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# ESTATE PLANNING & PROBATE OVERVIEW:

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## I. Basic Estate Planning Documents

### A. Advanced Health Care Directives

1. Health Care Powers of Attorney. Generally, the purpose of a health care power of attorney is to authorize an agent to make health care decisions for the principal if the principal becomes incapacitated, but there are also other purposes as discussed below. Health care powers of attorney are governed by R.C. 1337.11 to 1337.17.

#### Three Primary Purposes of Health Care Powers of Attorney.

Authorize Agent to Make Health Care Decisions in Event of Incapacity. The primary purpose of a health care power of attorney is to appoint an agent to make health care decisions for the principal in the event of incapacity. See R.C. 1337.12. The health care decisions an agent can make for the principal are listed in the health care power of attorney. If the principal does not want to grant the agent one or more decision making powers, the principal can so indicate by crossing out the power on the form. Also, if the principal wants to authorize the agent to consent to the withdrawal of artificial hydration and nutrition in the event the principal is in a permanently unconscious state, the principal must initial the appropriate line.

Avoid Guardianship of the Person. A second purpose of a health care power of attorney is to avoid the necessity of having a guardian of the person appointed if the principal becomes incapacitated. Courts are required to determine if there is a less restrictive alternative to a guardianship of the person before appointing a guardian. See R.C. 2111.02(C)(5) and (6). A health care power of attorney is the most common less restrictive alternative to a guardian of the person.

Nominate Guardian of the Person. A third purpose of a health care power of attorney is to nominate the agent for appointment as the principal's guardian of the person in the event a guardianship becomes necessary notwithstanding the existence of the health care power of attorney. The nomination of a guardian of the person gives that person first priority to be appointed. See R.C. 2111.121. The statutory form for the health care power of attorney contains a provision that nominates the agent for appointment as the guardian of the person. Note that the statutory financial power of attorney being used for the Wills program also contains lines to nominate a guardian of the person. It is important that these nominations are consistent. If the client is executing a health care power of attorney, we recommend that the client not nominate a guardian of the person in the financial power of attorney to ensure there are not inconsistent nominations.

Execution of Health Care Power of Attorney and Living Will. A health care power of attorney and a living will must be signed by the principal before a notary public or two witnesses who are not named as the agent or successor agent, are not related to the principal by blood, marriage, or adoption, and who are not the principal's physician or the administrator of the nursing home in which the principal resides. Notarization or attestation by two witnesses is sufficient; both are not necessary. See R.C. 1337.12.

Revocation of Health Care Power of Attorney. A health care power of attorney can be revoked by the principal at any time; however, if a physician knows of the existence of the health care power of attorney, the revocation becomes effective as to the physician when he or she learns of the revocation. See R.C. 1337.14.

2. Living Wills. The purpose of a living will is to document the declarant's wish that life-sustaining treatment, including artificial supplied nutrition and hydration, be withheld or withdrawn if the declarant is unable to make informed healthcare decisions and is in a terminal condition or permanently unconscious state. By executing a living will, the declarant is stating that he would not want to receive life sustaining treatment if two physicians determine within a reasonable degree of medical certainty that the declarant is in a terminal condition or a permanently unconscious state from which he will not recover. Also, by initialing the appropriate line, the declarant can authorize the withdrawal of artificial hydration and nutrition if he is in a permanently unconscious state.

The living will also contains the declarant's wishes regarding organ donation (discussed below).

It is important to understand that a living will trumps/supersedes a health care power of attorney on the issues related to the continuation of life sustaining treatment. See R.C. 2133.03(B)(2). Thus, when a declarant executes a living will, the agent under a health care power of attorney will not have the ability to decide whether or not to withdrawal life sustaining treatment and/or artificial hydration and nutrition in the event the declarant cannot make informed decisions and has a terminal condition or is in a permanently unconscious state.

3. Donor Registrations. The donor registration form allows an individual to be included in the Ohio Donor Registry and to specify the particular body parts and purposes for which the body parts are being donated. An individual can also register to be included in the Ohio Donor Registry at any Bureau of Motor Vehicles (“BMV”) location; however, when a person registers at the BMV, the person is consenting to donate all of their organs for any purpose authorized by law.

If a client is already included in the Donor Registry and does not wish to limit the body parts he wishes to donate or the purposes for which the donation is made, then the client does not need to sign the donor registration form because it will not change anything. The donor registration form should be completed when the client: (1) wants to be included in Donor Registry for the first time; (2) wants to be removed from the Donor Registry; or (3) wants to limit the body parts he wishes to donate and/or the purposes for which the donation is made.

If a client chooses to execute the donor registration form, the attorney should remind the client to mail the form to the BMV at the address on the front of the form. If the form is not received by the BMV and entered into the Donor Registry, it will not be effective.

## **B. Durable Financial Powers of Attorney**

The Ohio Uniform Power of Attorney Act. Effective March 22, 2012, the State of Ohio enacted the Uniform Power of Attorney Act as set forth in R.C. 1337.21 to 1337.64 (the “Act”). The Act repealed former R.C. 1337.18, 1337.19, and 1337.20. However, powers of attorney that were executed prior to March 22, 2012 will be interpreted in accordance with prior law. R.C. 1337.64(B).

Durability of Financial Powers of Attorney under the Act. Ohio Revised Code Chapter 1337 covers both durable and nondurable powers of attorney. The Act provides that a power of attorney is durable unless it specifically provides that it is terminated by the incapacity of the principal. R.C. 1337.24. The magic language “shall not be affected by disability, incapacity or adjudged incompetency nor lapse of time” is no longer required to make the power of attorney durable.

