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S. 115 and H. 288: Steps toward Logic and Fairness in the Ohio Probate Law

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S. 115 AND H. 288: STEPS TOWARD LOGIC AND FAIRNESS IN THE OHIO PROBATE LAW

I. INTRODUCTION

S. 115[1] and H. 288[2] make revisions in various sections of the Ohio probate law. S. 115 contains provisions dealing with a wide range of topics, including the right to exoneration from mortgage liens on devised real property,[3] the effect of the passage of time on a durable power of attorney,[4] and exemptions from the odometer disclosure law for vehicles transferred by will or inheritance.[5] H. 288 deals with the personal liability of fiduciaries, trustees, and administrators who hold a general partnership interest, or enter into contracts while acting in their fiduciary capacity.[6]

This note will explore the problems and considerations which prompted the legislature to make these revisions in the Ohio probate law. It will also examine the revisions themselves and discuss the effect these revisions will have on the practice of probate law in Ohio.

II. SUMMARY AND EXPLANATION

S. 115, which was introduced upon the recommendation of the Ohio State Bar Association (O.S.B.A.), makes seven general revisions in the Ohio probate law.[7] The first revision provides that a person who inherits property which is burdened by a mortgage lien will acquire the property subject to the mortgage lien.[8] Under Ohio law prior to the enactment of S. 115, a person who acquired title to real property by devise was exonerated from the burden of the mortgage; the burden, therefore, fell upon the remainder of the estate.[9]

A second revision instituted by S. 115 exempts the transfer of ve-

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1. Act of June 30, 1983, 1983 Ohio Legis. Serv. 5-313 (Baldwin) (codified in scattered sections of tits. 13, 21, 45 & 53 OHIO REV. CODE ANN. (Page Supp. 1983)).

2. Act of Nov. 30, 1983, 1983 Ohio Legis. Serv. 5-368 (Baldwin) (codified in scattered sections of tits. 13 & 17 OHIO REV. CODE ANN. (Page Supp. 1983)).

3. *See* OHIO REV. CODE ANN. §§ 2107.54, 2113.52 (Page Supp. 1983).

4. *Id.* § 1337.09(A).

5. *Id.* § 4505.06(B)(2).

6. *Id.* § 1339.65.

7. These revisions were suggested and the original proposals were drafted by the Board of Governors of the Probate and Trust Law Section of the Ohio State Bar Association. Interview with Donald Schweller, member of the Probate and Trust Law section of the O.S.B.A. (March 14, 1984) [hereinafter cited as Schweller interview] (on file with University of Dayton Law Review).

8. OHIO REV. CODE ANN. § 2113.52(B) (Page Supp. 1983).

9. *See Report of the Probate & Trust Law Section*, 55 OHIO ST. B.A. REP. 1809, 1810 (1982) [hereinafter cited as *Probate Report* 1982].

hicles by devise from the odometer disclosure requirements of Ohio law.[10] Prior to the enactment of S. 115,[11] an executor or administrator was required to comply with the odometer disclosure requirements whenever a motor vehicle was transferred to a beneficiary or heir at law.[12]

The third change made by S. 115 concerns the power of the courts of common pleas to sell or lease real estate held in trust when the trustee has specifically been given such power by the instrument creating the trust. Under the provisions of section 5303.21,[13] as it existed prior to the enactment of the revisions, the courts of common pleas had the power to sell[14] or lease[15] real estate despite any objections raised by the trustee. S. 115 revises sections 5303.21 and 5303.31 to provide that the courts of common pleas no longer have this authority when the trustee has been given the power of sale or lease by the instrument creating the trust. Therefore, property cannot be sold or leased unless the trustee consents.

The fourth revision made by S. 115 provides a creditor with an option when filing a claim against the estate. The creditor may simply file the claim with the executor or administrator of the estate, or the creditor may file the claim with the estate and submit a copy of the claim to the probate court.[16] Under the law prior to the adoption of S. 115, the creditor was required to file his claim with the executor or administrator of the estate;[17] the executor or administrator was then required to compile a list of all the claims submitted and file it with the probate court.[18] The new bill provides that if the creditor has chosen to file a copy of the claim with the probate court, the probate court shall not close the administration of the estate until the claim has either been allowed or rejected.[19]

The fifth alteration made by the bill allows a testator to confer upon another person the power to nominate the testator's personal representative. Ohio Revised Code section 2107.65[20] provides that a testa-

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10. OHIO REV. CODE ANN. § 4505.06(B)(2) (Page 1982 & Supp. 1983).

11. S. 115 was passed June 3, 1983, and was signed into law by Governor Celeste on July 14, 1983. Act of June 30, 1983, Ohio Legis. Serv. 5-313 (Baldwin) (codified in scattered sections of tits. 13, 21, 45 & 53 OHIO REV. CODE ANN. (Page Supp. 1983)).

