Am. Sub. H.B. 242

124th General Assembly
(As Passed by the House)

Reps. Salerno, Willamowski, Latta, Seitz, Flowers, Wolpert, Hughes, G. Smith, Hagan, Damschroder, Buehrer, Sulzer, Coates, Sferra, Carano, Wilson, Schmidt, Evans, Cirelli, Collier, Callender, Barrett, Womer Benjamin

BILL SUMMARY

? Enacts the Uniform Simultaneous Death Act and repeals current law's presumption of the order of death provision for purposes of descent and distribution.

? Generally provides that a person who is not established by clear and convincing evidence to have survived another person or specified event by 120 hours is deemed to have predeceased the other person for certain probate purposes and to have predeceased the event for purposes of a provision of a governing instrument relating to the person surviving an event.

? Generally provides for purposes of passing property held in co-ownership with right of survivorship, that property so held passes as if each person survived the other by 120 hours if it is not established by clear and convincing evidence that one of the two co-owners survived the other co-owner by 120 hours.

? Specifies the circumstances under which a person who is not established by clear and convincing evidence to have survived another person by 120 hours is <u>not</u> deemed to have predeceased the other person.

? Refers to current standards for the determination of death, specifies the types of documents establishing prima-facie evidence of a person's death or status, and prescribes generally the circumstances under which a presumption of death arises under the bill.

? Provides that a payor or other third party is not liable for making a payment or transferring property to a person designated in a governing instrument as not entitled to the payment or property under the bill, if the payment or transfer was made before the payor or third party received written notice of a claimed lack of entitlement, and prescribes the procedures governing the giving and receipt of the written notice.

? Provides that a purchaser for value and without notice that the person transferring the property is not entitled to it or a person receiving a payment or property in satisfaction of a legally enforceable obligation without notice that the person making the payment or transferring the property is not entitled to it under the bill is not obligated to return the payment or property and is not liable for the amount of payment or the value of the property.

? Provides that the bill takes effect on January 1, 2002.

CONTENT AND OPERATION

Existing law

Under the Descent and Distribution Law provision on the order of death, when there is no evidence of the order in which the death of two or more persons occurred, no one of those persons is presumed to have died first, and the estate of each person passes and descends as though the person had survived the others. When the surviving spouse or other heir at law, legatee, or devisee dies within 30 days after the death of the decedent, the estate of the first decedent passes and descends as though that decedent had survived the surviving spouse, or other heir at law, legatee, or devisee. A beneficiary of a testamentary trust is not deemed to be a legatee or devisee within the meaning of this provision. The above provisions prevail over the right of election of a surviving spouse.

Current law as described in the preceding paragraph does not apply in the case of wills in which provision has been made for distribution of property different from that law. The provision of the will in that case does *not* prevail over the right of election of a surviving spouse. (R.C. 2105.21.)

Operation of the bill

The bill outright repeals the Descent and Distribution Law provision on the order of death as described above, and enacts in its place the Uniform Simultaneous Death Act.

Effect of nonsurvival by 120 hours for probate purposes

The bill provides that except as described below in "***Exceptions***," a person who is not established by clear and convincing evidence to have survived another specified person by 120 hours is deemed to have predeceased the other person for the following purposes (R.C. 2105.32(A)):

(1) When the title to real or personal property or the devolution of real or personal property depends upon a person's survivorship of the death of another person;

(2) When the right to elect an interest in or exempt a surviving spouse's share of an intestate estate under the Intestate Succession Law depends upon a person's survivorship of the death of another person;

(3) When the right to elect an interest in or exempt an interest of the decedent in the mansion house pursuant to the law governing a surviving spouse's election to receive the mansion house depends upon a person's survivorship of the death of another person;

(4) When the right to elect an interest in or exempt an allowance for support pursuant to the law governing the right of a surviving spouse and minor children to receive an allowance for support depends upon a person's survivorship of the death of another person.

The above provisions do not apply if their application would result in a taking of an intestate estate by the state (R.C. 2105.32(B)).

Effect of nonsurvival by 24 hours on governing instruments

Under the bill, except as described below in "***Exceptions***," a person who is not established by clear and convincing evidence to have survived a specified *event* by 120 hours is deemed to have predeceased the event for purposes of a provision of a *governing instrument* that relates to the person surviving an event (R.C. 2105.33). (See "***Definitions***," below, for definitions of the italicized terms.)

Effect of nonsurvival by 24 hours on co-ownership with right of survivorship

The bill specifies that except as described below in "***Exceptions***" (R.C. 2105.34):

(1) If it is not established by clear and convincing evidence that one of two *co-owners with right of survivorship* (see "***Definitions***," below) in specified real or

personal property survived the other co-owner by 120 hours, that property must pass as if each person had survived the other person by 120 hours.