Statutory Power of Attorney Form. R.C. 1337.60 contains a statutory power of attorney form. The Act and the statutory power of attorney use the term “Agent” rather than attorney-in-fact, though both terms may be used.

Three Primary Purposes of Financial Powers of Attorney.

Appoint Agent to Transact Business of Behalf of the Principal. The primary purpose of a financial power of attorney is to appoint an Agent (or attorney-in-fact) to transact business on the principal’s behalf. A financial power of attorney can be executed for a specific purpose such as the purchase or sale of real estate, or it can be executed to give the agent the general authority to act on the principal’s behalf until such time as the financial power of attorney is revoked. The statutory financial power of attorney form is a general power of attorney that remains effective until revoked.

Avoid Guardianship of the Estate. A second purpose of a financial power of attorney is to avoid the necessity of having a guardian of the estate appointed if the principal becomes incapacitated. Courts are required to consider if there is a less restrictive alternative to a guardianship of the estate before appointing a guardian and may deny a guardianship based upon a finding that a less restrictive alternative to a guardianship exists. R.C. 2111.02(C)(5) and (6). A financial power of attorney is the most common less restrictive alternative to a guardian of the estate.

Nominate Guardian of the Estate. A third purpose of a financial power of attorney is to nominate a person to serve as the guardian of the estate of the principal if a guardianship becomes necessary notwithstanding the existence of the financial power of attorney. R.C. 1337.28 allows the principal to nominate a guardian of his estate, person, or both, within the power of attorney.

The statutory form provides for the optional appointment of a guardian of the estate and/or person. Since the statutory health care power of attorney form also contains a standard provision that nominates the health care agent to serve as the guardian of the person, it is important that the client either not nominate a guardian of the person in the financial power of attorney or nominate the person who is named as their primary health care agent. If the person executes both, we recommend that the client not nominate a guardian of the person in the financial power of attorney to ensure the nominations are consistent.

The nomination of a guardian of the estate gives that person first priority to be appointed. R.C. 2111.121 and 1337.28. Specifically, R.C. 1337.28 provides that, except for good cause shown or disqualification, the court must make its appointment in accordance with the principal’s most recent

power of attorney. The power of attorney is not terminated and the agent's authority continues after an appointment by the court of a guardian subject to a different finding based on the best interests of the principal by the court.

Effectiveness. The Act provides that a power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency, normally the incompetency of the principal. R.C. 1337.29. The statutory power of attorney form provides for immediate effectiveness unless provided otherwise in the special instructions section.

Applicability. The Act applies to all powers of attorney except:

- A power coupled with an interest in the subject of that power, e.g., a credit transaction;
- A power to make health care decisions;
- A proxy to exercise voting rights;
- A power created on a government form for a governmental purpose. R.C. 1337.23.

Co and Successor Agents. R.C. 1337.31 permits a principal to designate two or more persons to act as co-agents and permits a principal to designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. The statutory power of attorney form provides for one agent and for one or more successor agents. We suggest discouraging clients from naming co-agents because requiring co-agents to act together creates logistical issues. Furthermore, nominating co-agents with the authority to act independently creates a risk of competing agents.

General Verses Specific Powers Granted in Financial Powers of Attorney. The Act essentially divides the powers granted to the agent into two categories: (1) general powers – powers that the principal can grant to the agent by making a general reference to the power; and (2) specific powers (or “Hot Powers”) that must be specifically included in the financial power of attorney if the principal wants to grant the agent such a power.

General Authority. If a power of attorney grants the agent authority to do all that a principal could do, the agent has the general authority granted in sections 1337.45 to 1337.58 of the Revised Code. R.C. 1337.42(C). A reference in a power of attorney to general authority with respect to a descriptive term for a subject in sections R.C. 1337.45 to 1337.58 incorporates the entire section as if it were set out in full in the power of attorney. The statutory power of attorney includes the following descriptions. If the client will be executing a financial power of attorney, the client should be encouraged to sign on the line including

all preceding subjects because there is a risk that a bank or other party will not honor the document otherwise.

- Real property;
- Tangible Personal Property;
- Stock and Bonds;
- Commodities and Options;
- Banks and other Financial Institutions;
- Operation of Entity or Business;
- Insurance and Annuities;
- Estates, Trusts, and other Beneficial Interests;
- Claims and Litigation;
- Personal and Family Maintenance;
- Benefits from Governmental Programs or Civil or Military Service;
- Retirement Plans;
- Taxes; and
- All Preceding Subjects

Specific Powers. R.C. 1337.42 provides that the agent will only have the power to do any of the following if the power of attorney expressly grants the agent the authority and if exercise of the authority is not otherwise prohibited by another agreement or instrument:

- Create, amend, revoke or terminate an inter vivos trust;
- Make a gift;
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Delegate authority granted under the power of attorney;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; and
- Exercise fiduciary powers that the principal has authority to delegate.

The specific powers can be very useful for estate planning, but also can be subject to abuse. The powers generally grant the agent the power to change the way property will pass at death, which can result in the client's property passing outside of probate in a manner other than that specified in the Will. The statutory power of attorney form does not include any of these specific powers and such powers would need to be written in on the lines for special instructions if the principal wanted to give such powers to the agent.

#### Execution and Revocation of Financial Powers of Attorney.

Execution. A financial power of attorney that includes the power to convey, mortgage, or lease an interest in real estate must be executed in the same manner as a deed, that is, it must be notarized. See R.C. 1337.01 and 5301.01. There is no requirement that a financial power of attorney be attested by two witnesses

and the attestation by two witnesses alone is not sufficient to create a valid financial power of attorney that includes the power to transfer real estate. A power of attorney is presumed genuine when acknowledged before a notary. R.C. 1337.25.

