



*Final Analysis*

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*Legislative Service Commission*

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**Reps. Salerno, Tiberi, Sulzer, O'Brien, DePiero, Boyd, Mottley, Core, Amstutz, Barrett, Sullivan, Verich, Womer Benjamin, Barnes, Jones**

**Sens. Herington, Espy, Latta, Spada, Oelslager, Cupp, White, Gardner**

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**ACT SUMMARY**

- ? Permits the summary release from administration of an estate and the transfer of titled assets of a decedent without appointing a fiduciary when either of the following applies:
  1. A person other than a surviving spouse pays or is obligated in writing to pay the decedent's funeral and burial expenses, and the value of the decedent's estate does not exceed the lesser of \$2,000 or the decedent's funeral and burial expenses.
  2. The decedent's surviving spouse has paid or is obligated in writing to pay the decedent's funeral and burial expenses or those expenses have been prepaid, and the value of the decedent's estate does not exceed the total of the allowance for support to the spouse and the decedent's minor children and an amount not in excess of \$2,000 for the decedent's funeral and burial expenses.
- ? In the Probate Law provision that authorizes a surviving spouse to select up to two of the deceased spouse's automobiles, replaces the requirement that the value of the selected automobiles be the appraised value with a requirement that the value of the selected automobiles be the value specified in the surviving spouse's affidavit submitted to the clerk of the court of common pleas for the purpose of transferring title to the automobiles to the surviving spouse.

- ? Expands the definition of "automobile" in the preceding provision to include a truck that was used as a method of conveyance by the deceased spouse or the deceased spouse's family when the deceased spouse was alive, regardless of whether the deceased spouse owned an automobile.
- ? Extends the statutory exemption to the doctrine of ademption ("a taking away" of a specific bequest during the testator's lifetime that deprives the intended beneficiary of the bequest) in the event of a sale of specifically devised or bequeathed property to include the sale of specifically devised or bequeathed property sold under a power of attorney or under a durable power of attorney.
- ? Provides that the county auditor is not to charge a fee for receiving a statement of value and providing an indorsement of conveyance for a deed in which a grantor is also a grantee.
- ? Permits a bank to enter into a written contract with a natural person for the proceeds of the person's deposits to be payable on the death of that person to another person (not just a natural person), or to any entity or organization in accordance with law.
- ? Permits a natural person to enter into a written contract with any bank, building and loan or savings and loan association, credit union, or society for savings whereby the proceeds of the owner's deposits may be made payable on the death of the owner to any person, and not just to a natural person.
- ? Specifies the circumstances under which a spendthrift provision in a trust that holds property granted to a skip person and qualifying as a nontaxable gift for purposes of the federal generation-skipping transfer tax would or would not cause a forfeiture or postponement of an interest in that property and makes other changes in the Spendthrift Trust Law.
- ? Permits an owner of real property, or of an interest in real property, to execute a "transfer on death" deed that designates a grantee (who may be the grantor property owner) and one or more beneficiaries to take title to the real estate upon the grantee's death, without having to go through probate.
- ? Prescribes the characteristics and ramifications of real property or an interest in real property that is subject to a transfer on death beneficiary designation.

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## CONTENT AND OPERATION

### Summary release from administration

#### Person other than surviving spouse: application for summary release

The act permits any person who is not a surviving spouse of the decedent and has paid or is obligated in writing to pay the decedent's burial and funeral expenses to apply to the probate court for an order granting a summary release from administration if the value of the assets of the decedent's estate does not exceed the lesser of \$2,000 or the amount of the decedent's funeral and burial expenses (R.C. 2113.031(B)(1)).<sup>1</sup> (See "Definitions," below.)

#### Surviving spouse: application for summary release

The act allows the decedent's surviving spouse to apply to the probate court for an order granting a summary release from administration if either of the following apply (R.C. 2113.031(B)(2)):<sup>2</sup>

(1) The decedent's funeral and burial expenses have been prepaid, and the value of the assets of the decedent's estate does not exceed the total of the following items:

(a) The allowance for support that is made to the surviving spouse and, if applicable, to the decedent's minor children and that is distributable to the surviving spouse;

(b) An amount, not exceeding \$2,000, for the decedent's funeral and burial expenses that are included in the funeral director's bill or that are not included in that bill but have been approved by the probate court.

(2) The decedent's funeral and burial expenses have not been prepaid, the decedent's surviving spouse has paid or is obligated in writing to pay the funeral and burial expenses, and the value of the assets of the decedent's estate does not exceed the total of the items referred to in (1)(a) and (b), above.

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<sup>1</sup> The act continues the requirement that the probate court charge and collect a fee of \$60 for relieving an estate from administration under R.C. 2113.03 and additionally requires the probate court to charge and collect a fee of \$60 for granting an order for a summary release from administration (R.C. 2101.16(A)(59)).

<sup>2</sup> See footnote 1 above.

**Requirements for issuance of summary release from administration order**

The act requires the probate court to order a summary release from administration in connection with a decedent's estate only if the court finds that all of the following are satisfied (R.C. 2113.031(C)):<sup>3</sup>

(1) The applicant for the order is not the surviving spouse of the decedent and has paid or is obligated in writing to pay the decedent's funeral and burial expenses, and the value of the assets of the decedent's estate does not exceed the lesser of \$2,000 or the amount of the decedent's funeral and burial expenses, or the applicant is the decedent's surviving spouse, and the circumstances described in (1) and (2) of "Surviving spouse: application for summary release," above, apply.

