Purposes and Uses of a Will (OH)

A Practical Guidance® Practice Note by Geoffrey S. Kunkler, Carlile Patchen & Murphy LLP

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This practice note describes the purposes and uses of a will in Ohio. It identifies the functions that a will may serve, such as transferring a testator's property and nominating an executor and a guardian for minor children. It also addresses the type of property that may be transferred by will.

For information on the requisites of creating and drafting a will, see Requisites, Instrumentation, and Will Provisions (OH). For information on revoking, reviving, amending, or interpreting a will, see Revocation, Revival, Amendments, and Will Contests (OH). For sample basic will forms, see Will for Individual with Spouse or Partner (Basic) (OH) and Will for Single Individual (Basic) (OH).

Purposes and Uses of a Will

The primary purpose of a will is to dispose of an individual's property after death. Tax Com. of Ohio v. Parker, 158 N.E. 89, 91 (Ohio 1927). See also Ohio Probate § 4.01. The Ohio Revised Code definition of "will" includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills. Ohio Rev. Code Ann. § 2107.01(A). A person who makes a will is referred to as the testator. Ohio Rev. Code Ann. § 2107.01(B).

A person who dies with a will is said to have died testate, while a person who dies without a will is said to have died intestate. In Ohio, a decedent's intestate property passes to his or her heirs as prescribed by statute. See Ohio Rev. Code Ann. § 2105.01 et seq. Since the disposition of property under the intestacy statute may differ greatly from the disposition intended by the decedent, perhaps the most important purpose of creating a will is ensuring that one's property passes upon death according to his or her true wishes. In Ohio, the law disfavors intestacy but does not prohibit it. See Polen v. Baker, 752 N.E.2d 258, 263 (Ohio 2001). Further, in interpreting ambiguous language in a will, Ohio courts apply an affirmative presumption against partial intestacy. That is, where a will is capable of two constructions, the court will favor the one by which the entire estate is disposed of. See Monroe v. Leckey, 142 N.E.2d 314 (Ohio C.P.1956).

By making and executing a will, a testator may:

- Direct the disposition of his or her property on death, either outright or to a continuing trust
- Nominate an executor
- Nominate a guardian for the testator's minor children
- Appoint an individual to control the disposition of his or her remains
- Exercise a testamentary power of appointment
- Create a trust for a beneficiary or class of beneficiaries

For sample basic will forms, see Will for Individual with Spouse or Partner (Basic) (OH) and Will for Single Individual (Basic) (OH).

Transfer Testator's Property

The primary use of a will is to direct the transfer of the testator's property on the testator's death to the beneficiaries designated by the testator to receive such

property. However, not all property is subject to disposition according to a testator's will—only probate property is. Property that is not subject to probate is considered nonprobate, including the following:

- Assets owned by the testator jointly with another individual, with survivorship rights
- Accounts (e.g., retirement, checking, savings) with a designated pay on death designation or transfer on death beneficiary
- Life insurance policies with a designated beneficiary
- Property held in trust
- Real property subject to a transfer on death beneficiary designation

Advise your client that nonprobate property passes either by operation of law or as a result of contract rights. See Ohio Probate Practice and Procedure § 12.03. A provision in the will that attempts to dispose of a nonprobate asset will be ineffective as to that asset. See, e.g., Ohio Rev. Code Ann. § 5302.23(B)(9) (transfer on death designation affidavit supersedes any attempt to transfer the real property by will).

Clients may see a will as unnecessary if all of their assets are nonprobate, that is, by being held in trust, owned jointly with rights of survivorship, or titled with a payable on death designation. Advise your client, however, that there are instances where a nonprobate asset may still pass in accordance with the terms of a will, such as when (1) a beneficiary form is incomplete or not filed prior to the testator's death, (2) all of the designated beneficiaries predecease the testator and no contingent beneficiary is named, (3) the joint account was established as an account of convenience only, or (4) the testator designated his or her estate as beneficiary. See Ohio Probate Practice and Procedure § 21.05. Because of these potential issues, you should always ensure that your client has a validly executed will in place, regardless of how assets are titled.

