Aida S. Montano *Legislative Service Commission*

H.B. 628

124th General Assembly
(As Introduced)

Rep. Hughes

BILL SUMMARY

- Specifically permits a surviving spouse to waive in writing the service of the citation to elect whether to exercise the surviving spouse's statutory rights, including the right to elect to take under the will or under the Intestate Succession Law, and requires the probate court to serve the citation by publication if service on the surviving spouse cannot be perfected by certified mail.

- Requires the certificate of giving notice of the admission of the will to probate to be filed with the court not later than two months after the admission of the will to probate, if no fiduciary has been appointed.

- In an estate of a decedent in which the sole legatee, devisee, or heir is also the administrator or executor of the estate, requires the administrator or executor to file a final account or final and distributive account or, in lieu of filing a final account, permits the filing of a certificate of termination of the estate within 30 days after the completion of its administration.

- Requires the creditors of an estate to present their claims, if the final account or certificate of termination has been filed, in a writing to those distributees of the estate who may share liability for the payment of the claims.

- Requires that the executor's or administrator's notice on the account that is delivered to each distributee indicate that the distributee may be liable to the estate if a claim is presented prior to the filing of a final account and may be liable to the claimant if the claim is presented after the filing of the final account.

- Authorizes a probate judge to establish by rule procedures for the resolution of disputes, including mediation, between parties to any civil action or proceeding within the probate court's jurisdiction and to charge and collect additional filing fees to be used to implement the procedures.

CONTENT AND OPERATION

Election by surviving spouse to exercise rights

Existing law

Citation to make the election. R.C. Chapter 2106. grants a surviving spouse certain rights and the right to make an election regarding the exercise of those rights. After the initial appointment of an administrator or executor of the estate, the probate court must issue a citation to any surviving spouse to elect whether to exercise the surviving spouse's rights under that chapter, including, after the probate of a will, the right to elect to take under the will or under the Intestate Succession Law. The citation is 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. The description must include a specific reference to the following: (1) the procedures available to the surviving spouse to file a complaint requesting the construction of the will in favor of the surviving spouse and (2) the presumption that the surviving spouse elects to take under the will if the surviving spouse does not make the election before the expiration of five months from the date of the initial appointment of an administrator or executor of the estate. The *description of the general rights* of the surviving spouse must include a specific reference to the presumption that the surviving spouse has waived any right not exercised within five months after the initial appointment of the administrator or executor of the estate or within any longer period of time allowed by the probate court if the surviving spouse *does not make the election* within that time period. The description of the effect of the election and of the general rights of the surviving spouse need not relate to the nature of any particular estate. (R.C. 2106.01(A) and (E) and 2106.02(B), and R.C. 2106.25--not in the bill.)

Service of citation to make the election. The citation to the surviving spouse to make the election as described above must be sent to the surviving spouse by certified mail. Notice that the citation has been issued by the court must be given to the administrator or executor of the estate of the deceased spouse. (R.C. 2106.02(A).)

Operation of the bill

Citation to make the election--waiver. The bill specifically permits a surviving spouse to waive the service of the citation required as described above, by filing in the probate court a written waiver of the citation. If the surviving spouse waives the service of the citation, the court must deliver to the surviving spouse in advance of execution of the waiver a description of the general rights of the surviving spouse under R.C. Chapter 2106. The waiver must include an acknowledgment of receipt of that description of the general rights of the surviving spouse. Both the description of the general rights of the surviving spouse that is required to accompany the citation under current law or that is required to be delivered to the surviving spouse under the bill in case of a surviving spouse's waiver of service of the citation and the description required under current law of the effect of the election to take under the will or under the Intestate Succession Law must include a specific reference to the procedures and the presumption described above in clauses (1) and (2) under "***Citation to make the election***" in "***Existing law***." The *description of the general rights* of the surviving spouse must include a specific reference to the presumption that the surviving spouse has waived any right not exercised within five months after the initial appointment of the administrator or executor of the estate or within any longer period of time allowed by the probate court *if the surviving spouse does not exercise the rights under R.C. Chapter 2106.* (instead of *if the surviving spouse does not make the election*) within that time period. (R.C. 2106.01(A) and 2106.02(B) and R.C. 2106.25--not in the bill.)

