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*Bill Analysis*  
*Legislative Service Commission*

## **H.B. 160**

127th General Assembly  
(As Reported by H. Civil & Commercial Law)

**Reps. Bubp and Latta, Seitz, Book**

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### **BILL SUMMARY**

- Permits a guardian of the estate of a minor or an incompetent or the personal representative of a deceased person, whether or not authorized by the instrument to disclaim, with the consent of the probate court to disclaim the succession to any property or interest in property that the ward, if an adult and competent, or the deceased, if living, might have disclaimed.
- Requires a disclaimant to deliver, file, or record the disclaimer prior to accepting any benefits of the disclaimed interest and at any time (the bill eliminates the reference to the nine-month period) after the latest of three specifically described dates, including the date on which the disclaimant attains 18 (instead of 21) years of age or is no longer an incompetent (existing law), and states that by eliminating the reference to the nine-month period the General Assembly intends to create the possibility that some disclaimers governed by the law of Ohio will be qualified under section 2518 of the Internal Revenue Code and some will not be qualified under that section.
- Provides that if a donative instrument expressly provides for the distribution of property or a part of or interest in property if there is a disclaimer, the property, part, or interest disclaimed must be distributed or disposed of, and accelerated or not accelerated, in accordance with the donative instrument.
- With respect to the existing provision that a disclaimant's right to disclaim is barred if the disclaimant does any of specified actions, eliminates the condition that the action be done before the expiration of the period within which the disclaimant may disclaim the interest.

- Specifies that a beneficiary's application for appointment as a personal representative or fiduciary does not waive or bar the disclaimant's right to disclaim a right, power, privilege, or immunity as a personal representative or fiduciary or the beneficiary's right to disclaim property.
- Provides that the disclaimer statute may be applied separately to different interests or powers created in the disclaimant by the same instrument.
- States that the bill's amendments to the disclaimer statute are intended to clarify and be declaratory of the law as it existed prior to the enactment of this act and are to be construed accordingly.

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## CONTENT AND OPERATION

### Background

The Ohio Trust Code (Sub. H.B. 416 of the 126th General Assembly) renumbered the former section governing the disclaimer of succession to property from R.C. 1339.68 to R.C. 5815.36 and made no changes to its provisions. The disclaimer law permits a disclaimer as follows: (1) a "disclaimant" (see "Definitions," below), 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 by law, or (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 by law.

The written instrument of disclaimer must be signed and acknowledged by the disclaimant and contain all of the following: (1) a reference to the donative instrument, (2) a description of the property, part of property, or interest disclaimed, and of any fiduciary right, power, privilege, or immunity disclaimed, and (3) a declaration of the disclaimer and its extent. (R.C. 5815.36(B)(1), (2), and (3).)

### Disclaimer by guardian of minor's or incompetent's estate or personal representative of a deceased

Under existing law, the guardian of the estate of a minor or an incompetent, or the personal representative (not a defined term) of a deceased person, with the consent of the court of common pleas' probate division, may disclaim, in whole or in part, the succession to any property or interest in property that the ward, if an

adult and competent, or the deceased, if living, might have disclaimed. The guardian or personal representative, or any interested person may file an application with the probate division of the court of common pleas that has jurisdiction of the estate, asking that the court order the guardian or personal representative to execute and deliver, file, or record the disclaimer on behalf of the ward or estate.

The bill modifies existing law by providing that the guardian or the "personal representative" (see "Definitions," below) as described in the preceding paragraph, *whether or not authorized by the instrument to disclaim*, with the consent of the court of common pleas' probate division, may disclaim, in whole or in part, the succession to any property or interest in property that the ward, if an adult and competent, or the deceased, if living, might have disclaimed. The guardian or personal representative, or any interested person may file an application with the probate division of the court of common pleas that has jurisdiction of the estate, asking that the court order the guardian or personal representative to execute and deliver, file, or record the disclaimer on behalf of the ward or estate, *or deceased person*. (R.C. 5815.36(B)(4).)

#### **Delivery, filing, or recording of disclaimer**

Existing law requires the disclaimant to deliver, file, or record the disclaimer, or cause the same to be done, not later than nine months after the latest of the following dates: (1) the effective date of the donative instrument if both the taker and the taker's interest in the property are finally ascertained on that date, (2) the date of the occurrence of the event upon which both the taker and the taker's interest in the property become finally ascertainable, or (3) the date on which the disclaimant attains 21 years of age or is no longer an incompetent, without tendering or repaying any benefit received while the disclaimant was under 21 years of age or an incompetent, and even if a guardian of a minor or incompetent had filed an application for a disclaimer and the probate division of the court of common pleas involved did not consent to the guardian executing a disclaimer.