Nominate Executor

A will may be used to nominate an executor. An executor is a person named or designated in a decedent's will to carry out the provisions of the will and administer the decedent's property. Under the Ohio Revised Code, an executor is one type of fiduciary. Fiduciary is the general term used to describe a person appointed by and accountable to the probate court acting in a fiduciary capacity for any person, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another. Ohio Rev. Code Ann. §§ 2109.01, 2109.02. See Ohio Transaction Guide § 81.20.

If an individual dies with a valid will but fails to nominate an executor in such will or the nominated executor fails to serve, the court will appoint a fiduciary known as an administrator with will annexed (also known as an administrator W.W.A.). See Ohio Rev. Code Ann. § 2113.05. See also Ohio Transaction Guide § 81.22.

Prior to the appointment by the court and receipt of Letters Testamentary, also known as Letters of Authority, the nominated executor does not have the authority to dispose of estate property, except as necessary for paying funeral expenses or performing necessary acts for the preservation of the estate. See Ohio Rev. Code Ann. § 2109.02.

Executor Qualifications

An individual named as executor in a will does not need to be an Ohio resident, so long as such individual is either:

- Related to the testator as a blood relative or by marriage
  –or–
- A nonresident who resides in a state that authorizes the appointment of a nonresident executor

Ohio Rev. Code Ann. § 2109.21(B)(1). See also Ohio Probate § 6.02.

If the person named executor is a minor at the time of the will's admission to probate, administration may be granted with the will annexed during the nominee's minority, unless there is another named executor who will accept the nomination. If the will appoints an adult co-executor who is available to serve, the adult executor can administer the estate until the minor attains 18 years of age. At that time, the former minor may be admitted as executor upon giving bond, if required and not waived in the will. Ohio Rev. Code Ann. § 2113.13. Ohio Probate Practice and Procedure § 10.02.

Advise clients to nominate individuals who are suitable, competent, and willing to accept the appointment. See Ohio Rev. Code Ann. § 2133.05. An executor must have sufficient time, attention, and energy to devote to administering the estate and managing its affairs. For estates that include an operating business, or an interest in such a business, an executor with business knowledge and experience will be desirable, although for simpler estates these qualities are not absolutely necessary.

As the executor's key duties include the obligation to collect and manage the decedent's assets, prepare and file an inventory, distribute estate assets, and account for the estate property, it may be desirable to nominate an executor who is familiar with the character, extent, and location of the testator's property. By extension, an executor with geographical proximity to the property to be administered is desirable. Although it is possible to appoint a nonresident executor in Ohio, as discussed above, it is generally

inadvisable to nominate an out-of-state resident unless the out-of-state resident is the only trustworthy member of the testator's family or has some particular or special qualifications to serve as executor.

Before nominating a certain individual as executor, a testator should consider the various conflicts or potential conflicts that such individual has with the beneficiaries and creditors of the estate. In determining whether an executor is suitable despite a conflict of interest, the probate court will evaluate the level of the conflict of personal interest and duty to the beneficiaries. See In re Estate of Young, 212 N.E.2d 612, 617 (Ohio Ct. App. Dist.1964). See also Ohio Probate § 6.03. Note, however, that the existence of a conflict between the executor and beneficiaries will not necessarily disqualify such executor, so long as such executor is "reasonably disinterested." See In re Estate of Henne, 421 N.E.2d 506, 509 (1981) (quoting In re Estate of Young, 212 N.E.2d 612, 617).

Attorney as Executor

There is no statute prohibiting a drafting attorney from serving as executor under the will, but you must be careful not to seek the appointment or inadvertently influence the client to make such an appointment. Additionally, you must be mindful of the Rules of Professional Conduct Rule 1.7 (regarding conflicts of interest) and Rules of Professional Conduct Rule 1.8(c) (prohibiting an attorney from drafting a will in which he or she is given a substantial gift). See Rule 1.8(c), Ohio Prof. Cond. Rule 1.7. See also Comment 8, Ohio Prof. Cond. Rule 1.8.

