
Ohio Trust Code Manual

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Chapter 1: Index to the Ohio Trust Code

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The Ohio Trust Code documents included in this manual are identified first below. Following that listing is an index to them by the Revised Code section to which they relate. Finally, the full text of each document follows this index. The documents are reports in the “first person,” prepared by the specific private practitioners and law professors who designed, wrote, obtained Ohio State Bar Association approval, and obtained enactment of the laws involved. They are the most authoritative materials available for explanation and interpretation of the Ohio Trust Code. The purpose of this index is to find them for you.

I. Documents

Ohio Trust Code, Ohio Rev. Code chapters 5801 to 5811.

NCCUSL Comments to Uniform Trust Code, from which the Ohio Trust Code was derived.

Report of C. Alan Newman on 2006 HB 416, The Ohio Trust Code as Enacted, noting how the OTC differs from the UTC and how the OTC changes prior Ohio law.

“The Ohio Trust Code: The Joint Committee’s Proposal for its First Amendment,” 18 *Probate Law Journal* 69 (Nov./Dec. 2007), report by C. Alan Newman on what became 2008 HB 499.

Reports of EPTPL Section to OSBA Council of Delegates (Fall 2009 and Spring 2011) on what became part of 2011 SB 117.

Report of committee of EPTPL Section to Section Council and to OSBA Council of Delegates on the “Tax Gap Bill” that was also included in 2011 SB 117.

Report of EPTPL Section to OSBA Council of Delegates (Spring 2013) on what became part of 2016 HB 232.

Report of EPTPL Section to OSBA Council of Delegates (Spring 2014) on what became part of 2018 HB 595.

Report of EPTPL Section to OSBA Council of Delegates (Fall 2015) on what became part of 2016 HB 432.

Report of EPTPL Section to OSBA Council of Delegates (Spring 2016) on what became part of 2018 HB 595.

Report of EPTPL Section to OSBA Council of Delegates (Spring 2019 and Summer 2020) on what became part of 2020 HB 464.

II. Index

Ohio Trust Code, Ohio Rev. Code Chapter 5801, General provisions and definitions.

5801.01 General definitions

NCCUSL Comment to UTC, § 103

Enacted by 2006 HB 416, see Newman Report, § 3

Amended by 2008 HB 499, see Newman article on first amendment, § 2

5801.011, Short title

Enacted by 2006 HB 416

5801.02, Application of trust chapters

NCCUSL Comment to UTC, § 102

Enacted by 2006 HB 416, see Newman Report, § 4

Amended by 2008 HB 499, see Newman article on first amendment, § 3

5801.03, Actual and constructive knowledge of facts
NCCUSL Comment to UTC, § 104
Enacted by 2006 HB 416

5801.04, Trustee powers, duties and relations—beneficiary rights
NCCUSL Comment to UTC, § 105
Enacted by 2006 HB 416, see Newman Report, § 5
Amended by 2008 HB 499, see Newman article on first amendment, § 23

5801.05, Application of common law and equity principles
NCCUSL Comment to UTC, § 106
Enacted by 2006 HB 416, see Newman Report, § 1A

5801.06, Designated jurisdiction—controlling law
NCCUSL Comment to UTC, § 107
Enacted by 2006 HB 416

5801.07, Connection with designated jurisdiction—transfer
NCCUSL Comment to UTC, § 108
Enacted by 2006 HB 416, see Newman Report, § 6

5801.08, Methods of notice—waiver
NCCUSL Comment to UTC, § 109
Enacted by 2006 HB 416

5801.09, Notice to beneficiary by request
NCCUSL Comment to UTC, § 110
Enacted by 2006 HB 416, see Newman Report, § 7

5801.10, Agreement among interested parties regarding trust matters
NCCUSL Comment to UTC, § 111
Enacted by 2006 HB 416, see Newman Report, § 8
Amended by 2008 HB 499, see Newman article on first amendment, §§ 5, 6, 7
Amended by 2011 SB 117, see EPTPL Report of Fall 2009, § B; EPTPL Report of Spring 2011, §§ A and B; and EPTPL Report on Tax Gap Bill
Amended by 2016 HB 432, see EPTPL Report of Fall 2015, § A

5801.11, Guardian to comply with duties under RC chapter 2111
Added by 2008 HB 499, see Newman article on first amendment, § 8

5801.12, Children born through the use of assisted reproduction technologies
Added by 2016 SB 232, see EPTPL Report of Spring 2013

5801.20, Definitions
Added by 2022 SB 202, see EPTPL Report of July 2020, § 4.

5801.21, Application of procedures
Added by 2022 SB 202, see EPTPL Report of July 2020, § 4.

5801.22, Termination of trust
Added by 2022 SB 202, see EPTPL Report of July 2020, § 4.

5801.23, Trustee resignation or removal
Added by 2022 SB 202, see EPTPL Report of July 2020, § 4.

5801.24, Time bar and release
Added by 2022 SB 202, see EPTPL Report of July 2020, § 4.

Ohio Trust Code, Ohio Rev. Code Chapter 5802, Jurisdiction of court.

5802.01 Judicial intervention in trust administration

NCCUSL Comment to UTC, § 201

Enacted by 2006 HB 416, see Newman Report, § 10

5802.02, Personal jurisdiction over trustee and beneficiaries

NCCUSL Comment to UTC, § 202

Enacted by 2006 HB 416

5802.03, Concurrent jurisdiction regarding inter vivos trusts

NCCUSL Comment to UTC, § 203

Enacted by 2006 HB 416, see Newman Report, § 11

Amended by 2018 HB 595, see EPTPL Report of Spring 2016, § 4

5802.04, Nature of action

Added by 2016 HB 432, see EPTPL Report of Fall 2015, § B

5802.05, Arbitration of trust disputes

Added by 2018 HB 595, see EPTPL Report of Spring 2014

Ohio Trust Code, Ohio Rev. Code Chapter 5803, Representatives

5803.01, Notice to and consent by representatives

NCCUSL Comment to UTC, § 301

Enacted by 2006 HB 416, see Newman Report, § 12

5803.02, Holder of power of appointment may represent others

NCCUSL Comment to UTC, § 302

Enacted by 2006 HB 416, see Newman Report, § 12

Amended by 2008 HB 499, see Newman article on first amendment, § 9

Amended by 2016 HB 432, see EPTPL Report of Fall 2015, § C

5803.03, Power of representative

NCCUSL Comment to UTC, § 303

Enacted by 2006 HB 416, see Newman Report, § 12

Amended by 2008 HB 499, see Newman article on first amendment, § 10

5803.04, Representation by person having same interest

NCCUSL Comment to UTC, § 304

Enacted by 2006 HB 416, see Newman Report, § 12

5803.05, Appointment to represent unrepresented interest

NCCUSL Comment to UTC, § 305

Enacted by 2006 HB 416, see Newman Report, § 12

Ohio Trust Code, Ohio Rev. Code Chapter 5804, Creation, modification, revocation and termination of trusts

5804.01, Methods of creation of trusts

NCCUSL Comment to UTC, § 401

Enacted by 2006 HB 416, see Newman Report, § 13

5804.02, General requirements for creation of trust
NCCUSL Comment to UTC, § 402
Enacted by 2006 HB 416, see Newman Report, §§ 13, 14
Amended by 2008 HB 499, see Newman article on first amendment, §§ 11, 12, 13
Amended by 2016 HB 432, see EPTPL Report of Fall 2015, § D

5804.03, Validity of nontestamentary trusts
NCCUSL Comment to UTC, § 403
Enacted by 2006 HB 416

5804.04, Trust purposes must be legitimate
NCCUSL Comment to UTC, § 404
Enacted by 2006 HB 416, see Newman Report, § 5B

5804.05, Purpose of charitable trust—enforcement
NCCUSL Comment to UTC, § 405
Enacted by 2006 HB 416, see Newman Report, § 21

5804.06, Trust induced by fraud, duress, or undue influence void
NCCUSL Comment to UTC, § 406
Enacted by 2006 HB 416, see Newman Report, § 15

5804.07, Written instrument not required
NCCUSL Comment to UTC, § 407
Enacted by 2006 HB 416, see Newman Report, § 16

5804.08, Trust to provide for care of animal
NCCUSL Comment to UTC, § 105
Enacted by 2006 HB 416, see Newman Report, § 17

5804.09, Trust created for noncharitable purpose
NCCUSL Comment to UTC, § 409
Enacted by 2006 HB 416, see Newman Report, § 17

5804.10, Termination of trust by revocation or by terms
NCCUSL Comment to UTC, § 410
Enacted by 2006 HB 416, see Newman Report, § 18

5804.11, Termination or modification of noncharitable irrevocable trust
NCCUSL Comment to UTC, § 411
Enacted by 2006 HB 416, see Newman Report, § 19
Amended by 2008 HB 499, see Newman article on first amendment, § 14
Amended by 2016 HB 432, see EPTPL Report of Spring 2011, § C
Amended by 2021 HB 7, see EPTPL Report of Spring 2019, § 5

5804.12, Judicial action due to change of circumstances
NCCUSL Comment to UTC, § 412
Enacted by 2006 HB 416, see Newman Report, §§ 20, 24
Amended by 2011 SB 117, see EPTPL Report on Tax Gap Bill

5804.13, Judicial action where charitable purpose frustrated
NCCUSL Comment to UTC, § 413
Enacted by 2006 HB 416, see Newman Report, § 20, 21

Amended by 2008 HB 499, see Newman article on first amendment, § 15

5804.14, Termination or modification where costs exceed value

NCCUSL Comment to UTC, § 414

Enacted by 2006 HB 416, see Newman Report, § 22

Amended by 2008 HB 499, see Newman article on first amendment, §§ 5, 16

5804.15, Reformation to conform to settlor's intention

NCCUSL Comment to UTC, § 415

Enacted by 2006 HB 416, see Newman Report, § 24

5804.16, Modification to achieve settlor's tax objectives

NCCUSL Comment to UTC, § 416

Enacted by 2006 HB 416, see Newman Report, § 24

5804.17, Combination or division of trusts

NCCUSL Comment to UTC, § 417

Enacted by 2006 HB 416, see Newman Report, § 23

Amended by 2008 HB 499, see Newman article on first amendment, § 17

Ohio Trust Code, Ohio Rev. Code Chapter 5805, Spendthrift trust provisions

5805.01, Validity and effect of spendthrift provisions

NCCUSL Comment to UTC, § 502

Enacted by 2006 HB 416, see Newman Report, § 25

Amended by 2008 HB 499, see Newman article on first amendment, § 5

5805.02, Enforceability and enforcement of spendthrift provisions

NCCUSL Comment to UTC, § 503

Enacted by 2006 HB 416, see Newman Report, § 25

5805.03, Creditors of discretionary trust beneficiary may not reach interest

No similar UTC provision

Enacted by 2006 HB 416, see Newman Report, § 25

Amended by 2008 HB 499, see Newman article on first amendment, § 5

5805.04, Creditor may not compel discretionary distribution—exceptions

NCCUSL Comment to UTC, § 504

Enacted by 2006 HB 416, see Newman Report, § 25

5805.05, Attachment of mandatory distributions absent spendthrift provision

NCCUSL Comment to UTC, §§ 501, 506

Enacted by 2006 HB 416, see Newman Report, § 25

5805.06, Rights of creditors—power of withdrawal

NCCUSL Comment to UTC, § 505

Enacted by 2006 HB 416, see Newman Report, §§ 25, 26

Amended by 2008 HB 499, see Newman article on first amendment, § 23

Amended by 2021 HB 7, see EPTPL Report of Spring 2019, § 4

5805.07, Trust property not subject to personal obligations of trustee

NCCUSL Comment to UTC, § 507
Enacted by 2006 HB 416

Ohio Trust Code, Ohio Rev. Code Chapter 5806, Powers of settlor

5806.01, Capacity of settlor same as testator
NCCUSL Comment to UTC, § 601
Enacted by 2006 HB 416, see Newman Report, § 15
Amended by 2008 HB 499, see Newman article on first amendment, § 18

5806.02, Revocation or amendment of trust
NCCUSL Comment to UTC, § 602
Enacted by 2006 HB 416, see Newman Report, § 26
Amended by 2008 HB 499, see Newman article on first amendment, § 19

5806.03, Control of rights of beneficiaries and duties of trustee
NCCUSL Comment to UTC, § 603
Enacted by 2006 HB 416, see Newman Report, § 26
Amended by 2008 HB 499, see Newman article on first amendment, § 20

5806.04, Actions concerning certain revocable trusts
NCCUSL Comment to UTC, § 604
Enacted by 2006 HB 416, see Newman Report, § 26
Amended by 2008 HB 499, see Newman article on first amendment, §§ 21, 22
Amended by 2018 HB 595, see EPTPL Report of Spring 2016, § 4

Ohio Trust Code, Ohio Rev. Code Chapter 5807, Trustees

5807.01, Acceptance or rejection of trusteeship
NCCUSL Comment to UTC, § 701
Enacted by 2006 HB 416

5807.02, Bond of trustee
NCCUSL Comment to UTC, § 702
Enacted by 2006 HB 416

5807.03, Cotrustees—delegation—liability
NCCUSL Comment to UTC, § 703
Enacted by 2006 HB 416, see Newman Report, §§ 27, 28, 29

5807.04, Vacancy defined—priority in filling—additional trustees
NCCUSL Comment to UTC, § 704
Enacted by 2006 HB 416, see Newman Report, §§ 30, 32

5807.05, Resignation of trustee—notice—approval
NCCUSL Comment to UTC, § 705
Enacted by 2006 HB 416

5807.06, Removal of trustee—grounds—protective measures
NCCUSL Comment to UTC, § 706
Enacted by 2006 HB 416, see Newman Report, § 31

5807.07, Powers and duties of removed or resigned trustee
NCCUSL Comment to UTC, § 707
Enacted by 2006 HB 416

5807.08, Compensation of trustee
NCCUSL Comment to UTC, § 708
Enacted by 2006 HB 416

5807.09, Reimbursement of trustee for administration expenses
NCCUSL Comment to UTC, § 709
Enacted by 2006 HB 416

Ohio Trust Code, Ohio Rev. Code Chapter 5808, Trust administration

5808.01, Duty of trustee generally
NCCUSL Comment to UTC, § 801
Enacted by 2006 HB 416

5808.02, Duty of loyalty to beneficiaries—voidable transactions—conflicts of interest
NCCUSL Comment to UTC, § 802
Enacted by 2006 HB 416, see Newman Report, § 33
Amended by 2011 SB 117, see EPTPL Report on Tax Gap Bill

5808.03, Multiple beneficiaries—duties of impartiality
NCCUSL Comment to UTC, § 803
Enacted by 2006 HB 416

5808.04, Duty to act as prudent person
NCCUSL Comment to UTC, § 105
Enacted by 2006 HB 416

5808.05, Reasonable administrative costs allowed
NCCUSL Comment to UTC, § 805
Enacted by 2006 HB 416, see Newman Report, § 34

5808.06, Trustee to use any special skills or expertise
NCCUSL Comment to UTC, § 806
Enacted by 2006 HB 416

5808.07, Delegation of powers and duties
NCCUSL Comment to UTC, § 807
Enacted by 2006 HB 416, see Newman Report, § 28

5808.08, Direction of settlor contrary to terms—power of modification
NCCUSL Comment to UTC, § 808
Enacted by 2006 HB 416, see Newman Report, § 35

5808.09, Taking control and protection of property
NCCUSL Comment to UTC, § 809
Enacted by 2006 HB 416

5808.10, Adequate records of administration
NCCUSL Comment to UTC, § 810
Enacted by 2006 HB 416

5808.11, Enforcement and defense of claims
NCCUSL Comment to UTC, § 811
Enacted by 2006 HB 416

5808.12, Collection of trust property—successor trustees
NCCUSL Comment to UTC, § 812
Enacted by 2006 HB 416, see Newman Report, § 36

5808.13, Keeping beneficiaries informed—requests—required reports
NCCUSL Comment to UTC, § 813
Enacted by 2006 HB 416, see Newman Report, § 37
Amended by 2008 HB 499, see Newman article on first amendment, §§ 20, 23, 24

5808.14, Judicial standard of review for discretionary trusts
NCCUSL Comment to UTC, § 814
Enacted by 2006 HB 416, see Newman Report, § 38, 39
Amended by 2008 HB 499, see Newman article on first amendment, § 25
Amended by 2011 SB 117, see EPTPL Report of Fall 2009, § B

5808.15, General powers of trustee
NCCUSL Comment to UTC, § 815
Enacted by 2006 HB 416, see Newman Report, § 40

5808.16, Specific powers of trustee
NCCUSL Comment to UTC, § 816
Enacted by 2006 HB 416, see Newman Report, §§ 40-43
Amended by 2008 HB 499, see Newman article on first amendment, §§ 26, 27

5808.17, Powers and duties of trustee on termination; protection from liability
NCCUSL Comment to UTC, § 817
Enacted by 2006 HB 416
Amended by 2011 SB 117, see EPTPL Report of Fall 2009, § D

5808.18, Trustee’s power to make distributions in further trust
No similar UTC provision
Added by 2011 SB 117, see EPTPL Report of Fall 2009, § B

5808.19, Anti-lapse provisions, survivorship with respect to future interests, substitute gifts
No similar UTC provision
Added by 2011 SB 117, see EPTPL Report of Fall 2009, § D
Amended by 2018 HB 595, see EPTPL Report of Spring 2016, § 3

Ohio Trust Code, Ohio Rev. Code Chapter 5809, Ohio Prudent Investor Act

5809.01, Trustee duty to comply with Act
NCCUSL Comment to UTC, § 901
Enacted by 2006 HB 416

5809.02, Standard of care—portfolio strategy—risk and return objectives
NCCUSL Comment to UTC, § 902
Enacted by 2006 HB 416

5809.03, Investment authority—diversification
NCCUSL Comment to UTC, § 903

Enacted by 2006 HB 416

5809.031, Duties of a trustee with respect to life insurance

No similar UTC provision

Added by 2011 SB 117, see EPTPL Report of Fall 2009, § A

5809.04, Duties at inception of trusteeship

NCCUSL Comment to UTC, § 904

Enacted by 2006 HB 416

5809.05, Reviewing compliance

NCCUSL Comment to UTC, § 905

Enacted by 2006 HB 416

5809.06, Delegation of investment and management functions

NCCUSL Comment to UTC, § 906

Enacted by 2006 HB 416

5809.07, Language invoking standard of Act

NCCUSL Comment to UTC, § 907

Enacted by 2006 HB 416

5809.08, Uniformity of application and construction, application to existing trusts

NCCUSL Comment to UTC, § 908

Enacted by 2006 HB 416, see Newman Report, § 44

Ohio Trust Code, Ohio Rev. Code Chapter 10, Breach of trust

5810.01, Breach of trust defined—judicial remedies

NCCUSL Comment to UTC, § 1001

Enacted by 2006 HB 416

5810.02, Liability to beneficiaries for breach—contribution

NCCUSL Comment to UTC, § 1002

Enacted by 2006 HB 416

5810.03, Trustee not accountable or liable for profit or loss absent breach

NCCUSL Comment to UTC, § 1003

Enacted by 2006 HB 416, see Newman Report, § 45

5810.04, Award of costs, expenses, and attorney fees

NCCUSL Comment to UTC, § 1004

Enacted by 2006 HB 416, see Newman Report, § 46

5810.05, Limitations period for action against trustee

NCCUSL Comment to UTC, § 1005

Enacted by 2006 HB 416, see Newman Report, § 47

Amended by 2008 HB 499, see Newman article on first amendment, § 28

5810.06, Trustee reliance on terms of trust

NCCUSL Comment to UTC, § 1006

Enacted by 2006 HB 416

5810.07, Reasonable care to ascertain material event

NCCUSL Comment to UTC, § 1007

Enacted by 2006 HB 416

5810.08, Enforceability of exculpatory trust term

NCCUSL Comment to UTC, § 1008

Enacted by 2006 HB 416, see Newman Report, § 48

5810.09, Beneficiary's consent to conduct constituting breach

NCCUSL Comment to UTC, § 1009

Enacted by 2006 HB 416

Amended by 2011 SB 117, see EPTPL Report of Spring 2011, § A

5810.10, Personal contract and tort liability of trustee

NCCUSL Comment to UTC, § 1010

Enacted by 2006 HB 416, see Newman Report, § 49

5810.11, Personal liability of trustee on contract as partner

NCCUSL Comment to UTC, § 1011

Enacted by 2006 HB 416, see Newman Report, § 50

5810.12, Person assisting of dealing with trustee in good faith

NCCUSL Comment to UTC, § 1012

Enacted by 2006 HB 416

5810.13, Certification of trust furnished to person not beneficiary

NCCUSL Comment to UTC, § 1013

Enacted by 2006 HB 416

Amended by 2008 HB 499, see Newman article on first amendment, §§ 29, 30, 31

Amended by 2011 SB 117, see EPTPL Report of Fall 2009, § E

5810.14, Transfer of personal property to trustee

No similar UTC provision

Added by 2011 SB 117, see EPTPL Report of Fall 2009, § F

Ohio Trust Code, Ohio Rev. Code Chapter 5811, Miscellaneous provisions

5811.01, Promotion of uniformity of law

NCCUSL Comment to UTC, § 1011

Enacted by 2006 HB 416, see Newman Report, § 51

5811.02, Electronic signatures in Global and National Commerce Act

NCCUSL Comment to UTC, § 1102

Enacted by 2006 HB 416

5811.03, Temporal application of provisions of Code

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Enacted by 2006 HB 416

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Chapter 2: Ohio Rev. Code Title 58 as Amended through 2023

Chapter 5801 General Provisions and Definitions

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Sec. 5801.01 General Definitions.

As used in Chapters 5801. to 5811. of the Revised Code:

(A) “Action,” with respect to an act of a trustee, includes a failure to act.

(B) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(C) “Beneficiary” means a person that has a present or future beneficial interest in a trust, whether vested or contingent, or that, in a capacity other than that of trustee, holds a power of appointment over trust property, or a charitable organization that is expressly designated in the

terms of the trust to receive distributions. “Beneficiary” does not include any charitable organization that is not expressly designated in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions.

(D) “Beneficiary surrogate” means a person, other than a trustee, designated by the settlor in the trust instrument to receive notices, information, and reports otherwise required to be provided to a current beneficiary under divisions (B)(8) and (9) of section 5801.04 of the Revised Code.

(E) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in division (A) of section 5804.05 of the Revised Code.

(F) “Current beneficiary” means a beneficiary that, on the date the beneficiary’s qualification is determined, is a distributee or permissible distributee of trust income or principal.

(G) “Environmental law” means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(H) “Guardian of the estate” means a guardian appointed by a court to administer the estate of any individual or to serve as conservator of the property of an individual eighteen years of age or older under section 2111.021 of the Revised Code.

(I) “Guardian of the person” means a guardian appointed by a court to make decisions regarding the support, care, education, health, and welfare of any individual or to serve as conservator of the person of an individual eighteen years of age or older under section 2111.021 of the Revised Code. “Guardian of the person” does not include a guardian ad litem.

(J) “Internal Revenue Code” means the “Internal Revenue Code of 1986,” 100 Stat. 2085, 26 U.S.C. 1 et seq., as amended.

(K) “Interests of the beneficiaries” means the beneficial interests provided in the terms of the trust.

(L) “Jurisdiction,” with respect to a geographic area, includes a state or country.

(M) “Mandatory distribution” means a distribution of income or principal, including a distribution upon termination of the trust, that the trustee is required to make to a beneficiary under the terms of the trust. Mandatory distributions do not include distributions that a trustee is directed or authorized to make pursuant to a support or other standard, regardless of whether the terms of the trust provide that the trustee “may” or “shall” make the distributions pursuant to a support or other standard.

(N) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.

(O) “Power of withdrawal” means a presently exercisable general power of appointment other than a power exercisable by a trustee that is limited by an ascertainable standard or that is exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(P) “Property” means anything or any interest in anything that may be the subject of ownership.

(Q) “Qualified beneficiary” means a beneficiary to whom, on the date the beneficiary’s qualification is determined, any of the following applies:

- (1) The beneficiary is a distributee or permissible distributee of trust income or principal.
- (2) The beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in division (Q)(1) of this section terminated on that date, but the termination of those interests would not cause the trust to terminate.
- (3) The beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(R) “Revocable,” as applied to a trust, means revocable at the time of determination by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, is serving.

(S) “Settlor” means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.

(T) “Spendthrift provision” means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary’s interest.

(U) “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, or an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(V) “Terms of a trust” means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(W) “Trust instrument” means an instrument executed by the settlor that contains terms of the trust and any amendments to that instrument.

(X) “Trustee” includes an original, additional, and successor trustee and a cotrustee.

(Y)(1) “Wholly discretionary trust” means a trust to which all of the following apply:

- (a) The trust is irrevocable.
- (b) Distributions of income or principal from the trust may or shall be made to or for the benefit of the beneficiary only at the trustee’s discretion.
- (c) The beneficiary does not have a power of withdrawal from the trust.
- (d) The terms of the trust use “sole,” “absolute,” “uncontrolled,” or language of similar import to describe the trustee’s discretion to make distributions to or for the benefit of the beneficiary.
- (e) The terms of the trust do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.
- (f) The beneficiary is not the settlor, the trustee, or a cotrustee.

(g) The beneficiary does not have the power to become the trustee or a cotrustee.

(2) A trust may be a wholly discretionary trust with respect to one or more but less than all beneficiaries.

(3) If a beneficiary has a power of withdrawal, the trust may be a wholly discretionary trust with respect to that beneficiary during any period in which the beneficiary may not exercise the power. During a period in which the beneficiary may exercise the power, both of the following apply:

(a) The portion of the trust the beneficiary may withdraw may not be a wholly discretionary trust with respect to that beneficiary;

(b) The portion of the trust the beneficiary may not withdraw may be a wholly discretionary trust with respect to that beneficiary.

(4) If the beneficiary and one or more others have made contributions to the trust, the portion of the trust attributable to the beneficiary's contributions may not be a wholly discretionary trust with respect to that beneficiary, but the portion of the trust attributable to the contributions of others may be a wholly discretionary trust with respect to that beneficiary. If a beneficiary has a power of withdrawal, then upon the lapse, release, or waiver of the power, the beneficiary is treated as having made contributions to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:

(a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code;

(b) If the donor of the property subject to the beneficiary's power of withdrawal is not married at the time of the transfer of the property to the trust, the amount specified in section 2503(b) of the Internal Revenue Code;

(c) If the donor of the property subject to the beneficiary's power of withdrawal is married at the time of the transfer of the property to the trust, twice the amount specified in section 2503(b) of the Internal Revenue Code.

(5) Notwithstanding divisions (Y)(1)(f) and (g) of this section, a trust may be a wholly discretionary trust if the beneficiary is, or has the power to become, a trustee only with respect to the management or the investment of the trust assets, and not with respect to making discretionary distribution decisions. With respect to a trust established for the benefit of an individual who is blind or disabled as defined in 42 U.S.C. 1382c(a)(2) or (3), as amended, a wholly discretionary trust may include either or both of the following:

(a) Precatory language regarding its intended purpose of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs;

(b) A prohibition against providing food and shelter to the beneficiary.

History. Effective date: 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5801.011 Short Title.

Chapters 5801. to 5811. of the Revised Code may be cited as the Ohio trust code.

History. Effective date: 01-01-2007.

Sec. 5801.02 Application of Trust Chapters.

Except as otherwise provided in any provision of Chapters 5801. to 5811. of the Revised Code, those chapters apply to charitable and noncharitable inter vivos express trusts and to trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. Chapters 5801. to 5811. of the Revised Code apply to charitable and noncharitable testamentary trusts to the extent provided by section 2109.69 of the Revised Code.

History. Effective date: 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5801.03 Actual and Constructive Knowledge of Facts.

(A) Subject to division (B) of this section, a person has knowledge of a fact if any of the following apply:

- (1) The person has actual knowledge of the fact.
- (2) The person has received notice or notification of the fact.
- (3) From all the facts and circumstances known to the person at the time in question, the person has reason to know the fact.

(B) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time an employee having responsibility to act for the trust received the information or the information would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

History. Effective date: 01-01-2007.

Sec. 5801.04 Trustee Powers, Duties, and Relations—Beneficiaries' Rights.

(A) Except as otherwise provided in the terms of the trust, Chapters 5801. to 5811. of the Revised Code govern the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(B) The terms of a trust prevail over any provision of Chapters 5801. to 5811. of the Revised Code except the following:

- (1) The requirements for creating a trust;
- (2) The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) The requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- (4) The power of the court to modify or terminate a trust under sections 5804.10 to 5804.16 of the Revised Code;

- (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Chapter 5805. of the Revised Code;
- (6) The power of the court under section 5807.02 of the Revised Code to require, dispense with, or modify or terminate a bond;
- (7) The power of the court under division (B) of section 5807.08 of the Revised Code to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) Subject to division (C) of this section, the duty under divisions (B)(2) and (3) of section 5808.13 of the Revised Code to notify current beneficiaries of an irrevocable trust who have attained twenty-five years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;
- (9) Subject to division (C) of this section, the duty under division (A) of section 5808.13 of the Revised Code to respond to the request of a current beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;
- (10) The effect of an exculpatory term under section 5810.08 of the Revised Code;
- (11) The rights under sections 5810.10 to 5810.13 of the Revised Code of a person other than a trustee or beneficiary;
- (12) Periods of limitation for commencing a judicial proceeding;
- (13) The power of the court to take any action and exercise any jurisdiction that may be necessary in the interests of justice;
- (14) The subject-matter jurisdiction of the court for commencing a proceeding as provided in section 5802.03 of the Revised Code.

(C) With respect to one or more of the current beneficiaries, the settlor, in the trust instrument, may waive or modify the duties of the trustee described in divisions (B)(8) and (9) of this section. The waiver or modification may be made only by the settlor designating in the trust instrument one or more beneficiary surrogates to receive any notices, information, or reports otherwise required under those divisions to be provided to the current beneficiaries. If the settlor makes a waiver or modification pursuant to this division, the trustee shall provide the notices, information, and reports to the beneficiary surrogate or surrogates in lieu of providing them to the current beneficiaries. The beneficiary surrogate or surrogates shall act in good faith to protect the interests of the current beneficiaries for whom the notices, information, or reports are received. A waiver or modification made under this division shall be effective for so long as the beneficiary surrogate or surrogates, or their successor or successors designated in accordance with the terms of the trust instrument, act in that capacity.

History. Effective date: 01-01-2007.

Sec. 5801.05 Application of Common Law and Equity Principles.

The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by Chapters 5801. to 5811. or another section of the Revised Code.

History. Effective date: 01-01-2007.

Sec. 5801.06 Designated Jurisdiction—Controlling Law.

(A) The law of the jurisdiction designated in the terms of a trust determines the meaning and effect of the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue determines the meaning and effect of the terms.

(B) The administration of a trust is governed by the law designated in the terms of the trust to govern trust administration. If the terms of the trust do not designate the governing law, both of the following apply:

(1) The law of the trust's principal place of administration governs the administration of the trust.

(2) If the trust's principal place of administration is transferred to another jurisdiction under section 5801.07 of the Revised Code, the law of the new principal place of administration of the trust governs the administration of the trust from the time of the transfer.

History. Effective date: 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5801.07 Connection with Designated Jurisdiction—Transfer.

(A) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, the terms of a trust designating the principal place of administration of the trust are valid and controlling if a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction or if all or part of the administration occurs in the designated jurisdiction.

(B) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(C) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by division (B) of this section, may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(D) The trustee shall notify the current beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty days before initiating the transfer. The notice of a proposed transfer shall include all of the following:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;

(4) The date on which the trustee expects the proposed transfer to occur.

(E) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 5807.04 of the Revised Code.

History. Effective date: 01-01-2007.

Sec. 5801.08 Methods of Notice—Waiver.

(A) Notice to a person or the sending of a document to a person under Chapters 5801. to 5811. of the Revised Code shall be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(B) Notice otherwise required or a document otherwise required to be sent under Chapters 5801. to 5811. of the Revised Code is not required to be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(C) The person to be notified or sent a document may waive notice or the sending of a document under Chapters 5801. to 5811. of the Revised Code.

(D) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

History. Effective date: 01-01-2007.

Sec. 5801.09 Notice to Beneficiary by Request.

(A) Whenever Chapters 5801. to 5811. of the Revised Code require notice to current or qualified beneficiaries of a trust, the trustee shall also give notice to any other beneficiary who has sent the trustee a request for notice.

(B) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in section 5804.08 or 5804.09 of the Revised Code has the rights of a current beneficiary under Chapters 5801. to 5811. of the Revised Code.

History. Effective date: 01-01-2007.

Sec. 5801.10 Agreement Among Interested Parties Regarding Trust Matters.

(A) As used in this section, "creditor" means any of the following:

(1) A person holding a debt or security for a debt entered into by a trustee on behalf of the trust;

(2) A person holding a debt secured by one or more assets of the trust;

(3) A person having a claim against the trustee or the assets of the trust under section 5805.06 of the Revised Code;

(4) A person who has attached through legal process a beneficiary's interest in the trust.

(B)(1) Subject to division (B)(2) of this section, the parties to an agreement under this section shall be any two or more of the following, or their representatives under the representation provisions of Chapter 5803. of the Revised Code, except that only the settlor and any trustee are required to be parties to an amendment of any revocable trust:

(a) The settlor if living and if no adverse income or transfer tax results would arise from the settlor's participation;

(b) The beneficiaries;

(c) The currently serving trustees;

(d) Creditors, if their interest is to be affected by the agreement.

(2) In addition to the parties to an agreement under division (B)(1) of this section, the parties shall include the attorney general if an agreement described in division (C)(7) of this section is being made and either of the following applies:

(a) An organization with one or more purposes that are described in division (A) of section 5804.05 of the Revised Code is a beneficiary.

(b) The trust is a charitable trust.

(C) The persons specified in division (B) of this section may by written instrument enter into an agreement with respect to any matter concerning the construction of, administration of, or distributions under the terms of the trust, the investment of income or principal held by the trustee, or other matters. The agreement may not effect a termination of the trust before the date specified for the trust's termination in the terms of the trust, change the interests of the beneficiaries in the trust except as necessary to effect a modification described in division (C)(5), (6), or (7) of this section, or include terms and conditions that could not be properly approved by the court under Chapters 5801. to 5811. of the Revised Code or other applicable law. The invalidity of any provision of the agreement does not affect the validity of the provisions of the agreement. Matters that may be resolved by a private settlement agreement include, but are not limited to, all of the following:

(1) Determining classes of creditors, beneficiaries, heirs, next of kin, or other persons;

(2) Resolving disputes arising out of the administration or distribution under the terms of the trust, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the terms of the trust;

(3) Granting to the trustee necessary or desirable powers not granted in the terms of the trust or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the terms of the trust or, if inconsistent with the express provisions or purposes of the terms of the trust, are necessary for the due administration of the terms of the trust;

(4) Modifying the terms of the trust, if the modification is not inconsistent with any material purpose of the trust;

(5) Modifying the terms of the trust in the manner required to qualify the gift under the terms of the trust for the charitable estate or gift tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by the Internal Revenue Code and regulations promulgated under it in any case in which the parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(6) Modifying the terms of the trust in the manner required to qualify any gift under the terms of the trust for the estate tax marital deduction available to noncitizen spouses, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code and regulations promulgated under it in any case in which the parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(7) Construing or modifying the terms of a trust that refer to the federal estate tax, federal generation-skipping transfer tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settlor;

(8) Resolving any other matter that arises under Chapters 5801. to 5811. of the Revised Code.

(D) No agreement shall be entered into under this section affecting the rights of a creditor without the creditor's consent or affecting the collection rights of federal, state, or local taxing authorities.

(E) Any agreement entered into under this section that complies with the requirements of division (C) of this section shall be final and binding on the parties to the agreement or persons represented by the parties to the agreement whether or by reason of Chapter 5803. of the Revised Code or otherwise, and their heirs, successors, and assigns, but shall have no effect on any trustee, settlor, beneficiary, or creditor who is not a party to the agreement or is not represented by a party to the agreement.

(F) Notwithstanding anything in this section, in division (D) of section 5803.03 of the Revised Code, or in any other rule of law to the contrary, a trustee serving under the terms of the trust shall only represent its own individual or corporate interests in negotiating or entering into an agreement subject to this section. No trustee serving under terms of the trust shall be considered to represent any settlor, beneficiary, or the interests of any settlor or beneficiary in negotiating or entering into an agreement subject to this section.

(G) Any party to a private settlement agreement entered into under this section may request the court to approve the agreement, to determine whether the representation as provided in Chapter 5803. of the Revised Code was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

(H) If an agreement entered into under this section contains a provision requiring binding arbitration of any disputes arising under the agreement, the provision is enforceable.

(I) Nothing in this section affects any of the following:

(1) The right of a beneficiary to disclaim under section 5815.36 of the Revised Code;

(2) The termination or modification of a trust under section 5804.10, 5804.11, 5804.12, 5804.13, 5804.14, 5804.15, or 5804.16 of the Revised Code;

(3) The ability of a trustee to divide or consolidate a trust under section 5804.17 of the Revised Code;

(4) The power of the trustee to make distributions pursuant to section 5808.18 of the Revised Code.

