

Report of the Estate Planning, Trust, and Probate Law Section

1 *To the Council of Delegates:*

2 The Estate Planning, Trust, and Probate Law Section respectfully requests your favorable
3 consideration of the following legislative proposals.

4 A. A proposal to amend R.C. 2305.19 to provide that the savings statute does not apply
5 to certain actions brought under Revised Code Title 21 and Revised Code Title 58,
6 where there is a statute of limitation relative to a particular proceeding, or a time bar
7 for an heir, beneficiary, or other interested person, such as a claimant, to file an action
8 to enforce such interest against an estate or trust. Proposal is attached as Exhibit A.

9 B. A proposal to amend R.C. 2106.26 and R.C. 3103.06 to allow postnuptial agreements
10 for the limited purpose of waiving spousal rights at the time of death. Proposal is
11 attached as Exhibit B.

12 C. A proposal to amend R.C. 2111.05 to increase the termination of small guardianships
13 from \$10,000.00 to \$25,000.00 and to amend R.C. 2111.18 to increase the amount for
14 settlement of an injury to a ward or a ward's property from the current \$10,000.00 to
15 \$25,000.00. . Proposal is attached as Exhibit C.

16 Respectfully submitted,

17 **Karen M. Moore**, *Columbus*
18 Chair

19 **EXHIBIT A.**

20 **R.C. 2305.19 Saving in case of reversal.**

21 (A) In any action that is commenced or attempted to be commenced, if in due
22 time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon
23 the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the
24 plaintiff's representative may commence a new action within one year after the date of
25 the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or
26 within the period of the original applicable statute of limitations, whichever occurs later.
27 This division applies to any claim asserted in any pleading by a defendant.

28 (B) If the defendant in an action described in division (A) of this section is a
29 foreign or domestic corporation, and whether its charter prescribes the manner or place of
30 service of process on the defendant, and if it passes into the hands of a receiver before the
31 expiration of the one year period or the period of the original applicable statute of
32 limitations, whichever is applicable, as described in that division, then service to be made
33 within one year following the original service or attempt to begin the action may be made
34 upon that receiver or the receiver's cashier, treasurer, secretary, clerk, or managing agent,
35 or if none of these officers can be found, by a copy left at the office or the usual place of
36 business of any of those agents or officers of the receiver with the person having charge

37 of the office or place of business. If that corporation is a railroad company, summons
38 may be served on any regular ticket or freight agent of the receiver, and if there is no
39 regular ticket or freight agent of the receiver, then upon any conductor of the receiver, in
40 any county in the state in which the railroad is located. The summons shall be returned as
41 if served on that defendant corporation.

42 (C) This section does not apply to an action involving any one or more of
43 sections 2106.22, 2107.76, 2109.35, 2115.16, 2117.12, 5806.04, and 5810.05 of the
44 Revised Code.

45 **R.C. 2107.76 Will contest action - time limits.**

46 (A) No person who has received or waived the right to receive the notice of the
47 admission of a will to probate required by section 2107.19 of the Revised Code may
48 commence an action permitted by section 2107.71 of the Revised Code to contest the
49 validity of the will more than three months after the filing of the certificate described in
50 division (A)(3) of section 2107.19 of the Revised Code. No other person may commence
51 an action permitted by section 2107.71 of the Revised Code to contest the validity of the
52 will more than three months after the initial filing of a certificate described in division
53 (A)(3) of section 2107.19 of the Revised Code. A person under any legal disability
54 nevertheless may commence an action permitted by section 2107.71 of the Revised Code
55 to contest the validity of the will within three months after the disability is removed, but
56 the rights saved shall not affect the rights of a purchaser, lessee, or encumbrancer for
57 value in good faith and shall not impose any liability upon a fiduciary who has acted in
58 good faith, or upon a person delivering or transferring property to any other person under
59 authority of a will, whether or not the purchaser, lessee, encumbrancer, fiduciary, or other
60 person had actual or constructive notice of the legal disability.

