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Bill Analysis

Legislative Service Commission

H.B. 85

124th General Assembly
(As Introduced)

Reps. Hughes, Goodman, Sullivan, Setzer, Patton, Allen, Jolivette, Niehaus, Webster, Redfern, Latta, DePiero, Reidelbach

BILL SUMMARY

- Restructures existing 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.
- 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 elective rights.
- Generally requires a surviving spouse to exercise the spouse's elective 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 elective 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 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.
- Modifies the time period within which any person may commence an action to contest the validity of a will.
- 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.
- 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.
- Enacts provisions subjecting a transferee of a "nonprobate transfer" to liability to a decedent's probate estate for allowed claims against the estate and statutory allowances to the decedent's surviving spouse and children to the extent the estate is insufficient to satisfy those claims, and prescribing the order of liability of those transferees, the manner of enforcement of the liability, and other applicable rules.
- Modifies and updates other provisions in the Probate Law.

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CONTENT AND OPERATION

Overview of the bill

The bill generally restructures the provisions in existing 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 bill also modifies various provisions of the Probate Law pertaining to the exercise of a surviving spouse's elective 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 filing a will contest action, a distributee's liability to a claimant upon timely presentation of a claim against the estate, investment of unclaimed money, contents of an inventory, and "nonprobate transfers" and liability of nonprobate transferees.

Existing law--fiduciary's accounts

Time for filing accounts; exceptions

The current 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. Generally, every executor and administrator must render an account of the executor's or administrator's administration of the estate within *nine months* after appointment and, after the initial account is rendered, must render further accounts at least once each year. Unless a certificate of termination of an estate is filed as described in the following paragraph or the filing of the account is waived, *every fiduciary*, other than a guardian of the person only (*fiduciary* implicitly includes an executor or administrator) must 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 may order. *Every fiduciary*, other than a guardian of the person only, must 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.)

In estates of decedents in which the sole legatee, devisee, or heir also is the executor or administrator, no partial accountings are required, and no final account or final and distributive account is required to be filed. That executor or administrator 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 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 by 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.

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. Generally, every fiduciary, other than an executor, administrator, or guardian of the person only, must 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 must 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 must 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, must 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 may order. (R.C. 2109.30(A), 1st par.)

The probate court, by order, may waive an account that is 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 applies: (1) the estate assets consist entirely of real property, (2) the estate assets consist 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 has 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 consist entirely of real property and of personal property held as described in clause (2), above, and the court has 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 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 clauses (2) and (3), above. (R.C. 2109.30(C).)

Contents and types of accounts

Every *fiduciary's account* must 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 must 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 must, and the accounts of other fiduciaries may, show receipts and disbursements separately identified as to principal and income. Every account must be upon the signature of the fiduciary. When two or more joint fiduciaries render an account, the court may allow the account upon the signature of one of them. (R.C. 2109.30(A), 2nd and 3rd par.)

When a fiduciary is 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 may do so and include a report of the distribution in the fiduciary's succeeding account. 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(A), 5th and 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, must 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 may designate a deputy clerk, an agent of a corporate surety on the bond of the fiduciary, or another suitable person whom the court appoints as commissioner

to make the examination and to report the person's findings to the court. If securities are located outside the county, the court may appoint a commissioner or request another probate court to make the examination and to report its findings to the court. The court may 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" (see **COMMENT 1**) are held and managed by a fiduciary who is an individual or by a corporate fiduciary and if the trust merges into a "qualified community foundation," (see **COMMENT 2**) after the fiduciary files 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 are not required to render any accounting to the court pertaining to the merged trust and activities that follow the effective date of the merger. (R.C. 2109.30(D).)

Operation of the bill--fiduciary's accounts

The bill 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 bill 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 bill 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 bill requires an administrator or executor to render an account at any time other than a time otherwise mentioned in the bill 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 bill requires every administrator and executor to render an account of the administrator's or executor's administration not later than 12

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 bill), 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 existing law and described above under "**Existing 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 bill) or the Ohio Estate Tax Law (existing law) has been filed, and any estate tax has been paid. (R.C. 2109.301(B)(2).)

The bill 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, or the time for contesting the will has not yet expired.
- (3) The surviving spouse has filed an election to take against the will, or the time for making the election has not yet expired.
- (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 bill modifies current 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 bill 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 "Existing law--fiduciary's accounts" (R.C. 2109.301(A)).

The bill applies the provisions in current law as described above in "Contents and types of accounts" and "Examination by court" under "Existing 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 bill requires an administrator or executor who files an account pursuant to the bill 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 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 (R.C. 2109.32(B)(3)).

Guardian's or conservator's account

Time for filing account. The bill requires every guardian or *conservator* (added by the bill) (see **COMMENT 3**) 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 bill 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 bill, 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 bill 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 bill, the court may waive, by order, an account that the bill 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 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.

