



H.B. 59

123rd General Assembly
(As Introduced)

Reps. Womer Benjamin, Mottley, Pringle, Salerno

BILL SUMMARY

- Amends the Charging of Trust Receipts and Expenses to Income and Principal (CTREIP) Law: by modifying the manners in which a trust is considered to be administered with "due regard" for income beneficiaries and remainderpersons when receipts are credited and expenditures are charged; by requiring all trustees to administer their trusts in accordance with a "reasonable and equitable view" rule when exercising a discretionary power of administration regarding a matter within the CTREIP Law's scope; and by permitting a fiduciary to credit a receipt or charge an expenditure with respect to a trust, or property passing to a trust, that is eligible for a federal or Ohio estate tax marital deduction or estate tax charitable deduction only to the extent that the credit or charge will not cause a material reduction or loss of the deduction.
- Requires that, when an original will is lost, spoliated, or destroyed before or after the testator's death, a probate court must admit the will to probate if the will's proponent establishes by clear and convincing evidence the will's contents and its execution with the requisite legal formalities and if no opponent to the will's admission establishes by a preponderance of the evidence that the testator had revoked the will.
- Modifies the manners in which a will generally is revoked by actions of persons other than a testator and specifies that a testator's revocation of a will is valid only if the testator, at the time of the revocation, has the same capacity as the law requires for the execution of a will.
- Requires that present values for probate matters be determined in accordance with the Ohio Estate Tax Law instead of the American Experience Table of Mortality.

- Eliminates the general requirement that the Tax Commissioner give a "written consent" to certain transfers, deliveries, or payments of property following a decedent's death and substitutes a requirement that the covered entities or persons give a "written notice" to the Tax Commissioner of a delivery, transfer, or payment.
- Eliminates the need for the Tax Commissioner's written consent to the transfer to a decedent's representative of the contents of a safe deposit box that is opened and inventoried in the presence of the Tax Commissioner or the Tax Commissioner's agent.
- Requires the Tax Commissioner to issue a written acknowledgment of the receipt of each "written notice" described above and of each opening and inventory of the contents of a safe deposit box as described above.

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CONTENT AND OPERATION

Background law

The Probate Code contains an entire chapter (R.C. Chapter 2109.) that *generally governs* the appointment, resignation, and removal of, general responsibilities of, bonds or other forms of security for, residency qualifications of, accounts, inventory, and investment authority of, ethical restrictions upon, and other matters pertaining to *most fiduciaries* who are appointed by and accountable to a probate court and who are acting in a fiduciary capacity for another individual or are charged with duties in relation to any property, interest, trust, or estate for

another individual's benefit. The Probate Code also contains chapters that focus upon the powers and responsibilities of and other matters pertaining to *specific fiduciaries* who are appointed by and accountable to a probate court, such as guardians and conservators for the person or estate of minors or incompetents and administrators and executors for the estates of decedents.

Statutes outside of the Probate Code also apply to fiduciaries who are or *who are not* appointed by and accountable to a probate court. Most of these Miscellaneous Fiduciary Laws are contained in Chapters 1339. and 1340. of the Revised Code (see **COMMENT 1**) and focus upon various topics that pertain to *specifically defined* "fiduciaries" or to *specific types* of fiduciaries (e.g., inter vivos and testamentary trustees).

Trust receipts and expenditures allocation

The Miscellaneous Fiduciary Laws include the Charging of Trust Receipts and Expenses to Income and Principal (CTREIP) Law that pertains to trustees, income beneficiaries, and remaindermen (see **COMMENT 2**). The bill gender-neutralizes the term "remaindermen" throughout the CTREIP Law by changing it to "*remainderpersons*" (secs. 1340.01(C), 1340.02, 1340.03(B), and 1340.12(A)(1) and (C)(5)). It also continues, modifies, or enacts the following provisions in the CTREIP Law (sec. 1340.02--see **COMMENT 3**):

(1) The bill continues existing law's provision that a trust must be administered with due regard to the respective interests of the income beneficiaries and the remainderpersons (hereafter, "the due regard principle") (division (A)).

(2) The bill specifies that, with respect to the *allocation of receipts and expenditures*, a trust is administered in accordance with the due regard principle if a *receipt* is credited or an *expenditure* is charged to income, to principal, or partly to income and principal (a) in accordance with the trust instrument's terms notwithstanding contrary provisions of the CTREIP Law or (b) in accordance with the CTREIP Law in the absence of any contrary trust instrument terms (divisions (A)(1) and (2)). These provisions are a continuation of existing law.

