



Section IX

probate law

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

– Chester A. Arthur

The 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 applications 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.

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/she owns or his/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 step-parent. 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 Section 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 control-led 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.

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/Estates_and_Trusts