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 bill applies the provisions in current law as described above in "**Contents and types of accounts**" and "**Examination by court**" under "**Existing 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 bill 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) and 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 bill 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 bill applies the provisions in existing law as described above in "**Contents and types of accounts,**" "**Examination by court,**" and "**Account of testamentary charitable trust**" under "**Existing law--fiduciary's accounts**" specifically to *testamentary trustees or other fiduciaries*. (R.C. 2109.303(A), (B), and (C).)

Miscellaneous

The bill 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

Existing law

Every fiduciary's account that is required in current law 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. At the hearing upon an account, 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. The court may order the account approved and settled or make any other order that it considers proper. 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.

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 bill

The bill provides that every fiduciary's account required by the bill 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 bill modifies and expands the provisions in current 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 bill), 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 bill, 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 bill. These rights may be barred following a hearing on the account pursuant to R.C. 2109.33 (see **COMMENT 4**). (R.C. 2109.32(C)).

Surviving spouse's elective rights

Existing 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. Current law provides that "[A]fter the probate of a will and the filing of the inventory and the appraisement," 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 may be made at any time after the death of the decedent, but must 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 may allow further time for the making of the election. If no action is taken by the surviving spouse before the expiration of the one-month period, it is conclusively presumed that the surviving spouse elects to take under the will. The election must be entered on the journal of the court.

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. The law provides 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 must be accompanied by a general description of the effect of the election and the general rights of the surviving spouse. The description 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 to the presumption that arises if the surviving spouse does 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 need not relate to the nature of any particular estate. (R.C. 2106.02(B).)

Operation of the bill

The bill 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 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 *exercise the surviving spouse's elective rights under Chapter 2106., including, after the probate of a will, the right to* (added by the bill) take under the will or under the Intestate Succession Law (R.C. 2106.01(A)).

(2) The bill 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 bill, in continuing law, 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 bill, unless otherwise specified by a provision of the Revised Code or this provision, a surviving spouse must exercise all elective rights 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 elective 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 an elective right and for good cause shown, the court may allow further time for exercising the elective right that is the subject of the motion. (R.C. 2106.25.)

(5) The bill 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 bill). 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 bill) rights of the surviving spouse need not relate to the nature of any particular estate. (R.C. 2106.02(B).)

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, 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 current law. (R.C. 2106.13.)

Operation of the bill

Under the bill, 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 bill 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

Existing law

Notice of admission of the will to probate. Generally, when a will has been admitted to probate, the fiduciary for the estate or another person as described below in "**Persons required or not required to file**" promptly must 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. 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. 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. 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 bill

The bill 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 5**). (R.C. 2107.19(A)(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 bill 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 months of the fiduciary's appointment (Section 3).

Will contest action

Existing 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 bill). 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 "**Existing law**" under "**Notice and certificate of notice regarding probate of will**" may 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 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.* However, 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 bill

Under the bill, no person (the bill removes the phrase "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 the latest of the following time periods: (1) two months after the filing of the certificate of giving notice or waiver of notice, (2) one month after the filing of the inventory (inventory of the decedent's interest in real estate located in Ohio and of the decedent's tangible and intangible personal property that is to be administered and has come to the executor's or administrator's possession or knowledge), or (3) four months after the testator's death. The bill 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 bill specifies that the filing of an amendment or supplement to the inventory, or a report of newly discovered assets does not extend the time for contesting the validity of the will. A person under any legal disability may commence an action to contest the validity of the will within *two* (instead of *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

Existing law

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 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, or to satisfy any claims against the estate.

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 "**Existing law**" under "**Surviving spouse's**

elective rights," the executor or administrator "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 "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 "is" personally liable only to those claimants who present their claims before the distribution. *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.*

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 bill

Under the bill, 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, or to satisfy any claims against the estate "as provided in this section" (i.e., R.C. 2113.53) (added by the bill). The bill provides that after distribution of the estate assets under the will, 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).)

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 bill, *if there is a surviving spouse* (added by the bill) 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 bill**" under "**Surviving spouse's elective 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 bill). The bill 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 bill 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

Existing law

Under R.C. 2113.533, if the executor or administrator distributes 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 must send a notice to the distributee prior to that distribution. The executor or administrator must pay out of the estate the costs associated with the preparation and mailing of the notice. The notice must 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 informs the distributee that the distribution of the assets is being made before the expiration of the one-year deadline for the filing of claims against the estate, and for that reason 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 the distributee receives if a valid claim is subsequently made against the estate within the permitted time.

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

R.C. 2113.533 prescribes a statutory form to be used for the notice until the Supreme Court, pursuant to its powers of superintendence under the Ohio Constitution, develops and adopts a form to govern the notice.

Existing 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. 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 to each distributee as provided in R.C. 2113.533* (R.C. 2117.06(K)).

