



*“Men may die, but the fabrics of free institutions remain unshaken.”*

– Chester A. Arthur

**T**he probate division of the court of common pleas (often referred to simply as the “probate court”) in each of Ohio’s 88 counties is one of the busiest in the court system. Most people think of probate law as governing the administration of the estates that are left behind when people die. Such administration includes, among other things, the payment of taxes and debts, and the transfer of all probate estate property to the appropriate individuals or entities.

But probate law is much more than that. Generally, the probate division is responsible for protecting people who need care, safeguarding personal and property rights, and supervising people in positions of trust. For example, the probate division handles:

- the issuance of marriage licenses;
- adoption;
- appointment of guardians to care for children and other persons who cannot care for themselves or their property;
- proper care and treatment for the mentally ill, mentally retarded, or persons suffering from developmental or physical disabilities; and
- name changes.

## Protecting Individuals in Need of Care

Some people need special protection, including children who are orphaned, parents who are unable to care for their children and individuals suffering from mental illness, developmental disabilities and physical disabilities. Additionally, age or illness can affect an individual’s physical ability or mental capacity, or both, including the ability to care for one’s self or one’s property. In Ohio, the probate court has the *jurisdiction* (the obligation and authority) to supervise the protection of minors and those with physical or mental disabilities. For example, the probate court appoints guardians for both minors and adults, manages adoptions, and the court handles appli-

cations to hospitalize persons for treatment of mental illnesses.

## Safeguarding Personal and Property Rights

When an individual dies, his or her property must be transferred to:

- the person or persons named in that individual’s last will and testament;
- heirs designated according to Ohio law, when there is no will; or
- the person(s) identified in a will substitute, such as the survivor designated in a survivorship deed, or the person designated in a payable-on-death arrangement.

## Supervising Those in Positions of Trust

Individuals serving in positions of trust, whether they are executors, administrators, guardians, conservators, trustees, attorneys-in-fact, or other persons who act on behalf of third persons, are called *fiduciaries*. Fiduciaries owe a special duty to those whose interests and property they control or manage. When, for example, an executor or administrator is appointed to settle an estate, or a guardian is appointed to look after the affairs of a child or a person who has become incompetent, it is important that the fiduciary’s conduct be supervised. Fiduciaries are in positions of trust, and historically, many types of fiduciaries act under the supervision of the probate court. They must regularly report their activities, particularly their financial activities, to the probate court. However, trustees serving under trust agreements created outside a will generally need not regularly report to the probate court; their acts are reviewed by the court only upon request of a beneficiary or other interested party.

# Wills

As we explained in Part VIII, the current owner of private property can dictate who is to be the future owner when the current owner dies. The most common device to transfer ownership upon death is a *will*, or more formally, a *last will and testament*. Increasingly, people are using will substitutes, such as living trusts to transfer private property to surviving spouses, children or other beneficiaries without going through the probate process.

## Who Can Make a Will

Under Ohio law, any person age 18 or older who has a sound mind and memory, and is not under restraint, can make a valid will.

The requirement of sound mind and memory does not mean that the *testator* (the individual making the will) must be in total possession of his or her faculties. The testator's mind may be dulled by pain or sickness or enfeebled by age; he or she may even suffer to some extent from mental deficiency or mental illness. So long as the testator knows who his or her family members are, generally knows the nature and extent of what he or she owns, and understands that the document is a will, the testator has the legal capacity to make a will.

The fact that a will makes an apparently unfair or unequal distribution of a testator's property does not necessarily indicate that the testator lacked the mental capacity to make the will. A testator's will may disregard family and friends of long standing and still be valid. (See "*Limitations on Wills; Special Provisions*" later in this chapter, for a discussion of the rights of a surviving spouse.)

The requirement that a testator not be under restraint means that testator must be free to choose to make a will and to make it the way he or she wants, and is not coerced, defrauded, or improperly influenced to do so.

## Requirements for Making a Will

1) Except as explained below (at #5), for a will to be valid, it must be in writing and signed by the testator, and the signing must be confirmed by two competent and impartial witnesses. (Those witnesses do not have to know the contents of the will, but only that the testator signed it voluntarily.) These basic requirements are strictly enforced, although there is some leeway in how the requirements can actually be met.

2) The will may be typed or handwritten, or the will may even be partially typed and partially handwritten. Another individual may sign the will for the testator, provided this person does so at the testator's specific direction and in the presence of the testator and the two independent witnesses. (Please note that a will does *not* have to be notarized.)

3) There may be a problem with potential beneficiaries under a will serving as witnesses to that will. The possible problem is that a witness to a will may not receive more under the will than he or she would have received as an heir if there were no will. This could significantly reduce the amount the witness/beneficiary receives in comparison to what the testator had intended to leave that person. This rule affects only the particular witness/beneficiary; it does not mean that the entire will becomes invalid simply because a witness is named in the will to receive a gift.

Further, a murderer cannot inherit from his or her victim, and a gift to such a murderer in the deceased person's will is ignored when the estate is distributed.

4) While people can draft their own wills, certain precise concepts and legal language must be used to ensure that the will is valid and complete. Some "do-it-yourself" forms and computer programs may be adequate, but these one-size-fits-all documents often are prepared for nationwide distribution, and they may not fully conform to Ohio law or to the testator's wishes.

Clearly, use of such forms does not give the testator the benefit of the interview process, and the ideas that a professional can bring to the estate planning process. Therefore, an individual should consult a lawyer about writing and signing a will. It should be noted that lawyers who draft wills are under professional limitations similar to those of witnesses. In general, the lawyer who drafts a will cannot be a beneficiary of it, unless related to the testator.