With respect to the allocation of receipts and expenditures, the bill *generally* eliminates existing law's *third manner* in which a trust currently is considered to be administered in accordance with the due regard principle (but see (3) below). That manner is as follows: if *neither* of the "rules of administration" described in (2)(a) or (b) above applies, the crediting of a receipt or the charging of an expenditure to income, to principal, or partly to income and principal must be in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as those entitled to principal and in view of the manner

in which persons of ordinary prudence, discretion, and judgment would act in the management of their own affairs (hereafter, "the reasonable and equitable view rule") (existing division (A)(3)).

(3) The bill generally requires a trustee to administer a trust instrument in accordance with the "reasonable and equitable view rule" when the trustee is exercising a *discretionary power* of administration regarding a matter that is *within the scope of the CTREIP Law*, whether the discretionary power is granted by the trust instrument's terms or the CTREIP Law (new division (B)).

(4) Existing law provides that, if a trust instrument gives the trustee *discretion* in crediting a receipt or charging an expenditure to income, to principal, or partly to income and principal and *if the trust instrument's terms* do not expressly provide otherwise, the trustee must exercise that discretion in accordance with the principles of the CTREIP Law. Existing law also provides that, if a bona fide doubt exists as to the CTREIP Law's applicability, any allocation made by the trustee in good faith is binding on all persons who have any interest in the trust. (Existing division (B).)

The bill modifies this existing law by substituting a provision specifying that, if a trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income, to principal, or partly to income and principal, *no inference of imprudence or partiality* arises from the fact that the trustee has made an allocation contrary to the CTREIP Law (new division (C)).

(5) The bill enacts a new provision that permits a fiduciary (presumably meaning a "trustee") to credit a receipt or to charge an expenditure to income or principal with respect to a trust, or property passing to a trust, that is eligible for a *federal or Ohio estate tax marital deduction or estate tax charitable deduction* only to the extent that the credit of the receipt or the charge of the expenditure will not cause a material reduction or loss of the deduction (new divisions (D) and (E)) (see **COMMENT 4**).

Lost, spoliated, or destroyed wills

Existing law

The existing Wills Law *permits* a probate court to admit a lost, spoliated, or destroyed will to probate if all of the following apply (sec. 2107.26):

(1) The probate court is satisfied that the will was executed according to the law in force at the time of its execution and was not revoked at the time of the testator's death.

(2) The original will was lost, spoliated, or destroyed (a) *subsequent to* the testator's death, (b) *before* the testator's death if the testator's lack of knowledge of the loss, spoliation, or destruction can be proved by clear and convincing testimony, or (c) *after* the testator became incapable of making a will by reason of insanity.

(3) The original will cannot be produced in the probate court in as complete a manner as the originals of wills that are actually so produced for probate.

Changes proposed by the bill

The bill substitutes a provision that, when an original will is lost, spoliated, or destroyed *before or after* the testator's death, a probate court *must admit* the lost, spoliated, or destroyed will to probate, if both of the following apply (sec. 2107.26):

(1) The proponent of the will establishes by clear and convincing evidence the will's contents and the will's execution with the formalities required at the time of execution by the jurisdiction in which the will was executed.

(2) No person opposing the will's admission to probate establishes by a preponderance of the evidence that the testator had revoked the will. (See COMMENT 5.)

Revocation of a will

Existing law

The existing Wills Law provides that a will generally *is revoked* in any of the following manners (sec. 2107.33(A)):

(1) By the testator's tearing, canceling, obliterating, or destroying it with the intention of revoking it;

(2) By some person in the testator's presence (*apparently* taking any of the actions listed in (1) above);

(3) By the testator's express written direction (*apparently* by some person taking any of the actions listed in (1) above but not necessarily in the testator's presence);

(4) By some other written will or codicil executed in accordance with the Wills Law;

(5) By some other writing that is signed, attested, and subscribed in accordance with the Wills Law. (See **COMMENT 6**.)

Changes proposed by the bill

Manner of revocation. The bill modifies existing law's manners in which a will generally is revoked by actions of *persons other than the testator* by specifying that a will is revoked as follows (sec. 2107.33(A)(2) and (3)):

(1) By some person, *at the testator's request* (added by the bill) and in the testator's presence, by *tearing, canceling, obliterating, or destroying* (specified by the bill) the will *with the intention of revoking it* (added by the bill);

(2) By some *person tearing, canceling, obliterating, or destroying* (specified by the bill) the will pursuant to the testator's express written direction.

