



# OHIO LEGISLATIVE SERVICE COMMISSION

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## Bill Analysis

Aida S. Montano

### **Sub. H.B. 595**

132nd General Assembly  
(As Reported by H. Civil Justice)

**Reps.** Cupp and Rezabek, Seitz, Riedel, Manning

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### **BILL SUMMARY**

- Specifies the coroner's duties with regards to a deceased person, including notifying the person who has been assigned the rights of disposition for the deceased person of the deceased person's death and the disposition of the deceased person's property.
- Disqualifies a person who is convicted of involuntary manslaughter that is not a proximate result of a felony aggravated vehicular homicide or vehicular homicide offense from in any way benefiting by the death of the victim of that offense.
- Provides that if a will incorporates a trust instrument only in the event that a bequest or device is ineffective, the trust instrument must be deposited in the probate court not later than 30 days after the determination that the bequest or device is ineffective.
- Specifies terms that must be used if a testator intends to incorporate a trust instrument in a will.
- Specifies that the exception to the antilapse provisions for wills and trusts only applies to multigenerational class gifts.
- Allows for the creation of a trust for the benefit of a minor beneficiary if the minor is entitled to money or property whether by settlement for personal injury or damage to tangible or intangible property, inheritance or otherwise.
- Allows for the creation of the county probate court guardianship services fund, the multicounty probate court guardianship services fund, and the county or multicounty guardianship services board.

- Provides a procedure for a person entitled to be appointed as a decedent's personal representative to file an application with the probate court to release the decedent's medical records and medical billing records for the limited purpose of deciding whether or not to file a wrongful death claim.
- Specifies that a provision in the terms of a trust, except for a testamentary trust, that requires the arbitration of disputes, other than disputes of the validity of all or part of a trust instrument, is enforceable and unless otherwise specified, the arbitration is presumed to be binding.
- Relocates the provisions regarding determining the validity of a will before the testator's death, creates a procedure for determining the validity of a trust, and makes conforming changes.
- Specifies that the probate division of the common pleas court has exclusive jurisdiction to render declaratory judgments regarding the validity of a trust, but the probate division may transfer the proceeding to the general division of the common pleas court.
- Generally prohibits a person from contesting the validity of any trust as to facts decided if the trust was submitted to the probate court by the settlor during the settlor's lifetime and was declared valid by the court.
- Allows a person to contest the validity of a trust described in the preceding dot point if the person is one who should have been named a party defendant in the action in which the trust was declared valid and if the person was not named a defendant and properly served in that action.

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## CONTENT AND OPERATION

### Coroner's duties: notice of person's death and disposition of property

The bill modifies existing law regarding notifying any known relatives of a deceased person who meets death in a specified manner by requiring the coroner to make a reasonable effort to notify those relatives. The bill removes the requirement that the next of kin, other relatives, or friends of the deceased person, in that order, have prior right as to the disposition of the body of the deceased person and that the coroner must make a diligent effort to ascertain the next of kin, other relatives, or friends of the deceased person if relatives of the deceased are unknown. Instead, the bill requires the coroner make a reasonable effort to determine the identity of the person who has been assigned the rights of disposition for the deceased person under R.C. 2108.70 to 2108.90 (not in the bill) and must notify that person. After the coroner has completed the performance of the coroner's legal duties with respect to the body of the deceased person, the coroner must return the body to that person.<sup>1</sup>

Existing law requires the coroner to take charge and possession of all moneys, clothing, and other valuable personal effects of the deceased person, found in connection with or pertaining to the body, and must store the possessions in the county coroner's office or other suitable place. The bill allows the person who has been assigned the rights of disposition for the deceased person to request the coroner to give those possessions to that person.<sup>2</sup>

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<sup>1</sup> R.C. 313.14(A)(1).

<sup>2</sup> R.C. 313.14(A)(2).