5) There is only one exception to the requirement that a will be in writing. An oral (or *nuncupative*) will is valid to transfer personal property—not real property—under certain conditions. The conditions are:

- the will is made in a “deathbed” situation by a testator who knows he or she is dying;
- the testator states his or her intended property distributions to two competent, impartial witnesses of the testator’s choosing;
- the witnesses write out the will and sign it within 10 days of the testator’s statement; and
- the written will is filed with the probate court within six months after the testator’s death.

A testator can modify the terms of an earlier written will (for example, to change the beneficiary of a particular item of personal property) by making an oral will during his or her last illness, but he or she cannot revoke a written will by making an oral will.

## **A Will Must Be Probated**

Ohio law states that a will cannot govern the distribution of the testator’s property unless the will is filed with the probate court. Stated another way, this means that the court must admit a will to probate before it can control the distribution of a testator’s property, so a will left in a drawer at home is not effective. Under the law, anyone knowing of a deceased’s will is required to notify the probate court of its existence and location.

## **Lost, Damaged or Destroyed Wills**

People usually keep wills in safe places. Sometimes these places are so safe that wills

cannot be found, or sometimes a will is destroyed or damaged in a fire or flood. If a will cannot be found, or is totally or partially destroyed, copies of the original often are available. Attorneys generally keep copies of the wills they have prepared.

When an original will is misplaced or destroyed in some way, a copy can be admitted to probate, provided it can be proven that the lost will was valid and was the last will of the testator, and that the testator did not know the will had been misplaced, damaged, or destroyed.

## **How Wills Are Revoked**

A will can be revoked in a number of ways. The most common way is by making a new, or later, will. One of the standard statements in a will is that the testator revokes all previous wills.

A testator also can revoke a will by purposefully canceling it, tearing it up, obliterating it, or destroying it. The testator must personally take such an action, be present when such an action is taken, or give another person written instructions to take such an action on the testator’s behalf. A will can be revoked by canceling, tearing, destroying, or obliterating only when there is proof of the testator’s actions and intent to revoke the will.

If the testator is competent, the revocation of a prior will is absolute. The best way to explain this concept is by example: Tom writes a will. Later, he writes, “CANCELED,” or words having a similar meaning, on all the pages of the will and through his signature. Tom then makes a second will. Later, he tears up the second will, and makes a third will, which he subsequently obliterates with permanent black marker. Tom then makes a fourth will, which he later burns. Assuming that Tom was competent at all times, and that he clearly took the above actions to revoke the various wills, Tom does not have a will. If Tom dies, none of the wills he made can be revived.

Under Ohio law, a divorce or dissolution can affect the provisions of a will. When a court issues its decree or order in a divorce case, or approves a settlement in dissolution of marriage, the court’s order automatically revokes the provisions in a

will for a former spouse, unless the testator has indicated a clear intent in the will that the former spouse should remain a beneficiary despite the end of the marriage.

Wills may be amended by a *codicil*, a document that meets the same requirements as an original will. That is, the amendment must be in writing, signed by the testator and witnessed by two competent and impartial people. A will cannot be amended by writing changes on it.

## **Limitations on Wills; Special Provisions**

The general rule is that a testator can use a will to dispose of his or her property in any way, or to any persons. There are some important exceptions to this general rule. Further, the law makes special provisions for circumstances that are often overlooked by people when they make wills or when circumstances change after they have made their wills.

The law gives a surviving spouse certain choices that prevent total disinheritance of probate assets—that is, assets subject to probate administration. (Certain assets that do not have to be administered through probate court are called *non-probate assets*. For example, assets derived from contractual agreements such as living trusts, insurance policies, payable-on-death accounts, joint and survivorship accounts, pensions, or security accounts with payable-on-death or joint and survivorship provisions, function independently of wills and may not be subject to probate administration. These devices are sometimes called *will substitutes*.)

While a testator can disinherit others in a will, a testator cannot entirely disinherit his or her spouse, or leave only a token inheritance. The surviving spouse can accept the will and take whatever share of the estate the will provides, or reject the will and take whatever share he or she is entitled to under the law. Generally, a surviving spouse is entitled to one-half or one-third of a testator's net estate, depending on the number of testator's children who survive the testator. (See

*the "Statute of Descent and Distribution" section below.*)

A surviving spouse and surviving children also are entitled to a living allowance of \$40,000 and to live in the family home for one year. (The living allowance is treated as one of the debts of the estate.) If the family home is sold to pay debts, the surviving spouse may be entitled to the fair rental value of the family house.

The surviving spouse also has the right to have two automobiles (or trucks if used for family transportation), provided they were not specifically bequeathed and the combined value of both automobiles is less than \$40,000. The automobiles are not subject to probate administration. The surviving spouse is also entitled to claim one watercraft or one outboard motor not specifically given in the will. He or she also has the right to be reimbursed for the payment of the funeral expenses of the deceased spouse.

The surviving spouse may have a *dower* (widow's or widower's) *interest* of one-third of any real property owned by the testator during the marriage for the balance of the surviving spouse's life. This dower interest also can be claimed by the surviving spouse with regard to real property that was sold or disposed of during the deceased's life without the spouse's consent. Today, the possibility of a dower interest is limited because buyers rarely buy real property without requiring the release of the dower interest in the deed.

It should be noted that the surviving spouse is not always entitled to the entire \$40,000 living allowance. The probate court is required to make an equitable distribution of the allowance among the surviving spouse and any minor children. Therefore, the surviving spouse receives the entire amount if the children are also the deceased's children. However, if, for example, there are children of a prior marriage, a portion of the money may go to them or to their surviving parent for their benefit according to the needs of all of them.

