



Aida S. Montano

Final Analysis
Legislative Service Commission

Sub. H.B. 85

124th General Assembly
(As Passed by the General Assembly)

Reps. Hughes, Goodman, Sullivan, Setzer, Patton, Allen, Jolivette, Niehaus, Webster, Redfern, Latta, DePiero, Reidelbach, Sulzer, Seitz, WomerBenjamin, Manning, Jones, Grendell, Schmidt, G. Smith, Cates, Flannery, Lendrum, Coates, Otterman, Evans, Damschroder, Aslanides, Blasdel, Rhine, Collier, Barrett, Fessler, Kearns, Latell, Schneider, Oakar, Salerno, Gilb

Sens. Austria, Johnson, Espy, Jacobson, Spada

Effective date: October 31, 2001

ACT SUMMARY

- Restructures preexisting provisions pertaining to the accounts of fiduciaries by enacting separate sections of law providing for accounts of executors and administrators, accounts of guardians and conservators, and accounts of testamentary trustees and other fiduciaries and modifies certain requirements pertaining to the time for filing and the contents of those accounts and other provisions pertaining to fiduciaries' accounts.
- Requires an executor or administrator to file a supplemental final account with respect to the disposition of newly discovered assets.
- Modifies the provisions pertaining to the court hearing and approval of an account and generally requires a probate court to discharge a fiduciary 12 months after approval of the fiduciary's final and distributive account.
- Extends the time period within which an executor or administrator of an estate must collect the assets and complete the administration of the estate from nine to 13 months after the date of appointment.
- Requires a probate court, after the initial appointment of an administrator or executor, to issue a citation to a surviving spouse to exercise that spouse's rights.

- Generally requires a surviving spouse to exercise the spouse's rights within five months after the initial appointment of an executor or administrator and establishes the conclusive presumption that a surviving spouse has waived any right not exercised within that five-month period or longer period of time allowed by the court.
- If a probate court must allocate an allowance for support, requires the executor or administrator, within five months of the initial appointment of an executor or administrator, to file an application to allocate the allowance for support.
- Requires the notice of the admission of a will to probate to be given within two weeks of the admission of the will to probate.
- Requires the certificate of giving notice of the admission of a will to probate to be filed not later than two months after the appointment of the fiduciary, unless the court grants an extension of that time, and imposes penalties upon a fiduciary for neglecting or refusing to file that certificate when due.
- Reduces the time within which persons who have received or waived notice of the admission of a will to probate may file a civil action contesting the validity of the will from four months to three months after the filing of the certificate of the giving of that notice or the waiver of that notice.
- Specifies certain limitations with respect to the personal liability of any distributee to a claimant who presents a claim against the estate in a timely manner.
- Outright repeals the provision that requires an executor or administrator to send a notice to a distributee prior to a distribution of any part of the estate assets before the expiration of the time period for filing claims against the estate.
- Requires an executor or administrator who makes a distribution of assets prior to the expiration of the time for filing claims against the estate to provide notice on the account delivered to each distributee that the distributee may be liable to the estate if a valid claim is subsequently made within the permitted time.

- Permits a probate court to allow the investment for a period of not more than two years of a sum of money to be distributed or owing to a creditor of the estate and that remains unclaimed prior to the filing of a final account.
- Requires an inventory to contain a statement whether or not, insofar as it can be ascertained, the filing of an Ohio estate tax return will be required.
- Modifies and updates other provisions in the Probate Law.
- Creates a procedure to permit a probate court to issue an order declaring a man to be the father of an adult child if specified conditions are met.
- Specifies in uncodified law the effectivity of the act's provisions.

TABLE OF CONTENTS

Overview of the act	4
Preexisting law--fiduciary's accounts.....	4
Time for filing accounts; exceptions.....	4
Contents and types of accounts.....	6
Examination by court.....	7
Account of testamentary charitable trust.....	7
Operation of the act--fiduciary's accounts.....	8
Executor's and administrator's account	8
Guardian's or conservator's account	10
Testamentary trustee's and other fiduciary's account	11
Miscellaneous	12
Court hearing and approval of account	12
Prior and continuing law.....	12
Operation of the act.....	12
Completion of administration of estate.....	13
Surviving spouse's rights	13
Prior law.....	13
Operation of the act.....	14
Allowance for support.....	15
Notice and certificate of notice regarding probate of will.....	16
Prior and continuing law.....	16
Operation of the act.....	17
Uncodified law.....	18
Will contest action.....	18
Prior and continuing law.....	18

Operation of the act.....	19
Distribution of estate assets: distributee's liability to claimant upon timely presentation of claim	19
Preexisting law.....	19
Operation of the act.....	20
Notice of distribution of assets prior to deadline for filing claims against the estate	21
Prior law.....	21
Operation of the act.....	22
Uncodified law.....	22
Investment of unclaimed money.....	22
Inventory contents	23
Declaration of fatherhood.....	23
Filing of the declaration.....	23
Probate court action after receipt of a declaration.....	24
Uncodified law.....	25

CONTENT AND OPERATION

Overview of the act

The act generally restructures the provisions in preexisting law pertaining to accounts of fiduciaries by enacting separate sections of law for accounts of executors and administrators, accounts of guardians and conservators, and accounts of testamentary trustees and other fiduciaries and modifies certain requirements with respect to those accounts. The act also modifies various provisions of the Probate Law pertaining to the exercise of a surviving spouse's rights, application for and payment of an allowance for support, notice of the admission of a will to probate and certificate of giving notice or waiver of notice, the time for completing the administration of an estate, a distributee's liability to a claimant upon timely presentation of a claim against the estate, investment of unclaimed money, and contents of an inventory. The act enacts procedures for a probate court to issue an order declaring a man to be the father of an adult child if specified conditions are met.

Preexisting law--fiduciary's accounts

Time for filing accounts; exceptions

The Fiduciary Law requires fiduciaries to render accounts of the administration of the fiduciary's estate or trust at varying periods of time depending upon the type of fiduciary, or upon an order of a probate court.