12. This requirement was imposed by OHIO REV. CODE ANN. § 4505.06 (Page 1982).

13. *Id.* § 5303.21 (Page 1981 & Supp. 1983).

14. *Id.* (Page 1981).

15. *Id.* § 5303.31.

16. OHIO REV. CODE ANN. § 2117.06(A) (Page Supp. 1983).

17. *See* OHIO REV. CODE ANN. § 211.06 (Page 1982).

18. *Id.*

19. OHIO REV. CODE ANN. § 2117.06(F) (Page Supp. 1983).

20. *Id.* § 2107.65.

tor may confer "the power to nominate . . . an executor, co-executor, successor executor or successor co-executor."[21] This section also allows the testator to specify that a person so nominated may serve without bond.[22]

The sixth change instituted by S. 115 involves the duration of a durable power of attorney.[23] Under prior law it was not clear whether the authority of a durable power of attorney was affected by the passage of time. As a result, some financial institutions refused to honor a durable power of attorney which had not been recently executed.[24] S. 115 clarifies the law by amending section 1337.09(A) to specifically provide that the authority of a durable power of attorney is not affected by the lapse of time after its execution unless the instrument itself states a termination date.[25]

Finally, S. 115 amends the probate law by enacting section 1337.09(B).[26] This section authorizes the principal of a durable power of attorney to nominate either the attorney in fact,[27] or another qualified person[28] to be appointed the guardian of the principal's person, estate, or both if the need for such a guardian should arise. Prior to the enactment of S. 115, Ohio law did not permit a principal to nominate a guardian.

H. 288, which was introduced at the request of the Ohio Bankers Association,[29] concerns the personal liability of an executor, trustee, or administrator who undertakes a general partnership interest or enters into a contract in a fiduciary capacity.[30] Under the prior Ohio law, the party holding the general partnership interest was held personally lia-

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21. *Id.*

22. *Id.*

23. A "durable power of attorney" is one in which the principal provides, by the use of particular language, that the authority of the attorney in fact is not affected by the subsequent disability of the principal. *See* OHIO LEGISLATIVE SERV. COMM'N BILL ANALYSIS: AM. S.B. 115 (AS REPORTED BY THE H. CIVIL & COMMERCIAL LAW COMM.) 4 (1983) [hereinafter cited as S. 115 LEGISLATIVE ANALYSIS] (on file with University of Dayton Law Review).

24. *See Report of the Probate and Trust Law Section*, (pt. II) 56 OHIO ST. B.A. REP. 592, 594 (1983) [hereinafter cited as *Probate Report* 1983].

25. OHIO REV. CODE ANN. § 1337.09(A) (Page Supp. 1983).

26. *Id.* § 1337.09(B).

27. An "attorney in fact" is one who is given the power of attorney, in a writing, to act as a party's agent or attorney. The power of attorney is revoked by operation of law upon the death of the principal. BLACK'S LAW DICTIONARY 1055 (5th ed. 1979).

28. A person is qualified to be appointed guardian when he or she is competent, suitable, and willing to accept the appointment. OHIO REV. CODE ANN. § 2111.121(B) (Page Supp. 1983).

29. Schweller interview, *supra* note 7.

30. *See* OHIO LEGISLATURE SERV. COMM'N, BILL ANALYSIS: H.B. 288 (AS INTRODUCED) 1 (1983) [hereinafter cited as H. 288 LEGISLATIVE ANALYSIS] (on file with University of Dayton Law Review).

ble for the debts and obligations incurred by the partnership.[31] This was true whether the general partnership interest was held pursuant to one's fiduciary duties or solely for one's own self-interest. Obviously, this situation was inherently unfair, and it discouraged banking institutions, corporate fiduciaries, and individuals from holding a general partnership interest while acting in a fiduciary capacity.[32] Thus, under the prior law, a person acting in a fiduciary capacity received very little[33] in return for having his or her personal assets placed at risk. H. 288 provides immunity from personal liability to an executor, administrator, or trustee who holds a general partnership interest or enters into a contract while serving as a fiduciary.[34]

III. ANALYSIS

The impetus and original drafting of S. 115 was supplied by the O.S.B.A.[35] As originally introduced,[36] S. 115 made four revisions in the Ohio laws dealing with the administration of decedents' estates.[37]

A. Sections 2107.54 and 2113.52: The Right to Exoneration

The first revision, which is embodied in amended section 2113.52 of the Revised Code, denies a devisee the right to exoneration from mortgages which burden devised real estate unless a right to exoneration is specifically granted by the testator.[38] Under the law prior to the enactment of S. 115, unless there was a specific provision in the will to the contrary, a devisee of real estate which was encumbered by a mortgage lien was provided a right of exoneration from the mortgage lien.[39] Thus, the party who acquired title to real estate through devise was allowed to reap the benefits which accrued to such title, but incurred no obligation for the mortgage lien. Consequently, the burden of the mortgage lien fell upon the residuary estate. The previous section 2107.54

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31. *See* OHIO REV. CODE ANN. § 1775.14 (Page 1982).

