

**As Introduced**

**125th General Assembly  
Regular Session  
2003-2004**

**S. B. No. 64**

**Senators Goodman, Randy Gardner, Stivers, Jacobson**

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**A BILL**

To amend sections 1337.091, 1339.66, 2107.27, and 1  
2109.62 and to enact sections 1339.621 and 2107.24 2  
of the Revised Code to provide for distribution of 3  
the trust estate upon a probate court's 4  
termination of small trusts and representation in 5  
a trust, to specify the circumstances for the 6  
revocation or nonrevocation of a power of attorney 7  
upon the termination of the marriage or separation 8  
agreement between the principal and the 9  
principal's spouse as attorney in fact, and to 10  
provide a procedure for a probate court to treat a 11  
document as a will notwithstanding its 12  
noncompliance with the statutory formalities for 13  
executing wills. 14

**BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:**

**Section 1.** That sections 1337.091, 1339.66, 2107.27, and 15  
2109.62 be amended and sections 1339.621 and 2107.24 of the 16  
Revised Code be enacted to read as follows: 17

**Sec. 1337.091.** (A) The death or adjudged incompetency of any 18  
principal who has executed a power of attorney in writing does not 19  
revoke the power and authority of the attorney in fact who, 20

without actual knowledge of the death or adjudged incompetency of 21  
the principal, acts in good faith under the power of attorney. Any 22  
action so taken, unless otherwise invalid or unenforceable, inures 23  
to the benefit of and binds the principal and the principal's 24  
heirs, devisees, and personal representatives. 25

(B)(1) An affidavit, that is executed by the attorney in fact 26  
~~stating that the attorney in fact did not have,~~ at the time of 27  
doing an act pursuant to the power of attorney, ~~actual knowledge~~ 28  
~~of the revocation of the power of attorney by the principal, or~~ 29  
~~the revocation of the power of attorney by death or adjudged~~ 30  
~~incompetency of the principal~~ is, in the absence of fraud, 31  
conclusive proof of the nonrevocation of the power of attorney at 32  
that time. If if the affadavit contains the following: 33

(a) A statement that the attorney in fact has no actual 34  
knowledge of the revocation of the power of attorney by the 35  
principal; 36

(b) A statement that the attorney in fact has no actual 37  
knowledge of the revocation of the power of attorney by death or 38  
adjudged incompetency of the principal; 39

(c) If the attorney in fact was never married to the 40  
principal, a statement of that fact; 41

(d) If the attorney in fact was married to the principal and 42  
the marriage has been terminated, a statement that the power of 43  
attorney is not revoked by reason of law due to the termination of 44  
the marriage between the principal and the attorney in fact; 45

(e) If the attorney in fact is married to the principal and a 46  
separation agreement has been entered into between the principal 47  
and the attorney in fact in which they intend to fully and finally 48  
settle each spouse's prospective property rights in the property 49  
of the other, a statement that the power of attorney is not 50

revoked by reason of law due to the existence of a separation 51  
agreement of that nature entered into between the principal and 52  
the attorney in fact. 53

(2) If the exercise of the power of attorney requires the 54  
execution and delivery of any instrument that is recordable, the 55  
affidavit ~~when~~ that is executed under division (B)(1) of this 56  
section, if acknowledged before a notary public in the same manner 57  
as a deed, is likewise recordable. 58

(C) This section shall not be construed to alter or affect 59  
any provision for revocation contained in any power of attorney. 60  
This section shall not be construed to affect any provision of a 61  
power of attorney that indicates, consistent with section 1337.09 62  
of the Revised Code, that the authority of the attorney in fact is 63  
exercisable by the attorney in fact as provided in the power of 64  
attorney notwithstanding the later disability, incapacity, or 65  
adjudged incompetency of the principal. 66

