Aida S. Montano *Legislative Service Commission*

H.B. 345

124th General Assembly
(As Introduced)

Rep. Womer Benjamin

BILL SUMMARY

? Increases the limit on the amount of the current value of a trust that may be terminated by a court upon the trustee's motion, from less than $50,000 to less than $100,000.

? Authorizes an individual whose certificate of title of a motor vehicle, watercraft, or outboard motor shows sole ownership by that individual to apply for a certificate of title designating that motor vehicle, watercraft, or outboard motor in beneficiary form by naming on the certificate of title a transfer-on-death beneficiary or beneficiaries to take ownership of the motor vehicle, watercraft, or outboard motor upon the owner's death.

? Permits the owner of a motor vehicle, watercraft, or outboard motor designated in beneficiary form to cancel or change the designation of the transfer-on-death beneficiary or beneficiaries at any time without the beneficiary's or beneficiaries' consent.

? Authorizes a transfer-on-death beneficiary or beneficiaries who survive the owner to apply for a certificate of title to the motor vehicle, watercraft, or outboard motor upon submitting proof of the owner's death, and states that a transfer of a motor vehicle, watercraft, or outboard motor to a transfer-on-death beneficiary or beneficiaries resulting from a designation in beneficiary form is not testamentary.

? Provides that if no transfer-on-death beneficiary or beneficiaries survive the owner, the motor vehicle, watercraft, or outboard motor must be included in the deceased owner's probate estate.

? Modifies the provisions in the Motor Vehicle Law pertaining to the transfer of ownership and registration, application generally for a

certificate of title, and application for a certificate of title upon transfer of ownership by operation of law, to make them applicable with respect to the transfer-on-death of a motor vehicle designated in beneficiary form.

? Modifies the provisions in the Watercraft Law pertaining to the application generally for a certificate of title, the contents of a certificate of title, and the application for a certificate of title upon transfer of ownership by operation of law to make them applicable with respect to the transfer-on-death of a watercraft or outboard motor designated in beneficiary form.

? Provides that any natural person or fiduciary who pays a creditor's claim against an estate be subrogated to the creditor's rights proportionate to the amount of the payment and be entitled to reimbursement for that amount in accordance with the priority of payments set forth in current law.

? Modifies the time for the filing by an executor or administrator of an application for a certificate of transfer of real property that passes by the laws of intestate succession or under a will, to any time after the filing of an inventory that includes the real property but prior to the filing of the executor's or administrator's final account.

? Generally extends the time for an executor or administrator to continue the decedent's business from one month to four months next following the date of the executor's or administrator's appointment and defines "decedent's business" to mean a business owned by the decedent as a sole proprietor at the time of death.

? Generally prohibits a fiduciary's exercise of the power conferred by the governing instrument to make any discretionary distribution of principal or income to or for the benefit of one or more beneficiaries who possess both the right to remove the fiduciary and the right to appoint a successor fiduciary that may include but is not limited to the beneficiary, any of the beneficiaries, or any related or subordinate person within the meaning of the Internal Revenue Code.

? Extends the nonapplicability of the Fiduciary Discretionary Distributions Law, which prescribes the prohibitions generally against a fiduciary's exercise of certain powers conferred by the governing instrument to make discretionary distributions of principal or income, to: (a) a trust during the time it is revocable or amendable by its settlor, (b) generally any

power held by a decedent's or settlor's spouse who is the trustee under a decedent's trust for which a marital deduction for estate tax purposes has been allowed, or (c) generally any irrevocable trust created under a governing instrument executed before the expiration of three years after the amendment's effective date if all of the parties in interest elect affirmatively not to be subject to that Law's application through a written instrument delivered to the fiduciary.

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CONTENT AND OPERATION

Increase of valuation limit for the termination of small trusts

Under the existing Fiduciary Laws, upon the filing of a motion by a trustee with the court that has jurisdiction over a trust, upon reasonable notice to all beneficiaries who are known and in being and who have vested or contingent interests in the trust, and after holding a hearing, the court may terminate the trust, in whole or in part, if it determines that all of the following apply: (a) it is no

longer economically feasible to continue the trust, (b) the termination of the trust is for the benefit of the beneficiaries, (c) the termination of the trust is equitable and practical, and (d) the current value of the trust is *less than $50,000*. The existence of a spendthrift or similar provision in a trust instrument or will does not preclude the termination of a trust pursuant to the preceding sentence. (R.C. 1339.66(A) and 2109.62(A)(1) and (2).)

