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Advanced Topics in Probate Law

Top 10 Changes From the Omnibus Probate Bill

**Magistrate Crystal D. Burnett
&
Magistrate Paula D. Haas**

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Number 10

Persons Prohibited From Benefitting From Another's Death

- R.C. 2105.19(A).
- Existing law generally prohibits: any person who is convicted of, pleads guilty to, or is found not guilty by reason of insanity of a violation of or complicity in the violation of aggravated murder, murder or voluntary manslaughter; any person who is later found incompetent to stand trial; and any juvenile who is found delinquent for those offenses, from in any way benefiting by the death.
- Amended to include involuntary manslaughter pursuant to R.C. 2903.04(A) that was not a proximate result of committing felony aggravated vehicular homicide pursuant to R.C. 2903.06.

Number 9

Attorney-Client Privilege When Client is a Fiduciary

- 5815.16(B)
- Provides that any communication between an attorney and a client who is acting as a fiduciary is privileged and protected from disclosure to third parties to whom the fiduciary owes fiduciary duties to the same extent as if the client was not acting as a fiduciary.
- This provision expands current law which provides that absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of performing those services, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations. R.C. 5815.16(A).

Number 8

Application for Release of Medical Records and Medical Billing Records

- R.C. 2113.032
- Creates a procedure for anyone eligible to be appointed personal representative or named executor in a will to apply to the probate court for release of the decedent's medical records and medical billing records, for the limited purpose of deciding if to file a wrongful death, personal injury, or survivorship action on behalf of the decedent.
- The application must include the Next of Kin form.
- May be filed prior to the filing of any application for authority to administer the estate.

- Probate court must send a copy of the application to persons listed on the Next of Kin form
- Upon the filing of the application, payment of the filing fee, and not earlier than 10 days after the court sends a copy of the application to the persons listed on the Next of Kin form, the court may order the records released with or without a hearing.
- The court’s order must direct all medical providers to release the records to the applicant for the limited purpose of deciding whether or not to file a wrongful death, personal injury, or survivorship action.
- The records are confidential.
- Upon obtaining the records and prior to the expiration of the applicable statute of limitations, the applicant must file a report with the court certifying that the requested records were received and whether an administration of the decedent’s estate will be filed

Number 7

Admission of Will to Probate

- R.C. 2107.18
- Modifies current law by providing that the probate must admit a will to probate if it appears from the face of the will, or if the probate court requires, in its discretion, the testimony of the witnesses to a will and it appears from that testimony, that the execution of the will complies with the law in force at the time of the will’s execution in the jurisdiction in which “the testator was physically present when” (added by the bill) it was executed , with the law in force in Ohio at the time of the testator’s death, or with the law in force in the jurisdiction of the testator’s domicile at the time of death.

Foreign Wills

- R.C. 2129.05
- Clarifies current law by providing that authenticated copies of wills “of persons not domiciled in this state” (added by the bill) executed and proved according to the laws of any state or territory of the U.S., relative to property in this state, may be admitted to record in the probate court of a county where a part of that property is situated.

Number 6

Incorporation of a Written Trust into a Will

- R.C. 2107.05
- Current law allows an existing document or memorandum to be incorporated in a will by reference, if referred to as being in existence at the time the will is executed. The document or memorandum must be deposited in the court when the will is probated or within 30 days after.
- Notwithstanding that provision, the bill provides that if a will incorporates a trust instrument only in the event that a bequest or devise to a trust is ineffective, the trust

instrument must be deposited in the probate court not later than 30 days after the final determination that such bequest or devise is ineffective.

- The bill also provides that if a testator intends to incorporate a trust instrument into a will, the testator's will must manifest that intent through the use of the term "incorporate," "made a part of," or similar language.
- Any language in a testator's will that only identifies a trust is not sufficient to manifest an intent to incorporate that trust instrument by reference in the will.
- Applies to the wills of testator's who die on or after the effective date of the bill.
- The amendment of R.C. 2107.05 is intended to abrogate the holdings in *Hageman v. Cleveland Trust Company*, 45 Ohio St.2d 178 (1976) and the Second District Court of Appeals in *Gehrke v. Senkiw*, 2016-Ohio-2657.