The law generally avoids tying up property forever. The *rule against perpetuities* says, in effect, that someone cannot create a trust that

keeps the property from being distributed free and clear for longer than 21 years beyond the end of the lives of people who are living when the trust or will becomes effective.

Let's assume that Mr. Smith has two children, four grandchildren and a one-year-old great-grandson at the time of his death, and that his will creates a trust that says that the Smith Family Farm must remain in the trust for at least 100 years, to be used only by family members. Under the rule against perpetuities, the property must be distributed not later than 21 years after the death of the last survivor of these descendants, and if the great-grandson is the last survivor of them, the property must be distributed 21 years after his death, regardless of whether he dies at 50 or age 99. Recently, Ohio's laws have been written to permit gifts of property that can exist in perpetuity (so-called *dynasty trusts*).

The law has special provisions that automatically change a will in some situations, such as when:

- an additional child, or children, is born after the will was made;
- a person named as a beneficiary in the will dies before the death of the testator, or within 30 days of the testator's death; or
- the testator is divorced or granted a dissolution of marriage after the will was made.

When children are born to the testator after a will has been made, the general rule is that these children (called *afterborn children* or *pretermitted heirs*) are entitled to share in the estate the same as the testator's other children. The testator, however, is not bound by this general rule, since testators are not required to leave anything to their children. Like other children, afterborn children can be specifically disinherited, or can be treated differently from their siblings. A testator's directions will be followed by the court if the will clearly shows that afterborn children are not to share in the estate, or are to share in a different way from the children who were alive when the will was made.

Similarly, when an individual named as a beneficiary in a will dies before the testator (called a *predeceased beneficiary*), the gift is not automatically invalidated (or *lapsed*) unless the will makes it clear that the beneficiary must survive the testator. Ohio's "anti-lapse" statute says that, if the will does not specifically state that a gift to a predeceased beneficiary is invalid, then the gift goes to the lineal descendants of the predeceased beneficiary, as long as that beneficiary is a relative of the testator. If the predeceased beneficiary is not related, no gift passes to his or her lineal descendants.

The property of a lapsed gift becomes part of the *residuary estate*, to be distributed to the (other) *residuary beneficiaries*—those people who are named to receive the balance of the estate after all debts are paid and specific bequests are distributed.

When an individual named in the will dies within 30 days of the testator, that individual is considered to have died before the testator, unless the testator says otherwise in his or her will.

A will does not take effect until the testator's death, and thus addresses only property that the testator owned at death. The fact that the testator disposed of some property and acquired other property after the will was made does not necessarily affect the will. A will can still be valid and control distribution of estate assets even though, at death, the testator owned none of the specific property he or she mentioned in the will and owned when the will was made. Of course, if the testator does not own the specifically mentioned property or any interest in it when he or she dies, then a gift of that property would be invalid. For example, if Peter's will states, "Mary will receive my 1920 Rolls Royce," and the Rolls Royce was sold before the testator's death, Mary obviously would not be able to receive that Rolls Royce through Peter's will.

# What Happens When There Is No Will?

Some individuals simply choose not to make a will, while others do not make a will because they might not want to offend their relatives, or because they believe that the distribution required by law is appropriate for their situations. Others may feel wills are important, but never get around to writing them. Some people make wills that dispose of only part of their property, while some wills are invalid in whole or in part. Even when there is a valid will, an individual may choose not to take the share provided in the will.

In any case, when an individual dies owning property not governed by a valid will, Ohio law dictates how his or her property must be distributed.

## Statute of Descent and Distribution

The basic provisions governing inheritance of *intestate property* (or property not governed by a will or will substitutes) are found in a law called the *statute of descent and distribution*. For the most part, the statute (*Ohio Revised Code* § 2105.06) favors the nearest relatives surviving the deceased. It provides for distribution of intestate property as follows in the graphic to the right.

Those who are entitled to inherit from a testator by intestacy are called the testator's *heirs*. If a testator leaves a will, then the testator will have *will beneficiaries* as well as heirs; these two groups might or might not be the same people.

## Share of Descendants and Next-of-Kin or Heirs

In all of the above cases in which lineal descendants inherit, their respective shares are determined according to their place in the family tree and through the ancestor who “represents” them (this representation is known as *per stirpes*). For this example, assume Mary and Peter have four children: Peter dies. Three years later, Mary dies without a will (*intestate*); three of her four children (Abe, Ben and Carol) are alive at her death; a daughter (Diane), who died before Mary, had two children who are alive.

In this instance, the estate would be divided into fourths. Mary's three surviving children would each take one-fourth and her two grandchildren would share equally in their deceased parent's (Diane's) one-fourth. These grandchildren would each get one-eighth of the estate, since their mother (Diane) is said to represent them.

The members of the nearest generation of descendants with a living member inherit equally.

For example, if Mary's only living relatives were seven grandchildren—Abe had one, Ben had none, Carol had four, and Diane had two—Mary's estate would be divided into seven equal portions. But if Ben and the seven grandchildren all survived Mary, then Mary's estate would be divided into four equal portions: one for Ben, one for Abe's child, one to split four ways among Carol's children, and one to divide equally between Diane's two children.

You can see that whether Abe's child receives one-fourth or one-seventh of Mary's estate depends on whether his Uncle Ben survives Mary, which might be by as little as 30 days.