Operation of the bill

The bill outright repeals R.C. 2113.533 and repeals the provision 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 to each distributee as provided in R.C. 2113.533*. (R.C. 2117.06(K).)

Uncodified law

The bill 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

Existing law

Current law provides 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 may order it turned into the county treasury as provided in R.C. 2113.65 (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 *one year*, to accumulate for the benefit of the persons entitled to the sum of money. 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.)

Operation of the bill

The bill modifies current law by providing that if a sum of money (the bill 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

Existing 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 bill). 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.)

Operation of the bill

Under the bill, 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).

Nonprobate transfers and transferees--operation of the bill

Liability of nonprobate transferees

The bill provides that except as otherwise provided by a provision of the Revised Code, a transferee of a "nonprobate transfer" (see "**Definition**," below) is subject to liability to the decedent's probate estate for allowed claims against the decedent's probate estate and statutory allowances to the decedent's spouse and children to the extent the decedent's probate estate is insufficient to satisfy those claims and allowances. Nonprobate transferees are liable for this insufficiency in the following order:

(1) As provided in the decedent's will or any other governing instrument;

(2) To the extent of the value of the nonprobate transfer received by the trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other facts or circumstances;

(3) Other nonprobate transferees.

Each nonprobate transferee within a class is liable for that person's proportionate share of the insufficiency imposed on that person's class, but not to exceed the value of nonprobate transfers received by that person.

Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liability under the bill will abate as necessary to satisfy the liability, as if all the trust instruments were a single will, and interests were devised under it.

A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails. (R.C. 2117.51(B), (C), (D), and (E).)

Enforcement of liability

Upon due notice to a nonprobate transferee, the liability imposed as described above is enforceable in proceedings in Ohio, wherever the transferee is

located. A proceeding may not be commenced unless the personal representative of the decedent's estate has received from the surviving spouse, a child to the extent that statutory allowances are affected, or a creditor, a written demand for the proceeding. If the personal representative declines or fails to commence a proceeding after a written demand, a person making the written demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the written demand and not of the estate. A personal representative who declines to commence a requested proceeding incurs no personal liability for so declining.

A proceeding as described in the preceding paragraph must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim. (R.C. 2117.51(F), (G), and (H).)

Applicable rules

Unless a written notice asserting that a decedent's probate estate is insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply (R.C. 2117.51(I)):

(1) Payment or delivery of assets by a financial institution registrar or other obligor to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered.

(2) A trustee receiving a nonprobate transfer is released from liability under the bill on any assets distributed to the trust's beneficiaries. Each beneficiary, to the extent of the distribution received, becomes liable for the amount of the trustee's liability attributable to that asset imposed as described above in "**Liability of nonprobate transferees**" with respect to the order of liability and the abatement of the interests of beneficiaries in all trusts incurring liability.

Definition

The bill defines "nonprobate transfer" as a valid transfer effective at death by a transferor whose last domicile was in Ohio to the extent that the transferor immediately before death had power, acting alone or in conjunction with any other person, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate (R.C. 2117.51(A)).

COMMENT

1. "Testamentary charitable trust" is defined as any charitable trust that is created by a will. "Charitable trust" means any fiduciary relationship with respect to property arising under the law of Ohio or of another jurisdiction as a result of a manifestation of intention to create it, and subjecting the person by whom the property is held to fiduciary duties to deal with the property within Ohio for any charitable, religious, or educational purpose. "Charitable trust" includes the fiduciary relationship, the entity serving as trustee, the status as trustee, the corpus of the trust, or a combination of all those meanings, regardless of the primary meaning of any use of the term, that is necessary in any circumstances to effect the purposes of the Charitable Trust Law. (R.C. 2109.30(D)(1)(a) and (c) and 109.23.)

2. "Qualified community foundation" means any foundation that is exempt from federal income taxation under sections 170(b)(1)(A)(vi) and 501(c)(3) of the Internal Revenue Code of 1986, as amended; that is further described in section 1.170A-9(10) and (11) of Title 26 of the Code of Federal Regulations, as amended; and that publishes at least annually and circulates widely within its community an audited report of its fund balances, activities, and donors (R.C. 2109.30(D)(1)(b)).

3. "Conservator" means a conservator appointed by a probate court in an order of conservatorship issued pursuant to R.C. 2111.021 upon petition of a competent adult who is physically infirm (R.C. 2111.01(F)--not in the bill).

4. R.C. 2109.33 prescribes the requirements and procedures for the service of notice of the hearing upon a fiduciary's account, waiver of service of notice and consent to the approval of any account by the court, and filing of exceptions to an account or to matters pertaining to the execution of a trust.

5. The bill applies existing 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.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced H0085-I.124/jc	02-13-01	p. 154