Number 5

Jurisdiction Regarding Inter Vivos Trust

- Under existing law, the probate division has concurrent jurisdiction with the general division to issue writs and orders and to hear and determine any action that involves an inter vivos trust.
- The bill specifies that the probate division has exclusive jurisdiction to render declaratory judgments regarding the validity of wills and trusts.
- The probate division, however, may transfer a declaratory judgment proceeding regarding the validity of wills and trusts to the general division pursuant to R.C. 5817.04(A).

Arbitration

- Under the bill, a provision in the terms of a non-testamentary trust that requires the arbitration of disputes, other than disputes regarding the validity of all or part of a trust instrument, between or among beneficiaries and a fiduciary under a trust, or a combination of those persons or entities, is enforceable.
- A provision requiring arbitration is presumed to require binding arbitration under Chapter 2711. of the Revised Code.

Actions Pertaining to Revocable Trusts

- Existing law provides that actions pertaining to a revocable trust to contest its validity, the validity of any amendment, the revocation of the trust during the lifetime of the settlor, or the validity of any transfer made to the trust during the lifetime of the settlor must be commenced by the earlier of the date that is two years after the date of the death of the settlor or that is six months from the date on which the trustee sends to the person bringing the action a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address, and of the time allowed for commencing the action.

- The bill specifies that no person may contest the validity of any trust as to facts decided if the trust was submitted to a probate court by the settlor during the settlor's lifetime and declared valid by the court pursuant to R.C. 5817.10(B)(1).
- A person, however, may contest the validity of the trust as to those facts if the person should have been named a party defendant in the action in which the trust was declared valid, pursuant to R.C. 5817.06(A), and if the person was not named a defendant and properly served in that action.

Number 4

Determining Validity of Will or Trust

- The bill repeals, modifies, and relocates the existing provisions regarding a determination that a will is valid from R.C. 2107.081 et seq. to new R.C. Chapter 5817.
- The bill also provides a similar procedure for determining whether a settlor's trust is valid and enforceable under its terms.

Filing a Complaint to Determine the Validity of a Will

- The bill allows a testator to file a complaint with the probate court to determine before the testator's death that the will is a valid will subject only to subsequent revocation or modification.
- The right to file this complaint is personal to the testator and cannot be exercised by the testator's guardian or an agent under the testator's power of attorney.
- A testator who wishes to obtain a validity determination as to his or her will must file a complaint to determine the validity of both the will and any related trust.
- The complaint must be accompanied by an express written waiver of the testator's physician-patient privilege provided in R.C. 2317.02(B). (Not previously required under R.C. 2107.081 et seq.)
- Failure to file such a complaint cannot be construed as evidence or an admission that the will is invalid.

Filing a Complaint to Determine Validity of a Trust

- The bill allows a settlor to file a complaint with the probate court to determine before the settlor's death that the settlor's trust is valid and enforceable under its terms, subject only to subsequent revocation or modification.
- The right to file this complaint is personal to the settlor and cannot be exercised by the settlor's guardian or an agent under the settlor's power of attorney.
- A settlor who wishes to obtain a validity determination as to his or her trust must file a complaint to determine the validity of both the trust and the related will.
- The complaint must be accompanied by an express written waiver of the settlor's physician-patient privilege provided in R.C.2317.02(B).
- Failure to file such a complaint cannot be construed as evidence or an admission that the trust is invalid.

- “Trust” means an inter vivos revocable trust or irrevocable trust instrument to which, at the time the complaint is filed, either: 1) the settlor resides in, or is domiciled in Ohio; or 2) the trust’s principal place of administration is in Ohio.

