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### **Proponent Testimony on House Bill 595**

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Chairman Bacon, Vice-Chair Dolan, Ranking Member Thomas, and Members of the Senate Judiciary Committee. I am Patricia D. Laub, attorney with Frost Brown Todd LLC, and the chair of the Ohio State Bar Association's Estate Planning, Trust and Probate Law Section (EPTPL). I am here on behalf of the OSBA to provide proponent testimony on HB595. The bill affectionately known as the 132<sup>nd</sup> GA Omnibus Probate Bill. The bill currently includes five important probate law changes that the OSBA's Council of Delegates have approved. We hope to add one more change that I will discuss near the end of my testimony.

#### **PROPOSAL 1: TO AMEND OHIO LAW GOVERNING A CORONER'S OBLIGATIONS OF NOTIFICATION TO MAKE IT CONSISTENT AND FREE OF CONFLICT WITH THE LAW CONCERNING RIGHT OF DISPOSITION.**

Sections 2108.70 to 2108.90 of the Ohio Revised Code were added, effective October 12, 2006, to assign to certain persons the right of disposition (burial or cremation) of a deceased person's body. Under Section 2108.72 of the Ohio Revised Code, a person, known as the declarant, may sign a written declaration conferring such rights on another person upon the declarant's death. If there is no such declaration, or if all named persons are deceased or otherwise unable to act, then there is a detailed statutory order of priority assigning the right of disposition under Section 2108.81(B) of the Ohio Revised Code.

Section 313.14 of the Ohio Revised Code governs the duties of a coroner to notify certain persons that the coroner has possession of a deceased body. The current proposal would update the statute by changing the persons to whom the coroner must give notice, and the persons to whom the coroner will release custody of the body, from "the decedent's next of kin, other relatives or friends," to the person assigned rights of disposition under Sections 2108.70 to 2108.90 of the Ohio Revised Code.

Sections 2108.72 to 2108.90 of the Ohio Revised Code include very specific provisions as to who has the right of disposition and enumerate and prioritize those persons' right of disposition. Having a different "class" of persons referenced and entitled to notification by the coroner in Section 313.14 creates confusion and could cause conflict if the next of kin who are directed to be notified under Section 313.14 are not the persons who have the priority of disposition under Sections 2108.70 to 2108.90. As such, it is important to make Section 313.14 consistent with Sections 2108.70 to 2108.90 with respect to the persons who need to be notified when the coroner has possession of a deceased body so that the persons receiving notice are the same persons who have the right to dispose of the body.

The EPTPL Section Council has communicated with and discussed this change with the Ohio State Coroners Association, which has approved the proposed statutory language.

**PROPOSAL 2: TO AMEND OHIO LAW TO CLARIFY THAT INCORPORATION OF THE TERMS OF A WRITTEN TRUST INTO A TESTATOR'S WILL OCCURS ONLY IF THE TESTATOR HAS PROVIDED CLEAR, EXPRESS INTENT TO DO SO IN SUCH WILL, AND IN CASES WHERE SUCH INCORPORATION IS CONDITIONED ON THE DETERMINATION THAT A BEQUEST OR DEVISE TO THE TRUSTEE OF THE TRUST IS OTHERWISE INEFFECTIVE, TO EXTEND THE DEADLINE FOR MAKING THE TERMS OF THE TRUST PART OF THE ESTATE PROCEEDING.**

Section 2107.05 of the Ohio Revised Code is Ohio's "incorporation by reference" statute. It honors a testator's incorporation into his will of external documents, books, records or memoranda. Material incorporated into a will in this way becomes part of the testator's will, and property disposed of within the material becomes part of the testator's probate estate. Under the statute, the incorporated material must be deposited in the probate court within thirty days after the will is probated, or later if the court grants an extension for good cause shown.

Section 2107.63 of the Ohio Revised Code honors a testator's devise or bequest to the trustee of a written trust. Provisions devising a testator's property to the trustee of a trust are generally called "pourover" provisions. Under Section 2107.63, property passing in this way becomes part of the trust estate and is administered in accordance with the trust instrument. Until now, it had been believed by practitioners that the trust instrument did not become part of the testator's will.

