

Ohio Court Reporters Association  
2024  
*Annual Conference*

# Future Outlook: Estate Planning

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McDonald Hopkins LLC  
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# Priming the Pump

- For many people, estate planning is the last thing they want to think about, but it doesn't need to be dreadful and depressing. It can be a constructive, creative process—like making a financial plan for the family or a strategic plan for a business. It can be fun—you'll see.
- **DISCLAIMER:** This is a general discussion—not advice. Please do not make or change your estate plan based on this presentation. This presentation does not even begin to address every important issue or rule, and there are exceptions to every rule. Some rules get swallowed by the exceptions. And then lawmakers change the rules.
- While there are some common practices, no two estate plans are the same. Your estate plan needs to be specific to your situation and your priorities, which will likely evolve over time.

# Goal: Understand the Process

1. Start with a list of assets that you own outright or in which you have some ownership interest— e.g. real estate, investments, retirement plans, bank accounts, life insurance, beneficial interests, contract rights, digital assets. Estimate the value of the assets and determine whether and how the assets can be transferred during life or at death.
2. Consider: Who are your beneficiaries--now and after you are gone?
3. Consider: Who you do trust to carry out your wishes if you are not able to do so because you are disabled or departed? These are your fiduciaries (executor, trustee, attorney-in-fact).
4. Formulate your plan, considering the particulars of your situation, legal requirements, and appropriate strategies.
5. Execute the plan: Draft or update the documents that put the plan into effect. This often includes wills, powers of attorney, healthcare and financial powers of attorney, a trust agreement, beneficiary designations, banking and investment account registrations, and deeds. Then sign the documents with the necessary formalities and confirm that they have been recorded or filed with the appropriate parties.
6. Tell your fiduciaries where to find the documents and how to access the necessary information; tell your beneficiaries as much as you are willing to tell them now.
7. Review the plan after every life event and at least every five years.

You need to lead the process in Items 1, 2, 3, 6, and 7. I recommend working with an experienced estate planner on Items 4 and 5. An experienced estate planner can assist with every step of the process, but if you have done the work of Items 1, 2, and 3 in advance, your work with the estate planner will be more efficient.

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## Why Bother?

1. Who gets what when and how?
2. Who does not get?
  - Black sheep?
  - Future creditors of beneficiaries?
3. Who decides?
  - Fiduciaries: Executor, trustee, guardian, power-holder, etc.
4. What if?
  - Disability
  - Divorce
  - Death
  - Financial distress
  - Law changes
  - Executor, trustee, guardian, power-holders

## What is the Probate Court?

The Probate Court is established in each county of Ohio to supervise the administration of the **estate of a decedent** who was a legal resident in the county at the time of his or her death. Each transaction involved in the administration of an estate is subject to the examination and approval of the Probate Court.

- Other matters within the Probate Court's jurisdiction are: issuance of marriage licenses, adoptions, guardianship proceedings, the involuntary commitment of the mentally ill, and land appropriation cases.

--from the Cuyahoga County Probate Court website

## The Probate Court:

Supervises the administration of the estates of residents:

- Who are **testators**—i.e. decedents who leave a will
- Who do not leave a will—whose estates are **intestate**.
  
- An **executor** is the person who has the job of accounting for all the assets; paying the taxes, debt and expenses of the decedent and distributing the rest to the beneficiaries in accordance with the will. Executors are named in the will and authorized by the Probate Court.
- An **administrator** is the person whom the Probate Court appoints to administer an intestate estate.

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## What Assets are Subject to Probate?

**Probate Property:** Generally, whether there is or is not a will, property titled in the name of the decedent alone, or otherwise personally owned by the decedent, is subject to the jurisdiction of the Probate Court—it will “go through Probate.”

**Non-probate Property:** Examples include:

- Property owned jointly with rights of survivorship,
- Property that transfers at death under a beneficiary designation.
- Other Transfer on Death (TOD) or Payable on Death (POD) arrangements,
- Property titled in the name of a trustee for decedent’s benefit.