Executor's and administrator's accounts. Prior law generally required every executor and administrator to render an account of the executor's or administrator's administration of the estate within *nine months* after appointment and, after the initial account was rendered, to render further accounts at least once each year. Unless a certificate of termination of an estate was filed as described in the following paragraph or the filing of the account was waived, *every fiduciary*, other than a guardian of the person only (*fiduciary* implicitly includes an executor or administrator) was required to render a final account within 30 days after completing the administration of the estate or the termination of the fiduciary's trust or within any other period of time that the court could order. *Every fiduciary*, other than a guardian of the person only, was required to render an account at any time other than the times mentioned in the law, upon the order of the court issued either at its own instance or upon the motion of any person interested in the estate for good cause shown. (R.C. 2109.30(A), 1st par.)

Preexisting law provided that in estates of decedents in which the sole legatee, devisee, or heir also was the executor or administrator, no partial accountings were required, and no final account or final and distributive account was required to be filed. That executor or administrator was discharged by filing with the court within 30 days after completing the administration of the estate a *certificate of termination* of an estate that stated all of the following: (1) that all debts and claims presented to the estate have been paid in full or settled finally, (2) that an estate tax return, if required under the Ohio Estate Tax Law, has been filed, and any estate tax due has been paid, (3) that all attorney's fees have been waived or paid, and all fiduciary fees have been waived or paid, (4) the amount of attorney's fees and the amount of fiduciary fees that have been paid, and (5) that all assets remaining after completion of the activities described above in clauses (1) to (4) have been distributed to the sole legatee, devisee, or heir.

Under preexisting law, unchanged but relocated by the act, in estates of decedents in which none of the legatees, devisees, or heirs is under a legal disability, each partial accounting of an executor or administrator may be *waived* by the written consent of all the legatees, devisees, or heirs filed in lieu of a partial accounting otherwise required. (R.C. 2109.30(B).)

Other fiduciary's accounts. Preexisting law generally required every fiduciary, other than an executor, administrator, or guardian of the person only, to render an account of the administration of the fiduciary's estate or trust at least once in each two years. A guardian of the person only was required to render an account at any time upon the order of the court issued either at its own instance or upon the motion of any person interested in the estate or trust for good cause shown. Any other fiduciary was required to render an account at any time other than the times mentioned above, upon the order of the court issued either at its

own instance or upon the motion of any person interested in the estate or trust for good cause shown.

Generally, every fiduciary, other than a guardian of the person only, was required to render a final account within 30 days after completing the administration of the estate or the termination of the fiduciary's trust or within any other period of time that the court could order. (R.C. 2109.30(A), 1st par.)

The probate court, by order, could waive an account that was required of a *guardian of the estate or a guardian of the person and estate*, other than an account made pursuant to court order, if any of the following circumstances applied: (1) the estate assets consisted entirely of real property, (2) the estate assets consisted entirely of personal property held by a bank, savings and loan association, or trust company under the law permitting the deposit of personal property in lieu of a bond, and the court had authorized expenditures of not more than \$5,000 annually for the support, maintenance, or, if applicable, education of the ward, or (3) the estate assets consisted entirely of real property and of personal property held as described in clause (2), above, and the court had authorized expenditures of not more than \$5,000 annually for the support, maintenance, or, if applicable, education of the ward. That order of a court was prima-facie evidence that a guardian of the estate or a guardian of the person and estate had authority to make expenditures as described in clauses (2) and (3), above. (R.C. 2109.30(C).)

Contents and types of accounts

Preexisting law required *every fiduciary's account* to include all of the following (R.C. 2109.30(A), 2nd par.):

(1) An itemized statement of all receipts of the fiduciary during the accounting period and of all disbursements and distributions made by the fiduciary during the accounting period. The itemized disbursements and distributions had to be verified by vouchers or proof, except in the case of an account rendered by a corporate fiduciary under the law permitting court investigation of a trust company.

(2) An itemized statement of all funds, assets, and investments of the estate or trust known to or in the possession of the fiduciary at the end of the accounting period, showing any changes in investments since the last previous account.

The accounts of testamentary trustees were required, and the accounts of other fiduciaries were permitted, to show receipts and disbursements separately identified as to principal and income.

Every account was required to be upon the signature of the fiduciary. When two or more joint fiduciaries rendered an account, the court could allow the account upon the signature of one of them. (R.C. 2109.30(A), 2nd and 3rd par.)

When a fiduciary was authorized by law or by the instrument governing distribution to distribute the assets of the estate or trust, in whole or in part, the fiduciary could do so and include a report of the distribution in the fiduciary's succeeding account (R.C. 2109.30(A), 5th par.).

The following provisions in preexisting law are unchanged by the act. An account showing complete administration before distribution of assets is designated "final account." An account filed subsequent to the final account and showing distribution of assets is designated "account of distribution." An account showing complete administration and distribution of assets is designated "final and distributive account." (R.C. 2109.30(B), 6th par.)

Examination by court

Upon the filing of *every account*, the fiduciary, except corporate fiduciaries subject to the law permitting a court investigation of trust companies, was required to exhibit to the court, for its examination, both of the following: (1) the securities shown in the account as being in the hands of the fiduciary, or the certificate of the person in possession of the securities, if held as collateral or pursuant to the law permitting the deposit of personal property in lieu of a bond or the law permitting the deposit of securities in a fiduciary capacity and (2) a passbook or certified bank statement showing as to each depository the fund deposited to the credit of the trust. The court could designate a deputy clerk, an agent of a corporate surety on the bond of the fiduciary, or another suitable person whom the court appointed as commissioner to make the examination and to report the person's findings to the court. If securities were located outside the county, the court could appoint a commissioner or request another probate court to make the examination and to report its findings to the court. The court could examine the fiduciary under oath concerning the account. (R.C. 2109.30(A), 4th par.)

Account of testamentary charitable trust

If the assets of a "testamentary charitable trust" were held and managed by a *fiduciary* who was an individual or by a corporate fiduciary and if the trust merged into a "qualified community foundation," after the fiduciary filed with the court a final and distributive account pertaining to the trust and activities up to the effective date of the merger, the fiduciary and any successors of the fiduciary were not required to render any accounting to the court pertaining to the merged trust and activities that followed the effective date of the merger. (R.C. 2109.30(D).)