Under existing law, if a firearm is included in the personal effects of a deceased person, the coroner must deliver the firearm to the chief of police of the municipal corporation within which the body is found or to the sheriff of the county if the body is not found within a municipal corporation. Upon delivery of the firearm, the chief of police or the sheriff must give the coroner a receipt for the firearm that states the date of delivery and an accurate description of the firearm. The firearm is only for evidentiary purposes. The bill allows the person who has been assigned the rights of disposition for the deceased person, rather than the deceased person's next of kin or other relative, to request that the firearm be given to that person once the firearm is no longer needed for evidentiary purposes. The chief of police or the sheriff must give the firearm to that person, instead of the next of kin or other relative, who requested the firearm only if the person may lawfully possess a firearm under applicable Ohio law or the law of the United States. The chief of police or sheriff must keep a record identifying the person, rather than the next of kin or other relative, to whom the firearm is given, the date the firearm was given to that person, and an accurate description of the firearm.<sup>3</sup>

Under the bill, if the person who has been assigned the rights of disposition for the deceased person, instead of the next of kin or other relative, does not request the firearm or is not entitled to possess the firearm, the firearm must be used at the discretion of the chief of police or sheriff.<sup>4</sup>

### **Persons prohibited from benefiting from another's death**

Existing law generally prohibits: (a) 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 or of a substantially equivalent existing or former law of any other state, the United States, or a foreign nation, (b) any person who is indicted for a violation of or complicity in the violation of any of those offenses or laws and subsequently is adjudicated incompetent to stand trial on that charge, and (c) any juvenile who is found to be a delinquent child for committing an act that, if committed by an adult, would be a violation of or complicity in the violation of any of those offenses or laws, from in any way benefiting by the death.<sup>5</sup>

The bill expands the above offenses, complicity in their violation, or violation of or complicity in the violation of the above offenses to include the offense of involuntary manslaughter that is not a proximate result of a felony aggravated vehicular homicide

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<sup>3</sup> R.C. 313.14(C).

<sup>4</sup> *Id.*

<sup>5</sup> R.C. 2105.19(A).



or vehicular homicide offense. A person who commits involuntary manslaughter by causing the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony is prohibited from in any way benefiting by the death, if that involuntary manslaughter offense is not the proximate result of a felony offense of aggravated vehicular homicide or vehicular homicide.<sup>6</sup>

### **Incorporation of a written trust into a will**

Existing law allows an existing document, book, record, or memorandum to be incorporated in a will by reference, if referred to as being in existence at the time the will is executed. That document, book, record, or memorandum must be deposited in the probate court when the will is probated or within 30 days after the will is probated, unless the court grants an extension of time for good cause shown. A copy may be substituted for the original document, book, record, or memorandum if the copy is certified to be correct by a person authorized to take acknowledgements.<sup>7</sup>

The bill states that, notwithstanding the provision in the preceding paragraph, 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.<sup>8</sup>

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. In the absence of such clear and express intent, a trust instrument cannot be incorporated into or made a part of the will. Any language in the 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.<sup>9</sup>

The bill specifies that the preceding two paragraphs apply, and must be construed as applying, to the wills of testators who die on or after the effective date of the bill.<sup>10</sup> Additionally, the bill states that the bill's amendment of R.C. 2107.05 as described above is intended to abrogate the holding of the Ohio Supreme Court in

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<sup>6</sup> R.C. 2105.19(A).

<sup>7</sup> R.C. 2107.05(A).

<sup>8</sup> R.C. 2107.05(B).

<sup>9</sup> R.C. 2107.05(C).

<sup>10</sup> R.C. 2107.05(D).



*Hageman v. Cleveland Trust Company*, 45 Ohio St.2d 178 (1976) and the Ohio Second District Court of Appeals in *Gehrke v. Senkiw*, 2016 Ohio 2657 (2016).<sup>11</sup>

## **Exceptions to antilapse 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 stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:<sup>12</sup>

(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 been entitled 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 been entitled 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 specifies that the exception in (2) above only applies to a class that includes more than one generation.<sup>13</sup>

### **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:<sup>14</sup>

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<sup>11</sup> Section 3.