Where to File Complaint for Determination of Validity of Will or Trust

- The bill requires the complaint to determine the validity of a will or trust be filed in the probate court.
- The probate judge, upon the motion of a party or the judge’s own motion, may transfer the proceeding to the general division. R.C. 5817.04(A).
- The venue for a complaint to determine the validity of a will is either: (1) the probate court of the county where the testator is domiciled; or 2) if the testator is not domiciled in Ohio, the probate court of any county where any real or personal property of the testator is located or, if no such property, the probate court of any county in Ohio. R.C. 5817.04(B).
- Prior law had no provision to transfer the proceeding to the general division nor any provision that if the testator is not domiciled in Ohio, the complaint may be filed in the probate court of any county where the testator’s personal property is located.
- The venue for a complaint to determine the validity of a trust is either: 1) the probate court of the county where the settlor resides or is domiciled; or 2) if the settlor does not reside in or is not domiciled in Ohio, the probate court of the county in Ohio in which the trust’s principal place of administration is located. R.C. 5817.05(C).

Contents of the Complaint (Will)

- A complaint to determine the validity of a will must name as party defendants all of the following, as applicable: 1) the testator’s spouse; 2) testator’s children; 3) the testator’s heirs at law; 4) the testator’s beneficiaries under the will; and 5) any beneficiary under the testator’s most recent will. R.C.5817.05(A)
- The complaint may name as a defendant any other person that the testator believes may have a pecuniary interest in the determination of the validity of the will. R.C. 5817.05 (B).
- The prior law did not list the types of party defendants. The prior law provided that defendants are all persons named in the will as beneficiaries, and all persons who would be entitled to inherit from the testator had the testator died intestate on the date the complaint was filed. R.C. 2107.081(A).
- The bill defines “beneficiary under a will” as either of the following: 1) any person designated in a will to receive a testamentary disposition of real or personal property; or 2) any person that, in a capacity other than that of executor, holds a power of appointment over estate assets, but does not include the class of permitted appointees among whom the power holder may appoint. R.C. 5817.01(B)(1).
- “Beneficiary under a will” includes a charitable organization that is expressly designated in the terms of the will to receive testamentary distributions, but does not include any charitable organization that is not expressly designated in the terms of the will, but to whom the executor in its discretion may make distributions. R.C. 5817.01(B)(2)

- R.C. 5817.05(C) sets forth specific information that may be contained in the complaint. Prior law did not list the contents of a complaint to declare a will valid.

Contents of Complaint (Trust)

- A complaint to determine the validity of a trust must name as party defendants the following, as applicable: 1) the settlor’s spouse; 2) the settlor’s children; 3) the settlor’s heirs at law; 4) the trustee(s) under the trust; 5) the beneficiaries under the trust; and 6) if the trust amends, amends and restates, or replaces a prior trust, any beneficiary under the settlor’s most recent prior trust.
- The complaint may name as a party defendant any other person that the settlor believes may have a pecuniary interest in the determination of the validity of the settlor’s trust.
- “Beneficiary under a trust” means either: 1) any person that has a present or future beneficial interest in a trust, whether vested or contingent; or 2) any person that, in a capacity other than that of a trustee, holds a power of appointment over trust property, but does not include the class of permitted appointees among whom the power holder may appoint.
- “Beneficiary under a trust” includes a charitable organization that is expressly designated in the terms of the trust to receive distributions, but does not include any charitable organization that is not expressly designated, but to whom the trustee may in its discretion make distributions.
- R.C. 5817.06(C) sets forth the information that may be contained in the complaint.

Service of Process

- Service of process, with a copy of the complaint and the will, and a copy of the *related trust*, if applicable, and service of process, with a copy of the complaint and the trust, and a copy of the *related will*, if applicable, must be made on every party defendant named in the filed complaint, as provided in the applicable Rules of Civil Procedure. R.C. 5817.07.
- Related trust means a trust for which both of the following apply: 1) the testator is the settlor of the trust; and 2) the trust is named as a beneficiary in the will in accordance with R.C. 2107.63. R.C. 5817.01(D).
- Related will means a will for which both of the following apply: 1) the testator is the settlor of a trust; and 2) the will names the trust as a beneficiary in accordance with R.C. 2107.63. R.C. 5817.01(E).

Hearing

- After the complaint is filed the court must set it for a hearing.
- The hearing is adversarial in nature and must be conducted pursuant to R.C. 2101.31 (determination of questions of fact) and R.C. 2721.10 (declaratory relief), except as otherwise provided in Chapter 5817 of the Revised Code. R.C. 5817.08.

