

**Prepared and issued as a public service by
Ohio Association of Probate Judges**

HISTORY OF THE PROBATE COURT

The term "probate" comes from the Latin word **probatio**, meaning "to prove," wherein matters in early English religious courts were proven before an ecclesiastical judge. Early American probate courts may be traced back to English Courts of Chancery and ecclesiastical, or religious, courts, which had jurisdiction over the probate of wills, administration of estates, and guardianships.

The first probate court in the United States was established in Massachusetts in 1784. Similar courts were subsequently established in other states under the name of surrogate, orphan courts, or courts of the ordinary. The Northwest Ordinance of 1787 provided for the first probate judge and court in the Ohio Territory. Under the first Ohio Constitution written in 1802, the court of common pleas had exclusive jurisdiction of probate matters. The Constitution of 1851 removed probate matters from the jurisdiction of common pleas courts and created in each county a separate probate court. Subsequent amendments to the Constitution in 1912, 1951, 1968, and 1973, and changes in the codified law in 1932 and 1976, have made the probate court what it is today: a special division of the court of common pleas. Each of Ohio's 88 counties has a probate division of its court of common Pleas.

COURT BUDGET

The money to operate the probate court is provided by the general fund of the county in which the court is located. However, the court returns to the general fund substantial monies through collection of fees and costs. A charge collected with the issuance of each marriage license allows Ohio probate courts to contribute over a million dollars annually to the Fund for Battered Spouses.

JURISDICTION OF THE COURT

The Ohio Revised Code places over two hundred separate duties upon the probate court. Those duties range from issuing marriage licenses to overseeing testamentary trusts valued in millions of dollars. The following is a brief outline and description of some of the duties of the court.

ADMINISTRATION OF ESTATES

Estate administration involves the court overseeing transfer of a decedent's

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probatable assets to this beneficiaries and heirs. The court accomplishes this task by appointing a fiduciary, either an executor or an administrator, who collects the assets, pays any outstanding debts, and then distributes the remaining assets to those who are entitled to receive them. The court supervises the actions of the fiduciary by requiring a bond, when necessary, and the filing of various documents, including an inventory and an accounting.

WILLS

The probate Court is responsible for testamentary wills as follows:

Safekeeping - Prior to death of the testator (maker), for a small filing fees, a will may be deposited with the probate court for safekeeping.

Probate - On the death of the testator, a will is admitted to probate by the court. Once admitted, the will may control estates administration and the distribution of the decedent's assets. If no will is admitted to probate, the Ohio Revised Code will control administration and distribution of the decedent's assets.

Will Contest - if a will is contested, a trail is conducted by the court to determine the validity of the will. If requested, a trial by jury is mandatory.

CONSENT FOR MEDICAL TREATMENT

Objections to consent for medical treatment, given under powers of attorney for health care or advanced directives (living wills), are filed in the probate court. In addition, objections and authority for consent to medical treatment where there is neither a power of attorney nor an advanced directive is also filed in the probate court.

GUARDIANSHIPS

The court may appoint, after hearing and investigation, a guardian for a minor, or for an adult who is found to be incompetent to take proper care of himself or his property. A guardian, with court supervision, is responsible for making personal and/or financial decisions for the ward. Court supervision is accomplished, in part, through the filing of reports and accountings by the guardian. Both a minor and an adult ward have a number of rights and protections to insure against an unnecessary or ineffective guardianship, including, for the adult ward, the right to be represented by an attorney.

CONSERVATORSHIPS

The court grants a conservatorship when the conservatee, the person who is the subject of the conservatorship, consents. A conservatee must be mentally competent buy physically infirm. The laws and procedures of guardianship may apply to conservatorships.

MENTAL ILLNESS AND MENTAL RETARDATION

Civil involuntary commitments of the mentally ill and retarded to state hospitals are the responsibility of the probate court. The courts is required to hold evidentiary hearings to determine the appropriateness of commitment and the length and place of treatment. Since the involuntary commitment involves the loss of liberty, the court insures protection of an individual's rights by providing legal representation at each step of the commitment process.

ADOPTIONS

All adoptions must be approved by the probate court before they become final. Person or persons wishing to adopt are required to submit to an investigation of their living environment by professionally-trained personnel to insure the suitability as parents.

BIRTH CERTIFICATES, REGISTRATION, AND CORRECTION

If a birth has not been recorded, or if a birth certificate has been lost, destroyed, or improperly or inaccurately recorded, the probate court has the power, upon application, to require recording or correction of the certificate.

Information on births before 1908 is available from the probate court. For individuals born prior to 1908, a certified certificate of birth may be obtained from the probate court.

CHANGES OF NAMES

Applications for legal change of name are filed in the probate court. After publishing of notice and hearing, the court, if reasonable and proper cause exists, may grant a name change.

MARRIAGE LICENSES

The probate court has exclusive jurisdiction to issue marriage licenses. After a five-day waiting period, unless waived by the court, and review of the application, a deputy clerk will issue a license for marriage. Over 100,000 licenses are issued annually by Ohio Probate Courts.

LEGITIMATIONS

Upon application and consent of the father, a probate court will legitimize a child not born in wedlock. A legitimized child has all the rights a child born in wedlock, including the right to inherit from his or her father.

LAND APPROPRIATIONS

The probate court has concurrent jurisdiction with the general division of the court of common pleas to hear land appropriation cases. In a land

appropriation, real property is being taken by the state, city, county, or a public utility under the laws of eminent domain, for a public purpose such as highway or power line construction. The main question resolved, usually by a jury, is the value to be paid to the owner(s) of the property taken.

