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STATEMENT OF THE OHIO STATE BAR ASSOCIATION

IN SUPPORT OF SENATE BILL 210

Before the House Civil Justice Committee

Representative Brett Hillyer, Chair

March 1, 2022

Chairman Hillyer, Vice-Chair Grendell, Ranking Member Galonski, and members of the House Civil Justice Committee, thank you for allowing me the opportunity to give proponent testimony regarding Senate Bill 210 on behalf of the Ohio State Bar Association (“OSBA”). This legislation would allow a married couple to enter into a postnuptial agreement and to amend or terminate the terms of a prenuptial agreement.

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.

a. Background: For over 130 years in Ohio, spouses have been legally capable of entering into agreements with each other as if unmarried except to the extent an agreement alters the legal relations between the spouses (postnuptial agreement). Legal relations between spouses are those rights and responsibilities that exist solely by reason of the marriage (e.g., right to inherit, election against the will, right to administer the estate, property division, spousal support, etc.). Currently, in Ohio, for spouses to have an enforceable agreement between themselves that alters their legal relations, such agreement must have been entered into prior to the marriage (premarital agreement) and once entered into cannot be amended or terminated.

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In other words, in Ohio, a couple can enter into a premarital agreement before they marry, but once married, they cannot enter into a postnuptial agreement. Additionally, a couple cannot change their premarital agreement once married even if they both desire to do so and irrespective of changes in circumstances, longevity of the marriage or changes in the law. As a result, couples are prohibited from entering into a legal agreement after they marry or modifying one if their circumstances change. Instead, the only options that exist for a married couple at this point in Ohio to contractually alter their marriage are divorce, dissolution, or legal separation.

b. Problem: Simply, life and laws change. However, in Ohio, couples are prohibited from amending or entering into agreements to evolve with their marriage. Other states by law understand that there is one certainty in life and marriage being that it will certainly change in unforeseen ways. Therefore, other states grant reasonable flexibility to allow married couples the ability to make changes to their marital agreements. Other states also recognize that premarital agreements are signed at the time when a couple knows each other the least and are incapable of predicting the future events that will occur in their marriage. Unfairly, couples moving to Ohio with the right to change their premarital agreements, lose their right to do so by becoming residents of Ohio. Right now, Ohio is one of four states that do not allow postnuptial agreements and we are one of only two states that prohibit postnuptial agreements by statute. Noteworthy, no other type of contract exists in Ohio that cannot be altered when both consensual parties to the agreement desire to change it.

c. Proposal: Senate Bill 210 would permit a couple to voluntarily enter into agreements with each other that alter their legal relations as they deem desirable and appropriate for themselves and their family as well as voluntarily modify or terminate existing premarital agreements to keep them fair under changed circumstances. Importantly, Senate Bill 210 requires that for an agreement to be valid, it must be entered into freely without fraud, duress, coercion or overreaching. Senate Bill 210 will also bring Ohio in line with almost all other states and give couples much needed flexibility for the sake of their marriages. We are in support of Senate Bill 210 to respond to the growing demand and necessity for these agreements from many different sources including:

- i. Growing trend of second marriages with one or more spouses having children from previous marriages that a spouse wants to provide for;
- ii. Tax and state law changes that can cause unwanted or unintentional changes to the operation of a couple's premarital agreement;
- iii. Couples wanting to define what their rights and responsibilities are in the marriage, which are likely to change over time;
- iv. Increased uncertainty in Ohio about the enforcement of premarital agreements that cannot be altered with a marriage's priorities shifting or changed circumstances;

- v. Increased cases of spouses entering into invalid postnuptial agreements or ineffectively amending their premarital agreements for fairness or marriage harmony regardless of the enforceability of such agreements.

Senate Bill 210 would grant couples the critical right to have agreements between them evolve with their marriage. The ability to enter into postnuptial agreements or amend premarital agreements will give married couples healthy options to address their marital agreement other than divorce. Also, married couples moving to Ohio will not lose their current right to amend their existing premarital or postnuptial agreements which they expected to amend to adjust to changed circumstances

We agree with Senator Theresa Gavarone's recent testimony before this committee that couples in Ohio should be granted the opportunity to do what they deem best for them and the flexibility to make their own decisions when it comes to their marriages and be able to change such decisions as life changes. We also think that this simple change can make all the difference in the world for couples and their families and will help marriages and families thrive.

Thank you for the opportunity to provide this testimony on Senate Bill 210. I am happy to answer any of your questions.