The bill increases the limit on the amount of the current value of a trust that may be terminated by a court as described above, from less than $50,000 to *less than $100,000* (R.C. 1339.66(A)(1)(d) and 2109.62(A)(1)(d)).

Transfer-on-death of a motor vehicle, watercraft, or outboard motor

The bill enacts new provisions regarding the transfer-on-death of a motor vehicle, watercraft, or outboard motor (see "***Definitions***," below) (R.C. 2131.13). The bill provides that these provisions are known and may be cited as the "Transfer-on-Death of Motor Vehicle, Watercraft, or Outboard Motor Statute" (hereafter, "TOD Statute") (R.C. 2131.13(H)(1)).

Manner of designation in beneficiary form

The bill authorizes an individual whose certificate of title of a motor vehicle, watercraft, or outboard motor shows *sole ownership* by that individual to make an application for a certificate of title to "designate that motor vehicle, watercraft, or outboard motor in beneficiary form." A motor vehicle, watercraft, or outboard motor is designated in beneficiary form if the certificate of title of the motor vehicle, watercraft, or outboard motor includes the name or names of the "transfer-on-death beneficiary or beneficiaries." (See "***Definitions***," below, for definitions of the quoted terms.) The designation of a motor vehicle, watercraft, or outboard motor in beneficiary form may be shown in the certificate of title by the words "transfer-on-death" or the abbreviation "TOD" after the name of the owner of the motor vehicle, watercraft, or outboard motor and before the name or names of the transfer-on-death beneficiary or beneficiaries. (R.C. 2131.13(B), (C)(1), and (D).)

The designation of a motor vehicle, watercraft, or outboard motor in beneficiary form is not required to be supported by consideration. The certificate of title in which the designation is made is not required to be delivered to the transfer-on-death beneficiary or beneficiaries in order for the designation in beneficiary form to be effective. (R.C. 2131.13(C)(2).)

Effect on ownership

The designation of a transfer-on-death beneficiary or beneficiaries on a certificate of title has *no effect* on the ownership of a motor vehicle, watercraft, or outboard motor until the death of its owner. The owner of a motor vehicle, watercraft, or outboard motor may cancel or change the designation of a transfer-on-death beneficiary or beneficiaries on a certificate of title at any time without the consent of the transfer-on-death beneficiary or beneficiaries by making an application for a certificate of title. (R.C. 2131.13(E).)

Effect upon owner's death

Upon the death of the owner of a motor vehicle, watercraft, or outboard motor designated in beneficiary form, the ownership of the motor vehicle, watercraft, or outboard motor passes to the transfer-on-death beneficiary or beneficiaries who survive the owner upon transfer of title to the motor vehicle, watercraft, or outboard motor in accordance with the procedures for transferring title to a motor vehicle, watercraft, or outboard motor. The transfer-on-death beneficiary or beneficiaries who survive the owner may apply for a certificate of title to the motor vehicle, watercraft, or outboard motor upon submitting proof of the death of the owner of the motor vehicle, watercraft, or outboard motor. If no transfer-on-death beneficiary or beneficiaries survive the owner, the motor vehicle, watercraft, or outboard motor must be included in the probate estate of the deceased owner. (R.C. 2131.13(F).)

Any transfer of a motor vehicle, watercraft, or outboard motor to a transfer-on-death beneficiary or beneficiaries that results from a designation of the motor vehicle, watercraft, or outboard motor in beneficiary form is not testamentary. The bill does not limit the rights of any creditor of the owner of a motor vehicle, watercraft, or outboard motor against any transfer-on-death beneficiary or beneficiaries or other transferees of the motor vehicle, watercraft, or outboard motor under other laws of Ohio. (R.C. 2131.13(G).)

Construction

The bill states that the provisions of the "Transfer-on-Death of Motor Vehicle, Watercraft, or Outboard Motor Statute" must be liberally construed and applied to promote their underlying purposes and policy. Unless displaced by particular provisions of that Statute, the principles of law and equity supplement the provisions of the Statute. (R.C. 2131.13(H)(2) and (3).)