The bill requires the disclaimant to deliver, file, or record the disclaimer, or cause the same to be done, *prior to accepting any benefits of the disclaimed interest and at any time* (the bill eliminates the reference to the nine-month period) after the latest of the dates described in clauses (1), (2), or (3) (as modified by the bill) in the preceding paragraph. The date under clause (3) is the date on which the disclaimant attains 18 (instead of 21) years of age or is no longer an incompetent, without tendering or repaying any benefit received while the disclaimant was under 18 (instead of 21) years of age or an incompetent, and even if a guardian of a minor or incompetent had filed an application for a disclaimer and the probate division of the court of common pleas involved did not consent to the guardian executing a disclaimer. (R.C. 5815.36(D).)

The bill states that the General Assembly recognizes that section 2518 of the Internal Revenue Code (see **COMMENT 1**) defines a qualified disclaimer, in part, as a written refusal by a person to accept an interest in property that is received by the transferor of the interest within nine months after the later of the date on which the transfer creating the interest is made and the date on which the person attains 21 years of age. By amending R.C. 5815.36(D) as described in the preceding paragraph to eliminate a reference to the nine-month period, the General Assembly intends to create the possibility that some disclaimers governed by the law of Ohio will be qualified under section 2518 of the Internal Revenue Code and some will not be qualified under that section. (Section 4.)

### **Distribution of disclaimed property; acceleration of remainder**

Under existing law, unless the donative instrument expressly provides that, if there is a disclaimer, there cannot be any acceleration of remainders or other interests, the property, part of property, or interest in property disclaimed, and any future interest that is to take effect in possession or enjoyment at or after the termination of the interest disclaimed, must descend, be distributed, or otherwise be disposed of, and must be accelerated, in the following manner: (1) if intestate or testate succession is disclaimed, as if the disclaimant had predeceased the decedent, (2) if the disclaimant is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the disclaimant had predeceased the donee of the power, (3) if the donative instrument is a nontestamentary instrument, as if the disclaimant had died before the effective date of the nontestamentary instrument, or (4) if the disclaimer is of a fiduciary right, power, privilege, or immunity, as if the right, power, privilege, or immunity was never in the donative instrument.

The bill modifies existing law by providing that *if a donative instrument expressly provides for the distribution of property, part of property, or interest in property if there is a disclaimer, the property, part of property, or interest disclaimed must be distributed or disposed of, and accelerated or not accelerated, in accordance with the donative instrument. In the absence of express provisions to the contrary in the donative instrument, the property, part of property, or interest in property disclaimed, and any future interest that is to take effect in possession or enjoyment at or after the termination of the interest disclaimed, must descend, be distributed, or otherwise be disposed of, and must be accelerated, in the manner described in (1) to (4) in the preceding paragraph.* (R.C. 5815.36(G).)

### **Limitations on right to disclaim**

Under existing law, the disclaimant's right to disclaim is barred if, *before the expiration of the period within which the disclaimant may disclaim the interest*, the disclaimant does any of the following: (1) assigns, conveys,

encumbers, pledges, or transfers, or contracts to assign, convey, encumber, pledge, or transfer, the property or any interest in it, (2) waives in writing the disclaimant's right to disclaim and executes and delivers, files, or records the waiver in the manner provided by law for a disclaimer instrument, (3) accepts the property or an interest in it, or (4) permits or suffers a sale or other disposition of the property pursuant to judicial action against the disclaimant.

The bill provides that the disclaimant's right to disclaim is barred if the disclaimant does any of the actions described in clauses (1) to (4) in the preceding paragraph. The bill eliminates the condition for doing any of the actions *before the expiration of the period within which the disclaimant may disclaim the interest.* (R.C. 5815.36(J).)

**Effect of beneficiary's application for appointment as fiduciary or personal representative**

Existing law provides that a fiduciary's application for appointment or assumption of duties as a fiduciary does not waive or bar the disclaimant's right to disclaim a right, power, privilege, or immunity. The bill modifies this provision by providing that *neither a fiduciary's application for appointment or assumption of duties as a fiduciary nor a beneficiary's application for appointment as a personal representative or fiduciary waives or bars the disclaimant's right to disclaim a right, power, privilege, or immunity as a personal representative or fiduciary or the beneficiary's right to disclaim property.* (R.C. 5815.36(K).)