Termination/Revocation. R.C. 1337.30(A) provides that a financial power of attorney will terminate when any of the following events occur:

- The principal dies;
- The principal becomes incapacitated, if the power of attorney is not durable;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;
- The purpose of the power of attorney is accomplished; or
- The principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

The execution of a power of attorney does not revoke a power of attorney previously executed unless the subsequent power of attorney provides that it is revoked or that all other powers of attorney are revoked. Note that the statutory power of attorney form does not state that it revokes prior powers of attorney. The attorney should consider adding this provision on the special instructions lines.

Also, if the financial power of attorney has been recorded, the revocation must also be recorded to be effective. R.C. 1337.05. It is also worth noting that a financial power of attorney that will be used for the conveyance, mortgage, or lease of real estate must be recorded in the office of the county recorder in which the real estate is located before the transfer is made. R.C. 1337.04. Most often the financial power of attorney is not recorded until it is going to be used to transfer an interest in real estate.

Termination of Agent's Authority. R.C. 1337.30(B) provides that an agent's authority to act under a power of attorney terminates when any of the following events occur:

- The principal revokes the authority;
- The agent dies, becomes incapacitated, or resigns;
- An action is filed for the divorce, dissolution, or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; and
- The power of attorney terminates.

Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. R.C. 1337.30(D). Accordingly, it

is important to provide actual knowledge of a revocation to persons who may act in reliance on the power of attorney.

**Agent's Duties.** The Act divides the agent's duties into two categories –those that cannot be modified by the power of attorney and those that can. Both types of duties are listed below.

Duties that Cannot Be Altered. R.C. 1337.34(A) provides that notwithstanding provisions in the power of attorney, the agent must to all of the following:

- Act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
- Act in good faith;
- Act only within the scope of authority granted in the power of attorney; and
- Attempt to preserve the principal's estate plan to the extent actually known by the agent if preserving the plan is consistent with the principal's best interest based on all relevant factors, including all of the following: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (4) eligibility for a benefit, a program, or assistance under a statute or regulation.

Duties that Can Be Altered. R.C. 1337.34(B) provides that the agent must to all of the following unless the power of attorney provides otherwise. The statutory power of attorney does not alter any of these duties.

- Act loyally for the principal's benefit;
- Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;
- Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;
- Keep a record of all receipts, disbursements, and transactions made on behalf of the principal; and
- Cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest.

## **II. Statute of Descent and Distribution**

When a person dies without a Will, the disposition of the person's probate property is controlled by the statute of descent and distribution, which is found in R.C. 2105.06.

Spouse Survives and All Children of the Decedent are also Children of the Spouse. If the spouse survives and all of the children of the decedent are also the children of the spouse, the spouse inherits the entire estate.

Spouse Survives, but Spouse is not the Parent of at Least One of the Decedent's Children. If the spouse survives and is not the parent of at least one of the decedent's children, then the spouse does not inherit the entire estate. Instead, the spouse inherits a portion of the estate, which varies depending on the number of the decedent's children who are not the children of the spouse.

Spouse is not Parent of Decedent's Only Child. If there is a spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, then the first twenty thousand dollars plus one-half of the balance of the intestate estate passes to the spouse and the remainder passes to the child or to the lineal descendants of the child, per stirpes.

Two or More Surviving Children and Spouse is the Parent of One, but Not All of the Children. If there is a spouse and more than one child or their lineal descendants surviving, and the spouse is the natural or adoptive parent of one, but not all, of the children, the first sixty thousand dollars and one-third of the balance of the estate passes to the spouse, and the remainder of the estate passes to the children equally, or to the lineal descendants of any deceased child, per stirpes.

Two or More Surviving Children and Spouse is Parent of None of the Children. If there is a spouse and more than one child or their lineal descendants surviving, and the spouse is not the parent of any of the children, the first twenty thousand dollars plus one-third of the balance of the intestate estate passes to the spouse and the remainder of the estate passes to the children equally, or to the lineal descendants of any deceased child, per stirpes.

No Surviving Spouse. If the spouse does not survive the decedent, then the decedent's children, or their descendants, inherit the entire estate equally, per stirpes.

### **III. Simple Wills**

Although no Will is truly simple, the term "simple Will" is generally used to refer to a Will that leaves the testator's probate property directly to the beneficiaries, rather than to an inter vivos or testamentary trust. This section summarizes the purposes of a simple Will, some of the legal doctrines that apply to simple Wills, and outlines the simple Will form that is being used for the Wills program.

#### Three Primary Purposes of Simple Will.

Disposition of Probate Estate. The first purpose of a simple Will is to set forth the disposition of the testator's probate assets. Generally, a probate asset is

any asset that is titled in one person's name that does not contain: (1) a "contractual" beneficiary designation; (2) a transfer on death or payable on death beneficiary designation; or (3) a joint ownership with survivorship designation.

Common examples of assets that contain valid beneficiary designations are life insurance and retirement accounts, which are not probate assets and therefore do not pass under a Will unless there is no living designated beneficiary. Probate assets include one-half of assets that are owned as tenants in common, but do not include assets that are owned as joint tenants with rights of survivorship. A deed that reads "A Client and B Client" creates a tenancy in common. A deed that reads "A Client and B Client for their joint lives, remainder to the survivor of them" or "A Client and B Client as joint tenants with rights of survivorship" creates a survivorship tenancy.