Definitions

The bill defines the following terms (R.C. 2131.13(A)):

(1) "Designate or designation in beneficiary form" means to designate, or the designation of, a motor vehicle, watercraft, or outboard motor in a certificate of title that indicates the present owner of the motor vehicle, watercraft, or outboard motor and the intention of the present owner with respect to the transfer of ownership on the present owner's death by designating one or more persons as the beneficiary or beneficiaries who will become the owner or owners of the motor vehicle, watercraft, or outboard motor upon the death of the present owner.

(2) "Motor vehicle" includes manufactured homes, mobile homes, recreational vehicles, and trailers and semitrailers whose weight exceeds 4,000 pounds (R.C. 4505.01(A)(2)--not in the bill).

(3) "Person" means an individual, a corporation, an organization, or other legal entity.

(4) "Transfer-on-death beneficiary or beneficiaries" means a *person or persons* (see definition in preceding paragraph (3)) specified in a certificate of title of a motor vehicle, watercraft, or outboard motor who will become the owner or owners of the motor vehicle, watercraft, or outboard motor upon the death of the present owner of the motor vehicle, watercraft, or outboard motor.

(5) "Watercraft" means any of the following when used or capable of being used for transportation on the water: (a) a vessel operated by machinery either permanently or temporarily affixed, (b) a sailboat other than a sailboard, (c) an inflatable, manually propelled boat having a hull identification number meeting the requirements of the United States Coast Guard, or (d) a canoe or rowboat. "Watercraft" does not include ferries as referred to in the Ferry Licensing Law (R.C. 1548.01(A) and 1547.01(A)--not in the bill).

Motor Vehicle Law

The bill modifies the Motor Vehicle Law to make its provisions applicable to the transfer-on-death of a motor vehicle.

Transfer of ownership and registration. Under the bill, if the death of the owner of a motor vehicle results in the transfer of ownership of the motor vehicle to a transfer-on-death beneficiary or beneficiaries designated as described in the TOD Statute, the registration must be continued upon the filing by the transfer-on-death beneficiary or beneficiaries of an application for an *amended certificate of registration*, unless that registration is prohibited by law (see **COMMENT** 1). The application must be accompanied by: (a) a service fee of $2.75 commencing on July 1, 2001, $3.25 commencing on January 1, 2003, and $3.50 commencing on January 1, 2004, (b) a transfer fee of $1, (c) the original certificate of registration, and (d) a copy of the certificate of title that specifies that the owner of

the motor vehicle has designated the motor vehicle in beneficiary form. Upon a proper filing, the Registrar must issue an amended certificate of registration in the name of the transfer-on-death beneficiary or beneficiaries. (R.C. 4503.12(C).)

Application for certificate of title. If an applicant for a certificate of title requests a designation of the motor vehicle in beneficiary form so that upon the death of the owner of the motor vehicle, ownership of the motor vehicle will pass to a designated transfer-on-death beneficiary or beneficiaries, the applicant may do so as provided in the TOD Statute. A person who establishes ownership of a motor vehicle that is transferable on death in accordance with the TOD Statute may terminate that type of ownership or change the designation of the transfer-on-death beneficiary or beneficiaries by applying for a certificate of title pursuant to existing law governing applications for certificates of title. (R.C. 4505.06(A), 2nd par.)

Existing law does not require the giving of information concerning the odometer and odometer reading of a motor vehicle when ownership of a motor vehicle is being transferred: (a) as a result of a bequest, (b) under the laws of intestate succession, (c) to a "surviving spouse" pursuant to a joint ownership with right of survivorship, a transfer of title of the deceased spouse, or by operation of law, or (d) in connection with the creation of a security interest (R.C. 4505.06(C)(2)).

The bill additionally does not require the giving of information concerning the odometer and odometer reading of a motor vehicle when ownership of the motor vehicle is being transferred to a transfer-on-death beneficiary or beneficiaries (R.C. 4505.06(C)(2)).

The bill also replaces "surviving spouse" with "survivor" in the existing provisions on transfer of ownership pursuant to a joint ownership with right of survivorship as described in the second preceding paragraph (R.C. 4505.06(C)(2)) and in R.C. 4503.12(B) (continuance of registration if motor vehicle is owned under joint ownership with right of survivorship).