Operation of the act--fiduciary's accounts

The act restructures the above-described provisions of R.C. 2109.30 pertaining to accounts of executors and administrators and other fiduciaries. It provides that every *executor and administrator* must render an account of the executor's or administrator's administration at the time and in the manner prescribed in R.C. 2109.301; every *guardian or conservator* must render an account of the ward's estate at the time and in the manner prescribed in R.C. 2109.302; and every *testamentary trustee and "other fiduciary"* (defined in the act as a fiduciary other than an executor, administrator, guardian, conservator, or testamentary trustee) must render an account of the testamentary trustee's or other fiduciary's administration at the time and in the manner prescribed in R.C. 2109.303. (R.C. 2109.30(A) and 2109.303(C)(4).) The act modifies certain requirements pertaining to the time for filing and the contents of those accounts and other aspects of the accounting provisions.

Executor's and administrator's account

Time for filing accounts. The act requires an administrator or executor to render an account at any time other than a time otherwise mentioned in the act upon an order of the probate court issued for good cause shown either at its own instance or upon the motion of any person interested in the estate. Except when a certificate of termination is filed as described below in "Exceptions," an administrator or executor must render a final account within 30 days after completing the administration of the estate or within any other period of time that the court may order. The act requires every administrator and executor to render an account of the administrator's or executor's administration not later than *13 months* (instead of *nine months*) after appointment, unless a certificate of termination is filed. Generally, after the initial account is rendered, every administrator and executor must render further accounts at least once each year. (R.C. 2109.301(A), 1st par., and (B)(3).)

Exceptions. In estates of decedents in which the sole legatee, devisee, or heir is also the administrator or executor of the estate, no partial accountings are required, and the administrator or executor is not required to file a final account or a final and distributive account. *In lieu of filing a final account* (added by the act), the administrator or executor of an estate of that type is discharged by filing with the court within 30 days after completing the administration of the estate a *certificate of termination* of an estate that states all of the information required under preexisting law and described above in "Executor's and administrator's accounts" under "Preexisting law--fiduciary's accounts," except that it must include a statement that an estate tax return, *if required under the provisions of the Internal Revenue Code* (added by the act) or the Ohio Estate Tax Law (preexisting law) has been filed, and any estate tax has been paid. (R.C. 2109.301(B)(2).)

The act requires every administrator and executor, within six months after appointment, to render a final and distributive account of the administrator's or executor's administration of the estate unless one or more of the following circumstances apply (R.C. 2109.301(B)(1)):

- (1) An Ohio estate tax return must be filed for the estate.
- (2) A proceeding contesting the validity of the decedent's will has been commenced.
- (3) The surviving spouse has filed an election to take against the will.
- (4) The administrator or executor is a party in a civil action.
- (5) The estate is insolvent.
- (6) For other reasons set forth by the administrator or executor, subject to court approval, it would be detrimental to the estate and its beneficiaries or heirs to file a final and distributive account.

Contents of account; examination by court. The act modifies former law's requirements in regard to the contents of an executor's or administrator's account by *eliminating* the requirement that the itemized disbursements and distributions must be verified by vouchers or proof, except in the case of an account rendered by a corporate fiduciary (R.C. 2109.301(A), 2nd par.).

The act modifies the authority of a probate court to examine the administrator or executor under oath concerning the account by *removing* the requirement that an executor or administrator must exhibit to the court for its examination certain securities and a passbook or certified bank statement of deposited funds and the designation of a commissioner to make an examination as described above in "**Examination by court**" under "**Preexisting law--fiduciary's accounts**" (R.C. 2109.301(A)).

The act applies the provisions in preexisting law as described above in "**Contents and types of accounts**" (except the last paragraph and the third paragraph preceding the last paragraph) and "**Examination by court**" under "**Preexisting law--fiduciary's accounts**," with the modifications described in the two preceding paragraphs, specifically to the accounts of *executors or administrators*. (R.C. 2109.301(A).)

Other accounting duties. The act requires an administrator or executor who files an account pursuant to the act to provide at the time of filing the account a copy of the account to each heir of an intestate estate or to each beneficiary of a testate estate. An administrator or executor is not required to provide a copy of the

account to: (1) an heir or a beneficiary whose residence is unknown or (2) a beneficiary of a specific bequest or devise who has received his or her distribution and for which a receipt has been filed or exhibited with the court. (R.C. 2109.32(B)(1).)

If an administrator or executor learns of the existence of newly discovered assets after the filing of the final account or otherwise comes into possession of assets belonging to the estate after the filing of the final account, the executor or administrator must file a *supplemental final account* with respect to the disposition of those assets and must provide a copy of the supplemental final account to each heir of an intestate estate or to each beneficiary of a testate estate, as described in the preceding paragraph and subject to the exceptions described in clauses (1) and (2) in that paragraph (R.C. 2109.32(B)(3)).

Guardian's or conservator's account

Time for filing account. The act requires every guardian or *conservator* (added by the act) to render an account of the administration of the ward's estate at least *once in each two years*. The guardian or conservator must render an account at any time other than a time otherwise mentioned in the act upon the order of the probate court issued for good cause shown either at its own instance or upon the motion of any person interested in the estate. Except as described below in "**Exception**," every guardian or conservator must render a final account within 30 days after completing the administration of the ward's estate or within any other period of time that the court may order. Notwithstanding the requirements for accounts by other guardians under the act, a guardian of the person is not required to render an account except upon an order of the court that the court issues for good cause shown either at its own instance or upon the motion of any person interested in the estate. (R.C. 2109.302(A), 1st par. and (B)(3).)

The act specifies that when a guardian *or conservator* is authorized by law to distribute the assets of the estate, in whole or in part, the guardian or conservator may do so and include a report of the distribution in the guardian's or conservator's succeeding account (R.C. 2109.302(A), 5th par.).

Exception. Under the act, the court may waive, by order, an account that the act requires of a *guardian of the estate or of a guardian of the person and estate*, other than an account made pursuant to court order, if any of the following circumstances apply:

- (1) The assets of the estate consist entirely of real property.
- (2) The assets of the estate consist entirely of personal property, that property is held by a bank, savings and loan association, or trust company in

accordance with the law permitting the deposit of personal property in lieu of a bond, and the court has authorized expenditures of not more than \$10,000 (instead of \$5,000) annually for the support, maintenance, or, if applicable, education of the ward.