61 ~~(B) Section 2305.19 of the Revised Code does not apply to an action permitted~~
62 ~~by section 2107.71 of the Revised Code to contest the validity of a will.~~

63 **Rationale for Proposal:**

64 The Ohio General Assembly has often expressed its interest to expedite the
65 administration of estates by reducing certain limitation periods, most recently in the
66 following circumstances:

67 1. Presentment of claim against an estate—from one year to six
68 months after death of decedent as provided in R.C. 2117.06,
69 effective for decedents who died after April 8, 2004.

70 2. Certificate of giving notice of admission of a Will to
71 probate – limitation in R.C. § 2107.19(A)(4) reduced from 3
72 months to 2 months after admission, effective for decedents who
73 died after April 8, 2004.

74 3. Election of surviving spouse under R.C. 2106.01 to take
75 under decedent’s Will or under intestate succession, and exercise
76 of all other surviving spouse’s rights under R.C. Chapter 2106, to

77 be made within five months after appointment of fiduciary,
78 effective for decedents who died after April 8, 2004.

79 4. Will Contests - limitation reduced from 4 months to 3
80 months after filing certificate of notice in R.C. 2107.19(A)(4),
81 effective for decedents who died after January 1, 2002.

82 5. An action to contest the validity of an antenuptial
83 agreement entered into by the decedent under R.C. 2106.22 - from
84 six months to four months after the appointment of the fiduciary,
85 effective for decedents who died after May 31, 1990.

86 Further, the General Assembly enacted R.C. 5806.04 (formerly 2305.121),
87 effective July 23, 2002, to provide that actions pertaining to revocable trusts made
88 irrevocable by the death of the settlor, such as a contest of the validity, or revocation, or
89 amendment, of the trust, or an action to contest the transfer of property to the trust, must
90 be commenced within two years of the death of the settlor. Moreover, under R.C.
91 5810.05, the General Assembly has expressed an intention that a trustee and trust
92 beneficiaries be provided with finality in the administration of the trust. That section
93 provides that a beneficiary may not commence an action against a trustee for breach of
94 trust more than two years (or, under certain circumstances, four years) after the date the
95 beneficiary receives a report that discloses the existence of a potential claim for breach of
96 trust.

97 The proposed legislation would further the General Assembly's stated intent for
98 the orderly and timely administration of estates and trusts by making the savings statute
99 inapplicable to proceedings in which the General Assembly has provided a fixed statute
100 of limitations.

101 Importantly, the effect of the proposal will be to overturn the November 20, 2007
102 decision in *Vitantonio, Inc. v. Baxter*, 116 Ohio St.3d 195, 2007 – Ohio – 6052, in which
103 the Ohio Supreme Court held that the savings statute does apply to claim actions filed
104 against a decedent's estate.

105 **EXHIBIT B.**

106 **Waiver of rights of a surviving spouse**

107 R.C. 2106.26. (A) The right of election and all other rights of a surviving spouse,
108 including, but not limited to all rights under Chapter 2106 of the Revised Code, any right
109 to be appointed as a fiduciary under 2109.02, 2113.06, and 2111.03, of the Revised Code,
110 any right to descent and distribution under 2105.06 and 2105.061 of the Revised Code,
111 any right to expectancy of dower under 2103.02 of the Revised Code, may be waived,
112 wholly or partially, before or after marriage, by a written contract, agreement,
113 amendment of any existing pre-nuptial or post-nuptial agreement, or waiver signed by the
114 surviving spouse.

115 (B) A waiver by a surviving spouse under division (A) of this section is not
116 enforceable if the surviving spouse proves any of the following:

- 117 (1) The surviving spouse did not execute the waiver voluntarily.
- 118 (2) The waiver was unconscionable when it was executed, and, before execution
119 of the waiver, any of the following occurs:
- 120 (a) The surviving spouse did not have full knowledge or
121 understanding of the waiver or was not provided a fair and reasonable disclosure
122 of the property of the decedent.
- 123 (b) The surviving spouse did not enter into the waiver or agreement
124 freely and without fraud, duress, coercion, or overreaching.
- 125 (c) The surviving spouse did not have a meaningful opportunity to
126 consult with independent counsel.
- 127 (C) The issue of enforceability of a waiver is for decision by the court as a matter
128 of law.
- 129 (D) Unless the waiver provides otherwise, a waiver of “all rights,” or equivalent
130 language, in the property or estate of a present or prospective spouse is (i) a waiver by
131 each waiving party of all rights of a surviving spouse described in Division (A) of this
132 section and (ii) a renunciation by each waiving party of all benefits that would otherwise
133 pass to the waiving party from the other by intestate succession or by virtue of any will,
134 revocable trust, revocable beneficiary designation or similar revocable instrument taking
135 effect at death, executed before the waiver.

136 **Contracts Affecting Marriage**

137 **R.C. 3103.06.** Except for post-nuptial agreements relating to rights of a
138 surviving spouse at death as provided in Section 2106.26 of the Revised Code, a husband
139 and wife cannot by any contract with each other, alter their legal relations, except that
140 they may agree to an immediate separation and make provisions for the support of either
141 of them and their children during the separation.

142 Section 2. The provisions of this Act shall be effective for post-nuptial
143 agreements made on or after the effective date hereof.

144 **Rationale for Proposal:**

145 The section recommends legislation which would permit postnuptial agreements for the
146 limited purpose of waiving spousal rights at the time of death. Although most other states
147 prohibit postnuptial agreements for divorce and separation purposes (except for
148 immediate separation or divorce), they do permit postnuptial agreements for estate
149 planning purposes. The Uniform Probate Code has a similar provision. The following is
150 based on the Uniform Act, but has the same Ohio protections and requirements as
151 prenuptial agreements. See Gross v Gross (1984) 11 Ohio St 3d 99, and Fletcher v
152 Fletcher (1994) 68 Ohio St 3d 464. Although it is now very easy to avoid spousal rights
153 at death in Ohio, that could change, and many clients will be residents of other states with
154 augmented estates at the time of death.

155 **EXHIBIT C.**

156 **R. C. 2111.05 Estates not more than ~~ten~~ twenty five thousand dollars - termination**
157 **of guardianship.**

158 When the whole estate of a ward, or of several wards jointly, under the same
159 guardianship, does not exceed ~~ten~~ twenty five thousand dollars in value, the guardian
160 may apply to the probate court for an order to terminate the guardianship. Upon proof
161 that it would be for the best interest of the ward to terminate the guardianship, the court
162 may order the guardianship terminated, and direct the guardian, if the ward is a minor, to
163 deposit the assets of the guardianship in a depository authorized to receive fiduciary
164 funds, payable to the ward when he attains majority, or the court may authorize the
165 delivery of the assets to the natural guardian of the minor, to the person by whom the
166 minor is maintained, to the executive director of children services in the county, or to the
167 minor himself.

168 If the ward is an incompetent, and the court orders the guardianship terminated, the court
169 may authorize the deposit of the assets of the guardianship in a depository authorized to
170 receive fiduciary funds in the name of a suitable person to be designated by the court, or
171 if the assets do not consist of money, the court may authorize delivery to a suitable
172 person to be designated by the court. The person receiving the assets shall hold and
173 dispose of them in the manner the court directs.

174 If the court refuses to grant the application to terminate the guardianship, or if no such
175 application is presented to the court, the guardian only shall be required to render account
176 upon the termination of his guardianship, upon order of the probate court made upon its
177 own motion, or upon the order of the court made on the motion of a person interested in
178 the wards or their property, for good cause shown, and set forth upon the journal of the
179 court.

180 If the estate is ~~ten~~ twenty five thousand dollars or less and the ward is a minor, the court,
181 without the appointment of a guardian by the court, or the giving of bond, may authorize
182 the deposit in a depository authorized to receive fiduciary funds, payable to the guardian
183 when appointed, or to the ward when he attains majority, or the court may authorize
184 delivery to the natural guardian of the minor, to the person by whom the minor is
185 maintained, to the executive director who is responsible for the administration of children
186 services in the county, or to the minor himself.