32. Testimony of William E. Karnatz, vice-president and manager of the Personal Trust Division of the Central National Bank of Cleveland, before the House Civil & Commercial Law Comm. (April 26, 1983) [hereinafter cited as Karnatz testimony] (on file with University of Dayton Law Review).

33. When a party acts in a fiduciary capacity, the profits from the partnership go to the beneficiary of the trust or estate, not to the fiduciary. The fiduciary receives a ministerial fee only. Karnatz testimony, *supra* note 32.

34. OHIO REV. CODE ANN. § 1339.65 (Page Supp. 1983).

35. Testimony of Sen. Zimmers on Am. S.B. 115 before the House Civil & Commercial Law Comm. (June 14, 1983) [hereinafter cited as Zimmers testimony] (on file with University of Dayton Law Review).

36. The bill was originally introduced by Senator Zimmers on March 9, 1983. S. 115 LEGISLATIVE ANALYSIS, *supra* note 23, at 6.

37. Zimmers testimony, *supra* note 35.

38. OHIO REV. CODE ANN. § 2113.52(B) (Page Supp. 1983).

39. *See Probate Report* 1982, *supra* note 9, at 1809, 1810.

provided that when an estate sold devised property to pay a debt owed by the testator, the other devisees and legatees had to contribute proportionately so that the loss was shared equally by all non-exonerated devisees and legatees.[40] Thus, under prior law, the burden of a mortgage lien was actually borne by the remaining devisees and legatees, while the devisee who received the real estate was completely exonerated.

The O.S.B.A., through its Probate and Trust Law Section,[41] concluded that this result was caused by a misinterpretation of the law and was contrary to the intention of the average testator.[42] The revisions to sections 2107.54 and 2113.52 were proposed to clarify the law and to allow the courts to honor the intention of the testator. The revisions accomplish this by shifting the burden of the mortgage lien from the residuary estate to the specific devisee who acquired title to the real estate.[43]

The revisions made in sections 2107.54 and 2113.52 are predicated upon common sense and fairness. The revisions have no adverse effects on the rights of creditors and allow the burden of a mortgage lien to follow the property for which it was incurred. Furthermore, a testator may still grant a right of exoneration to a devisee by including specific language to that effect in the will. Thus, these revisions, which allow a testator to exonerate a devisee from the burden of a mortgage lien but do not create a presumption of exoneration, bring the law into accord with commonsense notions of justice. Therefore, the revisions should have a positive effect on the way the law is perceived by the citizens of Ohio.

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40. OHIO REV. CODE ANN. § 2107.54 (Page 1976). The section stated in part:

> When real or personal property, devised or bequeathed, is taken from the devisee or legatee for the payment of a debt of the testator, the other devisees and legatees must contribute their respective proportions of the loss to the person from whom such payment was taken so that the loss will fall equally on all the devisees and legatees according to the value of the property received by each of them.

Id.

41. The O.S.B.A. is sub-divided into various committees, each of which deals with a specific area of law. The Probate and Trust Law Committee is one such committee, and it is responsible for determining if legislation is needed in the area of probate and trust law. If the committee determines that legislation is needed, a proposal and sample draft is written by the committee members. The proposed legislation is published in the Ohio Bar Journal, and sent to the O.S.B.A. Council of Delegates. If it is approved by the Council of Delegates, it is sent to the O.S.B.A.'s lobbyists, and they attempt to get the proposed draft introduced by a legislator. *See* Schweller interview, *supra* note 7.

42. *See, Probate Report* 1982, *supra* note 9, at 1809, 1810.

43. Zimmers testimony, *supra* note 35.

B. *Section 4505.06: Odometer Disclosure*

The revisions made in the odometer disclosure law are very practical and logical. The language of section 4505.06[44] makes it clear that the provision is intended to protect purchasers of used motor vehicles. Thus, on its face, the section is not relevant when a motor vehicle is acquired by devise or inheritance. When a person acquires a motor vehicle by devise or inheritance, no purpose is served by requiring the beneficiary or legal heir to certify the vehicle's mileage to himself or to herself. Furthermore, there is no reason to require a fiduciary to comply with the disclosure requirements,[45] because, as in the case of a beneficiary, there are no consumer interests which require protection. Therefore, since the impetus for the disclosure requirement is not present in these cases, the creation of an exception to the odometer disclosure requirements is very logical. The revisions remove a potential source of irritation to individual fiduciaries and beneficiaries. More importantly, they remove a legal requirement which could be perceived as serving no purpose other than to harass the citizens of Ohio.