# Statute of Descent and Distribution

Situation	Heirs and Distribution
1. No surviving spouse, but a surviving child or children or the lineal descendants of a deceased child.	Each living child receives an equal share of the estate and the descendants of a deceased child will divide that deceased child's share.
2. A surviving spouse (who is the natural or adoptive parent of all of the decedent's children) and one or more children of the decedent or the lineal descendants of a deceased child.	The entire estate goes to the surviving spouse.
3. A surviving spouse (who is not the natural or adoptive parent of the decedent's child) and one child or the lineal descendants of a deceased child.	The first \$20,000 goes to the surviving spouse plus one-third of the balance of the estate; the remainder goes to the child or the child's lineal descendants.
4. A surviving spouse (who is the natural or adoptive parent of one but not all of the decedent's children) and two or more children or the lineal descendants of any such deceased child.	The spouse receives \$60,000 plus one-third of the balance of the estate and the remainder goes to the children, equally; the lineal descendants of a deceased child divide the deceased child's share.
5. A surviving spouse (who is not the natural or adoptive parent of any of the decedent's children) and two or more children or the lineal descendants of any such deceased child.	The spouse receives \$20,000 plus one-third of the balance of the estate and the remainder to the children equally; the lineal descendants of a deceased child divide the deceased child's share.
6. A surviving spouse, but not surviving children or lineal descendants of a deceased child.	The entire estate passes to the surviving spouse.
7. Surviving parents, but no surviving spouse, children or lineal descendants of a deceased child surviving.	The estate goes to the parents in equal shares or the entire estate goes to the surviving parent.
8. Surviving siblings of the decedent, but no surviving spouse; no children nor lineal descendants of a deceased child and no parents surviving.	The estate goes to the surviving siblings (whether whole or half blood) with the lineal descendants of a deceased sibling dividing the deceased sibling's share.
9. One of more grandparents surviving, but no surviving spouse; no child nor the lineal descendants of a deceased child; no parents and no siblings surviving.	One-half of the estate goes to the paternal grandparents, equally, and one-half goes to the maternal grandparents, equally.
10. No surviving spouse, no children or deceased children, no parents, no siblings, no grandparents and no lineal descendants of grandparents.	Estate goes to the next of kin, if living, or to the step-children of the decedent with the lineal descendants of a step-child taking the step-child's share, or, if none, then "escheat" (pay) to the state.

# Administration of Estates

The purposes of the administration of estates are to ensure that all of a deceased individual's property is identified and assembled, that his or her debts are paid, and that the balance of his or her property is distributed to those entitled to it.

## Estates Subject to Administration

All estates must be settled according to the standard probate procedures for administering estates, established by Ohio law. However, estates totaling \$35,000 or less (or \$100,000 or less if everything is going to a surviving spouse) may be relieved from most of the formal steps of administration when the probate court is satisfied that the deceased individual's debts will be paid and his or her property will be given to those entitled to it. Relief from administration can mean substantial savings in time and court costs. In addition, estate administration can be streamlined when the sole executor and the sole beneficiary of the estate are the same person, regardless of the size of the estate.

## Probating the Will

When a person dies leaving a will (i.e., dies *testate*), the first step in administering the estate is to admit the will to probate. Under this procedure, the will is filed in the probate court. The court then examines the document to determine if it is a valid will. It may admit the will or, if there is some doubt about the validity, the court may order the witnesses to the will to appear and testify about the genuineness of the deceased individual's signature, or the deceased's condition at the time the will was signed, etc. If the witnesses cannot be located, their signatures may be validated by other testimony. The court will accept the will, (i.e., admit it to probate) if and when it is satisfied that the will is valid.

## Appointing an Executor or Administrator

Once the will is admitted to probate, the court appoints an *executor* (named in the will) of the estate. The executor is responsible for seeing that the estate is properly settled according to law. If an individual died without a will (or if the will fails to appoint an executor who is able to serve), the court appoints an *administrator* (whose duties are essentially the same as an executor). Executors and administrators are *fiduciaries*, meaning that they are authorized to act on behalf of others and are entrusted to properly handle others' estate assets. Although the probate court is not bound to appoint the person named by the testator, the court will normally appoint that person if the person is qualified to act as executor.

For intestate estates, the court prefers that a relative of the deceased act as administrator. In addition, an administrator must live in the state where the estate is being settled. Residency in the state is usually not technically required for an executor, but the court often prefers it.

Appointment of an executor or administrator is complete when the appointee accepts, acknowledges his or her duties and liabilities and posts a bond for the faithful performance of those duties. The purpose of the bond is to protect the estate's beneficiaries and creditors against the possibility that the executor or administrator will not honestly administer the estate.

Wills often contain a provision specifically asking the court to dispense with the bond for the named executor, indicating trust in the executor named in the will to faithfully perform the necessary duties. And while the court is not bound by such a request, it will usually grant it. If a bond is required, the premium is paid out of the estate's assets.

When the appointment is complete, the court will send the executor or administrator a written authorization to act on behalf of the estate. This authorization is called *letters testamentary* or *letters of authority* when issued to an executor and *letters of administration* when issued to an administrator.

When an executor or administrator dies, becomes ill, otherwise is unable to complete his or her duties, or does not properly perform those duties, he or she must be replaced. A successor or replacement executor is often named in a will. If the will does not name a successor, or if individuals named in the will as successors cannot serve or are not suitable to serve as executor, the court will name an individual (called an *administrator*, *W.W.A.*, or *administrator with the will annexed*) to perform those duties.

### **Finding, Assembling and Appraising the Estate Property**

The first duties of the executor or administrator are to locate all estate property, take an inventory of the property and, if necessary, have the property appraised or valued by one or more impartial appraisers. Although professional appraisers are not required if the property is easy to value (stocks, bank accounts, etc.), their services are required when the estate includes real estate, jewelry, antiques, etc. When the inventory and appraisal is complete, it is filed with the probate court.