(J) Nothing in this section restricts or limits the jurisdiction of any court to dispose of matters not covered by agreements under this section or to supervise the acts of trustees appointed by that court.

(K) This section shall be liberally construed to favor the validity and enforceability of agreements entered into under it.

(L) A trustee serving under the trust instrument is not liable to any third person arising from any loss due to that trustee's actions or inactions taken or omitted in good faith reliance on the terms of an agreement entered into under this section.

(M) Subject to divisions (B)(2) and (C)(7) of this section, this section does not apply to any of the following:

- (1) A charitable trust that has one or more charitable organizations as qualified beneficiaries;
- (2) A charitable trust the terms of which authorize or direct the trustee to distribute trust income or principal to one or more charitable organizations to be selected by the trustee, or for one or more charitable purposes described in division (A) of section 5804.05 of the Revised Code, if any of the following apply:
 - (a) The distributions may be made on the date that an agreement under this section would be entered into.
 - (b) The distributions could be made on the date that an agreement under this section would be entered into if the interests of the current beneficiaries of the trust terminated on that date, but the termination of those interests would not cause the trust to terminate.
 - (c) The distributions could be made on the date that an agreement under this section would be entered into if the trust terminated on that date.
- (3) An agreement pursuant to section 109.232 of the Revised Code.

(N) This section does not prohibit some or all of the persons who could enter into an agreement under this section from entering into agreements that are not described in this section and are governed by other law, including the common law. Nothing in this section limits or negates any consents, releases, or ratifications, whether under section 5810.09 of the Revised Code or otherwise, relating to any agreement described in this section or governed by other law.

History. Amended by 131st General Assembly File No. TBD, HB 432, §1, eff. 4/6/2017. Amended by 129th General Assembly File No.65, SB 117, §1, eff. 3/22/2012. Effective Date: 01-01-2007; 2008 HB499 09-12-2008

Sec. 5801.11 Guardian to Comply with Duties Under RC Chapter 2111.

A guardian of the estate or person, in acting under Chapters 5801. to 5811. of the Revised Code, shall comply with the guardian's duties under Chapter 2111. of the Revised Code or other applicable law.

History. Effective Date: 2008 HB499 09-12-2008.

Sec. 5801.12 Children Born through the Use of Assisted Reproductive Technologies

(A) As used in this section:

- (1) "Assisted reproductive technologies" means any medical or scientific technology or method designed to assist one or more persons to cause a pregnancy through means other than by sexual intercourse, including technologies that are developed after the date of this amendment.
- (2) "Trust" includes a revocable or irrevocable trust.

(B) Notwithstanding any other section of the Revised Code, this section governs the beneficial rights under a trust of any child born through the use of any assisted reproductive technologies, and also applies to the exercise of any power of appointment granted under a trust instrument or any other power to otherwise expand the class of beneficiaries under a trust instrument.

(C) No child of a settlor born through the use of any assisted reproductive technologies more than three hundred days after the date of death of the settlor of a trust instrument shall be considered the settlor's child under that trust instrument, under the exercise of any power to appoint trust assets in favor of the settlor's children, or under the exercise of any other power to otherwise expand the class of beneficiaries under the trust instrument, unless the terms of the trust clearly provide otherwise. No other person born through the use of any assisted reproductive technologies more than three hundred days after the date of the event that caused a class of beneficiaries to close under the terms of a trust shall be included in that class unless the terms of the trust clearly provide otherwise.

(D)(1) If the terms of a trust provide for a child or other person born through the use of assisted reproductive technologies and further provide for a time period in which that child or other person must be born in order to benefit under the terms of the trust, that time period shall apply in order for the child or other person to benefit under the terms of the trust, subject to a maximum time period of five years from the date of death of the settlor or the date of the event that caused a class of beneficiaries to close, whichever is applicable.

(2) If the terms of a trust provide for a child or other person born through the use of assisted reproductive technologies but do not provide for a time period in which that child or other person must be born in order to benefit under the terms of the trust, that child or other person must be born within a period of one year and three hundred days from the date of death of the settlor or the date of the event that caused a class of beneficiaries to close, whichever is applicable, in order for the child or other person to benefit under the terms of the trust.

History. Added by 131st General Assembly, SB 232, eff. 3/14/2017.

Sec. 5801.20 Definitions

As used in sections 5801.20 to 5801.24 of the Revised Code:

(A)(1) "Applicable reporting period" means either of the following, as applicable:

(a) The most recent four years, as of the date of preparation of a notice authorized under division (B) of section 5801.22 or division (B) of section 5801.23 of the Revised Code;

(b) If the trust became irrevocable during such four-year period, the period from the date the trust became irrevocable to the date of preparation of the notice.

(2) If the trustee sending the notice accepted the trusteeship during the period described in division (A)(1) of this section, the "applicable reporting period" shall be from the date of the trustee's acceptance to the date of preparation of the notice.

(B) "Departing trustee" means a trustee who is resigning or has been removed as trustee of a trust.

(C) "Distributions objection period" means a forty-five-day period for providing the trustee of the noticing trust with objections under division (D) of section 5801.22 of the Revised Code. The period commences with the date the notice and trustee's reports described in division (B) of section 5801.22 of the Revised Code are served on the recipient.

(D) "Noticing trust" means a trust whose trustee is serving or has served a notice and trustee reports under section 5801.22 or 5801.23 of the Revised Code.

(E) “Resignation or removal necessary parties” means the following persons:

(1) In the case of a trustee resignation:

(a) If the trust terms identify one or more persons to whom notice of the trustee’s resignation must be provided, the persons so identified and any other persons who are current beneficiaries of the trust, determined as of the date of the notice described in division (B) of section 5801.23 of the Revised Code;

(b) If the trust terms do not identify any persons to whom notice of the trustee’s resignation must be provided, the qualified beneficiaries of the trust, determined as of the date of the notice described in division (B) of section 5801.23 of the Revised Code.

(2) In the case of a trustee removal, the persons, if any, to whom notice of trustee removal is required to be provided under the trust terms and any other persons who are current beneficiaries of the trust, determined as of the date of the notice described in division (B) of section 5801.23 of the Revised Code.

(3) Any co-trustee of the trust;

(4) The successor trustee if one has been appointed or designated as provided in the trust terms or otherwise appointed, as provided in division (C) of section 5807.04 of the Revised Code or pursuant to other applicable law.

(F) “Successor trustee” means a person, not previously serving as a co-trustee, who is to replace the departing trustee following the departing trustee’s resignation or removal.

(G) “Terminating distributions necessary parties” means:

(1) The current beneficiaries of the trust, determined as of the date of the notice described in division (B) of section 5801.22 of the Revised Code;

(2) If the trust-terminating distributions include one or more mandatory distributions under the terms of the trust, all other persons living at the date of the notice who were current beneficiaries of the trust immediately prior to the triggering event that is the basis for the mandatory distributions;

(3) Any co-trustee of the trust.

(H) “Triggering event” means any event, such as a death, age attainment or other circumstance, that has occurred and that is the basis for a mandatory distribution under the terms of the trust.

(I) “Trust-terminating distributions” means distributions that, when completed, will distribute the remaining net assets of a trust and thereby effectively terminate the trust, including any such distributions that are made pursuant to section 5808.18 of the Revised Code or under any similar statutory or common law applicable to the trust.

(J) “Trustee indemnification clause” means a provision that indemnifies the trustee against loss arising from a claim relating to the trustee’s administration of the trust.

(K) “Trustee’s report” means a report as described in division (C) of section 5808.13 of the Revised Code.

(L) “Trustee succession objection period” means a forty-five-day period for providing to the departing trustee objections under division (D) of section 5801.23 of the Revised Code. The period commences with the date the notice and trustee’s reports described in division (B) of section 5801.23 of the Revised Code are served on the recipient.

History. Added by 134th General Assembly File No. TBD, SB 202, § 1, eff. 4/3/2023.

Sec. 5801.21 Concluding Trustee’s Administration of Irrevocable Trust.

(A) A trustee may, but is not required to, use the process prescribed in sections 5801.22 and 5801.23 of the Revised Code, as applicable, when concluding the trustee’s administration of an irrevocable trust.

(B) Sections 5801.20 to 5801.24 of the Revised Code do not apply to a testamentary trust subject to the supervision of a probate court.

(C) Except as otherwise provided in the Revised Code or other applicable law, including the common law, the provisions of sections 5801.22 and 5801.23 of the Revised Code may be used in combination with or in lieu of other options or proceedings available under the Revised Code or other applicable law, including the common law.

(D) A trustee’s substantial good-faith compliance with the requirements concerning the contents of the notices described in division (B) of section 5801.22 and division (B) of section 5801.23 of the Revised Code is deemed sufficient.

History. Added by 134th General Assembly File No. TBD, SB 202, § 1, eff. 4/3/2023.

Sec. 5801.22 Termination of Irrevocable Trust as a Result of Trust-Terminating Distributions.

(A) When a trust is to terminate as a result of trust-terminating distributions and the trustee elects to use the provisions of this section, the trustee shall serve on the terminating distributions necessary parties the documents and information described in division (B) of this section. The trustee also may serve those documents and that information on other persons who the trustee reasonably believes may have an interest in the trust. Service shall be made within a reasonable period of time after the event or determination that requires or authorizes such distributions.

(B) The documents and information to be served include both of the following:

(1) A written notice, executed by or on behalf of the trustee, that includes the following information:

(a) The date of the notice, corresponding to the date the notice is being sent;

(b) A description of the terms of the trust that require or authorize the trust-terminating distributions or a citation to any statute that requires or authorizes the distributions;

(c) If the terms of the trust require any of the proposed trust-terminating distributions, a description of any triggering event that is the basis for each mandatory distribution;

(d) A description of the proposed trust-terminating distributions that includes the names of the proposed distributees and a description, in general or specific terms, of the assets proposed for distribution to each;

(e) A description of the distributions objection period and the name, mailing address, electronic address if available, and telephone number of the person or office associated with the trustee to which any written objections should be sent;

(f) A description of the process, described in division (C) of this section, that will be followed if the trustee receives no written objections within the distributions objection period;

(g) A description of the process, described in division (D) of this section, that will be followed if the trustee receives a written objection within the distributions objection period;

(h) A statement of the impending bar of claims against the trustee, as described in division (F) of this section, that will result if an objection is not timely made;

(i) A statement that the trustee may rely upon the written statement of a recipient of the notice that such person consents to the proposed trust-terminating distributions and irrevocably waives the right to object to the distributions and any claim against the trustee for matters disclosed in the notice or the trustee's reports served with it and all other matters pertaining to the trustee's administration of the trust;

(j) A statement that the trustee may complete the distributions described in the notice prior to the expiration of the distributions objection period if all of the persons on whom the notice was served deliver to the trustee written consents and irrevocable waivers of the kind described in division (E) of this section;

(k) An exhibit showing the assets on hand at the date the notice is prepared and their respective values as shown in the regularly kept records of the trustee;

(l) An estimate of any assets, income, taxes, fees, expenses, claims, or other items reasonably expected by the trustee to be received or disbursed before completion of the trust-terminating distributions but not yet received or disbursed, including trustee fees remaining to be paid.

(2) One or more trustee's reports covering the applicable reporting period.

(C) If no written objection is received by the trustee within the distributions objection period:

(1) The notice and trustee's reports served pursuant to division (A) of this section shall be considered approved by each recipient of the notice and reports;

(2) The trustee, within a reasonable period of time following the expiration of the distributions objection period, shall distribute the assets as provided in the notice;

(3) Any person who was served such notice and reports shall be barred from bringing a claim against the trustee, and from challenging the validity of the trust, as provided in division (F) of this section.

(D)(1) If, after being served the notice and trustee's reports described in division (B) of this section, a qualified beneficiary or any other recipient of the notice wishes to object to matters disclosed in the notice or trustee's reports served, or any other matter pertaining to the trustee's administration of the trust, the person shall provide written notice of the objection to the trustee of the noticing trust within the distributions objection period. If the trustee receives a written objection within the distributions objection period, the trustee may do either of the following:

(a) Submit the written objection to the court for resolution. The expense of commencing, conducting, and concluding such a proceeding shall be charged as ordered by the court.

(b)(i) Resolve the objection with the objecting person by accepting a withdrawal of the person's objection or by written instrument, a written agreement as described in section 5801.10 of the Revised Code, or other means.

(ii) Any agreement or other written instrument executed by the objecting party pursuant to division (D)(1)(b)(i) of this section may include a release and a trustee indemnification clause, along with other terms agreed to by the parties. Reasonable expenses related to such written instrument or written agreement shall be charged to the trust.

(2) Within a reasonable time after resolution of all timely objections under division (D)(1) of this section, the trustee shall distribute the remaining trust assets as provided in the notice, subject to any modifications provided for in the terms of the document setting forth the resolution of each such objection.

(E)(1) The trustee may rely upon the written statement of a recipient of the notice and trustee's reports served under this section that the recipient:

(a) Consents to the proposed trust-terminating distributions;

(b) Irrevocably waives the right to object to the distributions;

(c) Irrevocably waives any claims against the trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the trustee's administration of the trust.

(2) The distributions described in the notice may be completed prior to the expiration of the distributions objection period if all of the persons on whom the notice and trustee's reports were served have delivered to the trustee similar written consents and irrevocable waivers.

(F)(1)(a) Any person who was served a notice and trustee's reports that comply with the requirements of this section and who either consented to the proposed trust-terminating distributions or failed to timely provide the trustee a written objection as described in this section is barred from:

(i) Bringing a claim against the trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the trustee's administration of the trust;

(ii) Challenging the validity of the trust.

Such claims shall be barred as described in division (F)(2) of this section.

(b) If all of the terminating distributions necessary parties and all qualified beneficiaries of the trust have been served a notice and trustee's reports that comply with the requirements of this section and have either consented to the proposed trust-terminating distributions or failed to timely provide the trustee a written objection as described in this section, all other beneficiaries of the trust, including persons who may succeed to the interests in the trust of the beneficiaries served, shall be barred as described in division (F)(2) of this section.

(2) The bar of claims under division (F) of this section applies:

(a) To each person barred, the person's personal representatives and assigns, and the person's heirs who are not beneficiaries of the noticing trust;

(b) To the same extent and with the same preclusive effect as if the court had entered a final order approving and settling the trustee's full account of its entire administration of the trust, notwithstanding the limitations periods otherwise applicable under section 5810.05 of the Revised Code.

(G) Any beneficiary who receives trust assets as a result of a trust-terminating distribution described in the notice described in division (B) of this section and who is barred from bringing claims under division (F) of this section may be required to return all or any part of the value of the distributed assets if the trustee determines that the return of assets is necessary to pay, or reimburse the trustee for payment of, taxes, debts, or expenses of the trust, including reasonable expenses incurred by the trustee in obtaining the return of those assets. The beneficiary shall make the return expeditiously upon receipt of a written notice from the trustee requesting the return of all or any part of the value of those distributed assets.

History. Added by 134th General Assembly File No. TBD, SB 202, § 1, eff. 4/3/2023.

Sec. 5801.23 Termination of Irrevocable Trust as a Result of Trustee Resignation or Removal.

(A) When a trustee resigns or is removed from an irrevocable trust pursuant to the terms of the trust or otherwise and the departing trustee elects to use the provisions of this section, the departing trustee shall serve on the resignation or removal necessary parties the documents and information described in division (B) of this section. The trustee also may serve those documents and that information on other persons who the trustee reasonably believes may have an interest in the trust. Service shall be made within a reasonable period of time after such resignation or removal.

(B) The documents and information to be served include all of the following:

(1) A written notice, executed by or on behalf of the departing trustee, that includes all of the following information:

(a) The date of the notice, corresponding to the date the notice is being sent;

(b) A description of any terms of the trust or the Revised Code relevant to the resignation or removal of the departing trustee and the provisions, if applicable, regarding the appointment or designation of the successor trustee;

(c) A description of any actions taken by the departing trustee, the beneficiaries of the trust, or other required parties pertaining to the resignation or removal of the departing trustee and, if applicable, the appointment or designation of the successor trustee;

(d) The name and address of the successor trustee, if one has been appointed or designated;

(e) If applicable, a statement confirming the successor trustee's acceptance of the trusteeship;

(f) A description of the trustee succession objection period and the name, mailing address, electronic mail address if available, and telephone number of the person or office associated with the departing trustee to which any written objections should be sent;

(g) A description of the process, described in division (C) of this section, that will be followed if the departing trustee receives no written objections within the trustee succession objection period;

(h) A description of the process, described in division (D) of this section, that will be followed if the departing trustee receives a written objection within the trustee succession objection period;

(i) A statement of the impending bar of claims against the departing trustee, as described in division (F) of this section, that will result if an objection is not timely made;

(j) A statement that the departing trustee may rely upon the written statement of a recipient of the notice that such person consents to the delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, and irrevocably waives the right to object to the delivery of the assets and any claim against the departing trustee for matters disclosed in the notice or the trustee's reports served with it and all other matters pertaining to the departing trustee's administration of the trust;

(k) A statement that the departing trustee may complete the delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, prior to the expiration of the trustee succession objection period if all of the persons on whom the notice was served deliver to the trustee written consents and irrevocable waivers of the kind described in division (E) of this section;

(l) An exhibit showing the assets on hand at the date the notice is prepared and their respective values as shown in the regularly kept records of the trustee;

(m) An estimate of any assets, income, taxes, fees, expenses, claims, or other items reasonably expected by the departing trustee to be received or disbursed before delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, but not yet received or disbursed, including trustee fees remaining to be paid.

(2) One or more trustee's reports covering the applicable reporting period.

(C) If no written objection is received by the departing trustee within the trustee succession objection period:

(1) The notice and trustee's reports served pursuant to division (A) of this section shall be considered approved by each recipient of the notice and reports.

(2) The departing trustee, within a reasonable period of time following the expiration of the trustee succession objection period, shall deliver the net trust assets to the successor trustee or to one or more co-trustees, as applicable.

(3) Any person who was served such notice and reports shall be barred from bringing a claim against the trustee, and from challenging the validity of the trust, as provided in division (F) of this section.

(D)(1) If, after being served the notice and trustee's reports described in division (B) of this section, a qualified beneficiary or any other recipient of the notice wishes to object to matters disclosed in the notice or reports or any other matter pertaining to the departing trustee's administration of the trust, the person shall provide written notice of the objection to the departing trustee within the trustee succession objection period. If the departing trustee receives a written objection within the trustee succession objection period, the departing trustee may do either of the following:

(a) Submit the written objection to the court for resolution. The expense of commencing, conducting, and concluding such a proceeding shall be charged as ordered by the court.

(b)(i) Resolve the objection with the objecting person by accepting a withdrawal of the person's objection or by written instrument, a written agreement as described in section [5801.10](#) of the Revised Code, or other means.

(ii) Any agreement or other written instrument executed by the objecting party pursuant to division (D)(1)(b)(i) of this section may include a release and a trustee indemnification clause, along with other terms agreed to by the parties. Reasonable expenses related to such written instrument or written agreement shall be charged to the trust.

(2) Within a reasonable time after resolution of all timely objections under division (D)(1) of this section, the departing trustee shall deliver the net trust assets to the successor trustee, or to one or more co-trustees as applicable, subject to any modifications provided for in the terms of the document setting forth the resolution of each such objection.

(E)(1) The departing trustee may rely upon the written statement of a recipient of the notice and trustee's reports served under this section that the recipient consents to, and irrevocably waives the right to object to:

(a) The departing trustee's resignation or removal;

(b) The appointment of the successor trustee, if applicable;

(c) Delivery of the net assets of the trust to the successor trustee or to one or more co-trustees, as applicable.

(2) The statement shall also irrevocably waive any claims against the departing trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the departing trustee's administration of the trust.

(3) The delivery of the net assets of the trust to the successor trustee, or to one or more co-trustees as applicable, may be completed prior to the expiration of the trustee succession objection period if all of the persons on whom the notice and trustee's reports were served have delivered to the departing trustee similar written consents and irrevocable waivers.

(F)(1) Any person who was served a notice and trustee's reports that comply with the requirements of this section and who either consented to the delivery of the net assets of the trust to the successor trustee or one or more co-trustees as applicable or failed to timely provide the departing trustee a written objection as described in this section is barred from:

(a) Bringing a claim against the departing trustee for breach of trust as to matters disclosed in the notice and trustee's reports and all other matters pertaining to the departing trustee's administration of the trust;

(b) Challenging the validity of the trust.

Such claims shall be barred as described in division (F)(3) of this section.

(2) If all of the resignation or removal necessary parties and all qualified beneficiaries of the trust have been served a notice and trustee's reports that comply with the requirements of this section and have either consented to the delivery of the net assets of the trust to the successor trustee or failed to timely provide the trustee a written objection as described in this section, all other beneficiaries of the trust, including persons who may succeed to the interests in the trust of the beneficiaries served, shall be barred as described in division (F)(3) of this section.

(3) The bar of claims under divisions (F)(1) and (2) of this section applies:

(a) To each person barred, the person's personal representatives and assigns, and the person's heirs who are not beneficiaries of the noticing trust;

(b) To the same extent and with the same preclusive effect as if the court had entered a final order approving and settling the departing trustee's full account of its entire administration of the trust, notwithstanding the limitations periods otherwise applicable under section [5810.05](#) of the Revised Code.

(c) To bar the person from bringing a claim against the successor trustee for failure to object to a matter that is subject to the bar of claims against the departing trustee to the same extent as the bar applies to claims against the departing trustee.

History. Added by 134th General Assembly File No. TBD, SB 202, § 1, eff. 4/3/2023.

Sec. 5801.24 Delivery of Notices and Trustee's Reports.

(A)(1) Division (A)(2) of this section applies if both of the following apply:

(a) A notice and trustee's reports under division (B) of section [5801.22](#) or division (B) of section [5801.23](#) of the Revised Code are served upon both of the following:

(i) The personal representative for the estate of a deceased beneficiary of the noticing trust or the trustee of a subtrust that is a beneficiary of the noticing trust;

(ii) One or more beneficiaries of the estate or subtrust whose fiduciary is served.

(b) Both the fiduciary of the estate or subtrust and one or more beneficiaries of that estate or subtrust who are served do either of the following:

(i) Consent to the proposed distributions or delivery of assets described in the notice;

(ii) Fail to object within the applicable objection period.

(2) If the criteria described in division (A)(1) of this section are met, the beneficiary of the estate or subtrust who is subject to the claims bar with respect to the administration of the noticing trust shall be barred to the same extent from bringing a claim against the fiduciary of the estate or subtrust for failure to object to a matter that is subject to the bar of claims against the trustee of the noticing trust.

(B) The notices and trustee's reports served by the trustee of the noticing trust under section [5801.22](#) or [5801.23](#) of the Revised Code shall be served on a person by any of the following means:

(1) Handing them to the person;

(2) Leaving them at either of the following locations:

(a) At the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office;

(b) At the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(3) Mailing them to the person's last known address by United States mail, in which event service is complete upon mailing;

(4) Delivering them to a commercial carrier service for delivery to the person's last known address within three calendar days, in which event service is complete upon delivery to the carrier;

(5) Sending them by electronic means to a facsimile number or electronic mail address provided by the person to be served or provided by his or her attorney, in which event service is complete upon transmission, but is not effective if the trustee of the noticing trust learns that they did not reach the person.

(C) No trustee shall request or include a trustee indemnification clause in the notice and trustee's reports served under division (B) of section [5801.22](#) or division (B) of section [5801.23](#) of the Revised Code or in any documentation served by the trustee with the notice and trustee's reports. However, in the event such notice and trustee's reports are served and a written objection is received by the trustee within the applicable objection period, a trustee indemnification clause may be included in an agreement or other written instrument executed by the objecting party pursuant to division (D)(1)(b)(i) of section [5801.22](#) or division (D)(1)(b)(i) of section [5801.23](#) of the Revised Code.

History. Added by 134th General Assembly File No. TBD, SB 202, § 1, eff. 4/3/2023.

Chapter 5802 Jurisdiction of Court

Section

- 5802.01 Judicial Intervention in Trust Administration.
- 5802.02 Personal Jurisdiction over Trustee and Beneficiaries.
- 5802.03 Concurrent Jurisdiction Regarding Inter Vivos Trust.
- 5802.04 Nature of Action
- 5802.05 Provision Regarding Arbitration of Disputes

Sec. 5802.01 Judicial Intervention in Trust Administration.

(A) A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(B) An inter vivos trust is not subject to continuing judicial supervision unless ordered by the court. Trusts created pursuant to a section of the Revised Code or a judgment or decree of a court are subject to continuing judicial supervision to the extent provided by the section, judgment, or decree or by court order.

(C) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

History. Effective Date 01-01-2007.

Sec. 5802.02 Personal Jurisdiction over Trustee and Beneficiaries.

(A) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(B) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from the trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(C) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

History. Effective Date 01-01-2007.

Sec. 5802.03 Concurrent Jurisdiction Regarding Inter Vivos Trust.

(A) Except as otherwise provided in division (B) of this section, the probate division of the court of common pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders and to hear and determine any action that involves an inter vivos trust.

(B) The probate division of the court of common pleas has exclusive jurisdiction to render declaratory judgments under Chapter 5817. Of the Revised Code. However, the probate division of the court of common pleas may transfer a declaratory judgment proceeding under that chapter to the general division of the court of common pleas pursuant to division (A) of section 5817.04 of the Revised Code.

History. Amended by 132nd General Assembly, HB 595, eff. 3/22/2019. Effective Date 01-01-2007.

Sec. 5802.04 Nature of Action.

An action brought under Chapters 5801. to 5811. of the Revised Code is a civil action subject to the Rules of Civil Procedure, and unless it involves a testamentary or other trust that already is subject to court supervision, is commenced by filing a complaint.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017.

Sec. 5802.05 Provision Regarding Arbitration of Disputes.

(A) A provision in the terms of a trust, excluding a testamentary trust, that requires the arbitration of disputes, other than disputes of the validity of all or a part of a trust instrument, between or among the beneficiaries and a fiduciary under the trust, or a combination of those persons or entities is enforceable.

(B) Unless otherwise specified in the terms of the trust, a trust provision requiring arbitration as described in division (A) of this section shall be presumed to require binding arbitration under Chapter 2711 of the Revised Code.

History. Added by the 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Chapter 5803 Representatives

Section

- 5803.01 Notice to and Consent by Representative.
 - 5803.02 Holder of Power of Appointment May Represent Persons Subject to Power.
 - 5803.03 Powers of Representative.
 - 5803.04 Representation by Person Having Same Interest.
 - 5803.05 Appointment to Represent Unrepresented Interest.
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Sec. 5803.01 Notice to and Consent by Representative.

(A) Notice to a person who may represent and bind another person under this chapter has the same effect as if notice were given directly to the other person.

(B) The consent of a person who may represent and bind another person under this chapter is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(C) Except as otherwise provided in sections 5804.11 and 5806.02 of the Revised Code, a person who under this chapter may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(D) A settlor may not represent and bind a beneficiary under this chapter with respect to the termination or modification of a trust under division (A) of section 5804.11 of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5803.02 Holder of Power of Appointment May Represent Persons Subject to Power.

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. To the extent there is no conflict of interest between the holder of a limited testamentary power of appointment or a presently exercisable limited power of appointment and the persons represented with respect to the particular question or dispute, the holder may also represent and bind persons whose interests as possible appointees are subject to the power. The rights of the holder of a presently exercisable general power of appointment are governed by section 5806.03 of the Revised Code.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5803.03 Power of Representative.

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute, all of the following apply:

(A) A guardian of the estate may represent and bind the estate that the guardian of the estate controls.

(B) A guardian of the person may represent and bind the ward if a guardian of the estate has not been appointed.

(C) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.

(D) Except as provided in division (F) of section 5801.10 of the Revised Code, a trustee may represent and bind the beneficiaries of the trust.

(E) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(F) A parent may represent and bind the parent's minor or unborn child if neither a guardian for the child's estate nor a guardian of the person has been appointed. If a minor or unborn child is not represented by a parent under this division, another person may represent and bind the minor or unborn child under section 5803.04 of the Revised Code if the requirements of that section are met.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5803.04 Representation by Person Having Same Interest.

Unless otherwise represented, a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

History. Effective Date 01-01-2007.

Sec. 5803.05 Appointment to Represent Unrepresented Interest.

(A) If the court determines that an interest is not represented under this chapter or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

(B) A representative may act on behalf of the individual represented with respect to any matter arising under Chapters 5801. to 5811. of the Revised Code, whether or not a judicial proceeding concerning the trust is pending.

(C) In making decisions, a representative may consider general benefit accruing to the living members of the individual's family.

History. Effective Date 01-01-2007.

Chapter 5804 Creation, Modification, Revocation, and Termination of Trusts

Section

- 5804.01 Methods of Creation of Trust.
- 5804.02 General Requirements for Creation of Trust.
- 5804.03 Validity of Nontestamentary Trusts.
- 5804.04 Trust Purposes Must Be Legitimate.
- 5804.05 Purposes of Charitable Trust—Enforcement.
- 5804.06 Trust Induced by Fraud, Duress, or Undue Influence Void.
- 5804.07 Written Instrument Not Required.
- 5804.08 Trust to Provide Care of Animal.
- 5804.09 Trust Created for Noncharitable Purpose.
- 5804.10 Termination of Trust by Revocation or by Terms.
- 5804.11 Termination or Modification of Noncharitable Irrevocable Trust.
- 5804.12 Judicial Action Due to Change of Circumstances.
- 5804.13 Judicial Action Where Charitable Purpose Frustrated.
- 5804.14 Termination or Modification Where Costs Exceed Value.
- 5804.15 Reformation to Conform to Settlor’s Intention.
- 5804.16 Modification to Achieve Settlor’s Tax Objectives.
- 5804.17 Combination and Division of Trust.
- 5804.18 When Certain Trust Is Irrevocable.

Sec. 5804.01 Methods of Creation of Trusts.

A trust may be created by any of the following methods:

- (A) Transfer of property to another person as trustee during the settlor’s lifetime or by will or other disposition taking effect upon the settlor’s death;
- (B) Declaration by the owner of property that the owner holds identifiable property as trustee;
- (C) Exercise of a power of appointment in favor of a trustee;
- (D) A court order.

History. Effective Date 01-01-2007.

Sec. 5804.02 General Requirements for Creation of Trust.

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

- (1) Subject to division (F) of this section, the settlor of the trust, other than the settlor of a trust created by a court order, has capacity to create a trust.
- (2) Subject to division (F) of this section, the settlor of the trust, other than the settlor of a trust created by a court order, indicates an intention to create the trust.
- (3) The trust has a definite beneficiary or is one of the following:
 - (a) A charitable trust;

- (b) A trust for the care of an animal, as provided in section 5804.08 of the Revised Code;
- (c) A trust for a noncharitable purpose, as provided in section 5804.09 of the Revised Code.
- (4) The trustee has duties to perform.
- (5) The same person is not the sole trustee and sole beneficiary.
- (B) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.
- (C) A power in a trustee or other person to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails, and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.
- (D) A trust is valid regardless of the existence, size, or character of the corpus of the trust. This division applies to any trust instrument that was executed prior to, or is executed on or after January 1, 2007.
- (E) A trust is not invalid because a person, including, but not limited to, the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial enjoyment of the corpus of the trust, provided that one or more other persons hold a vested, contingent, or expectant interest relative to the enjoyment of the corpus of the trust upon the cessation of the present beneficial enjoyment. A merger of the legal and equitable titles to the corpus of a trust described in this division does not occur in its creator, and, notwithstanding any contrary provision of Chapter 2107. of the Revised Code, the trust is not a testamentary trust that is required to comply with that chapter in order for its corpus to be legally distributed to other beneficiaries in accordance with the provisions of the trust upon the cessation of the present beneficial enjoyment. This division applies to any trust that satisfies the provisions of this division, whether the trust was executed prior to, on, or after October 10, 1991.
- (F) An agent under a power of attorney may create a trust for the principal, whether or not the principal has capacity to create the trust and indicates an intention to create the trust, but only as provided in sections 1337.21 to 1337.64 of the Revised Code, including sections 1337.42 and 1337.58 of the Revised Code and their limitations on creation of trusts and on gifts of property of the principal and the duty of the agents to attempt to preserve the principal's estate plan.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5804.03 Validity of Nontestamentary Trusts.

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation, any of the following applies:

- (A) The settlor was domiciled in, had a place of abode in, or was a national of the jurisdiction.
- (B) A trustee was domiciled or had a place of business in the jurisdiction.
- (C) Any trust property was located in the jurisdiction.

History. Effective Date 01-01-2007.

Sec. 5804.04 Trust Purposes Must Be Legitimate.

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust exists, and its assets shall be held, for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust.

History. Effective Date 01-01-2007.

Sec. 5804.05 Purposes of Charitable Trust—Enforcement.

(A) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(B) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(C) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

History. Effective Date 01-01-2007.

Sec. 5804.06 Trust Induced by Fraud, Duress, or Undue Influence Void.

A trust is void to the extent its creation was induced by fraud, duress, or undue influence. As used in this section, "fraud," "duress," and "undue influence" have the same meanings for trust validity purposes as they have for purposes of determining the validity of a will.

History. Effective Date 01-01-2007.

Sec. 5804.07 Written Instrument Not Required.

Except as required by any section of the Revised Code not in Chapters 5801. to 5811. of the Revised Code, a trust is not required to be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

History. Effective Date 01-01-2007.

Sec. 5804.08 Trust to Provide for Care of Animal.

(A) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(B) A person appointed in the terms of a trust or, if no person is so appointed, a person appointed by the court may enforce a trust authorized by this section. A person having an interest in the welfare of an animal that is provided care by a trust authorized by this section may request the court to appoint a person to enforce the trust or to remove a person appointed.

(C) The property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor if then living or to the settlor's successors in interest.

History. Effective Date 01-01-2007.

Sec. 5804.09 Trust Created for Noncharitable Purpose.

Except as otherwise provided in section 5804.08 of the Revised Code or any other section of the Revised Code:

(A) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. A trust created for a noncharitable purpose may not be enforced for more than twenty-one years.

(B) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(C) The property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor if then living or to the settlor's successors in interest.

History. Effective Date 01-01-2007.

Sec. 5804.10 Termination of Trust by Revocation or by Terms.

(A) In addition to the methods of termination prescribed by sections 5804.11 to 5804.14 of the Revised Code, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, a court determines that no purpose of the trust remains to be achieved, or a court determines that the purposes of the trust have become unlawful or impossible to achieve.

(B) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under sections 5804.11 to 5804.16 of the Revised Code or to approve or disapprove a trust combination or division under section 5804.17 of the Revised Code. The settlor may commence a proceeding to approve or disapprove a proposed modification or termination under section 5804.11 of the Revised Code. The settlor of a charitable trust may maintain a proceeding to modify the trust under section 5804.13 of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5804.11 Termination or Modification of Noncharitable Irrevocable Trust.

(A) If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, that all consents, including any given by representatives under Chapter 5803. of the Revised Code, are valid, and that all parties

giving consent are competent to do so, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. An agent under a power of attorney may exercise a settlor's power to consent to a trust's modification or termination only to the extent expressly authorized by both the power of attorney and the terms of the trust. The settlor's guardian of the estate may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized. The guardian of the settlor's person may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized and a guardian of the estate has not been appointed. This division does not apply to a noncharitable irrevocable trust described in 42 U.S.C. 1396p(d)(4).

(B) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified, but not to remove or replace the currently serving trustee, upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. A spendthrift provision in the terms of the trust may, but is not presumed to, constitute a material purpose of the trust. In determining what constitutes a material purpose of a trust, a court may but is not required to consider extrinsic evidence indicating a settlor's intent at the time the instrument was executed.

(C) Upon termination of a trust under division (A) or (B) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

(D) If not all of the beneficiaries consent to a proposed modification or termination of the trust under division (A) or (B) of this section, the court may approve the modification or termination if the court is satisfied of both of the following:

(1) That if all of the beneficiaries had consented, the trust could have been modified or terminated under this section;

(2) That the interests of a beneficiary who does not consent will be adequately protected.

History. Amended by 134th General Assembly, HB 7, eff. 8/17/2021. Effective Date 01-01-2007; 2008 HB499 09-12-2008; 2021 HB7 8-17-21.

Sec. 5804.12 Judicial Action Due to Change of Circumstances.

(A) The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor modification or termination will further the purposes of the trust. To the extent practicable, the court shall make the modification in accordance with the settlor's probable intention.

(B) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or impair the trust's administration.

(C) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(D) The court may modify or interpret the terms of a trust, including, but not limited to, a charitable trust or a trust having as a beneficiary an organization with one or more purposes that are described in division (A) of section 5804.05 of the Revised Code, that refer to the federal estate tax, federal generation-skipping transfer tax, or Ohio estate tax, or that contain a division of property based on the imposition or amount of one or more of those taxes, to give effect to the intent of the settlor.

History. Amended by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012. Effective Date 01-01-2007.

Sec. 5804.13 Judicial Action Where Charitable Purpose Frustrated.

(A) Except as otherwise provided in division (B) of this section, if a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve, all of the following apply:

(1) The trust does not fail in whole or in part.

(2) The trust property does not revert to the settlor or the settlor's successors in interest.