Specifically, prior to drafting a will naming you (or one of your partners or associates) as executor or trustee you should:

- Discuss all persons (and corporate entities) who were considered or might be selected for the position, including their relative abilities, competence, and integrity, as well as their fee structure if applicable
- Discuss the potential of the attorney, as executor or trustee, retaining the attorney's firm to represent the estate or trust and any potential conflicts that may arise if the attorney serves as both executor and legal counsel
- Advise of the attorney's compensation as serving as executor and the professional fees to which the attorney's firm will be entitled

Best practice is to keep a record of these communications in the client's file, since any potential conflicts may not surface until many years after the execution of the client's will.

Corporate Executor

In addition to natural persons, qualified financial institutions may act as executors. See Ohio Rev. Code Ann. §§ 1111.01, 1111.02, 1111.11. See also Oh Jur Decedents' Estates § 775. While banks operating as trust companies offer the advantage of providing professional staff with extensive estate administration experience and training in investment and accounting matters, these banks often have minimum asset thresholds that must be satisfied before they will agree to act as executor. With this in mind, before drafting a will that nominates a bank as executor, you should ascertain whether the company has a minimum asset threshold and then determine, to the extent possible, whether the estate will meet that threshold.

Another issue to consider is the fees charged by financial institutions, as their rates typically differ from what a natural person would otherwise be entitled to as executor. Further, discuss with your client what should happen if the trust company merges with or is acquired by another institution (i.e., whether the succeeding bank should serve as executor).

Co-executors

If appropriate, the testator may nominate two or more co-executors. Co-executors are treated by the law as a single person representing the decedent, and each is authorized to represent the estate in discharging the usual functions of an executor or administrator. See Oh Jur Fiduciaries § 26. Appointing co-executors may be appropriate when the estate would benefit from the combined ability and attention of multiple individuals. Or, in other cases, the estate may benefit from the personal attention and knowledge of an individual executor paired with the professional expertise, judgment, and resources of a corporate executor. However, you should ensure that the client understands that co-executors are to be nominated only if the testator is confident that the benefit of nominating multiple executors outweighs the potential risks and difficulties presented when there are multiple executors.

There are various issues with nominating co-executors, all of which your clients should be acutely aware of. Ideally, co-executors will work in harmony and their skills will complement one another. However, this is not always the case. In situations where there is disagreement among the co-executors, there may be frequent and repeated court appearances for instructions, which can prove costly and time-consuming. Disharmony among co-executors can stem from various underlying issues, such as family rivalries, personality conflicts, and conflicting financial interests, among

others. Even in situations without disharmony, nominating co-executors might cause unnecessary delay and expense if they do not live close to one another geographically, or if each co-executor's signature is needed on documents as is required by many Ohio probate courts.

You should ensure that the client understands that it is not necessary to nominate co-executors, even if he or she is concerned that the proposed executor cannot complete the administration of the estate without assistance. Executors can and often do rely on the guidance of attorneys, accountants, and other professionals. You should, however, advise the client to appoint successor executors who are similarly qualified to the nominated executor in the event such nominated executor is unable or unwilling to serve.

Duties and Powers of Executor

Executors and administrators derive their powers from the letters of appointment, commonly known as Letters of Authority, issued to them by the probate court having jurisdiction over the estate. See Ohio Probate § 6.08. Prior to the issuance of such letters, no act or transaction conducted by a fiduciary is valid. An exception to this rule is that executors or persons with the right of disposition may pay funeral expenses or prevent necessary acts for the preservation of the estate prior to the issuance of letters of appointment. Ohio Rev. Code Ann. § 2109.02.

