Ohio Legislative Service Commission

Bill Analysis

Aida S. Montano

Sub. H.B. 432*

131st General Assembly
(As Reported by H. Judiciary)

Reps. Cupp, Rezabek

BILL SUMMARY

Probate Law

- Specifies that a will deposited by or for the testator in the office of the judge of the probate court of the county in which the testator lives may be so deposited before or after the testator's death and if after such death, with or without applying for its probate.
- Increases the fee for the deposit of the will from $5 to $25 and specifies that the fee is to be paid to the court.
- Authorizes a probate judge to dispose of a deposited will after 100 years if it is not delivered or disposed as provided in continuing law, and requires the judge to keep an electronic copy of the will prior to such disposal.
- Specifies that a deposited will generally is not a public record until the time an application is filed to probate it.
- Provides that property devised or bequeathed to a beneficiary in a will who knows of the will's existence for one year after the testator's death and, without reasonable cause, intentionally conceals or withholds it or refuses to cause it to be offered for probate passes as if the beneficiary predeceased the testator.
- Provides that a provision in a will or governing instrument apportioning tax to an interest that is otherwise allowable as an estate tax marital or charitable deduction is

* This analysis was prepared before the report of the House Judiciary Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

ineffective unless it refers to such deduction and expressly acknowledges and accepts any resultant partial loss of the deduction.

- Modifies the number of automobiles that may be selected by a surviving spouse upon the other spouse's death from a maximum of two automobiles under current law to "one or more" automobiles.

- Increases the maximum total value of the automobiles that may be selected by the surviving spouse from $40,000 to $65,000.

Uniform Simultaneous Death Act (USDA)

- Substantially retains current law that generally provides, for purposes of the probate law or governing instruments, that an individual who is not established by clear and convincing evidence to have survived the other individual or an event by 120 hours is deemed to have predeceased the other individual or event.

- Generally provides that if it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by 120 hours, one-half of the property passes as if one co-owner survived the other by 120 hours and one-half passes as if the other co-owner survived the one by 120 hours.

- Generally provides that if there are more than two co-owners with right of survivorship and it is not established by clear and convincing evidence that at least one of the co-owners survived the others by 120 hours, the property passes in the proportion that one co-owner's ownership bears to all the co-owners' ownership.

- Substantially retains, with structural changes, the existing conditions for which survival by 120 hours is not required.

- Expands current law specifying the instances in which a payor or other third party is either liable or not liable for a payment made or an item of property or benefit transferred under the USDA.

- Provides that the bill does not impair any act done in any proceeding, or any right that accrued, before its effective date.

Intestate succession

- Specifies in intestate succession that a person described as living means the person was living at the time of the intestate's death and lived for at least 120 hours after such death, and a person is described as having died if the person died before the intestate or failed to live for at least 120 hours after the intestate's death.

- Provides that no descendant of an intestate inherits under the law on descent and distribution unless surviving the intestate for at least 120 hours, or unless born within 300 days after the intestate's death and living for at least 120 hours after birth.

Ohio Trust Code

- Provides that the Trust Code requirements for interested parties to enter into private settlement agreements regarding trust matters generally do not apply to agreements amending the governing instrument of charitable remainder trusts that require the approval of the Attorney General under continuing law.

- Specifies that an action under the Trust Code is a civil action subject to the Rules of Civil Procedure and is commenced by filing a complaint unless it involves a testamentary or other trust already subject to court supervision.

- Authorizes the holder of a limited testamentary power of appointment to also represent persons whose interests as possible appointees are subject to the power, to the extent no conflict of interest exists between the holder and the persons represented with respect to the particular question.

- Authorizes an agent under a power of attorney to create a trust for the principal, whether or not the principal has capacity to create the trust and indicates an intention to create the trust, but only as provided in the Uniform Power of Attorney Act.

Uniform Principal and Income Act (UPIA)

- Replaces current law with the following rules that generally apply in determining the allocation of a payment from a separate fund to a trust for which an election to qualify for a marital deduction is made or a trust that qualifies for the marital deduction under the Internal Revenue Code (IRC):

    - A trustee must allocate a payment from a separate fund to income to the extent of the fund's internal income and distribute that amount to the surviving spouse, and allocate the balance to principal.

    - If the trustee cannot determine the fund's internal income but can determine its value, the internal income is deemed to equal 4% of its value according to the most recent statement of value preceding the start of the accounting period.

- If the trustee cannot determine the fund's internal income or its value, the internal income is determined according to a formula in the IRC on the valuation tables for annuities.

- Specifies the applicable dates in which those new rules would apply depending on when or whether a payment has been received from a separate fund in relation to the bill's effective date or January 1 of the year the bill takes effect.

- Eliminates the current provision regarding the fiduciary duty of the trustee of a trust that qualifies for an estate tax marital deduction and is the beneficiary of an individual retirement account to withdraw and distribute the income of the account to the settlor's or testator's surviving spouse, and the satisfaction of that duty.

- Clarifies current law regarding the source of payment of income taxes paid by a trustee on the trust's share of an entity's taxable income, from income or principal or proportionately from principal and income depending upon the allocation of the receipts from the entity.

