

Fiduciary Appointments and Duties in Probate Proceedings (OH)

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



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This practice note addresses fiduciary appointees in Ohio probate proceedings. It discusses the role and duties of the executor or administrator, as well as appointment, resignation, and removal. The note provides an overview of fiduciary obligations in estate administration, such as marshaling assets, preparing and filing the inventory, dealing with creditors and debtors, and distributing and closing the estate.

For an in-depth discussion of probate law, see [Governing Law of Probate, Jurisdiction, and Proceedings \(OH\)](#). For more information on wills, see [Purposes and Uses of a Will \(OH\)](#); [Requisites, Instrumentation, and Will Provisions \(OH\)](#); and [Revocation, Revival, Amendments, and Will Contests \(OH\)](#). For will forms, see [Will for Single Individual \(Basic\) \(OH\)](#) and [Will for Individual with Spouse or Partner \(Basic\) \(OH\)](#).

Fiduciary Appointments

A probate action, whether administration of an intestate estate or the admittance of a will, requires the appointment of an individual who will administer the decedent's estate. Ohio Rev. Code Ann. § 2107.18. The probate court issues letters testamentary when there is a will (Ohio Rev. Code Ann. § 2113.05), or letters of administration when there is no will (Ohio Rev. Code Ann. § 2113.06). Both forms are commonly referred to as letters of authority in Ohio's

probate courts. The estate's personal representative, referred to as an executor or administrator in Ohio, must then administer the estate of the decedent.

A testator may also, in his or her will, confer upon one or more persons the power to nominate an executor of the testator's estate. Ohio Rev. Code Ann. § 2107.65.

For a discussion of the administration process, see Estate Administration below. For a discussion of specific probate petitions and pleadings, see [Governing Law of Probate, Jurisdiction, and Proceedings \(OH\) – The Application and Required Documents](#).

Role of Fiduciary

A fiduciary under Title 21 of the Ohio Revised Code is an individual appointed by and accountable to the probate court and 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. Under both Ohio common law and Ohio statutory law, an executor or administrator of an estate is a fiduciary with the duties incumbent to such role. See *Morris v. Mull*, 144 N.E. 436 (Ohio 1924) and *Schreiner v. Cincinnati Altenheim*, 22 N.E.2d 587 (Ohio Ct. App. 1939).

Duties

The duties of a fiduciary include those required by law plus any additional duties that the court orders. Ohio Rev. Code Ann. § 2109.02. The three general duties of an executor or administrator are (1) collection of assets; (2) payment of debts; and (3) distribution of any balance to legatees, devisees, and others entitled to a share. In *re Hirsch*; *Kammeron v. Freiberg*, 66 N.E.2d 636 (Ohio 1946).

The executor or administrator owes various other fiduciary duties to the beneficiaries of the estate. These duties include:

- The duty of keeping proper accounts
- The duty of giving timely notice
- The duty of preserving assets
- The duty to avoid the commingling of property –and–
- The basic duties of trust and loyalty

See *In re Estate of Usiak*, 874 N.E.2d 838 (Ohio Ct. App. 2007). For further discussion, see *Ohio Probate Practice and Procedure* § 11.06.

The executor or administrator also has the duty of prudent management of the estate. In *re Estate of Howison*, 197 N.E. 333 (Ohio Ct. App. 1934).

Powers

In Ohio, the powers of executors and administrators are governed by common law except as modified by statute. *Jelke v. Goldsmith*, 40 N.E. 167 (Ohio 1895); *Adm'x of Tracy v. Adm'r of Card*, 2 Ohio St. 431 (1853); *Blizzard v. Filler*, 20 Ohio 479 (1851).

Executors and administrators derive their powers from the letters of appointment, commonly known as letters of authority, issued to them by the probate court. 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.