Most deceased's assets include non-probate assets. These assets include living trusts, insurance policies, joint and survivorship and payable-on-death (POD) accounts, transfer-on-death (TOD) accounts, and deeds and securities or pension plans with named beneficiaries. The proceeds of these assets are part of the gross "estate" for federal and (usually) Ohio estate tax purposes, but generally are not part of the probate "estate" and, therefore, need not be listed on the inventory filed with the court.

The executor or administrator also has other duties. For example, the deceased may have been involved in a lawsuit as a plaintiff or defendant at the time of death, or the deceased (or the estate) may have a legal claim or cause of action against another party. The executor or administrator must see that the pending lawsuit is prosecuted, defended, or settled. Similarly, where the deceased had a claim or cause of action, which was not asserted, or only partially asserted, the

executor or administrator must finally assert the claim and, if necessary, file a lawsuit in a timely manner. For example, if the deceased was killed in a traffic accident, the executor or administrator may have to file a lawsuit to collect damages for wrongful death.

### **Paying Debts, Taxes, Costs and Other Expenses**

The executor or administrator must determine what, if any, debts the deceased owed. Creditors have six months after the deceased's death to present claims against the estate. These claims should be sent to the executor or administrator by certified mail. Any claim not made within six months is barred forever.

Debts of the estate may include debts the deceased incurred before death, or debts incurred by the estate, such as utility bills, real estate taxes and other expenses for maintaining estate assets. Examples of common estate debts are hospital and funeral expenses. Other obligations of the estate occur following death, such as probate court costs, attorney fees, appraiser fees and the compensation the executor or administrator may take for his or her services, and sometimes, depending upon the value of the estate, estate taxes.

Certain debts have priority. Generally, taxes, funeral expenses, and costs and expenses of administering the estate must be paid first. Usually, debts, costs and expenses will be paid out of cash in the estate. If there is not enough cash, it will be necessary to sell some of the estate property. Personal property will be sold first. If there is not enough personal property, real property (house/land) will be sold. The sale of personal property may be conducted in various ways. The sale might be a public or private sale of individual items, or it might be some form of auction. Unless the deceased authorized the executor to sell assets, the probate court must grant permission to conduct a sale.

## Distribution of Estate Assets

When all debts, taxes, costs and expenses have been paid, the balance of the estate must be distributed to the individuals named in the will or, if there is no will, to those identified in the statute of descent and distribution (the heirs). Distribution may be in cash or in kind, if the will authorizes the executor to distribute in kind, or if the administrator of an intestate estate gets court permission to do so. In-kind distribution is the transfer of something in particular to a beneficiary. For example, the will may state that the deceased's daughter is to receive a wedding ring and a silver tea service. If a sale is not necessary to obtain funds to pay debts, taxes, costs and expenses, or to obtain the necessary cash to pay all the heirs, the executor or administrator may transfer the wedding ring and tea service directly to the daughter. Sometimes a will explicitly authorizes the executor to make distribution in kind. The executor or administrator will usually consult the heirs to determine if they want cash or the particular property.

When authorized by the will or by the probate court, partial distribution of the estate property may be made to one or more heirs before the estate is completely settled and closed. Partial distribution is often made when the property involved is such that it should not go unused until the estate is settled (automobiles are often transferred under a partial distribution because they lose their value quickly and may suffer if not driven). Also, partial distribution is common in large estates, which may remain open for some time. Partial distribution, however, should not be made unless the administrator or executor is sure that enough property will be left in the estate to pay debts, taxes, costs and expenses.

The administrator or executor must notify those who receive partial distribution of estate assets that they might have to return it (or its value) if funds are later needed to satisfy a claim against the estate. For example, creditors have six months to make a claim against an estate. If a partial distribution is made before the six-month deadline and then an unexpected large claim is

made against the estate, beneficiaries of the partial distribution may have to return the amount or its value so that the claim can be paid.

## Accounting of Estate Assets

The executor or administrator is required to file an account within six months showing the estate assets, income, costs, expenses and distribution. This period is extended to 13 months in certain circumstances, including cases subject to a will contest or other litigation, or if the estate is required to file an Ohio or federal estate tax return. When the probate court approves the final account of an executor or administrator, some courts will explicitly release the executor or administrator from his or her fiduciary duties.

# Estate, Health and Financial Planning

## Estate Planning

*Estate planning* is the process of preparing for the disposition of a person's assets and execution of his or her wishes during life or at death, as well as preparing for alternate decision-makers in the event of one's incapacity. Wills, trusts, powers of attorney, life insurance policies, pension plans and bank accounts are some tools used in estate planning. The general purposes of estate planning are to:

- transfer an owner's assets to the people or organizations selected by the owner;
- minimize the effects of taxes; and
- allow the owner to choose an agent or trusted person who will carry out the owner's plan.

In general, trusts are legal agreements in which the trust maker (called a *settlor* or *grantor*) transfers property to himself/herself or to another person (a *trustee*) who manages the trust for the grantor's benefit and/or for the benefit of third persons.

A *living trust* (or *inter vivos trust*) is created (signed and funded) when the trust maker or grantor is alive. A living trust is the opposite of a

*testamentary trust*, which is a trust created by the grantor's will.

Living trusts have become popular in recent years because they have many advantages, including:

- avoiding the cost and difficulties of probate administration;
- avoiding the costs and court intrusions of traditional guardianships, if the grantor should become incompetent;
- providing a vehicle for implementing a tax plan to reduce or eliminate estate taxes; and
- ensuring confidentiality.