Testator's capacity. The bill also provides that a testator's revocation of a will is valid only if the testator, at the time of the revocation, has the same capacity as the law requires for the execution of a will (sec. 2107.33(G)). (See **COMMENT 7**.)

Present values

The existing Miscellaneous Probate Matters Law provides that the "American Experience Table of Mortality" must be used as the basis of determining present values in probate matters (existing sec. 2131.01). (See **COMMENT 8**.) The bill outright repeals that provision and instead specifies that present values for probate matters must be the values determined for Ohio estate tax purposes under the Ohio Estate Tax Law (new sec. 2131.01; Section 2). (See **COMMENT 9**.) The bill similarly provides that the court determine the present value and priority of the dower interest of a spouse in real property being sold at a judicial sale in accordance with new section 2131.011 (sec. 2103.041).

Transfers of property upon a decedent's death

Existing law

The Ohio Estate Tax Law generally prohibits the following entities from delivering, transferring, or paying the following types of tangible or intangible property (in whole or in part) after a decedent's death *without the Tax Commissioner's* prior or, in some cases, subsequent *written consent* (sec. 5731.39(A) to (E)):

(1) A corporation organized or existing under Ohio law cannot transfer on its books or issue a new certificate for any share of its *capital stock* registered in the name of a decedent, in trust for a decedent, or in the name of a decedent and another person or persons (hereafter, "in a prescribed form").

(2) A safe deposit company, trust company, financial institution, or other corporation or person that has in its possession, control, or custody a *deposit* in a prescribed form cannot deliver or transfer an amount in excess of three-fourths of the total value of that deposit, including accrued interest and dividends, as of the date of the decedent's death. The Tax Commissioner's written consent need not be obtained prior to the delivery or transfer of amounts having a value of three-fourths or less of that total value.

(3) A life insurance company cannot pay the proceeds of an annuity or matured endowment contract, of a *life insurance* contract payable to the decedent's estate, or of any other insurance contract taxable under the Ohio Estate Tax Law.

(4) A trust company or other corporation or person cannot pay the proceeds of certain *death benefit, retirement, pension, or profit-sharing plans* in excess of \$2,000.

(5) If the transfer of the property is taxable under the Ohio Estate Tax Law, a safe deposit company, trust company, financial institution, or other corporation or person that has in its possession, control, or custody *securities, assets, or other property* standing in a prescribed form cannot deliver or transfer any of that property that has a value as of the date of the decedent's death in excess of three-fourths of the total value of that property. The Tax Commissioner's written consent need not be obtained prior to the delivery or transfer of any of those types of property having a value of three-fourths or less of that total value.

Existing law also generally prohibits an entity or person listed in (5) above that has in its possession or control a *safe deposit box or similar receptacle* that stands in the name of a decedent or in the name of the decedent and another person or persons or to which the decedent had a "right of access" from delivering any of the receptacle's contents unless it is opened and inventoried in the presence of the Tax Commissioner or the Tax Commissioner's agent and a *written consent to transfer* is issued. This prohibition does not apply when a receptacle stands in the name of a corporation or partnership or in the name of a decedent as guardian or executor and does not preclude the delivery of a will, deed to a burial lot, or insurance policy from a *safe deposit box* in a specified manner to a representative of a decedent. (Sec. 5731.39(F).)

Changes proposed by the bill

The bill modifies the delivery, transfer, and payment prohibitions described in (1) to (5), above, by eliminating the requirement of the Tax Commissioner's prior or subsequent *written consent* to the delivery, transfer, or payment and by substituting a requirement that each covered entity or person *give* a prior or, in some cases, a subsequent *written notice* of the delivery, transfer, or payment to the Tax Commissioner (sec. 5731.39(A) to (E)). The bill continues the "general prohibition" against a covered entity or person delivering the contents of a covered *safe deposit box or similar receptacle* unless it is opened and inventoried in the presence of the Tax Commissioner or the Tax Commissioner's agent, but it repeals the requirement that the Tax Commissioner also must issue a written consent to the transfer of the contents (sec. 5731.39(F)).

Finally, the bill requires the Tax Commissioner to issue a *written acknowledgment of receipt* of each written notice described above and of each opening and inventory of the contents of a safe deposit box or similar receptacle in the presence of the Tax Commissioner or the Tax Commissioner's agent, solely to evidence the receipt or presence. The bill prohibits the Tax Commissioner from conditioning the issuance of a written acknowledgment on any requirement stated outside of R.C. 5731.39. (Sec. 5731.39(G).)