Service of citation to make the election. The bill provides an exception to the requirement that the citation to the surviving spouse to make the election as described above be sent to the surviving spouse by certified mail. If for any reason the probate court, within 30 days after the court initially issues the citation, is unable to perfect service of the citation on the surviving spouse by certified mail, the court must serve the citation by publication of the notice of the citation in a newspaper of general circulation in the county of residence of the surviving spouse. If the county of residence of the surviving spouse is unknown, the probate court must serve the citation by publication of the notice of the citation in a newspaper of general circulation in the county in which the estate is being administered. The costs of the publication must be assessed to the estate involved. (R.C. 2106.02(A) and (C).)

Suggested amendments of Superintendence Rules. The bill states that the General Assembly encourages the Supreme Court to amend Rule 60 of the Rules of Superintendence for the Courts of Ohio to require a probate court to issue the citation to the surviving spouse to elect whether to exercise the surviving spouse's rights under R.C. Chapter 2106. within seven days after the initial appointment of

the executor or administrator of the estate, unless a different time period is established by local court rule or the surviving spouse executes a waiver of the citation and acknowledgment of receipt of the description of the general rights of the surviving spouse under that chapter. The General Assembly also encourages the Supreme Court to amend Rule 64(A) of the Rules of Superintendence for the Courts of Ohio pertaining to accounts of fiduciaries to change the reference to "vouchers required by section 2109.30 of the Revised Code" to a reference to "vouchers required by sections 2109.302, 2109.303, and, if ordered by the court, 2109.301 of the Revised Code." (Section 3.)

Notice of admission of will to probate

Existing law

Generally, when a will has been admitted to probate, the fiduciary for the estate, the applicant for the admission of the will to probate, the applicant for a release from administration, or any other interested person, or the attorney for any of those persons (hereafter referred to as "notice givers"), within two weeks of the admission of the will to probate, must give a *notice* to the surviving spouse of the testator, to all persons who would be entitled to inherit from the testator if the testator had died intestate, and to all legatees and devisees named in the will (hereafter referred to as "notice recipients"). 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 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 a written waiver of the right to receive the notice in the probate court. The fact that the above notice has been given generally to all of the notice recipients who have not waived their right to receive the notice, and, if applicable, the fact that certain of those potential notice recipients have waived their right to receive the notice must be evidenced by a *certificate of giving notice* that must be filed by any of the notice givers required to give the notice, in the probate court *not later than two months after the appointment of the fiduciary, unless the court grants an extension of that time*. Failure to file the certificate in a timely manner will subject the fiduciary to specified citation and penalty provisions. (R.C. 2107.19(A)(1) to (4).)

Operation of the bill

The bill provides that the *certificate of giving notice* must be filed not later than two months after the appointment of the fiduciary *or, if no fiduciary has been appointed, not later than two months after the admission of the will to probate* (added by the bill), unless the court grants an extension of that time (R.C. 2107.19(A)(4)).

Accounts of executors and administrators

Existing law

Not later than 13 months after appointment, every administrator and executor must render an account of the administrator's or executor's administration, 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. An administrator or executor must render an account at any time other than a time otherwise mentioned in the statute 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 as otherwise described in the following paragraph, 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. (R.C. 2109.301(A) and (B)(4).)

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 final and distributive account. In lieu of filing a final account, the administrator or executor of an estate of that type *must be 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 specified statements. (R.C. 2109.301(B)(2).)

Operation of the bill

The bill modifies the requirements for the filing of a final account or final and distributive account and the filing of a certificate of termination of an estate of a decedent in which the sole legatee, devisee, or heir is also the administrator or executor of the estate. Under the bill, the administrator or executor of an estate of that type *must file* (instead of "shall not file") a final account <u>or</u> final and distributive account *or, in lieu* of filing a final account, the administrator or executor *may file* (instead of "shall be discharged by filing") with the court within 30 days after completing the administration of the estate a certificate of termination of the estate. The bill further provides that in an estate of the type described in this paragraph, a sole legatee, devisee, or heir of a decedent may be liable to creditors for debts of and claims against the estate that are presented after the filing of the certificate of termination of the estate and within the time allowed by law (i.e., within one year after the death of the decedent) for presentation of the creditors' claims. (R.C. 2109.301(B)(2) and (3) and 2117.06(B).)