(2) The application for summary release does all of the following:

(a) Describes all of the assets of the decedent's estate that are known to the applicant;

(b) Is in the form that the Supreme Court prescribes pursuant to its powers of superintendence under Section 5 of Article IV of the Ohio Constitution and is consistent with the requirements of the act;

(c) Has been signed and acknowledged by the applicant in the presence of a notary public or a deputy clerk of the probate court;

(d) Sets forth the following information if the decedent's estate includes a described type of asset:

(i) If the decedent's estate includes a motor vehicle, the motor vehicle's year, make, model, body type, manufacturer's vehicle identification number, certificate of title number, and date of death value;

(ii) If the decedent's estate includes an account maintained by a financial institution, that institution's name and the account's complete identifying number and date of death balance;

(iii) If the decedent's estate includes one or more shares of stock or bonds, the total number of the shares and bonds, their total date of death value, and, for

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<sup>3</sup> *The act expands the probate court's exclusive jurisdiction to include jurisdiction to hear and determine applications for an order granting a summary release from administration under the act's procedures and to hear and determine applications for an order relieving an estate from administration under continuing law (R.C. 2101.24(A)(1)(bb) and (cc)).*

each share or bond, its serial number, the name of its issuer, its date of death value, and, if any, the name and address of its transfer agent.

(3) The application is accompanied by all of the following that apply:

(a) A receipt, contract, or other document that confirms the applicant's payment or obligation to pay the decedent's funeral and burial expenses or, if applicable in the case of the applicant surviving spouse, the prepayment of the decedent's funeral and burial expenses;

(b) An application for a certificate of transfer, if an interest in real property is included in the assets of the decedent's estate;

(c) The fee required by the act (see footnote 1);

(4) At the time of its determination on the application, there are no pending proceedings for the administration of the decedent's estate and no pending proceedings for relief of the decedent's estate from administration.

(5) At the time of its determination on the application, there are no known assets of the decedent's estate other than the assets described in the application.

**Effect of summary release from administration order**

The act provides that if the probate court determines that the requirements listed above are satisfied, the court must issue an order that grants a summary release from administration in connection with the decedent's estate. The order has, and must specify that it has, all of the following effects (R.C. 2113.031(D)):

(1) It relieves the decedent's estate from administration.

(2) It directs the delivery to the applicant of the decedent's personal property together with the title to that property.

(3) It directs the transfer to the applicant of the title to any interests in real property included in the decedent's estate.

(4) It eliminates the duty of all persons to file an estate tax return and certificate in connection with the decedent's estate.<sup>4</sup>

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<sup>4</sup> *The act states that, if a probate court issues an order that grants a summary release from administration in connection with a decedent's estate under the act, that order eliminates the duty of all persons to file with respect to the estate for which the order was granted an estate tax return and a certificate stating that the return was filed, the date of filing, that all estate taxes have been paid, that all inventoried real property is listed in*

(5) It eliminates the need for a financial institution, corporation, or other entity or person to obtain the written consent of the Tax Commissioner prior to the delivery, transfer, or payment to the applicant of an asset of the decedent's estate. (See "Written consent of Tax Commissioner prior to transfer of decedent's assets," below.)

### Definitions

The act defines several terms for use in its summary release provisions as follows (R.C. 2113.031(A)):

(1) "Financial institution" has the same meaning as in the Financial Institutions Taxation Law. R.C. 5725.01, referred to in the act, defines "financial institution" as any of the following (R.C. 5725.01(A)):

(a) A national bank organized and existing as a national bank association pursuant to the "National Bank Act";

(b) A federal savings association or federal savings bank that is chartered under federal law (12 U.S.C. 1464);

(c) A bank, banking association, trust company, savings and loan association, savings bank, or other banking institution that is incorporated or organized under the laws of any state;

(d) Any corporation organized under the federal law governing corporations organized for the purpose of engaging in international or foreign banking or financial operations (12 U.S.C. 611 to 631);

(e) Any agency or branch of a foreign depository as defined in federal law governing foreign banks participating in domestic markets (12 U.S.C. 3101);

(f) A company licensed as a small business investment company under the "Small Business Investment Act of 1958";

(g) A company chartered under the "Farm Credit Act of 1933."

Corporations or institutions organized under the "Federal Farm Loan Act," insurance companies, and *credit unions* are *not* considered financial institutions within the meaning of the Financial Institutions Taxation Law (R.C. 5725.01(A)).

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*the return, and that all real property not inventoried also is listed in the return (R.C. 5731.21(A)(3)).*

However, under the act, "financial institution" also includes a *credit union* and a fiduciary that is not a trust company but that does trust business.

(2) "Funeral and burial expenses" means whichever of the following applies:

(a) The funeral and burial expenses of the decedent that are included in the bill of a funeral director;

(b) The funeral expenses of the decedent that are not included in the bill of a funeral director and that have been approved by the probate court;

(c) The funeral and burial expenses of the decedent that are described in (2)(a) and (b), above.

(3) "Surviving spouse" means either of the following:

(a) The surviving spouse of a decedent who died leaving the surviving spouse and no minor children;

(b) The surviving spouse of a decedent who died leaving the surviving spouse and minor children, all of whom are children of the decedent and the surviving spouse.

