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Bill Analysis
Legislative Service Commission

S.B. 64

125th General Assembly
(As Introduced)

Sens. Goodman, Randy Gardner, Stivers, Jacobson

BILL 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.
- Provides a procedure for a probate court to treat a document as a will notwithstanding the will's noncompliance with the statutory procedures for executing a will.

CONTENT AND OPERATION

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

Nonrevocation

Current law. Current 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).)

Current law 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 bill. The bill 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 bill, an affidavit executed by the attorney in fact at the time of doing an act pursuant to the power of attorney is, in the absence of fraud, conclusive proof of the nonrevocation of the power of attorney at that time if the affidavit contains the two statements under current law and also contains the following (R.C. 1337.091(B)(1)):

(1) If the attorney in fact was never married to the principal, a statement of that fact;

(2) If the attorney in fact was married to the principal and the marriage has been terminated, a statement 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) If the attorney in fact is married to the principal and 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, a statement 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 bill, 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

Current law

Under the general fiduciary law and under the 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 bill

The bill provides that, upon the termination of a trust as discussed above under "**Existing 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 bill 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 bill 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).)

Procedure if document purported to be a will is not executed in compliance with the statutory procedures for executing a will

Under continuing law, except oral wills, every last will and testament must be in writing, but may be handwritten or typewritten. That will must be signed at the end by the party making it, and by some other person in that party's presence and at that party's express direction. Two or more competent witnesses who saw the testator subscribe, or heard the testator acknowledge the testator's signature, must attest and subscribe the will in the presence of the party making the will. (R.C. 2107.03--not in the bill.)

The bill provides that if a document that purports to be a will is not executed in compliance with the requirements described above, that document must be treated as if it had been executed as a will in compliance with those requirements if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following (R.C. 2107.24):

(1) The decedent prepared the document or caused the document to be prepared.

(2) The decedent signed or attempted to sign the document and intended the document to constitute the decedent's will.

(3) Two or more witnesses saw the decedent sign or attempt to sign the document.

Notice of application to admit a will to probate court

Under current law, when an application is made to the probate court to admit to probate a will that has been lost, spoliated, or destroyed, the party seeking to prove the will is required to give a written notice by certified mail 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, to all legatees and devisees that are named in the will, and to all legatees and devisees that are named in the most recent will prior to the lost, spoliated, or destroyed will that is known to the applicant. The bill applies this provision to a document that was not executed in compliance with the requirements for making a will but that is treated as a will under the bill, as described above in **'Procedure if document purported to be a will is not executed in compliance with the statutory procedures for executing a will.'** (R.C. 2107.27(A).)

Current law also provides that, in the cases described above, the proponents and opponents of the will must cause the witnesses to the will, and any other witnesses that have relevant and material knowledge about the will, to appear before the court to testify. If upon that testimony the court finds that the requirements for a lost, spoliated, or destroyed will have been met, the probate court must find and establish the contents of the will as near as can be ascertained. The contents of the will must be effectual for all purposes as if the original will had been admitted to probate and record. The bill applies this provision to a document that was not executed in compliance with the requirements for making a will but that is treated as a will under the bill, as described above in **'Procedure if document purported to be a will is not executed in compliance with the statutory procedures for executing a will,'** and provides that the contents of that will are as effectual for all purposes as if the document treated as a will had satisfied all of the requirements for making a will and had been admitted to probate and record. (R.C. 2107.27(B) and (C).)

HISTORY

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