Ohio Transfers to Minors Act (OTMA)

- Generally permits the delay of the time for delivery to the minor of transferred custodial property until a specified time after the minor becomes 21, which time must be specified in the written instrument that provides for the gift or transfer.

- Generally provides that the time for delivery to the minor of custodial property transferred under a will, trust, or irrevocable exercise of a testamentary power of appointment may be delayed only if such instrument provides that the custodianship is until the minor attains a specified age which cannot be later than 25 years.

- Except in regard to the transfer of custodial real property, specifically permits a donor, transferor, trustee, executor, or administrator to designate one or more successor custodians.

- Permits a custodian to designate one or more successor custodians by transferring the custodial property, other than real estate, to self as custodian, followed by the designation of the successor custodian or custodians.

- Provides that the designation by a custodian of a successor custodian of custodial real estate is pursuant to the law on transfer on death of real property.

- Expands current law by providing that if no eligible successor custodian is designated under the OTMA as modified by the bill, the legal representative of a

custodian who is deceased or adjudged to be an incompetent may designate a successor custodian.

- Raises the threshold amount from $10,000 to $25,000 for a transfer to be authorized by a court if a trustee, executor, or administrator makes a transfer of property that is in the minor's best interest and is not prohibited by or inconsistent with the applicable governing instrument.

Sale of estate's real property by guardian

- Expands current law by providing another method for a guardian to sell the estate's real property in which written consents of the ward's spouse and potential heirs to the sale must be filed with the court, the sale price must be at least 80% of the appraised value, and the guardian must give a bond.

Franklin County guardianship program

- Authorizes the Franklin County Probate Court to charge fees for certain services rendered in connection with the establishment and management of adult guardianships.

- Eliminates the authority of the Franklin County Probate Court to appoint the members and director of the Franklin County Guardianship Service Board as guardians and authorizes the Court to appoint the Board itself as guardian.

- Permits the director or designee of the Franklin County Guardianship Service Board to act on behalf of the Board on all guardianship matters, and authorizes the Board to charge a reasonable fee approved by the probate judge for services to wards.

Court and court clerk's computerization fees

- Raises the additional maximum filing fee from $3 to $6 that the following courts may require to computerize the court or make available computerized legal research services: the probate court, domestic relations court, juvenile court, municipal court, county court, and Cuyahoga County Juvenile Court.

- Raises the additional maximum filing fee from $10 to $20 that any of the above courts may require to computerize the office of the clerk of court and to make technological advances in the office.

Transfer of structured settlement payment rights

- Eliminates the current authority of a probate court, and the procedure, to approve an application for the transfer of structured settlement payment rights if the structured settlement agreement was not approved by an Ohio court.

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CONTENT AND OPERATION

Overview of the bill

The bill makes changes to the Probate Law, the Uniform Simultaneous Death Act and related provisions in the law on intestate succession, the Ohio Trust Code, the Uniform Principal and Income Act, the Ohio Transfers to Minors Act, and the law regarding a guardian's sale of the estate's real property.

Probate Law

Wills

The bill modifies current law permitting a will to be deposited by the testator or some person for the testator in the office of the judge of the probate court in the county in which the testator lives by specifying that the deposit may be made before or after the testator's death and if after the testator's death, with or without applying for its probate. It increases the fee for the deposit of the will from $5 to $25, and specifies that the fee is to be paid to the court, instead of the "judge" under current law. Under continuing law, generally, a deposited will is delivered, during the testator's lifetime, only to the testator or a person authorized by the testator, and after the testator's death, to the person named in the indorsement on the envelope of the will. Under the bill, if the will is not so delivered or disposed within 100 years after the date of the will's deposit, the judge may dispose of the will in any manner the judge considers feasible. The judge must retain an electronic copy of the will prior to its disposal after 100 years. Subject to continuing law below, the deposited will is not a public record until the time an application is filed to probate it. Continuing law provides that if no person named in the indorsement demands the will and it is not one that has been declared valid pursuant to law, it must be publicly opened in the probate court within one month after notice of the testator's death and retained in the judge's office until offered for probate.[1]

The bill provides that property devised or bequeathed to a beneficiary named in a will who knows of the will's existence for one year after the testator's death and has the power to control it and, without reasonable cause, intentionally conceals or withholds it or neglects or refuses within that one year to cause it to be offered for or admitted to probate, passes as if the beneficiary had predeceased the testator. Under

[1] R.C. 2101.16(A)(26), 2107.07, and 2107.08, which is not in the bill.

current law, such property descends to the heirs of the testator, not including any heir who has concealed or withheld the will.[2]

Apportionment of estate tax

The bill provides that a provision in a will or other governing instrument that apportions tax to an interest that is otherwise allowable as an estate tax marital or charitable deduction is ineffective unless it refers to the marital or charitable deduction and expressly and unambiguously acknowledges and accepts any resultant partial loss of the deduction.[3] Under current law, generally, a tax cannot be apportioned against an interest that is allowable as an estate tax marital or charitable deduction.[4]

Selection of automobile by surviving spouse

The bill modifies the number of automobiles that may be selected by a surviving spouse upon the death of the other spouse who owned at least one automobile at the time of death, from a maximum of two automobiles to "one or more" automobiles. This change is subject to continuing law which provides that the interest of the deceased spouse in the automobiles that may be selected by the surviving spouse must not have been transferred to the surviving spouse due to joint ownership with right of survivorship, not transferred to a transfer-on-death beneficiary or beneficiaries, and not otherwise specifically disposed of by testamentary disposition.[5]

An affidavit of the surviving spouse with the title or titles of the selected automobiles must be submitted to the clerk of courts who then must transfer to the surviving spouse the decedent's interest in "one or more" automobiles under the bill, rather than "one or two" automobiles under current law.[6]

Under the bill, if the surviving spouse selected more than one automobile, the following apply:[7]

- The allowance for support, which is $40,000 under continuing law, must be reduced by the value of the automobile having the "lowest value."