**Effect of R.C. 2113.03: Release from administration**

**Continuing law.** An estate may be released from administration under continuing law if either of the following applies (R.C. 2113.03(A)):

(1) The value of the assets of the estate is \$35,000 or less.

(2) The value of the assets of the estate is \$100,000 or less, and either of the following applies:

(a) The decedent devised and bequeathed in a valid will all of the estate assets to a person who is named in the will as the decedent's spouse, and the decedent is survived by that person.

(b) The decedent is survived by a spouse whose marriage to the decedent was solemnized in a manner consistent with the Ohio law governing marriages or with a similar law of another state or nation, the decedent died without a valid will, and the decedent's surviving spouse is entitled to receive all of the estate assets under the Ohio statute of intestate succession or by operation of that statute and the statutory provisions governing the allowance for support.

The probate court, when satisfied that either of the above circumstances is satisfied, may enter an order relieving the estate from administration and directing delivery of personal property and transfer of real estate to the persons entitled to the personal property or real estate. The court may enter this order upon the application of any interested party, after notice of the filing of the application has been given to the surviving spouse and heirs at law in a manner and for the length of time the probate court directs, and after notice to all interested parties by publication in a newspaper of general circulation in the county, unless the notices are waived or found unnecessary. (R.C. 2113.03(B).)

**Operation of the act.** The act provides that the continuing release from administration provisions do not affect the ability of qualified persons to file an application for a summary release from administration under the act or to file an application for the grant of letters testamentary or letters of administration. It also provides that its summary release provisions do not affect the ability of qualified persons to file an application to relieve an estate from administration or an application for the grant of letters testamentary or letters of administration in connection with the decedent's estate. (R.C. 2113.03(E) and 2113.031(F).)

### **Records**

The act requires the probate court to keep a summary release from administration docket. The docket must show the date of the filing of the application for a summary release from administration, the decedent's name, the applicant's name, whether the applicant is the decedent's surviving spouse or a person described in the summary release provisions as qualified to file an application, and a brief note of the grant of the order of summary release from administration and of any other order or proceeding relating to the decedent's estate, with reference to the journal or other record in which the order or proceeding is found. (R.C. 2101.12(L).)

### **Written consent of Tax Commissioner prior to transfer of decedent's assets**

Continuing law generally requires a corporation, safe deposit company, life insurance company, trust company, financial institution, or other person to obtain the written consent of the Tax Commissioner prior to transferring specific assets or portions of an asset of the decedent's estate to any person and prior to permitting specified items to be removed from the decedent's safe deposit box. (R.C. 5731.39, not in the act.)

The act allows a certified copy of an order that grants a summary release from administration together with a certified copy of the application for that order to constitute sufficient authority for a financial institution, corporation, or other

entity or person described in the preceding paragraph or for a clerk of a court of common pleas to transfer title to an asset of the decedent's estate to the applicant for the summary release from administration. (R.C. 2113.031(E).)

### **Election of mansion house**

A surviving spouse may elect under continuing law to receive, as part of the surviving spouse's share of an intestate estate and the allowance for support, the decedent spouse's entire interest in the mansion house. The surviving spouse continues to be allowed to make an election of that nature in an estate relieved from administration under R.C. 2113.03. The act allows the surviving spouse to make an election to receive the entire interest of the decedent spouse in the mansion house in an estate that is subject to an order granting a summary release from administration. The election must be made at the time of or prior to the entry of the order granting a summary release from administration. Either the surviving spouse or the applicant for the order must file the application for the certificate of transfer as to real property included in the estate assets. (R.C. 2106.10(D).)

### **Certificate of transfer**

Under continuing law, when real property passes by the laws of intestate succession or under a will, the administrator or executor must file in probate court, prior to the filing of the administrator's or executor's final account, an application requesting the court to issue a certificate of transfer as to the real property. This requirement does not apply to real property sold by a executor or administrator or to cases in which an order relieving an estate from administration is made and the order may be substituted for the certificate of transfer. (R.C. 2113.61(A).)

The act requires that an application for a certificate of transfer of an interest in real property included in the assets of the decedent's estate accompany an application for a summary release from administration under the act. The act provides that the continuing law dealing with certificates of transfer of real property applies to the application for and the issuance of the requested certificate of transfer except to the extent that the probate court determines that the nature of any of the provisions of the continuing law is inconsistent with the nature of a grant of a summary release from administration. (R.C. 2113.61(A)(2).)

Under continuing law, if an executor or administrator failed to file an application for a certificate of transfer before being discharged, the application may be filed by an heir or devisee, or a successor in interest, in the probate court in which the will was probated or, in the case of an intestate estate, in the probate court in which administration was had. If no administration was had on an estate and if no administration is contemplated, an application for a certificate of transfer may be filed by an heir or devisee, or a successor in interest, in the probate court

of the county in which the decedent was a resident at the time of death. (R.C. 2113.61(D).)

The act provides that if no administration was had on an estate and if no administration is contemplated, *except in the case of the grant of or contemplated application for a grant of an order of a summary release from administration* (added by the act), an application for a certificate of transfer may be filed by an heir or devisee, or a successor in interest, in the probate court of the county in which the decedent was a resident at the time of death (R.C. 2113.61(D)).