COMMENT

1. Chapter 1339. of the Revised Code contains several *distinct* fiduciary laws, including the Uniform Fiduciaries Act that primarily pertains to fiduciaries and bank deposits and statutes that pertain to the exercise of ownership rights in connection with securities, the release of powers of appointment, the transfer of property between fiduciaries, the holding of cash or temporary investments by fiduciaries, a limitation on fiduciary liability when certain powers are reserved or granted to other persons, and the personal liability of fiduciaries in relation to certain contracts or certain partnership debts, obligations, or liabilities. Chapter 1340. of the Revised Code contains the CTREIP Law and the Discretionary Distributions by Fiduciaries Law.

2. The CTREIP Law defines an "income beneficiary" as the person to whom income is presently payable or for whom it is accumulated for distribution as income, a "remainderperson" as the person who is entitled to principal (including income that has been accumulated and added to principal), and a "trustee" as an inter vivos or testamentary original trustee, successor trustee, or added trustee (sec. 1340.01(A), (C), and (D)).

3. Section 3 of the bill states that it is the General Assembly's intent in amending section 1340.02 in the bill to limit the application of the Ohio Supreme Court's holding in *Sherman v. Sherman* (1966), 5 Ohio St.2d 27. The syllabus in *Sherman* reads as follows:

1. The fundamental rule of construction of a will is that the intent of the testator must govern, unless to give effect to that intent would create an estate forbidden by law.

2. Where a will which establishes a trust grants to the trustees of the property broad powers of sale, investment, voting of stock and all other powers to act which, in their judgment, are necessary to proper and advantageous management of the trust, and gives the trustees the power to determine the propriety of their own actions by a majority vote of the trustees, and gives the trustees discretion to allocate all receipts and all disbursements between principal and income, with the sole exception that premiums on investments shall be charged against principal, such powers indicate that it was the intention of the testator to permit the trustees, in the exercise of their discretion, to allocate capital gains and stock dividends to income, and in the absence of bad faith, abuse of discretion or action inconsistent with the purposes for which the trust was created, the court will not interfere with such allocation.

5 Ohio St.2d at 32.

4. In connection with its CTREIP Law changes, the bill defines the following terms (sec. 1340.02(E)):

<u><i>Defined term</i></u>	<u><i>Definition in R.C. 1340.02(E)</i></u>	<u><i>Calculation of deduction under cross-referenced federal or Ohio law</i></u>
(a) "Federal estate tax charitable deduction"	The estate tax charitable deduction allowed by Subtitle B, Chapter 11 of	For purposes of the federal estate tax, the value of the taxable estate

<u>Defined term</u>	<u>Definition in R.C. 1340.02(E)</u>	<u>Calculation of deduction under cross-referenced federal or Ohio law</u>
	the Internal Revenue Code of 1986, 26 U.S.C.A. 2055, as amended.	generally must be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers to or for the use of the following: (i) the United States, any state, any political subdivision of a state, or the District of Columbia for exclusively public purposes, (ii) certain corporations organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, (iii) certain trustees or fraternal societies, orders, or associations operating under the lodge system if contributions or gifts are to be used exclusively for the reasons mentioned above, (iv) certain veterans' organizations, or (v) certain employee stock ownership plans.
(b) "Federal estate tax marital deduction"	The estate tax marital deduction allowed by Subtitle B, Chapter 11 of the Internal Revenue Code of 1986, 26 U.S.C.A. 2056, as amended.	For purposes of the federal estate tax, the value of the taxable estate generally must be determined by deducting from the value of the gross estate an amount equal to the value of any

<u>Defined term</u>	<u>Definition in R.C. 1340.02(E)</u>	<u>Calculation of deduction under cross-referenced federal or Ohio law</u>
		interest in property that passes or has passed from the decedent to the decedent's surviving spouse, but only to the extent that the interest is included in determining the value of the gross estate. This deduction is subject to specified life estate or other terminable interest limitations.
(c) "Ohio estate tax charitable deduction"	The estate tax charitable deduction allowed by R.C. 5731.17(A).	For purposes of the Ohio estate tax levied in connection with <i>deceased Ohio residents</i> , the value of the taxable estate must be determined by deducting from the value of the gross estate the amount of bequests, legacies, devises, or transfers generally similar to those described in (i) to (iv) under "Federal estate tax charitable deduction" above.
(d) "Ohio estate tax marital deduction"	The estate tax marital deduction allowed by R.C. 5731.15(A).	For purposes of the Ohio estate tax levied in connection with <i>Ohio residents</i> who die on or after July 1, 1993, and who are survived by a spouse, the value of the taxable estate must be determined by deducting