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[2] R.C. 2107.10(A).

[3] R.C. 2113.86(C)(3).

[4] R.C. 2113.86(C)(1).

[5] R.C. 2106.18(A).

[6] R.C. 4505.10(B).

[7] R.C. 2106.13(A) and (C).

- The probate court, in considering the needs of the surviving spouse and the minor children when allocating an allowance for support must consider the benefit derived by the surviving spouse from the transfer of the automobile having the "lowest value."

Under current law, if the surviving spouse selected the maximum of two automobiles, the allowance for support is reduced by the value of, and the probate court in considering the needs described in the second dot point above must consider the benefit derived from the transfer of, the automobile having the lower value.[8]

Total value of automobiles selected

The bill increases the maximum total value of the automobiles that may be selected by the surviving spouse from $40,000 to $65,000.[9]

Uniform Simultaneous Death Act (USDA)

The bill provides that R.C. 2105.31 to 2105.40, described below, may be cited as the Uniform Simultaneous Death Act. It states that those sections must be applied and construed to effectuate their general purpose to make uniform the law with respect to their subject among the states enacting the law.[10]

Requirement of survival by 120 hours under Probate Code

The bill provides that, except as described below, if title to property, the devolution of property, the right to elect an interest in property, or the right to exempt property, homestead, or allowance for support depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by 120 hours is deemed to have predeceased the other individual.[11]

Under current law, except as described below, a person who is not established by clear and convincing evidence to have survived another specified person by 120 hours is deemed to have predeceased the other person for the following purposes:[12]

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[8] R.C. 2106.13(A) and (C).

[9] R.C. 2106.18(A).

[10] R.C. 2105.39 and 2105.40.

[11] R.C. 2105.32(A).

[12] R.C. 2105.32(A)(1) to (4).

- When the title to or the devolution of real or personal property depends upon a person's survivorship of the death of another person;

- When any of the following depends upon a person's survivorship of the death of another person: (1) the right to elect an interest in or exempt a surviving spouse's share of an intestate estate, (2) the right to elect an interest in or exempt an interest of the decedent in the mansion house, or (3) the right to elect an interest in or exempt an allowance for support.

The bill retains current law providing that the above requirement for survival does not apply if its application would result in a taking of an intestate estate by the state.[13]

Requirement of survival by 120 hours under governing instruments

The bill substantially retains current law by providing that, except as described below, an individual who is not established by clear and convincing evidence to have survived an event by 120 hours is deemed to have predeceased the event for purposes of a provision of a governing instrument that relates to the individual surviving an event, including the death of another individual. The bill eliminates the current definition of "event" as including the death of another person.[14]

Requirement of survival by 120 hours of co-owners with right of survivorship

The bill provides that, except as described below, the following apply:[15]

- If it is not established by clear and convincing evidence that one of two "co-owners with right of survivorship" (see "**Definitions**") survived the other co-owner by 120 hours, one-half of the property or account passes as if one co-owner had survived the other co-owner by 120 hours, and one-half of the property or account passes as if the other co-owner had survived the one co-owner by 120 hours.

- If there are more than two co-owners with right of survivorship and it is not established by clear and convincing evidence that at least one of the co-owners survived the others by 120 hours, the property or account passes in the proportion that one co-owner's ownership bears to the ownership of the whole number of co-owners.

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[13] R.C. 2105.32(B).

[14] R.C. 2105.31(D) and 2105.33.

[15] R.C. 2105.34.

Under current law, except as described below, the following apply:[16]

- If it is not established by clear and convincing evidence that one of two "co-owners with right of survivorship" in specified real or personal property survived the other co-owner by 120 hours, that property must pass as if each person had survived the other person by 120 hours.

- If there are more than two co-owners with right of survivorship in specified real or personal property and it is not established by clear and convincing evidence that at least one of the co-owners survived the others by 120 hours, that property must pass in the proportion that each person owns.

Exceptions to the requirement of survival by 120 hours

Under current law, a person who is not established by clear and convincing evidence to have survived another specified person by 120 hours is not deemed to have predeceased the other person if any of specified conditions apply. The bill specifies that survival by 120 hours is not required if any of the following conditions under current law as modified or retained by the bill applies:[17]

(1) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster, and that language is operable under the facts of the case, instead of under the situation in question in current law.

(2) The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period, or expressly requires the individual to survive the event for a specified period, but the survival of the event for the specified period must be established by clear and convincing evidence. The bill removes the reference in current law to the survival of an event for a specified period "in order for any right or interest governed by the instrument to properly vest or transfer."

