



**STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN SUPPORT OF SENATE BILL 199**

Before the Senate Judiciary Committee

Senator Nathan Manning, Chair

October 5, 2021

Chairman Manning, Vice Chair McColley, 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 Senate Bill 199.

My name is Susan Racey. I am a partner with the law firm of Tucker Ellis, and I have the privilege of serving as the Treasurer 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 3,000 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.

Senate Bill 199 includes five proposals that are the result of several years of hard work from members of our Section Council. These proposals were developed and vetted thoroughly by our Section, and they were approved by the Council of Delegates of the Ohio State Bar Association.

1. The first proposal would revise the law on disinterment of bodies, to make it consistent and coordinated with the Ohio right of disposition statutes.

- a. Background: The right of disposition statute in Ohio Revised Code §§2108.70 to 2108.90 addresses, among other things, who has the right to direct the disposition, after death, of an individual's body. It allows an individual to assign the right of disposition of his or her body to another person by a written declaration and, if no written declaration is made, sets forth a list of persons who would hold the right of disposition.

HEADQUARTERS

1700 Lake Shore Drive

Columbus, Ohio 43204

MAILING ADDRESS

P.O. Box 16562

Columbus, Ohio 43216-6562

PHONE

(614) 487-2050

(800) 282-6556

FAX & WEB

(614) 487-1008

www.ohiobar.org

It also gives the probate court the opportunity to assign the right of disposition, based on a list of factors set forth in the statute.

- b. Problem: A recent case highlighted the fact that this right of disposition statute has not been well coordinated with other statutes relating to an individual's remains, such as the disinterment statutes. As a result, there is a disconnect between who has the right to inter an individual's body and who has the right to disinter the body. So, under the current statutes, one person may claim the right to bury, while another person could claim the right to un-bury.
- c. Proposal: The proposal would coordinate and more uniformly treat these rights, by amending R.C. §§ 517.23, 517.24, 517.25, and 2108.82 to provide for the same priority of persons having the rights to both bury and un-bury a body.

2. The second proposal would clarify the process by which a creditor can present a claim against an estate.

- a. Background: Ohio law, in Revised Code § 2117.06, provides detailed procedures on how creditors of deceased persons may present their claims against that decedent's estate. If those procedures are not followed within a specified time, typically six months from the date of death, the claims are forever barred. Under current law, there are three methods by which a creditor may present a claim against an estate: (1) to the executor or administrator in a writing; (2) to the executor or administrator in a writing, and to the probate court by filing a copy of the writing with the court; and (3) in a writing that is sent by ordinary mail to the decedent and that is actually received by the executor or administrator within the specified time.
- b. Problem: Disputes frequently arise over whether a creditor has properly and timely presented its claim. Recently, the Ohio Supreme Court's decision in *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, and subsequent decisions by lower courts, have cast doubt on how to comply with these claims presentation methods. Prior to these decisions, most practitioners would have believed that delivery of the written claim by service to the executor and on the attorney for the estate was sufficient for these purposes.
- c. Proposal: The proposal would amend R.C. § 2117.06 to make it clear that it is sufficient for a creditor to present a claim by serving it upon the attorney for the executor or the administrator. This amendment would provide more certainty and predictability in determining whether a claim has been properly and timely presented. More specifically, the amendment would provide that the three methods by which a creditor may present a claim against an estate are as follows: (1) to the

executor or administrator, or to the attorney of record for the executor or administrator, in a writing; (2) to the probate court in a writing that identifies the probate court case number for the estate; and (3) in a writing that is actually received by the executor or administrator, or by an attorney who is identified as counsel for the executor or administrator in the probate court records for the estate of the decedent, within the specified time, and without regard to whom the writing is addressed.