(3) The assets of the estate consist entirely of real property and of personal property that is held as described in paragraph (2), above, and the court has authorized expenditures of not more than \$10,000 (instead of \$5,000) annually for the support, maintenance, or, if applicable, education of the ward.

The order of a court entered as described above is prima-facie evidence that a guardian of the estate or a guardian of the person and estate has authority to make expenditures as described in paragraphs (2) and (3), above. (R.C. 2109.302(B)(1) and (2).)

Contents of account; examination by court. The act applies the provisions in preexisting law as described above in "**Contents and types of accounts**" (except the last paragraph and the third paragraph preceding the last paragraph) and "**Examination by court**" under "**Preexisting law--fiduciary's accounts**" specifically to the accounts of *guardians or conservators*. (R.C. 2109.302(A).)

Testamentary trustee's and other fiduciary's account

Time for filing account. The act provides that except for accounts of testamentary charitable trusts, every testamentary trustee *must*, and every other fiduciary not subject to R.C. 2109.301 (accounts of executors and administrators) or 2109.302 (accounts of guardians and conservators) *may*, render an account of the trustee's or other fiduciary's administration of the estate or trust at least *once in each two years*. Any testamentary trustee or other fiduciary *must* render an account, subject to the provisions regarding the accounts of testamentary charitable trusts, at any time other than a time otherwise mentioned in the act upon an order of the court issued for good cause shown either at its own instance or upon the motion of any person interested in the estate or trust. Every testamentary trustee *must*, and every other fiduciary *may*, render a final account within 30 days after completing the administration of the estate or trust or *must* file a final account within any other period of time that the court may order. (R.C. 2109.303(A), 1st par.)

Contents of accounts; examination by court; account of testamentary charitable trust. The act applies the provisions in preexisting law as described above in "**Contents and types of accounts**" (except the last paragraph), "**Examination by court**," and "**Account of testamentary charitable trust**" under "**Preexisting law--fiduciary's accounts**" specifically to *testamentary trustees or other fiduciaries*. (R.C. 2109.303(A), (B), and (C).)

Miscellaneous

The act makes changes in the Probate Law to conform to the restructuring of the fiduciary accounting provisions. (R.C. 2109.07, 2109.09, 2109.11, 2109.12, 2109.18, 2109.24, 2113.28, and 5905.11.)

Court hearing and approval of account

Prior and continuing law

Every fiduciary's account that was required in prior law was required to be set for hearing before the probate court. The hearing had to be set not earlier than 30 days after the filing of the account. At the hearing upon an account, the court was required to inquire into, consider, and determine all matters relative to the account and the manner in which the fiduciary had executed the fiduciary's trust, including the investment of trust funds. The court could order the account approved and settled or make any other order that it considered proper. Continuing law provides that if the court finds that the fiduciary has fully and lawfully administered the estate or trust and has distributed the assets of the estate or trust in accordance with the law or the instrument governing distribution, as shown in the account, the court must order the account approved and settled and may order the fiduciary discharged.

Under continuing law, the probate court cannot approve the final account of any executor or administrator until the following events have occurred: (1) three months have passed since the death of the decedent, (2) the surviving spouse has filed an election to take under or against the will, or the time for making the election has expired. (R.C. 2109.32.)

Operation of the act

The act provides that every fiduciary's account required by the act must be set for hearing before the probate court. The hearing must be set not earlier than 30 days after the filing of the account. The act modifies and expands the provisions in prior law in the following manners:

(1) At the hearing upon an account *required by R.C. 2109.302 or 2109.303* (account of a guardian, conservator, testamentary trustee, or other fiduciary) *and, if ordered by the court, upon an account required by R.C. 2109.301* (account of an executor or administrator) (added by the act), the court must inquire into, consider, and determine all matters relative to the account and the manner in which the fiduciary has executed the fiduciary's trust, including the investment of trust funds, and may order the account approved and settled or make any other order as the court considers proper (R.C. 2109.32(A), 2nd par.).

(2) Upon approval of a final and distributive account of an executor or administrator as required by the act, the court may order the surety bond for the fiduciary terminated. Unless otherwise ordered by the court, the fiduciary must be discharged without further order 12 months following the approval of the final and distributive account. (R.C. 2109.32(A), 2nd par.)

(3) The rights of any person with a pecuniary interest in the estate are not barred by the approval of an account pursuant to the act. These rights may be barred following a hearing on the account pursuant to R.C. 2109.33. (R.C. 2109.32(C).)

Completion of administration of estate

Prior law required that, so far as the executor or administrator was able, the executor or administrator of an estate had to collect the assets and complete the administration of the estate within *nine months* after the date of appointment. Preexisting law, unchanged by the act, provides that upon application of the executor or administrator and notice to the interested parties, if the probate court considers that notice necessary, the court may allow further time in which to collect assets, to convert assets into money, to pay creditors, to make distributions to legatees or distributees, to file partial, final, and distributive accounts, and to settle estates. (R.C. 2113.25.)

The act extends the time period within which an executor or administrator of an estate must collect the assets and complete the administration of the estate from nine months to *13 months* after the date of appointment (R.C. 2113.25).

Surviving spouse's rights

Prior law

R.C. Chapter 2106. grants a surviving spouse certain rights in regard to the estate of the decedent spouse. One of these rights is the right of election. Former law required that "[A]fter the probate of a will and the filing of the inventory and the appraisalment," the probate court must issue a citation to the surviving spouse, if any is living at the time of the issuance of the citation, to elect whether to take under the will or under R.C. 2105.06 (Intestate Succession Law).

The election of a surviving spouse to take under a will or under the Intestate Succession Law could be made at any time after the death of the decedent, but was required to be made not later than "one month from the service of the citation to elect." On a motion filed before the expiration of the one-month period, and for good cause shown, the court could allow further time for the making of the election. If no action was taken by the surviving spouse before the expiration of

the one-month period, it was conclusively presumed that the surviving spouse elected to take under the will. The election must be entered on the journal of the court under continuing law.