(3) As in current law, with nonsubstantive changes, the imposition of a 120-hour requirement of survival would cause a nonvested property interest or a power of appointment to be invalid under R.C. 2131.08 (rule against perpetuities) but the survival must be established by clear and convincing evidence.

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[16] R.C. 2105.34.

[17] R.C. 2105.36.

(4) As in current law, with nonsubstantive changes, the application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition, but the survival must be established by clear and convincing evidence.

Evidence of death or status

Under the bill, in addition to any provisions of the Rules of Evidence, the following provisions relating to the determination of death and status apply:[18]

- An individual is dead if the individual has sustained irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the brain, including the brain stem, as determined in accordance with accepted medical standards. If the respiratory and circulatory functions of an individual are being artificially sustained, under accepted medical standards a determination that death has occurred is made by a physician by observing and conducting a test to determine that the irreversible cessation of all functions of the brain has occurred.

- A physician who makes a determination of death in accordance with the above provision and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for the physician's acts or the acts of others based on that determination.

- Any person who acts in good faith and relies on a determination of death made by a physician in accordance with the bill and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for the person's actions.

Under current law, a person is dead if the person has been determined to be dead pursuant to standards established under R.C. 2108.40 (definition of death under the Anatomical Gift Act). Instead of cross-referencing that section, the bill specifies its provisions as described above.

The bill essentially retains the other provisions of current law relating to the determination of death or status of an individual, instead of "person" under current law.[19] It eliminates the provision that the determination of death or status in current law is in addition to any other provision of the Revised Code or the Rules of Criminal

[18] R.C. 2105.35(A).

[19] R.C. 2105.35(B) to (G).

Procedure pertaining to the determination of a person's death and status, and retains the applicability of the Rules of Evidence regarding such determination.[20]

Nonliability or liability of payor or other third party

The bill expands current provisions specifying the instances of a payor's or other third party's liability or nonliability for a payment made or an item of property or other benefit transferred under the USDA as follows:[21]

- A person who purchases property for value or receives a payment or other item of property or benefit in partial or full satisfaction of a legally enforceable obligation, and without notice that the person selling or transferring the property or benefit or making a payment is not entitled to the property or benefit under the USDA, is neither obligated to return the payment, property, or benefit nor liable for the amount of the payment or the value of the property or benefit.

- A person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under the USDA is obligated to return the payment, property, or benefit, or is personally liable for the amount of the payment or the value of the property or benefit, to the person entitled to it under the USDA.

- If any provision of the USDA is preempted by federal law with respect to a payment, an item of property, or other benefit covered by the USDA, a person who, not for value, receives the payment, property, or other benefit to which the person is not entitled is obligated to return the payment, property, or benefit, or is personally liable for the amount of the payment or the value of the property or benefit, to the person who would have been entitled to it were the provision not preempted.

The bill retains, with technical and nonsubstantive changes, the existing provisions specifying the instances in which a payor or other third party is either not liable or liable for a payment made or an item of property or other benefit transferred under the USDA.[22]

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[20] R.C. 2105.35 and 2105.35(H).

[21] R.C. 2105.37(D), (E), and (F).

[22] R.C. 2105.37(A), (B), and (C).

Applicability

The bill provides that it does not impair any act done in any proceeding, or any right that accrued, before its effective date. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run, prior to the bill's effective date, under any provision of the Revised Code, that applicable provision applies with respect to that right. Any rule of construction regarding any provision of a governing instrument that is provided in the USDA applies to any governing instrument that is executed prior to the bill's effective date, unless there is a clear indication of a contrary intent in the governing instrument. The bill eliminates the applicability of the preceding sentence to a "multiple party account" under current law. It also eliminates the specific severability provision as applied in the current USDA.[23]

Definitions

The bill modifies the definitions of the following terms in the USDA:[24]

"Co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of property or accounts held under circumstances that entitle one or more individuals to the whole of the property or account on the death of the other individual or individuals. It eliminates from the current definition the specific references to "real or personal" property and to "insurance or other policies, or bank, savings bank, credit union, or other" accounts, and changes "persons" to "individuals."

"Governing instrument" means a deed, will, trust, insurance or annuity policy, account with a transfer-on-death designation or the abbreviation TOD, account with a payable-on-death designation or the abbreviation POD, transfer-on-death designation affidavit (added by the bill), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

"Payor" means a trustee, insurer, business entity, employer, government, governmental agency, political subdivision or instrumentality, or any other person authorized or obligated by law or a governing instrument to make payments or transfers. Current law does not specify "government" or "instrumentality" in the above definition.

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[23] R.C. 2105.38.

[24] R.C. 2105.31.

The bill eliminates the current definition of "event," which includes the death of another person. However, in the operative provisions in the bill that refer to an event as described above, the provision adds "including the death of an individual."