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes. In accordance with section 109.25 of the Revised Code, the attorney general is a necessary party to a judicial proceeding brought under this section.

(B) A provision in the terms of a charitable trust for an alternative charitable purpose or for the distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under division (A) of this section to apply cy pres to modify or terminate the trust.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5804.14 Termination or Modification Where Costs Exceed Value.

(A)(1) Except as provided in division (A)(2) of this section, after notice to the qualified beneficiaries, the trustee of an inter vivos trust consisting of trust property having a total value of less than one hundred thousand dollars may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) Division (A)(1) of this section does not apply to any of the following:

(a) A charitable trust that has one or more charitable organizations as qualified beneficiaries;

(b) A charitable trust the terms of which authorize or direct the trustee to distribute trust income or principal to one or more charitable organizations to be selected by the trustee, or for one or more charitable purposes described in division (A) of section 5804.05 of the Revised Code, if any of the following apply:

(i) The distributions may be made on the date that the trust would be terminated under division (A)(1) of this section.

(ii) The distributions could be made on the date that the trust would be terminated under division (A)(1) of this section if the interests of the current beneficiaries of the trust terminated on that date, but the termination of those interests would not cause the trust to terminate.

(iii) The distributions could be made on the date that the trust would be terminated under division (A)(1) of this section, if the trust terminated on that date but not under that division.

(B) If an inter vivos trust consists of trust property having a total value of less than one hundred thousand dollars, the court may modify or terminate the trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(C) Upon the termination of a trust pursuant to division (A)(1) of this section, the trustee shall distribute the trust estate in accordance with any provision specified in the terms of the trust for the premature termination of the trust. If there is no provision of that nature in the terms of the trust, the trustee shall distribute the trust estate among the beneficiaries of the trust in accordance with their respective beneficial interests and in a manner that the trustee determines to be equitable. For purposes of distributing the trust estate among the beneficiaries of the trust under this division, the trustee shall consider all of the following:

(1) The existence of any agreement among the beneficiaries with respect to their beneficial interests;

(2) The actuarial values of the separate beneficial interests of the beneficiaries;

(3) Any expression of preference of the beneficiaries that is contained in the terms of the trust.

(D) Upon the termination of a trust pursuant to division (B) of this section, the court shall order the distribution of the trust estate in accordance with any provision specified in the terms of the trust for the premature termination of the trust. If there is no provision of that nature in the terms of the trust, the court shall order the distribution of the trust estate among the beneficiaries of the trust in accordance with their respective beneficial interests and in a manner that the court determines to be equitable. For purposes of ordering the distribution of the trust estate among the beneficiaries of the trust under this division, the court shall consider the three factors listed in division (C) of this section.

(E) The existence of a spendthrift or similar provision in the terms of a trust or will does not preclude the termination of a trust pursuant to this section.

(F) This section does not apply to an easement for conservation or preservation.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5804.15 Reformation to Conform to Settlor's Intention.

The court may reform the terms of a trust, even if they are unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

History. Effective Date 01-01-2007.

Sec. 5804.16 Modification to Achieve Settlor’s Tax Objectives.

To achieve the settlor’s tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor’s probable intention. The court may provide that the modification has retroactive effect.

History. Effective Date 01-01-2007.

Sec. 5804.17 Combination or Division of Trusts.

After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not substantially impair the rights of any beneficiary or have a materially adverse effect on the achievement of the purposes of the trust.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5804.18 When Certain Trusts Is Irrevocable.

A trust described in 42 U.S.C. 1396p(d)(4) is irrevocable if the terms of the trust prohibit the settlor from revoking it, whether or not the settlor’s estate or the settlor’s heirs are named as the remainder beneficiary or beneficiaries of the trust upon the settlor’s death.

History. Effective Date 01-01-2007.

Chapter 5805 Spendthrift Trust Provisions

Section

- 5805.01 Validity and Effect of Spendthrift Provision.
- 5805.02 Enforceability and Enforcement of Spendthrift Provisions.
- 5805.03 Creditors of Discretionary Trust Beneficiary May Not Reach Interest.
- 5805.04 Creditor May Not Compel Discretionary Distribution—Exceptions.
- 5805.05 Attachment of Mandatory Distributions Absent Spendthrift Provision.
- 5805.06 Rights of Settlor’s Creditors—Power of Withdrawal.
- 5805.07 Trust Property Not Subject to Personal Obligations of Trustee.

Sec. 5805.01 Validity and Effect of Spendthrift Provisions.

(A) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary’s interest or if it restrains involuntary transfer of a beneficiary’s interest and permits voluntary transfer of a beneficiary’s interest only with the consent of a trustee who is not the beneficiary.

(B) A term of a trust providing that the interest of a beneficiary is held subject to a “spendthrift trust,” or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.

(C) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter and in section 5810.04 of the Revised Code, a creditor or assignee of the beneficiary may not reach the interest or a

distribution by the trustee before its receipt by the beneficiary. Real property or tangible personal property that is owned by the trust but that is made available for a beneficiary's use or occupancy in accordance with the trustee's authority under the terms of the trust shall not be considered to have been distributed by the trustee or received by the beneficiary for purposes of allowing a creditor or assignee of the beneficiary to reach the property.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5805.02 Enforceability and Enforcement of Spendthrift Provisions.

(A) As used in this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(B) Subject to section 5805.03 of the Revised Code, a spendthrift provision is unenforceable against either of the following:

(1) The beneficiary's child or spouse who has a judgment or court order against the beneficiary for support, but only if distributions can be made for the beneficiary's support or the beneficiary is entitled to receive mandatory distributions under the terms of the trust;

(2) A claim of this state or the United States to the extent provided by the Revised Code or federal law.

(C) A spendthrift provision is enforceable against the beneficiary's former spouse.

(D) A claimant described in division (B) of this section may obtain from the court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support.

(E) The only exceptions to the effectiveness of a spendthrift provision are those described in divisions (B) and (D) of this section, in division (B) of section 5805.05 of the Revised Code, and in sections 5805.06 and 5810.04 of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5805.03 Creditors of Discretionary Trust Beneficiary May Not Reach Interest.

Notwithstanding anything to the contrary in division (B) of section 5805.02 of the Revised Code, no creditor or assignee of a beneficiary of a wholly discretionary trust may reach the beneficiary's interest in the trust, or a distribution by the trustee before its receipt by the beneficiary, whether by attachment of present or future distributions to or for the benefit of the beneficiary, by judicial sale, by obtaining an order compelling the trustee to make distributions from the trust, or by any other means, regardless of whether the terms of the trust include a spendthrift provision.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5805.04 Creditor May Not Compel Discretionary Distribution—Exceptions.

(A) As used in this section, “child” includes any person for whom an order or judgment for child support has been entered in this or any other state.

(B) Except as otherwise provided in divisions (C) and (D) of this section, whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion.

(C) Division (B) of this section does not apply to this state for any claim for support of a beneficiary in a state institution if the terms of the trust do not include a spendthrift provision and do include a standard for distributions to or for the beneficiary under which the trustee may make distributions for the beneficiary’s support.

(D) Unless the settlor has explicitly provided in the trust that the beneficiary’s child or spouse or both are excluded from benefiting from the trust, to the extent a trustee of a trust that is not a wholly discretionary trust has not complied with a standard of distribution or has abused a discretion, both of the following apply:

(1) The court may order a distribution to satisfy a judgment or court order against the beneficiary for support of the beneficiary’s child or spouse, provided that the court may order the distributions only if distributions can be made for the beneficiary’s support under the terms of the trust and that the court may not order any distributions under this division to satisfy a judgment or court order against the beneficiary for support of the beneficiary’s former spouse.

(2) The court shall direct the trustee to pay to the child or spouse the amount that is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(E) Even if a trust does not contain a spendthrift provision, to the extent a beneficiary’s interest in a trust is subject to the exercise of the trustee’s discretion, whether or not such discretion is subject to one or more standards of distribution, the interest may not be ordered sold to satisfy or partially satisfy a claim of the beneficiary’s creditor or assignee.

(F) If the trustee’s or cotrustee’s discretion to make distributions for the trustee’s or cotrustee’s own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor’s claim if the beneficiary were not acting as trustee or cotrustee.

History. Effective Date 01-01-2007.

Sec. 5805.05 Attachment of Mandatory Distributions Absent Spendthrift Provision.

(A) To the extent that a trust that gives a beneficiary the right to receive one or more mandatory distributions does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary’s interest by other means. The court may limit an award under this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the support needs of the beneficiary, the beneficiary’s spouse, and the beneficiary’s dependent children or, with respect to a beneficiary who is the recipient of public benefits, the

supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support. If in exercising its power under this section the court decides to order either a sale of a beneficiary's interest or that a lien be placed on the interest, in deciding between the two types of action, the court shall consider among any other factors it considers relevant the amount of the claim of the creditor or assignee and the proceeds a sale would produce relative to the potential value of the interest to the beneficiary.

(B) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution the beneficiary is entitled to receive if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

History. Effective Date 01-01-2007.

Sec. 5805.06 Rights of Settlor's Creditors—Power of Withdrawal.

(A) Whether or not the terms of a trust contain a spendthrift provision, all of the following apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) Except to the extent that a trust is established pursuant to, or otherwise is wholly or partially governed by or subject to Chapter 5816. of the Revised Code, with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If an irrevocable trust has more than one settlor, the amount distributable to or for a settlor's benefit that the creditor or assignee of a particular settlor may reach may not exceed that settlor's interest in the portion of the trust attributable to that settlor's contribution. The right of a creditor or assignee to reach a settlor's interest in an irrevocable trust shall be subject to Chapter 5816. of the Revised Code to the extent that that chapter applies to that trust.

(3) With respect to a trust described in 42 U.S.C. section 1396p(d)(4)(A) or (C) , the court may limit the award of a settlor's creditor under division (A)(1) or (2) of this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the supplemental needs of the beneficiary.

(B) For purposes of this section, all of the following apply:

(1) The holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power during the period the power may be exercised.

(2) None of the following shall be considered an amount that can be distributed to or for the benefit of the settlor:

(a) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor only as a result of the exercise of a power of appointment held in a nonfiduciary capacity by any person other than the settlor;

(b) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor of a trust pursuant to the power of the trustee to make distributions or pursuant to the power of another in a fiduciary capacity to direct distributions, if and to the extent that the

distributions could be made from trust property the value of which was included in the gross estate of the settlor's spouse for federal estate tax purposes under section 2041 or 2044 of the Internal Revenue Code or that was treated as a transfer by the settlor's spouse under section 2514 or 2519 of the Internal Revenue Code;

(c) Trust property that, pursuant to the exercise of a discretionary power by a person other than the settlor, could be paid to a taxing authority or to reimburse the settlor for any income tax on trust income or principal that is payable by the settlor under the law imposing the tax.

History. Amended by 134th General Assembly, HB 7, eff. 8/17/2021. Effective date: 01-01-2007; 2013 HB479 3-27-2013; 2021 HB7 8-17-21.

Sec. 5805.07 Trust Property Not Subject to Personal Obligations of Trustee.

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

History. Effective Date 01-01-2007.

Chapter 5806 Powers of Settlor

Section

- 5806.01 Capacity of Settlor Same as Testator.
- 5806.02 Revocation or Amendment of Trust.
- 5806.03 Control of Rights of Beneficiaries and Duties of Trustees.
- 5806.04 Actions Concerning Certain Revocable Trusts.

Sec. 5806.01 Capacity of Settlor Same as Testator.

The capacity of a settlor required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5806.02 Revocation or Amendment of Trust.

(A) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This division does not apply to a trust created under an instrument executed before January 1, 2007.

(B) If a revocable trust is created or funded by more than one settlor, all of the following apply:

(1) To the extent the trust consists of community property, either spouse acting alone may revoke the trust, but the trust may be amended only by joint action of both spouses.

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.

(3) Upon the revocation or amendment of the trust by less than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(C) The settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust or, if the terms of the trust do not provide a method, by any method manifesting clear and convincing evidence of the settlor's intent, provided that a revocable trust may not be revoked or amended by a will or codicil, regardless of whether it refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust unless the terms of the trust expressly allow it to be revoked or amended by a will or codicil.

(D) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(E) An agent under a power of attorney may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only to the extent expressly authorized by both the terms of the trust and the power.

(F) A guardian of the estate of the settlor or, if no guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(G) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5806.03 Control of Rights of Beneficiaries and Duties of Trustees.

(A) During the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee, including the duties to inform and report under section 5808.13 of the Revised Code, are owed exclusively to, the settlor. If the trustee breaches its duty during the lifetime of the settlor, any recovery obtained from the trustee after the settlor becomes incapacitated or dies shall be apportioned by the court. If the settlor is living when the recovery is obtained, the court shall apportion the recovery between the settlor and the trust, or allocate the entire recovery to the settlor or the trust, as it determines to be equitable under the circumstances. If the settlor is not living when the recovery is obtained, the court shall apportion the recovery between the settlor's estate and the trust, or allocate the entire recovery to the settlor's estate or the trust, as it determines to be equitable under the circumstances.

(B) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5806.04 Actions Concerning Certain Revocable Trusts.

(A) Subject to division (E) of this section, any of the following actions pertaining to a revocable trust that is made irrevocable by the death of the settlor of the trust shall be commenced by the earlier of the date that is two years after the date of the death of the settlor of the trust or that is six months from the date on which the trustee sends the person bringing the action a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed under this division for commencing an action:

- (1) An action to contest the validity of the trust;
- (2) An action to contest the validity of any amendment to the trust that was made during the lifetime of the settlor of the trust;
- (3) An action to contest the revocation of the trust during the lifetime of the settlor of the trust;
- (4) An action to contest the validity of any transfer made to the trust during the lifetime of the settlor of the trust.

(B) Upon the death of the settlor of a revocable trust that was made irrevocable by the death of the settlor, the trustee, without liability, may proceed to distribute the trust property in accordance with the terms of the trust unless either of the following applies:

- (1) The trustee has actual knowledge of a pending action to contest the validity of the trust, any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust.
- (2) The trustee receives written notification from a potential contestant of a potential action to contest the validity of the trust, any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust, and the action is actually filed within ninety days after the written notification was given to the trustee.

(C) If a distribution of trust property is made pursuant to division (B) of this section, a beneficiary of the trust shall return any distribution to the extent that it exceeds the distribution to which the beneficiary is entitled if the trust, an amendment to the trust, or a transfer made to the trust later is determined to be invalid.

(D) This section applies only to revocable trusts that are made irrevocable by the death of the settlor of the trust if the grantor dies on or after July 23, 2002.

(E) Except as otherwise provided in this division, no person may contest the validity of any trust as to facts decided if the trust was submitted to a probate court by the settlor during the settlor's lifetime and declared valid by the judgment of a court pursuant to division (B)(1) of section 5817.10 of the Revised Code. A person may contest the validity of that trust as to those facts if the person is one who should have been named a party defendant in the action in which the trust was declared valid, pursuant to division (A) of section 5817.06 of the Revised Code, and if the person was not named a defendant and properly served in that action.

History. Amended by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Chapter 5807 Trustees

Section

- 5807.01 Acceptance or Rejection of Trusteeship.
 - 5807.02 Bond of Trustee.
 - 5807.03 Cotrustees—Delegation—Liability.
 - 5807.04 Vacancy Defined—Priority in Filling—Additional Trustees.
 - 5807.05 Resignation of Trustee—Notice—Approval.
 - 5807.06 Removal of Trustee—Grounds—Protective Measures.
 - 5807.07 Powers and Duties of Removed or Resigned Trustee.
 - 5807.08 Compensation of Trustee.
 - 5807.09 Reimbursement of Trustee for Administrative Expenses.
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Sec. 5807.01 Acceptance or Rejection of Trusteeship.

(A) Except as otherwise provided in division (C) of this section, a person designated as trustee accepts the trusteeship by substantially complying with a method of acceptance provided in the terms of the trust or, if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(B) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(C) A person designated as trustee, without accepting the trusteeship, may do either or both of the following:

(1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary;

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

History. Effective Date 01-01-2007.

Sec. 5807.02 Bond of Trustee.

(A) A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(B) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(C) A regulated financial-service institution qualified to do trust business in this state need not give bond, even if required by the terms of the trust.

History. Effective Date 01-01-2007.

Sec. 5807.03 Cotrustees—Delegation—Liability.

- (A) If there are three or more cotrustees serving, the cotrustees may act by majority decision.
- (B) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.
- (C) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.
- (D) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.
- (E) A trustee may delegate to a cotrustee duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. A delegation made under this division shall be governed by section 5808.07 of the Revised Code. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.
- (F) Except as otherwise provided in division (G) of this section, and subject to divisions (C) and (E) of this section, a trustee who does not join in an action of another trustee is not liable for the action.
- (G) Except as otherwise provided in this division, each trustee shall exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress a serious breach of trust. A trustee is not required to exercise reasonable care of that nature under this division, and a trustee is not liable for resulting losses, when section 5815.25 of the Revised Code is applicable or there is more than one other trustee and the other trustees act by majority vote.
- (H) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action.

History. Effective Date 01-01-2007.

Sec. 5807.04 Vacancy Defined—Priority in Filling—Additional Trustees.

- (A) A vacancy in a trusteeship occurs under any of the following circumstances:
 - (1) A person designated as trustee rejects the trusteeship;
 - (2) A person designated as trustee cannot be identified or does not exist;
 - (3) A trustee resigns;
 - (4) A trustee is disqualified or removed;
 - (5) A trustee dies;
 - (6) A guardian of the estate or person is appointed for an individual serving as trustee.
- (B) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(C) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

- (1) By a person designated in the terms of the trust to act as successor trustee;
- (2) By a person appointed by someone designated in the terms of the trust to appoint a successor trustee;
- (3) By a person appointed by unanimous agreement of the qualified beneficiaries;
- (4) By a person appointed by the court.

(D) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

- (1) By a person designated in the terms of the trust to act as successor trustee;
- (2) By a person appointed by someone designated in the terms of the trust to appoint a successor trustee;
- (3) By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust;
- (4) By a person appointed by the court.

(E) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

History. Effective Date 01-01-2007.

Sec. 5807.05 Resignation of Trustee—Notice—Approval.

- (A) A trustee may resign upon at least thirty days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees or with the approval of the court.
- (B) In approving a resignation of a trustee, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.
- (C) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

History. Effective Date 01-01-2007.

Sec. 5807.06 Removal of Trustee—Grounds—Protective Measures.

- (A) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or the court may remove a trustee on its own initiative.
- (B) The court may remove a trustee for any of the following reasons:
- (1) The trustee has committed a serious breach of trust;

(2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries.

(C) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order any appropriate relief under division (B) of section 5810.01 of the Revised Code that is necessary to protect the trust property or the interests of the beneficiaries.

History. Effective Date 01-01-2007.

Sec. 5807.07 Powers and Duties of Removed or Resigned Trustee.

(A) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(B) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

History. Effective Date 01-01-2007.

Sec. 5807.08 Compensation of Trustee.

(A) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(B) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if the duties of the trustee are substantially different from those contemplated when the trust was created or the compensation specified by the terms of the trust would be unreasonably low or high.

History. Effective Date 01-01-2007.

Sec. 5807.09 Reimbursement of Trustee for Administrative Expenses.

(A) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for expenses that were properly incurred in the administration of the trust and, to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(B) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

History. Effective Date 01-01-2007.

Chapter 5808 Trust Administration

Section

- 5808.01 Duties of Trustee Generally.
 - 5808.02 Duty of Loyalty to Beneficiaries—Voidable Transactions—Conflicts of Interest.
 - 5808.03 Multiple Beneficiaries—Duty of Impartiality.
 - 5808.04 Duty to Act as Prudent Person.
 - 5808.05 Reasonable Administrative Costs Allowed.
 - 5808.06 Trustee to Use Any Special Skills or Expertise.
 - 5808.07 Delegation of Powers and Duties.
 - 5808.08 Direction of Settlor Contrary to Terms—Power of Modification.
 - 5808.09 Taking Control and Protection of Property.
 - 5808.10 Adequate Records of Administration.
 - 5808.11 Enforcement and Defense of Claims.
 - 5808.12 Collection of Trust Property—Successor Trustees.
 - 5808.13 Keeping Beneficiaries Informed—Requests—Required Reports.
 - 5808.14 Judicial Standard of Review for Discretionary Trusts.
 - 5808.15 General Powers of Trustee.
 - 5808.16 Specific Powers of Trustee.
 - 5808.17 Powers and Duties of Trustee on Termination; Protection from Liability.
 - 5808.18 Trustee’s Powers to Make Distributions in Further Trust.
 - 5808.19 Anti-Lapse Provisions; Survivorship with Respect to Future Interests Substitute Gifts.
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Sec. 5808.01 Duty of Trustee Generally.

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with Chapters 5801. to 5811. of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5808.02 Duty of Loyalty to Beneficiaries—Voidable Transactions—Conflicts of Interest.

(A) A trustee shall administer the trust solely in the interests of the beneficiaries.

(B) Subject to the rights of persons dealing with or assisting the trustee as provided in section 5810.12 of the Revised Code, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account or that is otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless one of the following applies:

(1) The transaction was authorized by the terms of the trust or by other provisions of the Revised Code.

(2) The transaction was approved by the court.

(3) The beneficiary did not commence a judicial proceeding within the time allowed by section 5810.05 of the Revised Code.

(4) The beneficiary or the beneficiary's representative consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with section 5810.09 of the Revised Code.

(5) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(C) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with one of the following:

(1) The trustee's spouse;

(2) The trustee's descendant, sibling, or parent or the spouse of a trustee's descendant, sibling, or parent;

(3) An agent or attorney of the trustee;

(4) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(D) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(E) An investment by a trustee that is permitted by other provisions of the Revised Code is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Chapter 5809. of the Revised Code.

(F) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(G) This section does not preclude either of the following:

(1) Any transaction authorized by another section of the Revised Code;

(2) Unless the beneficiaries establish that it is unfair, any of the following transactions:

(a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(b) Payment of reasonable compensation to the trustee;

(c) A transaction between a trust and another trust, decedent's estate, or guardianship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(d) A deposit of trust money in a regulated financial-services institution that is an affiliate of the trustee;

(e) An advance by the trustee of money for the protection of the trust.

(H) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

History. Amended by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012. Effective Date 01-01-2007.

Sec. 5808.03 Multiple Beneficiaries—Duties of Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

History. Effective Date 01-01-2007.

Sec. 5808.04 Duty to Act as Prudent Person.

A trustee shall administer the trust as a prudent person would and shall consider the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

History. Effective Date 01-01-2007.

Sec. 5808.05 Reasonable Administrative Costs Allowed.

Except as otherwise permitted by law, in administering a trust, a trustee may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

History. Effective Date 01-01-2007.

Sec. 5808.06 Trustee to Use Any Special Skills or Expertise.

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

History. Effective Date 01-01-2007.

Sec. 5808.07 Delegation of Powers and Duties.

(A) A trustee may delegate duties and powers that a prudent trustee having comparable skills could properly delegate under the circumstances. In accordance with this division, a trustee shall exercise reasonable care, skill, and caution in doing all of the following:

- (1) Selecting an agent, cotrustee, or other fiduciary to whom the delegation is made;
- (2) Establishing the scope and terms of the delegation consistent with the purposes and terms of the trust;
- (3) Periodically reviewing the agent's, cotrustee's, or other fiduciary's actions in order to monitor the agent's, cotrustee's, or other fiduciary's performance and compliance with the terms of the delegation.

(B) In performing a delegated function, an agent, cotrustee, or other fiduciary owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(C) A trustee who complies with division (A) of this section is not liable to the beneficiaries of the trust or to the trust for the decisions or actions of the agent, cotrustee, or other fiduciary to whom the function was delegated.

(D) By accepting the delegation of powers or duties from the trustee of a trust that is subject to the laws of this state, an agent, cotrustee, or other fiduciary submits to the jurisdiction of this state.

History. Effective Date 01-01-2007.

Sec. 5808.08 Direction of Settlor Contrary to Terms—Power of Modification.

(A) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(B) As provided in section 5815.25 of the Revised Code, a trustee is not liable for losses resulting from certain actions or failures to act when other persons are granted certain powers with respect to the administration of the trust.

(C) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(D) Except to the extent otherwise provided by the terms of a trust, a person other than a beneficiary who holds a power to direct, including, but not limited to, a power to direct the modification or termination of a trust, is presumptively a fiduciary who, as a fiduciary, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

History. Amended by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013. Effective date: 01-01-2007.

Sec. 5808.09 Taking Control and Protection of Property.

A trustee shall take reasonable steps to take control of and protect the trust property.

History. Effective Date 01-01-2007.

Sec. 5808.10 Adequate Records of Administration.

(A) A trustee shall keep adequate records of the administration of the trust.

(B) A trustee shall keep trust property separate from the trustee's own property.

(C) Except as otherwise provided in division (D) of this section and in section 2131.21 of the Revised Code, a trustee not subject to federal or state banking regulation shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(D) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

History. Effective Date 01-01-2007.

Sec. 5808.11 Enforcement and Defense of Claims.

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

History. Effective Date 01-01-2007.

Sec. 5808.12 Collection of Trust Property—Successor Trustees.

A trustee shall take reasonable steps to collect trust property held by third persons. The responsibility of a successor trustee with respect to the administration of the trust by a prior trustee shall be governed by section 5815.24 of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5808.13 Keeping Beneficiaries Informed—Requests—Required Reports.

(A) A trustee shall keep the current beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(B) A trustee shall do all of the following:

(1) Upon the request of a beneficiary, promptly furnish to the beneficiary a copy of the trust instrument. Unless the beneficiary expressly requests a copy of the entire trust instrument, the trustee may furnish to the beneficiary a copy of a redacted trust instrument that includes only those provisions of the trust instrument that the trustee determines are relevant to the beneficiary's interest in the trust. If the beneficiary requests a copy of the entire trust instrument after receiving a copy of a redacted trust instrument, the trustee shall furnish a copy of the entire trust instrument to the beneficiary. If the settlor of a revocable trust that has become irrevocable has completely restated the terms of the trust, the trust instrument furnished by the trustee shall be the restated trust instrument, including any amendments to the restated trust instrument. Nothing in division (B)(1) of this section limits the ability of a beneficiary to obtain a copy of the original trust instrument, any other restatements of the original trust instrument, or amendments to the original trust instrument and any other restatements of the original trust instrument in a judicial proceeding with respect to the trust.

(2) Within sixty days after accepting a trusteeship, notify the current beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) Within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, notify the current beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in division (C) of this section;

(4) Notify the current beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(C) A trustee of a trust that has a fiscal year ending on or after January 1, 2007, shall send to the current beneficiaries, and to other beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report for the period during which the former trustee served must be sent to the current beneficiaries by the former trustee. A personal representative or guardian may send the current beneficiaries a report on behalf of a deceased or incapacitated trustee.

(D) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(E) The trustee may provide information and reports to beneficiaries to whom the provided information and reports are not required to be provided under this section.

(F) Divisions (B)(2) and (3) of this section apply only to a trustee who accepts a trusteeship on or after January 1, 2007, to an irrevocable trust created on or after January 1, 2007, and to a revocable trust that becomes irrevocable on or after January 1, 2007.

(G) During the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the trustee's duties under this section are owed exclusively to the settlor.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5808.14 Judicial Standard of Review for Discretionary Trusts.

(A) The judicial standard of review for discretionary trusts is that the trustee shall exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that with respect to distribution decisions a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.

(B) Subject to division (D) of this section, and unless the terms of the trust expressly indicate that a rule in this division does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard.

(2) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(C) A power whose exercise is limited or prohibited by division (B) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(D) Division (B) of this section does not apply to any of the following:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or 2523(e) of the Internal Revenue Code, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor;

(3) A trust if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

(E) For purposes of division (A) of this section, a trustee who acts reasonably and in good faith in exercising the power to distribute trust income or principal to the trustee of a second trust in accordance with division (A) or (B) of section 5808.18 of the Revised Code is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

History. Amended by 129th General Assembly file No. 65, SB 117, § 1, eff. 3/22/2012. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5808.15 General Powers of Trustee.

(A) A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust, may exercise all of the following powers:

(1) All powers over the trust property that an unmarried competent owner has over individually owned property;

(2) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property;

(3) Any other powers conferred by Chapters 5801. to 5811. of the Revised Code.

(B) The exercise of a power is subject to the fiduciary duties prescribed by Chapter 5808. of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5808.16 Specific Powers of Trustee.

Without limiting the authority conferred by section 5808.15 of the Revised Code, a trustee may do all of the following:

(A) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(B) Acquire or sell property, for cash or on credit, at public or private sale;

(C) Exchange, partition, or otherwise change the character of trust property;

(D) Deposit trust money in an account in a regulated financial-service institution;

(E) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(F) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;

(G) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to do any of the following:

(1) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;

(2) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(3) Pay calls, assessments, and other sums chargeable or accruing against the securities and sell or exercise stock subscription or conversion rights;

(4) Deposit the securities with a depository or other regulated financial-service institution.

(H) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

(I) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(J) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(K) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

(L) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(M) With respect to possible liability for violation of environmental law, do any of the following:

(1) Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(2) Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(3) Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(4) Compromise claims against the trust that may be asserted for an alleged violation of environmental law;

- (5) Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law.
- (N) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
- (O) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;
- (P) Exercise elections with respect to federal, state, and local taxes;
- (Q) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, exercise rights under any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, including the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;
- (R) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;
- (S) Guarantee loans made by others to the settlor of a revocable trust and, if the settlor so directs, guarantee loans made by others to a third party and mortgage, pledge, or grant a security interest in the property of a revocable trust to secure the payment of loans made by others to the settlor of the revocable trust and, if the settlor so directs, loans made by others to a third party;
- (T) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;
- (U) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by doing any of the following:
- (1) Paying it to the beneficiary's guardian of the estate, or, if the beneficiary does not have a guardian of the estate, the beneficiary's guardian of the person;
 - (2) Paying it to the beneficiary's custodian under sections 5814.01 to 5814.10 of the Revised Code and, for that purpose, creating a custodianship;
 - (3) If the trustee does not know of a guardian of the person or estate, or custodian, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;
 - (4) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.
- (V) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

- (W) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;
- (X) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;
- (Y) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;
- (Z) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;
- (AA) Employ agents, attorneys, accountants, investment advisors, and other professionals.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5808.17 Powers and Duties of Trustee on Termination; Protection from Liability.

(A) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(B) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(C) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent that it was induced by improper conduct of the trustee or that the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

(D) If a beneficiary who was entitled to receive a distribution is deceased, the beneficiary's death did not terminate the beneficiary's right to receive the distribution, and an administration of the beneficiary's estate is open, the trustee shall make the distribution to the personal representative of the beneficiary's estate. If a beneficiary who was entitled to receive a distribution is deceased, the beneficiary's death did not terminate the beneficiary's right to receive the distribution, and an administration of the beneficiary's estate is not open, the trustee, without liability, may make the distribution directly to the beneficiary's heirs or devisees without requiring the opening or re-opening of estate administration proceedings if the trustee does not know of an adverse claim to the distribution and one of the following applies:

(1) The beneficiary's estate was administered as an intestate estate in the jurisdiction in which the beneficiary was domiciled at death, and the trustee does both of the following:

(a) Distributes the personal property included in the distribution to the person or persons who were determined to be the heirs of the beneficiary in that administration, in the same manner as the personal property would have been distributed if it had been part of the beneficiary's intestate estate;

(b) Distributes the real property included in the distribution to the person or persons the trustee reasonably determines were the beneficiary's heirs under the statutes of descent and distribution, in effect at the time of the beneficiary's death, of the jurisdiction or jurisdictions in which the real property is located;

(2) The beneficiary's estate was administered as a testate estate in the jurisdiction in which the deceased beneficiary was domiciled at death, and the trustee does both of the following:

(a) Distributes the personal property included in the distribution to the residuary devisee or devisees under the beneficiary's will, in the same manner as the personal property would have been distributed in that administration if it had been part of the beneficiary's testate estate;

(b) Distributes the real property included in the distribution to the person or persons the trustee reasonably determines would have received the real property under the law of the jurisdiction or jurisdictions in which the real property is located.

(3) Division (D)(1) or (2) of this section does not apply, the beneficiary's death occurred at least six months before the trustee makes the distribution, and all of the following apply:

(a) The trustee determines that the beneficiary had created a trust during the beneficiary's life that remained in existence at the beneficiary's death.

(b) The beneficiary had executed a will that the trustee reasonably determines would have been admitted to probate if it had been offered for probate.

(c) The beneficiary's will described in division (D)(3)(b) of this section devised the residue of the beneficiary's estate to the trustee of the trust described in division (D)(3)(a) of this section to be held under the terms of that trust.

(d) The trustee makes the distribution to the trustee of the trust described in division (D)(3)(a) of this section.

(4) Division (D)(1), (2), or (3) of this section does not apply, the beneficiary's death occurred at least six months before the trustee makes the distribution, and all of the following apply:

(a) The trustee, exercising reasonable diligence, determines that an administration of the beneficiary's estate has not been commenced in the jurisdiction in which the trustee reasonably determines the beneficiary was domiciled at death.

(b) The trustee does not know of an administration of the beneficiary's estate having been commenced in any other jurisdiction.

(c) The trustee does not know of a purported last will and testament of the beneficiary.

(d) The trustee does both of the following:

(i) Distributes the personal property included in the distribution to the person or persons the trustee reasonably determines were the beneficiary's heirs under the statutes of descent and distribution, in effect at the time of the beneficiary's death, of the jurisdiction in which the trustee reasonably determines the beneficiary was domiciled at death;

(ii) Distributes the real property included in the distribution to the person or persons the trustee reasonably determines were the beneficiary's heirs under the statutes of descent and distribution, in effect at the time of the beneficiary's death, of the jurisdiction or jurisdictions in which the real property is located.

(E) The trustee's protection from liability for making distributions under division (D) of this section has no effect on the ability of third parties to pursue claims against the recipients of those distributions.

History. Amended by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012. Effective Date 01-01-2007.

Sec. 5808.18 Trustee's Powers to Make Distributions in Further Trust.

(A) Unless the trust instrument expressly provides otherwise and subject to the limitations set forth in this section, all of the following apply:

(1) If a trustee of a trust, referred to in this section as the "first trust," has absolute power under the terms of the first trust to make distributions of principal to one or more current beneficiaries, that trustee may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of another trust, referred to in this section as the "second trust," that is for the benefit of one or more current beneficiaries of the first trust. The second trust may be a trust under the trust instrument for the first trust or under a different governing instrument, including a governing instrument created by the trustee of the first trust. A trustee of a first trust who is authorized to make distributions to the trustee of a second trust pursuant to division (A) of this section may do so at any time, whether or not the trustee of the first trust would otherwise have made a distribution at that time to, or for the benefit of, any beneficiary pursuant to the terms of the first trust.

(2) In determining whether a trustee has absolute power to make distributions of principal to any current beneficiary and the identity of the current beneficiaries, all of the following apply:

(a) An absolute power to distribute principal includes any power to make distributions of principal that is not limited by reasonably definite standards or ascertainable standards, whether or not the word "absolute" is used in the trust instrument.

(b) A power to make distributions of principal for purposes that include best interests, welfare, comfort or happiness, or words of similar import, if not otherwise limited by reasonably definite standards or ascertainable standards, constitutes an absolute power not limited by reasonably definite standards or ascertainable standards, regardless of any requirement to take into account other resources of the current beneficiary or beneficiaries to whom those distributions may be made.

(c) If the current beneficiaries of the first trust are defined, in whole or in part, as a class of persons, that class includes any person who falls within that class of persons after the distribution to the second trust.

(d) A power to make distributions for the benefit of a beneficiary is considered a power to make distributions to that beneficiary.

(3) If property is distributed pursuant to the authority described in division (A) of this section, the governing instrument for the second trust may do either or both of the following:

(a) Grant a power of appointment to one or more of the beneficiaries for whose benefit the property was so distributed, including a power to appoint trust property to the power holder, the power holder's creditors, the power holder's estate, the creditors of the power holder's estate, or any other person, whether or not that person is a beneficiary of the first trust or the second trust;

(b) Provide that, at a time or upon an event specified in that governing instrument, the remaining trust property shall thereafter be held for the benefit of the beneficiaries of the first trust upon terms and conditions that are substantially identical to the terms and conditions of the trust instrument for the first trust, except that any current beneficiary or beneficiaries for whose benefit the property could have been, but was not, so distributed may be excluded from having any beneficial interest in the second trust.

(4) For purposes of division (A)(3) of this section, “terms and conditions” refer only to those terms and conditions that govern the interests of the beneficiaries.

(5) For purposes of division (A) of this section, charitable organizations that are not expressly designated in the terms of the first trust to receive distributions but to which the trustee of the first trust, in the discretion of the trustee, or in the discretion of any other person directing the trustee and acting in a fiduciary capacity, may at any time make a distribution, are considered beneficiaries of the first trust.

