



Ohio Legislative Service Commission

Bill Analysis

Aida S. Montano

Sub. S.B. 106*

128th General Assembly

(As Reported by H. Civil and Commercial Law)

Sens. Buehrer and Kearney, R. Miller, Schuler, Seitz, Turner, Fedor, Gillmor, Harris, Hughes, Schiavoni, Wagoner, Wilson, Smith, Sawyer

BILL SUMMARY

- Excludes from the application of the savings statute certain specified estate and trust proceedings that have limitation periods.
- Modifies the saving statute in wrongful death actions by providing that if a judgment for a plaintiff is reversed or the plaintiff fails otherwise than upon the merits, the plaintiff or the plaintiff's representative if the plaintiff dies and the cause of action survives may commence a new wrongful death action within one year after the date of reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the applicable period of limitations, whichever occurs later.
- Increases from \$10,000 or less to \$25,000 or less the amount of an estate of a ward that the court may terminate upon application by the guardian, for which the court may distribute the estate assets without a guardianship, and for which the court may authorize the settlement of claims of minors or adult incompetents without the appointment of a guardian.
- Modifies the residence requirements for a guardian by requiring a guardian to be a resident of this state instead of a resident of the county.
- Provides that the termination of a marriage revokes any trust provision that confers a beneficial interest on the former spouse.

* This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

- Modifies the definition of "qualifying transfer" as used in the definition of "resident," which applies to trusts under Ohio's Income Tax Law.

CONTENT AND OPERATION

Termination of guardianship

Current law provides that when the whole estate of a ward, or of several wards jointly, under the same guardianship, does not exceed \$10,000 in value, the guardian may apply to the probate court for an order to terminate the guardianship. Upon proof that it would be for the best interest of the ward to terminate the guardianship, the court may order the guardianship terminated and direct the guardian, if the ward is a minor, to deposit the assets of the guardianship in a depository authorized to receive fiduciary funds, payable to the ward when the ward attains majority, or the court may authorize the delivery of the assets to the natural guardian of the minor, to the person by whom the minor is maintained, to the executive director of the children services in the county, or to the minor. The bill increases from guardianships that do not exceed \$10,000 in value to guardianships that do not exceed \$25,000 in value the size of guardianships that can be terminated under this procedure. It applies the termination of guardianship procedure only to the whole estate of a ward by removing its application under existing law to the estates of several wards jointly under the same guardianship.

If the estate is \$10,000 or less and the ward is a minor, the court, without the appointment of a guardian by the court or the giving of bond, may authorize the deposit in a depository authorized to receive fiduciary funds, payable to the guardian when appointed, or to the ward when the ward attains majority, or the court may authorize the delivery to the natural guardian of the minor, to the person by whom the minor is maintained, to the executive director who is responsible for the administration of children services in the county, or to the minor. If the whole estate of a person over 18 years of age, who has been adjudged mentally ill or mentally retarded, does not exceed \$10,000 in value, the court, without the appointment of a guardian by the court or the giving of bond, may authorize the deposit of the estate in a depository authorized to receive fiduciary funds in the name of a suitable person to be designated by the court, or if the assets do not consist of money, the court may authorize delivery to a suitable person to be designated by the court. The person receiving the assets must hold and dispose of them in the manner the court directs. The bill increases from \$10,000 or less to \$25,000 or less the size of an estate for which the court may avoid the creation of guardianship under the above procedure. It also removes the reference to "mentally ill or mentally retarded" in the above described provision and replaces it with "incompetent." (R.C. 2111.05.)

Current law enumerates certain fees that the probate judge must charge and collect if possible for certain specified proceedings. These fees include a fee of \$10 for a proceeding regarding the disposal of an estate under \$10,000 of a minor or mentally ill person. Consistent with the above change to the types of estates that can be terminated or disposed of, the bill modifies this provision by providing that it applies to a proceeding regarding the disposal of an estate under \$25,000 for a minor or incompetent person. (R.C. 2101.16(A)(47).)

Settlement of claim of emancipated minor

Current law provides that *when* personal injury, damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible property is caused to a ward by wrongful act, neglect, or default that would entitle the ward to maintain an action and recover damages for the injury, damage, or loss, and when any ward is entitled to maintain an action for damages or any other relief based on any claim or is subject to any claim to recover damages or any other relief based on any claim, the guardian of the estate of the ward may adjust and settle the claim with the advice, approval, and consent of the probate court. In the settlement, if the ward is a minor, the parent or parents may waive all claim for damages on account of loss of service of the minor, and that claim may be included in the settlement. However, *when* it is proposed that the claim involved be settled for \$10,000 or less, the court, upon application by any person whom the court may authorize to receive and receipt for the settlement, may authorize the settlement without the appointment of a guardian and authorize the delivery of the moneys to the natural guardian of the minor, to the person by whom the minor is maintained, or to the minor. The court may authorize the minor or person receiving the moneys to execute a complete release on account of the receipt. The payment must be a complete and final discharge of any such claim.

