, the revocation or modification took full effect and was binding, and revoked the will or modified it to the extent of the valid modification. The revocation or modification, the judgment declaring it valid, and the will itself had to be sealed in an envelope, filed with the probate court, and be available during the testator's lifetime only to the testator.<sup>71</sup>

Former law also provided that a declaration of validity of a will, of a codicil to a will previously declared valid, or of a revocation or modification of a will previously determined valid generally was not subject to collateral attack and was appealable.<sup>72</sup>

### **Modification or revocation of a trust**

After a declaration of a trust's validity, the trust may be modified, terminated, revoked, or reformed under the Trust Code provisions on termination or modification of a trust, or other applicable law. The modification, termination, revocation, or reformation by a new trust or other document of a trust that has been declared valid does not affect the trust or the prior declaration of its validity if the later trust or other document is found by a court of competent jurisdiction to be invalid due to the settlor's lack of capacity, or undue influence, restraint, or duress on the settlor, or otherwise. An amendment of a trust that has been declared valid does not affect the trust or the prior declaration of its validity except as provided by the amendment. However, the amendment is not considered validated under R.C. Chapter 5817, unless its validity is also declared as provided in that Chapter.<sup>73</sup>

### **Admissibility of evidence**

The finding of facts by a court in a proceeding brought under R.C. Chapter 5817, is not admissible as evidence in any proceeding other than a proceeding brought to determine the validity of a will or trust. The determination or judgment rendered in

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<sup>70</sup> Former R.C. 2107.084(C), repealed.

<sup>71</sup> Former R.C. 2107.084(C), repealed.

<sup>72</sup> Former R.C. 2107.084(E), repealed.

<sup>73</sup> R.C. 5817.13 with reference to R.C. 5804.10 to 5804.16, not in the act.

such a proceeding is not binding upon the parties to that proceeding in any action that is not brought to determine the validity of a will or trust. The failure of a testator to file a complaint for a judgment declaring the validity of a will that the testator has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator. The failure of a settlor to file a complaint for a judgment declaring the validity of a trust that the settlor has executed is not admissible as evidence in any proceeding to determine the validity of that trust or any other trust executed by the settlor.<sup>74</sup>

## **Conforming changes**

The act makes conforming changes regarding determining the validity of a will in various sections of the Probate, Wills, and Declaratory Judgments Law<sup>75</sup> and determining the validity of a trust in the Declaratory Judgments Law.<sup>76</sup>

## **Eligibility determinations for certain cases involving Medicaid**

Under continuing law, the principal or income from a special needs trust is not a resource available to the applicant who applies for Medicaid or the applicant's spouse or the recipient who receives Medicaid or the recipient's spouse if the special needs trust meets all of the following requirements:<sup>77</sup>

(1) The trust contains assets of an applicant or recipient under age 65 and may contain the assets of other individuals.

(2) The applicant or recipient is disabled as defined in certain specified rules.

(3) The trust is established for the benefit of the applicant or recipient by a parent, grandparent, legal guardian, or a court.

(4) The trust requires that on the death of the applicant or recipient the state will receive all amounts remaining in the trust, up to the total amount of Medicaid payments made on behalf of the applicant or recipient.

The act modifies (3) above by providing that the trust is established for the benefit of the applicant or recipient by "any of the following: the applicant or recipient, if established on or after December 13, 2016"; a parent, grandparent, or legal guardian

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<sup>74</sup> R.C. 5817.14.

<sup>75</sup> R.C. 2101.24, 2107.01, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.71, 2137.01, and 2721.03.

<sup>76</sup> R.C. 2721.03.

<sup>77</sup> R.C. 5163.21(F)(1)(a).



"of the applicant or recipient," or a court (clauses in quotation marks are added by the act).<sup>78</sup>

## **Fiduciaries and Guardianship Services**

### **Attorney-client privilege when client is a fiduciary**

The act provides that any communication between an attorney and a client who is acting as a fiduciary is privileged and protected from disclosure to third parties to whom the fiduciary owes fiduciary duties to the same extent as if the client was not acting as a fiduciary. This provision expands continuing law which provides that absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations. Continuing law defines "fiduciary" as a trustee under an express trust or an executor or administrator of a decedent's estate.<sup>79</sup>