<sup>12</sup> R.C. 2107.52(B)(2).

<sup>13</sup> R.C. 2107.52(B)(2)(b).

<sup>14</sup> R.C. 5808.19(B)(2).



(1) A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date by at least 120 hours.

(2) If a beneficiary of a future interest under the terms of a trust 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 specifies that the exception in (2)(b) above applies only to a class that includes more than one generation.<sup>15</sup>

### **Trust for benefit of minor**

The bill 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 benefit of that beneficiary until the beneficiary reaches age 25, and order the distribution of the amount in accordance with the provisions of the trust. Prior to the appointment as a

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<sup>15</sup> R.C. 5808.19(B)(2)(b)(ii).

trustee of such a trust, the person to be appointed must be approved by a parent or guardian of the minor beneficiary of the trust, unless otherwise ordered by the probate court.<sup>16</sup>

### **Probate court guardianship services fund**

The bill permits a probate court or the probate courts of two or more counties to accept funds or other program assistance from, or charge fees for specified services described below rendered to, individuals, corporations, agencies, or organizations, including, but not limited to, a county board of alcohol, drug addiction, and mental health services or a county board of developmental disabilities, unless either or any of those county boards does not agree to the payment of those fees. Any funds or fees the probate court receives must be paid into the county treasury and credited to a fund to be known as the county probate court guardianship services fund and any funds or fees the probate courts of two or more counties receive must be paid into the county treasury of one or more of the counties and credited to a fund to be known as the multicounty probate court guardianship services fund.<sup>17</sup>

The moneys in a county or multicounty probate court guardianship services fund must be used for services to help ensure the treatment of any person who is under the care of a county board of alcohol, drug addiction, and mental health services, a county board of developmental disabilities, or any other guardianships. These services include, but are not limited to, involuntary commitment proceedings and the establishment and management of adult guardianships, including all associated expenses, for wards who are under the care of a county board of alcohol, drug addiction, and mental health services, a county board of developmental disabilities, or any other guardianships.<sup>18</sup>

If a probate court judge determines that some of the moneys in the county or multicounty probate court guardianship services fund are needed for the efficient operation of that probate court, the moneys may be used for the acquisition of equipment, the hiring and training of staff, community services programs, volunteer guardianship training services, the employment of magistrates, and other related services.<sup>19</sup>

The moneys in the county or multicounty probate court guardianship services fund that may be used in part for the establishment and management of adult

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<sup>16</sup> R.C. 2111.182.

<sup>17</sup> R.C. 2111.52(A) and (B).

<sup>18</sup> R.C. 2111.52(C).

<sup>19</sup> R.C. 2111.52(D).





guardianships may be utilized to establish a county or multicounty guardianship service.<sup>20</sup> A county or multicounty guardianship service is established by creating a county or multicounty guardianship service board. The probate court judge appoints one member. The board of directors of a county board of developmental disabilities appoints one member. The board of directors of a county board of alcohol, drug addiction, and mental health services appoints one member. The term of appointment of each member is four years.<sup>21</sup>

The county or multicounty guardianship services board may appoint a director. The board must determine the compensation of the director based on the availability of funds contained in the county or multicounty probate court guardianship services fund.<sup>22</sup> The county or multicounty guardianship services board may receive appointments from one or more county probate courts to serve as guardians of both the person and estate of wards. The director or any designee of a county or multicounty guardianship services board may act on behalf of the board in relation to all guardianship matters.<sup>23</sup>

The director of a county or multicounty guardianship services board may hire employees subject to available funds in the county or multicounty probate court guardianship services fund.<sup>24</sup> The board may also charge a reasonable fee for services provided to wards. A probate judge must approve any fees charged by the board.<sup>25</sup>

The county or multicounty guardianship services board must promulgate all rules and regulations necessary for the efficient operation of the board and the county or multicounty guardianship services.<sup>26</sup>

### **Application for release of medical records and medical billing records**

The bill permits any person entitled to be appointed as a decedent's personal representative to file an application with the probate court in the county in which the decedent resided seeking the release of the decedent's medical records and medical

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<sup>20</sup> R.C. 2111.52(E).