C. *Sections 5303.21 and 5303.31: The Power to Sell and Lease*

The amendments to sections 5303.21 and 5303.31 of the Revised Code insure that the express wishes of the grantor of a trust will be followed. The O.S.B.A. recognized that the law which authorized courts of common pleas to sell or lease an estate held in trust, without the approval of the trustee who had been given the power to sell or lease the real property,[46] was basically unfair and ignored the grantor's intention.[47] The revisions simply deprive the courts of common pleas of this authority; when the trust instrument gives the trustee authority to sell or lease real property, the estate cannot be sold or leased without the trustee's consent.[48] Thus, the change insures that the wishes of the grantor, as expressed in the creating instrument, will not be frustrated by the courts.

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44. OHIO REV. CODE ANN. § 4505.06(B) (Page 1982 & Supp. 1983). *See supra* note 10.

45. *Id.*

46. *See* OHIO REV. CODE ANN. §§ 5303.21, 5303.31 (Page 1981).

47. *See Report of the Probate and Trust Law Section*, 54 *Ohio St. B.A. Rep.* 699 (1981) [hereinafter cited as *Probate Report* 1981].

48. OHIO REV. CODE ANN. §§ 5303.21, 5303.31 (Page Supp. 1983). Section 5303.21(B) states that "[i]f an estate is held in trust and if the trustee is authorized by the trust instrument to sell real property, a court of common pleas shall not authorize the sale of the estate pursuant to division (A) of this section unless the trustee consents to the sale." *Id.* § 5303.21(B). Section 5303.31(B) states that "[i]f an estate is held in trust and if the trustee is authorized by the trust instrument to lease real property, a court of common pleas shall not direct pursuant to division (A) of this section that the estate be leased unless the trustee consents to the lease." *Id.* § 5303.31(B).

D. Section 2117.06: Options in Filing a Claim

The amendment to section 2117.06 provides a creditor with the option of filing a copy of the claim with the probate court in addition to the requirement that the claim be filed with the executor or administrator of the estate.[49] This change is intended to protect the creditors' interests. For example, a creditor could be in a situation where he or she does not wish to institute litigation to enforce the claim, yet does not want the claim to be ignored.[50] Under prior law, the administrator of the estate was required to compile a list of the known claims and submit it to the probate court.[51] Thus, it was possible for an estate to be closed by a probate judge when, through inadvertence or by the active design of the administrator, the judge was not aware of one or more claims. The revision offers a creditor a method by which this possibility can be eliminated. If a creditor files the claim with the probate court as well as with the estate, the probate court cannot close the administration of the estate until the claim has either been allowed or rejected.[52] Therefore, the revision provides a method, short of instituting a legal action, by which a creditor can insure that a claim will be considered. The executor still has the authority to allow or reject the claim, subject to the approval of the probate court,[53] but the creditor no longer is faced with the possibility that a claim will be completely ignored.

E. Additional Revisions Instituted by S. 115

During its consideration of S. 115, the House Civil and Commercial Law Committee included further revisions of the Ohio probate law in the bill. These revisions were recommended and originally drafted by the Probate and Trust Law Section of the O.S.B.A.

1. Section 2107.65: The Nomination of Executors

Section 2107.65 was enacted to deal with the nomination of execu-

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49. *Id.* § 2117.06(B).

50. *See Probate Report* 1982, *supra* note 9, at 1809.

51. OHIO REV. CODE ANN. § 2117.16 (Page 1976).

52. *Id.* § 2117.06(F) (Page Supp. 1983). Section 2117.06(F) specifically states that "[i]f a creditor presents a claim against an estate in accordance with division (A)(2) of this section, the probate court shall not close the administration of the estate until that claim is allowed or rejected." *Id.*

53. See OHIO REV. CODE ANN. § 2117.17(B) (Page Supp. 1983). This section states in part:

> The notice required by this section shall state that a hearing concerning the debts has been scheduled, shall set forth the time and the place of the hearing and shall state that the action of the executor or administrator in allowing and classifying claims will be confirmed at such hearing unless cause to the contrary is shown.