(B) Unless the trust instrument expressly provides otherwise and subject to the limitations set forth in this section, a trustee of a first trust who has power, other than absolute power as described in division (A) of this section, under the terms of the first trust to make distributions of principal to one or more current beneficiaries may exercise that power by distributing all or any part of the principal subject to the power, and all or any part of any income that is not otherwise currently required to be distributed, to the trustee of a second trust. The second trust may be a trust under the trust instrument for the first trust or under a different governing instrument, including a governing instrument created by the trustee of the first trust. The power described in this division may be exercised whether or not there is a current need to distribute trust principal under any standard contained in the first trust. The exercise of a trustee’s power under this division is valid only if the governing instrument for the second trust does not materially change the interests of the beneficiaries of the first trust. For purposes of this division, a power to make distributions for the benefit of a beneficiary shall be considered a power to make distributions to that beneficiary.

(C) The exercise of the power to make distributions to a second trust under division (A) or (B) of this section is subject to the following additional limitations:

(1)(a) The distribution to the trustee of the second trust shall not result in the reduction, limitation, or modification of any of the following rights or interests of a beneficiary of the first trust if the right or interest has come into effect with respect to the beneficiary:

(i) The current right to a mandatory distribution of income or principal of the first trust;

(ii) The current mandatory annuity or unitrust interest in the property of the first trust;

(iii) The right annually to withdraw a percentage of the value of the first trust or a specified dollar amount.

(b) For purposes of division (C)(1)(a)(i) of this section, a beneficiary’s current right to a distribution of income is not considered to be mandatory if, under the terms of the first trust, current distributions of principal may be made to any person other than that current beneficiary.

(2) If any transfer to the first trust qualified, or if not for the provisions of division (A) or (B) of this section would have qualified, for a marital or charitable deduction for purposes of any federal income, gift, or estate tax under the Internal Revenue Code, or for purposes of any state income, gift, estate, or inheritance tax, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first

trust, would have prevented the first trust from qualifying for that deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or under the same provisions of the applicable state law under which the transfer to the first trust so qualified.

(3) If any transfer to the first trust has been treated, or if not for the provisions of division (A) or (B) of this section would have been treated, as a gift qualifying for the exclusion from the gift tax described in section 2503(b) of the Internal Revenue Code, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented any gift to the first trust from so qualifying under the same provisions of section 2503 of the Internal Revenue Code under which the transfer to the first trust so qualified.

(4) If the assets of the first trust include any shares of stock in an S corporation, as defined in section 1361 of the Internal Revenue Code, and the first trust is, or if not for the provisions of division (A) or (B) of this section would be, a permitted shareholder under any provision of section 1361 of the Internal Revenue Code, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying as a permitted shareholder of shares of stock in an S corporation under the same provisions of section 1361 of the Internal Revenue Code under which the first trust so qualified.

(5) If any transfer to the first trust has been treated, or if not for the provisions of division (A) or (B) of this section would have been treated, as a gift qualifying for a zero inclusion ratio for purposes of the federal generation-skipping transfer tax under section 2642(c) of the Internal Revenue Code, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the transfer to the first trust from so qualifying.

(6) If the assets of the first trust include any interest subject to the minimum distribution rules of section 401(a)(9) of the Internal Revenue Code and the treasury regulations issued under that section, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have shortened the maximum distribution period otherwise allowable under section 401(a)(9) of the Internal Revenue Code and the treasury regulations with respect to that interest under the first trust.

(7)(a) As used in division (C)(7) of this section, "tax benefit" means any federal or state tax deduction, exemption, exclusion, or other tax benefit not otherwise listed in division (C) of this section.

(b) If the trust instrument for the first trust expressly indicates an intention to qualify for any tax benefit or if the terms of the trust instrument for the first trust are clearly designed to enable the first trust to qualify for a tax benefit, and if the first trust did qualify, or if not for the provisions of division (A) or (B) of this section would have qualified, for any tax benefit, the governing instrument for the second trust shall not include or omit any term that, if included in or omitted from the trust instrument for the first trust, would have prevented the first trust from qualifying for that tax benefit.

(8) The distribution to the trustee of the second trust shall not result in either of the following:

(a) An increase in, or a change in the method of determining, the compensation of the trustee unless the increase in, or change in the method of determining, that compensation has been consented to by all of the persons, other than the trustee of the second trust, who are current

beneficiaries of the second trust or is approved by the court having jurisdiction over the trust. However, an increase in compensation of the trustee arising solely because the duration of the second trust is longer than the duration of the first trust is not considered an increase in, or a change in the method of determining, the compensation of the trustee.

(b) A reduction in the standard of care applicable to the actions of the trustee of the first trust or the second trust or an exoneration of the trustee of the first trust or the second trust from liability for actions taken in bad faith or with willful disregard of the duties of either trustee, including by increasing the extent to which the trustee is entitled to indemnification from the trust, as provided in the terms of the first trust and under any law of this state.

(D) The exercise of the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section shall be by an instrument in writing, signed by the trustee of the first trust and filed with the records of the first trust.

(E) The power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section shall not be exercised in a manner contrary to any provision of section 2131.08 of the Revised Code to the extent applicable to the first trust and after applying the provisions of section 2131.09 of the Revised Code to the extent applicable to the first trust. Solely for purposes of applying under this division the provisions of sections 2131.08 and 2131.09 of the Revised Code, the exercise of the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section is considered the exercise of a nongeneral power of appointment as defined in division (F) of section 2131.09 of the Revised Code.

(F) The trustee of the first trust shall notify all current beneficiaries of the first trust, in writing, of the intended distribution to the trustee of a second trust pursuant to division (A) or (B) of this section not later than thirty days prior to that distribution. The distribution may be made prior to the expiration of thirty days from the date on which that notice is given to all current beneficiaries of the first trust if all of those current beneficiaries waive the thirty-day period from receipt of that notice. The trustee's giving of notice of an intended distribution under this division or the waiver or expiration of that thirty-day period from receipt of the notice do not limit the right of any beneficiary to object to the exercise of the trustee's power to distribute trust principal as provided in any other applicable provision of the Ohio Trust Code.

(G) Any person, other than the trustee, who has a power exercisable in a fiduciary capacity to direct the trustee to make any distribution of principal that, if held by the trustee, would be a power to make a distribution as described in division (A) or (B) of this section, may exercise that power by directing the trustee to make a distribution under either division (A) or (B) of this section, whichever would be applicable if that person were the trustee, subject to all of the limitations described in this section that apply to a trustee's exercise of that power.

(H) The exercise of the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section is not prohibited by a spendthrift clause or a provision in the trust instrument that prohibits the amendment or revocation of the trust.

(I) For purposes of division (A) of section 5808.14 of the Revised Code, a trustee who acts reasonably and in good faith in exercising the power to distribute trust income or principal to the trustee of a second trust in accordance with division (A) or (B) of this section, is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(J) Nothing in this section is intended to create or imply a duty to exercise a power to distribute income or principal of a trust, and no inference of impropriety shall arise as a result of a trustee not exercising the power to make any distribution to the trustee of a second trust under division (A) or (B) of this section.

(K) If the first trust is a testamentary trust established under the will of a testator who was domiciled in this state at the time of the testator's death, the power to distribute trust income or principal to the trustee of a second trust under division (A) or (B) of this section may be exercised only if approved by the court, if any, that has jurisdiction over the testamentary trust.

(L) Divisions (A) and (B) of this section do not apply to either of the following:

(1) Any trust during any period that the trust may be revoked or amended by its settlor;

(2) Any trustee with respect to any portion of the first trust as to which that trustee is also the settlor.

(M) If, and to the extent that, a trustee makes any distribution pursuant to division (A) or (B) of this section to the trustee of a second trust, then for purposes of division (W) of section 5801.01 of the Revised Code, the governing instrument for the second trust is considered to be an amendment of the trust instrument signed by the settlor of the first trust, even if that governing instrument is signed by a person other than that settlor.

(N) Nothing in this section shall be construed to limit the power of any trustee to distribute trust property in further trust, whether that power arises under the terms of the trust instrument, under any other section of Title LVIII of the Revised Code, under any other statute, or under the common law. The terms of a trust instrument may do any of the following:

(1) Confer upon the trustee the power to make any distribution, or confer upon any other person acting in a fiduciary capacity the power to direct the trustee to make any distribution, in further trust that is broader or more limited than, or that conflict with, the provisions of this section;

(2) Provide for different requirements for notice to beneficiaries of the trust of the trustee's exercise of the power conferred under the terms of the trust instrument or described in division (A) or (B) of this section;

(3) Waive any requirement of notice to the beneficiaries of the trust of the trustee's exercise of the power conferred under the terms of the trust instrument or described in division (A) or (B) of this section;

(4) Otherwise include any terms and conditions governing the distribution in further trust that the settlor of the trust determines.

(O)(1) Division (A) of this section is intended to be a codification of the common law of this state in effect prior to March 22, 2012, and applies to distributions, whenever made, from any trust that is governed by the law of this state or that has its principal place of administration in this state, whether that trust was created before, on, or after March 22, 2012.

(2) Division (B) of this section applies to distributions made on or after March 22, 2012, from any trust that is governed by the law of this state or that has its principal place of administration in this state, whether that trust was created before, on, or after March 22, 2012.

History. Amended by 129th General Assembly File No. 201, HB 479, § 1, eff. 3/27/2013. Added by 129th General Assembly File No.65, SB 117, § 1, eff. 3/22/2012.

Sec. 5808.19 Anti-Lapse Provisions, Survivorship with Respect to Future Interests; Substitute Gifts.

(A) As used in this section, unless otherwise provided in any other provision in this section:

(1) “Beneficiary” means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(2) “Class member” means an individual who fails to survive the distribution date by at least one hundred twenty hours but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date by at least one hundred twenty hours.

(3) “Descendant of a grandparent of the transferor” means an individual who would qualify as a descendant of a grandparent of the transferor under the rules of construction that would apply to a class gift under the transferor’s will to the descendants of the transferor’s grandparent.

(4) “Distribution date,” with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day but may occur at a time during the course of a day.

(5) “Future interest” means an alternative future interest or a future interest in the form of a class gift.

(6) “Future interest under the terms of a trust” means a future interest that was created by a transfer creating a trust or a transfer to an existing trust, or by an exercise of a power of appointment to an existing trust, that directs the continuance of an existing trust, designates a beneficiary of an existing trust, or creates a trust.

(7) “Per stirpes” means that the shares of the descendants of a beneficiary who does not survive the distribution date by at least one hundred twenty hours are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the beneficiary had died intestate and unmarried on the distribution date.

(8) “Revocable trust” means a trust that was revocable immediately before the settlor’s death by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, was serving.

(9) “Stepchild” means a child of the surviving, deceased, or former spouse of the transferor and not of the transferor.

(10) “Transferor” means any of the following:

(a) The donor and donee of a power of appointment, if the future interest was in property as a result of the exercise of a power of appointment;

(b) The testator, if the future interest was devised by will;

(c) The settlor, if the future interest was conveyed by inter vivos trust.

(B)(1)(a) As used in “surviving descendants” in divisions (B)(2)(b)(i) and (ii) of this section, “descendants” means the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

(b) As used in divisions (B)(2)(b)(i) and (ii) of this section, “surviving beneficiaries” or “surviving descendants” means beneficiaries or descendants, whichever is applicable, who survive the distribution date by at least one hundred twenty hours.

(2) Unless a contrary intent appears in the instrument creating a future interest under the terms of a trust, each of the following applies:

(a) A future interest under the terms of a trust is contingent on the beneficiary’s surviving the distribution date by at least one hundred twenty hours.

(b) If a beneficiary of a future interest under the terms of a trust does not survive the distribution date by at least one hundred twenty hours and if the beneficiary is a grandparent of the transferor, a descendant of a grandparent of the transferor, or a stepchild of the transferor, either of the following applies:

(i) If the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary’s surviving descendants. The surviving descendants take, per stirpes, the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date by at least one hundred twenty hours.

(ii) If the future interest is in the form of a class gift, other than a future interest 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 the deceased beneficiary or beneficiaries. The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least one hundred twenty hours passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date by at least one hundred twenty hours. Each deceased beneficiary’s surviving descendants who are substituted for the deceased beneficiary take, per stirpes, the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date by at least one hundred twenty hours. For purposes of division (B)(2)(b)(ii) of this section, “deceased beneficiary” means a class member who failed to survive the distribution date by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Describing a class of beneficiaries as “surviving” or “living,” without specifying when the beneficiaries must be surviving or living, such as a gift “for my spouse for life, then to my surviving (or living) children,” is not, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section.

(2) Subject to division (C)(1) of this section, attaching words of survivorship to a future interest under the terms of a trust, such as “for my spouse for life, then to my children who survive my spouse” or “for my spouse for life, then to my then-living children” is, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section. Words of survivorship under division (C)(2) of this section include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed as condition-precedent, condition-subsequent, or in any other form.

(3) A residuary clause in a will is not a sufficient indication of an intent that is contrary to the application of this section, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause. A residuary clause in a revocable trust instrument is not a sufficient indication of an intent that is contrary to the application of this section unless the distribution date is the date of the settlor’s death and the revocable trust instrument specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(D) If, after the application of divisions (B) and (C) of this section there is no surviving taker of the property, and a contrary intent does not appear in the instrument creating the future interest, the property passes in the following order:

(1) If the future interest was created by the exercise of a power of appointment, the property passes under the donor’s gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.

(2) If no taker is produced under division (D)(1) of this section and the trust was created in a nonresiduary devise in the transferor’s will or in a codicil to the transferor’s will, the property passes under the residuary clause in the transferor’s will. For purposes of division (D)(2) of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(3) If no taker is produced under divisions (D)(1) and (2) of this section, the transferor is deceased, and the trust was created in a nonresiduary gift under the terms of a revocable trust of the transferor, the property passes under the residuary clause in the transferor’s revocable trust instrument. For purposes of division (D)(3) of this section, the residuary clause in the transferor’s revocable trust instrument is treated as creating a future interest under the terms of a trust.

(4) If no taker is produced under divisions (D)(1), (2), and (3) of this section, the property passes to those persons who would succeed to the transferor’s intestate estate and in the shares as provided in the intestate succession law of the transferor’s domicile if the transferor died on the distribution date. Notwithstanding division (A)(10) of this section, for purposes of division (D)(4) of this section, if the future interest was created by the exercise of a power of appointment, “transferor” means the donor if the power is a nongeneral power, or the donee if the power is a general power.

(E) This section applies to all trusts that become irrevocable on or after March 22, 2012. This section does not apply to any trust that was irrevocable before March 22, 2012, even if property was added to the trust on or after March 22, 2012.

History. Amended by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019. Added by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012.

Chapter 5809 Ohio Uniform Prudent Investor Act

Section

- 5809.01 Trustee Duty to Comply with Act.
 - 5809.02 Standard of Care—Portfolio Strategy—Risk and Return Objectives.
 - 5809.03 Investment Authority—Diversification.
 - 5809.031 Duties of a Trustee with Respect to Acquisition, Retention, or Ownership of a Life Insurance Policy.
 - 5809.04 Duties at Inception of Trusteeship.
 - 5809.05 Reviewing Compliance.
 - 5809.06 Delegation of Investment and Management Functions.
 - 5809.07 Language Invoking Standard of Act.
 - 5809.08 Application and Construction.
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Sec. 5809.01 Trustee Duty to Comply with Act.

(A)(1) As used in the Revised Code, the “Ohio Uniform Prudent Investor Act” means sections 5809.01 to 5809.08, 5808.03, 5808.05, and 5808.06, division (A) of section 5808.02, and division (B) of section 5808.07 of the Revised Code, and those sections may be cited as the “Ohio Uniform Prudent Investor Act.”

(2) As used in the Ohio Uniform Prudent Investor Act, “trustee” means a trustee under any testamentary, inter vivos, or other trust.

(B) Except as provided in division (C) or (D) of this section, a trustee who invests and manages trust assets under the Ohio Uniform Prudent Investor Act owes a duty to the beneficiaries of the trust to comply with the Ohio Uniform Prudent Investor Act.

(C) The Ohio Uniform Prudent Investor Act may be expanded, restricted, eliminated, or otherwise altered, without express reference by the instrument creating a trust to the Ohio Uniform Prudent Investor Act or any section of the Revised Code that is part of that act.

(D) A trustee is not liable to a beneficiary of a trust to the extent the trustee acted in reasonable reliance on the provisions of the trust.

History. Effective Date 01-01-2007.

Sec. 5809.02 Standard of Care—Portfolio Strategy—Risk and Return Objectives.

(A) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this requirement, the trustee shall exercise reasonable care, skill, and caution.

(B) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(C) A trustee’s investment and management decisions respecting individual trust assets shall not be evaluated in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(D) Among circumstances that a trustee shall consider in investing and managing trust assets are the following as are relevant to the trust or its beneficiaries:

- (1) The general economic conditions;
- (2) The possible effect of inflation or deflation;
- (3) The expected tax consequences of investment decisions or strategies;
- (4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (5) The expected total return from income and appreciation of capital;
- (6) Other resources of the beneficiaries;
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital;
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

History. Effective Date 01-01-2007.

Sec. 5809.03 Investment Authority—Diversification.

(A) A trustee may invest in any kind of property or type of investment provided that the investment is consistent with the requirements and standards of the Ohio Uniform Prudent Investor Act.

(B) A trustee shall diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

History. Effective Date 01-01-2007.

Sec. 5809.031 Duties of a Trustee with Respect to the Acquisition, Retention, or Ownership of a Life Insurance Policy.

(A) Notwithstanding any other provision of the Ohio Uniform Prudent Investor Act, unless otherwise provided by the terms of the trust, the duties of a trustee with respect to the acquisition, retention, or ownership of a life insurance policy as a trust asset do not include any of the following duties:

- (1) To determine whether the policy is or remains a proper investment;
- (2) To diversify the investment in the policy relative to any other life insurance policies or to any other trust assets;
- (3) To exercise or not to exercise any option, right, or privilege available under the policy, including the payment of premiums, unless there is sufficient cash or there are other readily marketable trust assets from which to pay the premiums or there are other trust assets that were designated by the settlor or any other person transferring those assets to the trust to be used for that purpose, regardless of whether that exercise or nonexercise results in the lapse or termination of the policy;
- (4) To investigate the financial strength or changes in the financial strength of the life insurance company maintaining the policy;

(5) To inquire about changes in the health or financial condition of the insured or insureds under the policy.

(B) The trustee, the attorney who drafted a trust, or any person who was consulted with regard to the creation of a trust, in the absence of fraud, is not liable to the beneficiaries of the trust or to any other person for any loss arising from the absence of the duties specified in divisions (A)(1) to (5) of this section.

(C) Unless otherwise provided by the terms of the trust, this section applies to a trust established before, on, or after the effective date of this section and to a life insurance policy acquired, retained, or owned by a trustee before, on, or after the effective date of this section.

History. Amended by 129th General Assembly File No. 169, HB 247, § 1, eff. 3/22/2013. Added by 129th General Assembly File No 65, SB 117, § 1, eff. 03/22/2012.

Sec. 5809.04 Duties at Inception of Trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of trust assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and in order to comply with the requirements and standards of the Ohio Uniform Prudent Investor Act.

History. Effective Date 01-01-2007.

Sec. 5809.05 Reviewing Compliance.

Compliance with the Ohio Uniform Prudent Investor Act shall be determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

History. Effective Date 01-01-2007.

Sec. 5809.06 Delegation of Investment and Management Functions.

(A) A trustee may delegate investment and management functions of a trust that a prudent trustee having comparable skills could properly delegate under the circumstances. A trustee that exercises its delegation authority under this division shall comply with the requirements of division (A) of section 5808.07 of the Revised Code.

(B) In performing investment or management functions of a trust that are delegated to an agent, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(C) A trustee who delegates a function to an agent in compliance with division (A) of this section is not liable to the beneficiaries of the trust or to the trust for the decisions or actions of the agent to whom the function was delegated.

(D) By accepting the delegation of investment or management functions of a trust that is subject to the laws of this state, an agent submits to the jurisdiction of this state.

History. Effective Date 01-01-2007.

Sec. 5809.07 Language Invoking Standard of Act.

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted by the Ohio Uniform Prudent Investor Act: “investments permissible by law for investment of trust funds”; “legal investments”; “authorized investments”; “using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds considering the probable income as well as the probable safety of their capital”; “prudent man rule”; “prudent trustee rule”; “prudent person rule”; and “prudent investor rule.”

History. Effective Date 01-01-2007.

Sec. 5809.08 Uniformity of Application and Construction; Application to Existing Trusts.

(A) The Ohio Uniform Prudent Investor Act shall be applied and construed to effectuate the general purpose to make uniform the law with respect to the subject of these sections among the states enacting it.

(B) The Ohio Uniform Prudent Investor Act applies to trusts existing on or created after March 22, 1999. As applied to trusts existing on March 22, 1999, the Ohio Uniform Prudent Investor Act governs only decisions or actions occurring after March 22, 1999.

(C) The temporary investment of cash or funds pursuant to section 5815.26 or 2109.372 of the Revised Code shall be considered a prudent investment in compliance with the Ohio Uniform Prudent Investor Act.

History. Effective Date 01-01-2007.

Chapter 5810 Breach of Trust

Section

- 5810.01 Breach of Trust Defined—Judicial Remedies.
- 5810.02 Liability to Beneficiaries for Breach—Contribution.
- 5810.03 Trustee Not Accountable or Liable for Profit or Loss Absent Breach.
- 5810.04 Award of Costs, Expenses, and Attorney Fees from Trust.
- 5810.05 Limitations Period for Action Against Trustee.
- 5810.06 Trustee Reliance on Terms of Trust.
- 5810.07 Reasonable Care to Ascertain Material Event.
- 5810.08 Enforceability of Exculpatory Trust Term.
- 5810.09 Beneficiary Consent to Conduct Constituting Breach.
- 5810.10 Personal Contract and Tort Liability of Trustee.
- 5810.11 Personal Liability of Trustee on Contract as Partner.
- 5810.12 Person Assisting or Dealing with Trustee in Good Faith.
- 5810.13 Certification of Trust Furnished to Person Not Beneficiary.
- 5810.14 Transfer of Personal Property to Trustee.

Sec. 5810.01 Breach of Trust Defined—Judicial Remedies.

(A) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(B) To remedy a breach of trust that has occurred or may occur, the court may do any of the following:

- (1) Compel the trustee to perform the trustee's duties;
- (2) Enjoin the trustee from committing a breach of trust;
- (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) Order a trustee to account;
- (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) Suspend the trustee;
- (7) Remove the trustee as provided in section 5807.06 of the Revised Code;
- (8) Reduce or deny compensation to the trustee;
- (9) Subject to section 5810.12 of the Revised Code, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds;
- (10) Order any other appropriate relief.

History. Effective Date 01-01-2007.

Sec. 5810.02 Liability to Beneficiaries for Breach—Contribution.

(A) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following:

- (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred;
- (2) The profit the trustee made by reason of the breach.

(B) Except as otherwise provided in this division, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

History. Effective Date 01-01-2007.

Sec. 5810.03 Trustee Not Accountable or Liable for Profit or Loss Absent Breach.

(A) Absent a breach of trust, a trustee is not accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust.

(B) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

History. Effective Date 01-01-2007.

Sec. 5810.04 Award of Costs, Expenses, and Attorney Fees from Trust.

In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court, as justice and equity may require, may award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy.

History. Effective Date 01-01-2007.

Sec. 5810.05 Limitations Period for Action Against Trustee.

(A) A beneficiary may not commence a proceeding against a trustee for breach of trust more than two years after the date the beneficiary, a representative of the beneficiary, or a beneficiary surrogate is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary, the representative of the beneficiary, or the beneficiary surrogate of the time allowed for commencing a proceeding against a trustee.

(B) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the representative of the beneficiary knows of the potential claim or should know of the existence of the potential claim.

(C) If division (A) of this section does not apply, notwithstanding section 2305.09 of the Revised Code, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within four years after the first of the following to occur:

- (1) The removal, resignation, or death of the trustee;
- (2) The termination of the beneficiary's interest in the trust;
- (3) The termination of the trust;
- (4) The time at which the beneficiary knew or should have known of the breach of trust.

(D) Nothing in Chapters 5801. to 5811. of the Revised Code limits the operation of any principle of law or equity, including the doctrines of laches, unclean hands, estoppels, and waiver, that can bar claims.

History. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5810.06 Trustee Reliance on Terms of Trust.

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

History. Effective Date 01-01-2007.

Sec. 5810.07 Reasonable Care to Ascertain Material Event.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

History. Effective Date 01-01-2007.

Sec. 5810.08 Enforceability of Exculpatory Trust Term.

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries or was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

History. Effective Date 01-01-2007.

Sec. 5810.09 Beneficiary's Consent to Conduct Constituting Breach.

A trustee is not liable to a beneficiary for breach of trust if the beneficiary or the beneficiary's representative under the representation provisions of Chapter 5803. of the Revised Code consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless the consent, release, or ratification of the beneficiary or representative was induced by improper conduct of the trustee or, at the time of the consent, release, or ratification, the beneficiary or representative did not know of the beneficiary's rights or of the material facts relating to the breach.

This section applies regardless of whether the conduct being consented to, released, or ratified constitutes one or more breaches of fiduciary duty, violates one or more provisions of the Revised Code, or is taken without required court approval.

History. Amended by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012. Effective Date 01-01-2007.

Sec. 5810.10 Personal Contract and Tort Liability of Trustee.

(A) Except as otherwise provided in the contract, for contracts entered into on or after March 22, 1984, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity. The words "trustee," "as trustee," "fiduciary," or "as fiduciary," or other words that indicate one's trustee capacity, following the name or signature of a trustee are sufficient disclosure for purposes of this division.

(B) A trustee is personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(C) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

History. Effective Date 01-01-2007.

Sec. 5810.11 Personal Liability of Trustee on Contract as Partner.

(A)(1) Except as otherwise provided in division (C) of this section or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed. A partnership certificate that is filed pursuant to Chapter 1776. or 1777. or another chapter of the Revised Code and that indicates that a trustee holds a general partnership interest in a fiduciary capacity by the use following the name or signature of the trustee of the words "as trustee" or other words that indicate the trustee's fiduciary capacity constitutes a sufficient disclosure for purposes of this division.

(2) If a partnership certificate is not required to be filed pursuant to Chapter 1776. or 1777. or another chapter of the Revised Code, a sufficient disclosure for purposes of division (A) of this section can be made by a trustee if a certificate that is filed with the recorder of the county in which the partnership's principal office or place of business is situated and with the recorder of each county in which the partnership owns real estate satisfies all of the following requirements:

(a) The certificate states in full the names of all persons holding interests in the partnership and their places of residence.

(b) The certificate is signed by all persons who are general partners in the partnership and is acknowledged by a person authorized to take acknowledgements of deeds.

(c) The certificate uses the words "trustee under the (will or trust) of (name of decedent or settlor)," or other words that indicate the trustee's fiduciary capacity, following the trustee's name or signature.

(3) A contract or other written instrument that is delivered to a party that contracts with the partnership in which a trustee holds a general partnership interest in a fiduciary capacity and that indicates that the trustee so holds the interest constitutes a disclosure for purposes of division (A)(1) of this section with respect to transactions between the party and the partnership. If a disclosure has been made by a certificate in accordance with division (A) of this section, a disclosure for purposes of division (A) of this section with respect to such transactions exists regardless of whether a contract or other instrument indicates the trustee holds the general partnership interest in a fiduciary capacity.

(B) Except as otherwise provided in division (C) of this section, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(C) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(D) If the trustee of a revocable trust holds an interest as a general partner in a general or limited partnership, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

(E) The liability limitations in this section apply to trustees as partners notwithstanding the broader personal liabilities otherwise imposed by any partnership law.

(F) If a trust is identified as partner, the reference is deemed to be to, and the partner is, the current trustee or trustees of the trust and their successors as trustees.

History. Effective Date 01-01-2007; 2008 HB332 08-06-2008; 2008 HB499 09-12-2008.

Sec. 5810.12 Person Assisting or Dealing with Trustee in Good Faith.

(A) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(B) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(C) A person who in good faith delivers assets to a trustee is not required to ensure their proper application.

(D) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(E) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

History. Effective Date 01-01-2007.

Sec. 5810.13 Certification of Trust Furnished to Person Not Beneficiary.

(A) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing all of the following information:

(1) A statement that the trust exists and the date the trust instrument was executed;

(2) The identity of the settlor;

(3) The identity and address of the currently acting trustee;

(4) The powers of the trustee;

(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee.

(B) Any trustee may sign or otherwise authenticate a certification of trust.

(C) A certification of trust shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(D) A certification of trust is not required to contain the dispositive terms of a trust.

(E) A certification of trust may establish the identity of the trustee and any succession of trustees under division (B) or (C) of section 5810.14 of the Revised Code.

(F) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(G) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(H) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(I) This section does not affect the use or validity of a memorandum of trust under section 5301.255 of the Revised Code.

(J) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

History. Amended by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012. Effective Date 01-01-2007; 2008 HB499 09-12-2008.

Sec. 5810.14 Transfer of Personal Property to Trustee.

(A) Personal property may be transferred to a trustee as authorized by section 5804.01 of the Revised Code by executing the necessary written instrument that identifies the personal property transferred and identifies the trustee by name followed by the designation “trustee.”

(B) The future transfer of personal property to a trustee as a designated beneficiary, including, but not limited to, a transfer on death designation or payable on death designation, participation in a joint ownership arrangement, or any other contractual transfer arrangement, that is made by executing the necessary written instrument identifying the trustee by name followed by the designation “trustee” shall be considered a transfer of the personal property to the trustee serving at the time of the future transfer. A certification of trust under section 5810.13 of the Revised Code may establish the identity of the trustee and any succession of trustees.

(C) A written instrument transferring personal property to a trust or a written instrument providing for the future transfer of personal property to a trust, by identifying the trust without identifying the trustee, shall be considered a transfer of the personal property to the trustee serving at the time of transfer. A certification of trust under section 5810.13 of the Revised Code may establish the identity of the trustee and any succession of trustees.

(D) An instrument of transfer under this section may, but is not required to, contain any additional identifying information, including the trust name, the name of the settlor, the date of trust creation, and the date of applicable trust amendments.

(E) Nothing in this section is intended to affect the operation of section 5301.03 of the Revised Code.

(F) Nothing in this section is intended to affect or be in conflict with division (E) of section 5301.071 of the Revised Code that addresses transfers of real property to or from trusts and trustees.

History. Added by 129th General Assembly File No. 65, SB 117, § 1, eff. 3/22/2012.

Chapter 5811 Application and Construction of Code

Section

5811.01 Promotion of Uniformity of Law.

5811.02 Electronic Signatures in Global and National Commerce Act.

5811.03 Temporal Application of Provisions of Code.

Sec. 5811.01 Promotion of Uniformity of Law.

In applying and construing Chapters 5801. to 5811. of the Revised Code, a court may consider the need to promote uniformity of the law with respect to the subject matter of those chapters among states that enact the uniform trust code.

History. Effective Date 01-01-2007.

Sec. 5811.02 Electronic Signatures in Global and National Commerce Act.

The provisions of Chapters 5801. to 5811. of the Revised Code governing the legal effect, validity, or enforceability of electronic records or electronic signatures and of contracts formed or performed with the use of electronic records or electronic signatures conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7002, 114 Stat. 467, and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

History. Effective Date 01-01-2007.

Sec. 5811.03 Temporal Application of Provisions of Code.

(A) Except as otherwise provided in Chapters 5801. to 5811. of the Revised Code, all of the following apply:

(1) Chapters 5801. to 5811. of the Revised Code apply to all trusts created before, on, or after their effective date.

(2) Chapters 5801. to 5811. of the Revised Code apply to all judicial proceedings concerning trusts commenced on or after their effective date.

(3) Chapters 5801. to 5811. of the Revised Code apply to judicial proceedings concerning trusts commenced before the effective date of those chapters unless the court finds that application of a particular provision of those chapters would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision does not apply, and the superseded law applies.

(4) Any rule of construction or presumption provided in Chapters 5801. to 5811. of the Revised Code applies to trust instruments executed before the effective date of those chapters unless there is a clear indication of a contrary intent in the terms of the trust.

(5) Chapters 5801. to 5811. of the Revised Code do not affect an act done before the effective date of those chapters.

(B) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Chapters 5801. to 5811. of the Revised Code, that statute continues to apply to the right even if it has been repealed or superseded.

History. Effective Date 01-01-2007.

Chapter 5812 Uniform Principal and Income Act

Section

- 5812.01. Uniform Principal and Income Act Definitions.
- 5812.02. Fiduciary Duties—General Principles.
- 5812.03. Trustee’s Power to Adjust.
- 5812.07. Determination and Distribution of Net Income.
- 5812.08. Distribution to Residuary and Remainder Beneficiaries.
- 5812.12. When Right to Income Begins and Ends.
- 5812.13. Apportionment of Receipts and Disbursements When Decedent Dies or Income Interest Begins.
- 5812.14. Apportionment When Income Interest Ends.
- 5812.18. Character of Receipts.
- 5812.19. Distribution from Trust or Estate.
- 5812.20. Business and Other Activities Conducted by Trustee.
- 5812.24. Principal Receipts.
- 5812.25. Rental Property.
- 5812.26. Obligation to Pay Money.
- 5812.27. Insurance Policies and Similar Contracts.
- 5812.31. Insubstantial Allocations Not Required.
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- 5812.33. Liquidating Asset.
- 5812.34. Minerals, Water and Other Natural Resources.
- 5812.35. Timber.
- 5812.36. Property Not Productive of Income.
- 5812.37. Derivatives and Options.
- 5812.38. Asset-Backed Securities.
- 5812.42. Disbursements from Income.
- 5812.43. Disbursements from Principal.
- 5812.44. Transfers from Income to Principal for Depreciation.
- 5812.45. Transfers from Income to Reimburse Principal.
- 5812.46. Income Taxes
- 5812.47. Adjustments Between Principal and Income Because of Taxes.
- 5812.51. Citing Chapter
- 5812.52. Application to Existing Trusts and Estates.

Sec. 5812.01. Uniform Principal and Income Act Definitions.

As used in sections 5812.01 to 5812.52 of the Revised Code:

- (A) "Accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. "Accounting period" includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.
- (B) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.
- (C) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.
- (D) "Income" means money or property that a fiduciary receives as current return from a principal asset. "Income" includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in sections 5812.18 to 5812.38 of the Revised Code.
- (E) "Income beneficiary" means a person to whom net income of a trust is or may be payable.
- (F) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require or authorize it to be distributed in the trustee's discretion.
- (G) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.
- (H) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under sections 5812.01 to 5812.52 of the Revised Code to or from income during the period.
- (I) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.
- (J) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.
- (K) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.
- (L) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.
- (M) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

History. Effective Date 01-01-2007.

Sec. 5812.02 Fiduciary Duties—General Principles.

(A) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of sections 5812.07 to 5812.14 of the Revised Code, all of the following apply:

(1) A fiduciary shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in sections 5812.01 to 5812.52 of the Revised Code.

(2) A fiduciary may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by any provision of sections 5812.01 to 5812.52 of the Revised Code.

(3) A fiduciary shall administer a trust or estate in accordance with sections 5812.01 to 5812.52 of the Revised Code if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration.

(4) A fiduciary shall add a receipt, or charge a disbursement, to principal to the extent that the terms of the trust and any provision of sections 5812.01 to 5812.52 of the Revised Code do not provide for allocating the receipt or disbursement to or between principal and income.

(B) In exercising the power to adjust under division (A) of section 5812.03 of the Revised Code or a discretionary power of administration regarding a matter within the scope of sections 5812.01 to 5812.52 of the Revised Code, whether granted by the terms of a trust, a will, or a provision of any such section, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with sections 5812.01 to 5812.52 of the Revised Code is presumed to be fair and reasonable to all of the beneficiaries.

(C) In allocating receipts and disbursements to or between principal and income, a fiduciary may credit a receipt or charge an expenditure to income or principal with respect to a decedent's estate, a trust, or property passing to a trust, that is eligible for a federal estate tax marital deduction or Ohio estate tax marital deduction, or for a federal estate tax charitable deduction or Ohio estate tax charitable deduction, or for a federal gift tax marital deduction or federal gift tax charitable deduction only to the extent that the credit of the receipt or charge of the expenditure will not cause the reduction or loss of the deduction.

(D) As used in division (C) of this section:

(1) "Federal estate tax charitable deduction" means the estate tax charitable deduction allowed by subtitle B, Chapter 11 of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2055, as amended.

(2) "Federal estate tax marital deduction" means the estate tax marital deduction allowed by subtitle B, Chapter 11 of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2056, as amended.

(3) "Federal gift tax charitable deduction" means the gift tax charitable deduction allowed by subtitle B, Chapter 12 of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2522, as amended.

(4) "Federal gift tax marital deduction" means the gift tax marital deduction allowed by subtitle B, Chapter 12 of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2523, as amended.

(5) "Ohio estate tax charitable deduction" means the estate tax charitable deduction allowed by division (A) of section 5731.17 of the Revised Code.

(6) "Ohio estate tax marital deduction" means the estate tax marital deduction allowed by section 5731.15 of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5812.03 Trustee's Power to Adjust.

(A) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages the trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying division (A) of section 5812.02 of the Revised Code, that the trustee is unable to comply with division (B) of that section.