### **Fiduciary funds deposited in attorney's IOLTA**

The act modifies the Fiduciaries Law's provision on the deposit of funds by providing generally that immediately after appointment and throughout the *term of appointment*, instead of throughout administration of a trust, every fiduciary, pending payment of current obligations of the fiduciary's trust *or estate* (added by the act), distribution, or investment, must deposit all funds received by the fiduciary in the fiduciary's name as such fiduciary in one or more depositories the types of which are stated in that Law. All such deposits must be in a class of account that will be most advantageous to the trust *or estate*, and each depository must pay interest at the highest rate customarily paid to its patrons on deposits in accounts of the same class.<sup>80</sup>

A fiduciary of a trust or estate may transfer funds received by the fiduciary in the fiduciary's name as such fiduciary to the fiduciary's attorney for deposit in an interest on lawyer's trust account (IOLTA) established under the deposit of client funds provision in the Attorneys Law that is maintained by the attorney if the attorney, in consultation with the fiduciary, has determined that the funds are nominal in amount *or*, instead of "and," will be held in the IOLTA for a short period of time. The act

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<sup>78</sup> R.C. 5163.21(F)(1)(a)(iii).

<sup>79</sup> R.C. 5815.16.

<sup>80</sup> R.C. 2109.41(A).



eliminates the former condition that the probate court, upon petition by the fiduciary, has approved the deposit.<sup>81</sup>

The act moves to the Fiduciaries Law the same provision in the Attorneys Law which provides that notwithstanding any contrary provision in the Fiduciaries Law, a probate court examining a trust or estate may only access the account information of such an IOLTA for purposes of obtaining information related to that particular trust or estate and cannot access the IOLTA records that pertain to assets of any other estate or trust held in it.<sup>82</sup>

The act repeals a comparable provision in the Attorneys Law that permitted any attorney, law firm, or legal professional association to establish and maintain an IOLTA, for purposes of depositing funds received by a client, in the client's name as fiduciary of a trust or estate, with the same types of depositaries as stated in the Fiduciaries Law. Consistent with the act's change in the Fiduciaries Law, the act eliminates the requirement that the probate court must approve the deposit.<sup>83</sup>

### **Probate court guardianship services fund**

The act permits a probate court or the probate courts of two or more counties to accept funds or other program assistance from, or charge fees for specified services described below rendered to, individuals, corporations, agencies, or organizations, including a county board of alcohol, drug addiction, and mental health services (county ADAMH board) or a county board of developmental disabilities (county DD board), unless either or any of those county boards does not agree to the payment of those fees. Any funds or fees the probate court receives must be paid into the county treasury and credited to a fund to be known as the county probate court guardianship services fund and any funds or fees the probate courts of two or more counties receive must be paid into the county treasury of one or more of the counties and credited to a fund to be known as the multicounty probate court guardianship services fund.<sup>84</sup>

The moneys in a county or multicounty probate court guardianship services fund must be used for services to help ensure the treatment of any person who is under the care of a county ADAMH board, a county DD board, or any other guardianships. These services include involuntary commitment proceedings and the establishment and

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<sup>81</sup> R.C. 2109.41(C) with reference to R.C. 4705.09(A)(1).

<sup>82</sup> R.C. 2109.41(D); former R.C. 4705.09(A)(1)(b), repealed.

<sup>83</sup> Former R.C. 4705.09(A)(1)(b), repealed.

<sup>84</sup> R.C. 2111.52(A) and (B).

management of adult guardianships, including all associated expenses, for wards who are under the care of either of those county boards or any other guardianships.<sup>85</sup>

If a probate court judge determines that some of the moneys in the guardianship services fund are needed for the efficient operation of the county or multicounty guardianship service board created as described below, the moneys may be used for acquisition of equipment, hiring and training of staff, community services programs, volunteer guardianship training services, employment of magistrates, and any other services necessary for the fulfillment of the duties of either guardianship service board.<sup>86</sup>

### **County or multicounty guardianship service board**

The moneys in the guardianship services fund that may be used in part for the establishment and management of adult guardianships may be utilized to establish a county or multicounty guardianship service.<sup>87</sup> Either guardianship service is established by creating a county or multicounty guardianship service board (hereafter guardianship service board). The probate judge appoints one member. The board of directors of a participating county DD board appoints one member. The board of directors of a participating county ADAMH board appoints one member. Additional members of the guardianship service board may be added if a board member or members unanimously agree. If neither the county DD board nor the county ADAMH board chooses to participate in the guardianship service board, the probate court may appoint additional members. Each member's term of appointment is four years.<sup>88</sup>

The guardianship service board may appoint a director, and must determine the director's compensation based on the availability of funds in the guardianship services fund. The board may receive appointments from county probate courts to serve as guardians of both the person and estate of wards. The director or designee of a guardianship service board may act on the board's in relation to all guardianship matters.<sup>89</sup>

The director of a guardianship service board may hire employees subject to available funds in the guardianship services fund. The board may also charge a

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<sup>85</sup> R.C. 2111.52(C).