Certificate of title upon transfer of ownership by operation of law. Upon the death of the owner of a motor vehicle designated in beneficiary form under the TOD Statute, upon application for a certificate of title by the transfer-on-death beneficiary or beneficiaries designated pursuant to that Statute, and upon presentation of the certificate of title and the certificate of death of the decedent to the clerk of the court of common pleas of the county in which the last certificate of title was issued, the clerk must transfer the motor vehicle and issue a certificate of title to the transfer-on-death beneficiary or beneficiaries. The transfer does not affect any liens upon the motor vehicle so transferred. (R.C. 4505.10(D).)

Watercraft Law

The bill modifies the Watercraft Law to make its provisions applicable to the transfer-on-death of a watercraft or outboard motor.

Application for certificate of title. If an applicant for a certificate of title wishes to designate a watercraft or outboard motor in beneficiary form, the applicant may do so as provided in the TOD Statute (R.C. 1548.07(C)).

Any person who owns a watercraft or outboard motor for which a certificate of title is required may establish ownership of the watercraft or outboard motor that is transferable on death by designating the watercraft or outboard motor in beneficiary form in accordance with the TOD Statute. Any person who establishes ownership of a watercraft or outboard motor that is transferable on death in accordance with the TOD Statute may terminate that type of ownership or change the designation of the transfer-on-death beneficiary or beneficiaries by applying for a certificate of title in accordance with existing law governing applications for a certificate of title. (R.C. 1548.072.)

Contents of certificate of title. If a certificate of title is issued for a watercraft or outboard motor that is designated in beneficiary form, in addition to the information required by existing law, the certificate must show that the present owner of the watercraft or outboard motor has designated a specified transfer-on-death beneficiary or beneficiaries who will take ownership of the watercraft or outboard motor at the death of the present owner in accordance with the TOD Statute. (R.C. 1548.08.)

Certificate of title upon transfer of ownership by operation of law. Upon the death of an owner of a watercraft or outboard motor designated in beneficiary form under the TOD Statute, upon application of the transfer-on-death beneficiary or beneficiaries designated pursuant to that Statute, and upon presentation of the certificate of title and the certificate of death of the deceased owner to the clerk of the court of common pleas of the county in which the last certificate of title was issued, the clerk must transfer the watercraft or outboard motor and issue a certificate of title to the transfer-on-death beneficiary or beneficiaries. The transfer does not affect any liens upon any watercraft or outboard motor so transferred. (R.C. 1548.11(D).)

Other changes

Right of surviving spouse to decedent's automobiles. Under current law, upon the death of a married resident who owned at least one automobile at the time of death, the interest of the deceased spouse in up to two automobiles that are not transferred to the surviving spouse due to joint ownership with right of

survivorship and that are not otherwise specifically disposed of by testamentary disposition, may be selected by the surviving spouse. This interest must immediately pass to the surviving spouse upon transfer of the title or titles in accordance with the Motor Vehicle Law. (R.C. 2106.18(A).)

The bill modifies current law by providing that upon the death of a married resident who owned at least one automobile at the time of death, the interest of the deceased spouse in up to two automobiles that are not transferred to the surviving spouse due to joint ownership with right of survivorship, *that are not transferred to a transfer-on-death beneficiary or beneficiaries designated under the TOD Statute* (added by the bill), and that are not otherwise specifically disposed of by testamentary disposition may be selected by the surviving spouse (R.C. 2106.18(A)).

Disclaimer of succession to property. Existing law provides that a *disclaimant*, other than a fiduciary under an instrument who is not authorized by the instrument to disclaim the interest of a beneficiary, may disclaim, in whole or in part, the succession to any *property* by executing and by delivering, filing, or recording a written disclaimer instrument in the manner provided in R.C. 1339.68. (See **COMMENT** 2.) A disclaimant who is a fiduciary under an instrument may disclaim, in whole or in part, any right, power, privilege, or immunity, by executing and by delivering, filing, or recording a written disclaimer instrument in the manner provided in that section. If the interest disclaimed is created by a nontestamentary instrument, the disclaimer instrument must be delivered personally or by certified mail to the trustee or other person who has legal title to, or possession of, the property disclaimed. If the interest disclaimed is created by a testamentary instrument, by intestate succession, or by a transfer-on-death deed, the disclaimer instrument must be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate have been commenced, and an executed copy of the disclaimer instrument must be delivered personally or by certified mail to the personal representative of the decedent's estate. (R.C. 1339.68(B)(1) and (2) and (F)(1) and (2).)