<sup>21</sup> R.C. 2111.52(F)(1).

<sup>22</sup> R.C. 2111.52(F)(2).

<sup>23</sup> R.C. 2111.52(F)(3).

<sup>24</sup> R.C. 2111.52(F)(4).

<sup>25</sup> R.C. 2111.52(F)(5).

<sup>26</sup> R.C. 2111.52(F)(6).

billing records. The application must include a decedent's estate form listing the decedent's known surviving spouse, children, next of kin, legatees, and devisees, if any.

The application may be filed prior to the filing of any application for authority to administer the decedent's estate. Upon the filing of the application and the payment of a filing fee determined by the court, the court may order the release without a hearing and direct all medical providers that provided medical care or treatment to the decedent to release those records to the applicant for the limited purpose of deciding whether or not to file a wrongful death claim. The medical records and medical billing records are confidential and are not available for public viewing.

The court must send copies of the application and the judgment entry to anyone listed on the decedent's estate form. Upon obtaining the requested applicable records, the applicant must file a report with the court certifying that all of those requested records have been received and indicate whether an administration of the decedent's estate will be filed within the applicable statute of limitations filing time.<sup>27</sup>

### **Jurisdiction regarding inter vivos trust**

Under existing law, the probate division of the common pleas court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the common pleas court to issue writs and orders and to hear and determine any action that involves an inter vivos trust.<sup>28</sup> The bill specifies that the probate division of the common pleas court has exclusive jurisdiction to render declaratory judgments regarding the validity of wills and trusts. However, the probate division of the common pleas court may transfer a declaratory judgment proceeding regarding the validity of wills and trusts to the general division of the court of common pleas pursuant to R.C. 5817.04(A).<sup>29</sup>

### **Arbitration**

Under the bill, a provision in the terms of a trust, excluding a testamentary trust, that requires the arbitration of disputes, other than disputes of the validity of all or part of a trust instrument, between or among beneficiaries and a fiduciary under the trust, or a combination of those persons or entities, is enforceable.<sup>30</sup> Unless otherwise specified in

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<sup>27</sup> R.C. 2113.032.

<sup>28</sup> R.C. 5802.03(A).

<sup>29</sup> R.C. 5802.03(B) and 2101.24(B)(3).

<sup>30</sup> R.C. 5802.05(A).



the terms of the trust, a trust provision requiring arbitration is presumed to require binding arbitration under Chapter 2711. of the Revised Code.<sup>31</sup>

### **Actions pertaining to revocable trusts**

Existing law provides that any of the following actions pertaining to a revocable trust that is made irrevocable by the death of the settlor of the trust must be commenced by the earlier of the date that is two years after the date of the death of the settlor of the trust 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, of the trustee's name and address, and of the time allowed for commencing the action:<sup>32</sup>

- An action to contest the validity of the trust;
- An action to contest the validity of any amendment to the trust that was made during the lifetime of the settlor of the trust;
- An action to contest the revocation of the trust during the lifetime of the settlor of the trust;
- An action to contest the validity of any transfer made to the trust during the lifetime of the settlor of the trust.

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 judgment of the court pursuant to R.C. 5817.10(B)(1). A person may contest the validity of that trust as to those facts if the person is one who 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.<sup>33</sup>

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<sup>31</sup> R.C. 5802.05(B).

<sup>32</sup> R.C. 5806.04(A).

<sup>33</sup> R.C. 5806.04(E).