Intestate succession

Construction of living and died in intestacy

The bill provides that in the law on descent and distribution, when a person is described as living, it means that the person was living at the time of the death of the intestate from whom the estate came and that the person lived for at least 120 hours following the intestate's death, and when a person is described as having died, it means that the person died before such intestate or that the person failed to live for at least 120 hours following the intestate's death. Under current law, when a person is described as living, it means that the person was living at the time of the death of the intestate from whom the estate came, and when a person is described as having died, it means that the person died before such intestate.[25]

Inheritance rights of posthumous child

The bill provides that no descendant of an intestate inherits under the law on descent and distribution unless surviving the intestate for at least 120 hours, or unless born within 300 days after the intestate's death and living for at least 120 hours after birth. Under current law, descendants of an intestate begotten before the intestate's death, but born after the intestate's death, in all cases will inherit as if born in the intestate's lifetime and surviving the intestate, but in no other case can a person inherit unless living at the time of the intestate's death.[26]

Ohio Trust Code

Agreement among interested parties regarding trust matters

The bill provides that the requirements under the Trust Code for certain interested parties to enter into private settlement agreements regarding trust matters generally do not apply to agreements amending the governing instrument of charitable remainder trusts that require the approval of the Attorney General under continuing law on charitable trusts. This exclusion from the Trust Code requirements expands current law's general exclusions of charitable trusts that have charitable organizations as qualified beneficiaries or the terms of which authorize the trustee to distribute trust

[25] R.C. 2105.02.

[26] R.C. 2105.14.

income or principal to charitable organizations or for one or more charitable purposes if certain conditions apply.[27]

Commencement of litigation on inter vivos trusts

The bill specifies that an action brought under the Trust Code is a civil action that is subject to the Rules of Civil Procedure and is commenced by filing a complaint unless it involves a testamentary trust or other trust that already is subject to court supervision.[28]

Holder of limited power of appointment represent persons subject to power

The bill provides that to the extent there is no conflict of interest between the holder of a limited testamentary power of appointment or a presently exercisable limited power of appointment and the persons represented with respect to the particular question or dispute, the holder may also represent and bind persons whose interests as possible appointees are subject to the power. This provision expands current law which grants a similar representation to a holder of a general testamentary power of appointment.[29]

Creation by an agent of a trust for the principal

The bill authorizes an agent under a power of attorney to create a trust for the principal, whether or not the principal has capacity to create the trust and indicates an intention to create the trust, but only as provided in the Uniform Power of Attorney Act, including specific provisions in the Act providing limitations on creation of trusts and on gifts of property of the principal and the duty of the agent to attempt to preserve the principal's estate plan.[30] This provision is an exception to current law which requires that the settlor of a trust, other than the settlor of a trust created by a court order, must have capacity to create a trust and indicate an intention to create the trust.[31]

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[27] R.C. 5801.10(M)(3) and R.C. 109.232, which is not in the bill.

[28] R.C. 5802.04.

[29] R.C. 5803.02.

[30] R.C. 5804.02(F).

[31] R.C. 5804.02(A)(1) and (2).

Uniform Principal and Income Act (UPIA)

Deferred compensation, annuities, and similar payments from a separate fund

Current law provides that if, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a "payment" to income than is provided for by continuing law, the trustee must allocate to income the additional amount necessary to obtain the marital deduction. "Payment" is a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments, and includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including "a private or commercial annuity, an individual retirement account, or a pension, profit-sharing, stock-bonus, or stock-ownership plan." For purposes of the bill's provisions described below, the bill modifies the definition of "payment" to also include any payment made from any separate fund "regardless of the reason for the payment," and defines "separate fund" as including the above described annuity, account, or plan.[32]

The bill replaces the current law regarding the allocation of a payment to obtain an estate tax marital deduction for a trust with the following rules that generally apply in determining the allocation of a payment made from a "separate fund" to either a trust for which an election to qualify for a marital deduction under Internal Revenue Code (IRC) section 2056(b)(7) has been made (election with respect to life estate for surviving spouse) or a trust that qualifies for the marital deduction under IRC section 2056(b)(5) (life estate with power of appointment in the surviving spouse):[33]

- A trustee must determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to the UPIA. Upon the surviving spouse's request, the trustee must demand that the person administering the separate fund distribute the internal income to the trust. The trustee must then allocate a payment from the separate fund to income to the extent of the fund's internal income and distribute that amount to the surviving spouse. The trustee must allocate the balance of the payment to principal. Upon the surviving spouse's request, the trustee must allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

[32] R.C. 5812.32(A) and (D).

[33] R.C. 5812.32(D), (F), and (G).

- If a trustee cannot determine the internal income of a separate fund but can determine its value, the internal income of the separate fund is deemed to equal 4% of the fund's value according to the most recent statement of value preceding the beginning of the accounting period.

- If the trustee can determine neither the separate fund's internal income nor its value, the internal income is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under IRC section 7520 (valuation tables for annuities, any interest for life or a term of years, or any remainder or reversionary interest) for the month preceding the accounting period for which the computation is made.

The above rules do not apply if and to the extent that the series of payments would, without their application, qualify for the marital deduction under IRC section 2056(b)(7)(C) (survivor annuities where only the surviving spouse has the right to receive payments before the death of such surviving spouse).[34] The bill retains current law pertaining to the allocation to income or principal of a payment characterized as interest, a dividend, or a payment in lieu of interest or a dividend.[35]

Applicability

The bill's new rules above apply to the applicable trust on and after any of the following dates:[36]

- If the trust has not received a payment from a separate fund on the bill's effective date, the date of the decedent's death;

- If the trust receives the first payment from any and all separate funds payable to the trust in the calendar year beginning January 1 of the year in which the bill takes effect, the date of the decedent's death;

- If the trust is not as described above, January 1 of the year in which the bill takes effect.