In *Gehrke v. Senkiw*, 2016-Ohio-2657 (Ct. App.) (2016), the Second District Court of Appeals altered practitioners' long-standing beliefs. The court relied on *Hageman v. Cleveland Trust Company*, 45 Ohio St. 2d 178 (1976), to hold that a standard "pourover" provision in a testator's will required the incorporation of the testator's trust instrument into the testator's will. Incorporation of external material makes the material part of the testator's will. As a result, and because the *Gehrke* plaintiffs had not challenged the will within the three-month statute of limitations set forth in Section 2107.76 of the Ohio Revised Code, plaintiffs were time-barred from challenging the trust instrument. Because the court concluded that the testator had incorporated the trust instrument into his will, and the trust instrument therefore became part of his will, the plaintiffs could not rely on Section 5806.04 of the Ohio Revised Code which generally provides for a two-year statute of limitations within which to challenge an instrument creating or amending a revocable trust which was made irrevocable at the settlor's death.

These decisions create uncertainty for Ohio estate planners and probate litigators. The decisions blurred the lines between language in a will that practitioners thought simply distributed estate property to the trustee of a trust, per Section 2107.63 of the Ohio Revised Code, and language in a will that incorporates the terms of a written trust into the will, per Section 2107.05 of the Ohio Revised Code.

This uncertainty is troubling for litigators who want to be able to determine from the language in testator's will whether or not the testator's trust instrument is incorporated by reference. If the trust instrument is incorporated by reference, failure to challenge the will within the three-month statute of limitations will preclude a challenge to the trust. If the trust instrument is not incorporated in settlor's will by reference, the litigator may have the benefit of the longer statute of limitation applicable to trusts under Section 5806.04 of the Ohio Revised Code.

This uncertainty is also troubling for estate planners who may find that they have inadvertently incorporated the testator's trust instrument into the testator's will with what the planner intended to be simply a pourover provision. Estate planners typically do not want to incorporate the testator's trust instrument and make it part of the testator's will unless necessary to save the disposition of the property under the terms of the trust. Frequently, wills include language to incorporate the trust instrument contingent upon a determination that the bequest or devise to the trustee of the trust would otherwise be ineffective.

The relevant portion of HB 595 leaves in place the current language of Section 2107.05 of the Ohio Revised Code, now set forth in division (A), and adds new language by adding divisions (B), (C), (D), and (E).

Division (B) of the proposal provides that a testator who incorporates a trust instrument into the will only upon a determination that a bequest or devise to the trustee is otherwise ineffective must deposit the trust with the probate court not later than thirty days after a final determination that such bequest or devise would be otherwise ineffective. Without this addition, the testator would be required to deposit the trust with the probate court within thirty days after the will is probated pursuant to division (A) simply to protect against the possibility that the bequest or devise was later ruled ineffective. Such an action would clearly compromise the privacy of the trust. Therefore, the change allows the testator to protect the privacy of the trust if the trust is not challenged, or challenged unsuccessfully, and eliminates an unintended trap for probate attorneys where a trust is challenged, and the trust was not deposited with the court within the thirty days after the will is probated.

Division (C) restores the distinction between the use of pourover language and language of incorporation. If a testator intends to incorporate a trust as part of the will, the testator must do so by clear, express language by use of "incorporate," "made a part of," or similar language. The typical pourover language, by itself, is not sufficient cause the terms of the trust to be incorporated into the will.

Division (D) applies divisions (B) and (C) to wills of testators dying on or after the effective date of divisions (B) and (C). Division (E), which is not intended to be codified, makes it clear that this Section is being amended to reverse the holdings of *Hagenian* and *Gehrke*.

### **PROPOSAL 3: TO AMEND OHIO LAW TO CLARIFY THAT THE EXCEPTION TO THE ANTILAPSE STATUTES ONLY APPLIES TO MULTI-GENERATIONAL CLASS GIFTS.**

Section 2107.52 of the Ohio Revised Code provides that when a will makes a gift to a class and a member of the class predeceases the testator, a substitute gift will be made to the descendants of the deceased class member. Section 2107.52(B)(2)(b) provides an exception to this general rule when the class is defined as "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import. Comparable language relating to class gifts under a trust is found in Section 5808.19(B)(2)(b)(ii) of the Ohio Revised Code.