## Determining validity of will or trust

### Background

The bill repeals, modifies, and relocates the existing provisions regarding a determination that a will is valid.<sup>34</sup> 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 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 testator's will is a valid will subject only to subsequent revocation or modification of the will. The right to file this complaint or to voluntarily dismiss a complaint once filed is personal to the testator and cannot be exercised by the testator's guardian or an agent under the testator's power of attorney.<sup>35</sup>

A testator who wishes to obtain a validity determination as to the testator's will must file a complaint to determine the validity of both the will and any related trust.<sup>36</sup> The complaint must be accompanied by an express written waiver of the testator's physician-patient privilege provided in R.C. 2317.02(B).<sup>37</sup> Failure to file such a complaint must not be construed as evidence or an admission that the will is invalid.<sup>38</sup>

Current law does not require that the complaint be accompanied by an express written waiver of the testator's physician-patient privilege.

### 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 a subsequent revocation or modification. The right to file this complaint or to voluntarily dismiss a complaint once filed is personal to the settlor and cannot be exercised by the settlor's guardian or an agent under the settlor's power of attorney.<sup>39</sup>

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<sup>34</sup> R.C. 2107.081, 2107.082, 2107.083, 2107.084, 2107.085 (repealed and relocated to R.C. Ch. 5817.). Note that this part of the analysis will describe only parts of current law that are essentially different from the bill or will indicate if there is no comparable provision in current law.

<sup>35</sup> R.C. 5817.02(A).

<sup>36</sup> R.C. 5817.02(B).

<sup>37</sup> R.C. 5817.02(D).

<sup>38</sup> R.C. 5817.02(C).

<sup>39</sup> R.C. 5817.03(A).

A settlor who wishes to obtain a validity determination as to the settlor's trust must file a complaint to determine the validity of both the trust and the related will.<sup>40</sup> The complaint must be accompanied by an express written waiver of the settlor's physician-patient privilege provided in R.C. 2317.02(B).<sup>41</sup> Failure to file such a complaint must not be construed as evidence or an admission that the trust is invalid.<sup>42</sup>

"Trust" means an inter vivos revocable or irrevocable trust instrument to which, at the time the complaint for declaration of validity is filed, either of the following applies:<sup>43</sup>

- (1) The settlor resides in, or is domiciled in, Ohio.
- (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 a complaint to determine the validity of a will or trust be filed with 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 of the common pleas court.<sup>44</sup>

The venue for a complaint to determine the validity of a will is either (1) the probate court of the county in Ohio where the testator is domiciled, or (2) if the testator is not domiciled in Ohio, the probate court of any county in Ohio where any real property or personal property of the testator is located or, if there is no such property, the probate court of any county in Ohio.<sup>45</sup>

Current law has no provision for the probate judge, upon the motion of a party or the judge's own motion, to transfer the proceeding to the general division of the common pleas court. Current law also does not provide that if the testator is not domiciled in Ohio, the complaint may be filed in the probate court of any county in Ohio where the testator's *personal property* is located.<sup>46</sup>

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<sup>40</sup> R.C. 5817.03(B).

<sup>41</sup> R.C. 5817.03(D).

<sup>42</sup> R.C. 5817.03(C).

<sup>43</sup> R.C. 5817.01(F).

<sup>44</sup> R.C. 5817.04(A).

<sup>45</sup> R.C. 5817.04(B).

<sup>46</sup> Current R.C. 2107.081(A), not in the bill.



The venue for a complaint to determine the validity of a trust is either (1) the probate court of the county in Ohio where the settlor resides or is domiciled, or (2) if the settlor does not reside in or not domiciled in Ohio, the probate court of the county in Ohio in which the trust's principal place of administration is located.<sup>47</sup>

## **Contents of the complaint (will)**

### **Party defendants**

A complaint to determine the validity of a will must name as party defendants all of the following, as applicable:<sup>48</sup>

- The testator's spouse;
- The testator's children;
- The testator's heirs who would take property pursuant to R.C. 2105.06 had the testator died intestate at the time the complaint is filed;
- The testator's beneficiaries under the will;
- Any beneficiary under the testator's most recent prior will.