Burden of Proof

- The testator or settlor has the burden of establishing prima facie proof of the execution of the will or trust.
- A person who opposes the complaint has the burden of establishing one or more of the following: 1) lack of testamentary intent or the intent to create a trust; 2) lack of the testator's testamentary capacity, or the settlor's legal capacity to enter into and establish the trust; 3) undue influence, restraint, or duress on the testator or settlor; 4) fraud or mistake in the execution of the will or trust; or 5) revocation of the will or trust. R.C. 5817.09(A).
- A party to the proceeding has the ultimate burden of persuasion as to the matters for which the party has the initial burden of proof. R.C. 5817.09(B).

Validity of a Will or Trust

- The court must declare the will valid if it finds all of the following: 1) the will was properly executed pursuant to R.C. 2107.03 or under any prior law of Ohio that was in effect at the time of execution; 2) testator had the requisite testamentary capacity, was free from undue influence, and was not under restraint or duress; and 3) the execution of the will was not the result of fraud or mistake. R.C. 5817.10(A)(1).
- After the testator's death, unless the will is modified or revoked after the court's declaration, the will has full legal effect as the instrument of disposition of the testator's estate and must be admitted to probate upon request. R.C. 5817.10(A)(2)
- The court must declare the trust valid if it finds all of the following: 1) the trust meets the requirements of R.C. 5804.02; 2) the settlor had the legal capacity to enter into and establish the trust, was free from undue influence, and was not under restraint or duress; and 3) the execution of the trust was not the result of fraud or mistake. R.C. 5817.10(B)(1)
- Unless the trust is modified or revoked after the court's declaration, the trust has full legal effect. R.C. 5817.10(B)(2).
- The former law provided that any declaration of the validity of a will must be sealed in an envelope along with the will and filed by the probate judge in the probate court offices. The filed will was available during the testator's lifetime only to the testator. If the testator removed a filed will from the judge's possession, the declaration of validity no longer had any effect. R.C. 2107.084(B), not included in the bill.
- The court may, if it finds the will or trust to be valid, attach a copy of the valid document to the court's judgment entry, but failure to do so does not affect the determination of validity of the will or trust. R.C. 5817.10(C).

Impact of the Validity of the Will or Trust

- No person may contest the validity of a will or trust that is declared valid in a proceeding under Chapter 5817 of the Revised Code. R.C. 5817.11(A).
- A declaration of a will's or trust's validity is binding upon all defendants who were named or represented, and properly served, notwithstanding the failure to name a necessary defendant.
- However, if a person is one who should have been named a party defendant in the action and if the person was not named a defendant and properly served in that action, that person (after the testator's death in the case of a will) may contest the validity of a will or trust declared valid. R.C. 5817.11(B) and (C).
- In determining whether a person was a party defendant and properly served in the action, the representation rules of Chapter 5803. apply and a person represented in the action under those rules is bound by the declaration of validity even if, by the time of the testator's death, or challenge to the trust, the representing person has died or would no longer be able to represent the person to be represented in a proceeding under Chapter 5817. R.C. 5817.11(D).

Modification or Revocation of a Will

- After a declaration of a will's validity, the will may be modified by a later will or codicil executed according to the laws of Ohio or another state, and the will may be revoked under R.C. 2107.33 or other applicable law.
- The revocation by a later will, or other document, of a will that has been declared valid, does not affect the will or the prior declaration of its validity if the later will or other document is found by a court to be invalid due to the testator's lack of testamentary capacity, or undue influence, restraint, or duress on the testator, or otherwise.
- The amendment by a later codicil of a will that has been declared valid does not affect the will or the prior declaration of its validity except as provided by the codicil.
- However, the codicil is not considered validated under Chapter 5817 unless its validity is also declared. R.C. 5817.12(C).