Nominate Executor to Administer Estate. A simple Will also allows the testator to nominate the person who will administer the estate, to waive the bond requirement, and to specify the powers the Executor will have to administer the estate. Generally, the Executor's role is to file the Will with the probate court to open the estate, to gather the decedent's assets and report the assets to the court, to pay the decedent's debts, and to distribute the balance of the estate to the beneficiaries under the Will.

Nominate Guardian for Minor or Incompetent Children. The third primary purpose of a simple Will is to nominate a guardian for the person and estate of the testator's minor or incompetent children. R.C. 2111.121. Most of the clients for this program are elderly and thus will not have minor children. However, it is possible that a client could have an incompetent child for whom they serve as guardian. In such a case, the client can nominate a successor guardian for the incompetent child within the Will.

Ambulatory Nature of Will. A Will is not legally enforceable until the testator's death. A Will confers no rights on a beneficiary until the testator dies because the testator could always change or revoke their Will prior to the testator's death.

General Legal Doctrines that Apply to Simple Wills.

Rights of Surviving Spouses. In Ohio, a person cannot disinherit their spouse through a Will. Surviving spouses are given a number of statutory rights summarized as follows:

Family Allowance. Generally, the spouse is entitled to the first \$40,000 of the probate estate regardless of whether the Will provides for the spouse. If the decedent left minor children who

are not the children of the spouse, the probate court will apportion the family allowance between the spouse and minor children. See R.C. 2106.13. The family allowance is a priority claim and is paid before all inheritances and all debts other than administrative expenses and the funeral bill. See R.C. 2117.25.

Election Against Will. The spouse has the right to elect against the Will. See R.C. 2106.01. If the spouse so elects, then the spouse gives up what was left to them in the Will and instead receives one-half of the net estate if the decedent left one or no children. If the decedent left two or more children, the spouse will receive one-third of the net estate. The net estate is the portion of the estate that is left after all of the decedent's debts, including the \$40,000 family allowance, are paid.

Right to Two Automobiles. The spouse also has a right to receive up to two automobiles with a combined value of not more than \$40,000 that are not specifically bequeathed in the Will. See R.C. 2106.18. If the spouse chooses to take two automobiles, then the family allowance is reduced by the value of the automobile with a lower value. See R.C. 2106.13.

Right to a Boat and an Outboard Motor. The spouse also has a right to receive a boat and an outboard motor that are not specifically bequeathed in the Will. See R.C. 2106.19.

Mansion House. The spouse has several rights related to the decedent's mansion house/residence. These include the right to live in the mansion house rent-free for one year following the decedent's death (see R.C. 2106.15) and the right to purchase the mansion house at its appraised value. See R.C. 2106.16.

Lapse and the Anti-Lapse Statute. The doctrine of lapse provides that a person who is entitled to receive a gift in a Will must survive the testator to receive the gift. For example, if the Will left Tom a \$5,000 specific bequest, then Tom would have to survive the testator to receive the \$5,000 gift.

The anti-lapse statute, R.C. 2107.52, applies when the person who is entitled to receive the gift under a Will is a blood relative or stepchild of the testator. The statute overrides the doctrine of lapse and provides that if the blood relative or stepchild predeceases the testator, then the blood relative or stepchild's descendants, if any, take the predeceased relative's share of the estate, per stirpes, unless the Will specifically provides otherwise.

The language “if he survives me,” will override the anti-lapse statute. Thus, if a client wanted to leave their car to their son, Tom, but not to Tom’s children if Tom predeceases the client, then the Will should include a specific bequest that states: “I bequeath my car to my son Tom, if he survives me.” See R.C. 2107.52 (C)(2).

Ademption by Extinction. The doctrine of ademption by extinction provides that if an item of the property that is left to a beneficiary in the Will no longer exists at the time of the testator’s death, then the bequest goes away or is “adeemed” and the beneficiary is no longer entitled to receive the gift. This doctrine would apply, for example, if a Will contained a specific bequest of a car and the car was sold before the testator’s death. There are numerous exceptions to this doctrine set forth in R.C. 2107.501. The most commonly encountered exception provides that if property that is specifically devised or bequeathed in a Will is sold by a guardian or an agent under a financial power of attorney, then the beneficiary is entitled to receive a general pecuniary bequest in the amount of the net proceeds from the sale.

Ademption by Satisfaction. The doctrine of ademption by satisfaction (aka doctrine of advancement) applies when a testator leaves a beneficiary a gift in a Will and then gives the beneficiary the gift before the testator dies. In essence, if the object that is bequeathed in the Will no longer belongs to the testator at the time of his death because the testator gave it to the beneficiary before the testator’s death, then the gift is considered to be adeemed by satisfaction and the beneficiary is not entitled to receive anything to substitute for the property the beneficiary already received.

When the property in question is money or another asset that cannot be traced as easily as a specific item of tangible personal property, the doctrine of ademption by satisfaction only applies if there is a writing to evidence the testator’s intent to treat the testator’s lifetime gift as an advancement of the inheritance. The writing can be a letter or other writing signed by the testator or a receipt signed by the beneficiary that indicates that the gift is to be treated as an advancement against the beneficiary’s inheritance. See R.C. 2105.051.

Incorporation by Reference. Ohio law allows a testator to incorporate a document that exists at the time of the execution of the Will into the Will. When a document is incorporated by reference, it becomes part of the Will and is administered as an integral part of the Will. See R.C. 2107.05.