*Non-probate property is includable in the federal gross estate and remains subject to....*

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## Ohio's Statute of Descent and Distribution

### Ohio Revised Code Section 2105.06

When a person dies intestate having title or right to any personal property, or to any real property or inheritance, in this state, the personal property shall be distributed, and the real property or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

- (A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;
- (B) If there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;
- (C) 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, the first twenty thousand dollars plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, per stirpes;
- (D) If there is a spouse and more than one child or their lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first twenty thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

## Ohio's Statute of Descent and Distribution (cont.)

- (E) If there are no children or their lineal descendants, then the whole to the surviving spouse;
- (F) Except as provided in section 2105.062 of the Revised Code, if there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;
- (G) Except as provided in section 2105.062 of the Revised Code, if there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;
- (H) Except as provided in section 2105.062 of the Revised Code, if there are no brothers or sisters or their lineal descendants, one-half to the paternal grandparents of the intestate equally, or to the survivor of them, and one-half to the maternal grandparents of the intestate equally, or to the survivor of them;
- (I) Except as provided in section 2105.062 of the Revised Code, if there is no paternal grandparent or no maternal grandparent, one-half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among the next of kin;
- (J) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;
- (K) If there are no stepchildren or their lineal descendants, escheat to the state.

## Per Capita

### ORC Section 2105.11

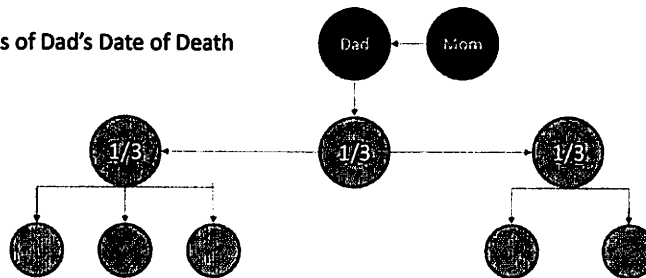
When a person dies intestate leaving children and none of the children of the intestate have died leaving children or their lineal descendants, the estate shall descend to the children of the intestate living at the time of the intestate's death in equal proportions.

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As of Dad's Date of Death



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Per Capita and Per Stirpes in Ohio Intestate Estates

**ORC Section 2105.14**

**No descendant of an intestate shall inherit under this chapter unless surviving the intestate for at least one hundred twenty hours, or unless born within three hundred days after the death of the intestate and living for at least one hundred twenty hours after birth.**

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**Per Stirpes in Ohio Intestate Estates**

**ORC Section 2105.13**

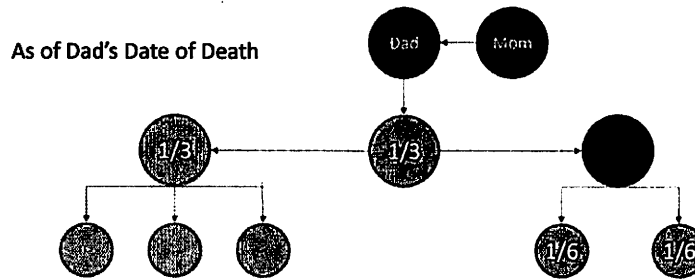
- **If some of the children of an intestate are living and others are dead, the estate shall descend to the children who are living and to the lineal descendants of the children who are dead, so that each child who is living will inherit the share to which the child who is living would have been entitled if all the children of the intestate were living, and the lineal descendants of the deceased child will inherit equal parts of that portion of the estate to which the deceased child would be entitled if the deceased child were living.**
- **This section shall apply in all cases in which the descendants of the intestate, not more remote than lineal descendants of grandparents, entitled to share in the estate, are of unequal degree of consanguinity to the intestate, so that those who are of the nearest degree of consanguinity will take the share to which they would have been entitled, had all the descendants in the same degree of consanguinity with them who died leaving issue, been living.**

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## Per Stirpes



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## Per Capita and Per Stirpes in Ohio Intestate Estates