### **Estate recovery program**

Continuing law requires the Department of Job and Family Services (to the extent federal law permits) to institute an estate recovery program against the property and estates of medical assistance recipients for the purpose of recovering the cost of services correctly paid under the medical assistance program to a recipient age 55 or older (R.C. 5111.11(B)). The act includes in the definition of "estate" for this provision of law property that would be administered under Title XXI of the Revised Code if not for the relief from administration provisions of section 2113.03 (as in continuing law) or for the act's *summary release provisions* in section 2113.031 (R.C. 5111.11(A)).

### **Right of surviving spouse to automobiles of decedent**

#### **Selection of automobiles**

**Continuing law.** Under continuing law, upon the death of a married resident who owned at least one automobile at the time of death, the surviving spouse may select the interest of the deceased spouse in up to two automobiles that are not transferred to the surviving spouse due to joint ownership with right of survivorship and that are not otherwise specifically disposed of by testamentary disposition. This interest immediately passes to the surviving spouse upon transfer of the title or titles. Under prior law, the sum total of the *appraised* values of the automobiles selected by a surviving spouse must not exceed \$40,000. Each automobile that passes to a surviving spouse is not considered an estate asset and is not to be included and stated in the estate inventory.

As used in the preceding provision in prior law, "automobile" included a truck *if the deceased spouse did not own an automobile* and if the truck was used as a method of conveyance by the deceased spouse or the deceased spouse's family when the deceased spouse was alive. (R.C. 2106.18(A) and (D).)

**Operation of the act.** The act replaces the requirement that the automobiles selected by the surviving spouse be appraised with a requirement that the value of

the automobiles is the value specified in the affidavit that the surviving spouse executes pursuant to section 4505.10(B). Under section 4505.10(B), which is not in the act, the surviving spouse must submit to the clerk of the court of common pleas (for the purpose of having the title to the automobiles transferred to the surviving spouse) the titles to the automobiles and *an affidavit that in addition to other information provides an approximate value for each automobile selected to be transferred to the surviving spouse.* The act expands the definition of automobile that is used for this provision to also include a truck that was used as a method of conveyance by the deceased spouse or the deceased spouse's family when the deceased spouse was alive, regardless of whether the deceased spouse owned an automobile. (R.C. 2106.18(A) and (D).)

### **Effect on allowance for support**

**Continuing law.** If a person dies leaving a surviving spouse and no minor children, leaving a surviving spouse and minor children, or leaving minor children and no surviving spouse, the surviving spouse, minor children, or both are entitled to receive, pursuant to a statutorily defined allocation formula, in money or property the sum of \$40,000 as an allowance for support. Under prior law, if the surviving spouse selected two automobiles from the decedent spouse's estate under the provision of law discussed in "**Selection of automobiles,**" above, the prescribed allowance for support must be reduced by the *appraised* value of the automobile having the lower *appraised* value of the two automobiles so selected. The money or property set off as an allowance are considered estate assets.

If the surviving spouse selected two automobiles from the decedent spouse's estate, the probate court, in considering the respective 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 lower *appraised* value of the two automobiles so selected. (R.C. 2106.13(A) and (C).)

**Operation of the act.** The act replaces the requirement that the value of the automobiles selected by the surviving spouse be the appraised value with a requirement that the value of the automobiles be the value that the surviving spouse specifies for the automobiles in the affidavit executed pursuant to section 4505.10(B). See discussion under "**Operation of the act**" in "**Selection of automobiles,**" above. (R.C. 2106.13(A), (C), and (D).)

## *The doctrine of ademption and Ohio's statutory exemption to the doctrine*

### *Continuing law*

The principle of ademption refers to "a taking away" of a specific bequest or devise and occurs when the object of the legacy ceases to exist. *Bool v. Bool* (1956), 165 Ohio St. 262, 267. In *Bool*, the Ohio Supreme Court held, at paragraph one of the syllabus, that "[w]here the subject of a specific bequest has been extinguished in the lifetime of a testator, such bequest is adeemed, and the designated beneficiary thereof is wholly deprived of it or any property in lieu of it, in the absence of a contrary expression in the will."

R.C. 2107.501(B) sets forth a narrow exception to the ademption doctrine. The section provides, in part:

\* \* \*

(B) If specifically devised or bequeathed property is sold by a guardian, or if a condemnation award or insurance proceeds are paid to a guardian as a result of condemnation, fire, or casualty to the property, the specific devisee or legatee has the right to a general pecuniary devise or bequest equal to the net proceeds of sale, the condemnation award, or the insurance proceeds, and such a devise or bequest shall be treated as property subject to section 2107.54 of the Revised Code. This section does not apply if subsequent to the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year.

\* \* \*

### *Operation of the act*

The act extends the protection of the existing exception to the ademption doctrine to the sale of specifically devised or bequeathed property by an agent acting within the authority of a power of attorney or a durable power of attorney. Therefore, under the act, if an agent acting within the authority of a power of attorney or a durable power of attorney sells specifically devised or bequeathed property, the specific devisee or legatee has the right to a general pecuniary devise or bequest equal to the net proceeds of the sale. Similarly, if an agent acting within the authority of a power of attorney or durable power of attorney receives a condemnation award or insurance proceeds as a result of condemnation, fire, or

casualty to specifically devised or bequeathed property, the specific devisee or legatee has a right to a general pecuniary devise or bequest equal to the condemnation award or insurance proceeds. The above provisions do not apply if, subsequent to the sale, condemnation, *fire*, or casualty, the testator is adjudicated as no longer being under a disability and survives the adjudication by one year. (R.C. 2107.501(B).)