<sup>86</sup> R.C. 2111.52(D).

<sup>87</sup> R.C. 2111.52(E).

<sup>88</sup> R.C. 2111.52(F)(1).

<sup>89</sup> R.C. 2111.52(F)(2) and (3).

reasonable fee for services provided to wards, and a probate judge must approve those fees.<sup>90</sup>

The guardianship service board must promulgate all rules and regulations necessary for the efficient operation of the board and the guardianship services.<sup>91</sup>

## **Courts**

### **Waiver of additional filing fees and advance deposits in municipal and county courts**

Under continuing law, a municipal or county court must require the collection of \$26 as additional filing fees in each new "civil action or proceeding" (hereafter civil action) for the charitable purpose of providing financial assistance to legal aid societies and to support the Office of the State Public Defender. The additional filing fee in the small claims division of a municipal or county court is \$11.<sup>92</sup>

Continuing law permits a municipal or county court, by rule, to require an advance deposit for the filing of any civil action and publication fees for calendars, motion dockets, and notices, or to require an advance deposit when a jury trial is demanded. Prior law permitted either court to waive the requirement for advance deposit upon affidavit or other evidence that a party was unable to make the required deposit.<sup>93</sup>

The act instead requires the municipal or county court to waive the above requirements for additional filing fees or for an advance deposit for the party that the court determines qualifies as an indigent litigant as described below in "**Procedure for determining indigency.**"<sup>94</sup>

### **Waiver of additional charges for special programs in municipal and county courts**

Continuing law permits a municipal court or county court to determine that for the court's efficient operation, additional funds are necessary to acquire and pay for special projects or services of the court. Upon that determination, either court by rule

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<sup>90</sup> R.C. 2111.52(F)(4) and (5).

<sup>91</sup> R.C. 2111.52(F)(6).

<sup>92</sup> R.C. 1901.26(A)(1)(a) and (C) and 1907.24(A)(1) and (C).

<sup>93</sup> R.C. 1901.26(A)(2) and (3) and 1907.24(A)(2) and (3).

<sup>94</sup> R.C. 1901.26(A)(1)(a), (2), and (3) and (C) and 1907.24(A)(1), (2), and (3) and (C).



may charge an additional fee on the filing of a criminal cause, civil action, or judgment by confession. If a municipal or county court offers a special program or services in cases of a specific type, the court may by rule assess an additional charge in a case of that type.<sup>95</sup>

Under the act, any fee or charge assessed as described above on the filing of a civil action must be waived if the applicable court determines that the person on whom the fee or charge is assessed qualifies as an indigent litigant as described below in "**Procedure for determining indigency.**"<sup>96</sup>

### **Waiver of advance deposit if required by a court of common pleas**

Continuing law permits a court of common pleas by rule to require an advance deposit for the filing of any civil action. On motion of the defendant, and if satisfied that such deposit is insufficient, the court can require it to be increased from time to time to secure all costs that could accrue in the cause, or require personal security to be given. If a plaintiff makes an affidavit of inability either to prepay or give security for costs, the clerk of the court is required to receive and file the petition. Such affidavit must be filed with the petition and treated as are similar papers in such cases.<sup>97</sup>

Under the act, the court of common pleas by rule may additionally require an advance deposit for the filing of any responsive action by the defendant. On the motion of *any party*, and if satisfied that the advance deposit is insufficient, the court may require it to be increased from time to time to secure all costs that may accrue in the cause, or may require personal security to be given. However, if a party makes an application to be qualified as an indigent litigant as described below in "**Procedure for determining indigency,**" the clerk of the court must receive and file the civil action or the defendant's responsive action. If the court approves the application, the clerk must waive the advance deposit or personal security and the court must proceed with the civil action or the defendant's responsive action. If the court denies the application, the clerk must retain the filing of the action or the defendant's responsive action, and the court must issue an order granting the applicant 30 days to make the required deposit or personal security prior to any dismissal or other action on the filing of the action or the defendant's responsive action.<sup>98</sup>

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<sup>95</sup> R.C. 1901.26(B)(1)(a) and (b) and 1907.24(B)(1)(a) and (b).