Distribution of estate assets; creditors' claims

Distribution of estate assets

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 pursuant to the spouse's right to make that election, *if they are necessary to satisfy any claims against the estate as provided in R.C. 2113.53*, or if the will is set aside. After the distribution, a distributee is personally liable to a claimant who presents a claim within one year after the death of the decedent, subject to the limitations described in this statute (see **COMMENT** 1). (R.C. 2113.53(A) and (B).)

Operation of the bill. The bill modifies existing law in the following manners (R.C. 2113.53(A) and (B)):

(1) It provides that each beneficiary or heir to whom the estate assets are distributed as described above is liable to return the assets or the proceeds from the assets *to the estate* (added by the bill) if they are necessary to satisfy the share of a surviving spouse who elects to take against the will pursuant to the spouse's right to make that election or if the will is set aside (the bill eliminates the condition for the return of the assets or the proceeds of the assets *if they are necessary to satisfy any claims against the estate as provided in R.C. 2113.53* to conform to the bill's changes discussed under "***Operation of the bill***" in "***Presentation of creditors' claims***," below).

(2) It provides that after distribution of the estate assets, a distributee is personally liable to a claimant who presents a *valid* (added by the bill) claim within one year after the death of the decedent, subject to the limitations described in **COMMENT** 1.

(3) It provides that if presentation of a claim is made in a writing to those distributees of the decedent's estate who may share liability for the payment of the claim (see clause (2) under "***Operation of the bill***" in "***Presentation of creditors' claims***," below), only those distributees who have received timely presentation of the claim have any liability for the claim, subject to the limitations described in **COMMENT** 1.

Presentation of creditors' claims

Existing law. Current law requires all creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, to present their claims in one of the following manners (R.C. 2117.06(A)):

(1) To the executor or administrator in a writing;

(2) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;

(3) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within one year after the death of the decedent. If an executor or administrator is not a natural person, the writing is considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within that one-year period.

If the executor or administrator makes a distribution of the assets of the estate prior to the expiration of the time for the filing of claims, the executor or administrator must provide *notice* on the account delivered to each distributee that the distributee may be liable to the estate up to the value of the distribution and may be required to return all or any part of the value of the distribution if a valid claim is subsequently made against the estate within the permitted time (R.C. 2117.06(K)).

Operation of the bill. The bill modifies the manners of presenting creditors' claims. It requires all creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, to present their claims in one of the following manners (R.C. 2117.06(A)):

(1) *After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination*, (added by the bill) in one of the manners specified above in clauses (1), (2), and (3) under "***Existing law***;"

(2) *If the final account or certificate of termination has been filed, in a writing to those distributees of the decedent's estate who may share liability for the payment of the claim* (added by the bill).

The bill further modifies existing law's notice requirement if the estate assets are distributed prior to the expiration of the one-year period for the filing of

claims. It provides that if the executor or administrator makes a distribution of the assets of the estate *pursuant to R.C. 2113.53* (added by the bill and referring to "***Distribution of estate assets***," above) prior to the expiration of the time for the *presentation* (changed from *filing*) of claims, the executor or administrator must provide notice on the account delivered to each distributee that the distributee may be liable to the estate *if a claim is presented prior to the filing of the final account and may be liable to the claimant if the claim is presented after the filing of the final account* (added by the bill) up to the value of the distribution and may be required to return all or any part of the value of the distribution if a valid claim is subsequently made against the estate within the permitted time (R.C. 2117.06(K)).

Rejection of creditors' claims

Existing law. An executor or administrator must reject a creditor's claim against the estate that the executor or administrator represents by giving the claimant written notice of the disallowance of the claim. The notice must be given to the claimant personally or by *registered* mail with return receipt requested, addressed to the claimant at the address given on the claim. Notice by mail is effective on delivery of the mail at the address given. A claim may be rejected in whole or in part. A claim that has been allowed may be rejected at any time after the allowance of the claim. A claim is rejected if the executor or administrator, on demand in writing by the claimant for an allowance of the claim within five days, which demand may be made at presentation or at any time after presentation, fails to give to the claimant, within that period, a written statement of the allowance of the claim. The rejection becomes effective at the expiration of that period. (R.C. 2117.11.)