<u>Defined term</u>	<u>Definition in R.C. 1340.02(E)</u>	<u>Calculation of deduction under cross-referenced federal or Ohio law</u>
		from the value of the gross estate a <i>marital deduction</i> in an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse, but only to the extent the interest is included in the value of the gross estate. Existing law clarifies when an interest in property is considered <i>as passing or as having passed from the decedent to the surviving spouse</i> .

5. The bill's changes to section 2107.26 appear to reverse a "presumption of testator revocation" described in *In re Estate of Haynes* (1986), 25 Ohio St.3d 101, 103-104, as follows (emphasis added):

This court has previously determined the appropriate standard of proof for admitting a lost, spoliated, or destroyed will to probate Both these cases held that to overcome *the presumption that the decedent revoked his will*, the proponent of the will had to satisfy the probate court by clear and convincing evidence that the will was lost, spoliated, or destroyed after decedent's death or, if such occurred before the decedent's death, that decedent lacked knowledge of such spoliation.

. . . Clear and convincing evidence is the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is

intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

...

Where a will is left in the custody of someone other than the testator and is not found at the death of the testator, there is no presumption that it was revoked. . . . However, *where a will is left in the custody of a testator and cannot be found after his death a presumption arises that he destroyed the will with an intent to revoke it. Behrens v. Behrens* (1890), 47 Ohio St.323

The presumption is not conclusive and may be rebutted

6. Existing law contains several other will revocation provisions that the bill does not affect. A will that has been declared valid by a probate court pursuant to a "living testator petition for a declaration of validity and deposit with the probate court" procedure may be revoked pursuant to a distinct "revocation petition and hearing" procedure (existing sec. 2107.33(A); sec. 2107.084(C)--not in the bill). In addition, unless the will expressly provides otherwise, a divorce, dissolution of marriage, annulment, or specified type of legal separation following a testator's execution of a will results in the revocation of any disposition or appointment of property made by the will to the former spouse (existing sec. 2107.33(C)).

7. With respect to the *legal capacity* to make a will, section 2107.02 (not in the bill) provides that a person who is at least 18 years of age, who is of sound mind and memory, and who is not under restraint (e.g., subject to fraud, compulsion, or undue influence) may make a will. With respect to legal capacity and the revocation of a will, see *Sheridan v. Harbison* (1990), 101 Ohio App.3d 206.

8. Existing section 2131.01 requires that the American Experience Table of Mortality be used in computing the present values of life estates, annuities for life, remainders, vested dower, etc. *for probate court purposes*. Although the table gives several rates of discount, nearly all Ohio courts have used the 6% rate. See *Henderson v. Henderson* (1968), 15 Ohio Misc. 276 (Paulding Cty. Ct. Common Pleas), in which the syllabus reads in part as follows:

...

4. Where lands are sold pursuant to Section 5303.21, Revised Code, and both life tenants are shown to enjoy excellent health, the value of their shares should be determined by application of the *statutory six percent formula* and the factor determined by reference to the mortality table prescribed by Section 2131.01, Revised Code, for the age of the younger life tenant, with the resulting percentage of the net sales proceeds to be distributed equally between such life tenants. The balance should be placed in trust to be accumulated until the death of the surviving life tenant and then distributed among the remaindermen as provided by the court under the will and applicable statutes.

9. Under the Ohio Estate Tax Law, subject to certain provisions that permit the valuation of qualified farm property at its value for its actual qualified use, the value of any property included in the "gross estate" must be the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. All relevant facts and elements of value as of the valuation date must be considered in determining that value. In addition, Internal Revenue Service rulings and regulations and federal court decisions defining the principles applicable in determining fair market value for purposes of the federal estate tax must be applied in determining fair market value for purposes of Ohio estate taxes to the extent that those rulings, regulations, and decisions are not inconsistent with the express provisions of the Ohio Estate Tax Law. However, the IRS's actual determination of the fair market value of any asset included in the gross estate is not controlling for purposes of the estate taxes imposed by the Ohio Estate Tax Law unless the person filing an Ohio estate tax return and the Tax Commissioner have agreed in writing to be bound by the federal determination. (Sec. 5731.01(B)--not in the bill.)

HISTORY

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