### **County auditor real estate transfer fees**

Continuing law provides, in pertinent part, that the county auditor must charge and receive fees for receiving statements of value and administering section 319.202 of the Revised Code regarding real property conveyance fees and taxes and indorsement of conveyance. The fee for such a transaction is one dollar, or ten cents per hundred dollars for each one hundred dollars, or fraction of one hundred dollars, of the value of real property transferred, whichever is greater. There are 23 exceptions where no fee may be charged when the transfer is made. (R.C. 319.54(F)(3).)

The act expands the exceptions to the fee, providing that no fee may be charged when the transfer is made between persons pursuant to R.C. 5302.18 (a deed in which a grantor is also a grantee is effective to convey the grantor's interest in the title to all of the grantees)--not in the act (R.C. 319.54(F)(3)(x)).

### **"Payment on death" (P.O.D.) account distribution**

Continuing law states that when a deposit is made in the name of two or more persons, payable to either person or the survivor, the bank may pay all of the deposit, any part of the deposit, or any interest earned on the deposit, to either of the named persons, or the guardian of the estate of either of the named persons, whether or not the other person is living. The receipt or acquittance of the person paid is a sufficient release and discharge of the bank for any payments made from the account to that person. A bank may enter into a written contract with a natural person for the proceeds of the person's deposits to be payable on the death of that person to another natural person in accordance with the terms, restrictions, and limitations set forth in R.C. 2131.10 (beneficiaries of P.O.D. accounts) and R.C. 2131.11 (Probate Law provisions regarding beneficiaries of P.O.D. accounts and release and discharge upon payment). (R.C. 1109.07.) Prior law also stated that a natural person, adult or minor, could enter into a written contract with any bank, building and loan or savings and loan association, credit union, or society for savings, authorized to receive money on an investment share certificate, share account, deposit, or stock deposit, and transacting business in this state, whereby the proceeds of the owner's investment share certificate, share account, deposit, or stock deposit could be made payable on the death of the owner to another natural

person or to any entity or organization, notwithstanding any provisions of law to the contrary. (R.C. 2131.10.)

The act permits P.O.D. account proceeds to be paid to any person and not just to a natural person (R.C. 1109.07(B) and R.C. 2131.10). In addition, a minor conflict existed in the prior law. A person could contract to have P.O.D. account proceeds paid to another natural person or to any entity or organization, but a bank could only pay those proceeds to another natural person. The act resolves the conflict by permitting the bank to pay the P.O.D. proceeds to another person or to any entity or organization. (R.C. 1109.07(B).)

### **Spendthrift provisions in inter vivos and testamentary trusts**

#### **Trust benefiting surviving spouse**

The general rule under the prior Spendthrift Trust Law was that a spendthrift provision in an instrument that created an inter vivos or testamentary trust (hereafter "trust") did not cause any forfeiture or postponement of any interest in property (a) that was granted to a surviving spouse of the testator or other settlor and (b) that qualified for the federal estate tax marital deduction allowed by the federal Estate Tax Law or the estate tax marital deduction allowed by the Ohio Estate Tax Law. (R.C. 1339.411(A)(1).) This rule did not apply if the trust instrument expressly stated that the testator's or other settlor's intention that obtaining a marital deduction was less important than enforcing the forfeiture or postponement of the interest in property in accordance with the spendthrift provision in the instrument (R.C. 1339.411(A)(2)). The rule also did not apply (a) to any beneficiary of a trust other than the testator's or other settlor's surviving spouse or (b) to any trust of which the testator's or other settlor's surviving spouse was a beneficiary if an interest in property did not qualify for a marital deduction (R.C. 1339.411(A)(3)).

The act provides that the above-described rule applies only to the forfeiture or postponement portions of a spendthrift provision and *does not apply* to any portion of a spendthrift provision that (a) prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or (b) prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate (R.C. 1339.411, new division (A)(3)).

#### **Trust benefiting skip person**

The act enacts a comparable rule, as described above, with respect to a spendthrift provision in a trust benefiting a skip person under the federal generation-skipping transfer tax laws. Under the act, a spendthrift provision in an instrument that creates an inter vivos or testamentary trust will not cause any

forfeiture or postponement of any interest in property that satisfies both of the following (R.C. 1339.411(C)(1)(a) and (b)):

(1) It is granted to a person who is a skip person under the federal Generation-Skipping Transfer (GST) Tax Law.

(2) It qualifies as a nontaxable gift under the federal GST Tax Law.

The act provides that this rule does not apply if an instrument that creates an inter vivos or testamentary trust expressly states the testator's or other settlor's intention that qualifying as a nontaxable trust gift under the federal GST Tax Law is *less important* than enforcing the forfeiture or postponement of the interest in property in accordance with the spendthrift provision in the instrument. The act also provides that the rule applies only to the forfeiture or postponement portions of a spendthrift provision and *does not apply to any portion of a spendthrift provision* that (a) prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or (b) prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate. (R.C. 1339.411(C)(2) and (3).)