Id.

tors. The section permits a testator to confer by will the power to nominate a personal representative.[54] It also confers upon the testator the power to declare in the will that the person nominated may serve without bond.[55] The necessity for this provision can be illustrated by the situation in which the testator has provided by will that a specific person or group of persons has the power to nominate the executor of the testator's will.[56] Because section 2113.05[57] did not specifically provide that a person so nominated could serve without bond, some probate courts took the position that if the name of the nominated executor was not specifically indicated in the will, the person nominated was required to post bond.[58] Section 2107.65 clearly resolves this issue.[59]

2. Section 1337.09: The Duration of Durable Powers of Attorney

When the O.S.B.A. learned that "certain financial institutions in the State of Ohio were failing to honor Durable Powers of Attorney which were not recently executed,"[60] it recommended a revision of the law dealing with the duration of a durable power of attorney.[61] The O.S.B.A. concluded that this inaccurate interpretation of the law was caused by a lack of clarity in section 1337.09,[62] and felt that the addition of a simple provision would eliminate the problem.[63] The resulting amendment of section 1337.09(A) makes it clear that in the absence of a specific terination date, the authorityof an attorney in fact is not affected by the passage of time following the execution of a durable power of attorney.[64]

This revision is significant because it insures that the wishes of the

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54. *Id.* § 2107.65. The section states:

A testator may confer in his will, upon one or more persons, the power to nominate, in writing, an executor, coexecutor, successor executor, or successor coexecutor, and may also provide in his will that persons so nominated may serve without bond. If a will confers such a power, the holders of it have the authority to nominate themselves as executor, coexecutor, successor executor, or successor coexecutor unless the will provides to the contrary.

Id.

55. *Id.*

56. *See Probate Report* 1983, *supra* note 24, at 592.

57. OHIO REV. CODE ANN. § 2113.05 (Page 1976).

58. *See Probate Report* 1983, *supra* note 24, at 592.

59. *See supra* note 54.

60. *Probate Report* 1983, *supra* note 24, at 592, 594.

61. *Id.*

62. OHIO REV. CODE ANN. § 1337.09(A) (Page 1979).

63. *Probate Report* 1983, *supra* note 24, at 592, 594.

64. OHIO REV. CODE ANN. § 1337.09(A) (Page Supp. 1983). The pertinent part of this section states that "the authority of the attorney in fact is exercisible by him as provided in the written instrument notwithstanding the later disability, incapacity, or adjudged incompetency of the principal and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument." *Id.*

grantor of a durable power of attorney will be given legal recognition. It is highly unlikely that a person grants a durable power of attorney with the expectation that, under the law, the authority granted will be diminished or totally dissipated by the passage of time. Thus, the bill reconciles the law with the expectations of the average citizen. Viewed from this perspective, the change is a positive development.

3. Sections 1337.09(B) and 2111.121: The Authority to Nominate a Guardian

The O.S.B.A. believed that a principal should have the authority to nominate a person to serve as his or her guardian in the event that it becomes necessary to institute guardianship proceedings at a future date.[65] Consistent with this belief, the O.S.B.A. was instrumental in revising the law to authorize the principal of a durable power of attorney to nominate a guardian.[66] Accordingly, under the new law, the court will consider the person nominated for appointment as guardian of the principal if such an appointment becomes necessary at a future time.[67] Section 1337.09(B) provides that the principal may authorize the person nominated, or the attorney in fact, to nominate a "successor" guardian for the court's consideration.[68] The principal is also granted the authority to direct that bond be waived for any party nominated to serve as guardian under this section.[69]

Section 2111.121(A) allows the nomination of a guardian to be made in a writing other than a durable power of attorney.[70] The authority granted to a principal by section 2111.121(A) is identical to that granted by section 1337.09(B).[71] For a nomination under section 2111.121(A) to be effective, the writing must comply with the four requirements described in that section.[72]

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65. *Probate Report* 1983, *supra* note 24, at 592, 595.

66. *Id.*

67. OHIO REV. CODE ANN. § 1337.09(B) (Page Supp. 1983). This nomination is not binding on the court, but is for the court's consideration if guardianship proceedings are initiated. *See infra* notes 73–75 and accompanying text.

68. OHIO REV. CODE ANN. § 1337.09(B) (Page Supp. 1983).

69. *Id.*

70. *Id.* § 2111.121(A).

71. *Id.* The principal has the authority to nominate a person to serve as guardian of his or her person, estate, or both; and, to authorize the person nominated to nominate a successor guardian; and, to direct that bond be waived for a person nominated for appointment as guardian or successor guardian in accordance with the written instrument. *Id.*

72. The four requirements for an effective nomination are that the writing shall:
(1) be signed by the person making the nomination in the presence of two witnesses;
(2) be signed by both witnesses;
(3) contain, immediately preceding their signitures, an attestation by the witnesses that the person making the nomination signed the writing in their presence; and,
(4) be acknowledged by the person making the nomination before a notary public.