**Sec. 1339.621.** If a principal executes a power of attorney 67  
designating the principal's spouse as the attorney in fact for the 68  
principal and if after executing the power of attorney, the 69  
principal and the principal's spouse are divorced, obtain a 70  
dissolution or annulment of their marriage, or enter into a 71  
separation agreement pursuant to which they intend to fully and 72  
finally settle each spouse's prospective property rights in the 73  
property of the other, the designation in the power of attorney of 74  
the spouse or former spouse of the principal to act as attorney in 75  
fact for the principal is revoked, unless the power of attorney 76  
provides otherwise. The subsequent remarriage of the principal to 77  
the principal's former spouse, or the termination of a separation 78  
agreement between the principal and the principal's spouse, does 79  
not revive a power of attorney that is revoked under this section. 80

Sec. 1339.66. (A)(1) Upon the filing of a motion by a trustee 81  
with the court that has jurisdiction over the trust, upon the 82  
provision of reasonable notice to all beneficiaries who are known 83  
and in being and who have vested or contingent interests in the 84  
trust, and after holding a hearing, the court may terminate the 85  
trust, in whole or in part, if it determines that all of the 86  
following apply: 87

(a) It is no longer economically feasible to continue the 88  
trust. 89

(b) The termination of the trust is for the benefit of the 90  
beneficiaries. 91

(c) The termination of the trust is equitable and practical. 92

(d) The current value of the trust is less than one hundred 93  
thousand dollars. 94

(2) The existence of a spendthrift or similar provision in a 95  
trust instrument or will does not preclude the termination of a 96  
trust pursuant to this section. 97

(B) If property is to be distributed from an estate being 98  
probated to a trust and the termination of the trust pursuant to 99  
this section does not clearly defeat the intent of the testator, 100  
the probate court has jurisdiction to order the outright 101  
distribution of the property or to make the property custodial 102  
property under sections 1339.31 to 1339.39 of the Revised Code. A 103  
probate court may so order whether the application for the order 104  
is made by an inter vivos trustee named in the will of the 105  
decedent or by a testamentary trustee. 106

(C) Upon the termination of a trust pursuant to this section, 107  
the probate court shall order the distribution of the trust estate 108  
in accordance with any provision specified in the trust instrument 109  
for the premature termination of the trust. If there is no 110

provision of that nature in the trust instrument, the probate 111  
court shall order the distribution of the trust estate among the 112  
beneficiaries of the trust in accordance with their respective 113  
beneficial interests and in a manner that the court determines to 114  
be equitable. For purposes of ordering the distribution of the 115  
trust estate among the beneficiaries of the trust under this 116  
division, the court shall consider all of the following: 117

(1) The existence of any agreement among the beneficiaries 118  
with respect to their beneficial interests; 119

(2) The actuarial values of the separate beneficial interests 120  
of the beneficiaries; 121

(3) Any expression of preference of the beneficiaries that is 122  
contained in the trust instrument. 123

(D) Unless otherwise represented or bound, a minor, an 124  
incapacitated or unborn person, or a person whose identity or 125  
location is unknown and is not reasonably ascertainable may be 126  
represented by or bound by another person who has a substantially 127  
identical interest in the trust as that minor, incapacitated or 128  
unborn person, or person whose identity or location is unknown and 129  
is not reasonably ascertainable, but only to the extent that there 130  
is no conflict of interest between the person who is represented 131  
or bound and the person who represents or binds that person. As 132  
used in this division, "minor" means a person who is under 133  
eighteen years of age. 134

**Sec. 2107.24.** If a document that purports to be a will is not 135  
executed in compliance with the requirements of section 2107.03 of 136  
the Revised Code, that document shall be treated as if it had been 137  
executed as a will in compliance with the requirements of that 138  
section if a probate court, after holding a hearing, finds that 139  
the proponent of the document as a purported will has established, 140

by clear and convincing evidence, all of the following:

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

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

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

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**Sec. 2107.27.** (A) When application is made to the probate court to admit to probate a will that has been lost, spoliated, or destroyed as provided in section 2107.26 of the Revised Code or a document that is treated as a will as provided in section 2107.24 of the Revised Code, the party seeking to prove the will shall 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 under Chapter 2105. of the Revised Code 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.

