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123rd General Assembly

(As Passed by the House)

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

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**BILL 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.

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## CONTENT AND OPERATION

### Summary release from administration

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

The bill 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 bill 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>

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<sup>1</sup> The bill retains 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.

(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 (see **COMMENT 1**);

(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.

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

The probate court must 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 bill;

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<sup>3</sup> *The bill 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 bill's procedures and to hear and determine applications for an order relieving an estate from administration under existing law (R.C. 2101.24(A)(1)(bb) and (cc)).*

(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 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 bill (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**

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>
- (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 bill 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 existing Financial Institutions Taxation Law. R.C. 5725.01, referred to in the bill, 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;

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<sup>4</sup> *The bill 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 bill, 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 the return, and that all real property not inventoried also is listed in the return (R.C. 5731.21(A)(3)).*

(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)). However, under the bill, "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**

**Existing law.** An estate may be released from administration under existing 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 bill.** The bill provides that the existing release from administration provisions do not affect the ability of qualified persons to file an application for a summary release from administration under the bill 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 bill 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**

Existing 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 bill.)

The bill 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 existing 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 currently is allowed to make an election of that nature in an estate relieved from administration under R.C. 2113.03. The bill 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 existing 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 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 bill 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 bill. The bill

provides that the existing 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 existing law is inconsistent with the nature of a grant of a summary release from administration. (R.C. 2113.61(A)(2).) (See **COMMENT 2.**)

Under existing 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 bill 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 bill), 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**

Existing law requires the Department of Human 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 bill 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 existing law) or for the bill's *summary release provisions* in section 2113.031 (R.C. 5111.11(A)).

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

##### **Selection of automobiles**

**Existing law.** Under existing 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 existing 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, "automobile" includes 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 bill.** The bill 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 bill, 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* (see **COMMENT 3**). The bill 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**

**Existing 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 (see **COMMENT 1**). 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 bill.** The bill 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 **COMMENT 3** and discussion under "**Operation of the bill**" 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**

#### **Existing 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.

\* \* \*

In *In re Estate of Hegel* (1996), 76 Ohio St.3d 476, the Ohio Supreme Court held that R.C. 2107.501(B) is strictly limited to the sale of specifically devised or bequeathed property by a guardian and does not extend to the sale of specifically devised or bequeathed property by an attorney-in-fact acting within the authority of a durable power of attorney for an incapacitated individual. Therefore, under current law, a specific devisee's or legatee's rights are protected and are not extinguished when a guardian sells specifically devised or bequeathed property, but those same rights are not protected when an attorney-in-fact, pursuant to a durable power of attorney, sells specifically devised or bequeathed property.

### **Operation of the bill**

The bill 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 bill, 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**

Existing 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 bill expands the exceptions to the fee, providing that no fee may be charged 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 bill (R.C. 319.54(F)(3)(x)).

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

Existing 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.) Existing law also states that a natural person, adult or minor, may 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 may 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 bill 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 exists in existing law. A person may contract to have P.O.D. account proceeds paid to another natural person or to any entity or organization, but a bank may only pay those proceeds to another natural person. The bill 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**

**Existing law.** The general rule under the existing Spendthrift Trust Law is that a spendthrift provision in an instrument that creates an inter vivos or testamentary trust (hereafter "trust") will not cause any forfeiture or postponement of any interest in property (a) that is granted to a surviving spouse of the testator or other settlor and (b) that qualifies 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 does not apply if the trust instrument expressly states the testator's or other settlor's intention that

obtaining a marital deduction is 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 does 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 is a beneficiary if an interest in property does not qualify for a marital deduction (existing R.C. 1339.411(A)(3)).

**Operation of the bill.** The bill provides that the above-described rule in existing law 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 bill enacts a comparable rule, as in existing law 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 bill, 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 (see **COMMENT 6**).

(2) It qualifies as a nontaxable gift under the federal GST Tax Law (see **COMMENT 7**).

The bill 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 (R.C. 1339.411(C)(2)). The bill 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)(3)).

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

Under existing 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 bill does *not* modify any of these provisions in existing law, but it makes some changes in the applicability of those provisions to certain preexisting trust instruments, as described below in "**Intent.**"

### **Intent**

**Existing law.** Existing law provides that 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. Those above-described provisions apply 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, is irrevocable.* (R.C. 1339.411(B)(4).)

**Operation of the bill.** The bill 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 bill, *all* of those above-described provisions apply to trust instruments executed prior to and existing on the effective date of the bill and to trust instruments executed on or after the effective date of the bill.

The bill deletes the provision in existing 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 in "Existing law" apply to trust instruments executed prior to and existing on October 1, 1996. (R.C. 1339.411(D).)

