

Report of the Estate Planning, Trust, and Probate Law Section

1 *To the Council of Delegates:*

2 The Estate Planning, Trust and Probate Law Section respectfully requests your favorable
3 consideration of the following proposal to make a change to the “residency” definition
4 for purposes of the Ohio income tax on trusts.

5 Respectfully submitted,

6 **Karen M. Moore**, *Columbus*
7 Chair

8 **EXHIBIT A**

9 **§ 5747.01(I)(3)(f)(v)**

10 (v) The transfer is made to a trust on account of the will of the testator
11 who was domiciled in this state at the time of testator’s death for purposes of the
12 taxes levied under Chapter 5731. of the Revised Code.

13 **Rationale for proposal:**

14 Ohio enacted a “temporary” income tax on trusts in 2002 (originally enacted to “sunset”
15 at the end of 2004). In 2005, the Ohio trust income tax provisions were made
16 “permanent”.

17 The “residency” of a trust is a critical determination with respect to the income taxation
18 of such trust by the State of Ohio. In that regard, R.C. 5747.01(I)(3) contains a lengthy,
19 convoluted series of statutory “tests” to determine whether a trust, or a part of a trust, is a
20 “resident” of Ohio for trust income tax purposes. The EPTPL Section proposes to
21 modify one of the statutory “tests” for residency of trusts, to assure that no arbitrary
22 distinction is made between (i) testamentary trusts (trusts established under a decedent’s
23 will); and (ii) *inter vivos* trusts (trusts established by a settlor while he or she is still
24 alive).

25 Under R.C. 5747.01(I)(3)(e)(i) (and R.C. 5747.01(I)(3)(a)(i)), a *testamentary* trust is an
26 Ohio-resident trust only if the decedent was domiciled in the State of Ohio at decedent’s
27 death.

28 Current R.C. 5747.01(I)(3)(e)(ii) provides that an *inter vivos* trust is an Ohio-resident
29 trust if (i) such trust receives a “qualifying transfer” on account of the death of a
30 decedent; and (ii) at least one of the qualifying beneficiaries of the trust is domiciled in
31 Ohio for at least part of the taxable year in question. Further, the current definition of
32 “qualifying transfer” (at R.C. 5747.01(I)(3)(f)(v)), includes any transfer “made to a trust

33 on account of the will of the testator.” Such “(f)(v)” transfers encompass traditional
34 “pour-over” provisions contained in many decedent’s wills, designed to transfer probate
35 assets over to the trustees of the decedent’s *inter vivos* trust.

36 Unlike R.C. 5747.01(I)(3)(e)(i), which includes an Ohio-domicile requirement with
37 respect to the testator, R.C. 5747.01(I)(3)(f)(v) fails to include an express Ohio-domicile
38 requirement in that particular branch of the “qualifying transfer” definition. Every other
39 clause of R.C. 5747.01(I)(3)(f) includes an Ohio-domicile/nexus requirement, and there
40 does not appear to be any rationale for having omitted such an Ohio-domicile
41 requirement from clause (v) of R.C. 5747.01(I)(3)(f).

42 The only information release now available regarding trust “residency” determinations,
43 issued by the Ohio Department of Taxation in 2003 (Information Release 2003-2),
44 includes a “Note” regarding this anomaly, but the statutory anomaly remains uncorrected.

45 Since it is clear that a *testamentary* trust is *not* an Ohio-resident trust if it is established
46 under the will of a decedent who was domiciled outside of Ohio, there would not seem to
47 be any policy justification for distinguishing amounts transferred to an *inter vivos* trust
48 under the will of a decedent domiciled outside of Ohio.

49 Accordingly, to eliminate this conceptual “gap”/“inconsistency”, it is proposed that R.C.
50 5747.01(I)(3)(f)(v) be amended so that a transfer to an *inter vivos* trust under a decedent’s
51 will would be a “qualifying transfer” (i.e., would cause the recipient *inter vivos* trust to be
52 an Ohio-resident trust with respect to such transfer) only if the decedent was domiciled in
53 the State of Ohio upon such decedent’s death.