Liabilities

The liabilities of executors and administrators are attached to their duties and responsibilities as fiduciaries, and as such, they are held to the standard of exercising ordinary prudence and skill in the management of the estate. In *re Estate of Howison*, 197 N.E. 333 (Ohio Ct. App. 1934). Note, however, that a corporate executor will be held to a higher standard in accordance with its superior skill and facilities for handling the estate. *Union Commerce Bank v. Kusse*, 251 N.E.2d 884 (Ohio Ct. Com. Pl. 1969).

If he or she is not personally at fault, the executor or administrator is not liable for any losses resulting from a decrease in value or the destruction of the estate's property. But if an executor or administrator neglects to sell personal property that is required to be sold, and instead retains, consumes, or disposes of it for his or her

own benefit, he or she will be charged with the personal property at double the appraised value. Ohio Rev. Code Ann. § 2113.34.

Special Administrator

If there is a delay in granting letters testamentary or of administration, the probate court may appoint a special administrator to collect and preserve the effects of the deceased. The court may further grant the special administrator any other authority the court considers appropriate. Ohio Rev. Code Ann. § 2113.15.

The special administrator collects the assets and debts of the decedent and preserves them for the executor or administrator who is ultimately appointed. Further, the special administrator may begin, maintain, or defend suits as administrator and sell any assets the court orders sold. The special administrator may also be compensated for his or her services that the court finds reasonable, provided he or she faithfully fulfills the fiduciary duties. Ohio Rev. Code Ann. § 2113.15.

Appointment of Executor or Administrator

An individual named as executor in a will does not need to be an Ohio resident. As long as such individual is related to the testator as a blood relative or by marriage, or resides in a state where a nonresident may legally be appointed executor, the appointment is valid. Ohio Rev. Code Ann. § 2109.21(B)(1).

In an intestacy, or when no executor is named in the will, an individual must be an Ohio resident to be appointed as an administrator of an Ohio estate. Further, the administrator must remain an Ohio resident throughout his or her service as administrator. On proof that he or she no longer resides in Ohio, the court will remove the individual. Ohio Rev. Code Ann. § 2109.21(A).

If the person who is named as 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 executor who will accept the nomination. If there is another such executor available, that executor will 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.

For a discussion of application for letters of authority with or without a will, see [Governing Law of Probate, Jurisdiction, and Proceedings \(OH\)](#).

Refusal to Accept Appointment

If the person named as executor refuses to accept the appointment, or, if after being served notice for the appointment, neglects to appear and accept, the court will grant letters to another capable and willing executor. If the person named or nominated as executor fails for 20 days after the probate of the will to give any required bond, the probate court will also grant letters testamentary to the other executor if there is one capable and willing to accept. If there is no other executor, the court commits administration of the estate, with the will annexed, to some suitable and competent person. Ohio Rev. Code Ann. § 2113.12 and § 2113.05.

Multiple Fiduciaries

When two or more fiduciaries have been appointed jointly to execute a trust and one or more of them dies, declines, resigns, or is removed, the title passes to the remaining fiduciaries. Those individuals execute the trust, unless the creating instrument expresses a contrary intention or unless the probate court on the application of persons interested in the trust determines otherwise. The remaining fiduciaries must submit a filing to the court within 90 days of the death, resignation, or removal of a co-fiduciary. The filing must contain a complete account covering all matters as to the time of death, resignation, or removal. Ohio Rev. Code Ann. § 2109.27.

Resignation and Removal of Fiduciary

If the fiduciary was appointed by, is under the control of, or is accountable to the probate court, the court may at any time accept the resignation of that fiduciary upon his or her proper accounting. To resign, the fiduciary must give 15 days' notice to the known, interested parties to the estate, then file a written statement with the court. The court may, upon such notice or motion, set the matter for a hearing and notify all interested persons. A fiduciary cannot resign without an order of the court. Ohio Rev. Code Ann. § 2109.24. See also 49 Oh Jur Fiduciaries § 297.