Under the bill, the above-described provisions apply *if* (rather than *when*) personal injury, damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible property is caused to a ward by a wrongful act, neglect, or default that would entitle the ward to maintain an action and recover damages for the injury, damage, or loss. The bill also provides that the court, upon application by any *suitable* person whom the court may authorize to receive and receipt for the settlement, may authorize the settlement without the appointment of a guardian and authorize the delivery of the moneys as provided in the law regarding the termination of a guardianship *if* (instead of *when*) it is proposed that a claim be settled for the *net amount of \$25,000 or less* (instead of \$10,000 or less) *after payment of fees and expenses as allowed by the court.* (R.C. 2111.18.)

Residence qualifications of guardian

Existing law requires that a guardian be a resident of the county, except that the court may appoint a nonresident of the county who is a resident of this state as guardian of the person, the estate, or both; that a nonresident of the county or of this state may be appointed a guardian, if named in a will by a parent of a minor or if selected by a minor over the age of 14 years as provided by R.C. 2111.12; and that a nonresident of the county or of this state may be appointed a guardian if nominated in or pursuant to a durable power of attorney as described in R.C. 1337.09(D) or a writing as described in R.C. 2111.121(A). A guardian, other than a guardian named in a will by a parent of a minor, selected by a minor over the age of 14 years, or nominated in or pursuant to such a durable power of attorney or writing, may be removed on proof that the guardian is no longer a resident of the county or state in which the guardian resided at the time of the guardian's appointment. (R.C. 2109.21(C).)

The bill requires that a guardian be a resident of *this state* (instead of the county), except that the court may appoint a nonresident *of this state* as a guardian if any of the following applies: (1) the nonresident is named in a will by a parent of a minor, (2) the nonresident is selected by a minor over the age of 14 years as provided in R.C. 2111.12, or (3) the nonresident is nominated in or pursuant to a durable power of attorney as described in R.C. 1337.09(D) or a writing as described in R.C. 2111.121(A). A guardian, other than a guardian named in a will by a parent of a minor, selected by a minor over the age of 14 years, or nominated in or pursuant to a durable power of attorney or writing described above in (3), may be removed on proof that the guardian is no longer a resident *of the state* (the bill deletes the reference to resident of the county or state in which the guardian resided at the time of appointment). (R.C. 2109.21(C).)

Savings statute

Under current law, in any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This provision applies to any claim asserted in any pleading by a defendant. (R.C. 2305.19.)

The bill provides that these provisions do not apply to any of the following (R.C. 2305.19(C)):



(1) An action or proceeding to set aside an antenuptial or separation agreement to which a decedent was a party that is commenced within four months after the appointment of the executor or administrator of the estate of the decedent (R.C. 2106.22, not in the bill);

(2) A will contest action (R.C. 2107.76);

(3) Upon settlement of a fiduciary's account, a motion that is filed or court order made to vacate an order of the probate court for fraud within one year after its discovery or a motion that is filed to vacate an order of the probate court for good cause other than fraud within three years after the settlement of a fiduciary's account (R.C. 2109.35, not in the bill);

(4) A hearing on the inventory of the decedent's interest in real estate located in Ohio and of the tangible and intangible personal property of the decedent that is to be administered and that has come to the executor's or administrator's possession or knowledge, that is held not later than one month after the date the inventory was filed (R.C. 2115.16, not in the bill);

(5) Any of specified actions pertaining to a revocable trust that is made irrevocable by the death of the trust's settlor, which action is commenced by the earlier of the date that is two years after the date of death of the settlor or that is six months from the date on which the trustee sends 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 the time allowed for commencing an action (R.C. 5806.04, not in the bill);

(6) Generally, a proceeding that is commenced by a beneficiary against a trustee for breach of trust within two years after the date the beneficiary, a beneficiary's representative, or a beneficiary surrogate is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the person of the time allowed for commencing such a proceeding (R.C. 5810.05, not in the bill).