(B) In deciding whether and to what extent to exercise the power conferred by division (A) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including all of the following factors to the extent they are relevant:

- (1) The nature, purpose, and expected duration of the trust;
- (2) The intent of the settlor;
- (3) The identity and circumstances of the beneficiaries;
- (4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- (6) The net amount allocated to income under sections 5812.01, 5812.02, and 5812.07 to 5812.52 of the Revised Code; and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;
- (8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation;
- (9) The anticipated tax consequences of an adjustment.

(C) A trustee shall not make an adjustment if any of the following applies:

- (1) The adjustment diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment.
- (2) The adjustment reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion.
- (3) The adjustment changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets.
- (4) The adjustment is from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside.
- (5) If possessing or exercising the power to make the adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make the adjustment;

(6) If possessing or exercising the power to make the adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make the adjustment;

(7) If the trustee is a beneficiary of the trust;

(8) If the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly.

(D) If division (C)(5), (6), (7), or (8) of this section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(E) A trustee may release the entire power conferred by division (A) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in division (C)(1), (2), (3), (4), (5), (6), or (8) of this section or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in division (C) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(F) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by division (A) of this section.

(G) The liability of a trustee relative to the exercise of adjustment authority conferred by divisions (A) to (F) of this section shall be limited in the following manner:

(1) Unless a court determines that a trustee has acted in bad faith, no trustee shall be held liable for damages for choosing not to make an adjustment.

(2) Unless a court determines that a trustee has acted in bad faith with respect to an adjustment, the sole remedy to be ordered by a court shall be a prospective correction of the adjustment.

(3) For purposes of this section, and subject to division (C) of this section, from time to time a trustee may make a safe-harbor adjustment to increase net trust accounting income up to and including an amount equal to four per cent of the trust's fair market value determined as of the first business day of the current year. If a trustee determines to make this safe-harbor adjustment, the propriety of this adjustment shall be conclusively presumed. Nothing in division (G)(3) of this section prohibits any other type of adjustment authorized under any provision of this section.

History. Effective Date 01-01-2007.

Sec. 5812.07 Determination and Distribution of Net Income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, all of the following apply:

(A) The fiduciary of the estate or of the terminating income interest shall determine, under the provisions of sections 5812.12 to 5812.47 of the Revised Code that apply to trustees and under division (E) of this section, the amount of net income and net principal receipts received from property specifically given to a beneficiary. The fiduciary shall distribute the net income and net principal receipts to the beneficiary that is to receive the specific property.

(B) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the provisions of sections 5812.12 to 5812.47 of the Revised Code that apply to trustees and by doing all of the following:

(1) Including in net income all income from property used to discharge liabilities;

(2) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes. However, the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction.

(3) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(C) A fiduciary shall distribute to a beneficiary that receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under division (B) of this section or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(D) A fiduciary shall distribute the net income remaining after distributions required by division (C) of this section, in the manner described in section 5812.08 of the Revised Code, to all other beneficiaries, including a beneficiary that receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable, general power of appointment over the trust.

(E) A fiduciary shall not reduce principal or income receipts from property described in division (A) of this section because of a payment described in section 5812.42 or 5812.43 of the Revised Code to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal

receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

History. Effective Date 01-01-2007.

Sec. 5812.08 Distribution to Residuary and Remainder Beneficiaries.

(A) Each beneficiary described in division (D) of section 5812.07 of the Revised Code is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one that does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of the decedent's death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(B) In determining a beneficiary's share of net income for the purpose of this section, all of the following apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(C) If a fiduciary does not distribute all of the collected but undistributed net income described in divisions (A) and (B) of this section to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each.

(D) To the extent that a fiduciary considers it appropriate, the fiduciary may apply the provisions of divisions (A) to (C) of this section to any net gain or loss, realized after the date of the decedent's death or an income interest termination or earlier distribution date, from the disposition of a principal asset to which such provisions apply.

History. Effective Date 01-01-2007.

Sec. 5812.12 When Right to Income Begins and Ends.

(A) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(B) An asset becomes subject to a trust on any of the following dates:

(1) The date it is transferred to the trust, in the case of an asset that is transferred to a trust during the transferor's life;

(2) The date of a testator's death, in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate;

(3) The date of an individual's death, in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(C) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under division (D) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(D) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

History. Effective Date 01-01-2007.

Sec. 5812.13 Apportionment of Receipts and Disbursements When Decedent Dies or Income Interest Begins.

(A) A trustee shall allocate to principal an income receipt or disbursement other than one to which division (A) of section 5812.07 of the Revised Code applies, if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(B) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and if it is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal, and the balance shall be allocated to income.

(C) For the purposes of this section, an item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date. Distributions to shareholders or other owners from an entity to which section 5812.18 of the Revised Code applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

History. Effective Date 01-01-2007.

Sec. 5812.14 Apportionment When Income Interest Ends.

(A) As used in this section, “undistributed income” means net income received before the date on which an income interest ends. “Undistributed income” excludes an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(B) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary that survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary’s share of the undistributed income that is not disposed of under the terms of the trust, unless the beneficiary has an unqualified power to revoke more than five per cent of the trust immediately before the income interest ends. If the beneficiary has such power, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

(C) When a trustee’s obligation to pay a fixed annuity or a fixed fraction of the value of the trust’s assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

History. Effective Date 01-01-2007.

Sec. 5812.18 Character of Receipts.

(A) As used in this section, “entity” means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which section 5812.19 of the Revised Code applies, a business or activity to which section 5812.20 of the Revised Code applies, or an asset-backed security to which section 5812.38 of the Revised Code applies.

(B) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(C) A trustee shall allocate all of the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust’s interest in the entity;

(3) Money received in total or partial liquidation of the entity;

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(D) Money is received in partial liquidation in either of the following circumstances:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation;

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty per cent of the entity’s gross assets, as shown by the entity’s year-end financial statements immediately preceding the initial receipt.

(E) Money is not received in partial liquidation, nor shall it be taken into account under division (D)(2) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(F) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

History. Effective Date 01-01-2007.

Sec. 5812.19 Distribution from Trust or Estate.

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, section 5812.18 or 5812.38 of the Revised Code applies to a receipt from the trust.

History. Effective Date 01-01-2007.

Sec. 5812.20 Business and Other Activities Conducted by Trustee.

(A) If a trust that conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(B) A trustee that accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(C) Activities for which a trustee may maintain separate accounting records under this section include all of the following:

- (1) Retail, manufacturing, service, and other traditional business activities;
- (2) Farming;
- (3) Raising and selling livestock and other animals;

- (4) Management of rental properties;
- (5) Extraction of minerals and other natural resources;
- (6) Timber operations;
- (7) Activities to which section 5812.37 of the Revised Code applies.

History. Effective Date 01-01-2007.

Sec. 5812.24 Principal Receipts.

A trustee shall allocate to principal all of the following:

- (A) To the extent not allocated to income under sections 5812.01 to 5812.52 of the Revised Code, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;
- (B) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to sections 5812.18 to 5812.38 of the Revised Code;
- (C) Amounts recovered from third parties to reimburse the trust because of disbursements described in division (A)(7) of section 5812.43 of the Revised Code or for other reasons to the extent not based on the loss of income;
- (D) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;
- (E) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income;
- (F) Other receipts as provided in sections 5812.31 to 5812.38 of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5812.25 Rental Property.

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and shall not be available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

History. Effective Date 01-01-2007.

Sec. 5812.26 Obligation to Pay Money.

(A) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

(B) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after the date it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after the date it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust shall be allocated to income.

(C) This section does not apply to an obligation to which section 5812.32, 5812.33, 5812.34, 5812.35, 5812.37, or 5812.38 of the Revised Code applies.

History. Effective Date 01-01-2007.

Sec. 5812.27 Insurance Policies and Similar Contracts.

(A) Except as otherwise provided in division (B) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(B) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to section 5812.20 of the Revised Code, loss of profits from a business.

(C) This section does not apply to a contract to which section 5812.32 of the Revised Code applies.

History. Effective Date 01-01-2007.

Sec. 5812.31 Insubstantial Allocations Not Required.

If a trustee determines that an allocation between principal and income required by section 5812.32, 5812.33, 5812.34, 5812.35, or 5812.38 of the Revised Code is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in division (C) of section 5812.03 of the Revised Code applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in division (D) of that section and may be released for the reasons and in the manner described in division (E) of the section. An allocation is presumed to be insubstantial if either of the following applies:

(A) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten per cent.

(B) The value of the asset producing the receipt for which the allocation would be made is less than ten per cent of the total value of the trust's assets at the beginning of the accounting period.

History. Effective Date 01-01-2007.

Sec. 5812.32 Deferred Compensation, Annuities and Similar Payments.

(A) As used in this section:

(1) "Payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. "Payment" includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of divisions (D), (E), (F), and (G) of this section, "payment" also includes any payment made from any separate fund regardless of the reason for the payment.

(2) "Separate fund" includes a private or commercial annuity, an individual retirement account, or a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(B) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(C) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten per cent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this division, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(D) Except as otherwise provided in division (E) of this section, divisions (F) and (G) of this section apply, and divisions (B) and (C) of this section do not apply, in determining the allocation of a payment made from a separate fund to either of the following:

(1) A trust for which an election to qualify for a marital deduction under section 2056(b)(7) of the Internal Revenue Code of 1986, 26 U.S.C. 2056(b)(7), as amended, has been made;

(2) A trust that qualifies for the marital deduction under section 2056(b)(5) of the Internal Revenue Code of 1986, 26 U.S.C. 2056(b)(5), as amended.

(E) Divisions (D), (F), and (G) of this section do not apply if and to the extent that the series of payments would, without the application of division (D) of this section, qualify for the marital deduction under section 2056(b)(7)(C) of the Internal Revenue Code of 1986, 26 U.S.C. 2056(b)(7)(C), as amended.

(F) A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to sections 5812.01 to 5812.52 of the Revised Code. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of

the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

(G) If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent of the fund's value according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the value of the fund, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under section 7520 of the Internal Revenue Code of 1986, 26 U.S.C. 7520, as amended, for the month preceding the accounting period for which the computation is made.

(H) This section does not apply to a payment to which section 5812.33 of the Revised Code applies.

(I)(1) This section applies to a trust described in division (D) of this section on and after any of the following dates:

(a) If the trust has not received a payment from a separate fund on the effective date of the amendment of this section, the date of the decedent's death;

(b) If the trust receives the first payment from any and all separate funds payable to the trust in the calendar year beginning January 1 of the year in which the amendment of this section takes effect, the date of the decedent's death.

(c) If the trust is not described in division (I)(1)(a) or (b) of this section, January 1 of the year in which the amendment of this section takes effect.

(2) For purposes of division (I)(1) of this section, "decedent" means the individual by reason of whose death the trust may now receive a payment from the separate fund.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5812.33 Liquidating Asset.

(A) As used in this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. "Liquidating asset" includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. "Liquidating asset" excludes a payment subject to section 5812.32 of the Revised Code, resources subject to section 5812.34 of the Revised Code, timber subject to section 5812.35 of the Revised Code, an activity subject to section 5812.37 of the Revised Code, an asset subject to section 5812.38 of the Revised Code, or any asset for which the trustee establishes a reserve for depreciation under section 5812.44 of the Revised Code.

(B) A trustee shall allocate to income ten per cent of the receipts from a liquidating asset and the balance to principal.

History. Effective Date 01-01-2007.

Sec. 5812.34 Minerals, Water and Other Natural Resources.

(A) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate the receipts in accordance with all of the following:

- (1) If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income.
- (2) If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.
- (3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety per cent shall be allocated to principal and the balance to income.
- (4) If an amount is received from a working interest or any other interest not provided for in division (A)(1), (2), or (3) of this section, ninety per cent of the net amount received shall be allocated to principal and the balance to income.

(B) An amount received on account of an interest in water that is renewable shall be allocated to income. If the water is not renewable, ninety per cent of the amount shall be allocated to principal and the balance to income.

(C) This section applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(D) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2003, the trustee may allocate receipts from the interest as provided in this section or in the manner used by the trustee before that date. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2003, the trustee shall allocate receipts from the interest as provided in this section.

History. Effective Date 01-01-2007.

Sec. 5812.35 Timber.

(A) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts in accordance with all of the following:

- (1) To income, to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;
- (2) To principal, to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;
- (3) To or between income and principal, if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying divisions (A)(1) and (2) of this section;

(4) To principal, to the extent that advance payments, bonuses, and other payments are not allocated pursuant to division (A)(1), (2), or (3) of this section.

(B) In determining net receipts to be allocated pursuant to division (A) of this section, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(C) This section applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(D) If a trust owns an interest in timberland on January 1, 2003, the trustee may allocate net receipts from the sale of timber and related products as provided in this section or in the manner used by the trustee before that date. If the trust acquires an interest in timberland after January 1, 2003, the trustee shall allocate net receipts from the sale of timber and related products as provided in this section.

History. Effective Date 01-01-2007.

Sec. 5812.36 Property Not Productive of Income.

(A) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under section 5812.03 of the Revised Code and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by division (A) of that section. The trustee may decide which action or combination of actions to take.

(B) In cases not governed by division (A) of this section, proceeds from the sale or other disposition of an asset shall be principal without regard to the amount of income the asset produces during any accounting period.

History. Effective Date 01-01-2007.

Sec. 5812.37 Derivatives and Options.

(A) As used in this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments that gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(B) To the extent that a trustee does not account under section 5812.20 of the Revised Code for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(C) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to

principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, shall be allocated to principal.

History. Effective Date 01-01-2007.

Sec. 5812.38 Asset-Backed Securities.

(A) As used in this section, “asset-backed security” means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. “Asset-backed security” includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. “Asset-backed security” excludes an asset to which section 5812.18 or 5812.32 of the Revised Code applies.

(B) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment that the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(C) If a trust receives one or more payments in exchange for the trust’s entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust’s interest in the security over more than one accounting period, the trustee shall allocate ten per cent of the payment to income and the balance to principal.

History. Effective Date 01-01-2007.

Sec. 5812.42 Disbursements from Income.

A trustee shall make all of the following disbursements from income to the extent that they are not disbursements to which division (B)(2) or (3) of section 5812.07 of the Revised Code applies:

(A) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(B) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(C) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest;

(D) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

History. Effective Date 01-01-2007.

Sec. 5812.43 Disbursements from Principal.

(A) A trustee shall make all of the following disbursements from principal:

(1) The remaining one-half of the disbursements described in divisions (A) and (B) of section 5812.42 of the Revised Code;

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in division (D) of section 5812.42 of the Revised Code of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust;

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(B) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

History. Effective Date 01-01-2007.

Sec. 5812.44 Transfers from Income to Principal for Depreciation.

(A) As used in this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(B) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but shall not transfer any amount for depreciation under any of the following circumstances:

(1) Any amount for depreciation of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) Any amount for depreciation during the administration of a decedent's estate;

(3) Any amount for depreciation under this section if the trustee is accounting under section 5812.20 of the Revised Code for the business or activity in which the asset is used.

(C) An amount transferred to principal need not be held as a separate fund.

History. Effective Date 01-01-2007.

Sec. 5812.45 Transfers from Income to Reimburse Principal.

(A) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(B) Principal disbursements to which division (A) of this section applies include all of the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

- (1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;
- (2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;
- (3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;
- (4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments;
- (5) Disbursements described in division (A)(7) of section 5812.43 of the Revised Code.

(C) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in division (A) of this section.

History. Effective Date 01-01-2007.

Sec. 5812.46 Income Taxes

(A) A tax required to be paid by a trustee based on receipts allocated to income shall be paid from income.

(B) A tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(C) A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid as follows:

- (1) From income, to the extent that receipts from the entity are allocated only to income;
- (2) From principal to the extent that receipts from the entity are allocated only to principal;
- (3) Proportionately from principal and income, to the extent that receipts from the entity are allocated to both income and principal;
- (4) From principal, to the extent that the tax exceeds the total receipts from the entity.

(D) After applying divisions (A) to (C) of this section, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5812.47 Adjustments Between Principal and Income Because of Taxes.

(A) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries that arise from any of the following:

- (1) Elections and decisions, other than those described in division (B) of this section, that the fiduciary makes from time to time regarding tax matters;
- (2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust;
- (3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or beneficiary.

(B) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement shall equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced shall be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

History. Effective Date 01-01-2007.

Sec. 5812.51 Citing Chapter.

(A) Sections 5812.01 to 5812.52 of the Revised Code may be cited as the “uniform principal and income act.”

(B) In applying and construing the “uniform principal and income act,” consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the “uniform principal and income act.”

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5812.52 Application to Existing Trusts and Estates.

Sections 5812.01 to 5812.51 of the Revised Code apply to every trust or decedent’s estate existing on January 1, 2003, except as otherwise expressly provided in the will or terms of the trust or in sections 5812.01 to 5812.51 of the Revised Code.

History. Effective Date 01-01-2007.

Chapter 5813 Institutional Trust Funds Act

Section

- 5813.01 Institutional Trust Funds Act Definitions.
 - 5813.02 Maximum Annual Distribution from Institutional Trust Fund.
 - 5813.03 Settlor's Intention That Income Be Otherwise Determined.
 - 5813.04 Standard of Care.
 - 5813.05 Exemption.
 - 5813.06 Relationship of Chapter to Uniform Management of Institutional Funds Act.
 - 5813.07 Citing Act.
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Sec. 5813.01 Institutional Trust Funds Act Definitions.

As used in sections 5813.01 to 5813.07 of the Revised Code:

- (A) "Institution" means an incorporated or unincorporated organization that is organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes or a governmental organization to the extent that it holds funds exclusively for any of those purposes.
- (B) "Governing board" means the body responsible for the management of an institution.
- (C) "Institutional trust fund" means a trust fund, or a part of a trust fund, that is held by a trustee for the exclusive use, benefit, or purposes of one or more institutions and that is not wholly distributable to the institution or institutions on a current basis under the terms of the applicable trust instrument. "Institutional trust fund" does not include a fund in which a beneficiary that is not an institution has an interest other than a right that may arise upon a violation of a covenant under the terms of the applicable trust instrument or upon a violation of or the failure of the purposes of the fund.
- (D) "Applicable fund value" means for any particular fiscal year the sum of the month-end values of the net assets of an institutional trust fund for the prior fiscal year for those months in which the institutional trust fund has been in existence during such prior fiscal year divided by the number of those months. The month-end values shall be determined by the trustee in accordance with the trustee's records, and any such determination made by a trustee in good faith is conclusive.
- (E) "Trust instrument" means a testamentary or inter vivos trust under which the trustee of the trust holds an institutional trust fund.
- (F) "Trustee" means an individual, corporation, institution, or organization, including, but not limited to, a bank, trust company, or other financial institution, serving as a trustee or as sole trustee under a trust instrument. "Trustee" includes an original trustee and any successor or added trustee.

History. Effective Date 01-01-2007.

Sec. 5813.02 Maximum Annual Distribution from Institutional Trust Fund.

(A) Subject to division (D) of this section and section 5813.03 of the Revised Code, during any fiscal year in which income may be or is required to be distributed to an institution from an institutional trust fund, income means the greater of the following:

(1) The income from the assets of the institutional trust fund for the fiscal year as determined in accordance with the applicable trust instrument and applicable law without regard to sections 5813.01 to 5813.07 of the Revised Code;

(2) The amount requested by the institution's governing board for the fiscal year pursuant to division (B) of this section.

(B) An institution's governing board may request that an amount be distributed to the institution for the fiscal year, and that amount shall not exceed the sum of both of the following:

(1) Five per cent of the applicable fund value for the institutional trust fund for the fiscal year;

(2) If, in any prior fiscal year that is after September 15, 1999, the governing board requested less than five per cent of the applicable fund value for that prior fiscal year and if the amount the institution actually received from the institutional trust fund pursuant to division (A) of this section was less than five per cent for that prior fiscal year, the aggregate difference between five per cent of the applicable fund value with respect to each such prior fiscal year and the amount the institution actually received pursuant to division (A) of this section for each prior fiscal year.

(C) If, under a trust instrument, more than one institution is a beneficiary of an institutional trust fund, the trustee shall take such actions that the trustee determines appropriate or necessary to allow for the distributions of income as contemplated by division (A) of this section, which actions may include dividing the institutional trust fund into separate shares according to the interest that each institution has in the total institutional trust fund held under the trust instrument.

(D) This section does not limit the authority or obligation of a trustee to distribute, or the authority of a governing board to request, funds as permitted or required under the terms of the applicable trust instrument.

History. Effective Date 01-01-2007.

Sec. 5813.03 Settlor's Intention That Income Be Otherwise Determined.

(A) Division (A) of section 5813.02 of the Revised Code does not apply if the applicable trust instrument expressly indicates the settlor's intention that income is to be otherwise than as defined in division (A) of section 5813.02 of the Revised Code.

(B) A restriction upon the definition of income in division (A) of section 5813.02 of the Revised Code may not be inferred from a designation of an institutional trust fund as an endowment; a direction or authorization in the applicable trust instrument to use only "income," "interest," "dividends," or "rents, issues, or profits," or "to preserve the principal intact," or a direction that contains other words of a similar import; a direction in a trust instrument that income and

principal are to be determined by reference to certain statutory provisions; or, subject to division (A) of this section, the inclusion of specified provisions in a trust instrument setting forth the way in which income and principal are to be determined.

(C) The rule of construction set forth in division (B) of this section applies to trust instruments executed or in effect before, on, or after September 15, 1999.

History. Effective Date 01-01-2007.

Sec. 5813.04 Standard of Care.

(A) In administering the powers to request amounts from a trustee of an institutional trust fund in accordance with divisions (A) and (B) of section 5813.02 of the Revised Code, members of a governing board of an institution shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision and shall make requests for amounts under divisions (A) and (B) of section 5813.02 of the Revised Code only as is prudent under this standard. In so doing, the governing board shall consider the long- and short-term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes; the institution's present and anticipated financial requirements; the expected total return on the investments held by the institution and held by the trustee under the applicable trust instrument; price level trends; and general economic conditions.

(B) In determining the expected total return on the investments held by a trustee of an institutional trust fund under the applicable trust instrument, the members of the governing board of an institution may follow, and are not required to examine independently, the determination of the trustee regarding the expected total return on the investments held by the trustee.

(C) A trustee of an institutional trust fund has no duty to inquire or ascertain whether the governing board of an institution has satisfied the standards set forth in divisions (A) and (B) of this section, and the trustee does not have any liability for the failure of the governing board to satisfy those standards.

History. Effective Date 01-01-2007.

Sec. 5813.05 Exemption.

Nothing in sections 5812.01 to 5812.52, or any other section of the Revised Code limits or restricts the definition of income in division (A) of section 5813.02 of the Revised Code or limits or restricts a governing board of an institution from requesting, or a trustee from making, distributions from an institutional trust fund in accordance with sections 5813.01 to 5813.07 of the Revised Code.

History. Effective Date 01-01-2007.

Sec. 5813.06 Relationship of Chapter to Uniform Management of Institutional Funds Act.

(A) Nothing in sections 5813.01 to 5813.05 of the Revised Code affects the construction or interpretation of sections 1715.51 to 1715.59 of the Revised Code relating to the uniform prudent management of institutional funds act. Specifically, neither the percentage set forth in division (B) of section 5813.02 of the Revised Code nor the amount actually requested by a

governing board pursuant to that section shall be construed or interpreted to limit or expand what is a prudent amount that can be expended by a governing board of an institution under sections 1715.51 to 1715.59 of the Revised Code.

(B) If an institutional trust fund is also an institutional fund as defined in division (C) of section 1715.51 of the Revised Code with the result that sections 1715.51 to 1715.59 of the Revised Code also are applicable to the institutional trust fund, then sections 1715.51 to 1715.59 of the Revised Code apply to the institutional trust fund, and sections 5813.01 to 5813.07 of the Revised Code do not apply to the institutional trust fund.

History. Effective Date 01-01-2007; 2008 HB522 06-01-2009.

Sec. 5813.07 Citing Act.

Sections 5813.01 to 5813.07 of the Revised Code may be cited as the “institutional trust funds act.”

History. Effective Date 01-01-2007.

Chapter 5814 Ohio Transfers to Minors Act

Section

- 5814.01 Transfers to Minors Act Definitions.
- 5814.02 Subject of Gift or Transfer.
- 5814.03 Effect of Gift or Transfer.
- 5814.04 Custodian—Powers and Duties.
- 5814.05 Fees and Compensation of Custodian.
- 5814.06 Responsibility of Issuer, Transfer Agent, Financial Institution, Broker, or Life Insurance Company.
- 5814.07 Successor Custodian.
- 5814.08 Accounting by and Determination of Liability of Custodian.
- 5814.09 Delayed Time for Delivery of Custodial Property
- 5814.10 Applicability and Construction.

Sec. 5814.01 Transfers to Minors Act Definitions.

As used in sections 5814.01 to 5814.10 of the Revised Code, unless the context otherwise requires:

(A) “Benefit plan” means any plan of an employer for the benefit of any employee, any plan for the benefit of any partner, or any plan for the benefit of a proprietor, and includes, but is not limited to, any pension, retirement, death benefit, deferred compensation, employment agency, stock bonus, option, or profit-sharing contract, plan, system, account, or trust.

(B) “Broker” means a person that is lawfully engaged in the business of effecting transactions in securities for the account of others. A “broker” includes a financial institution that effects such transactions and a person who is lawfully engaged in buying and selling securities for the person’s own account, through a broker or otherwise, as a part of a regular business.

(C) “Court” means the probate court.

(D) “The custodial property” includes:

(1) All securities, money, life or endowment insurance policies, annuity contracts, benefit plans, real estate, tangible and intangible personal property, proceeds of a life or endowment insurance policy, an annuity contract, or a benefit plan, and other types of property under the supervision of the same custodian for the same minor as a consequence of a transfer or transfers made to the minor, a gift or gifts made to the minor, or a purchase made by the custodian for the minor, in a manner prescribed in sections 5814.01 to 5814.10 of the Revised Code;

(2) The income from the custodial property;

(3) The proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment, or other disposition of the securities, money, life or endowment insurance policies, annuity contracts, benefit plans, real estate, tangible and intangible personal property, proceeds of a life or endowment insurance policy, an annuity contract, or a benefit plan, other types of property, and income.

(E) “Custodian” or “successor custodian” means a person so designated in a manner prescribed in sections 5814.01 to 5814.10 of the Revised Code.

(F) “Financial institution” means any bank, as defined in section 1101.01 of the Revised Code, any credit union as defined in section 1733.01 of the Revised Code, and any federal credit union, as defined in the “Federal Credit Union Act,” 73 Stat. 628 (1959), 12 U.S.C.A. 1752, as amended.

(G) “Guardian of the minor” includes the general guardian, guardian, tutor, or curator of the property, estate, or person of a minor.

(H) “Issuer” means a person who places or authorizes the placing of the person’s name on a security, other than as a transfer agent, to evidence that it represents a share, participation, or other interest in the person’s property or in an enterprise, or to evidence the person’s duty or undertaking to perform an obligation that is evidenced by the security, or who becomes responsible for or in place of any such person.

(I) “Legal representative” of a person means the executor, administrator, general guardian, guardian, committee, conservator, tutor, or curator of the person’s property or estate.

(J) “Member of the minor’s family” means a parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt of the minor, whether of the whole or half blood, or by adoption.

(K)(1) Except as provided in division (K)(2) of this section, “minor” means an individual who has not attained the age of twenty-one years.

(2) When used with reference to the beneficiary for whose benefit custodial property is held or is to be held, “minor” means an individual who has not attained the age at which the custodian is required under section 5814.09 of the Revised Code to transfer the custodial property to the beneficiary.

(L) “Security” includes any note, stock, treasury stock, common trust fund, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under an oil, gas, or mining title or lease, collateral trust certificate, transferable share, voting trust certificate, or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, any temporary

or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing. A "security" does not include a security of which the donor or transferor is the issuer. A security is in "registered form" when it specifies a person who is entitled to it or to the rights that it evidences and its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer.

(M) "Transfer" means a disposition, other than a gift, by a person who is eighteen years of age or older that creates custodial property under sections 5814.01 to 5814.10 of the Revised Code.

(N) "Transfer agent" means a person who acts as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of transfers of its securities, in the issue of new securities, or in the cancellation of surrendered securities.

(O) "Transferor" means a person who is eighteen years of age or older, who makes a transfer.

(P) "Trust company" means a financial institution that is authorized to exercise trust powers.

(Q) "Administrator" includes an "administrator with the will annexed."

History. Amended by 132nd General Assembly File No. TBD, HB 49, § 130.21, eff. 1/1/2018. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.02 Subject of Gift or Transfer.

(A) A person who is eighteen years of age or older may, during the person's lifetime, make a gift or transfer of a security, money, a life or endowment insurance policy, an annuity contract, a benefit plan, real estate, tangible or intangible personal property, or any other property to, may designate as beneficiary of a life or endowment insurance policy, an annuity contract, or a benefit plan, or make a transfer by the irrevocable exercise of a power of appointment in favor of, a person who is a minor on the date of the gift or transfer:

(1) If the subject of the gift or transfer is a security in registered form, by registering it in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act";

(2) If the subject of the gift or transfer is a security not in registered form, by delivering it to the donor or transferor, another person who is eighteen years of age or older, or a trust company, accompanied by a statement of a gift or transfer in the following form, in substance, signed by the donor or transferor and the person or trust company designated as custodian:

"GIFT OR TRANSFER UNDER THE OHIO TRANSFERS TO MINORS ACT

I, (name of donor or transferor), hereby deliver to (name of custodian) as custodian for (name of minor) under the Ohio Transfers to Minors Act, the following security (ies): (insert an appropriate description of the security or securities delivered, sufficient to identify it or them).

(signature of donor or transferor)

..... (name of custodian) hereby acknowledges receipt of the above described security (ies) as custodian for the above minor under the Ohio Transfers to Minors Act.

Dated:

(signature of custodian)”

(3) If the subject of the gift or transfer is money, by paying or delivering it to a broker, or a financial institution for credit to an account in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: “as custodian for (name of minor) under the Ohio Transfers to Minors Act.”

(4) If the subject of the gift or transfer is a life or endowment insurance policy, an annuity contract, or a benefit plan, by assigning the policy, contract, or plan to the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance by the words: “as custodian for (name of minor) under the Ohio Transfers to Minors Act.”

(5) If the subject of the gift or transfer is an interest in real estate, by executing and delivering in the appropriate manner a deed, assignment, or similar instrument in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: “as custodian for (name of minor) under the Ohio Transfers to Minors Act.”

(6) If the subject of the gift or transfer is tangible personal property, by delivering it to the donor or transferor, another person who is eighteen years of age or older, or a trust company, accompanied by a statement of a gift or transfer in the following form, in substance, signed by the donor or transferor and the person or trust company designated as custodian:

“GIFT OR TRANSFER UNDER THE OHIO TRANSFERS TO MINORS ACT

I, (name of donor or transferor), hereby deliver to (name of custodian) as custodian for (name of minor) under the Ohio Transfers to Minors Act, the following property: (insert an appropriate description of the property delivered, sufficient to identify it).

(signature of donor or transferor)

..... (name of custodian) hereby acknowledges receipt of the above described property as custodian for the above minor under the Ohio Transfers to Minors Act.

Dated:

(signature of custodian)”

(7) If the subject of the gift or transfer is tangible personal property, title to which is evidenced by a certificate of title issued by a department or agency of a state or of the United States, by issuing title to the donor or transferor, another person who is eighteen years of age or older, or a trust company, accompanied by a statement of a gift or transfer in the following form, in substance: "as custodian for (name of minor) under the Ohio Transfers to Minors Act"; or by delivering the title to another person who is eighteen years of age or older or a trust company, endorsed to that person followed in substance by the following words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act."

(8) If the subject of the gift or transfer is the designation of a minor as beneficiary of a life or endowment insurance policy, an annuity contract, or a benefit plan, by designating as beneficiary of the policy, contract, or plan the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act."

(9) If the subject of the gift or transfer is an irrevocable exercise of a power of appointment in favor of a minor or is an interest in any property that is not described in divisions (A)(1) to (8) of this section, by causing the ownership of the property to be transferred by any written document in the name of the donor or transferor, another person who is eighteen years of age or older, or a trust company, followed, in substance, by the words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act."

(B) Trustees, inter vivos or testamentary, executors, and administrators having authority to distribute or pay any trust or estate property to or for the benefit of a minor, or having authority to distribute or pay any trust or estate property to any other person for the benefit of a minor may, if authorized by a will or trust instrument, distribute or pay trust or estate property of any type mentioned in division (A) of this section in the manner and form provided in that division, and may name the custodian or successor custodian of the property if the will or trust instrument does not name an eligible custodian, or if the will or trust does not name an eligible successor custodian and the naming of a successor custodian is necessary. A person who is eighteen years of age or older, in the person's will or trust instrument, may provide that the fiduciary shall make any payment or distribution as provided in this division and may name the custodian and a successor custodian of the trust or estate property. As to any distribution or payment so made, the testator of a will, under the provisions of which a testamentary trust or estate is being administered, or the settlor of an inter vivos trust shall be deemed the donor or transferor.

(C) Any gift, transfer, payment, or distribution that is made in a manner prescribed in division (A), (B), or (E) of this section may be made to only one minor and only one person may be the custodian. All gifts, transfers, payments, and distributions made by a person in a manner prescribed in sections 5814.01 to 5814.10 of the Revised Code to the same custodian for the benefit of the same minor result in a single custodianship.

(D) A donor or transferor who makes a gift or transfer to a minor in a manner prescribed in division (A) of this section and a trustee, executor, or administrator acting under division (B) or (E) of this section shall promptly do all things within the donor's, transferor's, trustee's, executor's, or administrator's power to put the subject of the gift or transfer in the possession and control of the custodian, but neither the donor's, transferor's, trustee's, executor's, or administrator's failure to comply with this division, nor the designation by the donor, transferor, trustee, executor, or administrator of an ineligible custodian, nor the renunciation by the person or trust company designated as custodian, affects the consummation of the gift or transfer.

(E) If there is no will, or if a will, trust, or other governing instrument does not contain an authorization to make a transfer as described in this division, a trustee, executor, or administrator may make a transfer in a manner prescribed in division (A) of this section to self, another person who is eighteen years of age or older, or a trust company, as custodian, if all of the following apply:

- (1) Irrespective of the value of the property, the trustee, executor, or administrator considers the transfer to be in the best interest of the minor;
- (2) Irrespective of the value of the property, the transfer is not prohibited by or inconsistent with the applicable will, trust agreement, or other governing instrument;
- (3) If the value of the property exceeds ten thousand dollars, the transfer is authorized by the appropriate court.

(F) Except with respect to real property, a donor or transferor who makes a gift or transfer to a minor in a manner prescribed in division (A) of this section and a trustee, executor, or administrator acting under division (B) or (E) of this section may also designate one or more successor custodians, in substance, by adding to such designation the following words or words of similar import for the successor or successors designated: "In the event of the death or inability or unwillingness to serve of(name of custodian), or any successor custodian designated hereby,(name of first successor custodian), followed by (name of second successor custodian), in the order named, shall serve as successor custodian."

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.03 Effect of Gift or Transfer.

(A) A gift or transfer made in a manner prescribed in sections 5814.01 to 5814.10 of the Revised Code, is irrevocable and conveys to the minor indefeasibly vested legal title to the security, money, life or endowment insurance policy, annuity contract, benefit plan, real estate, tangible or intangible personal property, or other property given or, subject to the right of the owner of the policy, contract, or benefit plan to change the beneficiary if the custodian is not the owner, to the proceeds of a life or endowment insurance policy, an annuity contract, or a benefit plan given, but no guardian of the minor has any right, power, duty, or authority with respect to the custodial property except as provided in sections 5814.01 to 5814.10 of the Revised Code.

(B) By making a gift or transfer in a manner prescribed in sections 5814.01 to 5814.10 of the Revised Code, the donor or transferor incorporates in the gift or transfer all the provisions of these sections and grants to the custodian, and to any issuer, transfer agent, financial institution, broker, or third person dealing with a person or trust company designated as custodian, the respective powers, rights, and immunities provided in these sections.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.04 Custodian—Powers and Duties.

(A) The custodian shall collect, hold, manage, invest, and reinvest the custodial property.

(B) The custodian shall pay over to the minor for expenditure by the minor, or expend for the use or benefit of the minor, as much of or all the custodial property as the custodian considers advisable for the use and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in the custodian's discretion considers suitable and proper, with or without court order, with or without regard to the duty or ability of the custodian or of any other person to support the minor or the minor's ability to do so, and with or without regard to any other income or property of the minor that may be applicable or available for any purpose. Any payment or expenditure that is made under this division is in addition to, is not a substitute for, and does not affect the obligation of any person to support the minor for whom the payment or expenditure is made.

(C) The court, on the petition of a parent or guardian of the minor or of the minor, if the minor has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by the minor or to expend as much of or all the custodial property as is necessary for the use and benefit of the minor.