Once the court issues letters, it is the executor's obligation and duty, as a fiduciary of the testator's estate, to (1) collect assets generally within six months after the date of appointment, prepare and file an inventory, and appoint appraisers, if needed; (2) convert the assets into money; (3) invest the estate's assets; (4) pay creditors and succession taxes; (5) distribute the assets in accordance with the will; (6) file accounts; (7) prepare and file any applicable tax returns; and (8) settle the estate. See Ohio Rev. Code Ann. § 2113.25. See also Ohio Probate Practice and Procedure § 11.06. Additionally, unless otherwise directed by a decedent's will, the executor is authorized to:

- Continue the business of the decedent for four months following the date of the appointment, or for any further time as authorized by the court (Ohio Rev. Code Ann. § 2113.30)
- Manage real estate, including the rental of same, upon court order granting executor the authority to assume those duties (Ohio Rev. Code Ann. § 2113.311)

Ohio Transaction Guide § 81.40.

For more information on the duties and powers of an executor, see Fiduciary Appointments and Duties in Probate Proceedings (OH).

Make an Anatomical Gift

A will may be used to specify the testator's intent to make an anatomical gift. Ohio Rev. Code Ann. § 2108.05(A)(2). An anatomical gift made in this manner takes effect on the donor's death, whether or not the will is probated or deemed invalid after the donor's death. Ohio Rev. Code Ann. § 2108.05(E). Because the testator may have stated his or her preference for organ donation in a document other than the will, you should review any applicable documents to confirm that there are no inconsistent statements contained therein.

Nominate Guardian for Minor Children

A testator may nominate a guardian for his or her minor children in the testator's will. If the testator's death leaves a minor with no surviving parent, the probate court will consider the nomination, but has the discretion to appoint someone other than the testamentary nominee. Ohio Rev. Code Ann. §§ 2111.02, 2111.12(B). See also Ohio Transaction Guide § 82.30. The probate court will generally appoint such guardian except where it would not be in the child's best interest or there is some other reason not to. Ohio Rev. Code Ann. § 2111.121(B). See also In re Guardianship of Thomas, 771 N.E.2d 882, 897 (Ohio Ct. App. 2002).

Because a natural parent has a paramount right to custody over third parties, including custody through guardianship, a parent's guardianship nomination will generally be ineffective if both parents are alive. Ohio Rev. Code Ann. § 2111.08. As such, if both parents nominate a guardian in their wills, the guardianship provision of the parent first to die will have no legal effect. Ohio Rev. Code Ann. § 2111.12(B). See also Ohio Transaction Guide § 82.30. However, a probate court may deny custody to a natural parent and appoint a nonparent guardian if the probate court determines that the parent is unsuitable to care for the minor. Ohio Rev. Code Ann. § 2111.06. Circumstances warranting the denial of custody to a natural parent include the (1) abandonment of the child, (2) contractual relinquishment of the parent's custodial rights, or (3) total inability to care for the child. Further, the court may deny custody to a natural parent if it determines that the relationship would be detrimental to the child. In re JEWELL, 1984 Ohio App. LEXIS 11771, at *7 (Ct. App. Dec. 6, 1984).

There are two types of guardians that will typically be of concern to a parent, namely (1) guardian of the person and

(2) guardian of the estate. Ohio Rev. Code Ann. § 2111.02(A). These roles may be divided among multiple persons, or one person may be appointed to serve as both guardian of the person and guardian of the estate, as discussed in more detail below. See Ohio Rev. Code Ann. § 2111.01 et seq.

Because the testator may have nominated a guardian of minor children in his or her durable power of attorney, or some other writing executed in accordance with Ohio Rev. Code Ann. § 2111.121(A) (e.g., Standby Guardian Designation (OH)), you should review any applicable documents to confirm that there are no inconsistent nominations contained therein.

General Duties and Powers of Guardian

As a guardian is an agent of the court, the guardian's authority is limited by statutes, limitations, court decisions, and rules or orders of the probate court. R.C. § 2111.50(A)(2)(a). See also Ohio Probate Practice and Procedure § 29.02. A guardian may not exercise unlimited discretion. If a guardian does not have the express statutory right to act on a matter about which a ward may make a choice, the guardian needs court approval before acting. Ohio Probate Practice and Procedure § 29.02.