This language derives from Section 2-603(b)(2) of the Uniform Probate Code, which adopts the modern policy of expressly extending antilapse protection to certain class gifts. The antilapse

statute applies to single-generation class gifts ... in which one or more class members fail to survive the testator (by 120 hours) leaving descendants who survive the testator (by 120 hours). Multiple-generation class gifts, i.e., class gifts to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” “family,” or a class described by language of similar import are excluded from antilapse protection because antilapse protection is not necessary for class gifts of these types. Those class gifts already contain the idea of representation within them, under which a deceased class member's descendants are substituted for him or her.

The court in the 2015 decision of *Castillo v. Ott*, 2015-Ohio-905 (6<sup>th</sup> Dist.) held that “children” was a class described by “language of similar import” to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family.” The court then held that this prevented a substitute gift for the descendants of a deceased child. The *Castillo* decision is contrary to the policy of the antilapse statute and the Uniform Probate Code, upon which the statute is based, because the class gift to “children” is a single-generation class gift and each of the other classes described in Section 2107.52(B)(2)(b) are multi-generational.

Section 5808.19 is the analogous antilapse provision for trusts. For consistency, it is necessary to amend Section 5808.19 comparably.

Accordingly, HB 595 proposes to clarify that the exception to the antilapse protection applicable to class gifts in wills and trusts only applies to gifts to multi-generational classes.

**PROPOSAL 4: TO ADD ORC SECTION 5802.04 SO AS TO CLARIFY AND CONFIRM WHEN THE TERMS OF A TRUST MAY DIRECT THAT THE TRUSTEE AND/OR BENEFICIARIES MUST SETTLE DISPUTES BY ARBITRATION.**

Ohio courts have applied a presumption favoring arbitration when the claim in dispute falls within the scope of an arbitration provision. Arbitration agreements are generally favored in the law as a less costly and more efficient method of settling disputes. Nevertheless, courts have reiterated that because arbitration is a matter of contract, a court should not compel a party to arbitrate a dispute that he has not agreed to arbitrate.

The OSBA believes that arbitration for disputes involving wills and testamentary trusts should not be required. Rather, those disputes should be handled through the probate court.

However, because *inter vivos* trusts do not require court administration, the settlor of an *inter vivos* trust should be permitted to determine the method of alternative dispute resolution in the terms of the trust itself. A fundamental tenant of trust law allows a trust settlor to put terms and conditions on how and when a beneficiary inherits. Consequently, a trust provision in which the trust settlor requires a beneficiary to arbitrate disputes regarding trust administration should be viewed as within the settlor's power to place conditions on the beneficiary's access to the trust assets.

This proposal does not permit alternate dispute resolution provisions to apply when determining the validity of the trust itself. Rather, the law would apply only to disputes among trustees and beneficiaries involving trust administration.

Proposed Ohio Revised Code Section 5802.04 would clarify and confirm when the terms of an *inter vivos* trust may require that the trustee and/or beneficiaries settle disputes by arbitration. The

proposal is consistent with existing Ohio Revised Code Section 5801.10 (H), which provides that if a private settlement agreement contains a provision requiring binding arbitration of any disputes arising under the agreement, that arbitration provision is enforceable.

**PROPOSAL 5: TO AMEND OHIO LAW TO ALLOW A LIVING SETTLOR TO DETERMINE THE VALIDITY OF HIS OR HER TRUST, JUST AS A LIVING TESTATOR MAY DETERMINE THE VALIDITY OF HIS OR HER WILL UNDER CURRENT LAW, TO MAKE SOME MODIFICATIONS TO THE PROVISIONS FOR TESTATORS, AND TO COORDINATE THE TWO SETS OF PROVISIONS INTO A SINGLE CHAPTER.**

Ohio statutory law currently allows a living testator to file a declaratory judgment action in probate court seeking a determination that his or her will is valid. Except to the extent that the will is amended after a favorable determination, the procedure gives a testator an effective means of protecting his or her will from a post-mortem challenge based on allegations that the testator was influenced unduly or lacked testamentary capacity.