If a surviving spouse succeeded to the entire estate of the testator, having been named the sole devisee and legatee, it was presumed that the spouse elected to take under the will of the testator. The law provided that "[n]o citation shall be issued to the surviving spouse . . . and no election shall be required, unless the surviving spouse manifests a contrary intention." (R.C. 2106.01(A), (E), and (F).)

The citation to make the election was required to be accompanied by a general description of the effect of the election and the general rights of the surviving spouse. The description, under continuing law, must include a specific reference to the procedures available to the surviving spouse seeking a construction of the will in favor of that spouse and, under former law, needed to include a specific reference to the presumption that arose if the surviving spouse did not make the election as described in the preceding paragraph. The description of the effect of the election and of the rights of the surviving spouse did not need to relate to the nature of any particular estate. (R.C. 2106.02(B).)

Operation of the act

The act modifies the time and procedures for a surviving spouse to make an election in the following manners:

(1) It provides that *after the initial appointment of an administrator or executor of the estate* (instead of "after the probate of a will and the filing of the inventory and the appraisal") the probate court must issue a citation to the surviving spouse, if any is living at the time of the issuance of the citation, to elect whether to *exercise the surviving spouse's rights under R.C. Chapter 2106., including, after the probate of a will, the right to elect to* (added by the act) take under the will or under the Intestate Succession Law (R.C. 2106.01(A)).

(2) The act specifies that the election of a surviving spouse to take under a will or under the Intestate Succession Law may be made at any time after the death of the decedent, but the surviving spouse cannot make the election *later than five months from the date of the initial appointment of an administrator or executor of the estate* (instead of "later than one month from the service of the citation to elect"). On a motion filed before the expiration of the five-month period, and for good cause shown, the court may allow further time for the making of the election. If no action is taken by the surviving spouse before the expiration of the five-month period, it is conclusively presumed that the surviving spouse elects to take under the will. (R.C. 2106.01(E).)

(3) The act provides that if a surviving spouse succeeds to the entire estate of the testator, having been named the sole devisee and legatee, it is presumed that the spouse elects to take under the will of the testator, unless the surviving spouse manifests a contrary intention. It removes the provision that "[n]o citation shall be issued to the surviving spouse . . . and no election shall be required, unless the surviving spouse manifests a contrary intention." (R.C. 2106.01(F).)

(4) Under the act, unless otherwise specified by a provision of the Revised Code or this provision, a surviving spouse must exercise all rights under R.C. Chapter 2106. within five months of the initial appointment of an executor or administrator of the estate. It is conclusively presumed that a surviving spouse has waived any right not exercised within that five-month period or within any longer period of time allowed by the court. Upon the filing of a motion to extend the time for exercising a right under R.C. Chapter 2106. and for good cause shown, the court may allow further time for exercising the right that is the subject of the motion. (R.C. 2106.25.)

(5) The act specifies that the citation to make the election must be accompanied by a general description of the effect of the election *to take under the will or under the Intestate Succession Law* and the general rights of the surviving spouse *under R.C. Chapter 2106.* (added by the act). The description of the general rights of the surviving spouse under R.C. Chapter 2106. must include a specific reference to the presumption that arises if the surviving spouse does not make the election within the time period as described above in paragraph (4). The description of the effect of the election and of the *general* (added by the act) rights of the surviving spouse need not relate to the nature of any particular estate. (R.C. 2106.02(B).)

Allowance for support

Continuing law provides that 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, in money or property, generally the sum of \$40,000 as an allowance for support. The money or property set off as an allowance for support are considered estate assets. The probate court must order the distribution of the allowance for support according to allocation percentages, equitable shares, and other factors specified in continuing law. (R.C. 2106.13.)

Under the act, if the probate court must allocate the allowance for support, the administrator or executor, within five months of the initial appointment of an administrator or executor, must file with the probate court an application to allocate the allowance for support. The act specifically requires the administrator or executor to pay the allowance for support unless a competent adult or a

guardian with the consent of the court having jurisdiction over the guardianship waives the allowance for support to which the adult or the ward represented by the guardian is entitled. (R.C. 2106.13(D) and (E).)

Notice and certificate of notice regarding probate of will

Prior and continuing law

Notice of admission of a will to probate. Prior law required that generally, when a will had been admitted to probate, the fiduciary for the estate or another person as described below in "**Persons required or not required to file**" promptly was required to give a notice of the admission of the will to probate and in the manner provided by Civ. R. 73(E) (service of notice in a probate court) to all of the following: (1) the surviving spouse of the testator, (2) all persons who would be entitled to inherit from the testator under the Intestate Succession Law if the testator had died intestate, and (3) all legatees and devisees named in the will. Under continuing law, the notice must mention the probate of the will and, if a particular person being given the notice is a legatee or devisee named in the will, must state that the person is named in the will as a beneficiary. A copy of the will admitted to probate is not required to be given with the notice. A person entitled to be given the notice may waive that right by filing in the probate court, at any time prior to or after the will has been admitted to probate, a written waiver of the right to receive the notice. (R.C. 2107.19(A)(1) and (2).)

Certificate of giving notice or waiver of notice. Continuing law provides that the fact that the notice of the admission of the will to probate has been given, subject to the exception described below in "**Persons required or not required to file**," to all persons entitled to receive the notice, as described in the preceding paragraph, who have not waived that right, and, if applicable, the fact that certain persons have waived their right to receive the notice, must be evidenced by a *certificate of giving notice or waiver of notice* (R.C. 2107.19(A)(3)).

Persons required or not required to file. Under continuing law, both the notice of the admission of the will to probate and the certificate of giving notice or waiver of notice must be given or filed by any of the following: (1) the fiduciary for the estate, (2) the applicant for the admission of the will to probate, (3) the applicant for a release from administration, (4) any other interested person, or (5) the attorney for the fiduciary or for any of the persons described in clauses (2), (3), or (4), above. The fiduciary or other person described above is not required to give a *notice of the admission of the will to probate* to persons who have been notified of the application for probate of the will or of a contest as to jurisdiction or to persons whose names or places of residence are unknown and cannot with reasonable diligence be ascertained, and instead, must file in the probate court a certificate to that effect. (R.C. 2107.19(A)(4) and (B).)