For purposes of the above provisions, "decedent" means the individual by reason of whose death the trust may receive a payment from the separate fund.[37]

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[34] R.C. 5812.32(E).

[35] R.C. 5812.32(B) and (C).

[36] R.C. 5812.32(I)(1).

The bill retains the current provision that the allocation provisions, as modified by the bill, do not apply to a payment from a "liquidating asset" (an asset whose value will diminish or terminate because the asset is expected to produce receipts for a limited duration) to which R.C. 5812.33 applies (trustee allocates to income 10% of the receipts from a liquidating asset and the balance to principal).[38]

Distribution of income of retirement account

The bill repeals a provision in current law that specifies that the trustee of a trust that qualifies for a federal or Ohio estate tax marital deduction and is the beneficiary of an individual retirement account has a fiduciary duty, in regard to the income distribution provision of the trust, to withdraw and distribute the account's income, at least annually, to the surviving spouse of the testator or other settlor. Additionally, the bill repeals a provision that specifies that the trustee's fiduciary duty is satisfied if the terms of the trust expressly provide the surviving spouse a right to withdraw all of the assets from the trust or to compel the trustee to withdraw and distribute the income of the individual retirement account to the surviving spouse.[39]

Source of payment of income taxes

The bill clarifies current law by providing that a tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid as follows:[40]

- From income, to the extent the receipts from the entity are allocated "only" to income;
- From principal, to the extent that the receipts are allocated "only" to principal;
- Proportionately from principal and income, to the extent that the receipts are allocated to both income and principal;
- From principal, to the extent that the tax exceeds the total receipts from the entity.

Current law provides that the tax must be paid proportionately from income, to the extent that the receipts are allocated to income, and from principal, to the extent that

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[37] R.C. 5812.32(I)(2).

[38] R.C. 5812.32(H).

[39] R.C. 5815.23(C).

[40] R.C. 5812.46(C).

the receipts are allocated to principal and to the extent that the trust's share of the entity's taxable income exceeds the total receipts described in this sentence.[41]

After applying the provisions of continuing law regarding the tax to be paid based on receipts allocated to income or principal and the above provisions of the bill, the trustee must adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary. Current law provides that receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.[42]

Title of UPIA

The bill changes the citation to R.C. 5812.01 to 5812.52 by eliminating the year (1997) after Uniform Principal and Income Act.[43]

Ohio Transfers to Minors Act (OTMA)

Delayed distribution of custodial property

The Ohio Transfers to Minors Act (OTMA) permits a person who is at least 18 years of age to make a gift or transfer of any property to, designate as beneficiary of a life or endowment insurance policy, annuity contract, or benefit plan, or make a transfer by the irrevocable exercise of a power of appointment in favor of, a person who is a minor on the date of the gift or transfer. Under current law, a minor is an individual who has not attained 21 years of age.[44]

The bill generally permits the delay of the time for delivery to the minor of transferred custodial property until a specified time after the minor attains the age of 21, which time must be specified in the written instrument that makes or provides for the gift or transfer. The time for delivery to the minor of custodial property transferred under a will, trust instrument, or irrevocable exercise of a testamentary power of appointment may be delayed only if the governing will, trust, or exercise of the power of appointment provides in substance that the custodianship is to continue until the minor attains a specified age, which cannot be later than the date the minor attains the

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[41] R.C. 5812.46(C).

[42] R.C. 5812.46(D).

[43] R.C. 5812.51. The elimination of the year "1997" is due to the bill's changes which are in accord with the amendments to the Uniform Principal and Income Act adopted in 2008, by the National Conference of Commissioners on Uniform State Laws.

[44] R.C. 5814.01(K) and 5814.02(A).

age of 25. If the custodial property is transferred by inter vivos gift and the time for delivery of the property to the minor is delayed beyond the time the minor becomes 21, the custodian nevertheless must deliver the property to the minor upon the minor's written request within 60 days of attaining the age of 21, unless the donor or transferor, in the written instrument of gift or transfer provides that the property may not be delivered to the minor prior to attaining the specified age of delivery, which cannot be later than the date the minor becomes 25. If the time for delivery to the minor of custodial property is delayed until a specified time after the minor becomes 21 and the minor dies prior to attaining that age, the custodian, upon the minor's death, must deliver the property to the minor's estate.[45]

To specify a delayed time for delivery to the minor of the custodial property, the words "as custodian for ..... (name of minor) until age ..... (age of delivery of property to minor) under the Ohio Transfers to Minors Act," must be substituted in substance for the words "as custodian for ..... (name of minor) under the Ohio Transfers to Minors Act."[46]

The bill expands the definition of "minor," when used with reference to the beneficiary of custodial property, to mean an individual who has not attained the age at which the custodian is required under the above provisions to transfer the property to the beneficiary.[47]

The bill prohibits a custodian from comingling the assets of custodial property that have different delivery dates.[48]

Technical changes

The current provisions of R.C. 5814.09, which deal with the applicability and construction of the OTMA, are relocated without any substantive changes to new R.C. 5814.10. The above provisions on the delayed distribution of custodial property are located in re-enacted R.C. 5814.09. The bill makes conforming changes in other sections.[49]

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[45] R.C. 5814.09(A), (C), (D), and (E).