(2) If there are more than two co-owners with right of survivorship in specified real or personal property and it is not established by clear and convincing evidence that at least one of the co-owners survived the others by 120 hours, that property must pass in the proportion that each person owns.

Exceptions

The bill provides that a person who is not established by clear and convincing evidence to have survived another specified person by 120 hours is not deemed to have predeceased the other person if any of the following apply (R.C. 2105.36(A) and (B)):

(1) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster, and that language is operative under the situation in question.

(2) The governing instrument expressly indicates that a person is not required to survive an event by any specified period in order for any right or interest governed by the instrument to properly vest or transfer.

(3) The governing instrument expressly requires the person to survive the event for a specified period in order for any right or interest governed by the instrument to properly vest or transfer, and the survival of the event by the person or survival of the event by the person for the specified period is established by clear and convincing evidence.

(4) The imposition of a 120-hour requirement of the person's survival of the other specified person causes a nonvested property interest or a power of appointment to be invalid under the statute against perpetuities (see **COMMENT** 1), and the person's survival of the other specified person is established by clear and convincing evidence.

(5) The application of a 120-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition, and the person's survival of other specified person is established by clear and convincing evidence.

Determination and evidence of death

The bill provides that a person is dead if the person has been determined to be dead pursuant to standards established under R.C. 2108.30 (see **COMMENT** 2). A physician who makes a determination of death in accordance with that

section and any person who acts in good faith in reliance on a determination of death made by a physician in accordance with that section is entitled to the immunity conveyed by that section. (R.C. 2105.35(A)(1) and (2).)

Under the bill, a certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death of a person purportedly occurred is prima-facie evidence of the fact, place, date, and time of the person's death and the identity of the decedent. A certified or authenticated copy of any record or report of a domestic or foreign governmental agency that a person is missing, detained, dead, or alive is prima-facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report. In the absence of prima-facie evidence of death under this paragraph, the fact of death may be established by clear and convincing evidence, including circumstantial evidence. (R.C. 2105.35(B), (C), and (D).)

In the absence of evidence disputing the time of death stipulated on a document described in the preceding paragraph, a document so described that stipulates a time of death 120 hours or more after the time of death of another person, however the time of death of the other person is determined, establishes by clear and convincing evidence that the person survived the other person by 120 hours (R.C. 2105.35(G)).

Presumption of death

Under the bill, except as described in the following paragraph, a presumption of the death of a person arises (1) when the person has disappeared and been continuously absent from the person's place of last domicile for a five-year period without being heard from during the period or (2) when the person has disappeared and been continuously absent from the person's place of last domicile without being heard from and was at the beginning of the person's absence exposed to a specific peril of death, even though the absence has continued for less than a five-year period (R.C. 2105.35(E)).

When a person who is on active duty in the United States Armed Services has been officially determined to be absent in a status of "missing" or "missing in action," a presumption of death arises when the head of the federal department concerned has made a finding of death pursuant to the "Federal Missing Persons Act" (R.C. 2105.35(F)). (See **COMMENT** 3.)

Other death determination provisions

The bill provides that the provisions described above in "***Determination and evidence of death***" and "***Presumption of death***" are in addition to any other provisions of the Revised Code, the Rules of Criminal Procedure, or the Rules of

Evidence that pertain to the determination of death and status of a person (R.C. 2105.35(H)).

Effect on payor or other third party

The bill provides that a *payor* (see "***Definitions***," below) or other third party is *not liable* for any of the following (R.C. 2105.37(A)):

(1) Making a payment, transferring an item of real or personal property, or otherwise transferring any other benefit to a person designated in a governing instrument who, under the bill's provisions, is not entitled to the payment or item of property, if the payment or transfer was made *before* the payor or other third party received written notice of a claimed lack of entitlement pursuant to the bill;

(2) Taking any other action not specified above in paragraph (1) in good faith reliance on the person's apparent entitlement under the terms of the governing instrument *before* the payor or other third party received written notice of a claimed lack of entitlement pursuant to the bill.

A payor or other third party *is liable* for a payment, transfer, or other action taken *after* the payor or other third party receives written notice of a claimed lack of entitlement pursuant to the bill (R.C. 2105.37(B)).

Under the bill, written notice of a claimed lack of entitlement as described above must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement, a payor or other third party may pay any amount owed or transfer or deposit any item of real or personal property held by it to or with the probate court that has jurisdiction over the decedent's estate. If no probate proceedings have been commenced, upon receipt of written notice of a claimed lack of entitlement, a payor or other third party may pay any amount owed or transfer or deposit any item of real or personal property held by it to or with the probate court located in the county of the decedent's residence. The court must hold the funds or real or personal property until it is determined pursuant to the bill to whom the funds or real or personal property should be disbursed. The court then must order disbursement of the funds or real or personal property in accordance with that determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court. (R.C. 2105.37(C).)