The bill provides that if the interest disclaimed is created by a certificate of title to a motor vehicle, watercraft, or outboard motor that evidences ownership of the motor vehicle, watercraft, or outboard motor that is transferable on death pursuant to the TOD Statute, the disclaimer instrument must be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate have been commenced, and an executed copy of the disclaimer instrument must be delivered personally or by certified mail to the personal representative of the decedent's estate (R.C. 1339.68(F)(2)).

Joint ownership with right of survivorship in motor vehicle, watercraft, or outboard motor. The bill renumbers R.C. 2106.17 to *R.C. 2131.12* without making any substantive changes to that section dealing with joint ownership with right of survivorship in a motor vehicle, watercraft, or outboard motor. The bill makes changes in the Motor Vehicle Law and the Watercraft Law that conform to that renumbering and the provisions of the TOD Statute, and makes technical changes in those Laws. (R.C. 1547.54, 1548.071, 4549.08, and 4549.41.)

Reimbursement for payment of decedent's death

Existing law

The Probate Law requires every executor or administrator to proceed with diligence to pay the debts of the decedent and to apply the assets in the following order (R.C. 2117.25):

(1) Costs and expenses of administration;

(2) An amount, not exceeding $2,000, for funeral expenses that are included in the funeral director's bill, funeral expenses other than those in the funeral director's bill that are approved by the probate court, and an amount, not exceeding $2,000, for burial and cemetery expenses, including the portion of the funeral director's bill allocated to cemetery expenses that have been paid to the cemetery by the funeral director. Burial and cemetery expenses are limited to the following: (a) the purchase of a place of interment, (b) monuments or other markers, (c) the outer burial container, (d) the cost of opening and closing the place of interment, and (e) the urn.

(3) The allowance for support made to the surviving spouse, minor children, or both;

(4) Debts entitled to a preference under the laws of the United States;

(5) Expenses of the last sickness of the decedent;

(6) If the total bill of a funeral director for funeral expenses exceeds $2,000, in addition to the amount described above in paragraph (2), an amount, not exceeding $1,000, for funeral expenses that are included in the bill and that exceed $2,000;

(7) Personal property taxes and obligations for which the decedent was personally liable to the state or any of its subdivisions;

(8) Debts for manual labor performed for the decedent within 12 months preceding the decedent's death, not exceeding $300 to any one person;

(9) Other debts for which claims have been presented and finally allowed.

The part of the funeral director's bill that exceeds the total of $3,000 as described above in paragraphs (2) and (6), and the part of a claim included as described above in paragraph (8) that exceeds $300 must be included as a debt under paragraph (9), above, depending upon the time when the claim for the additional amount is presented (R.C. 2117.25).

Operation of the bill

The bill provides that any natural person or fiduciary who pays a claim of any creditor described in "***Existing law***," above, must be subrogated to the rights of that creditor proportionate to the amount of the payment and must be entitled to reimbursement for that amount in accordance with the priority of payments set forth as described above in "***Existing law***" (R.C. 2117.25(C)).

Issuance of certificate of transfer of real property

Existing law

Under the Probate Law, when real property passes by the laws of intestate succession or under a will, the administrator or executor must file in probate court, prior to the filing of the administrator's or executor's final account, an application requesting the court to issue a certificate of transfer as to the real property. The following are excluded from the application requirement: (a) real property sold by an executor or administrator or land registered under the Registration of Land Titles Law and (b) cases in which an order has been made under the law relieving an estate from administration and in which the order directing transfer of real property to the person entitled to it may be substituted for the certificate of transfer. (R.C. 2113.61(A)(1).)

An application for a certificate of transfer of an interest in real property included in the assets of the decedent's estate must accompany an application for a *summary release from administration*. Existing law on the application for a certificate of transfer applies to that application for and the issuance of the requested certificate of transfer except to the extent that the probate court determines that the nature of any of its provisions is inconsistent with the nature of a grant of a summary release from administration. (R.C. 2113.61(A)(2).)

Existing law prescribes the contents generally of an application for a certificate of transfer of real property (R.C. 2113.61(B)).