Modification or Revocation of a Trust

- After a declaration of a trust's validity, the trust may be modified, terminated, revoked, or reformed under R.C. 5804.10 to 5804.16, or other applicable law.
- The modification, termination, revocation, or reformation by a new trust or other document of a trust that has been declared valid does not affect the trust or the prior declaration of its validity if the later trust or other document is found by a court to be invalid due to the settlor's lack of capacity, or undue influence, restraint, or duress on the settlor, or otherwise.
- An amendment of a trust that has been declared valid does not affect the trust or the prior declaration of its validity except as provided by the amendment.
- However, the amendment is not considered validated under Chapter 5817 unless its validity is also declared. R.C. 5817.13.

Admissibility of Evidence

- The finding of facts by a court in a proceeding brought under Chapter 5817 is not admissible as evidence in any proceeding other than a proceeding brought to determine the validity of a will or trust.
- The judgment rendered in such a proceeding is not binding upon the parties to that proceeding in any action that is not brought to determine the validity of a will or trust.
- The failure of a testator to file a complaint for a judgment declaring the validity of a will that the testator has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator.
- The failure of a settlor to file a complaint for a judgment declaring the validity of a trust that the settlor has executed is not admissible as evidence in any proceeding to determine the validity of that trust or any other trust executed by the settlor. R.C. 5817.14.

Number 3 Exceptions to Anti-Lapse Provisions

Wills

- Existing law provides that, unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a step-child of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies: (R.C. 2107.52(B)(2))
 1. If the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. The surviving descendants take, per stirpes, the property to which the devisee would have taken had the devisee survived the testator.
 2. If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "Next of kin" "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee.

The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees.

Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take, per stirpes,

the share to which the deceased devisee would have taken had the deceased devisee survived the testator.

“Deceased devisee” means a class member who failed to survive the testator by at least 120 hours and left one or more surviving descendants.

- The bill clarifies that the exception to the “anti-lapse” protection for class gifts in wills only applies to gifts to multi-generational classes. R.C. 2107.52(B)(2)(b).

Trusts

- Existing law provides that, unless a contrary intent appears in the instrument creating a future interest under the terms of a trust, each of the following applies: (R.C. 5808.19(B)(2)).
 1. A future interest is contingent on the beneficiary’s surviving the distribution date by at least 120 hours.
 2. If a beneficiary of a future interest does not survive the distribution date by at least 120 hours and if the beneficiary is a grandparent of the transferor, a descendant of a grandparent of the transferor, or a stepchild of the transferor, either of the following applies:
 - (a) If the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary’s surviving descendants.

The surviving descendants take, per stirpes, the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date by at least 120 hours.

- (b) If the future interest is in the form of a class gift, other than a future interest to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family,” or a class described by language of similar import, a substitute gift is created in the surviving descendants of the deceased beneficiary or beneficiaries.

The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least 120 hours passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries.

Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date by at least 120 hours.

Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take, per stirpes, the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date by at least 120 hours.

"Deceased beneficiary" means a class member who failed to survive the distribution date by at least 120 hours and left one or more surviving descendants.

- The bill clarifies that the exception to the "anti-lapse" protection for class gifts in trusts only applies to gifts to multi-generational classes. R.C. 5808.19(B)(2)(b)(ii).

Number 2

Trust for Benefit of Minor

- New R.C. 2111.182 allows a probate court, if a minor is entitled to money or property whether by settlement or judgment for personal injury or damage to tangible or intangible property, inheritance or otherwise, to order that all or a portion of the amount received by the minor be deposited into a trust for the minor's benefit until the minor reaches the age of 25.
- The court will maintain continuing jurisdiction over the settlement until the minor reaches age 25, giving the court discretion to release all or some of the funds before age 25 when appropriate.
- The person to be appointed as trustee must be approved by a parent or guardian of the minor, unless otherwise ordered by the probate court.

Number 1

Fiduciary Funds Deposited in Attorney's IOLTA

- Amended the recently enacted IOLTA language from H.B. 223 of the 132nd General Assembly, effective March 23, 2018.
- Fiduciaries may still transfer funds to their attorneys for deposit in an IOLTA account, but the deposit no longer requires probate court approval. R.C. 2109.41(C).
- Funds may now be deposited if they are **either** nominal in amount (undefined) or held for a short period of time (also undefined).
- Prior law required both conditions to be met. R.C. 2109.41(D); R.C. 4705.09(A)(1)(b), repealed.