(D)(1) Except as provided in division (D)(2) of this section and in section 5814.09 of the Revised Code, to the extent that the custodial property is not so expended, the custodian shall deliver or pay the custodial property over to the minor on the minor's attaining the age of twenty-one years or, if the minor dies before attaining the age of twenty-one years, shall, upon the minor's death, deliver or pay the custodial property over to the estate of the minor.

(2) If the donor or transferor, in the written instrument that makes or provides for the gift or transfer, directs the custodian to deliver or pay over the custodial property to the minor on the minor's attaining any age between eighteen and twenty-one, the custodian shall deliver or pay over the custodial property to the minor on the minor's attaining that age, or, if the minor dies before attaining that age, the custodian shall, upon the minor's death, deliver or pay the custodial property over to the estate of the minor.

(E) The custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent person of discretion and intelligence dealing with the property of another, except that the custodian may, in the discretion of the custodian and without liability to the minor or the estate of the minor, retain any custodial property received in a manner prescribed in sections 5814.01 to 5814.10 of the Revised Code. If a custodian has special skills or is named custodian on the basis of representations of special skills or expertise, the custodian is under a duty to use those skills or that expertise.

(F) The custodian may sell, exchange, convert, or otherwise dispose of custodial property in the manner, at the time or times, for the price or prices, and upon the terms the custodian considers advisable. The custodian may vote in person or by general or limited proxy a security that is custodial property. The custodian may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of an issuer of a security that is custodial property, and to the sale, lease, pledge, or mortgage of any property by or to such an issuer, and to any other action by such an issuer. The custodian may purchase any life or endowment insurance policy or annuity contract on the life of the minor or any member of the family of the minor and pay, from funds in the custodian's custody, any premiums on any life or endowment insurance policy or annuity contract held by the custodian as custodial property. The custodian may execute and deliver any and all instruments in writing that the custodian considers advisable to carry out any of the custodian's powers as custodian.

(G) The custodian shall register each security that is custodial property and in registered form in the name of the custodian, followed, in substance, by the words: “as custodian for (name of minor) under the Ohio Transfers to Minors Act,” or shall maintain each security that is custodial property and in registered form in an account with a broker or in a financial institution in the name of the custodian, followed, in substance, by the words: “as custodian for (name of minor) under the Ohio Transfers to Minors Act.” A security held in account with a broker or in a financial institution in the name of the custodian may be held in the name of the broker or financial institution. A security that is custodial property and in registered form and that is held by a broker or in a financial institution in which the broker or financial institution does not have a lien for indebtedness due to it from a custodial account may not be pledged, lent, hypothecated, or disposed of except upon the specific instructions of the custodian. The custodian shall hold all money that is custodial property in an account with a broker or in a financial institution in the name of the custodian, followed, in substance, by the words: “as custodian for (name of minor) under the Ohio Transfers to Minors Act.” The custodian shall hold all life or endowment insurance policies, annuity contracts, or benefit plans that are custodial property in the name of the custodian, followed, in substance, by the words “as custodian for (name of minor) under the Ohio Transfers to Minors Act.” The custodian shall take title to all real estate that is custodial property in the name of the custodian, followed, in substance, by the words: “as custodian for (name of minor) under the Ohio Transfers to Minors Act.” In the event one or more successor custodians have been designated by the donor, transferor, trustee, executor, or administrator pursuant to division (F) of section 5814.02 of the Revised Code or by the custodian pursuant to division (E) of section 5814.07 of the Revised Code, each registration, account, policy, contract, plan, or title in the name of the custodian set forth in this division shall include such designation of successor custodian or custodians. The custodian shall keep all other custodial property separate and distinct from the custodian’s own property in a manner to identify it clearly as custodial property.

(H) The custodian shall keep records of all transactions with respect to the custodial property and make the records available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if the minor has attained the age of fourteen years.

(I) A custodian has, with respect to the custodial property, in addition to the rights and powers provided in sections 5814.01 to 5814.10 of the Revised Code, all the rights and powers that a guardian has with respect to property not held as custodial property.

(J) The custodian may invest in or pay premiums on any life or endowment insurance policy or annuity contract on either of the following:

(1) The life of the minor, if the minor or the estate of the minor is the sole beneficiary under the policy or contract;

(2) The life of any person in whom the minor has an insurable interest, if the minor, the minor’s estate, or the custodian in the custodian’s capacity as custodian is the sole beneficiary.

(K) All of the rights, powers, and authority of the custodian over custodial property, including all of the incidents of ownership in any life or endowment insurance policy, annuity contract, or benefit plan, are held only in the capacity of the custodian as custodian.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.05 Fees and Compensation of Custodian.

(A) A custodian is entitled to reimbursement from the custodial property for reasonable expenses incurred in the performance of the custodian's duties.

(B) A custodian may act without compensation for the custodian's services.

(C) Unless the custodian is a donor or transferor, the custodian may receive from custodial property reasonable compensation for the custodian's services determined by one of the following standards in the order stated:

(1) A direction by the donor or transferor when the gift or transfer is made;

(2) A statute of this state applicable to custodians;

(3) The statute of this state applicable to guardians;

(4) An order of the court.

(D) Except as otherwise provided in sections 5814.01 to 5814.10 of the Revised Code, a custodian shall not be required to give a bond for the performance of the custodian's duties.

(E) A custodian not compensated for the custodian's services is not liable for losses to the custodial property unless they result from the custodian's bad faith, intentional wrongdoing, or gross negligence or from the custodian's failure to maintain the standard of prudence in investing the custodial property provided in sections 5814.01 to 5814.10 of the Revised Code.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.06 Responsibility of Issuer, Transfer Agent, Financial Institution, Broker, or Life Insurance Company.

An issuer, transfer agent, financial institution, broker, life insurance company, or other person acting on the instructions of or otherwise dealing with any person purporting to act as a donor or transferor or dealing with any person or trust company purporting to act as a custodian is not required to do any of the following:

(A) Determine either of the following:

(1) Whether the person or trust company designated by the purported donor or transferor, or the person or trust company purporting to act as a custodian, has been duly designated;

(2) Whether any purchase, sale, or transfer to or by, or any other act of, any person or trust company purporting to act as a custodian is in accordance with or authorized by sections 5814.01 to 5814.10 of the Revised Code.

(B) Inquire into the validity or propriety under sections 5814.01 to 5814.10 of the Revised Code of any instrument or instructions executed or given by a person purporting to act as a donor or transferor or by a person or trust company purporting to act as a custodian;

(C) See to the application by any person or trust company purporting to act as a custodian of any money or other property paid or delivered to the person or trust company.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.07 Successor Custodian.

(A) Any person who is eighteen years of age or older or a trust company is eligible to become a successor custodian. A successor custodian has all the rights, powers, duties, and immunities of a custodian designated in a manner prescribed by sections 5814.01 to 5814.10 of the Revised Code.

(B) A custodian may resign and designate the custodian's successor by doing all of the following:

- (1) Executing an instrument of resignation that designates the successor custodian;
- (2) Causing each security that is custodial property and in registered form to be registered in the name of the successor custodian followed, in substance, by the words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act;"
- (3) Executing in the appropriate manner a deed, assignment, or similar instrument for all interest in real estate that is custodial property in the name of the successor custodian, followed, in substance, by the words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act;"
- (4) Delivering to the successor custodian the instrument of resignation, each security registered in the name of the successor custodian, each deed, assignment, or similar instrument for all interest in real estate that is in the name of the successor custodian, and all other custodial property, together with any additional instruments that are required for the transfer of the custodial property.

(C) A custodian may petition the court for permission to resign and for the designation of a successor custodian.

(D) A custodian may designate by the custodian's will a successor custodian, which designation is effective at the custodian's death. Upon the custodian's death, the custodian's legal representative shall do each of the following:

- (1) Cause each security that is custodial property and in registered form to be registered in the name of the successor custodian, followed, in substance, by the words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act";
- (2) Execute in the appropriate manner a deed, assignment, or similar instrument for all interest in real estate that is custodial property in the name of the successor custodian, followed, in substance, by the words: "as custodian for (name of minor) under the Ohio Transfers to Minors Act";
- (3) Deliver to the successor custodian each security registered in the name of the successor custodian, each deed, assignment, or similar instrument for all interest in real estate that is in the name of the successor custodian, and all other custodial property, together with any additional instruments that are required for the transfer of the custodial property.

(E) A custodian may designate one or more successor custodians by transferring the property of any type specified in division (A) of section 5814.02 of the Revised Code, other than real estate, in the manner and form provided in that division, to self as custodian, followed by the designation of the successor custodian or custodians in the manner and form provided in division (F) of section 5814.02 of the Revised Code. A custodian may designate one or more

successor custodians of real property by designating the successor custodian or custodians in the manner and form provided in sections 5302.22 to 5302.23 of the Revised Code. A designation of a successor custodian or custodians by the custodian shall replace any previous designation of successor custodians by the donor, transferor, or previous custodian.

(F) If no eligible successor custodian is designated by the donor, transferor, trustee, executor, or administrator pursuant to division (A) of section 5814.02 of the Revised Code, or in the donor's or transferor's will or trust, or by the custodian in the custodian's will pursuant to division (D) of this section or by transfer pursuant to division (E) of this section, the legal representative of a custodian who is deceased or is adjudged to be an incompetent by a court may designate a successor custodian. If the court in which the estate or guardianship proceedings relative to the custodian are pending approves the designation, the designation shall be regarded as having been effective as of the date of the death of the custodian or as of the date the custodian was adjudged to be an incompetent. Upon the approval of the court, the legal representative of the custodian shall cause the custodial property to be transferred or registered in the name of the successor custodian as provided in divisions (D)(1) to (3) of this section.

(G) If a person or entity designated as successor custodian is not eligible, or renounces or dies before the minor attains the age of twenty-one years or before the minor attains the age at which the custodian is required under section 5814.09 of the Revised Code to deliver the custodial property to the minor, or if the custodian dies without designating a successor custodian and division (F) of this section does not apply because the custodian does not have a legal representative, the guardian of the minor shall be the successor custodian. If the minor does not have a guardian, a donor or transferor, the legal representative of the donor or transferor, the legal representative of the custodian, a member of the minor's family who is eighteen years of age or older, or the minor, if the minor has attained the age of fourteen years, may petition the court for the designation of a successor custodian.

(H) A donor or transferor, the legal representative of a donor or transferor, a member of the minor's family who is eighteen years of age or older, a guardian of the minor, or the minor, if the minor has attained the age of fourteen years, may petition the court that, for cause shown in the petition, the custodian be removed and a successor custodian be designated or, in the alternative, that the custodian be required to give bond for the performance of the custodian's duties.

(I) Upon the filing of a petition as provided in this section, the court shall grant an order, directed to the persons and returnable on any notice that the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, grant any relief that the court finds to be in the best interests of the minor.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.08 Accounting by and Determination of Liability of Custodian.

(A) The minor, if the minor has attained the age of fourteen years, or the legal representative of the minor, a member of the minor's family who is eighteen years of age or older, or a donor or transferor or the donor's or transferor's legal representative may petition the court for an accounting by the custodian or the custodian's legal representative. A successor custodian may petition the court for an accounting by the custodian that the successor custodian succeeded.

(B) The court, in a proceeding under sections 5814.01 to 5814.10 of the Revised Code, or otherwise, may require or permit the custodian or the custodian's legal representative to account and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer of the custodial property.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5814.09 Delayed Time for Delivery of Custodial Property

(A) Subject to the requirements and limitations of this section, the time for delivery to the minor of custodial property transferred under or pursuant to division (A) of section 5814.02 of the Revised Code may be delayed until a specified time after the minor attains the age of twenty-one years, which time shall be specified in the written instrument that makes or provides for the gift or transfer pursuant to divisions (A)(1) to (9) of section 5814.02 of the Revised Code.

(B) To specify a delayed time for delivery to the minor of the custodial property, the words "as custodian for (name of minor) until age (age of delivery of property to minor) under the Ohio Transfers to Minors Act," shall be substituted in substance for the words "as custodian for (name of minor) under the Ohio Transfers to Minors Act."

(C) The time for delivery to the minor of custodial property transferred under a will, trust instrument, or irrevocable exercise of a testamentary power of appointment may be delayed under this section only if the governing will, trust, or exercise of the power of appointment provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time shall not be later than the date the minor attains the age of twenty-five years.

(D) If the custodial property is transferred by inter vivos gift and the time for delivery of the custodial property to the minor is delayed beyond the time the minor attains the age of twenty-one years, the custodian, nevertheless, shall deliver the custodial property to the minor if requested in writing by the minor within sixty days of the minor attaining the age of twenty-one years, unless the donor or transferor, in the written instrument of gift or transfer pursuant to divisions (A)(1) to (9) of section 5814.02 of the Revised Code, provides that the custodial property may not be delivered to the minor prior to attaining the specified age of delivery, which time shall not be later than the date the minor attains the age of twenty-five years.

(E) If the time for delivery to the minor of custodial property is delayed until a specified time after the minor attains the age of twenty-one years and the minor dies prior to attaining that age, the custodian shall, upon the minor's death, deliver the custodial property to the estate of the minor.

(F) A custodian may not commingle the assets of custodial property that have different delivery dates.

History. Added by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017.

Sec. 5814.10 Applicability and Construction.

(A) Sections 5814.01 to 5814.10 of the Revised Code shall be construed to effectuate their general purpose to make uniform the law of those states that enact similar provisions.

(B) Sections 5814.01 to 5814.10 of the Revised Code shall not be construed as providing an exclusive method for making gifts or transfers to minors.

(C) Nothing in sections 5814.01 to 5814.10 of the Revised Code, shall affect gifts made under former sections 1339.19 to 1339.28 of the Revised Code, nor the powers, duties, and immunities conferred by gifts in such manner upon custodians and persons dealing with custodians. Sections 5814.01 to 5814.10 of the Revised Code henceforth apply, however, to all gifts made in a manner and form prescribed in former sections 1339.19 to 1339.28 of the Revised Code, except insofar as the application impairs constitutionally vested rights. Sections 5814.01 to 5814.10 of the Revised Code shall be construed as a continuation of the provisions of former sections 1339.19 to 1339.28 of the Revised Code, according to the language employed, and not as a new enactment.

(D) Nothing in sections 5814.01 to 5814.10 of the Revised Code, as of May 7, 1986, shall affect gifts made under those sections as they existed prior to May 7, 1986, or the powers, duties, and immunities conferred by the gifts in any manner upon custodians and persons dealing with custodians. Sections 5814.01 to 5814.10 of the Revised Code, as of May 7, 1986, hereafter apply to all gifts made in a manner and form prescribed in those sections as they existed prior to May 7, 1986, except to the extent that the application of those sections, as of May 7, 1986, would impair constitutionally vested rights.

History. Renumbered from § 5814.09 and amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Chapter 5815 Miscellaneous Provisions

Section

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Sec. 5815.01 Inheritance and Bequest Defined.

Except when the intent of the settlor clearly is to the contrary, the following rules of construction shall apply in interpreting the terms "inheritance" and "bequest":

(A) The term "inheritance," in addition to its meaning at common law or under any other section or sections of the Revised Code, includes any change of title to real property by reason of the death of the owner of that real property, regardless of whether the owner died testate or intestate.

(B) The term "bequest," in addition to its meaning at common law or under any other section or sections of the Revised Code, includes any disposition of real property that occurs as a result of the death of the settlor.

History. Effective Date 01-01-2007.

Sec. 5815.02 Issuers of Securities and Holders of Record.

As used in sections 5815.02 and 5815.03 of the Revised Code:

(A) "Fiduciary" includes a trustee under any trust, expressed, implied, resulting, or constructive; an executor, administrator, public administrator, guardian, committee, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a public or private corporation, or public officer; or any other person acting in a fiduciary capacity for any person, trust, or estate.

(B) "Good faith" includes an act done honestly, whether it is done negligently or not.

(C) "Issuer" includes domestic corporations, companies, associations, and trusts; foreign corporations, companies, associations, and trusts, to the extent that securities issued by them are held of record by persons in this state or are held on deposit in this state, and to the extent that such foreign corporation, company, association, or trust is a holder of record of, or otherwise interested in, securities of domestic corporations, companies, associations, or trusts; and also the transfer agents and registrars of the issuer and the depositories for its securities.

(D) "Person" includes a corporation, partnership, association, or two or more persons having a joint or common interest.

(E) "Securities" includes the items in the following enumeration, which, however, is not exclusive:

(1) Shares, share certificates, and other certificates and evidences of ownership or participation in property, assets, or trust estate; bonds, notes, debentures, certificates, or evidences of indebtedness, certificates of interest or participation, collateral trust certificates, equipment-trust certificates, preorganization or subscription certificates or receipts, and voting-trust certificates; passbooks or certificates of deposit of money, securities, or other property; scrip certificates, fractional interests certificates, and, in general, interests or instruments commonly known as securities, and certificates of interest or participation in, temporary or interim certificates or receipts for, or warrants or rights to subscribe to, purchase, or receive, any of the foregoing, whether such securities were issued by the issuer in its corporate capacity, in its individual capacity, or in a fiduciary capacity;

(2) Securities that were issued originally by other corporations, companies, associations, or trusts, but have become the securities of the present issuer, individually or as a fiduciary.

History. Effective Date 01-01-2007.

Sec. 5815.03 Issuer of Securities May Treat Holders of Record as Competent.

Unless there has been delivered to an issuer a certified copy of an order, judgment, or decree of a court, judge, or administrative body or official, the legal effect of which is to restrict, suspend, or remove such capacity or authority, the issuer may treat all persons in whose names its securities are of record on its records as being of full age and competent and as having capacity and authority to exercise all rights of ownership in respect of the securities, including the right to receive and to give receipts for payments and distributions, the right to transfer the securities, and the right to vote or to give consent in person or by proxy, notwithstanding any description, limitation, or qualification appearing on the securities or on the records, any reference thereon to another instrument or to any fiduciary or pledgee or other relationship, or any knowledge or notice, actual or constructive, of the right, interest, or claim of any other person or of the infancy or lack of capacity or authority of the persons in whose names the securities are of record.

The issuer may treat a fiduciary as having capacity and authority to exercise all rights of ownership in respect of the securities that are of record in the name of a decedent holder, of a person in conservation, receivership, or bankruptcy, or of a minor, incompetent person, or person under disability, and the issuer shall be protected in any action taken or suffered by it in reliance upon any instrument showing the appointment of the fiduciary.

The issuer is not liable for loss caused by any act done or omitted by it under this section. The issuer need not see to the execution of any trust, or to the observance or performance of any obligation of a holder of record, a fiduciary, or a pledgee of the securities, and it need not inquire or inform itself concerning those matters.

This section does not enlarge the capacity, right, or authority of any holder of record of the securities as against any person other than the issuer, nor prevent any court of competent jurisdiction from enforcing or protecting any right, title, or interest in the securities in any person who is not a holder of record the securities.

This section does not protect any issuer who participates with a fiduciary in a breach of the fiduciary's trust with knowledge of such facts that the action of the issuer amounts to bad faith.

History. Effective Date 01-01-2007.

Sec. 5815.04 Uniform Fiduciary Act Definitions.

As used in sections 5815.04 to 5815.11 of the Revised Code:

(A) "Bank" includes any person, carrying on the business of banking and any financial institution defined in section 5725.01 of the Revised Code.

(B) "Fiduciary" includes a trustee under any trust, expressed, implied, resulting, or constructive, an executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust, or estate.

(C) "Person" includes a corporation, partnership, association, or two or more persons having a joint or common interest.

(D) "Principal" includes any person to whom a fiduciary as such owes an obligation.

(E) "Good faith" includes an act when it is in fact done honestly.

History. Effective Date 01-01-2007.

Sec. 5815.05 Transferee Not Responsible for Proper Application of Money.

A person who in good faith pays or transfers to a fiduciary any money or other property that the fiduciary as such is authorized to receive is not responsible for the proper application of the money or other property by the fiduciary. Any right or title acquired from the fiduciary in consideration of the payment or transfer is not invalid because of a misapplication by the fiduciary.

History. Effective Date 01-01-2007.

Sec. 5815.06 Deposit in Name of Fiduciary as Such—Liability of Bank.

If a deposit is made in a bank to the credit of a fiduciary as such, the bank may pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which the deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of the obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

If such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of the obligation as fiduciary in drawing or delivering the check.

History. Effective Date 01-01-2007.

Sec. 5815.07 Check Drawn by Fiduciary upon Account of His Principal—Liability of Bank.

If a check is drawn upon the principal's account by a fiduciary who is empowered to do so, the bank may pay the check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of the obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

If such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of the obligation as fiduciary in drawing or delivering the check.

History. Effective Date 01-01-2007.

Sec. 5815.08 Deposit to Personal Credit of Fiduciary.

If a fiduciary makes a deposit in a bank to the fiduciary's personal credit of checks drawn by the fiduciary upon an account in the fiduciary's own name as fiduciary, checks payable to the fiduciary as fiduciary, checks drawn by the fiduciary upon an account in the name of the principal if the fiduciary is empowered to draw checks thereon, checks payable to the principal and indorsed by the fiduciary if the fiduciary is empowered to indorse the checks, or if the fiduciary otherwise makes a deposit of funds held by the fiduciary as fiduciary, the bank receiving the deposit is not bound to inquire whether the fiduciary is committing a breach of the obligation as fiduciary.

The bank may pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of the obligation as fiduciary in making the deposit or in drawing the check, or with knowledge of such facts that the action of the bank in receiving the deposit or paying the check amounts to bad faith.

History. Effective Date 01-01-2007.

Sec. 5815.09 Deposit in Name of Two or More Trustees—Checks.

When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee authorized to do so by the other, neither the payee or other holder nor the bank is bound to inquire whether it is a breach of trust to authorize the trustee to draw checks upon the trust account and neither is liable unless the circumstances are such that the action of the payee or other holder or the bank amounts to bad faith.

History. Effective Date 01-01-2007.

Sec. 5815.10 Interpretation and Construction.

Sections 5815.04 to 5815.11 of the Revised Code shall be construed to effectuate their general purpose of making the law of this state uniform with the law of those states that enact similar legislation.

History. Effective Date 01-01-2007.

Sec. 5815.11 Rules of Law and Equity Applicable.

In any case not provided for in sections 5815.04 to 5815.11 of the Revised Code, the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments, and banking apply.

History. Effective Date 01-01-2007.

Sec. 5815.12 Power of Appointment Defined.

As used in sections 5815.13, 5815.14, and 5815.15 of the Revised Code, “power of appointment” means any power that is in effect a power to appoint, however created, regardless of the nomenclature used in creating the power and regardless of connotations under the law of property, trusts, or wills. The power includes but is not limited to powers which are special, general, limited, absolute, in gross, appendant, appurtenant, or collateral.

History. Effective Date 01-01-2007.

Sec. 5815.13 Exercising Power of Appointment.

Any power of appointment that is not subject to an express condition that it may be exercised only by a donee or holder of a greater age may be exercised by any donee or holder of the age of eighteen years or over.

History. Effective Date 01-01-2007.

Sec. 5815.14 Release and Disclaimer of a Power.

Any power of appointment may be released in whole or in part by the donee or holder of the power by an instrument in writing, signed and acknowledged in the manner prescribed for the execution of deeds. No such release is ineffective because it was given either for or without consideration, because it was signed and acknowledged before June 3, 1943, or because no delivery is made of a copy of the release as provided for in section 5815.15 of the Revised Code.

Sections 5815.14 and 5815.15 of the Revised Code do not affect the validity of a release of a power of appointment effected in any other form or manner.

A donee or holder of a power of appointment may disclaim the same at any time, wholly or in part, in the same manner and to the same extent as the donee or holder of the power might release it.

History. Effective Date 01-01-2007.

Sec. 5815.15 Notice of Release.

No fiduciary or other person having the possession or control of any property subject to a power of appointment, other than the donee or holder of such power, has notice of a release of the power until a copy of the release is delivered to the fiduciary or other person having possession or control.

No purchaser or mortgagee of real property subject to a power of appointment has notice of a release of the power until a copy of the release is delivered to the officer charged by law with the recording of deeds in the county in which the property is situated. If the property is in this state, the county recorder to whom a release is delivered shall record the release in the official records, and shall charge a fee computed in the same manner as the fee charged for recording deeds.

History. Amended by 130th General Assembly File No. 41, HB 72, § 1, eff. 1/30/2014. Effective Date 01-01-2007.

Sec. 5815.16 Duty of Attorney to Third Parties.

(A) Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.

(B) Any communication between an attorney and a client who is acting as a fiduciary is privileged and protected from disclosure to third parties to whom the fiduciary owes fiduciary duties to the same extent as if the client was not acting as a fiduciary.

(C) As used in this section, "fiduciary" means a trustee under an express trust or an executor or administrator of a decedent's estate.

History. Amended by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019. Effective Date 01-01-2007.

Sec. 5815.21 Federal Estate Tax Marital Deduction Distributions.

Whenever the executor of a will or the trustee of a testamentary or inter vivos trust is permitted or required to select assets in kind to satisfy a gift, devise, or bequest, whether outright or in trust, intended to qualify for the federal estate tax marital deduction prescribed by the United States "Internal Revenue Code of 1954," 68A Stat. 392, 26 U.S.C.A. 2056, or any comparable federal statute enacted after July 20, 1965, and the will or trust instrument empowers or requires the fiduciary to satisfy such gift, devise, or bequest by allocating assets thereto at any values other than market values at the date of satisfaction of such gift, devise, or bequest, the executor or trustee shall satisfy such gift, devise, or bequest by distribution of assets having a value fairly representative in the aggregate of appreciation or depreciation in the value of all property, including cash, available for distribution in satisfaction of such gift, devise, or bequest, unless the will or trust instrument expressly requires that distribution be made in a manner so as not to be fairly representative of such appreciation or depreciation.

History. Effective Date 01-01-2007.

Sec. 5815.22 Spendthrift Provisions.

(A)(1) Except as provided in divisions (A)(2), (3), and (4) of this section, a spendthrift provision in an instrument that creates an inter vivos or testamentary trust shall not cause any forfeiture or postponement of any interest in property that satisfies both of the following:

(a) It is granted to a surviving spouse of the testator or other settlor.

(b) It qualifies for the federal estate tax marital deduction allowed by Subtitle B, Chapter 11, of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2056, as amended, the estate tax marital deduction allowed by division (A) of section 5731.15 of the Revised Code, or the qualified terminable interest property deduction allowed by division (B) of section 5731.15 of the Revised Code.

(2) Division (A)(1) of this section does not apply if an instrument that creates an inter vivos or testamentary trust expressly states the intention of the testator or other settlor that obtaining a marital deduction or a qualified terminable interest property deduction as described in division (A)(1)(b) of this section is less important than enforcing the forfeiture or postponement of the interest in property in accordance with the spendthrift provision in the instrument.

(3) Division (A)(1) of this section applies only to the forfeiture or postponement portions of a spendthrift provision and does not apply to any portion of a spendthrift provision that prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate.

(4) Division (A)(1) of this section does not apply to any beneficiary of an inter vivos or testamentary trust other than the surviving spouse of the testator or other settlor or to any inter vivos or testamentary trust of which the surviving spouse of the testator or other settlor is a beneficiary if an interest in property does not qualify for a marital deduction or a qualified terminable interest property deduction as described in division (A)(1)(b) of this section.

(B)(1) Except as provided in divisions (B)(2) and (3) of this section, if an instrument creating an inter vivos or testamentary trust includes a spendthrift provision and the trust holds shares in an S corporation, the spendthrift provision shall not cause any forfeiture or postponement of any beneficial interest, income, principal, or other interest in the shares of the S corporation held by the trust. For purposes of division (B)(1) of this section, "S corporation" has the same meaning as in section 1361 of the "Internal Revenue Code of 1986," 26 U.S.C. 1361.

(2) Division (B)(1) of this section does not apply if an instrument that creates an inter vivos or testamentary trust expressly states the intention of the testator or other settlor that maintenance of the corporation's status as an S corporation is less important than enforcing the forfeiture or postponement of any beneficial interest, income, principal, or other interest in the S corporation shares in accordance with the spendthrift provision in the instrument.

(3) Division (B)(1) of this section applies only to the forfeiture or postponement portions of a spendthrift provision and does not apply to any portion of a spendthrift provision that prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate.

(C)(1) Except as provided in divisions (C)(2) and (3) of this section, a spendthrift provision in an instrument that creates an inter vivos or testamentary trust shall not cause any forfeiture or postponement of any interest in property that satisfies both of the following:

(a) It is granted to a person who is a skip person under the federal generation-skipping transfer tax imposed by Subtitle B, Chapter 13, of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2601-2663, as amended.

(b) It qualifies as a nontaxable gift under section 2642(c) of the "Internal Revenue Code of 1986," 26 U.S.C.A. 2642(c).

(2) Division (C)(1) of this section does not apply if an instrument that creates an inter vivos or testamentary trust expressly states the intention of the testator or other settlor that qualifying as a nontaxable trust gift as described in division (C)(1)(b) of this section is less important than enforcing the forfeiture or postponement of the interest in property in accordance with the spendthrift provision in the instrument.

(3) Division (C)(1) of this section applies only to the forfeiture or postponement portions of a spendthrift provision and does not apply to any portion of a spendthrift provision that prohibits a beneficiary from assigning, alienating, or otherwise disposing of any beneficial interest in a trust or prohibits a creditor of a beneficiary from attaching or otherwise encumbering the trust estate.

(D) Divisions (A), (B), and (C) of this section are intended to codify certain fiduciary and trust law principles relating to the interpretation of a testator's or other settlor's intent with respect to the provisions of a trust. Divisions (A), (B), and (C) of this section apply to trust instruments executed prior to and existing on August 29, 2000, and to trust instruments executed on or after August 29, 2000.

History. Effective Date 01-01-2007.

Sec. 5815.23 Effect of Requiring or Permitting Accumulation for More Than One Year of Any Income of Property.

(A) Except as provided in division (B) of this section, an instrument that creates an inter vivos or testamentary trust shall not require or permit the accumulation for more than one year of any income of property that satisfies both of the following:

(1) The property is granted to a surviving spouse of the testator or other settlor.

(2) The property qualifies for the federal estate tax marital deduction allowed by subtitle B, Chapter 11 of the "Internal Revenue Code of 1986," 26 U.S.C. 2056, as amended, the estate tax marital deduction allowed by division (A) of section 5731.15 of the Revised Code, or the qualified terminable interest property deduction allowed by division (B) of section 5731.15 of the Revised Code.

(B)(1) Division (A) of this section does not apply if an instrument that creates an inter vivos or testamentary trust expressly states the intention of the testator or other settlor that obtaining a marital deduction or a qualified terminable interest property deduction as described in division (A)(2) of this section is less important than requiring or permitting the accumulation of income of property in accordance with a provision in the instrument that requires or permits the accumulation for more than one year of any income of property.

(2) Division (A) of this section does not apply to any beneficiary of an inter vivos or testamentary trust other than the surviving spouse of the testator or other settlor or to any inter vivos or testamentary trust of which the surviving spouse of the testator or other settlor is a beneficiary if an interest in property does not qualify for a marital deduction or a qualified terminable interest property deduction as described in division (A)(2) of this section.

(C) Divisions (A) and (B) of this section are intended to codify existing fiduciary and trust law principles relating to the interpretation of a testator's or other settlor's intent with respect to the income provisions of a trust. Divisions (A) and (B) of this section apply to trust instruments executed prior to and existing on October 1, 1996, or executed thereafter. The trustee of a trust described in division (A) or (B) of this section, in a written trust amendment, may elect to not apply divisions (A) and (B) of this section to the trust. Any election of that nature, when made, is irrevocable.

History. Amended by 131st General Assembly File No. TBD, HB 432, § 1, eff. 4/6/2017. Effective Date 01-01-2007.

Sec. 5815.24 Limitations on Liability.

(A) As used in this section, "fiduciary" means a trustee under any expressed, implied, resulting, or constructive trust; an executor, administrator, public administrator, committee, guardian, conservator, curator, receiver, trustee in bankruptcy, or assignee for the benefit of creditors; a partner, agent, officer of a public or private corporation, or public officer; or any other person acting in a fiduciary capacity for any person, trust, or estate.

(B) A fiduciary, or a custodian, who is a transferee of real or personal property that is held by a fiduciary other than the person or entity serving as the transferee, is not required to inquire into any act, or audit any account, of the transferor fiduciary, unless the transferee is specifically directed to do so in the instrument governing the transferee or unless the transferee has actual knowledge of conduct of the transferor that would constitute a breach of the transferor's fiduciary responsibilities.

(C) If a trustee is authorized or directed in a trust instrument to pay or advance all or any part of the trust property to the personal representative of a decedent's estate for the payment of the decedent's legal obligations, death taxes, bequests, or expenses of administration, the trustee is not liable for the application of the trust property paid or advanced to the personal representative and is not liable for any act or omission of the personal representative with respect to the trust property, unless the trustee has actual knowledge, prior to the payment or advancement of the trust property, that the personal representative does not intend to use the trust property for such purposes.

(D) Regardless of whether a beneficiary is subject to the claims of any creditor, a trustee may pay any expense incurred by a beneficiary to the extent that payment is permitted by the instrument governing the trust, and the trustee may make those payments even if the payments exhaust the income and principal of the trust. A trustee is not liable to any creditor of a beneficiary for paying the expenses of a beneficiary as allowed by this division.

History. Amended by 129th General Assembly File No. 201, HB 479, § 1, eff. 3/27/2013. Effective date: 01-01-2007.

Sec. 5815.25 Administrative Duties and Responsibilities of Trust; Exclusion of Fiduciaries.

(A) As used in this section, “fiduciary” means a trustee under any testamentary, inter vivos, or other trust, an executor or administrator, or any other person who is acting in a fiduciary capacity for any person, trust, or estate.

(B) If an instrument or other applicable written agreement describes, appoints, or directs a fiduciary to handle only the administrative duties and responsibilities of a trust, that administrative fiduciary shall not have any duties, responsibilities, or liabilities to the trust beneficiaries or to other persons interested in a trust except for those administrative duties and responsibilities specifically described in the instrument or written agreement. The administrative duties and responsibilities of a trust under this division may include any of the following:

- (1) Opening and maintaining bank, brokerage, financial, or other custodial accounts to receive trust income or contributions and from which trust expenditures, bills, and distributions may be disbursed;
- (2) Maintaining and handling trust records, reports, correspondence, or communications;
- (3) Maintaining an office for trust business;
- (4) Filing any trust tax returns;
- (5) Employing agents in connection with the fiduciary’s administrative duties;
- (6) Taking custody of or storing trust property;
- (7) Any other similar administrative duties for the trust.

(C) If an instrument under which a fiduciary acts reserves to the grantor, or vests in an advisory or investment committee or in one or more other persons, including one or more fiduciaries, to the exclusion of the fiduciary or of one or more of several fiduciaries, any power, including, but not limited to, the authority to direct the acquisition, disposition, or retention of any investment or the power to authorize any act that an excluded fiduciary may propose, any excluded fiduciary is not liable, either individually or as a fiduciary, for either of the following:

- (1) Any loss that results from compliance with an authorized direction of the grantor, committee, person, or persons;
- (2) Any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the grantor, committee, person, or persons if that excluded fiduciary timely sought but failed to obtain that authorization.

(D) Any administrative fiduciary as described in division (B) of this section or any excluded fiduciary as described in division (C) of this section is relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the grantor, an advisory or investment committee, or one or more other persons have authority to direct the acquisition, disposition, or retention of any investment.

(E) This section does not apply to the extent that the instrument under which an administrative fiduciary as described in division (B) of this section or an excluded fiduciary as described in division (C) of this section contains provisions that are inconsistent with this section.

History. Amended by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013. Effective date: 01-01-2007.

Sec. 5815.26 Holding Cash or Making Temporary Investments.

(A) As used in this section:

(1) "Fiduciary" means a trustee under any testamentary, inter vivos, or other trust, an executor or administrator, or any other person who is acting in a fiduciary capacity for a person, trust, or estate.

(2) "Short term trust-quality investment fund" means a short term investment fund that meets both of the following conditions:

(a) The fund may be either a collective investment fund established pursuant to section 1111.14 of the Revised Code or a registered investment company, including any affiliated investment company whether or not the fiduciary has invested other funds held by it in an agency or other nonfiduciary capacity in the securities of the same registered investment company or affiliated investment company.

(b) The fund is invested in any one or more of the following manners:

(i) In obligations of the United States or of its agencies;

(ii) In obligations of one or more of the states of the United States or their political subdivisions;

(iii) In variable demand notes, corporate money market instruments including, but not limited to, commercial paper rated at the time of purchase in either of the two highest classifications established by at least one nationally recognized standard rating service;

(iv) In deposits in banks or savings and loan associations whose deposits are insured by the federal deposit insurance corporation, if the rate of interest paid on such deposits is at least equal to the rate of interest generally paid by such banks or savings and loan associations on deposits of similar terms or amounts;

(v) In fully collateralized repurchase agreements or other evidences of indebtedness that are of trust quality and are payable on demand or have a maturity date consistent with the purpose of the fund and the duty of fiduciary prudence.

(3) "Registered investment company" means any investment company that is defined in and registered under sections 3 and 8 of the "Investment Company Act of 1940," 54 Stat. 789, 15 U.S.C.A. 80a-3 and 80a-8.

(4) "Affiliated investment company" has the same meaning as in division (E)(1) of section 1111.10 of the Revised Code.