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## COMMENT

1. **Allowance for support.** 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 generally are entitled to receive "in money or property the sum of \$40,000" as an allowance for support. The money or property set off as an allowance for support is considered an "estate asset." (R.C. 2106.13(A).)

A probate court must order the distribution of an allowance for support in one of the following manners (R.C. 2106.13(B)):

(a) If the decedent died leaving a surviving spouse and no minor children, 100% to the surviving spouse;

(b) If the decedent died leaving a surviving spouse and minor children and if all of the minor children are the children of the surviving spouse, 100% to the surviving spouse;

(c) If the decedent died leaving a surviving spouse and minor children and if not all of the minor children are children of the surviving spouse, in equitable shares, as fixed by the probate court, to the surviving spouse and the minor children who are not the children of the surviving spouse.

(d) If the decedent died leaving minor children and no surviving spouse, in equitable shares, as fixed by the probate court, to the minor children.

2. Subject to the bill's provision on the qualified applicability of existing law, the application for a certificate of transfer must contain all of the following under R.C. 2113.61(B):

(1) The name, place of residence at death, and date of death of the decedent;

(2) A statement whether the decedent died testate or intestate;

(3) The fact and date of the filing and probate of the will, if applicable, and the fact and date of the appointment of the administrator or executor;

(4) A description of each parcel of real property situated in this state that is owned by the decedent at the time of his death;

(5) Insofar as they can be ascertained, the names, ages, places of residence, and relationship to the decedent of the persons to whom each parcel of real property described in division (B)(4) of this section passed by descent or devise;

(6) A statement that all the known debts of the decedent's estate have been paid or secured to be paid, or that sufficient other assets are in hand to complete the payment of those debts;

(7) Other pertinent information that the court requires.

Subject to the bill's provision on the qualified applicability of existing law, under R.C. 2113.61(C), the court must issue a certificate of transfer for record in each county in Ohio in which real property so passing is situated and the certificate must recite all of the following:

(1) The name and date of death of the decedent;

(2) Whether the decedent died testate or intestate and, if testate, the volume and page of the record of the will;

(3) The volume and page of the probate court record of the administration of the estate;

(4) The names and places of residence of the devisees, the interests passing to them, the names and places of residence of the persons inheriting intestate, and the interests inherited by them, in each parcel of real property described in division (B)(4) of this section [see above];

(5) A description of each parcel of real property described in division (B)(4) of this section [see above];

(6) Other information that in the opinion of the court should be included.

3. Section 4505.10(B) (not in the bill) specifies that the clerk of the court of common pleas of the county in which the last certificate of title was issued for any automobiles selected by a surviving spouse from the decedent spouse's estate must transfer the decedent's interest in the automobiles to the surviving spouse of the decedent upon receipt of the titles to the automobiles. An affidavit executed by the surviving spouse must be submitted to the clerk along with the titles. The affidavit must give the date of death of the decedent, state that each automobile for which the decedent's interest is to be transferred is not disposed of by testamentary disposition, and *must provide an approximate value for each automobile selected to be transferred by the surviving spouse*. The affidavit also must contain a description for each automobile for which the decedent's interest is to be transferred. The transfer does not affect any liens upon any automobile for which the decedent's interest is transferred.

4. Under the federal GST Tax Law, a tax is imposed on every "generation-skipping transfer," which is defined generally to mean a "taxable distribution," a "taxable termination," and a "direct skip." A "direct skip" generally means a transfer of an interest in property to a "skip person" that is subject to a federal estate or gift tax. A "skip person" means (a) a natural person assigned to a generation that is two or more generations below the generation assignment of the transferor or (b) a trust (i) if all interests in the trust are held by skip persons or (ii) if there is no person holding an interest in the trust, and at no time after the transfer may a distribution (including distributions on termination) be made from the trust to a "nonskip person" (defined as a person who is not a skip person). 26 U.S.C.A. 2601, 2612, and 2613. The federal GST Tax Law is found in Subtitle B, Chapter 13, of the Internal Revenue Code of 1986, 26 U.S.C.A. 2601-2663.

5. Under the federal GST Tax Law, with specific exceptions for certain transfers in trust, in the case of a direct skip that is a "nontaxable gift," the inclusion ratio (a statutorily defined formula with respect to any property transferred in a generation-skipping transfer) is *zero*. "Nontaxable gift" means any transfer of property to the extent that the transfer is not treated as a taxable gift under the provisions in the federal Gift Tax Law that exempt from taxation (a) the first \$10,000 of the gifts made to any person by a donor during a calendar year or (b) certain qualified transfers for educational expenses or medical expenses. 26 U.S.C.A. 2642(c) and, by reference, 2503(b) and 2503(e).

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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

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