Subject to the second preceding paragraph, the court must issue a certificate of transfer for record in each county in Ohio in which real property so passing is

situated, that must recite all of the information specified in existing law (R.C. 2113.61(C)).

Operation of the bill

The bill modifies the time for filing an application for a certificate of transfer of real property. It provides that when real property passes by the laws of intestate succession or under a will, the administrator or executor must file in probate court, *at any time after the filing of an inventory that includes the real property* (added by the bill) but prior to the filing of the administrator's or executor's final account, an application requesting the court to issue a certificate of transfer as to the real property. (R.C. 2113.61(A)(1).)

The bill further modifies the issuance of a certificate of transfer of real estate by providing that subject to the second paragraph above under "***Existing law***," *within five days following the filing of an application for a certificate of transfer that complies with R.C. 2113.61(B)* (contents of application) (added by the bill), the court must issue a certificate of transfer for record in each county in Ohio in which real property so passing is situated, that must recite all of the information specified in existing law (R.C. 2113.61(C)).

Continuing a decedent's business after death

Existing law

Under the Probate Law, except as otherwise directed by the decedent in the decedent's last will and testament, an executor or administrator, without personal liability for losses incurred, may continue the decedent's business during *one month* next following the date of the executor's or administrator's appointment, unless the probate court directs otherwise, and for any further time that the court may authorize on hearing and after notice to the surviving spouse and distributees. In either case, no debts incurred or contracts entered into can involve the estate beyond the assets used in that business immediately prior to the death of the decedent without the approval of the court first obtained. During the time the business is continued, the executor or administrator must file monthly reports in the court, setting forth the receipts and expenses of the business for the preceding month and any other pertinent information that the court may require. The executor or administrator may not bind the estate without court approval beyond the period during which the business is continued. (R.C. 2113.30.)

Operation of the bill

The bill extends the time for an executor or administrator to continue the decedent's business. It provides that except as otherwise directed by the decedent

in the decedent's last will and testament, an executor or administrator, without personal liability for losses incurred, may continue the decedent's business during *four months* (instead of one month) next following the date of the executor's or administrator's appointment, unless the probate court directs otherwise, and for any further time that the court may authorize on hearing and after notice to the surviving spouse and distributees (R.C. 2113.30(A)). The bill defines "decedent's business" as a business that is owned by the decedent as a sole proprietor at the time of the decedent's death, and not including a business that is owned in whole or in part by the decedent as a shareholder of a corporation, a member of a limited liability company, or a partner of a partnership, or under any other form of ownership other than a sole proprietorship (R.C. 2113.30(B)).

Fiduciary's discretionary distributions of trust principal or income

Existing law

The Fiduciary Discretionary Distributions Law provides that unless the governing instrument conferring the powers specifically refers to that Law and states that that Law does not apply, with certain exceptions, any of the following powers conferred upon a fiduciary by the governing instrument cannot be exercised by the fiduciary (R.C. 1340.22(A)):

(1) The power to make any discretionary distribution of either principal or income to or for the benefit of the fiduciary in the fiduciary's individual capacity;

(2) The power to make any discretionary distribution of either principal or income to satisfy any of the fiduciary's legal obligations in the fiduciary's individual capacity for support or other purposes;

(3) The power to make any discretionary distribution of either principal or income to or for the benefit of one or more beneficiaries to the extent that the fiduciary would or could receive a similar distribution in the fiduciary's individual capacity under any governing instrument from the beneficiary or beneficiaries acting as a fiduciary;

(4) *The power to make any discretionary distribution of either principal or income to or for the benefit of one or more beneficiaries who possess both the right to remove the fiduciary and the right to appoint a successor fiduciary, if the successor fiduciary has been appointed by the exercise of both of those rights by the beneficiary or beneficiaries.*

The Fiduciary Discretionary Distributions Law does not apply to any of the following (R.C. 1340.22(E)):

(1) Any purely discretionary power to distribute either principal or income to or for the benefit of a beneficiary, other than a beneficiary who is also a fiduciary, that is exercisable in a fiduciary capacity in the sole and absolute discretion of the fiduciary and without any other direction or limitation as to its exercise or use set forth in the governing instrument;

(2) Any power of appointment or withdrawal that specifically is granted in the governing instrument to a beneficiary and that is exercisable in an individual capacity but not in a fiduciary capacity.

