



**STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN SUPPORT OF HOUSE BILL 464**

Before the Senate Judiciary Committee
Senator John Eklund, Chair
December 16, 2020

Chairman Eklund, Vice-Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee. On behalf of the Ohio State Bar Association, I am pleased to offer proponent testimony in support of House Bill 464.

My name is John Furniss. I am a partner with the law firm of Vorys, Sater, Seymour and Pease, and I have the privilege of serving as Chair of the Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association. The OSBA's Estate Planning, Trust, and Probate Law Section consists of over 2,800 members, and one of its purposes is "to improve the law of Ohio by proposing, sponsoring, opposing and reporting on Ohio legislation affecting estate planning, trusts and estates." The Council is the governing body for the Section, and includes talented and dedicated attorneys throughout the State of Ohio.

House Bill 464 includes four proposals that are the result of many years of hard work from members of our Section Council. These proposals were developed and vetted thoroughly by our Section, and they were also unanimously approved by the Council of Delegates of the Ohio State Bar Association.

1. The first proposal would authorize guardians, with probate court approval, to create estate plans for wards.

- Problem: Under R.C. § 2111.50, a guardian, with probate court approval, may undertake some estate planning for his or her ward. However, the actions that can be taken are limited and do not permit the guardian to utilize common estate planning techniques that may benefit the ward and his or her estate, such as: the execution of disclaimers; the establishment of a revocable living trust to control the disposition of the ward's property after his or her death; and the designation of beneficiaries for insurance policies, retirements plans, and annuities.
- Proposal: The proposal would amend R.C. § 2111.50 to allow a guardian to seek probate court approval to utilize these common estate planning techniques, thereby enhancing the guardian's ability to protect, preserve, and efficiently administer the ward's estate for the ward's beneficiaries. It does not, however, impose a duty on a guardian to engage in such estate planning for the ward.

2. The second proposal would allow a surviving spouse to take an automobile without reduction to the family allowance to which he or she is entitled.

- Current Law: Under R.C. § 2106.13, a surviving spouse is entitled to some part or all of the allowance for support from the estate of his or her deceased spouse (up to \$40,000). However, if the surviving spouse elects to take more than one of the decedent's automobiles under R.C. § 2106.18, the spousal share of the allowance for support is reduced by the value of the automobile with the least value.
- Problem: Following a statutory change in 2017 that increased the number of automobiles that a surviving spouse could elect to take under R.C. § 2106.18, at least one magistrate interpreted R.C. § 2106.13 to require that the spousal share of the allowance for support be reduced by the value of all automobiles taken, not just the one with the least value. This interpretation is not consistent with the language of the statute and the history of these provisions.
- Proposal: The proposal would clarify that the spousal share of the allowance for support would be reduced only by the value of the automobile with the least value. This clarification is consistent with the history of these provisions and will ensure that, at the very least, a surviving spouse may receive one automobile without reducing his or her spousal share of the allowance of support.

3. The third proposal would provide that creditor rights after a lapse of a power of withdrawal are to be terminated.

- Current Law: R.C. § 5805.06(B) subjects trust assets that are, or were, subject to a power holder's right of withdrawal to the creditors of such power holder, to the extent (1) the right of withdrawal can be exercised over such trust assets (R.C. § 5805.06(B)(1), or (2) the right of withdrawal previously could be exercised over such trust assets, but the right subsequently lapsed or terminated (R.C. § 5805.06(B)(2)).
- Proposal: The proposal would repeal R.C. § 5805.06(B)(2). The result would be that, upon the lapse or termination of a power holder's right of withdrawal, the power holder's interest would no longer be available to the creditors of such beneficiary.
- Rationale: OSBA believes this change is appropriate: If the trust property is no longer available to a beneficiary, it should no longer be available to a beneficiary's creditors. The provision to be repealed was copied from the Uniform Trust Code. Many of the other states which have adopted the Uniform Trust Code also have deleted that provision.

4. The fourth proposal would provide allow changes to lists of future successor trustees under trust agreements.

- Current Law. The Ohio Trust Code denies to a court the power to remove a trustee except for cause (R.C. §5804.11(B) & R.C. § 5807.06). Further, since under R.C. § 5801.10(C), a private settlement agreement may contain only provisions that could be properly approved by a court, a private settlement agreement cannot be used to remove a trustee except for cause.

- Problem: Some consider it uncertain whether the nomination of a future or successor trustee is subject to this prohibition, that is, whether a future or successor trustee can be "removed" even before he assumes office. For example, a trust may provide for the surviving spouse to be trustee and for a named bank to become successor trustee when the surviving spouse dies, resigns or is disabled. May the court or a private settlement agreement change that successor to a different bank, or to an individual?
- Proposal: The proposal would confirm that the change of a future or successor trustee named in a trust agreement, whether by a court order or by a private settlement agreement, is not prohibited.

We would like to note that several other provisions were added in the House Civil Justice Committee. The OSBA has reviewed those proposals and we do not have any objections to the other changes now a part of the bill.

Thank you for the opportunity to provide this testimony. I would be happy to answer any questions you may have.