Such a complaint may name as a party defendant any other person that the testator believes may have a pecuniary interest in the determination of the validity of the testator's will.<sup>49</sup>

Existing law does not list the types of party defendants. Current law provides that defendants are all persons named in the will as beneficiaries, and all persons who would be entitled to inherit from the testator under R.C. Chapter 2105. had the testator died intestate on the date the complaint was filed.<sup>50</sup>

The bill defines "beneficiary under a will" as either of the following:<sup>51</sup>

(1) Any person designated in a will to receive a testamentary disposition of real or personal property;

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<sup>47</sup> R.C. 5817.04(C).

<sup>48</sup> R.C. 5817.05(A).

<sup>49</sup> R.C. 5817.05(B).

<sup>50</sup> Current R.C. 2107.081(A), not in the bill.

<sup>51</sup> R.C. 5817.01(B)(1).



(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.

"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 to receive distributions, but to whom the executor may in its discretion make distributions.<sup>52</sup>

### **Information contained in complaint (will)**

The complaint may contain all or any of the following:<sup>53</sup>

- A statement that a copy of the will has been filed with the court;
- A statement that the will is in writing;
- A statement that the will was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's express direction;
- A statement that the will was signed in the conscious presence of the testator by two or more competent individuals, each of whom either witnessed the testator sign the will, or heard the testator acknowledge signing the will;
- A statement that the will was executed with the testator's testamentary intent;
- A statement that the testator had testamentary capacity;
- A statement that the testator executed the will free from undue influence, not under restraint or duress, and in the exercise of the testator's free will;
- A statement that the execution of the will was not the result of fraud or mistake;
- The names and addresses of the testator and all of the defendants and, if any of the defendants are minors, their ages;

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<sup>52</sup> R.C. 5817.01(B)(2).

<sup>53</sup> R.C. 5817.05(C).

- A statement that the will has not been revoked or modified;
- A statement that the testator is familiar with the contents of the will.

Current law does not list the contents of a complaint to declare a will valid.

## **Contents of complaint (trust)**

### **Party defendants**

A complaint to determine the validity of a trust must name as party defendants the following, as applicable:<sup>54</sup>

- The settlor's spouse;
- The settlor's children;
- The settlor's heirs who would take property pursuant to R.C. 2105.06 had the settlor died intestate at the time the complaint is filed;
- The trustee or trustees under the trust;
- The beneficiaries under the trust;
- If the trust amends, amends and restates, or replaces a prior trust, any beneficiary under the settlor's most recent prior trust.

Such a 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.<sup>55</sup>

"Beneficiary under a trust" means either of the following:<sup>56</sup>

(1) Any person that has a present or future beneficial interest in a trust, whether vested or contingent.

(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.

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<sup>54</sup> R.C. 5817.06(A).

<sup>55</sup> R.C. 5817.06(B).

<sup>56</sup> R.C. 5817.01(A)(1).



"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 in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions.<sup>57</sup>

### **Information contained in complaint**

The complaint may contain all or any of the following:<sup>58</sup>

- A statement that a copy of the trust has been filed with the court;
- A statement that the trust is in writing and was signed by the settlor;
- A statement that the trust was executed with the intent to create a trust;
- A statement that the settlor had the legal capacity to enter into and establish the trust;
- A statement that the trust has a definite beneficiary or is one of the following:
  - A charitable trust;
  - A trust for the care of an animal as provided in R.C. 5804.08;
  - A trust for a noncharitable purpose as provided in R.C. 5804.09.
- A statement that the trustee of the trust has duties to perform;
- A statement that the same person is not the sole trustee and sole beneficiary of the trust;
- A statement that the settlor executed the trust free from undue influence, not under restraint or duress, and in the exercise of the settlor's free will;
- A statement that execution of the trust was not the result of fraud or mistake;
- The names and addresses of the settlor and all of the defendants and, if any of the defendants are minors, their ages;
- A statement that the trust has not been revoked or modified;

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<sup>57</sup> R.C. 5817.01(A)(2).

