



Sub. S.B. 64

125th General Assembly
(As Passed by the General Assembly)

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Reps. Willamowski, Book, Cates, DeBose, DePiero, Domenick, C. Evans, Gilb, Hagan, Harwood, Kearns, Oelslager, Otterman, S. Patton, T. Patton, Schmidt, Seitz, J. Stewart, Taylor, Trakas

Effective date: October 21, 2003

ACT SUMMARY

- Specifies the circumstances in which the revocation or nonrevocation of a power of attorney may occur upon the termination of the marriage, or upon the entering into of a separation agreement, between the principal and the principal's spouse as attorney in fact.
- Provides a procedure for the distribution of the trust estate when a probate court terminates, upon the trustee's motion, a trust with a current value of less than \$100,000.
- Specifies when a minor, an incapacitated or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable may be represented by or bound by another person with a substantially identical interest in a trust.
- Specifies that generally a spendthrift provision in an instrument that creates an inter vivos or testamentary trust does not cause any forfeiture or postponement of any interest in property that is granted to a surviving spouse of the testator or other settlor and that qualifies for the qualified terminable interest property deduction allowed under the exemptions to the taxable estate for Ohio estate tax purposes.
- Specifies that generally an instrument that creates an inter vivos or testamentary trust does not require or permit the accumulation for more than one year of any income of property that is granted to a surviving

spouse of the testator or other settlor and that qualifies for the qualified terminable interest property deduction allowed under the exemptions to the taxable estate for Ohio estate tax purposes.

CONTENT AND OPERATION

Power of attorney-nonrevocation and revocation by termination of marriage or separation agreement

Nonrevocation

Continuing law and law generally retained by the act. Continuing law provides that the death or adjudged incompetency of any principal who has executed a power of attorney in writing does not revoke the power and authority of the attorney in fact who, without actual knowledge of the death or adjudged incompetency of the principal, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, inures to the benefit of and binds the principal and the principal's heirs, devisees, and personal representatives. (R.C. 1337.091(A).)

Law generally retained by the act also provides that an affidavit that is executed by the attorney in fact stating that the attorney in fact did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation of the power of attorney by the principal or actual knowledge of the revocation of the power of attorney by death or adjudged incompetency of the principal is, in the absence of fraud, conclusive proof of nonrevocation of the power at that time. If the exercise of the power requires the execution and delivery of any instrument that is recordable, the affidavit when acknowledged before a notary public in the same manner as a deed, is likewise recordable. (R.C. 1337.091(B).)

Operation of the act. The act modifies the content of the affidavit (discussed above under "*Existing law*") that is conclusive proof of the nonrevocation of a power of attorney. Under the act, an affidavit that is executed by the attorney in fact is, in the absence of fraud, conclusive proof of the nonrevocation of the power of attorney at the time of the attorney in fact doing an act pursuant to the power of attorney if the affidavit contains the two statements under current law and also contains one of the following statements, whichever is applicable (R.C. 1337.091(B)(1)):

- (1) The attorney in fact was never married to the principal.
- (2) The attorney in fact was married to the principal, the marriage has been terminated, and the power of attorney states that the power of attorney is not

revoked by reason of law due to the termination of the marriage between the principal and the attorney in fact;

(3) The attorney in fact is married to the principal, a separation agreement has been entered into between the principal and the attorney in fact in which they intend to fully and finally settle each spouse's prospective property rights in the property of the other, and the power of attorney states that the power of attorney is not revoked by reason of law due to the existence of a separation agreement of that nature entered into between the principal and the attorney in fact.

Revocation

Under the act, if a principal executes a power of attorney designating the principal's spouse as the attorney in fact for the principal and if after executing the power of attorney, the principal and the principal's spouse are divorced, obtain a dissolution or annulment of their marriage, or enter into a separation agreement pursuant to which they intend to fully and finally settle each spouse's prospective property rights in the property of the other, the designation of the power of attorney in the spouse or former spouse of the principal to act as attorney in fact for the principal is revoked, unless the power of attorney provides otherwise. The subsequent remarriage of the principal to the principal's former spouse, or the termination of a separation agreement between the principal and the principal's spouse, does not revive the power of attorney that is revoked. (R.C. 1339.621.)

Termination of trusts under certain circumstances

Continuing law

Under the continuing general fiduciary law and under the continuing law regarding fiduciaries appointed by and accountable to the probate court, upon the filing of a motion by a trustee with the court that has jurisdiction over the trust, upon the provision of 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 (R.C. 1339.66(A)(1) and 2109.62(A)(1)):

- (1) It is no longer economically feasible to continue the trust.
- (2) The termination of the trust is for the benefit of the beneficiaries.
- (3) The termination of the trust is equitable and practical.
- (4) The current value of the trust is less than \$100,000.