If a fiduciary fails to make and file an inventory or fails to render a just and true account of the fiduciary's administration at the times required by statute, and if the failure continues for 30 days after the fiduciary has been notified by the court of the expiration of the relevant time, the court may remove the fiduciary. He or she will receive no allowance for his or her services, unless the court finds that the delay was necessary and reasonable. The court may also, after giving the fiduciary at least 10 days' notice, remove any fiduciary for habitual drunkenness; neglect of duty; incompetency; fraudulent conduct; because the interest of the property, testamentary trust, or estate that

the fiduciary is responsible for administering demands it, or for any other cause authorized by law. Upon the resignation or removal of the fiduciary, the court revokes all letters of authority for the fiduciary. Ohio Rev. Code Ann. § 2109.24.

If there are unsettled claims between the executor or administrator and the estate, the probate court may remove the executor or administrator if it thinks the claims will be the subject of controversy or litigation. Ohio Rev. Code Ann. § 2113.18.

The probate court may also remove the executor or administrator upon the motion of the surviving spouse, children, or other next of kin of the decedent if the executor or administrator refuses to bring a wrongful death action in the name of the decedent and the court determines that a prima facie case for such an action can be made from the information available. Ohio Rev. Code Ann. § 2113.18.

Estate Administration

Upon appointment, the executor or administrator must begin the process of administering the decedent's estate. He or she must collect and manage the decedent's assets, pay federal estate taxes, prepare and file an inventory, notify the creditors of the estate and pay estate debts, distribute estate assets, and account for the estate property. Upon application of any interested party, the court may authorize an examination of the executor or administrator under oath in open court on any matter relating to the administration of the estate. Ohio Rev. Code Ann. § 2113.26. Note that there is currently no Ohio estate or inheritance tax. For further discussion of the federal estate tax return, see [Federal Estate Tax Return](#).

For a discussion of release from administration, see [Governing Law of Probate, Jurisdiction, and Proceedings \(OH\)](#) and Ohio Probate § 3.02.

Duty to Collect and Manage Decedent's Assets

The executor or administrator must collect the assets and complete the administration of the estate within six months after his or her date of appointment, unless an extension to file a final and distributive account is authorized under Ohio Rev. Code Ann. § 2109.301(B). To obtain such an extension, the fiduciary must apply to the probate court. The court may also grant an extension of the time to file the inventory and accounts for good cause shown. Ohio Rev. Code Ann. § 2113.25.

Counsel should advise fiduciaries to keep an accurate record of all assets that come into their possession and to

make a record of any defects in the quality or condition of those assets upon receipt. Although counsel will primarily assist the fiduciary with administering the estate, counsel should also advise the fiduciary of the need to identify and keep records of nonprobate assets. The decedent's family members may require assistance transferring these assets properly; and all of the decedent's property, both probate and nonprobate, must be taken into account when preparing and filing any required federal tax returns for the estate. Additionally, nonprobate assets are taken into account when calculating fiduciary compensation, and in some counties, attorney's fees as well. For further discussion, see [Federal Estate Tax Return](#).

Real Property Management

In the event that no one in authority has assumed the management and possible rental of the decedent's real property, the executor or administrator, or an heir or devisee may apply to the probate court for an order giving the executor or administrator such management duties. Ohio Rev. Code Ann. § 2113.311.

In the course of performing such management duties, the executor or administrator is authorized to:

- Collect rents
- From the rents collected:
 - Pay all taxes and assessments due on the real property, and all usual operating expenses in connection with its management
 - Make repairs when necessary to preserve the real property from waste, provided that an order of the court shall first be obtained if the cost of repairs exceeds one hundred dollars
 - Insure buildings against loss by fire or other casualty and against public liability
- Advance money upon an order first obtained from the court for the repairs, taxes, insurance, and all usual operating expenses that are a charge on the real property
- Rent the property on a month-to-month basis, or upon an order first obtained from the court, for a period not to exceed one year –and–
- Prosecute actions for forcible entry and detainer of the real property

Ohio Rev. Code Ann. § 2113.311(E).