Pretermitted Heir. The pretermitted heir statute, R.C. 2107.34, provides that if a testator has a child (or adopts a child) after the Will is executed, the child is entitled to receive the share of the estate the child would have received if the testator died without a Will, unless the Will specifically provides otherwise. This statute is designed to prevent the accidental disinheritance of children who are born after the Will is executed.

### Common Dispositive Provisions Contained in Simple Wills.

Specific Bequests and Legacies. One type of provision that is commonly found in simple Wills are specific bequests. A specific bequest is a provision that leaves a specific item of personal property or a specific amount of money to a named individual. In the template simple Will we are using for the Wills program, specific bequests would be added in the beginning of Item 5. It is always prudent to include language to specify what will happen to the specific bequest if the beneficiary predeceases the testator. For example, if the client did not want to designate a successor taker, the clause could read: “If A predeceases me, then this bequest will lapse and pass as part of my residuary estate.”

One benefit of making a specific bequest is that an Executor cannot sell specifically bequeathed personal property to pay debts until all other property other than specifically devised real estate has been sold and the proceeds used to pay the debts. See R.C. 2113.40(A)(2).

Specific Devises. A specific devise is the same as a specific bequest except that it relates to real estate that is left to a named individual. One benefit of specifically devising real estate is that an Executor cannot sell such real estate to pay debts until all other property, including specifically bequeathed personal property, has been sold and the proceeds used to pay the debts. See R.C. 2127.02.

Residuary Clause. The residuary clause controls the disposition of the testator’s property that is not specifically bequeathed or devised in the Will.

### Execution of Simple Wills; Testamentary Formalities.

Testamentary Capacity. A person must have testamentary capacity to execute a valid Will. Part of the attorney’s job is to confirm that the client possesses testamentary capacity before allowing the client to execute a Will.

Initially, to have testamentary capacity, a person must be 18 years of age, be of sound mind and memory, and not be under any restraint. See R.C. 2107.02. Additionally, the person must know the following: (1) that the person is executing their Will and the purpose of the Will; (2) the extent and nature of the person's property; and (3) the person's family, that is, the persons who would inherit from the person if the person died without a Will.

Execution Formalities. To be valid, a Will must be: (1) signed at the end by the testator or by another person at the testator's express direction and in the testator's conscious presence; and (2) be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature. R.C. 2107.03.

To be competent, a witness must be at least 18 years of age. R.C. 2107.06. Further, the witness should not be a beneficiary under the Will. If one of the witnesses is a beneficiary, then the bequest or devise to the beneficiary lapses. If the beneficiary is also an heir at law, the beneficiary receives the lesser of (1) the bequest or devise under the Will, and (2) the beneficiary's intestate share of the estate. R.C. 2107.15.

Revocation of Will by an Act. The testator must have testamentary capacity to revoke a Will. A Will can be revoked in a number of ways that clearly indicate the testator's intent to revoke the Will. Some of the ways include tearing, burning, or otherwise destroying the Will with the intention to revoke it. A Will can also be revoked by another writing signed with testamentary formalities, including a subsequent Will, that indicates the testator's intention to revoke the Will. See R.C. 2107.33. Almost all Wills contain a clause that revokes former Wills and codicils.

Revocation of Will by Divorce. A divorce automatically revokes the dispositive provisions of the Will for the benefit of the former spouse as well as any nomination of the former spouse as executor, trustee, or guardian, unless the Will expressly provides otherwise. See R.C. 2107.33(D).

#### **IV. Probate Court**

Pursuant to the Ohio Constitution each county probate court is a division of the court of common pleas. The probate court is also a court of limited jurisdiction meaning that it can only hear or entertain certain cases and matters. The scope of the probate court's jurisdiction is set by the Ohio Revised Code.

## **A. Exclusive Jurisdiction**

The Ohio Revised Code grants the probate court exclusive jurisdiction over several matters. When the probate court has exclusive jurisdiction over a matter that means it is the only court that can, by law, hear or entertain that particular matter. Section 2101.24(A)(1) of the Ohio Revised Code grants exclusive jurisdiction to the Probate Court over the following (the following is not an exhaustive list):

1. To take the proof of and admit wills.
2. To grant and revoke letters of authority.
3. To direct and control the conduct of executors and administrators.
4. To appoint, remove, direct, and control the conduct of guardians, conservators, and testamentary trustees.
5. To grant marriage licenses.
6. To investigate the need for a guardianship.
7. To authorize the sale of lands and completion of land contracts by executors, administrators, and guardians.
8. To construe wills.
9. To render declaratory judgments.
10. To terminate testamentary trusts.
11. To hear will contests.
12. To make presumption of death determinations.
13. To hear actions against sureties on bonds of fiduciaries appointed by the probate court.
14. To hear actions related to durable health care powers of attorney.
15. To hear actions relating to the use of life sustaining treatment over persons in a permanently unconscious state.
16. To hear applications to release an estate from administration.
17. To determine actions over the right of disposition of bodily remains.

## **B. Concurrent Jurisdiction**

The Ohio Revised Code also grants concurrent jurisdiction to the probate court over several matters. When the probate court has concurrent jurisdiction it has the same powers in law and in equity as the court of common pleas. Section 2101.24(B)(1) of the Ohio Revised Code grants the probate court concurrent jurisdiction over the following matters:

1. Any action that involves an inter vivos trust, a charitable trust or foundation, a power of attorney, the medical treatment of a competent adult, or a writ of habeas corpus.
2. The designation or removal of a beneficiary of a life insurance policy, annuity contract, retirement plan, brokerage account, security account, bank account, real property, or tangible personal property.
3. Designation or removal of a pay-on-death or transfer-on-death beneficiary.
4. A change of title to a joint and survivorship interest.
5. Alleged gifts.
6. Non-probate transfers of assets.