Operation of the bill

Prohibition on exercise of discretionary distributions power. The bill modifies the general prohibition, described above in paragraph (4), on the exercise of the powers conferred upon a fiduciary by the governing instrument. It provides that unless the governing instrument conferring the powers specifically refers to Fiduciary Discretionary Distributions Law and states that that Law does not apply, with certain exceptions, the following power conferred upon a fiduciary by the governing instrument cannot be exercised by the fiduciary: the power to make any discretionary distribution of either principal or income to or for the benefit of one or more beneficiaries who possess both the right to remove the fiduciary and the right to appoint a successor fiduciary *that may include but is not limited to the beneficiary, any of the beneficiaries, or any related or subordinate person, within the meaning of section 672(c) of the "Internal Revenue Code of 1986"* (see **COMMENT** 3), *with respect to the beneficiary or any of the beneficiaries* (added by the bill), if the successor fiduciary has been appointed by the exercise of both of those rights by the beneficiary or beneficiaries. (R.C. 1340.22(A)(4).)

Nonapplicability of Fiduciary Discretionary Distributions Law. The bill expands the nonapplicability of the Fiduciary Discretionary Distributions Law as described above in "***Existing law***." It provides that that Law does not apply to any of the following (R.C. 1340.22(E)(3), (4), and (5)):

(1) Any trust during the time that the trust is revocable or amendable by its settlor;

(2) Any power held by a decedent's or settlor's spouse who is the trustee under a decedent's trust for which a marital deduction for estate tax purposes has been allowed, except a trust or portion of a trust regarding which a special election for qualified terminable interest property has been made as provided in section 2652(a)(3) of the "Internal Revenue Code of 1986" (see **COMMENT** 4);

(3) Subject to the following paragraph, any irrevocable trust created under a governing instrument executed before the expiration of three years after the

effective date of this amendment of the Fiduciary Discretionary Distributions Law, if all of the *parties in interest* (see "***Definition***," below) elect affirmatively not to be subject to the application of that Law through a written instrument delivered to the fiduciary.

In the case of a testamentary trust, the election described in the preceding paragraph must be filed with the probate court in which the will was admitted to probate. All of the parties in interest must make the election described in the preceding paragraph on or before the later of the expiration of three years after the amendment's effective date or three years after the date on which the trust becomes irrevocable.

Definition. The bill defines "party in interest" as any of the following, and not including a contingent remainder beneficiary:

(1) Each fiduciary then serving;

(2) Each current beneficiary then in existence or, if that beneficiary has not attained the age of majority or otherwise is incapacitated, the beneficiary's legal representative under applicable law or the attorney in fact of the current beneficiary under a durable power of attorney that is sufficient to grant the authority described above in paragraph (3) under "***Nonapplicability, etc.***";

(3) Each remainder beneficiary then in existence or, if that remainder beneficiary has not attained the age of majority or otherwise is incapacitated, the remainder beneficiary's legal representative under applicable law or the attorney in fact of the remainder beneficiary under a durable power of attorney that is sufficient to grant the authority described above in paragraph (3) under "***Nonapplicability, etc***."

COMMENT

1. These prohibitions are referred to in the following provisions of law:

(a) If a person who has a current valid Ohio driver's or commercial driver's license and who was issued a citation for a minor misdemeanor fails to appear at the time and place specified on the citation, fails to comply with the Citations Law, or fails to comply with or satisfy any judgment of the court within the time allowed by the court, the court must declare the forfeiture of the person's license (R.C. 2935.27(D)).

(b) If a person arrested for any of certain violations fails to appear in court at the date and time set by the court or fails to satisfy the judgment of the court or comply with all court orders within the time allowed by the court, the court may

declare the forfeiture of the person's license that was deposited as bond upon arrest (R.C. 2937.221(A)).

(c) The Registrar of Motor Vehicles or any deputy registrar cannot issue a certificate of registration for a motor vehicle owner or lessee who is named in a report of persons with outstanding arrest warrants issued by a municipal or county court until the Registrar receives notification from the court that there are no outstanding arrest warrants in the name of the person (R.C. 4503.13(A)).