Heirs and devisees are entitled to be paid their share of the net rents by the executor or administrator at intervals to take place at least annually. Ohio Rev. Code Ann. §

2113.311(F). For an in-depth discussion of a decedent's interest in real property, see Ohio Probate Practice and Procedure § 16.01.

Digital Assets

In 2017, Ohio enacted the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). See Ohio Rev. Code Ann. § 2137.01 et seq. RUFADAA is a uniform law that has been adopted by nearly every state. Under RUFADAA, a decedent may designate a person to receive some or all of his or her digital assets after death and such a designation will take precedence over the terms of a will or other document. Ohio Rev. Code Ann. § 2137.03. RUFADAA establishes procedures and requirements for a fiduciary to gain access to the decedent's digital assets. Ohio Rev. Code Ann. § 2137.05. In addition, a court may order disclosure of the contents of electronic communications. Ohio Rev. Code Ann. § 2137.06.

Application of RUFADAA is subject to any applicable terms-of-service agreement and/or federal law. Ohio Rev. Code Ann. § 2137.04. Practitioners should be aware that various federal laws cover the protection of digital assets, including the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act, the Copyright Act, and the Stored Communications Act. The fiduciary should exercise caution and follow all proper procedures to access the decedent's digital assets. This will help avoid liability under federal law, some of which imposes criminal penalties.

With the rapid increase of digital assets and communications, it is best practice for individuals to advise their fiduciaries on how to handle their digital assets after their death. Without such direction, the fiduciary will likely experience difficulty gaining access to a decedent's digital assets or may not even know of their existence.

Payment of Taxes

Ohio does not currently impose a death, inheritance, or estate tax. However, the fiduciary of the estate must address the estate's federal estate tax liability. If deemed necessary, the fiduciary can apply for and obtain an estate identification number (EIN) as soon as he or she has been granted the authority to act on behalf of the estate. Third parties paying the estate will require an EIN as a decedent's assets can no longer be reported under his or her social security number. The fiduciary must notify the Internal Revenue Service that he or she is acting in a fiduciary capacity. See I.R.C. §6903(a). An EIN will also be necessary to open an estate bank account that can be used to gather assets and to pay the debts and costs of administration.

For further discussion of the federal estate tax return, see [Federal Estate Tax Return](#) and [Federal Estate Tax Computation and Applicable Credit Amount](#).

Preparing and Filing the Inventory

Within three months of his or her appointment, a fiduciary must file a full inventory. It must detail the entrusted real and personal property, including its value as of the decedent's date of death. The inventory must also include the value of any yearly rent of the real property. Property that does not have a readily ascertainable value will need to be appraised. Exceptions to the inventory may be filed within six months of the return of the inventory by any person with an interest in the entrusted property. Ohio Rev. Code Ann. § 2109.58.

Unless the probate court grants an extension of time for good cause shown, an executor or administrator must file with the court an inventory of the following, with all values set forth as of the date of death of the decedent:

- The decedent's interest in real property located in Ohio –and–
- The tangible and intangible personal property of the decedent that is to be administered and that has come to the executor's or administrator's possession or knowledge

Ohio Rev. Code Ann. § 2115.02.

At least five days before filing the inventory, the executor or administrator must serve written notice upon the surviving spouse. Ohio Rev. Code Ann. § 2115.04. If the executor or administrator refuses to file an inventory and continues to refuse after a court order, the probate court may remove them. Ohio Rev. Code Ann. § 2115.03.