Operation of the act

The act requires the notice of the admission of the will to probate to be given within *two weeks* of the admission of the will to probate (instead of "promptly") and requires the certificate of giving notice to be filed not later than two months after the appointment of the fiduciary unless the court grants an extension of that time. Failure to file that certificate in a timely manner subjects the fiduciary to the citation and penalty provisions described in the following paragraphs (see **COMMENT 1**). (R.C. 2107.19(A)(1) and (4) and 2109.31.)

If a fiduciary neglects or refuses to file a certificate of notice of probate of will when due, as described in the preceding paragraph, or when ordered by a probate court, the court at its own instance may issue, and on the application of any interested party or of any of the next of kin of any ward must issue, a citation to that fiduciary pursuant to the Civil Rules to compel the filing of the overdue certificate of notice of probate of will. The citation may contain any of the following:

(1) A statement that the particular certificate of notice of probate of will is overdue;

(2) An order to the fiduciary to file the certificate of notice of probate of will, or otherwise to appear before the court on a specified date;

(3) A statement that, upon the issuance of the citation, a continuance to file the certificate of notice of probate of will may be obtained from the court only on or after the date specified pursuant to clause (2), above.

If a citation is issued to a fiduciary and the fiduciary fails to file the certificate of notice of probate of will prior to the appearance date specified in the citation, the court may order, on that date, one or more of the following:

(1) The removal of the fiduciary;

(2) A denial of all or part of the fees to which the fiduciary otherwise would be entitled;

(3) A continuance of the time for filing the certificate of notice of probate of will;

(4) An assessment against the fiduciary of a penalty of \$100 and costs of \$25 for the hearing, or a suspension of all or part of the penalty and costs;

(5) That the fiduciary is in contempt of the court for the failure to comply with the citation and that a specified daily fine, imprisonment, or daily fine and

imprisonment may be imposed against the fiduciary, beginning with the appearance date, until the certificate of notice of probate of will is filed with the court;

(6) If the fiduciary does not appear in the court on the specified appearance date, that the fiduciary is in contempt of the court for the failure to comply with the citation, and that one of the following may occur: (a) the fiduciary will be taken into custody by the sheriff or a deputy sheriff and brought before the court or (b) the fiduciary must appear before the court on a specified date or otherwise be taken into custody by the sheriff or a deputy sheriff and brought before the court.

The assessments, fines, and other sanctions that the court may impose upon a fiduciary may be imposed only upon a fiduciary and cannot be imposed upon the surety of any fiduciary. (R.C. 2109.31.)

Uncodified law

The act provides that the General Assembly encourages the Supreme Court to amend Rule 59(B) of the Ohio Rules of Superintendence to require fiduciaries appointed to administer testate estates to file a Certificate of Service of Notice of Probate of Will within *two weeks* of the fiduciary's appointment (Section 3). (See COMMENT 2.)

Will contest action

Prior and continuing law

Generally, a person interested in a will or codicil admitted to probate in a probate court may contest its validity by a civil action in the probate court in the county in which the will or codicil was admitted to probate (R.C. 2107.71(A)--not in the act). Under prior law, no person "who has received or waived the right to receive the notice of the admission of a will to probate" required as described above in "**Notice of admission of a will to probate**" in "**Prior and continuing law**" under "**Notice and certificate of notice regarding probate of will**" could commence an action to contest the validity of the will more than *four months* after the filing of the certificate certifying the giving of that notice to or the waiver of that notice by that person (hereafter, *certificate of giving notice or waiver of notice*). *No other person could commence an action to contest the validity of the will more than four months after the initial filing of a certificate of giving notice or waiver of notice.* However, under continuing law, a person under any legal disability may commence an action to contest the validity of the will within four months after the disability is removed, but the rights saved do not affect the rights of a purchaser, lessee, or encumbrancer for value in good faith and do not impose

any liability upon a fiduciary who has acted in good faith, or upon a person delivering or transferring property to any other person under authority of a will, whether or not the purchaser, lessee, encumbrancer, fiduciary, or other person had actual or constructive notice of the legal disability. (R.C. 2107.76.)

Operation of the act

Under the act, no person who has received or waived the right to receive the notice of the admission of a will to probate may commence an action to contest the validity of the will more than *three months* (instead of four months) after the filing of the certificate of giving notice or waiver of notice. The act repeals the provision that *no other person may commence an action to contest the validity of the will more than four months after the initial filing of a certificate of giving notice or waiver of notice*. The act continues the provision that a person under any legal disability may commence an action to contest the validity of the will within four months after the disability is removed. (R.C. 2107.76.)

Distribution of estate assets: distributee's liability to claimant upon timely presentment of claim

Preexisting law

Under preexisting law, unchanged by the act, at any time after the appointment of an executor or administrator, the executor or administrator may distribute to the beneficiaries entitled to assets of the estate under the will, if there is no action pending to set aside the will, or to the heirs entitled to assets of the estate by law, in cash or in kind, any part or all of the assets of the estate. Each beneficiary or heir formerly was liable to return the assets, or the proceeds from the assets, if they were necessary to satisfy the share of a surviving spouse who elected to take against the will, or to satisfy any claims against the estate.

Preexisting law provided that if the executor or administrator distributed any part of the assets of the estate before the expiration of the times for the making of an election by a surviving spouse as described above in "**Prior law**" under "**Surviving spouse's rights**," the executor or administrator "is" personally liable to any surviving spouse who subsequently elected to take against the will. If the executor or administrator distributed any part of the assets of the estate within three months after the death of the decedent, the executor or administrator "is" personally liable only to those claimants who presented their claims within that three-month period. If the executor or administrator distributed any part of the assets of the estate more than three months but less than one year after the death of the decedent, the executor or administrator "is" personally liable only to those claimants who presented their claims before the distribution. Former law provided that *if the executor or administrator distributes any part of the assets of the estate*

more than one year after the death of the decedent, the executor or administrator is personally liable only to those claimants who present their claims within one year after the death of the decedent. The executor or administrator is liable only to the extent a claim is finally allowed.