(B) A fiduciary is not required to invest cash that belongs to the trust and may hold that cash for the period prior to distribution if either of the following applies:

(1) The fiduciary reasonably expects to do either of the following:

(a) Distribute the cash to beneficiaries of the trust on a quarterly or more frequent basis;

(b) Use the cash for the payment of debts, taxes, or expenses of administration within the ninety-day period following the receipt of the cash by the fiduciary.

(2) Determined on the basis of the facilities available to the fiduciary and the amount of the income that reasonably could be earned by the investment of the cash, the amount of the cash does not justify the administrative burden or expense associated with its investment.

(C) If a fiduciary wishes to hold funds that belong to the trust in liquid form and division (B) of this section does not apply, the fiduciary may so hold the funds as long as they are temporarily invested as described in division (D) of this section.

(D)(1) A fiduciary may make a temporary investment of cash that may be held uninvested in accordance with division (B) of this section, and shall make a temporary investment of funds held in liquid form pursuant to division (C) of this section, in any of the following investments, unless the governing instrument provides for other investments in which the temporary investment of cash or funds is permitted:

(a) A short term trust-quality investment fund;

(b) Direct obligations of the United States or of its agencies;

(c) A deposit with a bank or savings and loan association, including a deposit with the fiduciary itself or any bank subsidiary corporation owned or controlled by the bank holding company that owns or controls the fiduciary, whose deposits are insured by the federal deposit insurance corporation, if the rate of interest paid on that deposit is at least equal to the rate of interest generally paid by that bank or savings and loan association on deposits of similar terms or amounts.

(2) A fiduciary that makes a temporary investment of cash or funds pursuant to division (D)(1) of this section may charge a reasonable fee for the services associated with that investment. The fee shall be in addition to the compensation to which the fiduciary is entitled for his ordinary fiduciary services.

(3) Fiduciaries that make one or more temporary investments of cash or funds pursuant to division (D)(1) of this section shall provide to the beneficiaries of the trusts involved, that are currently receiving income or have a right to receive income, a written disclosure of their temporary investment practices and, if applicable, the method of computing reasonable fees for their temporary investment services pursuant to division (D)(2) of this section. Fiduciaries may comply with this requirement in any appropriate written document, including, but not limited to, any periodic statement or account.

(4) A fiduciary that makes a temporary investment of cash or funds in an affiliated investment company pursuant to division (D)(1)(a) of this section shall, when providing any periodic account statements of its temporary investment practices, report the net asset value of the shares comprising the investment in the affiliated investment company.

(5) If a fiduciary that makes a temporary investment of cash or funds in an affiliated investment company pursuant to division (D)(1)(a) of this section invests in any mutual fund, the fiduciary shall provide to the beneficiaries of the trust involved, that are currently receiving income or have a right to receive income, a written disclosure, in at least ten-point boldface type, that the mutual fund is not insured or guaranteed by the federal deposit insurance corporation or by any other government agency or government-sponsored agency of the federal government or of this state.

History. Effective Date 01-01-2007.

Sec. 5815.27 Application of Generation-Skipping Transfer Tax Provisions.

(A) A provision in a will or trust agreement, which provision pertains to the payment of any taxes that are imposed by reason of the testator's or trust creator's death, does not include the payment of any portion of any tax that is imposed on any transfer under any other will or trust agreement by Chapter 13 of subtitle B of the "Internal Revenue Code of 1986," 100 Stat. 2718, 26 U.S.C. 2601-2624, as amended, unless the provision of the will or trust agreement specifically states, using the words "generation-skipping transfer tax," that the payment of the tax imposed under that chapter is included within the provision of the will or trust agreement.

(B) This section applies to wills and trust agreements that are executed before or after March 14, 1979.

History. Effective Date 01-01-2007.

Sec. 5815.28 Supplemental Services for Beneficiary with Physical or Mental Disability.

(A) As used in this section:

(1) "Ascertainable standard" includes a standard in a trust instrument requiring the trustee to provide for the care, comfort, maintenance, welfare, education, or general well-being of the beneficiary.

(2) "Disability" means any substantial, medically determinable impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of at least twelve months, except that "disability" does not include an impairment that is the result of abuse of alcohol or drugs.

(3) "Political subdivision" and "state" have the same meanings as in section 2744.01 of the Revised Code.

(4) "Supplemental services" means services specified by rule of the department of mental health and addiction services under section 5119.10 of the Revised Code or the department of developmental disabilities under section 5123.04 of the Revised Code that are provided to an individual with a disability in addition to services the individual is eligible to receive under programs authorized by federal or state law.

(B) Any person may create a trust under this section to provide funding for supplemental services for the benefit of another individual who meets either of the following conditions:

(1) The individual has a physical or mental disability and is eligible to receive services through the department of developmental disabilities or a county board of developmental disabilities;

(2) The individual has a mental disability and is eligible to receive services through the department of mental health and addiction services or a board of alcohol, drug addiction, and mental health services.

The trust may confer discretion upon the trustee and may contain specific instructions or conditions governing the exercise of the discretion.

(C) The general division of the court of common pleas and the probate court of the county in which the beneficiary of a trust authorized by division (B) of this section resides or is confined have concurrent original jurisdiction to hear and determine actions pertaining to the trust. In any action pertaining to the trust in a court of common pleas or probate court and in any appeal of the action, all of the following apply to the trial or appellate court:

(1) The court shall render determinations consistent with the testator's or other settlor's intent in creating the trust, as evidenced by the terms of the trust instrument.

(2) The court may order the trustee to exercise discretion that the trust instrument confers upon the trustee only if the instrument contains specific instructions or conditions governing the exercise of that discretion and the trustee has failed to comply with the instructions or conditions. In issuing an order pursuant to this division, the court shall require the trustee to exercise the trustee's discretion only in accordance with the instructions or conditions.

(3) The court may order the trustee to maintain the trust and distribute assets in accordance with rules adopted by the director of mental health and addiction services under section 5119.10 of the Revised Code or the director of developmental disabilities under section 5123.04 of the Revised Code if the trustee has failed to comply with such rules.

(D) To the extent permitted by federal law and subject to the provisions of division (C)(2) of this section pertaining to the enforcement of specific instructions or conditions governing a trustee's discretion, a trust authorized by division (B) of this section that confers discretion upon the trustee shall not be considered an asset or resource of the beneficiary, the beneficiary's estate, the settlor, or the settlor's estate and shall be exempt from the claims of creditors, political subdivisions, the state, other governmental entities, and other claimants against the beneficiary, the beneficiary's estate, the settlor, or the settlor's estate, including claims regarding the Medicaid program or based on provisions of Chapters 5121. or 5123. of the Revised Code and claims sought to be satisfied by way of a civil action, subrogation, execution, garnishment, attachment, judicial sale, or other legal process, if all of the following apply:

(1) At the time the trust is created, the trust principal does not exceed the maximum amount determined under division (E) of this section;

(2) The trust instrument contains a statement of the settlor's intent, or otherwise clearly evidences the settlor's intent, that the beneficiary does not have authority to compel the trustee under any circumstances to furnish the beneficiary with minimal or other maintenance or support, to make payments from the principal of the trust or from the income derived from the principal, or to convert any portion of the principal into cash, whether pursuant to an ascertainable standard specified in the instrument or otherwise;

(3) The trust instrument provides that trust assets can be used only to provide supplemental services, as defined by rule of the director of mental health and addiction services under section 5119.10 of the Revised Code or the director of developmental disabilities under section 5123.04 of the Revised Code, to the beneficiary;

(4) The trust is maintained and assets are distributed in accordance with rules adopted by the director of mental health under section 5119.01 of the Revised Code or the director of developmental disabilities under section 5123.04 of the Revised Code;

(5) The trust instrument provides that on the death of the beneficiary, a portion of the remaining assets of the trust, which shall be not less than fifty per cent of such assets, will be deposited to the credit of the services fund for individuals with mental illness created by section 5119.51 of the Revised Code or the services fund for individuals with developmental disabilities created by section 5123.40 of the Revised Code.

(E) In 1994, the trust principal maximum amount for a trust created under this section shall be two hundred thousand dollars. The maximum amount for a trust created under this section prior to November 11, 1994, may be increased to two hundred thousand dollars.

In 1995, the maximum amount for a trust created under this section shall be two hundred two thousand dollars. Each year thereafter, the maximum amount shall be the prior year's amount plus two thousand dollars.

(F) This section does not limit or otherwise affect the creation, validity, interpretation, or effect of any trust that is not created under this section.

(G) Once a trustee takes action on a trust created by a settlor under this section and disburses trust funds on behalf of the beneficiary of the trust, then the trust may not be terminated or otherwise revoked by a particular event or otherwise without payment into the services fund created pursuant to section 5119.51 or 5123.40 of the Revised Code of an amount that is equal to the disbursements made on behalf of the beneficiary for medical care by the state from the date the trust vests but that is not more than fifty per cent of the trust corpus.

History. Amended by 131st General Assembly File No. TBD, HB 158, § 1, eff. 10/12/2016. Amended by 130th General Assembly File No. 25, HB 59, § 101.01, eff. 9/29/2013. Amended by 128th General Assembly ch. 201, SB 79, § 1, eff. 10/06/2009. Effective date 01-01-2007.

Sec. 5815.31 Termination of Marriage Revokes Any Trust Provision Conferring a Beneficial Interest or a Power or Nomination.

Unless the trust or separation agreement provides otherwise, if, after executing a trust in which the grantor reserves to self a power to alter, amend, revoke, or terminate the provisions of the trust, a grantor is divorced, obtains a dissolution of marriage, has the grantor's marriage annulled, or, upon actual separation from the grantor's spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, the spouse or former spouse of the grantor shall be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall be revoked. If the grantor remarries the grantor's former spouse or if the separation agreement is terminated, the spouse shall not be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall not be revoked.

History. Amended by 128th General Assembly File No. 13, SB106, § 1, eff. 03-23-2010. Effective date 01-01-2007.

Sec. 5815.32 Revocation of Power of Attorney upon Termination of Marriage or Entering Separation Agreement.

If a principal executes a power of attorney designating the principal's spouse as the attorney in fact for the principal and if after executing the power of attorney, the principal and the principal's spouse are divorced, obtain a dissolution or annulment of their marriage, or enter into a separation agreement pursuant to which they intend to fully and finally settle each spouse's prospective property rights in the property of the other, the designation in the power

of attorney of the spouse or former spouse of the principal to act as attorney in fact for the principal is revoked, unless the power of attorney provides otherwise. The subsequent remarriage of the principal to the principal's former spouse, or the termination of a separation agreement between the principal and the principal's spouse, does not revive a power of attorney that is revoked under this section.

History. Effective Date 01-01-2007.

Sec. 5815.33 Termination of Marriage Revokes Designation of Spouse as Beneficiary.

(A) As used in this section:

(1) "Beneficiary" means a beneficiary of a life insurance policy, an annuity, a payable on death account, an individual retirement plan, an employer death benefit plan, or another right to death benefits arising under a contract.

(2) "Employer death benefit plan" means any funded or unfunded plan or program, or any fund, that is established to provide the beneficiaries of an employee participating in the plan, program, or fund with benefits that may be payable upon the death of that employee.

(3) "Individual retirement plan" means an individual retirement account or individual retirement annuity as defined in section 408 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 408, as amended.

(B)(1) Unless the designation of beneficiary or the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, and subject to division (B)(2) of this section, if a spouse designates the other spouse as a beneficiary or if another person having the right to designate a beneficiary on behalf of the spouse designates the other spouse as a beneficiary, and if, after either type of designation, the spouse who made the designation or on whose behalf the designation was made, is divorced from the other spouse, obtains a dissolution of marriage, or has the marriage to the other spouse annulled, then the other spouse shall be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is revoked as a result of the divorce, dissolution of marriage, or annulment.

(2) If the spouse who made the designation or on whose behalf the designation was made remarries the other spouse, then, unless the designation no longer can be made, the other spouse shall not be deemed to have predeceased the spouse who made the designation or on whose behalf the designation was made, and the designation of the other spouse as a beneficiary is not revoked because of the previous divorce, dissolution of marriage, or annulment.

(C) An agent, bank, broker, custodian, issuer, life insurance company, plan administrator, savings and loan association, transfer agent, trustee, or other person is not liable in damages or otherwise in a civil or criminal action or proceeding for distributing or disposing of property in reliance on and in accordance with a designation of beneficiary as described in division (B)(1) of this section, if both of the following apply:

(1) The distribution or disposition otherwise is proper;

(2) The agent, bank, broker, custodian, issuer, life insurance company, plan administrator, savings and loan association, transfer agent, trustee, or other person did not have any notice of the facts that resulted in the revocation of the beneficiary designation by operation of division (B)(1) of this section.

History. Effective date: 01-01-2007.

Sec. 5815.34 Termination of Marriage Affects Survivorship Rights.

(A)(1) Unless the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, and subject to division (A)(2) of this section, if the title to any personal property is held by two persons who are married to each other, if the title is so held for the joint lives of the spouses and then to the survivor of them, and if the marriage of the spouses subsequently is terminated by a judgment or decree granting a divorce, dissolution of marriage, or annulment, then the survivorship rights of the spouses terminate, and each spouse shall be deemed the owner of an undivided interest in common in the title to the personal property, that is in proportion to the spouse's net contributions to the personal property.

(2) If the spouses described in division (A)(1) of this section remarry each other and the title to the personal property continues to be held by them in accordance with that division, then the survivorship rights of the spouses are not terminated, and the spouses again hold title in the personal property for their joint lives and then to the survivor of them.

(B)(1) Unless the judgment or decree granting the divorce, dissolution of marriage, or annulment specifically provides otherwise, and subject to division (B)(2) of this section, if the title to any personal property is held by more than two persons and at least two of the persons are married to each other, if the title is so held for the joint lives of the titleholders and then to the survivor or survivors of them, and if the marriage of any of the titleholders who are married to each other subsequently is terminated by a judgment or decree granting a divorce, dissolution of marriage, or annulment, then the survivorship rights of the titleholders who were married to each other terminate, the survivorship rights of the other titleholders are not affected, and each of the titleholders who were married to each other shall be deemed to be the owner of an undivided interest in common in the personal property, that is in proportion to the net contributions of the titleholders who were married to each other to the personal property.

(2) If the titleholders who were married to each other as described in division (B)(1) of this section remarry each other, and if the title to the personal property continues to be held by them, and the other titleholders whose survivorship rights continued unaffected, in accordance with that division, then the survivorship rights of the remarried titleholders are not terminated, and the remarried and other titleholders again hold title in the personal property for their joint lives and then to the survivor or survivors of them.

(C) An agent, bank, broker, custodian, issuer, life insurance company, plan administrator, savings and loan association, transfer agent, trustee, or other person is not liable in damages or otherwise in a civil or criminal action or proceeding for distributing or disposing of personal property in reliance on and in accordance with a registration in the form of a joint ownership for life, with rights of survivorship, as described in division (A)(1) or (B)(1) of this section, if both of the following apply:

- (1) The distribution or disposition otherwise is proper;
- (2) The agent, bank, broker, custodian, issuer, life insurance company, plan administrator, savings and loan association, transfer agent, trustee, or other person did not have any notice of the facts that resulted in the termination of the rights of survivorship by operation of division (A)(1) or (B)(1) of this section.

History. Effective date: 01-01-2007.

Sec. 5815.35 General Partners Acting as Fiduciary.

(A)(1) As used in this division, “fiduciary” means any person, association, or corporation, other than a trustee of a testamentary trust, 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, or estate for another’s benefit. A fiduciary also includes an agency under contract with the department of developmental disabilities 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 person with a developmental disability.

(2) A fiduciary who enters a contract as fiduciary on or after March 22, 1984, is not personally liable on that contract, unless the contract otherwise specifies, if the contract is within the fiduciary’s authority and the fiduciary discloses that the contract is being entered into in a fiduciary capacity. In a contract, the words “fiduciary” or “as fiduciary “ or other words that indicate one’s fiduciary capacity following the name or signature of a fiduciary are sufficient disclosure for purposes of this division.

(B)(1) As used in this division:

“Partnership” includes a partnership composed of only general partners and a partnership composed of general and limited partners.

(2) Subject to division (D) of this section, an executor or administrator who acquires, in a fiduciary capacity, a general partnership interest upon the death of a general partner of a partnership is not personally liable for any debt, obligation, or liability of the partnership that arises from the executor’s or administrator’s actions, except as provided in this division, as a general partner, or for any debt, obligation, or liability of the partnership for which the executor or administrator otherwise would be personally liable because the executor or administrator holds the general partnership interest, if the executor or administrator discloses that the general partnership interest is held by the executor or administrator in a fiduciary capacity. This immunity does not apply if an executor or administrator causes loss or injury to a person who is not a partner in the partnership by a wrongful act or omission. This immunity is not available to an executor or administrator who holds a general partnership interest in a fiduciary capacity if the spouse or any lineal descendants of the executor or administrator, or the executor or administrator other than in a fiduciary capacity, holds any interest in the partnership.

A partnership certificate that is filed pursuant to Chapter 1777. or another chapter of the Revised Code and that indicates that an executor or administrator holds a general partnership interest in a fiduciary capacity by the use following the name or signature of the executor or

administrator of the words “executor under the will of (name of decedent) “ or “administrator of the estate of (name of decedent) “ or other words that indicate the executor’s or administrator’s fiduciary capacity constitutes a sufficient disclosure for purposes of this division.

If a partnership certificate is not required to be filed pursuant to Chapter 1776. or 1777. or another chapter of the Revised Code, a sufficient disclosure for purposes of this division can be made by an executor or administrator if a certificate that satisfies the following requirements is filed with the recorder of the county in which the partnership’s principal office or place of business is situated and with the recorder of each county in which the partnership owns real estate:

- (a) The certificate shall state in full the names of all persons holding interests in the partnership and their places of residence;
- (b) The certificate shall be signed by all persons who are general partners in the partnership, and shall be acknowledged by a person authorized to take acknowledgements of deeds;
- (c) The certificate shall use the words “executor under the will of (name of decedent)” or “administrator of the estate of (name of decedent)” or other words that indicate the executor’s or administrator’s fiduciary capacity, following the name or signature of the executor or administrator.

A contract or other written instrument delivered to a party that contracts with the partnership in which an executor or administrator holds a general partnership interest in a fiduciary capacity, that indicates that the executor or administrator so holds the interest, constitutes a disclosure for purposes of this division with respect to transactions between the party and the partnership. If a disclosure has been made by a certificate in accordance with this division, a disclosure for purposes of this division with respect to such transactions exists regardless of whether a contract or other instrument indicates the executor or administrator holds the general partnership interest in a fiduciary capacity.

If an executor or administrator acquires, in a fiduciary capacity, a general partnership interest, the decedent’s estate is liable for debts, obligations, or liabilities of the partnership.

(C) An estate that includes a general partnership interest is not liable for the debts, obligations, or liabilities of a partnership in which another estate has a general partnership interest, merely because the executor or administrator of the estates holds a general partnership interest in both of the partnerships in the executor’s or administrator’s fiduciary capacities.

(D) Divisions (B) and (C) of this section apply to general partnership interests held by executors or administrators in their fiduciary capacities prior to and on or after March 22, 1984. If an appropriate disclosure is made pursuant to division (B) of this section, the immunity acquired under that division extends only to debts, obligations, and liabilities of the partnership arising on and after the date of the disclosure and to debts, obligations, and liabilities of the partnership that arose prior to the acquisition of the general partnership interest by the executor or administrator becoming a general partner.

(E) The liability limitations in this section (E) apply to fiduciaries as partners notwithstanding the broader personal liabilities otherwise imposed by any partnership law.

(F) If an estate or other fund held by a fiduciary is identified as a partner, the reference is deemed to be to, and the partner is, the current executor, administrator, or other fiduciary of the estate or other fund and their successors as executors, administrators, or other fiduciaries.

History. Amended by 131st General Assembly File No. TBD, HB 158, § 1, eff. 10/12/2016.

Amended by 128th General Assembly ch. 13, SB 79, § 1, eff. 10/06/2009. Effective date: 01-01-2007; 2008 HB332 08-06-2008; 2008 HB499 09-12-2008.

Sec. 5815.36 Disclaiming Testamentary and Nontestamentary Succession to Real and Personal Property

(A) As used in this section:

(1) “Disclaimant” means any person, any guardian or personal representative of a person or estate of a person, or any attorney-in-fact or agent of a person having a general or specific authority to act granted in a written instrument, who is any of the following:

(a) With respect to testamentary instruments and intestate succession, an heir, next of kin, devisee, legatee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entirety, surviving tenant of a tenancy with a right of survivorship, beneficiary under a testamentary instrument, or person designated to take pursuant to a power of appointment exercised by a testamentary instrument;

(b) With respect to nontestamentary instruments, a grantee, donee, person succeeding to a disclaimed interest, surviving joint tenant, surviving tenant by the entirety, surviving tenant of a tenancy with a right of survivorship, beneficiary under a nontestamentary instrument, or person designated to take pursuant to a power of appointment exercised by a nontestamentary instrument;

(c) With respect to fiduciary rights, privileges, powers, and immunities, a fiduciary under a testamentary or nontestamentary instrument. Division (A)(1)(c) of this section does not authorize a fiduciary who disclaims fiduciary rights, privileges, powers, and immunities to cause the rights of any beneficiary to be disclaimed unless the instrument creating the fiduciary relationship authorizes the fiduciary to make such a disclaimer.

(d) Any person entitled to take an interest in property upon the death of a person or upon the occurrence of any other event.

(2) “Personal representative” includes any fiduciary as defined in section 2109.01 of the Revised Code and any executor, trustee, guardian, or other person or entity having a fiduciary relationship with regard to any interest in property passing to the fiduciary, executor, trustee, guardian, or other person or entity by reason of a disclaimant’s death.

(3) “Property” means all forms of property, real and personal, tangible and intangible.

(B)(1) A disclaimant, other than a fiduciary under an instrument who is not authorized by the instrument to disclaim the interest of a beneficiary, may disclaim, in whole or in part, the succession to any property by executing and by delivering, filing, or recording a written disclaimer instrument in the manner provided in this section.

(2) A disclaimant who is a fiduciary under an instrument may disclaim, in whole or in part, any right, power, privilege, or immunity, by executing and by delivering, filing, or recording a written disclaimer instrument in the manner provided in this section.

(3) The written instrument of disclaimer shall be signed and acknowledged by the disclaimant and shall contain all of the following:

(a) A reference to the donative instrument;

(b) A description of the property, part of property, or interest disclaimed, and of any fiduciary right, power, privilege, or immunity disclaimed;

(c) A declaration of the disclaimer and its extent.

(4) The guardian of the estate of a minor or an incompetent, or the personal representative of a deceased person, whether or not authorized by the instrument to disclaim, with the consent of the probate division of the court of common pleas may disclaim, in whole or in part, the succession to any property, or interest in property, that the ward, if an adult and competent, or the deceased, if living, might have disclaimed. The guardian or personal representative, or any interested person may file an application with the probate division of the court of common pleas that has jurisdiction of the estate, asking that the court order the guardian or personal representative to execute and deliver, file, or record the disclaimer on behalf of the ward, estate, or deceased person. The court shall order the guardian or personal representative to execute and deliver, file, or record the disclaimer if the court finds, upon hearing after notice to interested parties and such other persons as the court shall direct, that:

(a) It is in the best interests of those interested in the estate of the person and of those who will take the disclaimed interest;

(b) It would not materially, adversely affect the minor or incompetent, or the beneficiaries of the estate of the decedent, taking into consideration other available resources and the age, probable life expectancy, physical and mental condition, and present and reasonably anticipated future needs of the minor or incompetent or the beneficiaries of the estate of the decedent. A written instrument of disclaimer ordered by the court under this division shall be executed and be delivered, filed, or recorded within the time and in the manner in which the person could have disclaimed if the person were living, an adult, and competent.

(C) A partial disclaimer of property that is subject to a burdensome interest created by the donative instrument is not effective unless the disclaimed property constitutes a gift that is separate and distinct from undisclaimed gifts.

(D) The disclaimant shall deliver, file, or record the disclaimer, or cause the same to be done, prior to accepting any benefits of the disclaimed interest and at any time after the latest of the following dates:

(1) The effective date of the donative instrument if both the taker and the taker's interest in the property are finally ascertained on that date;

(2) The date of the occurrence of the event upon which both the taker and the taker's interest in the property become finally ascertainable;

(3) The date on which the disclaimant attains eighteen years of age or is no longer an incompetent, without tendering or repaying any benefit received while the disclaimant was under eighteen years of age or an incompetent, and even if a guardian of a minor or incompetent had filed an application pursuant to division (B)(4) of this section and the probate division of the court of common pleas involved did not consent to the guardian executing a disclaimer.

(E) No disclaimer instrument is effective under this section if either of the following applies under the terms of the disclaimer instrument:

(1) The disclaimant has power to revoke the disclaimer.

(2) The disclaimant may transfer, or direct to be transferred, to self the entire legal and equitable ownership of the property subject to the disclaimer instrument.

(F)(1) Subject to division (F)(2) of this section, if the interest disclaimed is created by a nontestamentary instrument, including, but not limited to, a transfer on death designation affidavit pursuant to section 5302.22 of the Revised Code, the disclaimer instrument shall be delivered personally or by certified mail to the trustee or other person who has legal title to, or possession of, the property disclaimed. If the interest disclaimed is created by a transfer on death designation affidavit pursuant to section 5302.22 of the Revised Code, the disclaimer instrument shall be filed with the county recorder of the county in which the real property that is the subject of that affidavit is located.

(2) If the interest disclaimed is created by a testamentary instrument, by intestate succession, or by a certificate of title to a motor vehicle, watercraft, or outboard motor that evidences ownership of the motor vehicle, watercraft, or outboard motor that is transferable on death pursuant to section 2131.13 of the Revised Code, the disclaimer instrument shall be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate have been commenced, and an executed copy of the disclaimer instrument shall be delivered personally or by certified mail to the personal representative of the decedent's estate.

(3) If no proceedings for the administration of the decedent's estate have been commenced, the disclaimer instrument shall be filed in the probate division of the court of common pleas in the county in which proceedings for the administration of the decedent's estate might be commenced according to law. The disclaimer instrument shall be filed and indexed, and fees charged, in the same manner as provided by law for an application to be appointed as personal representative to administer the decedent's estate. The disclaimer is effective whether or not proceedings thereafter are commenced to administer the decedent's estate. If proceedings thereafter are commenced for the administration of the decedent's estate, they shall be filed under, or consolidated with, the case number assigned to the disclaimer instrument.

(4) If an interest in real estate is disclaimed, an executed copy of the disclaimer instrument also shall be recorded in the office of the recorder of the county in which the real estate is located. The disclaimer instrument shall include a description of the real estate with sufficient certainty to identify it, and shall contain a reference to the record of the instrument that created the interest disclaimed. If title to the real estate is registered under Chapters 5309. and 5310. of the Revised Code, the disclaimer interest shall be entered as a memorial on the last certificate of title. A spouse of a disclaimant has no dower or other interest in the real estate disclaimed.

(G) If a donative instrument expressly provides for the distribution of property, part of property, or interest in property if there is a disclaimer, the property, part of property, or interest disclaimed shall be distributed or disposed of, and accelerated or not accelerated, in accordance with the donative instrument. In the absence of express provisions to the contrary in the donative instrument, the property, part of property, or interest in property disclaimed, and any future interest that is to take effect in possession or enjoyment at or after the termination of the interest disclaimed, shall descend, be distributed, or otherwise be disposed of, and shall be accelerated, in the following manner:

(1) If intestate or testate succession is disclaimed, as if the disclaimant had predeceased the decedent;

(2) If the disclaimant is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the disclaimant had predeceased the donee of the power;

(3) If the donative instrument is a nontestamentary instrument, as if the disclaimant had died before the effective date of the nontestamentary instrument;

(4) If the disclaimer is of a fiduciary right, power, privilege, or immunity, as if the right, power, privilege, or immunity was never in the donative instrument.

(H) A disclaimer pursuant to this section is effective as of, and relates back for all purposes to, the date upon which the taker and the taker's interest have been finally ascertained.

(I) A disclaimant who has a present and future interest in property, and disclaims the disclaimant's present interest in whole or in part, is considered to have disclaimed the disclaimant's future interest to the same extent, unless a contrary intention appears in the disclaimer instrument or the donative instrument. A disclaimant is not precluded from receiving, as an alternative taker, a beneficial interest in the property disclaimed, unless a contrary intention appears in the disclaimer instrument or in the donative instrument.

(J) The disclaimant's right to disclaim under this section is barred if the disclaimant does any of the following:

(1) Assigns, conveys, encumbers, pledges, or transfers, or contracts to assign, convey, encumber, pledge, or transfer, the property or any interest in it;

(2) Waives in writing the disclaimant's right to disclaim and executes and delivers, files, or records the waiver in the manner provided in this section for a disclaimer instrument;

(3) Accepts the property or an interest in it;

(4) Permits or suffers a sale or other disposition of the property pursuant to judicial action against the disclaimant.

(K) Neither a fiduciary's application for appointment or assumption of duties as a fiduciary nor a beneficiary's application for appointment as a personal representative or fiduciary waives or bars the disclaimant's right to disclaim a right, power, privilege, or immunity as a personal representative or fiduciary or the beneficiary's right to disclaim property.

(L) The right to disclaim under this section exists irrespective of any limitation on the interest of the disclaimant in the nature of a spendthrift provision or similar restriction.

(M) A disclaimer instrument or written waiver of the right to disclaim that has been executed and delivered, filed, or recorded as required by this section is final and binding upon all persons.

(N)(1) The right to disclaim and the procedures for disclaimer established by this section are in addition to, and do not exclude or abridge, any other rights or procedures that exist or formerly existed under any other section of the Revised Code or at common law to assign, convey, release, refuse to accept, renounce, waive, or disclaim property.

(2) A disclaimer is not considered a transfer or conveyance by the disclaimant, and no creditor of a disclaimant may avoid a disclaimer.

(3) This section shall take precedence over any other section of the Revised Code that conflicts with this section.

(O)(1) No person is liable for distributing or disposing of property in a manner inconsistent with the terms of a valid disclaimer if the distribution or disposition is otherwise proper and the person has no actual knowledge of the disclaimer.

(2) No person is liable for distributing or disposing of property in reliance upon the terms of a disclaimer that is invalid because the right of disclaimer has been waived or barred if the distribution or disposition is otherwise proper and the person has no actual knowledge of the facts that constitute a waiver or bar to the right to disclaim.

(P)(1) A disclaimant may disclaim pursuant to this section any interest in property that is in existence on September 27, 1976, if either the interest in the property or the taker of the interest in the property is not finally ascertained on that date.

(2) No disclaimer executed pursuant to this section destroys or diminishes an interest in property that exists on September 27, 1976, in any person other than the disclaimant.

(Q) This section may be applied separately to different interests or powers created in the disclaimant by the same testamentary or nontestamentary instrument.

History. Amended by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013. Amended by 128th General Assembly File No.17, SB 124, § 1, eff. 12/28/2009. Effective date: 01-01-2007; 2008 HB160 06-20-2008.

Sec. 5815.37 Temporary Conveyances

(A) If any interest in real property held by any trustee of an express trust that is wholly or partially governed by a law of this state or any interest in real property located in this state that is held by the trustee of a trust wholly governed by the law of one or more jurisdictions other than this state is temporarily conveyed to any beneficiary of that trust and reconveyed back to any trustee of that trust, the interest in the real property shall be subject to divisions (B) and (C) of this section if all of the following apply:

(1) That temporary conveyance is for the principal purpose of enabling some or all of that interest in the real property to be used as collateral in a loan transaction.

(2) The loan proceeds will be delivered to the trustee of the trust or will otherwise be principally used for the benefit of one or more beneficiaries of the trust.

(3) The interest in the real property is reconveyed back to one or more trustees of the trust within a reasonable time after the reconveying beneficiary acquired actual notice that the lender has perfected the lender's collateral rights in and to the interest in the real property.

(4) The lender in question is any of the following:

(a) A bank, thrift, savings bank, savings and loan association, credit union, or any other similar financial institution if the activities of the other similar financial institution are subject to supervision by the Ohio superintendent of financial institutions, the federal deposit insurance corporation, the comptroller of the currency, the office of thrift supervision, any other comparable state or federal regulatory agency or entity, or a successor of any of them;

(b) An insurance company subject to supervision by the Ohio department of insurance or any comparable agency established by the law of any other jurisdiction;

(c) Any other corporation, limited liability company, partnership, or other similar or comparable entity the routine and regular business activities of which commonly include the making of commercial or residential loans that are wholly or partially secured by real property.

(B) If a temporary conveyance and reconveyance of an interest in real property is made for the principal purpose of allowing a lender to acquire, perfect, foreclose on, or exercise collateral rights in and to the real property interest in question, the temporary conveyance to a beneficiary shall be disregarded for all other purposes, and the reconveyance back to a trustee shall relate back to the date immediately preceding that reconveyance on which the interest in the real property was transferred to any trustee of the trust in a transaction other than a loan transaction described in division (A)(1) of this section.

(C) In connection with any temporary conveyance and reconveyance of an interest in real property pursuant to division (A) of this section, the following shall survive unimpaired after any reconveyance back to a trustee made pursuant to division (A)(3) of this section:

(1) The rights, duties, and obligations of a lender under the documents governing the loan transaction, including, but not limited to, any of the following to the extent they are provided for in those documents:

(a) A lender's collateral rights in and to any interest in real property that is reconveyed to a trustee;

(b) The lender's rights under any mortgage, deed of trust, lien, encumbrance, or any other similar or comparable instrument or arrangement used to give the lender collateral rights in and to the interest being reconveyed, including, but not limited to, a lender's right to foreclose on that interest in real property;

(c) The lender's obligations to make loans or advances or to provide any person with any notice called for by the documents governing the loan transaction.

(2) The rights, duties, and obligations of any debtor under any documents governing the loan transaction, including, but not limited to, the following to the extent they are provided for in those documents:

(a) The duty to repay the lender or any other person who is entitled to receive payments under the documents governing the loan transaction;

(b) The duty to honor any agreements or covenants made by the debtor in the documents governing the loan transaction;

(c) The right to receive any advances, loans, notices, or other benefits called for by the documents governing the loan transaction.

(D) The following apply for purposes of division (A)(1) of this section:

(1) A court shall liberally construe the temporary conveyance to a beneficiary of the trust in question in determining whether the principal purpose of the temporary conveyance is to enable some or all of the interest in the real property to be used as collateral in a loan transaction.

(2) An interest in real property shall be considered to be used as collateral if, as part of a lending transaction, that interest is wholly or partially made subject to a mortgage, deed of trust, lien, encumbrance, or any other similar or comparable instrument or arrangement used to give the lender collateral rights in and to that interest.

(E) A court shall liberally construe division (A)(2) of this section in determining whether the loan proceeds referred to in that division will be principally used for the benefit of one or more beneficiaries of the trust in question.

(F) For purposes of division (A)(3) of this section, any reconveyance to a trustee shall be considered to have occurred within a reasonable time if it is made within one hundred twenty days of the date on which the reconveying beneficiary acquired actual notice that the lender has perfected the lender's collateral rights in and to the interest in the real property. In all other cases, a court shall consider all relevant facts and circumstances in determining whether a beneficiary has reconveyed the interest in the real property back to a trustee within a reasonable time after the reconveying beneficiary acquired that actual notice.

(G)(1) A court shall liberally construe division (A)(4) of this section in determining whether a corporation, limited liability company, partnership, or other similar or comparable entity qualifies as a lender within the meaning of that division.

(2) Subject to the rule of liberal interpretation set forth in division (G)(1) of this section, the Ohio superintendent of financial institutions may from time to time issue regulations setting forth a nonexhaustive list of entities that qualify as a lender within the meaning of division (A)(4) of this section and also may from time to time issue regulations setting forth specific entities or classes of entities that do not qualify as a lender within the meaning of that division.

(H) An interest in real property may be subject to or involved in more than one loan transaction undertaken pursuant to this section.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013.

Sec. 5815.41 Consignment of Art Works Definitions.

As used in sections 5815.41 to 5815.48 of the Revised Code:

(A) "Art dealer" means a person engaged in the business of selling works of art, other than a person exclusively engaged in the business of selling goods at public auction.

(B) "Artist" means the creator of a work of art.

(C) "On consignment" means delivered to an art dealer for the purpose of sale or exhibition, or both, to the public by the art dealer other than at a public auction.

(D) "Work of art" means an original art work that is any of the following:

(1) A visual rendition including, but not limited to, a painting, drawing, sculpture, mosaic, or photograph;

(2) A work of calligraphy;

(3) A work of graphic art, including, but not limited to, an etching, lithograph, offset print, or silk screen;

(4) A craft work in materials, including, but not limited to, clay, textile, fiber, wood, metal, plastic, or glass;

(5) A work in mixed media, including, but not limited to, a collage or a work consisting of any combination of the items listed in divisions (D)(1) to (4) of this section.

History. Effective date: 01-01-2007.

Sec. 5815.42 Art Dealer's Acceptance of Work on Consignment from Artist.

