“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 estates left behind when people die. Such administration includes, among other things, the payment of debts and taxes, and the transfer of 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 or whose parents are unable to care for them, and individuals suffering from mental illness, developmental disabilities and physical disabilities. Age or illness also can affect a person’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 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(s) designated in a payable-on-death or transfer-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 when 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 must regularly report their activities to the probate court, particularly their financial activities. However, trustees serving under trust agreements created outside a will generally won’t need to 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 will be the future owner of the property when he or she 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 revocable (“living”) trusts or joint accounts 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. The testator has the legal capacity to make a will as 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 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.

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) For a will to be valid, it must be in writing and signed by the testator. (A narrow exception to this requirement is explained in item number 5 on the next page.) Also, the signing must be confirmed by two competent and impartial witnesses. (These 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 both. 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 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. 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. Because the court must admit a will to probate before it can control the distribution of a testator’s property, 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 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 purposely cancelling 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 cancelling, 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, “CANCELLED,” 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 the dissolution of a 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, 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 revocable (living) trusts, insurance policies, payable-on-death accounts, joint and survivorship accounts, pensions or security accounts with transfer-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, page 137.)

A surviving spouse and surviving children also are entitled to a living allowance of $40,000 (which is treated as one of the debts of the estate) and to live in the family home for one year. 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 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 previous marriage, a portion of the money may go to those children or to their surviving parent for the children’s benefit according to their needs.)

In addition to the living allowance, 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 vehicles is less than $40,000. These vehicles are not subject to probate administration. The surviving spouse is also entitled to claim one watercraft and one outboard motor not specifically given in the will. He or she also has the right to be reimbursed for the deceased spouse’s funeral expenses.

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.

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

- an additional child 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 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 after-born 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 children who were alive when the will was made, after-born children can be specifically disinherited or treated differently from their siblings. A testator’s directions will be followed by the court if the will clearly shows that after-born 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 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 mentioned in the will. Of course, if the testator does not own the specifically mentioned property or have 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 choose not to make a will. The reasons vary: perhaps they are concerned about offending their relatives or 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 a valid will exists, a named beneficiary may choose not to take the share that the will provides.

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 chart on page 139.

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 has will beneficiaries as well as heirs; these two groups might or might not consist of the same people.
Share of Descendants and Next-of-Kin or Heirs

In all of the above cases in which lineal descendants inherit part of an estate, 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 share for Ben, one share for Abe’s child, one share to split four ways among Carol’s children, and one share 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

<table>
<thead>
<tr>
<th>Situation</th>
<th>Heirs and Distribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. No surviving spouse, but a surviving child or children or the lineal descendants of a deceased child.</td>
<td>Each living child receives an equal share of the estate and the descendants of a deceased child will divide that deceased child’s share.</td>
</tr>
<tr>
<td>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.</td>
<td>The entire estate goes to the surviving spouse.</td>
</tr>
<tr>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>6. A surviving spouse, but not surviving children or lineal descendants of a deceased child.</td>
<td>The entire estate passes to the surviving spouse.</td>
</tr>
<tr>
<td>7. Surviving parents, but no surviving spouse, children or lineal descendants of a deceased child surviving.</td>
<td>The estate goes to the parents in equal shares or the entire estate goes to the surviving parent.</td>
</tr>
<tr>
<td>8. Surviving siblings of the decedent, but no surviving spouse; no children nor lineal descendants of a deceased child and no parents surviving.</td>
<td>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.</td>
</tr>
<tr>
<td>9. One or more grandparents surviving, but no surviving spouse; no child nor the lineal descendants of a deceased child; no parents and no siblings surviving.</td>
<td>One-half of the estate goes to the paternal grandparents, equally, and one-half goes to the maternal grandparents, equally.</td>
</tr>
<tr>
<td>10. No surviving spouse, no children or deceased children, no parents, no siblings, no grandparents and no lineal descendants of grandparents.</td>
<td>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.</td>
</tr>
</tbody>
</table>
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. Similarly, estates totaling $5,000 or less (or $40,000 or less if everything is going to a surviving spouse) may be summarily released from administration. For a non-spouse to obtain such a summary release from administration, the amount of the funeral bill must exceed the value of the assets being released. Estate administration also 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, for example, about the genuineness of the deceased individual’s signature or the deceased’s condition at the time the will was signed. 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 dies without a will (i.e., dies intestate) 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 those of 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 and 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. 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.