The existence of a spendthrift trust or similar provision in a trust instrument or will does not preclude the termination of a trust.

If property is to be distributed from an estate being probated to a trust and the termination of the trust as discussed above does not clearly defeat the intent of the testator, the probate court has jurisdiction to order the outright distribution of the property or to make the property custodial property under the Transfers to Minors Act. A probate court may so order whether the application for the order is made by an inter vivos trustee named in the will of the decedent or by a testamentary trustee. (R.C. 1339.66(A)(2) and (B) and 2109.62(A)(2) and (B).)

Operation of the act

The act provides that, upon the termination of a trust as discussed above under "**Continuing law**," the probate court must order the distribution of the trust estate in accordance with any provision specified in the trust instrument for the premature termination of the trust. If there is no provision of that nature in the trust instrument, the probate court is required to order the distribution of the trust estate among the beneficiaries of the trust in accordance with their respective beneficial interests and in a manner that the court determines to be equitable. The court is required to consider all of the following information for the purposes of ordering the distribution of the trust estate among the beneficiaries of the trust (R.C. 1339.66(C) and 2109.62(C)):

- (1) The existence of any agreement among the beneficiaries with respect to their beneficial interests;
- (2) The actuarial values of the separate beneficial interests of the beneficiaries;
- (3) Any expression of preference of the beneficiaries that is contained in the trust instrument.

Representation of a minor, incapacitated person, unborn person, or unknown trust beneficiary by person with substantially identical interest in the trust

The act provides that, unless otherwise represented or bound, a minor, an incapacitated or unborn person, or a person whose identity or location is unknown and is not reasonably ascertainable may be represented by or bound by another person who has a substantially identical interest in the trust as that minor, incapacitated or unborn person, or person whose identity or location is unknown and is not reasonably ascertainable, but only to the extent that there is no conflict of interest between the person who is represented or bound and the person who

represents or binds that person. The act defines minor, for the purposes of this provision, as a person under 18 years of age. (R.C. 1339.66(D) and 2109.62(D).)

Spendthrift provision in a trust

Law largely unchanged by the act provides generally that a spendthrift provision in an instrument that creates an inter vivos or testamentary trust must not cause any forfeiture or postponement of any interest in property that satisfies both of the following (R.C. 1339.411):

(1) It is granted to a surviving spouse of the testator or other settlor.

(2) It qualifies for the federal estate tax marital deduction allowed by Subtitle B, Chapter 11, of the "Internal Revenue Code of 1986" or the estate tax marital deduction allowed by R.C. 5731.15(A) of the Revised Code (provides for exemptions from the taxable estate).

Under the act, a spendthrift provision in an instrument creating an inter vivos or testamentary trust also must not cause any forfeiture or postponement of any interest in property that satisfies (1) above and qualifies for the "qualified terminable interest property deduction" allowed as a deduction from the gross estate in determining Ohio estate taxes (R.C. 1339.411(A)(1)(b)).

Law largely retained by the act also provides that the above described provision does not apply if an instrument that creates an inter vivos or testamentary trust expressly states the intention of the testator or other settlor that obtaining a marital deduction is less important than enforcing the forfeiture or postponement of the interest in property in accordance with the spendthrift provision in the instrument. It also does not apply to any beneficiary of an inter vivos or testamentary trust other than the surviving spouse of the testator or other settlor or to any inter vivos or testamentary trust of which the surviving spouse of the testator or other settlor is a beneficiary if an interest in property does not qualify for a marital deduction. (R.C. 1339.411.)

The act includes the "qualified terminable interest property deduction" allowed under the exemption from the taxable estate in the exceptions described above (R.C. 1339.411(B)(2) and (4)).

Restriction on the accumulation of income for more than one year

Law largely unchanged by the act provides that generally an instrument that creates an inter vivos or testamentary trust is prohibited from requiring or permitting the accumulation for more than one year of any income of property that satisfies both the following (R.C. 1339.412):

(1) The property is granted to a surviving spouse of the testator or other settlor.

(2) The property qualifies for the federal estate tax marital deduction allowed by Subtitle B, Chapter 11 of the "Internal Revenue Code of 1986" or the estate tax marital deduction allowed by R.C. 5731.15(A).

The act applies the above prohibition on the accumulation for more than one year of any income of certain property to property that satisfies (1) above and qualifies for the "qualified terminable interest property deduction" allowed as a deduction from the gross estate in determining Ohio estate taxes. The act adds references to this type of deduction to the existing exceptions to the above prohibition. (R.C. 1339.412(A) and (B).)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced Reported, S. Judiciary on Civil Justice	04-01-03 05-08-03	pp. 235-236 p. 325
Passed Senate (32-0) Reported, H. Judiciary	05-14-03 06-19-03	pp. 341-342 pp. 938-939
Passed House (98-1)	06-25-03	pp. 973-974

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