## **C. Powers When Jurisdiction is Proper**

When the probate court has jurisdiction over a matter, whether exclusive or concurrent, the probate court has full power and authority to dispose of the matter. The phrase “plenary power at law and in equity” is used in the Ohio Revised Code. That phrase means that the probate court can fully dispose of any matter properly before it or that the probate court can make legal determinations over matters that aren’t within the probate court’s exclusive or concurrent jurisdiction as long as the overarching matter is within its jurisdiction. For example, the probate court may construe a prenuptial agreement to determine whether an exception to an Inventory is proper. Normally construction of a prenuptial agreement falls outside of the probate court’s jurisdiction and would have to be brought in a different court. However, since construction of the prenuptial agreement is necessary to fully handle the exception to the Inventory (a matter over which the probate court does have exclusive jurisdiction) the probate court can exercise its plenary power and construe the agreement for that particular purpose.

## **V. Probate Code Sections Overview**

The Ohio Probate Code (which is not the formal name but a name often used by practitioners) is contained in Title 21 of the Ohio Revised Code. Title 21 of the Ohio Revised Code is then broken down into chapters and each of those chapters addresses a unique subset or area of probate law. In total there are 19 chapters dedicated to probate estate administration, guardianship proceedings, land sales, and wrongful death actions. These 19 chapters include:

### **Chapter 2101: Probate Court – Jurisdiction; Procedure**

Chapter 2101 is largely dedicated to establishing the jurisdiction of the probate court (see Session One materials), enumerating the powers, responsibilities, and authority of the probate judge, and setting forth the responsibilities of the probate court. Chapter 2101 is where you will also find information about record keeping requirements of the court and court cost information (in addition to the court's own fee list).

### **Chapter 2103: Dower**

Dower is an antiquated term that in Ohio refers to a spouse's one-third life estate interest in the real property of their consort (their spouse). The concept and impact of dower in probate practice has greatly diminished and almost disappeared because subsequent legislation has provided further protection of surviving spouses. For those with intellectual curiosity, Chapter 2103 is where you can find all the information you need about barring dower, conveyance in lieu of dower, assignment of dower, and forfeiture of dower.

### **Chapter 2105: Descent and Distribution**

Chapter 2105 serves two main functions. The first portion of the chapter (Sections 2105.01 through 2105.26) is largely dedicated to determining the proper people to inherit the assets of an estate when the decedent did not have a last will and testament (often referred to as an intestate estate). The later portion of the chapter (Sections 2105.31 through 2105.39) comprise the Ohio Uniform Simultaneous Death Act and address situations where people who would inherit from each other both pass away in quick succession and no evidence exists to determine which of them passed away first.

### **Chapter 2106: Rights of Surviving Spouses**

The title to Chapter 2106 is pretty self-explanatory as it sets forth the rights a surviving spouse has in the estate of his or her deceased spouse. The sections contained in Chapter 2106 specifically set forth what rights are available to the surviving spouse, the timing for a surviving spouse to exercise those rights, and the appropriate procedure for the surviving spouse to exercise those rights.

## **Chapter 2107: Wills**

The title to Chapter 2107 is also fairly instructive in that the Chapter deals exclusively with wills. Within Chapter 2107 are statutes that define what constitutes a will, set forth the proper means of execution of a will, provide the procedure for declaring a will valid, indicate proper process to follow when a will is lost, and present the means for revoking a will. In addition, Sections 2107.71 through 2107.77 govern will contest actions and provide specific information on parties, procedures, and time limits that depart from the Ohio Rules of Civil Procedure.

## **Chapter 2108: Revised Uniform Anatomical Gift Act**

The content of Chapter 2108 covers two main topics. Sections 2108.01 through 2108.521 address all aspects of organ donation including who can make an anatomical gift, creation of a donor registry, proper parties for removing organs, procedures for informational release, and post mortem examinations. The remaining sections, starting with 2108.70 and ending with 2108.99 govern the disposition of bodily remains outside of the organ donation context (think burial, cremation, etc.). These statutes indicate who has priority to make decisions regarding a person's bodily remains and how disputes over disposition of bodily remains are to be handled.

## **Chapter 2109: Fiduciaries**

Chapter 2109 serves as overarching rules for all fiduciaries appointed by the probate court. A fiduciary is any person appointed by and accountable to the probate court and has specific duties regarding the management of property for the benefit of others. The term fiduciary includes executors, administrators, trustees, commissioners, and several other appointed positions handled by the probate court.

Within the individual sections of Chapter 2109 are explanations of the bonding requirements of a fiduciary, the duties of a fiduciary, the basis for removal and replacement of a fiduciary, the qualifications for being a fiduciary, the transactions a fiduciary cannot undertake, and the accountings required by various fiduciaries. The contents of Chapter 2109 serve as starting point for understanding the obligations of a fiduciary which are then further defined for each specific fiduciary in subsequent chapters.

## **Chapter 2111: Guardians; Conservatorship**

One of the chapters that further defines the obligations of a fiduciary is Chapter 2111. Specifically, Chapter 2111 details the obligations, qualifications, and powers of guardians and conservators. In addition Chapter 2111 sets forth the procedures for initiation of guardianship proceedings, investigation of the need for a guardianship, handling of certain transactions by a guardian, and termination of a guardianship.