#### **Trust holding shares in S corporation**

Under continuing law, except as mentioned below, if an instrument creating an inter vivos or testamentary trust includes a spendthrift provision and the trust holds shares in an S corporation (defined, by reference to 26 U.S.C. 1361, to mean a small business corporation that, with respect to any taxable year, has elected in a specified manner to be an S corporation and for which an election of that nature is in effect), the spendthrift provision will not cause any forfeiture or postponement of any beneficial interest, income, principal, or other interest in those shares. This rule does not apply if the instrument creating the trust expressly states the testator's or other settlor's intention that maintenance of the corporation's status as an S corporation is less important than enforcing the forfeiture or postponement of any beneficial interest, income, principal, or other interest in the S corporation shares in accordance with the spendthrift provision in the instrument. The rule applies only to the forfeiture or postponement portions of a spendthrift provision and does not apply to any portion of a spendthrift provision that (a) prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or (b) prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate. (R.C. 1339.411(B)(1), (2), and (3).) The act does *not* modify any of these provisions in continuing law, but it makes some changes in the applicability of those provisions to certain preexisting trust instruments, as described below in "**Intent**."

### Intent

Prior law provided that the provisions described above in "Trust holding shares in S corporation" were intended to codify certain fiduciary and trust law principles relating to the interpretation of a testator's or other settlor's intent with respect to the provisions of a trust. Those above-described provisions applied to trust instruments executed prior to and existing on the effective date of the law adding those provisions (Sub. H.B. 391 of the 121st General Assembly, effective October 1, 1996), *unless the trustee of a trust of that nature, in a written trust amendment, elects to do otherwise. Any election of that nature, when made, was irrevocable.* (R.C. 1339.411(B)(4).)

The act provides that the provisions described above in "Trust benefiting surviving spouse" and "Trust benefiting skip person," in addition to the provisions described above in "Trust holding shares in S corporation," are intended to codify certain fiduciary and trust law principles relating to the interpretation of a testator's or other settlor's intent with respect to the provisions of a trust. Under the act, *all* of those above-described provisions apply to trust instruments executed prior to and existing on the effective date of the act and to trust instruments executed on or after the effective date of the act. The act deletes the provision in prior law that, *unless the trustee of a trust of that nature, in a written trust amendment, elects to do otherwise, and that any election of that nature, when made, is irrevocable,* the provisions described above apply to trust instruments executed prior to and existing on October 1, 1996. (R.C. 1339.411(D).)

### Creation of a transfer on death interest in real property

#### Generally

The act specifies that a deed conveying any interest in real property, and in substance following the form described below (see "Form of a transfer on death deed"), when duly executed in accordance with the existing provisions contained in Chapter 5301. that pertain to conveyances of real property and when recorded in the office of the county recorder does both of the following: (1) creates a present interest as sole owner or tenant in common in the grantee and creates a "transfer on death interest" in the beneficiary or beneficiaries, and (2) upon the death of the grantee, the deed vests the interest of the decedent in the beneficiary or beneficiaries. The transfer mechanism is described below in "Transfer of property upon property owner's death." (R.C. 5302.22(A).)

### **Execution of a transfer on death deed**

The act specifies that any person who, under the Revised Code or Ohio common law, owns real property or any interest in real property as a sole owner or a tenant in common may create an interest in the real property that is transferable on death by executing and recording a deed as provided in the act that (1) conveys the person's entire, separate interest in the real property to one or more individuals, including the grantor (these individuals are the *grantees* of the property or interest; hereafter, they are referred to as the *property owners*), and (2) designates one or more other persons, identified in the deed by name, as "transfer on death beneficiaries." A deed conveying an interest in real property that includes a transfer on death beneficiary designation does not have to be supported by consideration or be delivered to the transfer on death beneficiary to be effective. (R.C. 5302.22(B).)

### **Transfer of property upon property owner's death**

Under the act, upon the death of any individual who owns real property or an interest in real property that is subject to a "transfer on death beneficiary designation" made under a "transfer on death deed" as described above, the deceased owner's interest is to be transferred *only to the transfer on death beneficiaries who are identified in the deed by name and who survive the deceased owner or that are in existence on the date of the deceased owner's death*. The transfer of the deceased owner's interest must be recorded by presenting to the county auditor and filing with the county recorder an affidavit, accompanied by a certified copy of a death certificate for the deceased owner. The affidavit must recite: (1) the name and address of each designated transfer on death beneficiary who survived the deceased owner or that is in existence on the date of the deceased owner's death, (2) the date of the deceased owner's death, (3) a description of the subject real property or real property interest, and (4) the names of each designated transfer on death beneficiary who has not survived the deceased owner or that is not in existence on the date of the deceased owner's death. It must be accompanied by a certified copy of a death certificate for each designated transfer on death beneficiary who has not survived the deceased owner. The county recorder must make an index reference to any affidavit so filed in the record of deeds. (R.C. 5302.22(C).)

If the title to real property that is subject to a transfer on death beneficiary designation made under a transfer on death deed under the act is registered under the existing Registration of Land Titles Law (contained in Chapter 5309.--often referred to as Ohio's Torrens Act), upon the death of the person holding the real property or an interest in it, the procedure for the transfer of the interest of the deceased owner shall be pursuant to R.C. 5309.081. (R.C. 5302.22(C).)

**Liberal construction of deeds--clear intent to create a transfer on death interest**

The act provides that any deed containing language that shows a clear intent to designate a transfer on death beneficiary must be liberally construed to do so (R.C. 5302.23(A)).