If 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 may be 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 of the deceased’s assets include non-probate assets. These assets include revocable (living) trusts, insurance policies, joint and survivorship and payable-on-death (POD) accounts, transfer-on-death (TOD) affidavit, 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 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. Most claims not made within six months are barred forever. Tax obligations, funeral expenses and other obligations incurred after death in administering an estate are not subject to the six-month bar on claims.

Debts of the estate may include debts the deceased incurred before death or debts incurred by the estate after death, such as utility bills, real estate taxes and other expenses for maintaining estate assets. Examples of common estate debts are hospital and funeral expenses. Common estate administration expenses and taxes also include probate court costs, attorney fees, accountant fees, appraiser fees, income taxes with respect to the deceased final income tax returns (as well as taxes with respect to income earned during the estate administration) and the compensation the executor or administrator may take for his or her services. Depending on the net value of the estate (including, for this purpose, all assets or accounts in which the deceased had a financial interest or control at death), federal or state estate taxes may be payable.

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, then 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. Distributions may be made in kind in intestate estates if the administrator gets court permission to do so.

In-kind distribution refers to 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, 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 those assets or their 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 those assets or their value so the claim can be paid.

**Accounting of Estate Assets**

The executor or administrator is required to file an account showing the estate assets, income, costs, expenses and distribution within six months. 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 grantor or sometimes a settlor) transfers property to himself or herself, or to another person (a trustee) who manages the trust for the grantor’s benefit and for the benefit of third persons.

A revocable trust, sometimes also known as a “living” trust, is created (signed and funded) when the grantor is alive and may be amended (changed) or revoked (cancelled) at any time during the grantor’s life. Through the terms of the revocable trust, the grantor keeps all the benefits of any property placed into it for the rest of his or her life. The grantor also can be the trustee, but the grantor’s spouse or a trust company also often serves as trustee. In general, a court-filed accounting for a revocable trust is not required unless a beneficiary requests one, so the trustee customarily reports the financial transactions of a revocable trust solely to the grantor (during his or her life) and then to the beneficiaries once the trust becomes irrevocable at the grantor’s death. A revocable trust can be funded with any property such as bank and brokerage accounts, stocks and bonds, a home and other real estate. Some revocable trusts may not be funded initially, but rather at a later time or at the grantor’s death. An attorney can help advise when a revocable trust should funded and with what property. The terms of a trust are described in writing in a document often called the declaration of trust or trust agreement. This document is signed by both the grantor and the trustee.

A revocable trust is the opposite of a testamentary trust, which is only created after the grantor’s death. A testamentary trust is a trust that is established by the grantor’s will. Because a testamentary trust is only created after the grantor’s death, it cannot be amended or revoked. Unlike a revocable trust, a testamentary trust is subject to the ongoing supervision of the probate court, and accountings for the financial activities of a testamentary trust generally must be filed by the trustee with the court every two years.

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

• avoiding the cost and difficulties of probate administration and accountings;
• avoiding the costs and court intrusions of traditional guardianships during the grantor’s life if the grantor should become incompetent;
• providing a vehicle for implementing a tax plan to reduce or defer estate taxes; and
• permitting confidentiality regarding the trust assets and financial transactions.

However, these advantages can be overstated. Estate planning requires individuals to make informed choices. They must investigate the various tools available and understand their effects. For example, while revocable 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 either a revocable trust or a testamentary trust. In addition, a will and, thus, some probate administration, is necessary for most individuals who have a revocable trust because some assets are not placed in a revocable trust. Also, probate administration can be helpful in some estates and guardianships because of the probate court’s supervision and required regular reports, and the court can replace fiduciaries that do not do their jobs.

One thing that a revocable 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 look-back period for Medicaid eligibility after a transfer is five years).

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 a 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 to be used by other Ohioans who have disabilities.

A revocable trust (as opposed to an irrevocable trust) is not directly relevant to public assistance planning because it can be revoked or cancelled. For this reason, the trust assets are considered to belong to the trust owner for public assistance planning purposes. A revocable trust might, however, be very useful to, say, a mother who wishes to use it as part of a general estate plan 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 revocable trust, or other estate-planning device, should consult an attorney for assistance in this complex area.

Incincapacity 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, as well as 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.

Effective in March 2012, Ohio law makes all powers of attorney “durable,” meaning that the agent can act even if the principal becomes incapacitated (for example, 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), unless the power of attorney document says otherwise.

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”). An HCPOA 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. Anticipating the inability to make health care decisions at some time in the future, the principal grants this power in the HCPOA and gives the agent guidance on what to do.