## **Chapter 2112: Adult Guardianship and Protective Proceedings Jurisdiction Act**

When a guardianship involves multiple jurisdictions (i.e., more than one state) then Chapter 2112 is where to look. The sections of this chapter outline how to handle and address the various issues that arise when guardianships stretch over multiple jurisdictions. Some of these issues include jurisdictional transfers, determinations of proper jurisdiction, and treatment of filings and evidence from other jurisdictions.

## **Chapter 2113: Executors and Administrators – Appointment; Powers; Duties**

Chapter 2113 also builds upon Chapter 2109 in that it further delineates the powers and duties of executors and administrators. As a reminder an executor is a fiduciary nominated pursuant to the terms of a person's will (and appointed by the probate court) to administer that person's estate while an administrator is a person appointed by the probate court to administer the estate of a person that passed away without a will. The job of an executor and administrator are very synonymous which is a large reason why Chapter 2113 covers executors and administrators at the same time.

The content of Chapter 2113 governs the appointment and removal of executors and administrators, sets forth the responsibilities of an executor or administrator when administering a probate estate, explains various steps an executor or administrator must take in certain transactions, and directs the filings that an executor or administrator must make. Certain sections of Chapter 2113 even detail how and when an executor or administrator can make distributions to beneficiaries.

## **Chapter 2115: Executors and Administrators – Inventory**

Though a separate chapter in title 21 of the Revised Code, Chapter 2115 could easily be incorporated into and consolidated under Chapter 2113. The 14 sections of Chapter 2115 deal with the Inventory of a decedent's Estate. An Inventory is essentially an itemized list of all assets that a decedent owned in his or her sole name as of his or her date of death. The details set forth in Chapter 2115 include the proper contents of an Inventory, who should receive notice of the Inventory, the role of appraisers in preparation of the Inventory, and procedures for setting hearings on the Inventory.

## **Chapter 2117: Presentation of Claims Against Estate**

Chapter 2117 also has a very self-explanatory title in that it deals with claims against a probate estate. The sections of Chapter 2117 are arguably some of the most important in Title 21 of the Revised Code because they address issues that frequently arise in the administration of an estate, they are frequently misapplied and misunderstood, and they govern a fiduciary's personal liability for certain improper payments. The sections are worth close study because they set forth special statutory procedures for how and when claims can be presented, how claims can be accepted or rejected, and the remedies available for a party with a rejected claim.

Along with specifically dealing with claims against an estate, Chapter 2117 also address the issues associated with insolvent estates. An estate is insolvent when the debts of the estate exceed the assets of the estate. The major statute to review when dealing with an insolvent estate is 2117.25. This particular statute provides the executor or administrator with the order in which debts of an insolvent estate must be paid. If the debts are paid out of order and creditors with a lower priority get paid before creditors with a higher priority, then personal liability arises for the fiduciary.

### **Chapter 2119: Trustee for Absentee**

When a person has disappeared while owning property in Ohio, is unable to return to Ohio, or refuses to return to Ohio, and that person's property requires attention, then Chapter 2119 provides the procedures for handling, managing, and disposing of that person's property.

### **Chapter 2121: Presumed Decedent's Law**

In particular circumstances an Ohio resident is presumed dead and his or her assets can be administered based on that presumption. The sections contained in Chapter 2121 provide the process and requirements of administering the estate of a person that is presumed deceased.

### **Chapter 2123: Determination of Heirship**

Occasionally the identity of the person or people entitled to receive the assets of an estate is not entirely clear. When that situation arises, Chapter 2123 provides the filing, procedural, and notice requirements to follow to ensure the fiduciary distributes the estate assets to the correct person.

### **Chapter 2125: Action for Wrongful Death**

When a person's death is caused by wrongful act, neglect, or default that would entitled the decedent to file a cause of action and receive damages had he or she not died, then a wrongful death action can be filed in the name of the executor or administrator against the person's whose wrongful act, neglect, or default cause the decedent's death. The sections of Chapter 2125 govern such a wrongful death action. Among the individual sections are directions on the proper persons entitled to recover in a wrongful death action, instruction on allocation of wrongful death proceeds, and methods for determination of damages in a wrongful death action.

### **Chapter 2127: Sale of Lands**

Chapter 2127 is a unique chapter in that it sets forth all the procedures and requirements that a fiduciary must carry out when that fiduciary has to sell the real property of an estate or guardianship. Land sale proceedings are required anytime a

will does not give an executor authority to sell, when an administrator is appointed, or when real estate is being sold from a guardianship. The sections of Chapter 2127 are very specific as to when a land sale is proper, what documents must be filed, what parties must be named defendants, and the order in which the sale must proceed. It is crucial that probate practitioners know the details and operation of Chapter 2127 because those details and operations at times depart from the normal course of a private real estate sale. It is up to the practitioner to educate the fiduciary, realtor, buyer, and title company on how the sections of 2127 alter the normal course.

### **Chapter 2129: Ancillary Administration**

Anytime a person owns real estate or tangible personal property within Ohio but dies as a resident of another state, then an ancillary administration must be filed in Ohio to transfer the decedent's Ohio property to the proper person or people. Within Chapter 2129 are the filing requirements, notice requirements, and procedures for opening an ancillary administration are found. The chapter also deals with handling of certain creditor claims against an ancillary estate.

### **Chapter 2131: Miscellaneous**

The catchall chapter of Title 21 is Chapter 2131. The collection of statutes contained in Chapter 2131 address present value calculations for Ohio estate tax purposes, dealing with contingent and expectant interests in estates, the statute of perpetuities, the deposit of securities in a fiduciary capacity, and the ability to create a joint ownership with a right of survivorship in an automobile.