If the principal makes a nomination through either type of writing and guardianship proceedings are commenced, the court will appoint the person nominated if that person is competent, suitable, and willing to accept the appointment.[73] Thus, depending upon the court's interpretation of the terms *competent* and *suitable*, this section could constitute a significant change in the law. Prior to the enactment of S. 115, a person possessed no legal authority to nominate the party who would, should circumstances necessitate it, be appointed his or her guardian. Such authority is significant in light of the probability that most people have a clear preference concerning who they want to be put in charge of their financial affairs. Accordingly, sections 2111.121(A) and 1337.09(B) grant the public this authority. Of course, should the principal's choice prove to be unsuitable, the court has the authority to disregard the nomination[74] and appoint a more appropriate person to serve as guardian.[75] Thus, the revisions provide individuals with an opportunity to exert greater control over their futures without sacrificing those futures to the perils of poor judgment by others and unforeseen circumstances.

F. H. 288: The Personal Liability of Fiduciaries

H. 288 was originally proposed and drafted by the Ohio Bankers Association. The bill is designed to alleviate the problems confronting parties who enter into contracts or acquire general partnership interests while acting in a fiduciary capacity. H. 288[76] provides executors, administrators, and trustees with immunity from personal liability for partnership debts, obligations, and liabilities which are incurred while they are holding a general partnership interest in the course of their fiduciary duties.[77] The bill also extends immunity from personal liability to fiduciaries and trustees in regard to any contracts they execute in the scope of their fiduciary duties.[78]

Under the Ohio partnership law as it existed prior to the enactment of H. 288, an act within the scope of any general partner's au-

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Id.

73. *Id.* § 2111.121(B).

74. *Id.*

75. The decision of the court to disregard the nominee and appoint another person guardian is dependent upon the court's interpretation of the terms "competent" and "suitable." At this time, there are no reported decisions which clarify this definitional issue. In practice, however, the probate court's decision on this issue would be subject to an abuse of discretion standard on appellate review and would therefore be very difficult to successfully challenge. *See In re* Estate of Henne, 66 Ohio St. 2d 232, 421 N.E.2d 506 (1981) (examining a court's "suitability" decision concerning an executor appointment).

76. *See* OHIO REV. CODE ANN. § 1339.65 (Page Supp. 1983).

77. *Id.* § 1339.65(B)(2).

78. *Id.* § 1339.65(A)(2).

thority was sufficient to bind all the general partners.[79] Similarly, the partnership was held liable for acts of a general partner, even if the acts were not within the ordinary scope of the partner's authority, provided the acts were authorized by the other general partners.[80] Thus, a partnership was held liable for any losses or injuries inflicted upon a nonpartner by the tortious acts or omissions of a general partner.[81] A partnership was also held liable for a loss incurred by a nonpartner when the nonpartner's property or money was misapplied by a general partner while the property or money was in the partnership's custody and control.[82] The language of section 1775.14 created problems for trustees and fiduciaries. This section provided that all general partners would be held personally liable, both jointly and severally, for any debts and obligations incurred by the partnership,[83] including the debts and obligations described in sections 1775.12[84] and 1775.13.[85]

Section 1775.14 created a difficult problem for trustees, fiduciaries, and administrators, because, prior to the enactment of H. 288, it imposed personal liability upon these parties, who were held to be the holders of legal title to the trust or property.[86] Thus, a party who acquired a general partnership interest in the course of a fiduciary role subjected his or her personal assets to liability for any debts or obligations incurred by the partnership.

The testimony of Mr. William E. Karnatz, vice-president and manager of the personal trust division of the Central National Bank of Cleveland, illustrated the problems caused by the Ohio partnership law as it existed prior to the enactment of H. 288. Mr. Karnatz noted that during the course of his career with the bank, the bank had

> experienced numerous situations where it would have been in the best interest of our trust customers to either (a) *continue* to participate as a general partner in the investment and tax opportunities afforded by a general partnership, or (b) participate as an original investor in one. In

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79. OHIO REV. CODE ANN. § 1775.08 (Page 1978).

80. *See generally* OHIO REV. CODE ANN. §§ 1775.01–.15 (Page 1978).

81. *Id.* § 1775.12.

82. *Id.* § 1775.13.

83. *Id.* § 1775.14. The section stated that all partners were liable:

> (A) Jointly and severally for everything chargeable to the partnership under sections 1775.12 and 1775.13 of the Revised Code.
>
> (B) Jointly for all other debts and obligations of the partnership, but any partner may enter into a separate obligation to perform a partnership contract.

Id.

84. *Id.* § 1775.12 (Page 1978).

85. *Id.* § 1775.14. *See supra* notes 82–83 and accompanying text.

86. Testimony of Rep. Mahnic on H. 288 before the House Civil & Commercial Law Comm. (April 26, 1983) [hereinafter cited as Mahnic testimony] (on file with University of Dayton Law Review).