**Characteristics and ramifications of transfer on death beneficiary designation**

Under the act, real property or an interest in real property that is subject to a transfer on death beneficiary designation created in accordance with the act or as described in the preceding paragraph has all of the following characteristics and ramifications (R.C. 5302.23(B)(1) to (8)):

(1) **Transfer only to living/existing beneficiaries; multiple living/existing beneficiaries; reversion of property to the owner's probate estate.** An interest of a deceased owner may be transferred only to transfer on death beneficiaries who are identified in the deed by name and who survive the deceased owner or that are in existence on the date of the deceased owner's death. If more than one transfer on death beneficiary is designated, the beneficiaries will take title in the interest in equal shares as "tenants in common." If a transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of the deceased owner's death, and the deceased owner has designated one or more persons as contingent transfer on death beneficiaries as provided in (2) below, the designated contingent transfer on death beneficiaries will take the same interest that would have passed to the transfer on death beneficiary had that transfer on death beneficiary survived the deceased owner or been in existence on the date of the deceased owner's death. If none of the designated transfer on death beneficiaries survives the deceased owner or is in existence on the date of the deceased owner's death and no contingent transfer on death beneficiaries have been designated or have survived the deceased owner, the interest of the deceased owner's death must be distributed as part of the probate estate of the deceased owner of the interest. (Div. (B)(1).)

(2) **Designation of contingent transfer on death beneficiaries.** A transfer on death deed may contain a designation of one or more persons as "contingent transfer on death beneficiaries," who will take the interest of the deceased owner that would otherwise have passed to the designated transfer on death beneficiary if the named designated transfer on death beneficiary does not survive the deceased owner or is not in existence on the date of death of the deceased owner. Contingent transfer on death beneficiaries must be identified in the deed by name (Div. (B)(2)).

(3) **Ramifications, prior to the owner's death, of a designation.** The designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a designated transfer on death beneficiary has no interest in the real property until the death of the owner of the interest (Div. (B)(3)).

(4) **Revocation or modification of a designation.** The designation in a deed of any transfer on death beneficiary may be revoked or changed at any time, without the consent of that designated transfer on death beneficiary by the owner of the interest by executing in accordance with the existing provisions contained in Chapter 5301. that pertain to conveyances of real property and recording a deed conveying the grantor's entire, separate interest in the real property to one or more persons, including the grantor, with or without the designation of another transfer on death beneficiary (Div. (B)(4)).

(5) **Types of interests that may be subjected to a designation.** A fee simple title or any fractional interest in a fee simple title may be subjected to a transfer on death beneficiary designation (Div. (B)(5)).

(6) **Extent of an interest that is transferred.** A designated transfer on death beneficiary takes only the interest that the deceased owner or owners held on the date of death, subject to all encumbrances, reservations, and exceptions (Div. (B)(6)).

(7) **Effect of a designation on a lienholder's rights.** No rights of any lienholder, including, but not limited to, any mortgagee, judgment creditor, or mechanic's lienholder, are affected by the designation of a transfer on death beneficiary pursuant to the act. If any lienholder takes action to enforce the lien, by foreclosure or otherwise through a court proceeding, it is not necessary to join the transfer on death beneficiary as a party defendant in the action unless the transfer on death beneficiary has another interest in the real property that is vested at the time of the action. (Div. (B)(7).)

(8) **Non-testamentary nature of a transfer pursuant to a designation.** Any transfer on death of real property or of an interest in real property that results from a deed designating a transfer on death beneficiary is not testamentary (Div. (B)(8)).

#### **Form of a transfer on death deed**

The act provides that a deed containing a transfer on death designation under its provisions must in substance conform to the following form (R.C. 5302.22(A)):

"Transfer on Death Deed

..... (Marital status), of ..... County, ..... (for valuable consideration paid, if any), grant(s) (with covenants, if any), to ..... whose tax mailing address is ....., transfer on death to ....., beneficiary(s), the following real property:

(Description of land or interest in land and encumbrances, reservations, and exceptions, if any.)

Prior Instrument Reference: ....., Wife (husband) of the grantor, releases all rights of dower therein.

Witness ..... hand this ..... day of ....."

(Execution in accordance with Chapter 5301. of the Revised Code)

**Disclaimer of succession to property**

Continuing law provides that a disclaimant, other than a fiduciary under an instrument who is not authorized by the instrument to disclaim the interest of a beneficiary, may disclaim, in whole or in part, the succession to any property by executing and by delivering, filing, or recording a written disclaimer instrument in the manner provided in R.C. 1339.68.<sup>5</sup> A disclaimant who is a fiduciary under an instrument may disclaim, in whole or in part, any right, power, privilege, or immunity, by executing and by delivering, filing, or recording a written disclaimer

<sup>5</sup> "Disclaimant" means any person, any guardian or personal representative of a person or estate of a person, or any attorney-in-fact or agent of a person having a general or specific authority to act granted in a written instrument, who is any of the following: (a) with respect to testamentary instruments and intestate succession, an heir, next of kin, devisee, legatee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entireties, surviving tenant of a tenancy with a right of survivorship, beneficiary under a testamentary instrument, or person designated to take pursuant to a power of appointment exercised by a testamentary instrument, (b) with respect to nontestamentary instruments, a grantee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entireties, surviving tenant of a tenancy with a right of survivorship, beneficiary under a nontestamentary instrument, or person designated to take pursuant to a power of appointment exercised by a nontestamentary instrument, (c) with respect to fiduciary rights, privileges, powers, and immunities, a fiduciary under a testamentary or nontestamentary instrument, or (d) any person entitled to take an interest in property upon the death of a person or upon the occurrence of any other event.