Selection of Guardian – Considerations

Parents sometimes nominate a single individual to serve as both guardian of the person and the estate. In many cases, the person selected by the parent to provide for the personal care of the child may also have some experience in handling money and making investments. In such a case, the person nominated as guardian of the person may also be nominated as guardian of the estate.

Counsel should make sure the parent is aware, however, that the responsibilities of these two roles are essentially distinct. A person who is physically and emotionally capable of providing for the minor's personal needs may not necessarily have the business skill, experience, or instincts necessary to keep detailed records and make investment decisions. Conversely, a skilled financial manager will not necessarily be able or willing to undertake the day-to-day responsibilities of caring for a minor child.

Guardian of the Person

Selecting a suitable person to nominate as guardian of the person of a minor child can be a difficult decision for a parent. Such individual is primarily responsible for the care and custody of the minor. The duties of the guardian include protecting the minor's property, providing suitable maintenance and education for the minor, making health care decisions for the minor, and obeying all orders and judgments of the probate court. Ohio Rev. Code § 2111.13(A)(1). See also Ohio Probate Practice and Procedure § 29.03.

Although the best interests of the child will be uppermost in the parent's mind, determining how best to serve those interests will not always be easy. The decision can also be complicated by family dynamics. Desirable characteristics of a guardian include:

- Similar age to (or younger than) the parent
- Good health
- Character, habits, and lifestyle that make for a good environment for the child
- Goals, values, and parenting style similar to or shared with the child's family
- Acquaintance with the child and ability to interact with the child on a mutually satisfactory basis
- Longstanding and stable relationship with the child's family

The foregoing considerations frequently indicate the desirability of nominating a relative from the parent's generation, such as one of the parent's siblings or cousins. There is no requirement that a guardian is a relative, however. Nor is there a requirement that the guardian named in the will by the parent of a minor is a resident of Ohio (Ohio Rev. Code Ann. § 2109.21(C)(1)(a)), though appointment of a guardian who lives close to the minor's former home may cause less disruption to the minor's life than appointing a guardian who lives outside of Ohio.

While the law does not require a guardian to be married, marital status may be a factor in determining an individual's suitability to discharge the duties of a guardian. On one hand, a guardian who is married may be expected to have the assistance of his or her spouse in meeting the minor's needs. On the other hand, having joint guardians always comes with the possibility of disagreements or disputes that may hamper the effective discharge of their duties. If a testator wants to name a married couple to act as joint guardians, the testator should consider specifying what should happen if the couple is no longer married or if either of the two nominees has passed away. If the testator would be comfortable having one spouse serve alone as guardian but not the other, it may be more straightforward to nominate only that spouse as guardian, with the hope that the other spouse remains involved, even in the absence of a legal obligation to do so. Therefore, if your client is considering nominating joint guardians, advise him or her to only appoint individuals whom the testator would trust to serve as sole guardian.

Guardian of the Estate

While the position is different in nature, it is still desirable for a nominee for guardian of the estate to share some of the same characteristics as a nominee for guardian of the person. For example, it is desirable for the guardian of the estate to have a close and trusted relationship with the family; but such guardian should also have the ability to properly hold and manage the minor's property. Additionally, such guardian must have the ability to guard the minor's financial and personal interests. A person who is capable of handling money and property, making prudent investment decisions, being responsive, and keeping detailed and accurate records would generally be a preferred candidate. The guardian of the estate will be required to provide the probate court with an inventory of the child's property within three months after his or her appointment. Ohio Rev. Code Ann. § 2111.14. See also Ohio Probate Practice and Procedure § 29.04.