<sup>58</sup> R.C. 5817.06(C).

- A statement that the settlor is familiar with the contents of the trust.

## 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.<sup>59</sup>

"Related trust" means a trust for which both of the following apply:<sup>60</sup>

- (1) The testator is the settlor of the trust.
- (2) The trust is named as a beneficiary in the will in accordance with R.C. 2107.63.

"Related will" means a will for which both of the following apply:<sup>61</sup>

- (1) The testator is the settlor of a trust.
- (2) The will names the trust as a beneficiary in accordance with R.C. 2107.63.

Current law specifies that service of process must be made on every party defendant named in the complaint by the following methods:<sup>62</sup>

- By certified mail or other personal service permitted by the Rules of Civil Procedure if the party is an inhabitant of or is found in Ohio;
- By certified mail, with a copy of the summons and complaint, to the party's last known address or any other valid personal service permitted by the Rules of Civil Procedure if the party is not an inhabitant of, or is not found in, Ohio;
- By publication according to Civil Rule 4.4 if the party's address is unknown, if all methods of personal service under the preceding dot point were attempted without success, or if the interest of the party is unascertainable in the will or in the testator's estate if the will is declared invalid.

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<sup>59</sup> R.C. 5817.07.

<sup>60</sup> R.C. 5817.01(D).

<sup>61</sup> R.C. 5817.01(E).

<sup>62</sup> Current R.C. 2107.082, not in the bill.

There is no provision in current law for service of a copy of a related trust to a will.

## Hearing

After a complaint to determine the validity of a will or trust is filed, the court must fix a time and place for a hearing. Notice of the hearing must be given to the testator or settlor, as applicable, and to all party defendants, as provided in the applicable Rules of Civil Procedure. The hearing is adversarial in nature and must be conducted pursuant to R.C. 2101.31 (determination of questions of fact) and 2721.10 (declaratory relief), except as otherwise provided in Chapter 5817. of the Revised Code.<sup>63</sup>

"Court" means the probate court of the county in which the complaint under R.C. 5817.02 or 5817.03 is filed or the general division of the common pleas court to which the probate court transfers the proceedings under R.C. 5817.04(A).<sup>64</sup>

## Burden of proof

The testator or settlor has the burden of establishing prima facie proof of the execution of the will or trust, as applicable. A person who opposes the complaint has the burden of establishing one or more of the following:<sup>65</sup>

- The lack of testamentary intent or the intent to create a trust, as the case may be;
- The lack of the testator's testamentary capacity, or the settlor's legal capacity to enter into and establish the trust;
- Undue influence, restraint, or duress on the testator or settlor;
- Fraud or mistake in the execution of the will or trust;
- Revocation of the will or trust.

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.<sup>66</sup>

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<sup>63</sup> R.C. 5817.08.

<sup>64</sup> R.C. 5817.01(C).

<sup>65</sup> R.C. 5817.09(A).

<sup>66</sup> R.C. 5817.09(B).

Current law has no provision comparable to the bill's provisions above.

### **Validity of a will or trust**

The court must declare the will valid if it finds all of the following:<sup>67</sup>

- 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.
- The testator had the requisite testamentary capacity, was free from undue influence, and was not under restraint or duress.
- The execution of the will was not the result of fraud or mistake.

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.<sup>68</sup>

The court must declare the trust valid if it finds all of the following:<sup>69</sup>

- The trust meets the requirements of R.C. 5804.02.
- 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.
- The execution of the trust was not the result of fraud or mistake.