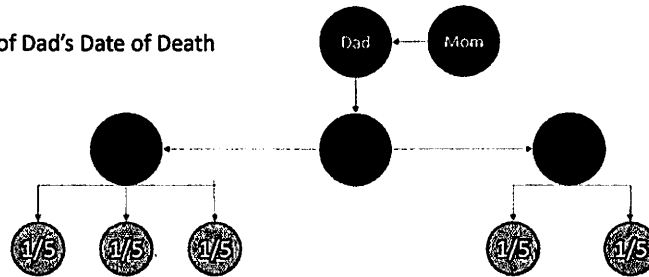
### ORC Section 2105.12

When all the descendants of an intestate, in a direct line of descent, are on an equal degree of consanguinity to the intestate, the estate shall pass to such persons in equal parts, however remote from the intestate such equal and common degree of consanguinity may be.

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## Ohio's Modern Per Stirpes—ORC Section 2015.12

As of Dad's Date of Death



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## Who may make will?

### ORC Section 2107.02

**A person who is eighteen years of age or older, of sound mind and memory, and not under restraint may make a will.**

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## Testamentary Capacity

1. Understand the nature of the business in which he or she is engaged.
2. Comprehend generally the nature and extent of his or her property.
3. Hold in mind the names and identity of those who have natural claims upon his or her bounty.
4. Appreciate his or her relation to the members of his or her family.

The Ohio Supreme Court in the case of Niemes v. Niemes (1919)

## Method of Making Will

### ORC 2107.03

- Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator's conscious presence and at the testator's express direction. The will shall 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.
- For purposes of this section, "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

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## Ohio's Ant-Lapse Statute and Diller v. Diller

In this case, Ted, the testator, left a will stating, in effect:

**"I leave the farm to my brother John.**

**Everything else I leave equally to my brother John and my sister Mary,  
per stirpes."**

Ted died in 2019.

John died in 2016. John was survived by two children.

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## Diller v. Diller (cont.)

In an opinion rendered on December 6, 2021, the Court of Appeals of Ohio, Third Appellate District, Mercer County, held that Ohio's anti-lapse statute in effect at the time of the testator's death did not apply to a **primary devise**, so the bequest of the farm to John lapsed, and the farm passed under the residuary clause, one-half to Mary, and one-quarter each to John's children.

- A devise is a gift of property.
- The anti-lapse statute in effect in 2019 said "devise" for purposes of the anti-lapse statute "means an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment."

**WARNING:** The first rule of statutory interpretation is "Read the statute." The second rule of statutory interpretation is "Read the whole statute." This presentation contains excerpts of Sections of the Ohio Revised Code, in violation of the second rule of statutory interpretation. Proceed with caution.

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## Ohio's Anti-Lapse Statute

### ORC Section 2107.52

Effective: April 3, 2023

(A) As used in this section:

(3)(a) "Devise" includes a primary devise, an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(b) Except as otherwise provided in this division, the amendment to division (A)(3)(a) of this section in this act shall be given retroactive effect to the fullest extent permitted under Ohio Constitution, Article II, Section 28. The amendment shall not be given retroactive effect in those instances where doing so would invalidate or supersede any instrument that conveys real property or any interest in the real property, recorded in the office of the county recorder in which that real property is situated.

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## Effect of Ohio's Anti-lapse Statute (cont.)

(2) Unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:

(a) If the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. The surviving descendants take, per stirpes, the property to which the devisee would have been entitled had the devisee survived the testator.

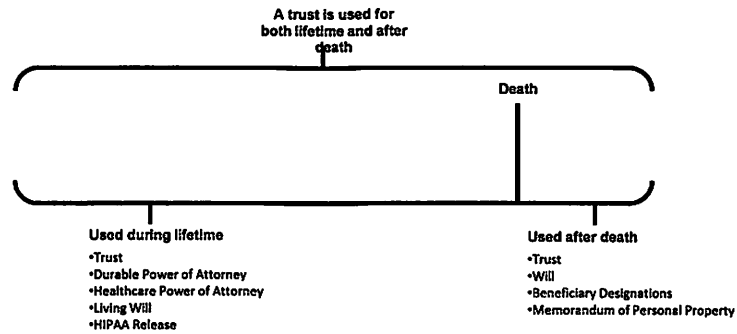
(b) If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import that includes more than one generation, a substitute gift is created in the surviving descendants of any deceased devisee.....