> these instances, the high degree of investment prudence to which a fiduciary is held . . . clearly justified participation in the general partnership but for the element of personal liability to which the Bank's own assets would be exposed.[87]

Mr. Karnatz went on to describe the dilemma that faced banks in Ohio. He stated that while many excellent investment opportunities existed for trust customers willing to acquire a general partnership interest, most of these opportunities were routinely rejected because, as corporate fiduciaries, banks could not enter into investments which placed the assets of the bank and its shareholders at risk.[88] Thus, banks were faced with a difficult choice. A bank could either fulfill its role as fiduciary of a particular trust by entering into the most favorable investment opportunities for the trust, or it could fulfill its role as corporate fiduciary and refuse to take any action which would place its assets, and those of its shareholders, in jeopardy. Faced with this choice, most corporate fiduciaries chose to protect their assets and those of their shareholders, even though this choice often meant foregoing the most favorable investment opportunities available to an individual trust.

The same dilemma confronted individual executors, trustees, and administrators.[89] For example, how many individuals would be willing to accept a fiduciary role which places their personal assets at risk, but which allows the benefits to accrue to another person or group of people? Clearly, this position would not be attractive to many people.

H. 288 attempts to solve these problems by providing an immunity, subject to certain exceptions,[90] from personal liability for partnership debts and obligations to executors, administrators, and trustees who acquire a general partnership interest while acting in their fiduciary capacity. The same immunity is granted to trustees of a revocable trust[91] who become general partners in the course of their fiduciary capacity.[92] The immunity is only available if the executor, trustee, or administrator reveals that the general partnership interest is being held

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87. Karnatz testimony, *supra* note 32 (emphasis in original).

88. *Id.*

89. *Id.*

90. These exceptions provide that the immunity is not available if:

(1) the executor, administrator or trustee caused the loss or injury to a nonpartner by tortious conduct; or

(2) the executor, administrator or trustee personally hold, or a spouse or any lineal descendent holds an interest in the partnership.

OHIO REV. CODE ANN. § 1339.65(B)(2) (Page Supp. 1983).

91. The revocable trust must be one which, by its terms, becomes revocable upon the settlor's death. *Id.* § 1339.65(B)(1)(b).

92. *Id.* § 1339.65(B)(1)(b)(2).

in a fiduciary capacity.[93] Thus, if an executor, trustee, or administrator has made a proper disclosure,[94] he or she would possess all of the rights of a general partner, but would not be held personally liable for the partnership's debts and obligations.

Under the provisions of H. 288, the grantor of a revocable trust would be held personally liable for the debts and obligations of the partnership when the trustee holds a general partnership interest in a fiduciary capacity.[95] Similarly, if an executor, administrator, or trustee acquires a general partnership interest while acting in a fiduciary capacity, the estate or corpus of the trust will be held liable for the debts and obligations of the partnership.[96]

H. 288 also provides immunity from personal liability to fiduciaries[97] and trustees[98] for contracts entered into on behalf of the

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93. *Id.*

94. A proper disclosure under section 1339.65(B)(1)(b)(2) requires that the fiduciary do one of the following:

(a) In a "fictitious" partnership certificate (as described previously) or in any other partnership certificate filed pursuant to statute (such as a limited partnership certificate), the use of words following the fiduciary's name or signature, indicating the general partnership interest is held in his or her fiduciary capacity would constitute a sufficient disclosure.

(b) If a partnership certificate is not required to be filed under any statute, a specified certificate filed with one or more county recorders would constitute a sufficient disclosure. The certificate would have to state the full name and place of residence of each person holding an interest in the partnership, be signed by all such persons, be acknowledged, and use words (following the fiduciary's name or signature) indicating that the fiduciary holds the general partnership interest in his or her fiduciary capacity.

(c) A contract or other written instrument that is delivered to a party that contracts with a partnership in which an executor, administrator, or trustee holds a general partnership interest in a fiduciary capacity, and indicates that the interest is so held, would constitute a disclosure for transactions between the party and the partnership. A disclosure by means of a certificate creates an immunity and would cover such transactions regardless of whether a contract or other instrument indicates that the executor, administrator, or trustee holds the general partnership interest in his or her fiduciary capacity.

See H. 288 LEGISLATIVE ANALYSIS, *supra* note 30, at 4.

95. OHIO REV. CODE ANN. § 1339.65(B)(2) (Page Supp. 1983).

96. *Id.*

97. For the purposes of section 1339.65:

> 'Fiduciary' means any person, association, or corporation, other than an assignee or trustee for an insolvent debtor or a guardian under Chapter 5905. of the Revised Code, that is appointed by and accountable to the probate court, and that is acting in a fiduciary capacity for another or charged with duties in relation to any property, interest, trust, or estate for another's benefit. A fiduciary also includes the department of mental retardation and developmental disabilities, or an agency under contract with the department for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code, when appointed by and accountable to the probate court as a guardian or trustee for a mentally retarded or developmentally disabled person.