**Effect of disclaimer statute on preexisting rights; application of disclaimer statute to other interests**

Existing law provides that the right to disclaim and the procedures for disclaimer established by law (R.C. 5815.36) are in addition to, and do not exclude or abridge, any other rights or procedures existing under any other section of the Revised Code or at common law to assign, convey, release, refuse to accept, renounce, waive, or disclaim property. The bill provides that the right to disclaim and the procedures for disclaimer established by law (R.C. 5815.36) are in addition to, and do not exclude or abridge, any other rights or procedures *that exist or formerly existed* under any other section of the Revised Code or at common law to assign, convey, release, refuse to accept, renounce, waive, or disclaim property. (R.C. 5815.36(N).)

The bill further provides that R.C. 5815.36 may be applied separately to different interests or powers created in the disclaimant by the same testamentary or nontestamentary instrument (R.C. 5815.36(Q)).

## Definitions

The bill defines "disclaimant" as 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 (R.C. 5815.36(A)(1)):

(1) 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 entirety, 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;

(2) With respect to nontestamentary instruments, a grantee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entirety, 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;

(3) With respect to fiduciary rights, privileges, powers, and immunities, a fiduciary under a testamentary or nontestamentary instrument. This provision does not authorize a fiduciary *who disclaims fiduciary rights, privileges, powers, and immunities to cause the rights of any beneficiary to be disclaimed* (instead of *disclaim the rights of beneficiaries*) unless the instrument creating the fiduciary relationship authorizes *the fiduciary to make* such a disclaimer (provisions added by the bill are in italics).

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

The bill defines "personal representative" as including any fiduciary as defined in R.C. 2109.01 (see **COMMENT 2**) and any executor, trustee, guardian, or other person or entity having a fiduciary relationship with regard to any interest in property passing to the fiduciary, executor, trustee, guardian, or other person or entity by reason of a disclaimant's death (R.C. 5815.36(A)(2)).

## Intent to clarify

The bill states that its amendments to the disclaimer statute as described in this analysis are intended to clarify and be declaratory of the law as it existed prior to the enactment of the bill as an act and are to be construed accordingly (Section 3).

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## COMMENT

1. As a general rule, if a person makes a qualified disclaimer with respect to any interest in property, the provisions on estate and gift taxes (26 U.S.C. 2001 et seq.) apply with respect to such interest as if the interest had never been transferred to that person (26 U.S.C. 2518(a)). For purposes of this general rule, the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if all of the following apply (26 U.S.C. 2518(b)):

(a) The refusal is in writing;

(b) That writing is received by the transferor of the interest, the transferor's legal representative, or the holder of the legal title to the property to which the interest relates not later than the date that is nine months after the later of the day on which the transfer creating the interest in such person is made, or the day on which such person attains age 21;

(c) The person has not accepted the interest or any of its benefits;

(d) As a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either to the spouse of the decedent, or to a person other than the person making the disclaimer.

For purposes of the above general rule, a disclaimer with respect to an undivided portion of an interest that meets the requirements of the preceding definition is treated as a qualified disclaimer of that portion of the interest. A power with respect to property is treated as an interest in such property. A written transfer of the transferor's entire interest in the property that meets requirements similar to the requirements of paragraphs (b) and (c), above, and that is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of "qualified disclaimer," above) is treated as a qualified disclaimer. (26 U.S.C. 2518(c).)

2. R.C. 2109.01 (not in the bill) defines "fiduciary," except as provided in R.C. 2109.022 (limitation on liability of fiduciary when certain powers granted to other persons), as any person, other than an assignee or trustee for an insolvent debtor or a guardian under R.C. 5905.01 to 5905.19 (Veterans' Guardianship Law), appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another; and includes an agency under contract with the Department of Mental Retardation and Developmental Disabilities for the provision of protective service under R.C. 5123.55 to 5123.59 (guardianship, trusteeship, or conservatorship appointments) appointed by and accountable to the

probate court as guardian or trustee with respect to mentally retarded or developmentally disabled persons.

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## **HISTORY**

ACTION	DATE
Introduced	04-17-07
Reported, H. Civil & Commercial Law	05-24-07

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