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(B) In the cases described in division (A) of this section, the proponents and opponents of the will shall 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 any witnesses reside out of its jurisdiction, or reside within its jurisdiction but are infirm or unable to attend, the probate court may order their testimony to be taken and reduced to writing by some competent person. The testimony shall be filed in the records of the probate court pertaining to the testator's estate.

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(C) If upon such proof the court finds that the requirements 171  
of section 2107.24 or 2107.26 of the Revised Code, whichever is 172  
applicable, have been met, the probate court shall find and 173  
establish the contents of the will as near as can be ascertained. 174  
The contents of the will established under section 2107.26 of the 175  
Revised Code shall be as effectual for all purposes as if the 176  
original will had been admitted to probate and record. The 177  
contents of the will established under section 2107.24 of the 178  
Revised Code shall be as effectual for all purposes as if the 179  
document treated as a will had satisfied all of the requirements 180  
of section 2107.03 of the Revised Code and had been admitted to 181  
probate and record. 182

**Sec. 2109.62.** (A)(1) Upon the filing of a motion by a trustee 183  
with the court that has jurisdiction over the trust, upon the 184  
provision of reasonable notice to all beneficiaries who are known 185  
and in being and who have vested or contingent interests in the 186  
trust, and after holding a hearing, the court may terminate the 187  
trust, in whole or in part, if it determines that all of the 188  
following apply: 189

(a) It is no longer economically feasible to continue the 190  
trust. 191

(b) The termination of the trust is for the benefit of the 192  
beneficiaries. 193

(c) The termination of the trust is equitable and practical. 194

(d) The current value of the trust is less than one hundred 195  
thousand dollars. 196

(2) The existence of a spendthrift or similar provision in a 197  
trust instrument or will does not preclude the termination of a 198  
trust pursuant to this section. 199

(B) If property is to be distributed from an estate being 200

probated to a trust and the termination of the trust pursuant to 201  
this section does not clearly defeat the intent of the testator, 202  
the probate court has jurisdiction to order the outright 203  
distribution of the property or to make the property custodial 204  
property under sections 1339.31 to 1339.39 of the Revised Code. A 205  
probate court may so order whether the application for the order 206  
is made by an inter vivos trustee named in the will of the 207  
decedent or by a testamentary trustee. 208

(C) Upon the termination of a trust pursuant to this section, 209  
the probate court shall order the distribution of the trust estate 210  
in accordance with any provision specified in the trust instrument 211  
for the premature termination of the trust. If there is no 212  
provision of that nature in the trust instrument, the probate 213  
court shall order the distribution of the trust estate among the 214  
beneficiaries of the trust in accordance with their respective 215  
beneficial interests and in a manner that the court determines to 216  
be equitable. For purposes of ordering the distribution of the 217  
trust estate among the beneficiaries of the trust under this 218  
division, the court shall consider all of the following: 219

(1) The existence of any agreement among the beneficiaries 220  
with respect to their beneficial interests; 221

(2) The actuarial values of the separate beneficial interests 222  
of the beneficiaries; 223

(3) Any expression of preference of the beneficiaries that is 224  
contained in the trust instrument. 225

(D) Unless otherwise represented or bound, a minor, an 226  
incapacitated or unborn person, or a person whose identity or 227  
location is unknown and is not reasonably ascertainable may be 228  
represented by or bound by another person who has a substantially 229  
identical interest in the trust as that minor, incapacitated or 230  
unborn person, or person whose identity or location is unknown and 231

is not reasonably ascertainable, but only to the extent that there 232  
is no conflict of interest between the person who is represented 233  
or bound and the person who represents or binds that person. As 234  
used in this division, "minor" means a person who is under 235  
eighteen years of age. 236

**Section 2.** That existing sections 1337.091, 1339.66, 2107.27, 237  
and 2109.62 of the Revised Code are hereby repealed. 238