The executor or administrator must file the following statements as part of the inventory:

- A particular statement of all securities for the payment of money that belong to the deceased and are known to the executor or administrator, specifying the name of the debtor in each security, the date, the sum originally payable, the endorsements on the securities with their dates, the serial numbers or other identifying data as to each security, and the sum that, in the judgment of the appraisers, can be collected on each claim
- A statement of all debts and accounts belonging to the deceased that are known to the executor or administrator and specify the name of the debtor, the date, the balance or thing due, and the value or sum that can be collected on the debt, in the judgment of the appraisers –and–
- An account of all monies that belong to the deceased and have come into the possession or under the control

of the executor or administrator (If none has come into the possession or under the control of the executor or administrator, the fact must be stated in the inventory.)

Ohio Rev. Code Ann. § 2115.09.

Once completed, the appraisers must sign and certify the inventory. Ohio Rev. Code Ann. § 2115.15. Upon the filing of the inventory, the court sets a date for a hearing on the inventory no later than one month after filing. Ohio Rev. Code Ann. § 2115.16. Notice of the hearing may then be served upon any persons interested in the estate. Continuance of the hearing is available for good cause shown. Ohio Rev. Code Ann. § 2115.16.

For further discussion of gathering assets and filing the inventory, see Ohio Probate § 8.04.

Managing Creditors and Paying Debts

Upon his or her death, a decedent's debts become the debts of his or her estate. Creditors' rights to receive payment of debts from the estate supersede the rights of beneficiaries under the will. *McDonald v. McDonald*, 5 Ohio Op. 132 (Ct. Com. Pl. 1936).

Every executor or administrator must proceed with diligence to pay the debts of the decedent in the following order:

1. Costs and expenses of administration
2. Funeral, burial, and cemetery expenses not exceeding \$4,000
3. The allowance for support made to the surviving spouse, minor children, or both under Ohio Rev. Code Ann. § 2106.13
4. Debts entitled to a preference under the laws of the United States
5. Expenses of the last sickness of the decedent
6. If the total bill of a funeral director for funeral expenses exceeds \$4,000, then, in addition to the amount described in (2) above, an amount not exceeding \$2,000 for funeral expenses that are included in the bill and that exceed \$4,000
7. Expenses of the decedent's last continuous stay in a nursing home, residential facility, or hospital long-term care unit
8. Personal property taxes, claims made under the Medicaid estate recovery program, and obligations for which the decedent was personally liable to the state or any of its subdivisions
9. Debts for manual labor performed for the decedent within 12 months preceding the decedent's death, not exceeding \$300 to any one person

10. Other debts for which claims have been presented and finally allowed

Ohio Rev. Code Ann. § 2117.25.

Creditors having claims against the estate have six months after the death of the decedent to present their claims in writing to the executor or administrator if the final account has not yet been filed, or to the distributees of the estate who may share in the liability for payment if the final account has been filed. Ohio Rev. Code Ann. § 2117.06. If a creditor fails to present its claim within the six-month period, such claim is forever barred. Ohio Rev. Code Ann. § 2117.06(C).

Alternatively, the fiduciary may shorten the six-month claim period to thirty days. He or she accelerates the bar against creditor claims by giving written notice to a potential claimant that:

- Identifies the decedent by name
- States the date of the death of the decedent
- Identifies the executor or administrator by name and mailing address –and–
- Informs the potential claimant that any claims the claimant may have against the estate are required to be presented to the executor or administrator in a writing within the earlier of 30 days after receipt of the notice by the potential claimant, or 6 months after the date of the death of the decedent

Ohio Rev. Code Ann. § 2117.07.

It is best practice for the fiduciary to settle all estate debts prior to distribution. If distribution to beneficiaries and heirs occurs without notice of an existing debt, then that creditor may compel the beneficiaries and heirs to contribute toward the payment of the debt. See Ohio Rev. Code Ann. § 2117.06. This can be problematic for estates where the distributed amount is relatively small, and the recipients are likely to have already spent the assets received.

Note that if a fiduciary fails to pay a creditor, whether by refusal or neglect, such creditor may file a petition in the probate court against the fiduciary for payment of the debt. Ohio Rev. Code Ann. § 2109.59. It is because of this potential personal liability that the best practice is to avoid making distributions before settling all debts.

