

AN ACT

To amend sections 1337.091, 1339.411, 1339.412, 1339.66, and 2109.62 and to enact section 1339.621 of the Revised Code to provide for distribution of the trust estate upon a probate court's termination of small trusts and representation in a trust, to specify the circumstances for the revocation or nonrevocation of a power of attorney upon the termination of the marriage between the principal and the principal's spouse as attorney in fact or upon their entering into a separation agreement, to specify when the forfeiture or postponement provisions of a spendthrift provision in an inter vivos or testamentary trust apply to a property interest that qualifies as a qualified terminable interest property deduction, and to specify when such a trust may require or permit the accumulation for more than one year of any income of property that qualifies as such an interest.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 1337.091, 1339.411, 1339.412, 1339.66, and 2109.62 be amended and section 1339.621 of the Revised Code be enacted to read as follows:

Sec. 1337.091. (A) 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.

(B)(1) 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 the revocation of the power of attorney by death or adjudged incompetency of the principal is, in the absence of fraud, conclusive proof of the nonrevocation of the power of attorney at that the time. If of the attorney in fact doing an act pursuant to the power of attorney if the affidavit contains the following:~~

(a) A statement that the attorney in fact, at the time of doing an act pursuant to the power of attorney, had no actual knowledge of the revocation of the power of attorney by the principal;

(b) A statement that the attorney in fact, at the time of doing an act pursuant to the power of attorney, had no actual knowledge of the revocation of the power of attorney by death or adjudged incompetency of the principal;

(c) One of the following statements, whichever is applicable:

(i) The attorney in fact was never married to the principal.

(ii) 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.

(iii) 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.

(2) If the exercise of the power of attorney requires the execution and delivery of any instrument that is recordable, the affidavit when that is executed under division (B)(1) of this section, if acknowledged before a notary public in the same manner as a deed, is likewise recordable.

(C) This section shall not be construed to alter or affect any provision for revocation contained in any power of attorney. This section shall not be construed to affect any provision of a power of attorney that indicates, consistent with section 1337.09 of the Revised Code, that the authority of the attorney in fact is exercisable by the attorney in fact as provided in the power of attorney notwithstanding the later disability, incapacity, or adjudged incompetency of the principal.

Sec. 1339.411. (A)(1) Except as provided in divisions (A)(2), (3), and (4) of this section, a spendthrift provision in an instrument that creates an inter vivos or testamentary trust shall not cause any forfeiture or

postponement of any interest in property that satisfies both of the following:

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

(b) It qualifies for the federal estate tax marital deduction allowed by Subtitle B, Chapter 11, of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2056, as amended, ~~or~~ the estate tax marital deduction allowed by division (A) of section 5731.15 of the Revised Code, or the qualified terminable interest property deduction allowed by division (B) of section 5731.15 of the Revised Code.

(2) Division (A)(1) of this section 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 or a qualified terminable interest property deduction as described in division (A)(1)(b) of this section is less important than enforcing the forfeiture or postponement of the interest in property in accordance with the spendthrift provision in the instrument.

(3) Division (A)(1) of this section applies only to the forfeiture or postponement portions of a spendthrift provision and does not apply to any portion of a spendthrift provision that prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate.

(4) Division (A)(1) of this section 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 or a qualified terminable interest property deduction as described in division (A)(1)(b) of this section.

(B)(1) Except as provided in divisions (B)(2) and (3) of this section, if an instrument creating an inter vivos or testamentary trust includes a spendthrift provision and the trust holds shares in an S corporation, the spendthrift provision shall not cause any forfeiture or postponement of any beneficial interest, income, principal, or other interest in the shares of the S corporation held by the trust. For purposes of division (B)(1) of this section, "S corporation" has the same meaning as in section 1361 of the "Internal Revenue Code of 1986," 26 U.S.C. 1361.

(2) Division (B)(1) of this section 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 maintenance of the corporation's status as an S corporation is less important than enforcing the forfeiture or postponement

of any beneficial interest, income, principal, or other interest in the S corporation shares in accordance with the spendthrift provision in the instrument.

(3) Division (B)(1) of this section applies only to the forfeiture or postponement portions of a spendthrift provision and does not apply to any portion of a spendthrift provision that prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate.

(C)(1) Except as provided in divisions (C)(2) and (3) of this section, a spendthrift provision in an instrument that creates an inter vivos or testamentary trust shall not cause any forfeiture or postponement of any interest in property that satisfies both of the following:

(a) It is granted to a person who is a skip person under the federal generation-skipping transfer tax imposed by Subtitle B, Chapter 13, of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2601-2663, as amended.

(b) It qualifies as a nontaxable gift under section 2642(c) of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2642(c).

(2) Division (C)(1) of this section 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 qualifying as a nontaxable trust gift as described in division (C)(1)(b) of this section is less important than enforcing the forfeiture or postponement of the interest in property in accordance with the spendthrift provision in the instrument.