"Property" means all forms of property, real and personal, tangible and intangible. (R.C. 1339.68(A).)



instrument in the manner provided in that section. If the interest disclaimed is created by a nontestamentary instrument, the disclaimer instrument must be delivered personally or by certified mail to the trustee or other person who has legal title to, or possession of, the property disclaimed. If the interest disclaimed is created by a testamentary instrument or by intestate succession, the disclaimer instrument must be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate have been commenced, and an executed copy of the disclaimer instrument must be delivered personally or by certified mail to the personal representative of the decedent's estate. (R.C. 1339.68(A), (B)(1) and (2), and (F)(1) and (2).)

The act provides that, subject to the provision as described below, if the interest disclaimed is created by a nontestamentary instrument, the disclaimer instrument must be delivered personally or by certified mail to the trustee or other person who has legal title to, or possession of, the property disclaimed. If the interest disclaimed is created by a testamentary instrument, by intestate succession, or *by a transfer on death deed pursuant to the act's provisions in R.C. 5302.22*, the disclaimer instrument must be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate have been commenced, and an executed copy of the disclaimer instrument must be delivered personally or by certified mail to the personal representative of the decedent's estate. (R.C. 1339.68(F)(1) and (2).)

#### **Estate tax return certificates**

Continuing law provides that, with certain exceptions, the executor, administrator, or such other person in possession of property that is subject to estate taxes upon transfer under R.C. 5731.02 (estate taxes levied on the transfer of taxable estates of decedents who were Ohio residents at death) or R.C. 5731.19(A) (estate taxes levied on the transfer of taxable estates of nonresident decedents), must file an estate tax return within nine months of the date of the decedent's death, in the form prescribed by the Tax Commissioner, in duplicate, with the probate court of the county. The return must include all property that is subject to estate taxes upon transfer, whether the property is transferred under the last will and testament of the decedent or otherwise. The estate tax return must be accompanied by a certificate that is signed by the person required to file the return, and that states all of the following: (1) the fact that the return was filed, (2) the date of the filing of the return, (3) the fact that the estate taxes under R.C. 5731.02 or R.C. 5731.19(A) that are shown to be due in the return, have been paid in full, (4) if applicable, the fact that real property listed in the inventory for the decedent's estate is included in the return, and (5) if applicable, the fact that real property not listed in the inventory for the decedent's estate, including, but not limited to, survivorship tenancy property as described in R.C. 5302.17 also is

included in the return. (R.C. 5731.21(A)(1).) The act expands that final provision, providing that, if applicable, the certificate must state the fact that real property not listed in the inventory for the decedent's estate, including, but not limited to, survivorship tenancy property as described in R.C. 5302.17 *or transfer on death property as described in the act's provisions in R.C. 5302.22 and R.C. 5302.23* also is included in the return. (R.C. 5731.21(A)(1)(b)(v).)

**Conforming changes**

Continuing R.C. 5302.01 specifies, in relevant part, that the forms set forth in existing R.C. 5302.05 (a general warranty deed), 5302.07 (a limited warranty deed), 5302.09 (a deed of an executor, administrator, trustee, guardian, receiver, or commissioner), 5302.11 (a quit-claim deed), 5302.12 (a mortgage), 5302.14 (a statutory condition), and 5302.17 (a survivorship tenancy deed) may be used and are sufficient for their respective purposes. They are known as, and may be referred to as, "Statutory Forms." They may be altered as circumstances require, and the authorization of such forms does not prevent the use of other forms. The act expands these provisions to add a reference to R.C. 5302.22 (a transfer on death deed), as enacted in the act, to the list of "Statutory Forms." (R.C. 5302.01.)

Continuing R.C. 5302.02 provides that the rules and definitions contained in existing R.C. 5302.03 ("grant" as a sufficient word of conveyance), 5302.04 (all interest is conveyed, unless stated to the contrary), 5302.06 (effect of "general warranty covenants"), 5302.08 (effect of "limited warranty covenants"), 5302.10 (effect of "fiduciary covenants"), 5302.13 (effect of "mortgage covenants"), 5302.17 (establishment and effect of survivorship tenancies), 5302.18 (effect of deed where grantor also is grantee), 5302.19 (presumption of tenancies in common), 5302.20 (establishment and effect of survivorship tenancies), and 5302.21 (recognition of prior tenancies by the entirety and joint and survivorship tenancies) apply to all deeds or other instruments relating to real estate, whether the statutory forms or other forms are used, where the instruments are executed on or after October 1, 1965. The act expands this provision to include a reference to R.C. 5302.22, as enacted in the act, to the list of sections included in the provision, provided the instrument in question is executed on or after the act's effective date. (R.C. 5302.02.)

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**HISTORY**

ACTION	DATE	JOURNAL ENTRY
Introduced	04-27-99	p. 478
Reported, H. Civil & Commercial Law	06-24-99	p. 964



Passed House (95-1)	06-29-99	pp.	1106-1109
Reported, S. Judiciary	02-01-00	p.	1364
Passed Senate (33-0)	04-04-00	pp.	1551-1552
House concurred in Senate amendments (96-0)	04-11-00	pp.	1785-1786

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