<sup>96</sup> R.C. 1901.26(B)(1)(c) and 1907.24(B)(1)(c).

<sup>97</sup> R.C. 2323.31.

<sup>98</sup> *Id.*



## Waiver of costs secured by certain plaintiffs

Continuing law requires that in all actions in which the plaintiff is a nonresident of the county in which the action is brought, a partnership suing by its company name, an insolvent corporation, or any party required to furnish security as described above in "**Waiver of advance deposit if required by a court of common pleas**," the plaintiff must deposit cash or furnish security for costs. Former law provided that when such plaintiff made an affidavit of inability to give security or a cash deposit to secure the costs, the clerk was required to receive and file the petition. The affidavit had to be filed with it and treated as were similar papers.<sup>99</sup>

Under the act, when a plaintiff described above makes an application to be qualified as an indigent litigant as described below in "**Procedure for determining indigency**," the clerk must receive and file the civil action. If the court approves the application, the clerk must waive the cash deposit or the security, and the court must proceed on the civil action. If the court denies the application, the clerk must retain the filing of the action and the court must issue an order granting the applicant 30 days to make the required cash deposit or security prior to any dismissal or other action on the filing.<sup>100</sup>

## Action dismissed for want of security for costs

Continuing law specifies that if security for costs is not given in a case mentioned in R.C. 2323.30 and 2323.31, as described above, the court generally must dismiss the action on motion of the defendant and give notice to the plaintiff at any time before the commencement of the trial. The act states that this does not apply if a party makes an application to qualify as an indigent litigant as described below.<sup>101</sup>

## Publication of court calendars

Under continuing law, for the publication of court calendars, motion dockets, and notices, the fees for which are not fixed by law, the paper's publisher must receive a sum fixed by the judges for each case brought, to be paid in advance by the party filing the petition, transcripts for appeal, or lien, to be taxed in the costs and collected as other costs. The act creates an exception to the above requirement if the party is determined by the court to qualify as an indigent litigant as described below.<sup>102</sup>

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<sup>99</sup> R.C. 2323.30.

<sup>100</sup> R.C. 2323.30.

<sup>101</sup> R.C. 2323.33.

<sup>102</sup> R.C. 2701.09.



## **Procedure for determining indigency**

### **Affidavit of indigency filed when civil action or proceeding is filed**

Under the act, in order to qualify as an indigent litigant, defined as a litigant who is unable to make an advance deposit or security for fees or costs set forth in a "civil action or proceeding" (hereafter civil action), the applicant's attorney or the applicant if the litigant is proceeding pro se, must file with the court in which a civil action is filed an affidavit of indigency in a form approved by the Supreme Court, or, until that Court approves a form, a form requesting substantially the same financial information as the financial disclosure and affidavit of indigency form used by the public defender for the appointment of counsel in a criminal case. The clerk of the court must accept the action for filing.<sup>103</sup>

A judge or magistrate of the court must review the filed affidavit of indigency, and approve the application if the applicant's gross income does not exceed 187 and 5/10% of the federal poverty guidelines as determined by the U.S. Department of Health and Human Services for the state of Ohio and the applicant's monthly expenses are equal to or in excess of the applicant's liquid assets as specified in Ohio Administrative Code 120-1-03(C)(2) (standards of indigence – other liquid financial assets), as amended, or a substantially similar provision. If the application is approved, the clerk must waive the advance deposit or security and the court must proceed with the civil action. If the application is denied, the clerk must retain the filing of the action, and the court must issue an order granting the applicant 30 days to make the required deposit or security, prior to any dismissal or other action on the filing of the action.<sup>104</sup>

### **Affidavit of indigency filed during pendency of civil action or proceeding**

Following the filing of the civil action with the clerk, the judge or magistrate, at any time while the action is pending and on an applicant's, opposing party's, or court's motion, may conduct a hearing to inquire into the applicant's status as an indigent litigant. The judge or magistrate must affirm the applicant's status as an indigent litigant if the applicant's gross income does not exceed the percentage of the federal poverty guidelines, and the applicant's monthly expenses are equal to or in excess of the applicant's liquid assets, both percentage and expenses as described in the preceding paragraph. The court must proceed with the action if it finds that the applicant qualifies as an indigent litigant. If the court finds that the applicant does not qualify or no longer qualifies as an indigent litigant if previously so qualified, the clerk must retain the filing of the action, and the court must issue an order granting that applicant 30 days to make

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<sup>103</sup> R.C. 2323.311(A), (B)(1), (2), and (3).