Id. § 1339.65(A)(1)(a).

98. For the purposes of section 1339.65 "trustee" refers to a trustee of an inter vivos trust. *Id.* § 1339.65(A)(1)(b). "An inter vivos trust is one created during one's lifetime and hence it must be in existence at the time of the settlor's demise." Hageman v. Cleveland Trust Co., 41

estate or trust by the fiduciary or trustee. To be eligible for this immunity: (1) the contract must be within the person's authority; (2) the person must disclose that the contract is being entered into in the person's capacity as a trustee or fiduciary;[99] and (3) the contract must not specify that the person is personally liable for the contract.[100]

The revisions made by H. 288 are logical and practical. As illustrated by the testimony of Mr. Karnatz,[101] the law existing prior to the enactment of H. 288 placed those who acted in a fiduciary capacity in a pressing dilemma.[102] This bill removes the source of the dilemma, and requires the party who stands to benefit from the contract or general partnership interest to bear the risk involved with the venture. Because it moves the law in the direction of logic and fairness, this bill should be looked upon as a step forward for the Ohio legal system.

VI. CONCLUSION

The enactment of S. 115 and H. 288 did not signal the beginning of radical or earthshaking changes in Ohio. These bills were not highly controversial and did not provoke heated debate in the legislature. Nevertheless, the passage of these two bills is significant because the revisions they make in Ohio law move the law in a direction which is both logical and inherently fair.

The movement toward logic and fairness brought about by these bills can be illustrated by each of the instituted revisions. For example, prior to the enactment of H. 288, a person serving in a fiduciary capacity was penalized through the imposition of personal liability for making decisions and taking actions which were in the best interest of the trust or estate on whose behalf the fiduciary was acting. The law created a situation in which the party gaining the most from the fiduciary's actions was completely immune from liability, while the fiduciary's assets were placed in jeopardy. Clearly this situation was contrary to ordinary standards of justice and fairness. The revisions made in this area by H. 288 change the law so that the risk of the activity falls upon the party who stands to reap the benefits of the activity. Thus, the changes make the law more understandable and logical to the average person.

Ohio App. 2d 160, 161–62, 324 N.E.2d 594, 596 (1974), *rev'd on other grounds*, 45 Ohio St. 2d 178, 343 N.E.2d 121 (1976).

99. In a contract, the disclosure requirement is satisfied if the words "trustee," "fiduciary," "as fiduciary" or other words which indicate a trustee or fiduciary capacity follow the name of signature of the trustee or fiduciary. *Id.* § 1339.65(A)(2).

100. *Id.*

101. *See supra* notes 87–89 and accompanying text.

102. *See supra* notes 87–88 and accompanying text.

The changes instituted by S. 115 also move the law in a positive direction. For example, there was no logical reason to require a party who acquired a vehicle by devise or inheritance to certify the mileage on the odometer to himself or to herself as was required by the prior law. Similarly, because of the intensely personal nature and the long range impact of a guardianship relationship, there was no valid reason to impose a guardian upon an individual rather than to allow the person to nominate a guardian. Clearly, the changes made in these two sections, and the other changes made by S. 115 move the law to a more logical and fair position than existed previously.

The revisions instituted by S. 115 and H. 288 are significant not for the specific changes made, but rather for the quality of the reasoning behind the revisions. The changes simplify the law and move it to a position which should be perceived as being both logical and fair by the majority of Ohio's citizens. Moreover, the revisions are significant in that they indicate the Ohio legislature's willingness to employ commonsense solutions to rectify legislative infirmities.

Richard W. Zawtocki

S. 115

Code Sections Affected: To amend sections 1337.09, 2107.181, 2107.54, 2107.59, 2109.02, 2109.21, 2111.02, 2113.05, 2113.12, 2113.52, 2117.06, 2117.17, 4505.06, 4549.41, 4549.46, 5303.21, and 5303.31, and to enact sections 2107.65 and 2111.121 and repeal section 2117.16.

Effective Date: October 14, 1983.

Sponsor: Zimmers (S)

Committees: Judiciary (S)
Civil & Commercial Law (H)

H. 288

Code Sections Affected: To amend sections 1775.03, 1775.14, 1775.15, 1775.17, 1775.33, and 1781.09, and to enact section 1339.65.

Effective Date: March 22, 1984.

Sponsor: Mahnic (H)

Committees: Financial Institutions & Insurance (S)
Civil & Commercial Law (H)