Sale of Estate Property

A will or devise may authorize an executor, administrator, or testamentary trustee to sell any class of the decedent's personal property or real property. If the authority to sell estate property exists, the probate court does not require

an order for such fiduciary to proceed with the sale. Furthermore, the power to sell authorizes a sale for any purpose considered by the fiduciary to be in the best interest of the estate, unless there is an express limitation stating otherwise in the will or devise. Ohio Rev. Code Ann. § 2113.39. If the will or devise is silent as to sale, the executor or administrator must apply to the court for permission to sell the real or personal property.

Distributing the Estate, Filing Final Account, Discharge

The executor or administrator has the duty to distribute the estate. He or she will gather the assets, pay expenses and debts, and distribute the remainder of the decedent's assets. Failure to distribute could result in personal liability to the executor or the administrator. Ohio Rev. Code Ann. § 2109.59. The court may order distribution and the fiduciary must comply and account to the court for the distribution. Ohio Rev. Code Ann. § 2109.36. For further discussion of distribution, see 33 Oh Jur Decedents' Estates §§ 1385 through 1388.

The court or an interested person may—by motion for good cause—compel the executor or administrator to render an account at any time. The executor or administrator must render a final account within 30 days after completing administration of the estate, or within any period of time as the court may order. Ohio Rev. Code Ann. § 2109.301(A). It is common practice for courts to require filings of annual accounts.

An account must include an itemized statement of all receipts of the administrator or executor during the accounting period and of all disbursements and distributions made by the executor or administrator during the same period. In addition, the account must include an itemized statement of all funds, assets, and investments of the estate known to or in the possession of the administrator or executor at the end of the accounting period. The account must show any changes in investments since the last previous account. Ohio Rev. Code Ann. § 2109.301(A).

When an administrator or executor is authorized by law or by the instrument governing distribution to distribute the assets of the estate, in whole or in part, the administrator or executor may do so and include a report of the distribution in the administrator's or executor's succeeding account. Ohio Rev. Code Ann. § 2109.301(A).

The executor or administrator must render a final and distributive account of his or her administration of the estate within six months after appointment. This time period is extended if:

- The will is contested
- The surviving spouse of the decedent elects to take against the will
- The administrator or executor is a party in a civil action
- The estate is insolvent
- The will provides for a posthumously born child –or–
- For other reasons set forth by the administrator or executor, subject to court approval, it would be detrimental to the estate and its beneficiaries or heirs to file a final and distributive account

Ohio Rev. Code Ann. § 2109.301(B)(1).

For estates of decedents in which the sole legatee, devisee, or heir is also the administrator or executor of the estate, partial accountings are not required. Such an executor or administrator may file either a final account or final and distributive account. Alternatively, he or she may file with the court, within 30 days after completing the administration of the estate, a certificate of termination of an estate that states all of the following:

- All debts and claims presented to the estate have been paid in full or settled finally.

- An estate tax return, if required, has been filed, and any estate tax has been paid.
- All attorney's fees have been waived by or paid to counsel of record of the estate, and all executor or administrator fees have been waived or paid.
- If paid, the amount of attorney's fees and the amount of administrator or executor fees that have been paid.
- All assets remaining after completion of the aforementioned activities have been distributed to the sole legatee, devisee, or heir.

Ohio Rev. Code Ann. § 2109.301(B)(2).

The fiduciary will be discharged 12 months following the approval of the final and distributive account unless otherwise ordered by the court. Ohio Rev. Code Ann. § 2109.32. Also, upon the approval of the final and distributive account, the court may order the surety bond for the fiduciary terminated. Ohio Rev. Code Ann. § 2109.32.

Following discharge, the fiduciary should notify the Internal Revenue Service that he or she is no longer serving as the fiduciary for the estate. See I.R.C. § 6903.

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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.

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