

Good afternoon Chairman Hillyer, Vice Chairman Grendell, Ranking Member Galonski and members of the Civil Justice Committee. Our names are Travis Faber, Esq. and John Willamowski, Jr., Esq. and we are here today as interested parties to Substitute Senate Bill 199, specifically the provisions amending R.C. 2107.52, Ohio's antilapse statute.

At common law, if a testator dies with a will and an individual who is named as a beneficiary in the will has predeceased the testator, then the beneficiary's gift, a "devise" in the will, lapses and the property is distributed through the residuary estate. However, when a testator dies in Ohio and leaves a valid will, that "devise" may not lapse if certain conditions found within R.C. 2107.52 (the antilapse statute) are met.

Substitute Senate Bill 199 seeks to modify the conditions in which a "devise" will lapse, as it adds a "primary devise" to the definition of "devise" found in 2107.52(A)(3).

When drafting an antilapse statute, the legislature is seeking to codify what they believe the presumed intent of the common testator is. More simply, the legislature is making a value judgment of who they believe most people would want their property to go to if the person the decedent listed in their will dies before them. Whatever this body decides a common testator would likely want is not our concern today. That is up to this body's sound discretion.

Our concern is with the proposed language that would create 2107.52(A)(3)(b). As drafted, that language states:

"2107.52(A)(3)(b) Except as otherwise provided in this division, the amendment to division (A)(3)(a) of this section in this act shall be given retroactive effect to the fullest extent permitted under Ohio Constitution, Article II, Section 28. The amendment shall not be given retroactive effect in those instances where doing so would invalidate or supersede any instrument that conveys real property or any interest in the real property, recorded in the office of the county recorder in which that real property is situated."

The current proposed language makes the proposed changes to qualifying devises in the antilapse statute retroactive. Constitutionally speaking, this is very concerning not only because it will directly impact cases already being litigated but also because it attempts to strip certain Ohio citizens of vested property rights.

This is because once a testator has died, the property rights of a beneficiary have vested and Article 2, Section 28 of the Ohio Constitution does not allow for the legislature to divest the beneficiaries. Thus, changes to R.C. 2107.52 should be prospective, because if they are not, the changes are likely unconstitutional pursuant to Article 2, Section 28 of the Ohio Constitution. This language is effectively punting the constitutional question to the Ohio Supreme Court, which will create uncertainty in the law for quite some time and is not good public policy.

To this end, we have submitted two possible changes to the proposed legislation in an effort to resolve the constitutional deficiencies the current language contains.

The most appropriate remedy to this problem is to remove the proposed language that would create 2107.52(A)(3)(b), and to amend R.C.2107.52(F) to the effective date of the statute in order to ensure the change is prospective.

An alternative, although still likely to have some open constitutional questions, is to add language at the end of 2107.52(A)(3)(b), to exempt estates opened prior to the effective date of the statutory change, such as the following:

2107.52(A)(3)(b) Except as otherwise provided in this division, the amendment to division (A)(3)(a) of this section in this act shall be given retroactive effect to the fullest extent permitted under Ohio Constitution, Article II, Section 28. The amendment shall not be given retroactive effect in those instances where doing so would invalidate or supersede any instrument that conveys real property or any interest in the real property, recorded in the office of the county recorder in which that real property is situated- **, nor in any estate proceeding initiated prior to (insert effective date of statute).**

We believe that either of these would strengthen the bill and eliminate some of the uncertainty this bill would otherwise create.

Thank you very much for your time and attention this afternoon. I would be happy to take any questions you may have.