[46] R.C. 5814.09(B).

[47] R.C. 5814.01(K)(2).

[48] R.C. 5814.09(F).

[49] R.C. 2109.62, 2111.131, 5814.01 to 5814.08, 5814.10, and 5808.16.

Designation of successor custodian

The bill provides that, except with respect to real property, a donor or transferor who makes a gift or transfer to a minor and a trustee, executor, or administrator, acting under continuing law, may also designate one or more successor custodians by adding to such designation the following words or words of similar import for the successor or successors designated:[50]

> In the event of the death or inability or unwillingness to serve of ..... (name of custodian), or any successor custodian designated hereby, ... (name of first successor custodian), followed by ..... (name of second successor custodian), in the order named, shall serve as successor custodian.

A custodian may designate one or more successor custodians by transferring the custodial property, other than real estate, in the manner and form under continuing law, to self as custodian, followed by the designation of the successor custodian or custodians in the form described above. A custodian may designate one or more successor custodians of real property by designating the successor in the manner and form provided in the law pertaining to transfer on death of real property. A designation of a successor custodian or custodians by the custodian replaces any previous designation of successor custodians by the donor, transferor, or previous custodian.[51]

If one or more successor custodians have been designated by the donor, transferor, trustee, executor, or administrator or by the custodian, as described above, each registration of a security or each account, life or endowment insurance policy, annuity contract, benefit plan, or title to real estate that is custodial property in the name of the custodian must include such designation of successor custodian or custodians.[52]

Continuing law permits a custodian to designate by the custodian's will a successor custodian, which designation is effective at the custodian's death.[53]

Under the bill, if no eligible successor custodian is designated by the donor, transferor, trustee, executor, or administrator or in the donor's or transferor's will or

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[50] R.C. 5814.02(F).

[51] R.C. 5814.07(E).

[52] R.C. 5814.04(G).

[53] R.C. 5814.07(D).

trust, by the custodian in the custodian's will, or by transfer by the custodian to self, pursuant to the above provisions, the legal representative of a custodian who is deceased or is adjudged to be an incompetent by a court may designate a successor custodian.[54] Current law provides that if no eligible successor custodian is designated by the donor or transferor or in the donor's or transferor's will or trust, or by the custodian in the custodian's will, or if the custodian dies intestate or is adjudged to be an incompetent by a court, the legal representative of the custodian may designate a successor custodian.[55]

The bill expands current law by providing if a person or entity designated as successor custodian renounces or dies before the minor attains the age at which the custodian is required to deliver the custodial property to the minor (see "**Delayed distribution of custodial property**," above), the minor's guardian is the successor custodian. Current law provides that if a person or entity designated as successor custodian is not eligible, or renounces or dies before the minor attains the age of 21 years, or if the custodian dies without designating a successor custodian and the custodian does not have a legal representative, the minor's guardian becomes the successor custodian.[56]

Court approval of custodianship

Under current law, if there is no will, or if a will, trust, or other governing instrument does not contain an authorization to make a transfer of custodial property, a trustee, executor, or administrator may make a transfer to self, another person who is 18 years or older, or a trust company, as custodian, if irrespective of the value of the property, the trustee, executor, or administrator considers the transfer to be in the minor's best interest, the transfer is not prohibited by or inconsistent with the applicable governing instrument, and if the value of the property exceeds $10,000, the transfer is authorized by the appropriate court. The bill raises the amount of the value of the property to over $25,000 to require the transfer to be authorized by the appropriate court.[57]

Sale of estate's real property by guardian

The bill provides that in addition to the other methods provided by law, a guardian of the estate may sell at public or private sale, grant options to sell, exchange,

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[54] R.C. 5814.07(F).

[55] Existing R.C. 5814.07(E).

[56] R.C. 5814.07(G).

[57] R.C. 5814.02(E).

re-exchange, or otherwise dispose of any real estate parcel belonging to the estate at any time, at prices, and upon terms consistent with the bill, and may execute and deliver deeds and other instruments of conveyance if all of the following conditions are met:[58]

- The ward's spouse and all persons entitled to the next estate of inheritance from the ward in the real property give written consent, which must be filed in the probate court, to a power of sale for a particular parcel or for all the real estate belonging to the estate.

- The sale must be made at a price of at least 80% of the appraised value, as set forth in an approved inventory, if the real estate was appraised within two years prior to the filing of the consents. If the value of the real estate was not determined by an appraisement, or the appraisement was completed more than two years prior to the filing of the consents, the real estate must be appraised and a sale must be made at a price of at least 80% of the appraised value.

- No power of sale is effective if the ward's spouse or any next of kin is a minor, and no person may give the consent of the minor.

- Upon filing the consents, the guardian must execute such bond or additional bond payable to the state in an amount the court considers sufficient, having regard to the amount of real property to be sold, its appraised value, the amount of the original bond given by the guardian, and the distribution to be made of the sale proceeds.