## **VI. Fiduciary Titles**

When an estate is administered there is always a person or people appointed by the probate court to handle the administration. The exact title of that person or people varies depending on the circumstances of each estate. The most common titles found in estate administration are as follows:

### **Executor**

Executor is the title given to a person who is nominated in a decedent's will as the executor and who has been appointed by the probate court as a suitable person to carry out the administration. A person is only formally considered an executor (and hence only has the legal authority of an executor) after they are appointed by the probate court. Simply being nominated in a will as an executor does not confer any power or authority. After being appointed the executor has all the authority granted by the terms of the will in addition to the authority granted in the Ohio Revised Code.

## **Administrator**

The title administrator is given to a person appointed by the probate court to administer the estate of a person that passed away without a will (often referred to as an intestate estate). An administrator must be an Ohio resident and in most circumstances must obtain a bond as a prerequisite to appointment. An administrator has all authority granted in the Ohio Revised Code along with any additional authority specifically granted by the probate court.

## **Administrator WWA**

The title Administrator WWA (which stands for with will attached or with will annexed) is given to a person who is not nominated in a person's will but is appointed by the probate court to administer a testate estate. An administrator WWA has all the authority granted by the decedent's will and can avoid the need for bond if the decedent's will waives the bond requirement. An administrator WWA becomes necessary when all persons nominated as executor in a will have been removed, have passed away, or are unwilling to serve.

## **Special Administrator**

A special administrator is a title given to a person appointed by the probate court on a short-term basis to collect and preserve a decedent's assets when there is a delay in the appointment of an executor or administrator. The probate court can grant a special administrator any authority that the court considers proper. Appointment of a special administrator is rare and would only potentially occur when will contest action is filed or when there is a suit concerning proof of the will. Even in these circumstances, however, a fiduciary is usually appointed at the outset of a probate estate without any delay. Any will contest actions are then filed after appointment and thus does not result in a delay of appointment.

## **Commissioner**

A commissioner is the title given to a person who is administering an estate that is being release from administration. A release from administration is summary probate proceeding that is available when the assets of an estate are below particular thresholds. Typically a commissioner is appointed for a limited time and only for the limited purpose of transferring a decedent's assets pursuant to the probate court's order releasing an estate from administration.

## **VII. Domicile and Venue in Estate Proceedings**

The Ohio Revised Code provides that the probate division of the common pleas court has exclusive jurisdiction over a number of estate proceedings, such as the admission of wills. However, the subsequent question after determining the court with proper jurisdiction is to determine which probate court is the proper venue.

Proper venue is a statutory question and frequently revolves around the concept of a decedent's domicile.

## **Domicile**

Domicile is a legal concept that Ohio law defines as the place where a person voluntarily fixes his or her habitation, not for a temporary or special purpose, but with the intention of making it his or her permanent home and to which, whenever he or she is away, he or she intends to return. *In Re Estate of Stephan*, 17 Ohio Op. 361 (P.C. 1940). The law ascribes a domicile to every person and no person can be without one. *Sturgeon v. Korte*, 34 Ohio St. 525 (1878). Domicile controls a person's legal relations and responsibilities. While the concept of domicile is straightforward, determining domicile is always a case-by-case and fact laden inquiry. *Id.* The factors that courts often consider to determine a person's domicile include:

1. The maintenance of a home.
2. The location where a person is registered to vote.
3. Where a person registered titled property (e.g., automobile).
4. Place of burial.
5. Community ties.
6. Health considerations.

## **Venue**

After a decedent's domicile is determined, then the question of the proper venue to administer that decedent's estate can be answered. Ohio Revised Code Section 2107.11 provides guidance on questions of venue and indicates that the proper venue for admitting a will to probate is:

1. In the county in which the decedent was domiciled at the time of death.
2. In any county where any real property or personal property of the decedent is located if, at the time of death, the decedent was not domiciled in Ohio.
3. In the county in which a probate court rendered a judgment declaring the testator's will valid and in which the will was filed with the probate court.

## **VIII. Probate Property vs. Non-Probate Property**

The distinction between probate and non-probate property is arguably the single most important aspect of estate administration. The property a decedent owned and how the decedent owned that property indicate the steps required to transfer the property to the appropriate person, people, or entity. All of a decedent's property can be divided into two separate groups with one group being probate property and the other group being non-probate property.

### **Probate Property**

Probate property consists of any asset that the decedent owned in his or her sole name. This means that the assets does not have a joint owner, a transfer on death or pay on death beneficiary, or a designated beneficiary (such as on a life insurance policy). If an asset is probate property it also means that asset was not titled in the name of a trust. A decedent's will directs how probate property is handled and who receives the probate property. To transfer probate property, an estate must be opened in the appropriate county probate court and the estate must be administered in accordance with Title 21 of the Ohio Revised Code.

### **Non-Probate Property**

Non-probate property consists of any asset that is jointly owned with a right of survivorship, that has a transfer on death or pay on death beneficiary, that has a designated beneficiary, or that is titled in the name of a trust. Non-probate property transfers to the joint owner, designated beneficiary, or trust beneficiary by operation of law at a person's death. A person's will has no impact on how non-probate assets are transferred and the life insurance policy, trust agreement, or transfer on death beneficiary paperwork controls disposition.

### **Impact of Probate vs. Non-Probate**

The difference between probate and non-probate property has several impacts on the overall administration of an estate. Some of the more substantive impacts include:

1. The spousal rights provided in Chapter 2106 only apply to probate property.
2. A decedent's unsecured debts can only be collected out of probate assets.
3. The family allowance can only be collected out of probate property.
4. Probate proceedings are public record while non-probate transfers remain private.