When a claim against an estate has been rejected in whole or in part but not referred to referees, or when a claim has been allowed in whole or in part and thereafter rejected, the claimant must commence an action on the claim, or that part of the claim that was rejected, within two months after the rejection if the debt or that part of the debt that was rejected is then due, or within two months after the debt or part of the debt that was rejected becomes due, or be forever barred from maintaining an action on the claim or part of the claim that was rejected. If the executor or administrator dies, resigns, or is removed within that two-month period and before action is commenced on the claim or part of the claim that was rejected, the action may be commenced within two months after the appointment of a successor. For the purposes of this provision, the action of a claimant is commenced when the *petition* and praecipe for service of summons on the executor or administrator have been filed. (R.C. 2117.12.)

Operation of the bill. The bill modifies existing law to provide for the rejection of claims that are presented to distributees of the estate if the final account or the certificate of termination has been filed as provided in the bill (see

"***Presentation of creditors' claims***," above), and to make technical changes. It provides that an executor or administrator, *or a distributee who receives the presentation of a claim as provided in R.C. 2117.06(A)(2)*, (see "***Presentation of creditors' claims***," above) must reject a creditor's claim against the estate by giving the claimant written notice of the disallowance of the claim. The notice must be given to the claimant personally or by *certified* (changed from *registered*) mail with return receipt requested, addressed to the claimant at the address given on the claim. Notice by mail is effective on delivery of the mail at the address given. A claim may be rejected in whole or in part. A claim that has been allowed may be rejected at any time after the allowance of the claim. A claim is rejected if the executor or administrator, *or a distributee who receives the presentation of a claim as provided in R.C. 2117.06(A)(2)*, on demand in writing by the claimant for an allowance of the claim within five days, which demand may be made at presentation or at any time after presentation, fails to give to the claimant, within that *five-day* period, a written statement of the allowance of the claim. The rejection becomes effective at the expiration of that period. (R.C. 2117.11.)

The bill further modifies the provision pertaining to a claimant's action on the claim by providing that for purposes of that provision, the action of a claimant is commenced when the *complaint* (changed from *petition*) and praecipe for service of summons on the executor or administrator, *or on the distributee who received the presentation of the claim as provided in R.C. 2117.06(A)(2)* (added by the bill), have been filed. (R.C. 2117.12.)

Dispute resolution procedures

The bill authorizes a probate judge to establish by rule procedures for the resolution of disputes between parties to any civil action or proceeding that is within the jurisdiction of the probate court. Any procedures so adopted must include, but are not limited to, mediation. If the probate judge establishes any such dispute resolution procedures, the probate judge may charge, in addition to the fees and costs authorized under continuing law, a reasonable fee that is to be collected on the filing of each action or proceeding and that is to be used to implement the procedures. The probate court must pay to the county treasurer of the county in which the court is located all of those fees collected. The treasurer must place the funds from the fees in a separate fund to be disbursed upon an order of the probate judge. If the probate judge determines that the amount of the moneys in that fund is more than the amount that is sufficient to satisfy the purpose for which the additional fee was imposed, the probate judge may declare a surplus in the fund and expend the surplus moneys for other appropriate expenses of the probate court. (R.C. 2101.163.) (See **COMMENT** 2.)

Applicability

R.C. 2106.01 and 2106.02 (election by surviving spouse to exercise rights), R.C. 2107.19 (notice of admission of will to probate), R.C. 2109.301 (accounts of executors and administrators), and R.C. 2113.53, 2117.06, 2117.11, and 2117.12 (distribution of estate assets; creditors claims), as amended by the act and as described in this analysis, apply to estates that are in existence or are initiated on or after the act's effective date of this act. R.C. 2101.163 (dispute resolution procedures), as enacted by the act, applies to civil actions and proceedings that are pending in or brought before the probate court on or after the act's effective date. (Section 5.)

COMMENT

1. Current law, unchanged by the bill, provides that the personal liability of any distributee cannot exceed the lesser of (a) 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 or (b) 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 are determined by the following fraction: (i) 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 and (ii) 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. (R.C. 2113.53(B).)

2. The provisions of R.C. 2101.163 in the bill are similar to the provisions of former R.C. 2101.163, which was enacted by Am. Sub. H.B. 350 of the 121st General Assembly (Tort Reform Act). In conformity with the Supreme Court of Ohio's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, which held Am. Sub. H.B. 350 unconstitutional *in toto* for violating the one-subject rule, Sub. S.B. 108 of the 124th General Assembly outright repealed former R.C. 2101.163. It appears from the *Sheward* decision that former R.C. 2101.163 did not violate any substantive constitutional provision.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	08-27-02	p. 1997

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