Effect on purchaser or person receiving property

The bill provides that the following persons are neither obligated under the bill to return the payment, item of property, or benefit nor liable under the bill for the amount of the payment or the value of the item of property or benefit (R.C. 2105.38(A)):

(1) A person who purchases real or personal property that would otherwise be subject to the bill's provisions *for value* and *without notice* that the person selling or otherwise transferring the real or personal property is not entitled to the real or personal property pursuant to the bill;

(2) A person who receives a payment or other item of real or personal property in partial or full satisfaction of a legally enforceable obligation *without notice* that the person making the payment or otherwise transferring the real or personal property is not entitled to the real or personal property pursuant to the bill.

A person who, *not for value*, receives a payment, item of real or personal property, or any other benefit to which the person is not entitled under the bill is obligated to return the payment, item of real or personal property, or benefit, and is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under the bill (R.C. 2105.38(B)).

The bill provides that if R.C. 2105.31 to 2105.39 or any provision of those sections are preempted by federal law with respect to a payment, an item of real or personal property, or any other benefit covered by those sections, a person who, *not for value*, receives the payment, item of property, or any other benefit to which the person is not entitled under those sections is obligated to return the payment, item of property, or benefit, and is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were those sections or any provision of those sections not preempted (R.C. 2105.38(C)).

Effective date and related provisions

The operative provisions of the bill take effect on January 1, 2002 (Section 3).

The bill provides that *R.C. 3105.31 to 3105.39* (see **COMMENT** 4) do not impair any act done in any proceeding, or any right that accrued, before January 1, 2002. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that has commenced to run prior to January 1, 2002,

under any provision of the Revised Code, the provision of the applicable Revised Code section applies with respect to that right. (R.C. 2105.39(A).)

Any rule of construction or presumption that is provided in *R.C. 3105.31 to 3105.39* (see **COMMENT** 4) applies to any governing instrument that is executed, or any multiple-party account that is opened, prior to January 1, 2002, unless there is a clear indication of a contrary intent in the governing instrument or multiple-party account (R.C. 2105.39(B)).

Severability clause

The bill specifies that if any provision of R.C. 2105.31 to 2105.39 or the application of those sections to any persons or circumstance is held invalid, the invalidity does not affect other provisions or applications of those sections that can be given effect without the invalid provision or application (R.C. 2105.39(C)).

Definitions

The bill defines the following terms as used in the bill (R.C. 2105.31):

(1) "Co-owners with right of survivorship" includes joint tenants, tenants by the entireties, and other co-owners of real or personal property, insurance or other policies, or bank or other accounts held under circumstances that entitle one or more persons to the whole of the property or account on the death of the other person or persons.

(2) "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with a transfer-on-death designation or the abbreviation TOD, account with a payable-on-death designation or the abbreviation POD, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

(3) "Payor" means a trustee, insurer, business entity, employer, governmental agency, political subdivision, or any other person authorized or obligated by law or a governing instrument to make payments or transfers.

(4) "Event" includes the death of another person.

Miscellaneous

The bill changes the references in certain sections in the Descent and Distribution Law, the Wills Law, and the Presumed Decedents' Law from "sections 2105.01 to 2105.21" or "sections 2105.06 to 2105.21" to "Chapter 2105.

of the Revised Code" (R.C. 2105.02, 2105.04, 2105.07, 2105.08, 2107.34, 2121.02, and 2121.06).

COMMENT

1. Under the statute against perpetuities, subject to specified laws dealing with specific types of trusts and with certain exceptions, no interest in real or personal property is good unless it must vest, if at all, not later than 21 years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in lands or tenements lying within Ohio must be and remain an absolute estate in fee simple to the issue of the first donee in tail. (R.C. 2131.08(A)--not in the bill.)

2. R.C. 2108.30, not in the bill, provides that an individual is dead if the individual has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the brain, including the brain stem, as determined in accordance with accepted medical standards. If the respiratory and circulatory functions of a person are being artificially sustained, under accepted medical standards a determination that death has occurred is made by a physician by observing and conducting a test to determine that the irreversible cessation of all functions of the brain has occurred.

A physician who makes a determination of death in accordance with the above provision and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for the physician's acts or the acts of others based on that determination. Any person who acts in good faith in reliance on a determination of death made by a physician in accordance with the above provision and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for the person's actions.

3. The presumption of death provisions in the bill are similar to the presumption of death provisions in the existing Presumed Decedents' Law, R.C. 2121.01.

4. The bill's reference to "sections 3105.31 to 3105.39 of the Revised Code" is erroneous and should be to *sections 2105.31 to 2105.39 of the Revised Code*.

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	05-02-01	p.	400
Reported, H. Civil and Commercial Law	06-13-01	p.	658
Passed House (96-0)	09-19-01	p.	838

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