These advantages can be overstated, however. Estate planning requires individuals to make informed choices. They must investigate the various tools available and understand their effects. For example, while living trusts are very flexible, they are not cure-alls, nor are they applicable in every situation. For example, consider that while there are expenses involved in the probate administration of a deceased's assets, expenses also are involved in establishing and administering a living or a testamentary trust. In addition, a will and, thus, some probate administration, is necessary for most individuals who have a living trust because some assets are not placed in a living trust. Also, probate administration can be helpful in some estates and guardianships because of the probate court's supervision and required regular reports. Also, the court can replace fiduciaries that do not do their jobs.

One thing that a revocable living trust *cannot* do, contrary to some advertising, is to help an individual qualify for public assistance programs, such as Medicaid and Supplemental Security Income (SSI). These programs create special estate-planning considerations for individuals who are trying to provide for themselves as senior citizens, or are trying to provide for someone with a disability. Public assistance programs have strict and complex asset and income requirements. To meet these requirements, individuals sometimes transfer assets to their children or to *irrevocable* trusts so that their children will receive an

inheritance. The federal government has responded to this kind of transfer by establishing a period after such a transfer in which an individual is ineligible for public assistance (for example, the current waiting period for Medicaid eligibility is up to five years after a transfer of assets).

On the other hand, government rules make it possible for an individual, with proper planning, to go to a nursing facility without impoverishing his or her spouse. In addition, the state of Ohio has made it possible to create an *irrevocable supplemental services trust* for an individual with mental illness or mental retardation, or other developmental disability. The trust allows certain assets to be sheltered for limited purposes but, upon the death of the beneficiary of the trust, a portion of the assets goes to the state of Ohio for the use of other Ohioans with disabilities.

A *revocable living trust* (as opposed to an *irrevocable trust*) is not directly relevant to public assistance planning because it can be revoked or canceled. For this reason, the trust assets are considered to belong to the trust owner for public assistance planning purposes. A living trust might, however, be very useful to, say, a mother who wishes to use it as part of a general estate plan, for example, to provide a trust for the care of her disabled son after her death.

Estate planning is a detailed process that must be tailored to the needs of particular individuals. An individual who is contemplating the use of a living trust, or other estate-planning device, should consult an attorney for assistance in this complex area.

## **Incapacity and Health Care Planning**

While advanced medical techniques have made it possible to prolong the lives of individuals with health conditions, they also raise practical, moral and legal questions. Concern for these life-and-death issues, and the burden and potential liability they place on the family and medical providers, has led to the development of various legal devices. The *health care power of attorney* and the *living will* are among these devices.

### • Durable Power of Attorney

The word *attorney* simply means representative agent. A *power of attorney* is a document that appoints someone as an agent, either for limited purposes or for very broad, all-inclusive purposes.

Generally, when someone becomes incompetent (for instance, when injury, age or a condition such as Alzheimer's disease takes away the person's ability to handle his or her own financial affairs and make medical decisions), any power of attorney that he or she has previously executed becomes null and void.

However, a power of attorney can be drafted in a way that it remains valid if it includes a provision specifically stating that it should not be terminated even after a person (the *principal*) becomes incompetent. Such a provision makes it a *durable* power of attorney.

### • Health Care Power of Attorney (HCPOA)

One type of durable power of attorney is called the *health care power of attorney* (HCPOA, also sometimes called a "DPOA"). It permits an agent to make health care decisions if the principal's physician has determined that he or she is unable to make and communicate his or her own health care decisions. The principal grants this power knowing that at some time in the future he or she may not be able to make such decisions, and gives the agent guidance on what to do.

Unlike a living will, discussed below, the agent's powers are not limited to the time of the principal's terminal illness or permanently unconscious state. The agent may be given broad powers over every type of medical or medically related situation or decision (provided that the principal is unable to make and communicate his or her own health care decisions). However, the law imposes certain restrictions. For example, the agent cannot authorize the removal of treatment that the principal has previously authorized unless circumstances have changed substantially. Also, the agent cannot authorize the removal of life-sustaining treatment unless the principal is in a

terminal condition or permanently unconscious state.

To be a valid document, the HCPOA must be:

- executed by a competent adult;
- signed and dated by the person granting the power; and
- witnessed by two disinterested and legally competent individuals OR acknowledged before a notary public who will attest the individual appears to be of sound mind and not under or subject to duress, fraud, or undue influence.

### • Living Will

The *living will* is an individual's own statement and choice about the specifics and extent of treatment he or she wishes to receive when he or she is in a terminal condition and/or permanently unconscious state and no longer able to make and communicate those decisions. The living will does not appoint another person to make these decisions.

As with the HCPOA, a living will has certain limitations. A living will becomes operative only when:

- the attending physician and a second physician determine that the person (*declarant*) is in a terminal condition or a permanently unconscious state; and
- the attending physician determines the person is not able to make informed decisions regarding treatment, and there is no reasonable possibility that he or she will regain the capacity to make these decisions.

Any competent adult may execute a living will with the same formalities described above for the HCPOA.

A living will may include the declarant's intent to make an anatomical gift (such as organs or tissues) upon his or her death. In this case, the declarant also should complete a Donor Registry Enrollment Form and send it to the Ohio Bureau of Motor Vehicles so his or her name can be added to Ohio's official donor registry.

Both the HCPOA and living will documents are also known as *advance directives* because they state an individual's wishes about medical and

end-of-life treatment *before* such treatment may be needed. Anyone interested in an HCPOA or a living will should review the forms for each developed by the Ohio State Bar Association with the Ohio State Medical Association, the Ohio Hospital Association, the Ohio Osteopathic Association and the Ohio Hospice & Palliative Care Organization. The forms conform to the requirements of the law and are available from the Ohio Hospice & Palliative Care Organization through its Web site at <http://www.ohpco.org/>. It is not necessary to use the standard forms. However, for either document to be valid, it must include certain specific language spelled out in the *Ohio Revised Code* and included in these forms. Physicians and attorneys will have copies of the standard forms, as will many organizations.