The bill also authorizes a ward's spouse who is the guardian of the estate to sell real estate to self under the same conditions as above.[59]

Continuing law provides the method in which a guardian may sell a ward's real estate, that is, by filing a complaint with the probate court to obtain authority to sell real property. The complaint must contain a description of the real property proposed to be sold and its value, a statement of the nature of the interest of the ward in the real property, a recital of all mortgages and liens upon and adverse interests in the real property, the facts showing the reason or necessity for the sale, and any additional facts necessary to constitute the cause of action under the statute on which the action is predicated.[60]

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[58] R.C. 2127.012(A).

[59] R.C. 2127.012(B).

[60] R.C. 2127.10, which is not in the bill.

Franklin County guardianship program

Fees for guardianship services

The bill authorizes the Franklin County Probate Court to charge fees for certain services rendered to individuals, corporations, agencies, or organizations, including the Board of Alcohol, Drug Addiction, and Mental Health Services of Franklin County or the Franklin County Board of Developmental Disabilities. These services are to help ensure the treatment of persons under the care of those Boards or any other guardianships and include involuntary commitment proceedings and the establishment and management of adult guardianships. The fees are to be paid into the Franklin County treasury to the credit of the Franklin County Probate Court Mental Health Fund.[61]

Franklin County Guardianship Service Board

The bill eliminates the authority of the Franklin County Probate Court under current law to appoint the members and director of the Franklin County Guardianship Service Board as guardians of the person and estate of wards, and authorizes the Court to appoint the Franklin County Guardianship Service Board as guardian. Because the bill eliminates the ability of the Court to appoint the director of the Franklin County Guardianship Service Board as guardian, the bill also eliminates the current provision dealing with the replacement of a former director of the Board serving as guardian with a new director without having a successor guardianship hearing if the wards are the same. The bill permits the director or any designee of the Board to act on behalf of the Board on all guardianship matters. It authorizes the Board to charge a reasonable fee for services provided to wards and requires the fees to be approved by the probate judge.[62]

Court and court clerk's computerization fees

The bill raises the additional maximum filing fee for each cause or appeal from the current $3 to $6 that the following courts may require to computerize the court or make available computerized legal research services for the court's efficient operation: the probate court, domestic relations court, juvenile court, municipal court, county court, and Cuyahoga County Juvenile Court. It raises the additional maximum filing fee for each cause or appeal from $10 to $20 that any of those courts may require to

[61] R.C. 2101.026(A) and (B).

[62] R.C. 2101.026(E)(3) to (5).

computerize the office of the clerk of court and, additionally under the bill, to make technological advances.[63]

Under continuing law, not affected by the bill, the additional maximum filing fee for each cause or appeal that the court of common pleas may require to computerize the court or make available computerized legal research services is $6 and the additional maximum fee to computerize and make technological advances in the office of the clerk of court is $20.[64]

Transfer of structured settlement payment rights

Continuing law requires that a person file an application for the approval in advance of a transfer of structured settlement payment rights in the Ohio court that approved the structured settlement agreement. A structured settlement is an arrangement for periodic payments of damages for injury to a person that is established by a settlement or a court judgment in resolution of a tort claim.[65]

Out-of-state structured settlement agreements

The bill eliminates the current provision that if the structured settlement agreement was not approved by an Ohio court, a person must file an application for the approval in advance of a transfer of structured settlement payment rights in the probate division of the court of common pleas of the county in which the payee, the structured settlement obligor, or the annuity issuer resides.[66] It also eliminates the references in the procedure for such application to "responsible administrative authority," and removes its definition under current law as any government authority of another state vested by that state's law with the original exclusive jurisdiction over the settled claim resolved by a structured settlement.[67]

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[63] R.C. 1901.261, 1907.261, 2101.162, 2151.541, 2153.081, and 2301.031.

[64] R.C. 2303.201, which is not in the bill. The optional maximum computerization fees for the court of common pleas and for the office of the clerk in R.C. 2303.021 were increased from $3 to $6 and $10 to $20, respectively, in Am. Sub. H.B. 197 of the 129th General Assembly. The provisions pertaining to those fees in the probate, domestic relations, and juvenile courts and divisions, and Cuyahoga County Juvenile Court are found in sections separate from R.C. 2303.201, i.e., R.C. 2101.162, 2151.541, 2153.081, and 2301.031. H.B. 97 did not amend those sections to increase the fees. H.B. 197 also did not raise the fees in R.C. 1901.261 and 1907.261 pertaining to the computerization of municipal and county courts and clerk's offices.

[65] R.C. 2323.58(K) and 2323.584(A).

[66] R.C. 2323.584(A).

[67] R.C. 2323.58(J) and (O), 2323.583(D)(2), and 2323.584(B)(2).

In the current definition of "applicable law" in interpreting the terms of a structured settlement, the bill eliminates the laws of any other jurisdiction if: (1) the laws of that other jurisdiction govern the structured settlement, (2) a court or a responsible administrative authority approved the structured settlement agreement under the laws of that other jurisdiction, or (3) the transfer of payments under the structured settlement is subject to the laws of that other jurisdiction. It retains the current definition of "applicable law" as the laws of the United States or the laws of Ohio, including principles of equity applied by Ohio courts.[68]

HISTORY

ACTION	DATE
Introduced	01-26-16
Reported, H. Judiciary	---

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[68] R.C. 2323.58(B).