<sup>104</sup> R.C. 2323.311(B)(4).



a required deposit or security, prior to any dismissal or other action on the filing or pendency of the action.<sup>105</sup>

### **Waiver of indigency requirements**

The act provides that nothing in its provisions prevents a court from approving or affirming an application to qualify as an indigent litigant for an applicant whose gross income exceeds the percentage of the federal poverty guidelines, or whose liquid assets equal or exceed the applicant's monthly expenses, as described above. Any indigency finding by the court must excuse the indigent litigant from the obligation to prepay any subsequent fee or cost arising in the civil case or proceeding unless the court addresses the payment or nonpayment of that fee or cost specifically in a court order.<sup>106</sup>

### **Effect of judgment in favor of indigent litigant**

If the indigent litigant as the prevailing party proceeds with an execution on the court's judgment as set forth in the Revised Code sections on execution of judgments, in order to provide for the recovery of applicable costs, any payment on any execution of the judgment in favor of the indigent litigant must be made through the clerk of the court. The clerk must apply that payment to any outstanding costs prior to any disbursement of funds to the indigent litigant. This requirement may be waived upon court entry by the judge or magistrate. The above remedy is not the exclusive remedy of the clerk for the payment of costs, and the clerk has all remedies available under the law.<sup>107</sup>

### **Party's qualification as an indigent litigant**

The act provides that if with respect to the filing of any civil action or of a responsive action by a defendant in any court of record, a party qualifies as an indigent litigant, the clerk of the court must receive and file the action or the defendant's responsive action and the court must waive any advance deposit or security for such filing, any advance payment for taxable costs, including fees for publication or other service of process, and any advance payment of any fee required in prosecuting or advancing the action or the defendant's responsive action.<sup>108</sup>

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<sup>105</sup> R.C. 2323.311(B)(5).

<sup>106</sup> R.C. 2323.311(B)(6) and (7).

<sup>107</sup> R.C. 2323.311(C) with reference to R.C. Chapters 2327., 2329., 2331., and 2333., not in the act.

<sup>108</sup> R.C. 2746.10.



## Jurisdiction over custody or child support

### Juvenile court jurisdiction

#### Prohibition to exercise jurisdiction

The act prohibits a juvenile court from exercising jurisdiction in certain situations below to determine custody or support for a child if any of the following applies:<sup>109</sup>

(1) The child's parents are married.

(2) The child's parents are not married and there is an existing custody or support order for the child or the child's sibling over which the court does not have jurisdiction.

(3) The determination is ancillary to the parents' pending action for divorce, dissolution of marriage, annulment, or legal separation.

Under former law, these situations in which juvenile courts had exclusive, original jurisdiction were as follows:<sup>110</sup>

(1) To determine custody of any child who was not a ward of another Ohio court;

(2) To hear and determine a request for a support order when the request was not ancillary to an action for divorce, dissolution of marriage, annulment, or legal separation, a criminal or civil action involving a domestic violence allegation, or a support action involving the Uniform Interstate Family Support Act (UIFSA).

Juvenile courts also had original jurisdiction to hear and determine an application for a support order, if the child was not a ward of another Ohio court.<sup>111</sup> The juvenile court custody and child support jurisdiction under former law gave juvenile courts authority to determine custody and child support for a child with married parents, which the act eliminates. Additionally, the act's changes regarding juvenile court jurisdiction over preexisting child support or custody orders for unmarried parents is also circumscribed by the act.

The prohibition on juvenile court jurisdiction under the act does not affect the authority of the court to issue a custody order regarding a delinquent, unruly, abused,

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<sup>109</sup> R.C. 2151.233 with reference to R.C. 2151.23(A)(2), (A)(11), and (B)(4), not in the act.

<sup>110</sup> R.C. 2151.23(A)(2) and (A)(11), not in the act.