Will contest actions

Current law states that no person who has received or waived the right to receive the notice of the admission of a will to probate and no other person may commence an action to contest the validity of the will more than three months after the filing of the certificate of giving notice or waiver of notice as required under R.C. 2107.19(A)(3) (R.C. 2107.76(A)). Current law also states that the savings provision under R.C. 2305.19 (described in "**Savings statute**" above) does not apply to an action to contest the validity of a will. The bill removes this provision to be consistent with paragraph (2), above. (R.C. 2107.76(B).)

Savings statute in wrongful death actions

Existing law provides that in every civil action for wrongful death commenced or attempted to be commenced within the time specified by R.C. 2125.02(D)(1) or (D)(2)(c), (d), (e), (f), or (g) (see **COMMENT**), if a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits and if the time limited by any of those provisions for the commencement of the action has expired at the date of the reversal or failure, the plaintiff or, if the plaintiff dies and the cause of action survives, the personal representative of the plaintiff may commence a new civil action for wrongful death within one year after that date. The bill provides that in every civil action for wrongful death commenced or attempted to be commenced within the time specified by R.C. 2125.02(D)(1) or (D)(2)(c), (d), (e), (f), or (g) (see **COMMENT**), if a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the personal representative of the plaintiff may commence a new civil action for wrongful death within one year after *the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period specified by any of those provisions, whichever occurs later* (added by the bill). (R.C. 2125.04.)

Definition of "resident" for purposes of Ohio's income tax on trusts

Under current law, for the purposes of the Ohio income tax on trusts, "resident" means, among other things, a trust that, in whole or part, resides in Ohio. If only part of a trust resides in Ohio, the trust is a resident only with respect to that part. (R.C. 5747.01(I)(3).) A trust resides in Ohio for the trust's current taxable year to the extent that the trust consists directly or indirectly, in whole or in part, of assets, net of any related liabilities, that were transferred, or caused to be transferred, directly or indirectly, to the trust by, among other persons, a person, a court, or a governmental entity or instrumentality on account of the death of a decedent, but only if the trust is, among other things, described as a trust where the transfer is a qualifying transfer, the trust is an irrevocable inter vivos trust, and at least one of the trust's qualifying beneficiaries is domiciled in Ohio for purposes of the Ohio Income Tax Law during all or some portion of the trust's current taxable year (R.C. 5747.01(I)(3)(a)(i) and (e)(ii)). A "qualifying transfer" is a transfer of assets, net any related liabilities, directly or indirectly to a trust, if the transfer is, among other things, made to a trust on account of the will of a testator (R.C. 5747.01(I)(3)(f)(v)). The bill modifies this provision by specifying that a "qualifying transfer" is a transfer of assets, net any related liabilities, directly or indirectly to a trust, if the transfer is, among other things, made to a trust on account of the will of a testator *who was domiciled in Ohio at the time of the testator's death for purposes of the taxes levied under the Ohio Estate Tax Law* (language in italics added by the bill).

Revocation of power of appointment when there is a termination of marriage

Current law provides that, unless the trust or separation agreement provides otherwise, if, after executing a trust in which the grantor reserves to self a power to alter, amend, revoke, or terminate the provisions of the trust, a grantor is divorced, obtains a dissolution of marriage, has the grantor's marriage annulled, or, upon actual separation from the grantor's spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, the spouse or former spouse of the grantor is deemed to have predeceased the grantor and any provision in the trust conferring a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor is revoked. If the grantor remarries the grantor's former spouse or if the separation agreement is terminated, the spouse cannot be deemed to have predeceased the grantor and any provision in the trust conferring a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor is not revoked. The bill adds that the termination of a marriage revokes any provision in the trust that confers *any beneficial interest* on the spouse or former spouse (in addition to revoking any powers of appointment or nomination as trustee or trust advisor) and that any provision in the trust that confers *any beneficial interest* on the spouse or former spouse is not revoked if the grantor remarries the grantor's former spouse or if the separation agreement is terminated. (R.C. 5815.31.)

COMMENT

R.C. 2125.02(D)(1), not in the bill, provides that with certain exceptions, a civil action for wrongful death must be commenced within two years after the decedent's death.

R.C. 2125.02(D)(2)(c), (d), (e), (f), and (g), not in the bill, are exceptions to the statute of limitations for wrongful death actions involving a product liability claim, which is ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product (R.C. 2125.02(D)(2)(a)).

HISTORY

ACTION

DATE

Introduced	04-09-09
Reported, S. Judiciary - Civil Justice	06-18-09
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Reported, H. Civil & Commercial Law	---

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