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## DOCUMENTS TIMELINE

### Basic Estate Planning Documents



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## Basic Trust Terminology

- **Trust:** An arrangement under which the settlor places property in the care of a trustee for the benefit of beneficiaries, as set forth in a trust agreement. Trustees hold legal title as fiduciaries; beneficiaries have beneficial rights.
- **Settlor or Grantor:** The person who establishes and funds the trust
- **Trustee:** The person responsible for administering the trust for the benefit of the beneficiaries, subject to the trust agreement and fiduciary obligations.
- **Inter Vivos Trust or Living Trust:** A trust established during the settlor's lifetime.
- **Testamentary Trust:** A trust established at death under the terms of a will.
- **Revocable Trust:** The settlor retains the ability to remove assets from the trust, modify the terms of the trust, or terminate the trust. Typically becomes irrevocable at death of the settlor.
- **Irrevocable Trust:** The trust assets cannot be returned to the settlor, and the terms of the trust cannot be modified. A separate legal entity for tax purposes.

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## Common Trust Purposes Include, but are not limited to:

- Place legal ownership of multiple assets in the hands of the trustee to manage and distribute according to plan during life and after death.
- Transfer assets to beneficiaries outside of probate—the assets owned by the trustee are not in the grantor's probate estate.
- Provide for grantor's incapacity.
- Provide for a beneficiary's incapacity: minor children, disabilities, illness, including addictions.
- Take advantage of available tax exclusions and deductions.
- Provide for different generations or blended families
- In the case of some irrevocable trusts, prevent assets from being used for purposes other than the beneficiaries' benefit. Limited protection may be available for settlors.

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## General Requirement for Creation of Trust

Summary of ORC Section 5804.02:

A trust is created only if all of the following apply:

- The settlor has capacity to create a trust.
- The settlor of the trust indicates an intention to create the trust.
- The trust has a definite beneficiary or is one of the following: A charitable trust, a trust for an animal, certain non-charitable trusts (for a limited time)
- The trustee has duties to perform.
- The same person is not the sole trustee and sole beneficiary.

## Beneficiary Designations on Retirement Accounts— Planning Considerations

1. Naming individuals as direct beneficiaries of retirement accounts is a simple and secure way to preserve income tax deferral on retirement accounts payable to death beneficiaries, and prevent acceleration of the income tax to the death beneficiaries.
2. Naming a charity as a direct beneficiary of a retirement account is a simple and tax-efficient way to deliver the account to charity at the death of the account owner.
3. If benefits are made payable to trust, the planning is much more complicated and the tax benefits to individual and charitable beneficiaries are less certain.
4. So, why would anyone ever name a trust as a beneficiary of a retirement account?
  - All the reasons people have used trusts for centuries. For example, protect an incompetent child, or provide for spouse before giving to charity.
5. Consider whether the simplicity and certainty of direct designations, standalone trusts, or specific bequests of IRAs and retirement benefits outweigh the client's reasons for wanting to use a complex trust with multiple beneficiaries and classes of assets.

## Common Concerns to Consider in Design of Trust

Providing for minor children  
Providing for spouse and children from a prior marriage  
Providing for unmarried partners  
Providing for beneficiaries with special needs  
Providing for adult children  
In-laws  
Charities



## Other Lifetime Documents

- Financial Durable Power of Attorney
  - Allows another to make financial decisions for you
  - Effective immediately, incapacity not required
- Health Care Power of Attorney
  - Allows another to make health care decisions for you
  - Incapacity required
- Living Will
  - Your wishes regarding end of life decisions
  - Not the same as a DNR (DNR is a medical order)
- Authorization of Protected Health Information
  - Allows your HIPAA protected information to be shared with those you choose.