Ohio enacted the “antemortem probate” proceeding for wills in 1979 when a will was the primary instrument to dispose of one's assets at death. Estate planning has evolved so that the *inter vivos*, or living, trust now is commonly used in estate planning. The proposal updates Ohio statutory law to allow a living settlor to likewise seek the same determination of validity with respect to his or her trust. Accordingly, the OSBA recommends adoption of new Chapter 5817/Establishment of Will and Trust Validity Before Death.

**PROPOSAL 6: TO AMEND SECTION 5815.16 OF THE OHIO REVISED CODE BY ADDING NEW LANGUAGE TO MAKE CLEAR THAT A COMMUNICATION BETWEEN A LAWYER AND A CLIENT ACTING AS A FIDUCIARY IS PRIVILEGED AND PROTECTED FROM DISCLOSURE TO THIRD PARTIES TO WHOM THE FIDUCIARY OWES FIDUCIARY DUTIES TO THE SAME EXTENT AS IF THE CLIENT WERE NOT ACTING AS A FIDUCIARY.**

Under the “fiduciary exception” to the attorney-client privilege, a fiduciary who obtains legal advice related to the execution of fiduciary obligations is precluded from asserting the attorney-client privilege against beneficiaries of the trust or estate. If the fiduciary exception applies, the communications between the fiduciary and his lawyer will be discoverable by the beneficiaries and perhaps obtainable even outside the discovery process.

Section 5815.16 of the Ohio Revised Code was added, effective January 1, 2007, to provide that absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations. The statute defines “fiduciary” as a trustee under an express trust or an executor or administrator of a decedent’s estate. Following the enactment of Section 5815.16 of the Ohio Revised Code, many believed that Section 5815.16 of the Ohio Revised Code confirmed that the fiduciary exception to the attorney-client privilege was not applicable in Ohio.

In 2011, the U.S. Supreme Court held that the fiduciary exception to the attorney-client privilege did not apply to the general trust relationship between the United States and the Indian tribes. *U.S.*

*v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2331 (2011). As result of the *Jicarilla* decision, renewed attention was given to the issue of the attorney-client privilege between fiduciaries and their counsel. See, e.g., Bartolucci, Short, and Talen, “The Attorney-Client Privilege and the Fiduciary Exception: Why Frank Discussions between Fiduciaries and Their Attorneys Should be Protected by the Privilege,” 48 Real Property, Trust and Estate L.J. 1 (2013) (noting several states’ case law and statutory limitation and rejection of the fiduciary exception even in light of a fiduciary’s duty to inform and report to beneficiaries).

After *Jicarilla*, the EPTPL Section Council considered the need for legislative clarification/confirmation of Ohio law on this subject but determined that the existing provisions of Section 5815.16 adequately addressed the issue of what duties might be owed to a third party by an attorney representing a fiduciary. However, a recent decision from the Eighth District Court of Appeals, *Dueck v. Clifton Club Co.*, 2017-Ohio-7161, has required the Section to rethink its position on the adequacy of Section 5815.16 of the Ohio Revised Code. In *Dueck*, the Court applied the fiduciary exception to the attorney-client privilege without even referencing Section 5815.16 of the Ohio Revised Code. In *Dueck*, the Court held that trustees’ refusal to provide privileged communications between the trustees and their attorneys concerning trust administration was a breach of the trustees’ fiduciary duties.

The OSBA recommends that Section 5815.16 of the Ohio Revised Code be amended to add language that makes it clear that Ohio does not recognize the fiduciary exception to the attorney client privilege. This is not a change in Ohio law; it is a confirmation of current law deemed necessary in light of sweeping language in the *Jicarilla* decision.

The OSBA urges the Committee to amend the bill as requested by myself and Mr. Bob Brucken and to favorably report the bill. I am available to answer questions.