Unlike a living will, discussed on page 145, 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 the extent of treatment he or she wishes to receive when 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 such 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. The declarant with this intent 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 creating an HCPOA or a living will should review the forms for each that were 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 (now Midwest Care Alliance) through its website at www.midwestcarealliance.org (click on “advance directives” box at the bottom of the home page).

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 September 2010, new standard forms were issued to conform to changes in Ohio law. Documents executed before 2010 are still valid, but those signed since 2010 should use the current standard forms or have met 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 or her own preferences regarding mental health treatment and to appoint a person to make mental health care decisions when he or she is unable to do so.

A regular HCPOA can address both physical and mental health issues and 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 creating a mental health declaration 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 the 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 the patient will not be able to recover any kind of meaningful life and the patient specifically requests that he or she should 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 preauthorize 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, asking 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 himself or herself or others, or needs special care that he or 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, and 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 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. For example, a stepchild may be adopted by his or her stepparent. Also, orphans, abandoned children, children placed for adoption by their parents, and children whose legal relationship with their parents has been ended by a court 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.

For Journalists: Covering Probate Law

Journalists and other writers who cover probate law issues should understand the responsibilities of the probate court. Covering families involved in probate conflicts requires special attention to detail and to the impact such stories may have on those whose lives are affected by these disputes.

Since probate matters generally involve families and disputes may be matters of public record, traditional journalists have generally consulted with their editors, producers and legal counsel because of concerns about privacy and prevailing journalistic ethics.

Non-traditional journalists, citizen journalists, bloggers and those without formal training or education in journalism and journalism ethics may not know or care about the ethics of publishing stories regarding probate legal matters. When it comes to disclosing legitimately private information, courts to date have not offered any additional protections for the new and emerging categories of journalists in the Internet age. (For more detail on privacy and reporting, see Part XV.) The Supreme Court of Ohio has, however, attempted to address general privacy concerns in its Rules of Superintendence. As a result, most probate courts now have “personal identifier/confidentiality” forms that provide for Social Security numbers and bank account numbers (and, in some instances, the names and addresses of beneficiaries) to be kept private.

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 persons suffering from mental illness, mental retardation, or from developmental or physical disabilities.

Continued on page 149
Chapter Summary continued

- 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.
- 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 it is the last will of the testator, and that the testator did not intentionally damage or destroy it in order to revoke it.
- A will can be revoked in a number of ways. The most common way is by making a new 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 have led to the development of various legal devices. The health care power of attorney, the revocable (living) will and the mental health declaration are among these devices.
- Commitment of those with mental illness or retardation, 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:

From the OSBA’s “Law You Can Use” column:
www.ohiobar.org/lawyoucanuse (search by title or topic)
“Ask Questions To Decide if a Revocable (‘Living’) Trust is Right for You”
“Consumers Should Seek Legal Advice before Establishing Trusts”
“Keep DNR Orders Where Emergency Squads Can Find Them”
“Know Legal Steps To Take after Someone Dies”
“Know Risks before Using Joint and Survivor Bank Accounts”
“Make Sure Your Assets Go To Intended Beneficiaries”
“Ohio Law Helps You Provide for Fido After You’re Gone”
“Ohio’s Income Tax on Trusts Is Here To Stay”
“Probate Court Screens Prospective Parents in Private Adoptions”
“Recognized Advance Directive Forms Simplify Health Care Planning”
“State Recovers Medicaid Costs from Estates”
“Transfer-on-Death Designation Affidavit Avoids Probate of Real Estate”
“Using Trusts To Improve Quality of Life for Individuals with Disabilities”
“What Are the Residency Requirements for Ohio Guardians?”
“What Is Charitable Planning?”
“What You Should Know about the Declaration of Mental Health Treatment”
“What You Should Know about Do Not Resuscitate (DNR) Orders”
“What You Should Know about Guardianships and Advance Care Planning”
“What You Should Know about Health Care Powers of Attorney”
“What You Should Know about Living Wills”
“What You Should Know about Organ and Tissue Donation”
“What You Should Know about the Declaration of Mental Health Treatment”
“When A Loved One Dies … Who Pays the Bills?”

From the OSBA’s Law Facts pamphlet series:
www.ohiobar.org/lawfacts (search by title)
“Administering an Estate without a Will”
“Do Not Resuscitate (DNR) Orders”
“Financial Powers of Attorney”
“Guardianships”
“Living Wills and Health Care Powers of Attorney”
“Revocable (‘Living’) Trusts”
“Probate”
“Wills”

From Cornell Law School Legal Information Institute:
http://law.cornell.edu/wex (type key words in search box)