(d) The Registrar must take any necessary measures to ensure that neither the Registrar nor any deputy registrar accepts any application for the registration or transfer of registration of any motor vehicle owned or leased by any person named in the declaration of forfeiture under the Forfeiture of License Law (R.C. 4507.168(B)).

(e) Upon receipt of a notice of unpaid judgments or default judgments pertaining to noncriminal parking infractions, the Registrar or any deputy registrar cannot accept any application for the registration or transfer of registration of any motor vehicle owned or leased by the person named in the notice unless the person presents a release as provided in the law or unless the Registrar is properly notified that the judgments or default judgments have been paid, dismissed, or reversed on appeal or that the initial notice was given in error and is therefore canceled (R.C. 4521.10(B)(1)).

2. R.C. 1339.68(A) contains the following definitions:

> (1) "Disclaimant" means any person, any guardian or personal representative of a person or estate of a person, or any attorney-in-fact or agent of a person having a general or specific authority to act granted in a written instrument, who is any of the following:
>
> (a) With respect to testamentary instruments and intestate succession, an heir, next of kin, devisee, legatee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entireties, surviving tenant of a tenancy with a right of survivorship, beneficiary under a testamentary instrument, or person designated to take pursuant to a power of appointment exercised by a testamentary instrument;

(b) With respect to nontestamentary instruments, a grantee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entireties, surviving tenant of a tenancy with a right of survivorship, beneficiary under a nontestamentary instrument, or person designated to take pursuant to a power of appointment exercised by a nontestamentary instrument;

(c) With respect to fiduciary rights, privileges, powers, and immunities, a fiduciary under a testamentary or nontestamentary instrument. This section does not authorize a fiduciary to disclaim the rights of beneficiaries unless the instrument creating the fiduciary relationship authorizes such a disclaimer.

(d) Any person entitled to take an interest in property upon the death of a person or upon the occurrence of any other event.

(2) "Property" means all forms of property, real and personal, tangible and intangible.

3. For purposes of the Internal Revenue Code's Subpart E (Grantors and Others Treated as Substantial Owners), that Code defines the term "related or subordinate party" as any *nonadverse party* (defined as a person who is not an "adverse party," which means any person having a substantial beneficial interest in the trust that would be adversely affected by the exercise or nonexercise of the power that the person possesses respecting the trust) who is:

(a) The grantor's spouse if living with the grantor;

(b) The grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

(26 U.S.C. 672(a), (b), and (c).)

4. Section 2652(a)(3) in Chapter 13 on Tax of Generation-Skipping Transfers of the Internal Revenue Code provides as follows with respect to *qualified terminable interest property*:

(3) Special election for qualified terminable interest property.--In the case of--

(A) any trust with respect to which a deduction is allowed to the decedent under section 2056 by reason of subsection (b)(7) thereof (see below), and

(B) any trust with respect to which a deduction to the donor spouse is allowed under section 2523 by reason of subsection (f) thereof (election with respect to life estate for donee spouse),

the estate of the decedent or the donor spouse, as the case may be, may elect to treat all of the property in such trust for purposes of this chapter as if the election to be treated as qualified terminable interest property had not been made.

26 U.S.C.A. 2056(b)(7) provides in part as follows:

(7) Election with respect to life estate for surviving spouse.--

(A) In general.--In the case of qualified terminable interest property--

(i) for purposes of subsection (a), such property shall be treated as passing to the surviving spouse, and

(ii) for purposes of paragraph (1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

(B) Qualified terminable interest property defined.--For purposes of this paragraph--

(i) In general.--The term "qualified terminable interest property" means property--

(I) which passes from the decedent,

(II) in which the surviving spouse has a qualifying income interest for life, and

(III) to which an election under this paragraph applies.

(ii) Qualifying income interest for life.--The surviving spouse has a qualifying income interest for life if--

(I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and

(II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Subclause (II) shall not apply to a power exercisable only at or after the death of the surviving spouse. To the extent provided in regulations, an annuity shall be treated in a manner similar to an income interest in property (regardless of whether the property from which the annuity is payable can be separately identified).

(iii) Property includes interest therein.--The term "property" includes an interest in property.

(iv) Specific portion treated as separate property.--A specific portion of property shall be treated as separate property.

(v) Election.--An election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	08-28-01	p. 821

H0345-I.124/jc