(3) Division (C)(1) of this section applies only to the forfeiture or postponement portions of a spendthrift provision and does not apply to any portion of a spendthrift provision that prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate.

(D) Divisions (A), (B), and (C) of this section are intended to codify certain fiduciary and trust law principles relating to the interpretation of a testator's or other settlor's intent with respect to the provisions of a trust. Divisions (A), (B), and (C) of this section apply to trust instruments executed prior to and existing on ~~the effective date of this amendment~~ August 29, 2000, and to trust instruments executed on or after ~~the effective date of this amendment~~ August 29, 2000.

Sec. 1339.412. (A) Except as provided in division (B) of this section, an instrument that creates an inter vivos or testamentary trust shall not require or permit the accumulation for more than one year of any income of

property that satisfies both of the following:

(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," 26 U.S.C. 2056, as amended, ~~or~~ the estate tax marital deduction allowed by division (A) of section 5731.15 of the Revised Code, or the qualified terminable interest property deduction allowed by division (B) of section 5731.15 of the Revised Code.

(B)(1) Division (A) of this section 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 or a qualified terminable interest property deduction as described in division (A)(2) of this section is less important than requiring or permitting the accumulation of income of property in accordance with a provision in the instrument that requires or permits the accumulation for more than one year of any income of property.

(2) Division (A) of this section 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 or a qualified terminable interest property deduction as described in division (A)(2) of this section.

(C)(1) The trustee of a trust that qualifies for an estate tax marital deduction for federal or Ohio estate tax purposes and that is the beneficiary of an individual retirement account has a fiduciary duty, in regard to the income distribution provision of the trust, to withdraw and distribute the income of the individual retirement account, at least annually, to the surviving spouse of the testator or other settlor.

(2) A trustee's fiduciary duty as described in division (C)(1) of this section is satisfied if the terms of the trust instrument expressly provide the surviving spouse a right to withdraw all of the assets from the trust or a right to compel the trustee to withdraw and distribute the income of the individual retirement account to the surviving spouse.

(D) Divisions (A), (B), and (C)(1) of this section are intended to codify existing fiduciary and trust law principles relating to the interpretation of a testator's or other settlor's intent with respect to the income provisions of a trust. Divisions (A), (B), and (C) of this section apply to trust instruments executed prior to and existing on October 1, 1996, or executed thereafter.

The trustee of a trust described in division (A) or (B) of this section, in a written trust amendment, may elect to not apply divisions (A) and (B) of this section to the trust. Any election of that nature, when made, is irrevocable.

Sec. 1339.621. 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 in the power of attorney of 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 a power of attorney that is revoked under this section.

Sec. 1339.66. (A)(1) 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:

- (a) It is no longer economically feasible to continue the trust.
- (b) The termination of the trust is for the benefit of the beneficiaries.
- (c) The termination of the trust is equitable and practical.
- (d) The current value of the trust is less than one hundred thousand dollars.

(2) The existence of a spendthrift or similar provision in a trust instrument or will does not preclude the termination of a trust pursuant to this section.

(B) If property is to be distributed from an estate being probated to a trust and the termination of the trust pursuant to this section 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 sections 1339.31 to 1339.39 of the Revised Code. 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.

(C) Upon the termination of a trust pursuant to this section, the probate court shall 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 shall 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. For purposes of ordering the distribution of the trust estate among the beneficiaries of the trust under this division, the court shall consider all of the following:

(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.

(D) 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. As used in this division, "minor" means a person who is under eighteen years of age.

Sec. 2109.62. (A)(1) 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:

(a) It is no longer economically feasible to continue the trust.

(b) The termination of the trust is for the benefit of the beneficiaries.

(c) The termination of the trust is equitable and practical.

(d) The current value of the trust is less than one hundred thousand dollars.

(2) The existence of a spendthrift or similar provision in a trust instrument or will does not preclude the termination of a trust pursuant to this section.

(B) If property is to be distributed from an estate being probated to a trust and the termination of the trust pursuant to this section 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 sections 1339.31 to 1339.39 of the Revised Code. 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.

(C) Upon the termination of a trust pursuant to this section, the probate court shall 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 shall 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. For purposes of ordering the distribution of the trust estate among the beneficiaries of the trust under this division, the court shall consider all of the following:

(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.

(D) 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. As used in this division, "minor" means a person who is under eighteen years of age.

SECTION 2. That existing sections 1337.091, 1339.411, 1339.412, 1339.66, and 2109.62 of the Revised Code are hereby repealed.

Speaker _____ *of the House of Representatives.*

President _____ *of the Senate.*

Passed _____, 20____

Approved _____, 20____

Governor.

Sub. S. B. No. 64

10

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the
____ day of _____, A. D. 20____.

Secretary of State.

File No. _____ Effective Date _____