Current law provides that any declaration of validity of a will must be sealed in an envelope along with the will and filed by the probate judge or the judge's designee in the probate court offices. The filed will is available during the testator's lifetime only to the testator. If the testator removes a filed will from the judge's possession, the declaration of validity no longer has any effect.<sup>70</sup>

Unless the trust is modified or revoked after the court's declaration, the trust has full legal effect.<sup>71</sup>

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<sup>67</sup> R.C. 5817.10(A)(1).

<sup>68</sup> R.C. 5817.10(A)(2).

<sup>69</sup> R.C. 5817.10(B)(1).

<sup>70</sup> Current R.C. 2107.084(B), not in the bill.

<sup>71</sup> R.C. 5817.10(B)(2).

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.<sup>72</sup>

### **Impact of the validity of the will or trust**

Unless the will or trust is modified or revoked, and except as otherwise provided below, 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.<sup>73</sup>

The failure to name a necessary defendant regarding the validity of a will or trust is not jurisdictional. 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 in which the will or trust was declared valid 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.<sup>74</sup>

In determining whether a person was a party defendant and properly served in an action to declare a will or trust valid under Chapter 5817. of the Revised Code, 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.<sup>75</sup>

### **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 of competent jurisdiction 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

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<sup>72</sup> R.C. 5817.10(C).

<sup>73</sup> R.C. 5817.11(A).

<sup>74</sup> R.C. 5817.11(B) and (C).

<sup>75</sup> R.C. 5817.11(D).

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. of the Revised Code unless its validity is also declared as provided in that Chapter.<sup>76</sup>

Current law provides that a testator may revoke or modify a will declared valid by filing a complaint in the probate court in possession of the will and asking that the will be revoked or modified. The complaint must name as parties defendant the persons who were parties defendant in a previous action declaring the will valid, the persons who are named in any modification as beneficiaries, and the persons who would be entitled because of the revocation or modification, to inherit from the testator under R.C. Chapter 2105. had the testator died intestate on the date the complaint was filed. Service of the complaint and process are made on these parties by the methods authorized in a complaint to declare the previous will valid.<sup>77</sup>

Under current law, unless waived by all parties, the court must conduct a hearing on the validity of the revocation or modification requested. If the court finds that the revocation or modification is valid, the revocation or modification takes full effect and is binding and revokes the will or modifies it to the extent of the valid modification. The revocation or modification, the judgment declaring it valid, and the will itself must be sealed in an envelope, filed with the probate court, and be available during the testator's lifetime only to the testator.<sup>78</sup>

Existing law also provides that a declaration of validity of a will, of a codicil to a will previously declared valid, or of a revocation or modification of a will previously determined valid generally is not subject to collateral attack and is appealable.<sup>79</sup>

### **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 of competent jurisdiction 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

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<sup>76</sup> R.C. 5817.12(C).

<sup>77</sup> Current R.C. 2107.084(C), not in the bill.

<sup>78</sup> Current R.C. 2107.084(C), not in the bill.

<sup>79</sup> Current R.C. 2107.084(E), not in the bill.

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. of the Revised Code unless its validity is also declared as provided in that Chapter.<sup>80</sup>

### **Admissibility of evidence**

The finding of facts by a court in a proceeding brought under Chapter 5817. of the Revised Code is not admissible as evidence in any proceeding other than a proceeding brought to determine the validity of a will or trust. The determination or 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.<sup>81</sup>

### **Conforming changes**

The bill makes conforming changes regarding determining the validity of a will in R.C. 2101.24, 2107.01, 2107.07, 2107.08, 2107.09, 2107.10, 2107.11, 2107.12, 2107.16, 2107.18, 2107.20, 2107.22, 2107.33, 2107.71, 2137.01, and 2721.03 and determining the validity of a trust in R.C. 2721.03.

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## **HISTORY**

<b>ACTION</b>	<b>DATE</b>
Introduced	04-10-18
Reported, H. Civil Justice	06-07-18

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<sup>80</sup> R.C. 5817.13.

<sup>81</sup> R.C. 5817.14.