3. The third proposal would allow a person to make a transfer on death designation for tangible personal property.

- a. Current law: Current Ohio law allows for Transfer on Death (“TOD”) designations of real estate, bank accounts, brokerage accounts, stocks, bonds, interests in closely held entities such as LLCs, motor vehicles, watercraft and outboard motors. Additionally, persons may use beneficiary designations for life insurance, annuities, retirement plans and IRAs, and various other employee benefits. Many persons make use of these opportunities to designate their loved ones as their beneficiaries, so that these assets pass directly to their beneficiaries, and this method also allows them to avoid a probate process for these assets.
- b. Problem: One thing that is not possible under current Ohio law is that a person cannot designate beneficiaries for their tangible personal property that does not have a certificate of title. So these items, often of little economic value, must pass through the probate process to get into the hands of the heirs, or else be put into a more complicated trust arrangement to avoid the probate process. So many people transfer their assets by the TOD and beneficiary designation methods that often, these tangible personal property items are the only remaining asset which has to be probated, and people choose not to follow the law regarding probate administration with regard to the tangible personal property items.
- c. Proposal: The proposal is to create a new Ohio Revised Code § 2131.14 to allow for transfer on death beneficiary designations for tangible personal property that does not have a certificate of title, by a written transfer on death beneficiary designation, which must be signed and dated by the owner, and be notarized. An owner could name primary and contingent beneficiaries. The new statute also would provide that divorce, dissolution or annulment of marriage would revoke the designation to a spouse. Additionally, the statute would provide protection to persons who deliver the tangible personal property pursuant to a TOD designation.

4. The fourth proposal would clarify the effective date provisions of certain provisions of the rule against perpetuities statute.

- a. Background: The rule against perpetuities, set forth in Ohio Revised Code § 2131.09, provides that an interest in property must vest no later than 21 years after the death of the last to die of a life in being at the time the interest was created. The

rule against perpetuities has been recognized in Ohio for centuries. It is a highly technical part of the Code. One portion of Ohio's rule, R.C. § 2131.09(B), became effective on March 22, 1999, and allowed individuals to opt-out of the rule against perpetuities.

- b. **Problem:** On March 27, 2013, a number of amendments were made to this opt-out provision. Those amendments addressed the exercise of non-general powers of appointment in a trust that has opted-out of the rule against perpetuities. Those amendments were intended to apply for interests in property created on or after the effective date of the amendment. But the statute, in its current form, says that the language introduced by the 2013 amendments applies to interests created on or after "the effective date of this section." This created an ambiguity for someone reading the statute, since it is not clear whether the "effective date of the section" is March 22, 1999, or March 27, 2013.
 - c. **Proposal:** The proposal to amend R.C. § 2131.09 would make the effective dates clear by reference to the specific effective dates and thus provide better guidance to practitioners navigating this already challenging section of the Revised Code.
- 5. The fifth proposal would add an optional provision to the Ohio Trust Code, providing for a process for a trustee to resolve potential claims on conclusion of the trustee's administration of an Ohio irrevocable inter vivos trust.**
- a. **Background information:** A trustee who is concluding the administration of an irrevocable inter vivos trust needs to bring to orderly closure any issues that may have arisen during the course of that trustee's administration or that may arise after the trustee's involvement with the trust concludes. This applies to trust terminating distributions and when a trustee is resigning or has been removed, and the trustee will be departing the administration and delivering trust assets to a successor trustee.
 - b. **Problem:** Under current law, there are only two ways for a trustee of an irrevocable inter vivos trust to achieve this closure with the assurance that a later claim against the trustee will not arise, one of which involves a time-consuming and costly adjudication of the trustee's accounts in a court proceeding, and the other of which involves the preparation of a broad indemnification and release document which many trust beneficiaries find to be overreaching. (This is not an issue for a trustee of a testamentary trust, created under the will of a decedent, because a testamentary trustee is subject to the supervision of the probate court, files a final account with the probate court, and obtains the court's approval of the account and a release from any claims concerning the trustee's administration of the trust, after the court notifies the beneficiaries and provides them with an opportunity to file any objections or claims.)
 - c. **Proposal:** The proposal would modify the Ohio Trust Code by adding new Ohio Revised Code § § 5801.20, 5801.21, 5801.22, 5801.23 and 5801.24, to provide for

a voluntary, simplified and expedient process for a trustee of an irrevocable inter vivos trust to use when concluding a trust administration. This proposal balances the trustee's desire for finality with trust beneficiaries' meaningful notice, adequate information and a reasonable opportunity to assert any objections or file any claims against the trustee.

- i. The procedure would require that the trustee provide written notice and up to four years of trust reports to specified persons, including all of the current beneficiaries of the trust.
- ii. Detailed disclosure requirements include a listing of the trust assets, a description of the action proposed by the trustee, and contact details for the trustee.
- iii. Persons receiving notice would have 45 days in which to provide the trustee with written notice of any objection to the trustee's proposed action or any other objection concerning the trustee's administration of the trust.
- iv. If no objections are filed, the notice and trustee's reports are considered approved by each person who received notice, and the persons receiving notice will be barred from later challenges to the trustee, to the same extent, and with the same preclusive effect, as if a court had entered a final order approving and settling the trustee's full account of the trust administration.

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