Under continuing law, the executor or administrator is liable only to the extent that the sum of the remaining assets of the estate and the assets returned by the beneficiaries or heirs is insufficient to satisfy the share of the surviving spouse and to satisfy the claims against the estate. The executor or administrator is not liable in any case for an amount greater than the value of the estate that existed at the time that the distribution of assets was made and that was subject to the spouse's share or to the claims. (R.C. 2113.53.)

Operation of the act

Under the act, each beneficiary or heir is liable to return the assets, or the proceeds from the assets, if they are necessary to satisfy the share of a surviving spouse who elects to take against the will, if they are necessary to satisfy any claims against the estate "as provided in this section (i.e., R.C. 2113.53)," or "if the will is set aside" (added by the act). The act provides that after distribution of the estate assets under the will or by law, a distributee "shall be" personally liable to a claimant who presents a claim within one year after the decedent's death, subject to the limitations described in the following paragraphs. (R.C. 2113.53(A) and (B) and R.C. 2117.06(B)--not in the act.)

The personal liability of any distributee cannot exceed the lesser of the following:

(1) The amount the distributee has received reduced by the amount, if any, previously returned or otherwise used for the payment of the spouse's share or claims finally allowed;

(2) The distributee's proportionate share of the spouse's share or of claims finally allowed. Any distributee's proportionate share of the spouse's share or of claims finally allowed must be determined by the following fraction: (a) the numerator is the total amount received by the distributee, reduced by all amounts, if any, previously returned or otherwise used for the payment of the spouse's share or claims finally allowed, (b) the denominator is the total amount received by all distributees reduced by all amounts, if any, previously returned or otherwise used for the payment of the spouse's share or claims finally allowed.

Under the act, *if there is a surviving spouse* (added by the act) and if the executor or administrator distributes any part of the assets of the estate before the expiration of the times for the making of an election by a surviving spouse as

described above in paragraph (2) in "Operation of the act" under "Surviving spouse's rights," the executor or administrator *shall be* (instead of "is") personally liable to any surviving spouse who subsequently elects to take against the will. If the executor or administrator distributes any part of the assets of the estate within three months after the death of the decedent, the executor or administrator *shall be* (instead of "is") personally liable only to those claimants who present their claims within that three-month period. If the executor or administrator distributes any part of the assets of the estate more than three months but less than one year after the death of the decedent, the executor or administrator *shall be* (instead of "is") personally liable only to those claimants who present their claims before the *time of distribution and within the time set forth in R.C. 2117.06(B)* (i.e., within one year after the decedent's death) (added by the act). The act repeals the provision that *if the executor or administrator distributes any part of the assets of the estate more than one year after the death of the decedent, the executor or administrator is personally liable only to those claimants who present their claims within one year after the death of the decedent*. The act also repeals the provision that *the executor or administrator shall be liable only to the extent a claim is finally allowed*. (R.C. 2113.53(C).)

Notice of distribution of assets prior to deadline for filing claims against the estate

Prior law

Former R.C. 2113.533 required that, if the executor or administrator distributed any part of the assets of the estate prior to the expiration of the time period for the filing of claims against the estate (i.e., one year after the decedent's death), the executor or administrator was required to send a notice to the distributee prior to that distribution. The executor or administrator was required to pay out of the estate the costs associated with the preparation and mailing of the notice. The notice needed to contain the following information:

- (1) The county of probate, the probate case number, and the name of the estate of the deceased;
- (2) The date of the notice and the address of the executor or administrator;
- (3) A statement that informed the distributee that the distribution of the assets was being made before the expiration of the one-year deadline for the filing of claims against the estate, and for that reason the distributee could be liable to the estate up to the value of the distribution and could be required to return all or any part of the value of the distribution the distributee received if a valid claim was subsequently made against the estate within the permitted time.

The notice was required to include a signature line for the distributee preceded by a statement that the distributee received the notice and acknowledged that the distributee could be required to return to the estate the value of the distribution the distributee receives.

Former R.C. 2113.533 prescribed a statutory form to be used for the notice until the Supreme Court, pursuant to its powers of superintendence under the Ohio Constitution, developed and adopted a form to govern the notice.

Continuing law pertaining to the presentment of claims against an estate sets forth the times, requirements, and procedures for the presentment and allowance of creditors' claims against an estate. A preexisting provision in that law provided that if the executor or administrator made a distribution of the assets of the estate prior to the expiration of the time for the filing of claims, the executor or administrator had to provide notice to each distributee *as provided in R.C. 2113.533* (R.C. 2117.06(K)).

Operation of the act

The act outright repeals R.C. 2113.533. It provides that if the executor or administrator makes a distribution of the assets of the estate prior to the expiration of the time for the filing of claims, the executor or administrator must provide notice *on the account delivered to each distributee that the distributee may be liable to the estate up to the value of the distribution and may be required to return all or any part of the value of the distribution if a valid claim is subsequently made against the estate within the time permitted in the law pertaining to the presentment of claims against an estate* (instead of *as provided in R.C. 2113.533*). (R.C. 2117.06(K).)

Uncodified law

The act provides that the version of R.C. 2117.06 that is presented in this act is the version of that section that was in effect immediately prior to the effective date of Am. Sub. H.B. 350 of the 121st General Assembly. That version of R.C. 2117.06 is used in this act in order to repeal the amendments made to that section by Am. Sub. H.B. 350 of the 121st General Assembly, to revive the version of that section immediately prior to January 27, 1997, the effective date of that act, and to clarify the existing language of that section. (Section 4.)

Investment of unclaimed money

Prior law provided that if a sum of money "directed by a decree or order of the probate court" to be distributed to heirs, next of kin, or legatees, or owing from an estate to a creditor of the estate, "remains for six months unclaimed," the court

could order it turned into the county treasury as provided in the law providing for the disposition of the investment of unclaimed money, or could order the executor or administrator to invest it as the court directs for a period not to exceed *one year*, to accumulate for the benefit of the persons entitled to the sum of money. Under continuing law, the investment must be made in the name of the probate judge of the court for the time being and is subject to the order of the judge and the judge's successors in office. (R.C. 2113.64.)