A person's advance directives should be updated every few years, for changes in both the law and in personal circumstances. In December 2004, new standard forms were issued to conform with changes in Ohio law. Documents executed before 2004 are still valid, but those signing since then should be sure to use the current standard forms or check with an attorney to make sure changes in the law are reflected in the documents.

Other, less common, types of advance directives are described below.

#### • **Mental Health Declaration**

*A Declaration of Mental Health Treatment* is a document that allows an individual to state his/her own preferences regarding mental health treatment and to appoint a person to make mental health care decisions when he/she is unable to do so.

A regular HCPOA can address both physical and mental health issues, and still is sufficient for many Ohioans. In comparison to physical health care issues, however, mental health issues can be more complex and their specific treatments (e.g., medications and therapies) generally are not addressed in a general HCPOA. Those who would benefit from having such a document include people who have been diagnosed with mental illness or people who think they might need

mental health treatment at some point (for example, those of advanced age or those who have a progressive illness that is likely to involve mental health issues).

The mental health declaration lets health care professionals know the principal's own preferences regarding mental health treatment. It also allows the agent (or *proxy*) to advocate for these choices and make other decisions in principal's best interest if no preference is stated.

#### • **DNR Orders**

In medical terminology, "DNR" stands for "do not resuscitate." A DNR order is a physician order written into a patient's medical records that says cardiopulmonary resuscitation (CPR) is not to be administered. Doctors are required by their code of ethics to do everything they can to keep a patient alive, unless 1) the patient will not be able to recover any kind of meaningful life, and 2) the patient specifically requests that he or she not be revived in the event of a catastrophic illness.

A person can obtain a DNR order by asking his or her physician to write such an order. If, after consulting with the patient, a physician determines that both of the necessary conditions exist, the physician will write the DNR order into the patient's medical records. It will go into effect immediately.

A person also can pre-authorize a physician to write a DNR order in the event that he or she becomes terminally ill or permanently unconscious. A person may use the following two documents to authorize and request that his or her physician write a DNR order:

- a living will; or
- a health care power of attorney authorizing an agent to request such action.

It is important to understand, however, that a person's authorization or request does not constitute an actual DNR order; such an order is actually in place **ONLY** when a physician has specifically written a DNR order into the patient's medical records at the time of the patient's terminal illness or permanent unconsciousness.

Because a living will takes effect only if and when a person is terminally ill or in a permanently unconscious state, a DNR order that is authorized by a living will cannot be issued until the person is determined to be so afflicted in the opinion of two physicians, one of whom must be a specialist. Similarly, a person may give an agent the authority, through an HCPOA, to direct a physician to issue a DNR order, but that authority takes effect only when the patient is unable to communicate his or her own wishes.

## Other Duties of the Probate Court

Commitment of the mentally ill and retarded, appointment and supervision of guardians, supervision of adoptions, and the issuance of marriage licenses are among the important duties of the probate court.

### Commitment of the Mentally Ill or Retarded

When an individual suffering from mental illness or mental retardation poses a danger to the self or others, or needs special care that he/she refuses or is unable to get, then that individual may be asked to come before the probate court for the purpose of being committed to a hospital or institution for care or treatment. The probate judge may commit such an individual to a public or private hospital or institution only after carefully assessing the evidence of that person's mental status.

### Guardianships

A *guardian* is an individual appointed by the probate court to be responsible for another person, or for another person's property, or both. (The individual for whom the guardian is appointed is called the *ward*.) A guardian will be appointed if the ward is unable to handle his or her affairs. The disability may be due to youth, advanced age,

mental condition or physical condition. A guardianship may be voluntary (that is, the guardian is appointed at the ward's request) or it may be involuntary. A guardian is a fiduciary and must take charge of his or her ward's property and give a periodic accounting of the ward's condition and financial affairs to the probate court.

Under the law, the court must take the "least restrictive alternative" in establishing the appropriate care for the ward.

Ohio allows the probate court to appoint *limited guardians* and *conservators*. In general, when a person is legally incompetent, but the nature of what he or she owns or his or her personal situation does not require the guardian to perform all of the duties of living, the court can appoint a limited guardian to perform only those functions that are necessary. This might be the case, for example, when a person has only an interest in real estate that needs to be managed, but the cost and mechanics of his or her personal care is being covered by a spouse. In such a case, the court might appoint a limited guardian who is only responsible to take care of the real estate, and does not have to handle other affairs. A family member or friend might be willing to assume this kind of limited duty, but not other duties that a guardian normally would have to perform.

When an individual is mentally capable but physically infirm, the court can appoint a conservator to assist the individual in handling his or her affairs, either temporarily or permanently. Where a conservatorship is established, the judge sets forth the particular duties that the conservator is to perform. Thus, if someone were injured in an automobile accident and were in a full body cast for four months, the court might appoint a conservator to make deposits, sign checks, handle mail, and do other day-to-day things (with input from the injured person) until the cast was removed and the injured person was again able to resume control.

The court also may appoint an *interim guardian* or an *emergency guardian* in special situations such as a temporary disability, or until a full hearing can be arranged to determine whether

a full guardianship is necessary. Interim and emergency guardians only serve for short periods.

## Adoptions

*Adoption* is the legal method by which a single adult, a husband and wife, or life partners gain full responsibility for rearing and caring for someone else's minor child. Through adoption, the child legally becomes the child of the adoptive parent or parents following approval by the probate court.