187 If the whole estate of a person over eighteen years of age, who has been adjudged
188 ~~mentally ill or mentally retarded~~, incompetent does not exceed ~~ten~~ twenty five thousand
189 dollars in value, the court, without the appointment of a guardian by the court or the
190 giving of bond, may authorize the deposit of the estate in a depository authorized to
191 receive fiduciary funds in the name of a suitable person to be designated by the court, or
192 if the assets do not consist of money, the court may authorize delivery to a suitable
193 person to be designated by the court. The person receiving the assets shall hold and
194 dispose of them in the manner the court directs.

195 **R.C. 2111.18 Claim for injury to ward or damage to property - settlement.**

196 When personal injury, damage to tangible or intangible property, or damage or loss on
197 account of personal injury or damage to tangible or intangible property is caused to a
198 ward by wrongful act, neglect, or default that would entitle the ward to maintain an action
199 and recover damages for the injury, damage, or loss, and when any ward is entitled to
200 maintain an action for damages or any other relief based on any claim or is subject to any
201 claim to recover damages or any other relief based on any claim, the guardian of the
202 estate of the ward may adjust and settle the claim with the advice, approval, and consent
203 of the probate court. ~~In the settlement, if the ward is a minor, the parent or parents may~~
204 ~~waive all claim for damages on account of loss of service of the minor, and that claim~~
205 ~~may be included in the settlement. However,~~ When it is proposed that the net amount to
206 be received by a ward after payment of fees and expenses as allowed by the court for the
207 A claim involved be settled, for ~~ten~~ twenty five thousand dollars or less, the court, upon
208 application by any suitable person whom the court may authorize to receive and receipt
209 for the settlement, may authorize the settlement without the appointment of a guardian
210 and authorize the delivery of the moneys ~~to~~ as provided in R.C. 2111.05. ~~the natural~~
211 ~~guardian of the minor, to the person by whom the minor is maintained, or to the minor~~
212 ~~himself.~~ The court may authorize the ~~minor or~~ person receiving the moneys to execute a
213 complete release on account of the receipt. The payment shall be a complete and final
214 discharge of any such claim. In the settlement, if the ward is a minor, the parent or
215 parents may waive all claim for damages on account of loss of service of the minor, and
216 that claim may be included in the settlement.

217 **R.C. 2101.16 Fees.**

218 (A) The fees enumerated in this division shall be charged and collected, if possible, by
219 the probate judge and shall be in full for all services rendered in the respective
220 proceedings:

221 (47) Minor or mentally ill person, etc., disposal of estate under ~~ten~~ twenty five thousand
222 dollars of \$ 10.00

223 **Rationale for Proposal:**

224 Changes to R.C. 2111.05 increase the termination of small guardianships from
225 \$10,000.00 to \$25,000.00. The last increase to this section was in 1978 when the amount
226 was raised from \$3,000.00 to the current \$10,000.00. The update also includes a change
227 in the terminology from “mentally ill or mentally retarded” to “incompetent.”
228

229 Changes to R.C. 2111.18 increase the amount for settlement of an injury to a ward or a
230 ward’s property from the current \$10,000.00 to \$25,000.00. Additionally, the provision
231 expands the use of this Section to include settlements involving incompetents rather than
232 only applying to settlements involving minors. The changes also clarify that the
233 \$25,000.00 settlement amount is the **net** amount to be received by the ward after legal
234 fees and expenses are paid. Some courts have not allowed this section to be utilized if the

235 gross amount of the settlement exceeded the statutory amount, even though the net
236 amount to the ward would usually be substantially less than the statutory amount.

237

238 To conform the section on court costs with the proposed changes herein, the reference in
239 R.C. 2101.16(A)(47) is also updated to reflect the increased amount in R.C. 2111.05 to
240 \$25,000.00.

241

242 The changes were prepared by the Guardianship sub-committee of the Estate Planning
243 Trust and Probate Law Section of the Ohio State Bar Association which was approved at
244 our last Council meeting on September 12th, 2008 and which were also approved by the
245 probate judges at their meeting on June 9, 2008.