The extent of the property that must be managed may have some bearing on the parent's selection. Although a personal friend or relative might be competent to hold and manage a relatively small estate, a person with professional fiduciary experience (or even a trust company) may be better suited to handle a larger estate. Counsel should be aware, however, that a guardian of the estate will not be required if some other arrangement has been made for the management of the minor's property, such as a trust. If the value of the property devolving to the minor is substantial, it is generally advisable to direct the property to a testamentary trust for the minor's benefit, as discussed below. The appointed trustee, rather than a guardian of the estate, will be responsible for administering the trust. For a detailed discussion of trusts, see Characteristics and Uses of Trusts (OH).

Create or Exercise Power of Appointment

In a will, a testator may create a power of appointment in a donee. A testator may also exercise a power of appointment previously granted to the testator via some other source, and which is exercisable by the testator's will. Ohio Transaction Guide § 67.23. A power of appointment is not property; rather, it is an authority created or reserved by a person to dispose of an interest in real or personal property. Oh Jur Estates, Powers, and Restraints on Alienation § 137.

In essence, a testamentary power of appointment is a power that a testator can either:

- Reserve in the named donee, allowing the donee to designate to whom and in what amounts the property will be distributed once the property is in the donee's possession –or–
- Restrict the named donee's control over the property

In creating a power of appointment, the testator should specify (1) the property that is the subject of the power; (2) the manner in which the power is to be exercised; and (3) the permissible appointees in whose favor the donee can exercise the power, such as the donee, the donee's estate, creditors of the donee or donee's estate, and certain individuals or classes of individuals. See Oh Jur Estates, Powers, and Restraints on Alienation § 156.

To validly exercise a power of appointment by a will, the testator must specifically reference the power. Ohio Rev. Code Ann. § 2107.521. Further, the testator must exercise the power in accordance with the instructions prescribed by the instrument creating the power, if any. Murstein v. Central Nat'l Bank, 495 N.E.2d 37, 40 (Ohio Ct. App. 1985). A general residuary clause in a will does not exercise a power of appointment held by the testator absent a specific reference to such power. Clinton Cty. Nat'l Bank & Tr. Co. v. First Nat'l Bank, 403 N.E.2d 968, 93 (Ohio 1980).

For more information on Powers of Appointment, see Powers of Appointment and Estate Taxation.

Create a Trust for a Beneficiary or Class of Beneficiaries

A trust created under a will is referred to as a testamentary trust. Additionally, the terms of the will govern the testamentary trust, so there is no separate trust agreement, and such trust is irrevocable.

Testamentary trusts can be used for a number of reasons. One potential reason for creating a testamentary trust is to achieve various tax benefits. Another use of a testamentary trust is to defer distributions of a child's inheritance until a later age when such child will be more responsible. Furthermore, if such child is thought to be financially irresponsible by the testator, that child's inheritance can remain in trust throughout his or her lifetime, with specific directions as to the circumstances and conditions under which distributions of income and principal from his or her inheritance can be made. Lastly, a testamentary trust can be used to provide income and principal, if necessary, to a surviving spouse during his or her lifetime, but then provide for the ultimate distribution of the assets to the testator's children.

For more information on trusts, see Requirements and Restrictions on Trust Purposes and Administration (OH).

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Geoff was named a "Top Lawyer" by Columbus CEO magazine in 2016, 2018-2020. He was named Top Attorneys Rising Stars for 2020 by Columbus Monthly. Geoff is rated AV Preeminent® by Martindale-Hubbell®. He was also listed as one of Ohio Super Lawyers magazine's "Rising Stars" for 2019 and 2020, and listed in Columbus Business First magazine's Class of 2020 'Forty Under 40.'

Geoff is involved with the Delaware County Foundation, where he is Vice-Chair of the Board of Directors and a member of the Development Committee. He is also involved in the special needs community. In addition to volunteering at state-level competitions, he is the current Chair of the Board of Directors for Special Olympics Ohio. Geoff was previously the inaugural Chair of the Development Committee. He supports The Ohio State University and is a member of the Buckeye Club. Additionally, Geoff is a founding member and the current and inaugural Treasurer for the Central Ohio Business and Wealth Planning Council.