The probate court evaluates the prospective parents (or parent) to determine if the proposed adoption is in the child's best interest. If so, the probate court approves the adoption. A child of any age up to 18 can be adopted. (Under certain circumstances a disabled adult can be adopted.)

Adoptions occur in various situations. A stepchild may be adopted by his or her stepparent; orphans, abandoned children, children placed for adoption by their parents, and children whose

legal relationship with their parents has been ended by a court also may be adopted.

## Marriage Licenses

The probate court supervises the issuance of marriage licenses. (*Marriage licenses are examined in more detail in Part X at "The Marriage License."*) In summary, the probate court will not issue marriage licenses to a prospective married couple if either:

- is underage;
- is under the influence of alcohol or a controlled substance at the time of application; or
- suffers from a communicable form of syphilis.

Blood tests are not required to obtain a marriage license in Ohio. If an applicant is underage, a license can be issued if appropriate parental consent is provided and the court is satisfied that suitable counseling has been received. If a girl is under 16 and pregnant, the juvenile court may grant permission to marry.

## Chapter Summary

- The *probate division* (or probate court) of the court of common pleas in each of Ohio's 88 counties is one of the busiest in the court system.
- *Probate law* covers the proper administration of the estates of individuals who have died—including the payment of taxes and court-approved debts, and the transfer of all probate estate property to the appropriate individuals or entities.
- Probate law also governs the issuance of marriage licenses, adoptions, appointment of guardians to care for children and other persons who cannot care for themselves or their property, and proper care and treatment for the mentally ill, mentally retarded persons, or persons suffering from developmental or physical disabilities.
- Individuals serving in positions of trust, whether they are executors, administrators, guardians, conservators, trustees, attorneys-in-fact, or other persons who act on behalf of third persons, are called *fiduciaries*.
- The current owner of private property can determine who is to be the future owner when the current owner dies. The most common device to transfer ownership upon death is a *will*, or more formally, a *last will and testament*. An individual making a will is called a *testator*.

***Continued on page 126***

## Chapter Summary *continued*

- A will cannot govern the distribution of the testator's property unless it is filed with the probate court.
- When an original will is misplaced or destroyed in some way, a copy can be admitted to probate, provided it can be proven that the will is valid and is the last will of the testator, and that the testator did not intentionally damage or destroy it in order to revoke it, or did not know that the will had been misplaced, damaged, or destroyed.
- A will can be revoked in a number of ways. The most common way is by making a new, or later, will.
- The basic provisions governing inheritance of *intestate property* (or property not governed by a will or will substitutes) are found in a law called the *statute of descent and distribution*. For the most part, the statute favors the nearest relatives surviving the deceased.
- Estates are administered through the probate process to ensure that all of a deceased individual's property is identified and assembled, his or her debts are paid and the balance of his or her property is distributed to those entitled to it.
- Once the will is admitted to probate, the court appoints an executor of the estate. An *executor* is someone who is responsible for seeing that the estate is properly settled according to law.
- If there is no will, the court appoints an *administrator* to handle the estate's administration.
- Estate executors and administrators must locate and take inventory of all estate property, determine and pay any debts owed by the deceased, pay any estate taxes that are required, and distribute the balance of the estate to individuals named in the will or designated by the statute of descent and distribution. When an estate is closed, the executor or administrator must file an account of assets, income, costs, expenses and distribution with the court.
- *Estate planning* is the process of managing a person's assets and decisions during life or at death. Wills, trusts, powers of attorney, life insurance policies, pension plans and bank accounts are some tools used in estate planning.
- Concern for life-and-death issues, and the burden and potential liability they place on the family and medical providers, has led to the development of various legal devices. The *health care power of attorney*, the *living will* and the *mental health declaration* are among these devices.
- Commitment of the mentally ill and retarded, appointment and supervision of guardians, supervision of adoptions, and the issuance of marriage licenses are among other important duties of the probate court.

## Web Links:

### **OSBA's "Law You Can Use" articles:**

(go to <http://www.ohiobar.org/pub/lycu> and search for article by title or by topic)

- "Ask Questions To Decide if a Living Trust is Right for You"
- "Complete Asset List Is Essential"
- "Five Reasons To Plan Your Estate Now"
- "Guardianships Impact Estate Planning"
- "Keep DNR Orders Where Emergency Squads Can Find Them"
- "Know Legal Steps To Take after Someone Dies"
- "Ohioans Can Use Living Will To Express Anatomical Gift Intentions"
- "Ohio's Income Tax on Trusts Is Here To Stay"
- "Recognized Advance Directive Forms Simplify Health Care Planning"
- "Transfer-on-Death Deed Avoids Probate"
- "What You Should Know about the Declaration of Mental Health Treatment"
- "What You Should Know about Guardianships and Advance Care Planning"
- "What You Should Know about Organ and Tissue Donation"

### **OSBA's "LawFacts" pamphlets:**

(go to <http://www.ohiobar.org/pub/lawfacts/> and search by title)

- "Administering an Estate Without a Will"
- "Financial Powers of Attorney"
- "Guardianships"
- "Living Trusts"
- "Probate"
- "Wills"
- "Living Wills and Health Care Powers of Attorney"
- "DNR Orders"

### **From Hieros Gamos's Web site:**

<http://www.hg.org/estate.html>

- "Estate and Trust Law" page

### **From Cornell Law School Legal Information Institute:**

[http://www.law.cornell.edu/wex/index.php/Estate\\_Planning](http://www.law.cornell.edu/wex/index.php/Estate_Planning)

[http://www.law.cornell.edu/wex/index.php/Estates\\_and\\_Trusts](http://www.law.cornell.edu/wex/index.php/Estates_and_Trusts)