<sup>111</sup> R.C. 2151.23(B)(4), not in the act.



neglected, or dependent child or juvenile traffic offender that grants custody of the child to a relative or places the child under a kinship care agreement.<sup>112</sup>

### **Transfer of jurisdiction**

The act permits a juvenile court to transfer jurisdiction over a child support or custody action or order as follows:<sup>113</sup>

(1) To the appropriate domestic relations court,<sup>114</sup> if the parents of the child subject to the action or order are married and not parties to a pending divorce, dissolution of marriage, legal separation, or annulment proceeding;

(2) To the appropriate domestic relations court, if the child's parents are not married and there is an existing order for custody or support for the child or the child's sibling over which the juvenile court does not have jurisdiction;

(3) To the common pleas court exercising jurisdiction over a pending divorce, dissolution of marriage, legal separation, or annulment proceeding to which the child's parents are parties;

(4) To the common pleas court exercising jurisdiction over a civil domestic violence protection order, if the child or the child's parents are subject to both a child support order and the protection order.

### **Transfer requirements**

Under the act, jurisdiction over a transferrable action or order described above must be transferred and the receiving court has exclusive jurisdiction over the action or order if the following requirements are met:<sup>115</sup>

(1) The domestic relations court, the juvenile court, or an interested party makes a motion to transfer jurisdiction;

(2) The receiving court consents to the transfer;

(3) The juvenile court certifies all or part of the record in the action or related to the order to the receiving court.

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<sup>112</sup> R.C. 2151.234 with reference to R.C. 2151.23(A)(1), not in the act.

<sup>113</sup> R.C. 2151.235(A).

<sup>114</sup> For purposes of the discussion in this analysis under "**Jurisdiction over child support and custody**," "common pleas court with domestic relations jurisdiction" is referred to as "domestic relations court."

<sup>115</sup> R.C. 2151.235(B).

### **Transfer applicability**

A juvenile court's ability and requirement to transfer jurisdiction under the act applies to all orders in effect, and all actions or proceedings pending or initiated, on or after the act's effective date.<sup>116</sup>

### **Child Support Enforcement Agency (CSEA) notification and review**

The act requires, if a child is subject to a support order issued by a domestic relations court, a juvenile court to notify the domestic relations court and the CSEA serving the domestic relations court's county if the juvenile court does both of the following:<sup>117</sup>

(1) Adjudicates the child to be delinquent, unruly, abused, neglected, or dependent;

(2) Grants custody of the child to an individual or entity other than as set forth in the order issued by the domestic relations court.

The act also requires the CSEA to review such court child support orders as it reviews court child support orders under continuing law, which requires a CSEA to, periodically or upon request, review court child support orders and provides procedures for the CSEA's review for: (a) notification of proceedings, (b) determination of the necessity for and calculating a modification, and (c) notification of the right to request a hearing on modification.<sup>118</sup>

### **Certification to a juvenile court**

The act states that nothing concerning (a) juvenile court jurisdiction or CSEA notification and review under the act or (b) the designation of common pleas court domestic relations, juvenile, and probate duties under continuing law, is to be construed to prevent a domestic relations court from certifying a case to a juvenile court. The act also provides that the juvenile court's consent is not required for the certification.<sup>119</sup>

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<sup>116</sup> R.C. 2151.235(C).

<sup>117</sup> R.C. 2151.236.

<sup>118</sup> R.C. 2151.236 with reference to R.C. 3119.60 and 3119.63 to 3119.76, not in the act.

<sup>119</sup> R.C. 3109.06 and 3109.061 with reference to R.C. 2301.03 and 3109.04(D)(2), not in the act.



## "Domestic relations matters" definition

The act defines "domestic relations matters," as it applies to common pleas courts' (including domestic relations divisions') jurisdiction over domestic relations matters, to mean both of the following:<sup>120</sup>

(1) Any matter committed to the jurisdiction of domestic relations courts as designated in the Common Pleas Courts Law;

(2) Actions and proceedings under Ohio law governing divorce, spousal support, annulment, dissolution of marriage; children; parentage; neglect, abandonment, or domestic violence; UIFSA; child support; and the Uniform Child Custody Jurisdiction and Enforcement Act.

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## HISTORY

| ACTION                                      | DATE     |
|---|----------|
| Introduced                                  | 04-10-18 |
| Reported, H. Civil Justice                  | 06-07-18 |
| Passed House (91-0)                         | 06-27-18 |
| Reported, S. Judiciary                      | 12-06-18 |
| Passed Senate (31-0)                        | 12-13-18 |
| House concurred in Senate amendments (86-0) | 12-13-18 |

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<sup>120</sup> R.C. 3105.011(B) with reference to R.C. 2301.03 and R.C. Chapters 3105., 3109. to 3115., and 3119. to 3127., not in the act.