TESTAMENTARY AND INTER VIVOS TRUSTS

The probate court is responsible for insuring that the terms of testamentary trusts (those created by a will) are complied with. This is accomplished, in part, through periodic accountings to the court. Questions involving interpretation and enforcement of both testamentary and inter vivos trusts (those created during a person's lifetime) may be submitted to the court.

APPOINTMENTS TO BOARDS AND COMMISSIONS

It is the responsibility of the probate judge to appoint members of various independent boards and commissions. As an example, all of the members of County Metropolitan Parks Boards and Facilities Review Boards are appointed by the probate judge. In addition, when a vacancy occurs on a school board or a board of township trustees, the probate judge, after a period of time prescribed by statute, must appoint an individual to fill the vacancy.

LAW AND PROCEDURE IN THE PROBATE COURT

The Probate Court (Title 21 of the Ohio Revised Code), Rules of Civil Procedure, Rules of Superintendence, case law, and local court rules are the major sources for law and procedures in the probate court.

In the majority of probate matters, procedure is informal. Normally, probate filings consists of various forms, affidavits, reports, accountings, or other documents filed for the court's review. In most cases, there is no opposition to those filings; thus, there is not an adversary situation in which two opposing parties appear before the court in a courtroom setting. Much of the court's work is done with only one party before the judge, referee, or deputy clerk in an informal setting.

When a contested or adversarial matter, such as a declaratory judgment, will contest, or land appropriation, is heard, a court procedure is identical to that of any other trial court.

JURY TRIALS IN THE PROBATE COURT

The court, or judge, always determines or rules on questions of law. If there is a question of disputed fact in a contested or adversarial matter in probate court, the judge has the option of deciding issues of disputed fact or of impaneling a jury and allowing the jury to determine any questions of fact.

The exception to the rule is found in will contests, concealment of assets, and land appropriations. In those matters, the court, when requested by a party, must impanel a jury to determine disputed facts. In practice, with the

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exception of will contests and land appropriations, almost all probate matters are decided by a judge or referee sitting without a jury.

RECORDS

With the exception of the juvenile court judge, the probate judge is the only judge who is ex officio clerk of his own court. As clerk, he is responsible for the keeping and maintaining of all records and filings of the probate court.

COURT OFFICERS

JUDGE: The office of judge of the court of common pleas, probate division, is elected, non-partisan, office with a six-year term. As a judge of the court of common pleas, the probate judge, in addition to exclusive probate jurisdiction, has full criminal and civil powers. When assigned to one of the other divisions, a probate judge may hear either criminal or non-probate civil cases.

Note: In Ohio's less populous counties, duties of a probate court may be handled by a judge who is both probate judge and juvenile judge, or, in the smallest of Ohio's counties, one common pleas judge may handle all matters, including probate.

REFEREES: Under Ohio law, a judge may appoint attorney-referees to handle certain cases filed with a court. Due to heavy caseloads, probate courts use the referee system. A referee acts and makes his decision in the same manner as a judge. In contested matters, a referee's decision is in the form of a report to the probate judge. If the referee's report is not objected to, the report becomes the decision and order of the court. If an objection is filed, the judge, after hearing, may accept, modify, or reject the report and rehear the matter. The referee system has proven to be an efficient and effective means of handling an ever-increasing volume of filings.

INVESTIGATORS: To determine whether to grant an adoption or guardianship, and to supervise guardianships, the probate court appoints court investigators. A probate court investigator, before appointment, must meet certain specific educational and training requirements.

DEPUTY CLERKS: The Ohio Revised Code authorizes the probate judge to appoint deputy clerks to assist in carrying out the business of the court. All of the court's employees are sworn as deputy clerks. The specific task of each clerk varies from that of issuing marriage licenses to handling and reviewing inventories and accounts. Each clerk is authorized to act in an official capacity to accept filings and certify records of the probate court.

LEGAL PRACTICE IN THE PROBATE COURT

Legal practice in the probate court is restricted by law to attorneys who are licensed by the Supreme Court of Ohio. If an individual wishes to handle his or her own case, he or she may do so; however, they may not represent others. Due to the complexity of the law and desire to avoid costly errors,

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many individuals who have filings before the court are represented by an attorney. Deputy clerks are prevented by law from practicing law and, therefore, are limited in the amount of advice they are permitted to give.

EXPLANATION OF THE ASSOCIATION SEAL



The red shield encloses symbols representing the heritage of Ohio's probate courts.

The scale is the traditional representation of justice. The bishop's miter hat and the three lions are symbols of the courts from which probate courts have inherited their jurisdiction. The miter represents the ecclesiastical, or church court, and the three lions represent the chancery court of old England. Both courts shared a duty to protect the "miserables personae," those who by reasons of weakness or incapacity could not adequately protect their own rights.

That duty is reflected in the motto of the Association. "To Protect with Justice"... "Protegere cum justitia" - to protect the interest of the incompetent, but in doing so, to see that justice is done for both the incompetent and those who have dealt with the incompetent.

ABOUT THIS PAMPHLET

This publication is designed as a service to the public in order to provide a general understanding of the duties and procedures of the probate court. This pamphlet should not be considered as a legal reference. If you have a legal question dealing with probate, an attorney should be consulted. Additional copies of this pamphlet are available on request, for a nominal fee, by writing to the Ohio Judicial Conference.