These documents can help prevent a guardianship proceeding.

## Durable Power of Attorney

- Names an “Attorney-in-fact” or Agent to act on your behalf. Usually gives broad authority to manage finances.
  - *Consider carefully whether to include gifting and other estate planning powers.*
- This document is critical if you become incapacitated.
- Named Agent can either act on your behalf immediately or upon incapacity—why it’s called “durable.”
- This document can avoid the need for guardianship proceedings.
- Must be signed with two witnessed or notarized.

## Health Care Power of Attorney & Living Will

- Names an Agent to make health care decisions on your behalf if you are unable to do so.
- This document is critical if you become incapacitated.
- This document can avoid the need for guardianship proceedings.
- If you do not have a Living Will, you can authorize your Agent to make decisions about life-sustaining care if your physicians find that you are permanently unconscious or in a terminal condition. Cannot remove comfort care.
- A Living Will provides your directions to your health care professionals if they find that you are permanently unconscious or in a terminal condition.
- Execution formalities must be observed.
- Can be filed with the Probate Court and/or your healthcare providers.
- Link to Forms: [https://www.leadingageohio.org/aws/LAO/pt/sp/advance\\_directives](https://www.leadingageohio.org/aws/LAO/pt/sp/advance_directives)

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## Taxes

- Gift Taxes – \$18,000 Annual Exemption in 2024
- Estate Taxes – 40% Tax on assets over \$13.61M in 2024
  - Unified credit exempts gifts during life and distributions during death adding up to \$13.61M
- Portability – The surviving spouse inherits the unused exemption
  - Spouse A dies with \$7.5M, Spouse B may give away \$19.72M before incurring estate tax
- Generation Skipping Tax – 40% Tax on gifts over \$13.61M in 2024 to grandchildren
- Income Taxes – Estates and Trusts are subject to highest income tax rates (37%) at \$15,200

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## Tax Changes

- Set to Sunset – January 1, 2026
  - Estate, Gift, GST exemptions revert to 2017 levels—less than half of current levels (as adjusted for inflation)
  - Annual Exclusion Gifts remain the same with annual increase for inflation
  - What to do? Use it or lose it?

## Gift Planning

- Annual Exclusion Gifts
  - \$18,000 Annual Exemption in 2024
- Funding Education
  - 529 Plan – up to the annual exclusion amount
    - Nice option for those without estate tax issues
    - May front load 5 years with no gift tax consequence
    - If overfunded, may have difficulty using the funds tax efficiently
  - 2503(c) Trust – fund with the annual exclusion amount
    - Beneficiary may remove the assets at 21
  - Parents/Grandparents pay for education directly to the institution
    - Does not affect any annual or lifetime gifting

- Medical Expenses
  - Parents/Grandparents pay directly to the care provider

- Charitable gifts
  - QCD – RMD from qualified account paid directly to charity

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# Takeaway—The Process

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  2. Consider: Who are your beneficiaries--now and after you are gone?
  3. Consider: Who you do trust to carry out your wishes if you are not able to do so because you are disabled or departed? These are your fiduciaries (executor, trustee, attorney-in-fact).
  4. Formulate your plan, considering the particulars of your situation, legal requirements, and appropriate strategies.
  5. Execute the plan: Draft or update the documents that put the plan into effect. This often includes wills, powers of attorney, healthcare and financial powers of attorney, a trust agreement, beneficiary designations, banking and investment account registrations, and deeds. Then sign the documents with the necessary formalities and confirm that they have been recorded or filed with the appropriate parties.
  6. Tell your fiduciaries where to find the documents and how to access the necessary information; tell your beneficiaries as much as you are willing to tell them now.
  7. Review the plan after every life event and at least every five years.
- You need to lead the process in Items 1, 2, 3, 6 and 7. Work with an experienced estate planner on Items 4 and 5.
  - I will not predict what AI may mean to the this process, but I expect that the output from an AI application will depend on your informed input, so developing and maintaining an appropriate estate plan will still require thoughtful preparation and assistance from experienced counsel.

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## THANK YOU



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