The act modifies prior law by providing that if a sum of money (the act removes "directed by a decree or order of the probate court") to be distributed to heirs, next of kin, or legatees, or owing from an estate to a creditor of the estate, remains *unclaimed prior to the filing of a final account* (instead of "remains for six months unclaimed"), the court may order it turned into the county treasury as provided in the law providing for the disposition of the investment of unclaimed money, or may order the executor or administrator to invest it as the court directs for a period not to exceed *two years* (instead of *one year*), to accumulate for the benefit of the persons entitled to the sum of money. (R.C. 2113.64.)

Inventory contents

Under continuing law, within three months after the executor's or administrator's appointment, unless the probate court grants an extension for good cause shown, the executor or administrator must file with the court an inventory of the decedent's interest in real property located in Ohio and of the decedent's tangible and intangible personal property that is to be administered and that has come to the executor's or administrator's possession or knowledge (R.C. 2115.02--not in the act). The inventory generally must contain: (1) a particular statement of, and specified information regarding, all securities for the payment of money that belong to the deceased and are known to the executor or administrator, (2) a statement of, and specified information regarding, all debts and accounts belonging to the deceased that are known to the executor or administrator, and (3) an account of all moneys that belong to the deceased and have come to the hands of the executor or administrator. (R.C. 2115.09.)

Under the act, the inventory also must contain a statement whether or not, insofar as it can be ascertained, the filing of an Ohio estate tax return will be required. (R.C. 2115.09.)

Declaration of fatherhood

Filing of the declaration

The act permits a man alleging himself to be the father of an adult child (a person born in this state who is 23 years old or older), the adult child's mother, and

the adult child in question to appear together before a probate judge and jointly file a declaration stating that the man is the father of the adult child and requesting that the court issue an order declaring that the man is the adult child's father. The declaration must state all of the following: (1) the adult child's birth certificate does not designate anyone as the adult child's father, (2) the request for the order is made freely and voluntarily by all parties appearing before the court, and (3) genetic test results show the man to be the father of the adult child. A copy of the birth certificate and the "genetic test" results must be attached to the declaration. (R.C. 2105.25(B).)

The act defines "genetic test" as having the same meaning as in R.C. 3111.09, which defines "genetic tests" and "genetic testing" as either of the following (R.C. 3111.09(E)(1)):

- (1) Tissue or blood tests, including tests that identify the presence or absence of common blood group antigens, the red blood cell antigens, human lymphocyte antigens, serum enzymes, serum proteins, or genetic markers;
- (2) Deoxyribonucleic acid typing of blood or buccal cell samples.

"Genetic test" and "genetic testing" may include the typing and comparison of deoxyribonucleic acid derived from the blood of one individual and buccal cells of another.

The act also permits a man alleging himself to be the father of an adult child and the adult child in question to appear together before the court without the adult child's mother in order to file the declaration if the mother is deceased or has been adjudicated incompetent (R.C. 2105.25(C)).

The act generally requires the declaration to be filed in the county where the alleged father resides. However, if the alleged father is not a resident of this state, the declaration may be filed in any county of the state. (R.C. 2105.25(B) and (C).)

Probate court action after receipt of a declaration

The act requires a probate court to issue an order declaring a man alleging himself to be the father of an adult child to be the father of that adult child if the court determines all of the following (R.C. 2105.26(A)):

- (1) The order was freely and voluntarily requested.

(2) No person is designated as the father of the adult child on the adult child's birth certificate.

(3) Genetic test results show that the man is the father of the adult child.

(4) It is in the best interests of the man and the adult child that the order be issued.

If the court issues the order, as part of that order the court must order the adult child's birth certificate to be changed, and the certificate must be changed, to designate the man as the adult child's father (R.C. 2105.26(B) and 3705.09(G)).

After the issuance of the order, the adult child must be considered to be the child of the man declared to be the father as if the child was born under lawful wedlock. The adult child and the adult child's mother may not be awarded child support from the man for the time that the adult child was a minor. (R.C. 2105.26(C).)

Uncodified law

The act provides that R.C. 2106.01, 2106.02, 2106.13, 2107.19, 2107.76, 2109.07, 2109.09, 2109.18, 2109.24, 2109.30, 2109.31, 2109.32, 2113.25, 2113.28, 2113.53, 2113.64, 2115.09, and 2117.06, as amended by this act, and R.C. 2106.25 and 2109.301, as enacted by this act (provisions pertaining to the accounts of executors or administrators and related provisions and other changes in the Probate Law), apply only to estates of decedents who die on or after January 1, 2002 (Section 5).

The act provides that R.C. 2109.12, 2109.18, 2109.24, 2109.30, and 5905.11, as amended by this act, and R.C. 2109.302, as enacted by this act (provisions pertaining to the accounts of guardians and conservators and related provisions), apply to guardians or conservators of wards' estates that are in existence or are created on or after January 1, 2002 (Section 6).

The act provides that R.C. 2109.11, 2109.18, 2109.24, and 2109.30, as amended by this act, and R.C. 2109.303, as enacted by this act (provisions pertaining to the accounts of testamentary trustees or other fiduciaries and related provisions), apply to testamentary trustees or other fiduciaries of trusts that are in existence or are created on or after January 1, 2002, or to other fiduciaries under governing instruments that are in existence or are created on or after January 1, 2002 (Section 7).

COMMENT

1. The act applies continuing law's citation and penalty provisions that apply when a fiduciary neglects or refuses to file an account, inventory, or report when due according to the Probate Law or when ordered by the probate court, to a fiduciary who neglects or refuses to file a *certificate of notice of probate of will* when due or when ordered by the probate court. (R.C. 2109.31.)

2. There is an ambiguity in the act's provisions since under R.C. 2107.19(A)(4), as amended by the act, the period for filing a certificate of giving notice of probate of a will is *two months* after the appointment of the fiduciary.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-13-01	p. 154
Reported, H. Civil and Commercial Law	03-28-01	p. 274
Passed House (98-0)	04-03-01	pp. 284-285
Reported, S. Judiciary on Civil Justice	06-14-01	p. 662
Passed Senate (33-0)	06-14-01	p. 666
House concurred in Senate amendments (98-1)	06-20-01	pp. 683-684

01-hb85.124/jc