If an art dealer accepts a work of art, on a fee, commission, or other compensation basis, on consignment from the artist who created the work of art, the following consequences attach:

(A) The art dealer is, with respect to that work of art, the agent of the artist.

(B) The work of art is trust property and the art dealer is a trustee for the benefit of the artist until the work of art is sold to a bona fide third party or returned to the artist.

(C) The proceeds of the sale of the work of art are trust property and the art dealer is a trustee for the benefit of the artist until the amount due the artist from the sale is paid.

(D) The art dealer is strictly liable for the loss of, or damage to, the work of art while it is in the art dealer's possession or control. The value of the work of art is, for the purpose of this division, the value established in the written contract between the artist and art dealer entered into pursuant to section 5815.45 of the Revised Code.

History. Effective date: 01-01-2007.

Sec. 5815.43 When Work of Art Ceases to Be Trust Property.

(A) If a work of art is trust property under section 5815.42 of the Revised Code when it is initially received by the art dealer, it remains trust property, notwithstanding the subsequent purchase of the work of art by the art dealer directly or indirectly for the art dealer's own account, until the purchase price specified pursuant to division (A)(3) of section 5815.45 of the Revised Code is paid in full to the artist.

(B) If an art dealer resells a work of art that the art dealer purchased for the art dealer's own account to a bona fide third party before the artist has been paid in full, the work of art ceases to be trust property and the proceeds of the resale are trust funds in the possession or control of the art dealer for the benefit of the artist to the extent necessary to pay any balance still due to the artist. The trusteeship of the proceeds continues until the artist is paid in full under the contract entered into pursuant to section 5815.45 of the Revised Code.

History. Effective date: 01-01-2007.

Sec. 5815.44 Work of Art Not Subject to Claims of Creditors of Art Dealers.

A work of art that is trust property under section 5815.42 or 5815.43 of the Revised Code is not subject to the claims, liens, or security interests of the creditors of the art dealer, notwithstanding Chapters 1301. to 1310. of the Revised Code.

History. Effective date: 01-01-2007.

Sec. 5815.45 Written Contract Prerequisite for Accepting Work of Art.

(A) An art dealer shall not accept a work of art, on a fee, commission, or other compensation basis, on consignment from the artist who created the work of art unless, prior to or at the time of acceptance, the art dealer enters into a written contract with the artist that contains all of the following:

- (1) The value of the work of art and whether it may be sold;
- (2) The time within which the proceeds of the sale are to be paid to the artist, if the work of art is sold;
- (3) The minimum price for the sale of the work of art;
- (4) The fee or percentage of the sale price that is to be paid to the art dealer for displaying or selling the work of art.

(B) If an art dealer violates this section, a court, at the request of the artist, may void the obligation of the artist to that art dealer or to a person to whom the obligation is transferred, other than a holder in due course.

History. Effective date: 01-01-2007.

Sec. 5815.46 Display Conditions.

An art dealer who accepts a work of art, on a fee, commission, or other compensation basis, on consignment from the artist who created the work of art shall not use or display the work of art or a photograph of the work of art, or permit the use or display of the work of art or a photograph of the work of art, unless both of the following occur:

- (A) Notice is given to users or viewers that the work of art is the work of the artist;
- (B) The artist gives prior written consent to the particular use or display.

History. Effective date: 01-01-2007.

Sec. 5815.47 Waiver of Provisions is Void.

Any portion of an agreement that waives any provision of sections 5815.41 to 5815.48 of the Revised Code is void.

History. Effective date: 01-01-2007.

Sec. 5815.48 Liability for Violations.

Any art dealer who violates section 5815.45 or 5815.46 of the Revised Code is liable to the artist for the artist's reasonable attorney's fees and in an amount equal to the greater of either of the following:

- (A) Fifty dollars;
- (B) The actual damages, if any, including the incidental and consequential damages, sustained by the artist by reason of the violation.

History. Effective date: 01-01-2007.

Chapter 5816 Ohio Legacy Trust Act

Section

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Sec. 5816.01 Short Title.

This chapter may be cited as the Ohio legacy trust act.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013

Sec. 5816.02 Definitions.

As used in this chapter, unless the context otherwise requires:

(A)(1) "Advisor" means a person to whom both of the following apply:

(a) The person satisfies the eligibility criteria specified in division (A) of section 5816.11 of the Revised Code.

(b) The person is given the authority by the terms of a legacy trust to remove or appoint one or more trustees of the trust or to direct, consent to, or disapprove a trustee's actual or proposed investment, distribution, or other decisions.

(2) Any person to whom division (A)(1) of this section applies is considered an advisor even if that person is denominated by another title, such as protector.

(B) "Asset" means property of a transferor but does not include any of the following:

(1) Property to the extent it is encumbered by a valid lien;

(2) Property to the extent it is exempt at the time of a qualified disposition under any applicable nonbankruptcy law, including, but not limited to, section 2329.66 of the Revised Code;

(3) Property held in the form of a tenancy by the entireties to the extent that, under the law governing the entireties estate at the time of a qualified disposition, it is not subject to process by a creditor holding a claim against only one tenant;

(4) Any property transferred from a nonlegacy trust to a legacy trust to the extent that the property would not be subject to attachment under the applicable nonbankruptcy law governing that nonlegacy trust.

(C) "Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. Chapter 11, as amended.

(D) "Beneficiary" has the same meaning as in section 5801.01 of the Revised Code.

(E) "Claim" means a right to payment, whether or not the right is reduced to judgment or is liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(F) "Creditor" means a person who has a claim against a transferor and any transferee or assignee of, or successor to, that claim.

(G) "Debt" means a liability on a claim.

(H) "Disposition" means a direct or indirect transfer, conveyance, or assignment of property, including, but not limited to, a partial, contingent, undivided, or co-ownership interest in property. "Disposition" includes the exercise of a general power so as to cause a transfer of property to a trustee or trustees but does not include any of the following:

(1) The release or relinquishment of an interest in property that, until the release or relinquishment, was the subject of a qualified disposition;

(2) The exercise of a limited power so as to cause a transfer of property to a trustee or trustees;

(3) A disclaimer of an interest in a trust, bequest, devise, or inheritance.

(I) "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1 et seq., as amended.

(J) "Investment decision" means any participation in any decision regarding the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of or rights in investments.

(K)(1) "Legacy trust" means a trust evidenced by a written trust instrument to which all of the following apply:

(a) The trust has, names, or appoints at least one qualified trustee for or in connection with the property that is the subject of a qualified disposition.

(b) The trust expressly incorporates the laws of this state to wholly or partially govern its validity, construction, and administration.

(c) The trust expressly states that it is irrevocable.

(d) The trust has a spendthrift provision applicable to the interests of any beneficiary in the trust property, including any interests of a transferor in the trust property.

(2) A trust that satisfies the criteria specified in division (K)(1) of this section is considered a legacy trust even if the trust instrument also allows for one or more nonqualified trustees and regardless of the language used to satisfy those criteria.

(L) "Lien" has the same meaning as in section 1336.01 of the Revised Code.

(M) "Nonlegacy trust" means any trust other than a legacy trust.

- (N) “Nonqualified trustee” means any trustee other than a qualified trustee.
- (O) “Person” has the same meaning as in section 5801.01 of the Revised Code.
- (P) “Property” has the same meaning as in section 5801.01 of the Revised Code.
- (Q) “Qualified affidavit” means an affidavit that meets the requirements of section 5816.06 of the Revised Code.
- (R) “Qualified disposition” means a disposition by or from a transferor to any trustee of a trust that is, was, or becomes a legacy trust.
- (S) “Qualified trustee” means a person who is not a transferor and to whom both of the following apply:
- (1)(a) The person, if a natural person, is a resident of this state.
- (b) The person, if not a natural person, is authorized by the law of this state or by a court of competent jurisdiction of this state to act as a trustee and either of the following applies:
- (i) The activities of that person are subject to supervision by the Ohio superintendent of financial institutions, the federal deposit insurance corporation, the comptroller of the currency, or the office of thrift supervision or a successor of any of them.
- (ii) That person is a “family trust company,” as defined in section 1112.01 of the Revised Code, and that family trust company may be licensed or unlicensed for purposes of Chapter 1112. of the Revised Code, provided that all of the following also apply regardless of the family trust company’s licensing status:
- (I) The family trust company shall maintain an office in this state, on either an exclusive basis or on a shared basis with one or more other persons.
- (II) The family trust company shall open and maintain at least one bank or brokerage account in this state.
- (III) The family trust company shall maintain in this state, on an exclusive or nonexclusive basis, electronic or physical records for the legacy trust.
- (IV) The family trust company shall satisfy all of the requirements imposed by divisions (B), (C), (D), and (E)(1) of section 1112.14 of the Revised Code.
- (V) No beneficiary of a legacy trust, when acting for or on behalf of a family trust company, or when acting as an officer, manager, director, employee, or other agent or representative of a family trust company, may have any vote or authority regarding any decision to make or withhold any distribution from such legacy trust to or for the benefit of that beneficiary.
- Nothing in division (S)(1)(b)(ii) of this section shall prohibit a beneficiary from exercising any rights, powers, privileges, or authority granted to that beneficiary by or in any trust instrument governing a legacy trust.
- (2) The person maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition, maintains records for the legacy trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the legacy trust, or otherwise materially participates in the administration of the legacy trust.
- (T) “Spendthrift provision” has the same meaning as in section 5801.01 of the Revised Code.

(U) "Spouse" and "former spouse" means only the person to whom a transferor was married on or before a qualified disposition is made.

(V) "Transferor" means a person who directly or indirectly makes a disposition.

(W) "Valid lien" has the same meaning as in section 1336.01 of the Revised Code.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013; 2021 HB7 8-17-21.

Sec. 5816.03 Spendthrift Provisions.

(A) In addition to any other method allowed by law, the spendthrift provision of a legacy trust may be stated as provided in division (B) of section 5805.01 of the Revised Code.

(B) Except as otherwise provided in this section, the spendthrift provisions of a legacy trust shall restrain both voluntary and involuntary transfer of a transferor's interest in that trust. Any spendthrift provision in a legacy trust is enforceable under any applicable nonbankruptcy law within the meaning of section 541(c)(2) of the Bankruptcy Code regardless of whether or not the relevant legacy trust instrument makes any reference to that enforceability. In addition to the restraints required by this division, a legacy trust and its spendthrift provisions may provide for any other restraints on alienation that are permitted by any law of this state.

(C) Notwithstanding division (B) of this section or the terms of any spendthrift provision, but subject to divisions (D), (E), and (F) of this section, a transferor's interest in property that is the subject of a qualified disposition may be attached or otherwise involuntarily alienated in connection with any debt that the transferor owes pursuant to an agreement or court order for either of the following:

(1) The payment of child or spousal support or alimony to or for the transferor's spouse, former spouse, child, or children, or to any governmental agency that is designated by statute, rule, or regulation to be the payee of that child or spousal support or alimony;

(2) The division or distribution of property in favor of the transferor's spouse or former spouse.

(D) A transferor's interest in property that is transferred pursuant to a qualified disposition and the transferor's beneficial interest in a legacy trust shall not be subject to any claim for forced heirship or legitime.

(E) A transferor's interest in property that is transferred pursuant to a qualified disposition and the transferor's beneficial interest in a legacy trust shall not be subject to a distributive award under section 3105.171 of the Revised Code or to any similar award under the law of another jurisdiction, to any person other than the transferor's spouse or former spouse. A court shall liberally construe and apply this provision in finding that such similarity exists.

(F) Nothing in this section shall deprive any beneficiary of any exemption rights that the beneficiary may have under any applicable law after the trust property is received by that beneficiary.

History. Added by 129th General Assembly File No.201, HB 479, §1, eff. 3/27/2013.

Sec. 5816.04 Limits to Transferor's Authority.

To the extent conferred by the governing legacy trust instrument, a transferor to a legacy trust may have any or all of the rights, powers, and interests described in section 5816.05 of the Revised Code. A transferor shall have no rights, powers, or interests in, over, to, or regarding the corpus or income of a legacy trust unless those rights, powers, or interests are granted, permitted, or recognized by both section 5816.05 of the Revised Code and the governing legacy trust instrument. Any written, verbal, tacit, express, or implied agreement or understanding or any other agreement or understanding purporting to grant, permit, or recognize any greater rights, powers, or interests than are provided in this section or the governing legacy trust instrument is void. Any portion of a legacy trust instrument that is not voided under this section shall remain valid and effective.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013.

Sec. 5816.05 Permissible Retained Rights of a Transferor.

A legacy trust may allow or provide for any or all of the following rights, powers, interests, or provisions, none of which grants, or is considered to be, either alone or in any combination, a right or power to revoke a trust or to voluntarily or involuntarily transfer an interest in that trust:

- (A) A provision that, upon the happening of a defined event or a stated contingency, results in the termination of a transferor's right to mandatory income or principal;
- (B) The power of a transferor to veto a distribution from the trust;
- (C) A power of appointment, other than a power to appoint to a transferor, a creditor of the transferor, the estate of the transferor, or a creditor of the transferor's estate, that is exercisable by will or by other written instrument of a transferor effective upon the death of the transferor or during the lifetime of the transferor;
- (D) The right of a transferor to receive trust income as set forth in the trust instrument.
- (E) Both of the following:
 - (1) A transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in section 664 of the Internal Revenue Code;
 - (2) The transferor's right, at any time and from time to time by written instrument delivered to the trustee, to release the transferor's retained interest in that unitrust or annuity trust, in whole or in part, in favor of one or more charitable organizations that have a succeeding beneficial interest in that unitrust or annuity trust;
- (F) The power of a transferor to consume, invade, or appropriate property of the trust, but only if limited in each calendar year to five per cent of the value of the trust principal at the time of the exercise of the power;
- (G) A transferor's potential or actual receipt or use of principal or income of the trust if the potential or actual receipt or use is or would be the result of any of the following that applies with respect to one or more of the qualified trustees:

(1) A qualified trustee's acting in the trustee's discretion. For purposes of division (G)(1) of this section, a qualified trustee shall have discretion with respect to the distribution or use of principal or income unless the discretion is expressly denied to the trustee by the terms of the trust instrument.

(2) A qualified trustee's acting pursuant to a standard in the trust instrument that governs the distribution or use of principal or income;

(3) A qualified trustee's acting at the direction of an advisor who is acting in the advisor's discretion or pursuant to a standard in the trust instrument that governs the distribution or use of principal or income. If an advisor is authorized to direct that distribution or use, the advisor's authority shall be discretionary unless otherwise expressly stated in the trust instrument.

(H) The right of a transferor to remove any advisor and appoint a new advisor who satisfies the eligibility criteria set forth in division (A) of section 5816.11 of the Revised Code;

(I) The right of a transferor to remove any trustee and appoint a new trustee;

(J) A transferor's potential or actual use of real property or tangible personal property, including, but not limited to, property held under a qualified personal residence trust as described in section 2702(c) of the Internal Revenue Code and regulations promulgated under that section, or a transferor's possession and enjoyment of a qualified interest as defined in section 2702(b) of the Internal Revenue Code;

(K) Any provision requiring or permitting the potential or actual use of trust income or principal to pay, in whole or in part, income taxes due on the income of the trust, including, but not limited to, any provision permitting that use in the discretion of any one or more of the qualified trustees acting in the qualified trustee's discretion or at the direction of an advisor who is acting in the advisor's discretion;

(L) The ability of a qualified trustee, whether pursuant to the qualified trustee's discretion or the terms of the legacy trust instrument or at the direction of an advisor, to pay after the death of a transferor all or any part of the debts of the transferor outstanding on or before the transferor's death, the expenses of administering the transferor's estate, or any estate, gift, generation skipping transfer, or inheritance tax;

(M) Any provision that pours back after the death of a transferor all or part of the trust property to the transferor's estate or any trust;

(N) A power held by a transferor allowing the transferor, while acting in a nonfiduciary capacity, to substitute property of equivalent value for any property that is part of the principal of the legacy trust;

(O) Any other rights, powers, interests, or provisions permitted or allowed by any other section of this chapter.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013; 2021 HB7 8-17-21.

Sec. 5816.06 Qualified Affidavits and Related Rules.

(A) Except as otherwise provided in this section, a transferor shall sign a qualified affidavit before or substantially contemporaneously with making a qualified disposition.

(B) A qualified affidavit shall be notarized and shall contain all of the following statements under oath:

- (1) The property being transferred to the trust was not derived from unlawful activities.
- (2) The transferor has full right, title, and authority to transfer the property to the legacy trust.
- (3) The transferor will not be rendered insolvent immediately after the transfer of the property to the legacy trust.
- (4) The transferor does not intend to defraud any creditor by transferring the property to the legacy trust.
- (5) There are no pending or threatened court actions against the transferor, except for any court action identified by the affidavit or an attachment to the affidavit.
- (6) The transferor is not involved in any administrative proceeding, except for any proceeding identified by the affidavit or an attachment to the affidavit.
- (7) The transferor does not contemplate at the time of the transfer the filing for relief under the Bankruptcy Code.

(C) A qualified affidavit is considered defective if it materially fails to meet the requirements set forth in division (B) of this section, but a qualified affidavit is not considered defective due to any one or more of the following:

- (1) Any nonsubstantive variances from the language set forth in division (B) of this section;
- (2) Any statements or representations in addition to those set forth in division (B) of this section if the statements or representations do not materially contradict the statements or representations required by that division;
- (3) Any technical errors in the form, substance, or method of administering an oath if those errors were not the fault of the affiant, and the affiant reasonably relied upon another person to prepare or administer the oath.

(D)(1) A qualified affidavit is not required from a transferor who is not a beneficiary of the legacy trust that receives the disposition.

(2) A subsequent qualified affidavit is not required in connection with any qualified disposition made after the execution of an earlier qualified affidavit if that disposition is a part of, is required by, or is the direct result of, a prior qualified disposition that was made in connection with that earlier qualified affidavit.

(E) If a qualified affidavit is required by this section and a transferor fails to timely sign a qualified affidavit or signs a defective qualified affidavit, then, subject to the normal rules of evidence, that failure or defect may be considered as evidence in any proceeding commenced pursuant to section 5816.07 of the Revised Code, but the legacy trust or the validity of any attempted qualified disposition shall not be affected in any other way due to that failure or defect.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013; 2021 HB7 8-17-21.

Sec. 5816.07 Restrictions on Actions, Remedies, and Claims

(A) Notwithstanding any provision of law to the contrary but subject to division (G) of section 5816.10 of the Revised Code, no creditor may bring an action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, an action at law or in equity, or an action for an attachment or other final or provisional remedy, against any person who made or received a qualified disposition, against or involving any property that is the subject of a qualified disposition or is otherwise held by or for any trustee as part of a legacy trust, or against any trustee of a legacy trust, except that a creditor, subject to this section and section 5816.08 of the Revised Code, may bring an action to avoid any qualified disposition of an asset on the ground that a transferor made the qualified disposition with the specific intent to defraud the specific creditor bringing the action.

(B) A creditor's cause of action or claim for relief under division (A) of this section to avoid any qualified disposition of an asset is extinguished unless that action is brought by a creditor of a transferor who meets one of the following requirements:

(1) The creditor is a creditor of the transferor before the relevant qualified disposition, and the action is brought within the later of the following periods:

(a) Eighteen months after the qualified disposition;

(b) Six months after the qualified disposition is or reasonably could have been discovered by the creditor if the creditor files a suit against the transferor, other than an action under division (A) of this section to avoid the qualified disposition, or makes a written demand for payment on the transferor that in either case asserts a claim based on an act or omission of the transferor that occurred before the qualified disposition, and that suit is filed, or the written demand is delivered to the transferor, within three years after the qualified disposition.

(2) The creditor becomes a creditor after the qualified disposition, and the action under division (A) of this section to avoid the qualified disposition is brought within eighteen months after the qualified disposition.

(C) In any action to avoid the qualified disposition under this section, the burden is upon the creditor to prove the matter by clear and convincing evidence. This division is construed as providing a substantive rather than a procedural rule or right under the law of this state.

(D) Notwithstanding any provision of law to the contrary but subject to division (G) of section 5816.10 of the Revised Code, a creditor or any other person shall have only the rights and remedies with respect to a qualified disposition that are provided in this section and section 5816.08 of the Revised Code, and the creditor or other person shall have no claim or cause of action against any trustee or advisor of a legacy trust or against any person involved in the counseling in connection with, or the drafting, preparation, execution, administration, or funding of, a legacy trust.

(E) Notwithstanding any provision of law to the contrary but subject to division (G) of section 5816.10 of the Revised Code, and in addition to any other limitations, restrictions, or bars imposed by this section, no action of any kind, including, but not limited to, an action to enforce a judgment entered by a court or other body having adjudicative authority, shall be brought at law or in equity against a trustee or an advisor of a legacy trust or against any person involved in the counseling in connection with, or the drafting, preparation, execution, administration, or

funding of, a legacy trust if and to the extent that, in connection with the qualified disposition that forms the basis of that action, the time in which a creditor could sue to avoid that qualified disposition would have expired under this section.

(F) If more than one qualified disposition is made in connection with the same legacy trust, all of the following apply:

(1) Each qualified disposition will be separately evaluated, without regard to any subsequent qualified disposition, to determine whether a creditor's claim regarding that particular qualified disposition is extinguished as provided in division (B) of this section.

(2) The following apply when determining the order in which property is paid, applied, or distributed from a legacy trust:

(a) Any payment, application, or distribution of money is considered to have been made from or with the money most recently received or acquired by any trustee of a legacy trust except to the extent that it is proven otherwise beyond a reasonable doubt. As used in division (F)(2)(a) of this section:

(i) "Money" means cash or cash equivalents.

(ii) "Cash" means the coins or currency of the United States or any other nation.

(iii) "Cash equivalent" includes certified or uncertified checks; money orders; bank drafts; any electronic transfer of funds; negotiable instruments; instruments indorsed in blank or in bearer form; securities issued or guaranteed by the United States, any state of the United States, or any state or federal agency; funds on deposit in any savings or checking account or any similar account; funds on deposit in any money market account or similar account; any demand deposit account, time deposit account, or savings deposit account at any bank, savings and loan association, brokerage house, or similar institution; or any other monetary instrument or device that is commonly or routinely accepted as a cash equivalent. Division (F)(2)(a)(iii) of this section shall be liberally construed and applied.

(b) Any payment, application, or distribution of fungible assets other than money is considered to have been made from or with the fungible assets most recently received or acquired by any trustee of a legacy trust except to the extent that it is proven otherwise by clear and convincing evidence. For purposes of division (F)(2)(b) of this section:

(i) Any asset that can be classified as either money or a fungible asset shall be classified as money.

(ii) "Fungible assets" means any assets, other than money, that are interchangeable for commercial purposes and the properties of which are essentially identical. Division (F)(2)(b)(ii) of this section shall be liberally construed and applied.

(c) Division (F)(2) of this section is construed as providing a substantive rather than a procedural rule or right under the law of this state.

(G) For purposes of this section, the counseling in connection with, or the drafting, preparation, execution, administration, or funding of, a legacy trust includes the counseling in connection with, or the drafting, preparation, execution, administration, or funding of, any limited partnership, limited liability company, corporation, or similar or comparable entity if the limited partnership interests, limited liability company interests, stock, or other similar or comparable ownership interests in the relevant entity are subsequently transferred to any trustee of any trust that is, was, or becomes a legacy trust.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013.

Sec. 5816.08 Avoidance of Qualified Dispositions.

All of the following apply in connection with any action brought pursuant to this section or division (A) of section 5816.07 of the Revised Code:

(A) If a qualified disposition is wholly or partially avoided, all of the following apply:

(1) That specific qualified disposition shall be avoided only to the extent necessary to satisfy a transferor's debt to the creditor who brought the action pursuant to division (A) of section 5816.07 of the Revised Code, and any part of the qualified disposition that is not used to satisfy that debt shall remain subject to the legacy trust in question.

(2) All other qualified dispositions to any trustee of the legacy trust in question, including, but not limited to, any qualified disposition of a partial, co-ownership, or undivided interest in property by a transferor other than the transferor whose qualified disposition is avoided, together with the legacy trust itself, shall remain valid and effective.

(3) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the avoided qualified disposition, all of the following apply:

(a) The trustee shall have a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney's fees, properly incurred by the trustee in the defense of the action or proceedings to avoid the qualified disposition.

(b) The qualified disposition shall be avoided subject to the proper fees, costs, and pre-existing rights, claims, and interests of the trustee and of any predecessor trustee that has not acted in bad faith.

(c) For purposes of division (A)(3) of this section, no trustee shall be considered to have acted in bad faith merely because the trustee accepted the property that is the subject of the qualified disposition.

(4) If the court is satisfied that a beneficiary of a legacy trust has not acted in bad faith in receiving a distribution from that trust, the avoidance of the qualified disposition shall be subject to the right of the beneficiary to retain that distribution if the distribution was made upon the exercise of a trust power or discretion vested in a trustee or advisor and that power or discretion was exercised prior to the creditor's commencement of the action to avoid the qualified disposition. For purposes of division (A)(4) of this section, no beneficiary, including a beneficiary who is also a transferor of the trust, shall be considered to have acted in bad faith merely because the beneficiary accepted a distribution made in accordance with the terms of the trust instrument.

(5) A creditor has the burden of proving by clear and convincing evidence that a trustee or a beneficiary acted in bad faith under division (A)(3) or (4) of this section. Division (A)(5) of this section is construed as providing a substantive rather than a procedural rule or right under the law of this state.

(B) The court shall award reasonable attorney's fees and costs to any prevailing party in any final judgment rendered in any action wholly or partially brought under this section or division (A) of section 5816.07 of the Revised Code.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013.

Sec. 5816.09 Automatic Removal of Trustees; General Rules on Successor.

Any successor or replacement trustees of a legacy trust shall be determined or selected in the following manners:

(A)(1) Division (A)(2) of this section applies if in any action involving a legacy trust or any trustee of the legacy trust a court enters or issues any order in which or by which the court declines to apply the law of this state in determining any of the following matters:

- (a) The validity, construction, or administration of the trust;
- (b) The effect of any term or condition of the trust, including, but not limited to, a spendthrift provision;
- (c) The rights and remedies of any creditor or other suitor in connection with a qualified disposition.

(2) Immediately upon the court's entry or issuance of an order referred to in division (A)(1) of this section, and without the need for any other order of any court, any qualified trustee who is a party to that action shall cease in all respects to be a trustee of the legacy trust, and the position of trustee shall be occupied in accordance with the terms of the trust instrument that governed the legacy trust immediately before that cessation, or, if the terms of the trust instrument do not provide for another trustee and the trust would otherwise be without a trustee, any court of this state, upon the application of any beneficiary of the legacy trust, shall appoint a successor qualified trustee upon the terms and conditions that it determines to be consistent with the purposes of the trust and this chapter. Upon a qualified trustee ceasing to be a trustee pursuant to division (A)(2) of this section, that qualified trustee shall have no power or authority other than to convey trust property to any other trustee that is appointed, installed, or serving in accordance with that division.

(3) For purposes of division (A) of this section:

- (a) "Court" includes a judicial tribunal, an administrative tribunal, or other adjudicative body or panel.
- (b) "Order" includes any order, writ, judgment, entry, edict, mandate, directive, instruction, or decree issued or entered by any court.

(B) In all cases other than the situation described in division (A) of this section, both of the following apply:

(1) If a legacy trust ceases to have at least one qualified trustee, the vacancy in the qualified trusteeship shall be filled pursuant to section 5807.04 of the Revised Code except to the extent that the legacy trust expressly provides otherwise.

(2) If a legacy trust ceases to have at least one trustee, the vacancy in the trusteeship shall be filled pursuant to section 5807.04 of the Revised Code, and the successor trustee shall be a qualified trustee unless the legacy trust instrument expressly provides otherwise.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013; 2021 HB7 8-17-21.

Sec. 5816.10 Miscellaneous Rules; Conflicts, Tacking, Savings, Migration.

(A) In the event of any conflict between any provision of this chapter and any provision of Chapter 1336. of the Revised Code or any other provision of law similar to any provision of Chapter 1336. of the Revised Code, including, but not limited to, any similar provision of law adopted, promulgated, or enacted by a jurisdiction other than this state, the provision of this chapter shall control and prevail to the maximum extent permitted by the Ohio Constitution and the United States Constitution. When determining whether a provision of law is similar to any provision of Chapter 1336. Of the Revised Code, a court shall be liberal in finding that such similarity exists.

(B) A statement in a trust instrument stating that it “shall be governed by the laws of Ohio” or other statement to similar effect or of similar import is considered to expressly incorporate the laws of this state to govern the validity, construction, and administration of that trust instrument and to satisfy division (K)(1)(b) of section 5816.02 of the Revised Code.

(C) A disposition by a nonqualified trustee to a qualified trustee shall not be treated as other than a qualified disposition solely because the nonqualified trustee is a trustee of a nonlegacy trust.

(D) A disposition to any nonqualified trustee of a legacy trust shall be treated as a qualified disposition if at the time of the disposition any of the following applies:

(1) There is at least one qualified trustee serving pursuant to the terms of that legacy trust.

(2) There is no qualified trustee serving but the circumstances require the appointment or installation of a qualified trustee pursuant to division (A)(2) of section 5816.09 of the Revised Code.

(3) There is no qualified trustee serving but within one hundred eighty days after the date of disposition a qualified trustee fills the vacancy in the qualified trusteeship or an application to appoint a qualified trustee is filed pursuant to division (B) of section 5816.09 of the Revised Code.

(E) If a disposition is made by a trustee of a nonlegacy trust to a trustee of a legacy trust, both of the following apply:

(1) Except to the extent expressly stated otherwise by the terms of that disposition, the disposition shall be considered a qualified disposition for the benefit of all of the persons who are the beneficiaries of both the nonlegacy trust and the legacy trust.

(2) The date of the disposition to the legacy trust shall be considered to be the date on which the property that was part of the nonlegacy trust was first continuously subject to any law of a jurisdiction other than this state that is similar to this chapter. When applying division (E)(2) of this section, a court shall be liberal in finding that such continuity and similarity exist.

(F) A legacy trust may contain any terms or conditions that provide for changes in or to the place of administration, situs, governing law, trustees or advisors, or the terms or conditions of the legacy trust or for other changes permitted by law.

(G) Any valid lien attaching to property before a disposition of that property to a trustee of a legacy trust shall survive the disposition, and the trustee shall take title to the property subject to the valid lien and subject to any agreements that created or perfected the valid lien. Nothing

in this chapter shall be construed to authorize any disposition that is prohibited by the terms of any agreements, notes, guaranties, mortgages, indentures, instruments, undertakings, or other documents. In the event of any conflict between this division and any other provision of this chapter, this division shall control.

(H) To the maximum extent permitted by the Ohio Constitution and the United States Constitution, the courts of this state shall exercise jurisdiction over any legacy trust, any legacy trust matter, or any qualified disposition and shall adjudicate any case or controversy brought before them regarding, arising out of, or related to, any legacy trust, any legacy trust matter, or any qualified disposition if that case or controversy is otherwise within the subject matter jurisdiction of the court. Subject to the Ohio Constitution and the United States Constitution, no court of this state shall dismiss or otherwise decline to adjudicate any case or controversy described in this division on the ground that a court of another jurisdiction has acquired or may acquire proper jurisdiction over, or may provide proper venue for, that case or controversy or the parties to the case or controversy. Nothing in this division shall be construed to do either of the following:

(1) Prohibit a transfer or other reassignment of any case or controversy from one court of this state to another court of this state;

(2) Expand or limit the subject matter jurisdiction of any court of this state.

(I)(1) If any disposition is made by a trustee of a legacy trust, referred to in division (I) of this section as the “first legacy trust,” to a trustee of a second legacy trust, referred to in division (I) of this section as the “second legacy trust,” whether pursuant to section 5808.18 of the Revised Code or any other applicable law, then all of the following apply to any property involved in such disposition:

(a) Except to the extent expressly stated otherwise by the terms of that disposition, the disposition shall be considered a qualified disposition for the benefit of all persons who are the beneficiaries of both the first legacy trust and the second legacy trust.

(b) An item of property shall be treated as having been transferred to a trustee of the second legacy trust on the earlier of any of the following:

(i) The date of the original qualified disposition of the item to a trustee of the first legacy trust;

(ii) If, before being held by the trustee of the first legacy trust, the item previously was held by a trustee of a predecessor legacy trust, or by one or more trustees of a consecutive and uninterrupted series of predecessor legacy trusts, then the date of the original qualified disposition to the first trustee to hold that item as part of any such predecessor legacy trust;

(iii) If, before being held by the trustee of the first legacy trust, that item was held by a trustee of a nonlegacy trust referred to in division (E)(2) of this section, then the date determined pursuant to that division;

(iv) The earliest date determined by any combination of divisions (I)(1)(b)(i) to (iii) of this section.

(2) For purposes of division (I)(1)(b) of this section, any reference to an item of property shall include any proceeds of or substitutes for that item.

(3) Notwithstanding division (S) of section 2816.02 of the Revised Code, a qualified trustee of the first legacy trust may serve as a qualified trustee of the second legacy trust.

(4) The dispositions covered by division (I) of this section include, but are not limited to, any disposition that is made by a trustee of the first legacy trust acting pursuant to a direction issued by a person having the power to direct a distribution of trust property pursuant to the thrust instrument governing the first legacy trust, including, but not limited to, a power to direct as provided in division (G) of section 5808.18 of the Revised Code.

(J) Any reference in this chapter to an “action” or a “proceeding” shall be broadly construed to encompass any suit or proceeding in any jurisdiction or before any judicial tribunal, administrative tribunal, or other adjudicative body or panel.

(K) This chapter and its provisions reflect and embody the strong public policy of this state.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013; 2021 HB7 8-17-21.

Sec. 5816.11 Trust Advisors; Eligibility; Default Fiduciary Status.

(A) Any person may serve as an advisor of a legacy trust except that a transferor may act as an advisor only in connection with investment decisions.

(B) An advisor shall be considered a fiduciary unless the terms of a legacy trust instrument expressly provide otherwise.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013.

Sec. 5816.12 Rules Regarding Discretion.

Except to the extent expressly provided otherwise by the terms of a legacy trust instrument, each trustee and each advisor of a legacy trust shall have the greatest discretion permitted by law in connection with all matters of trust administration, all trust distributions, and all other trustee or advisor decisions.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013.

Sec. 5816.13 Discretionary Interests Not Property of a Beneficiary.

No beneficiary or other person shall be considered to have property interest in any property of a legacy trust to the extent that the distribution of that property is subject to the discretion of one or more qualified trustees or advisors, either acting alone or in conjunction with any other person, including authorized to veto any distributions from the legacy trust.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013.

Sec. 5816.14 Applicability of Chapter.

This chapter applies to qualified dispositions made on or after March 27, 2013, except that division (S)(1)(b)(ii) of section 5816.02 of the Revised Code applies to any legacy trust settled or administered on or after the effective date of this amendment.

History. Added by 129th General Assembly File No.201, HB 479, § 1, eff. 3/27/2013; 2021 HB7 8-17-21.

Chapter 5817 **Determination of Validity of Trust or Will During Lifetime**

Section

- 5817.01 Definitions.
- 5817.02 Action by Testator.
- 5817.03 Action by Settlor.
- 5817.04 Jurisdiction; Venue.
- 5817.05 Testator Complaint; Party Defendants.
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- 5817.10 Declaration of Validity.
- 5817.11 Effect of Declaration.
- 5817.12 Subsequent Modification of Will.
- 5817.13 Subsequent Modification of Will.
- 5817.14 Information not Admissible.

Sec. 5817.01 Definitions.

As used in this chapter:

(A)(1) “Beneficiary under a trust” means either of the following:

(a) Any person that has a present or future beneficial interest in a trust, whether vested or contingent;

(b) Any person that, in a capacity other than that of trustee, holds a power of appointment over trust property, but does not include the class of permitted appointees among whom the power holder may appoint.

(2) “Beneficiary under a trust” includes a charitable organization that is expressly designated in the terms of the trust to receive distributions, but does not include any charitable organization that is not expressly designated in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions.

(B)(1) “Beneficiary under a will” means either of the following:

(a) Any person designated in a will to receive a testamentary disposition of real or personal property;

(b) Any person that, in a capacity other than that of executor, holds a power of appointment over estate assets, but does not include the class of permitted appointees among whom the power holder may appoint.

(2) “Beneficiary under a will” includes a charitable organization that is expressly designated in the terms of the will to receive testamentary distributions, but does not include any charitable organization that is not expressly designated in the terms of the will to receive distributions, but to whom the executor may in its discretion make distributions.

(C) "Court" means the probate court of the county in which the complaint under section 5817.02 or 5817.03 of the Revised Code is filed or the general division of the court of common pleas to which the probate court transfers the proceeding under division (A) of section 5817.04 of the Revised Code.

(D) "Related trust" means a trust for which both of the following apply:

(1) The testator is the settlor of the trust.

(2) The trust is named as a beneficiary in the will in accordance with section 2107.63 of the Revised Code.

(E) "Related will" means a will for which both of the following apply:

(1) The testator is the settlor of a trust.

(2) The will names the trust as a beneficiary in accordance with section 2107.63 of the Revised Code.

(F) "Trust" means an inter vivos revocable or irrevocable trust instrument to which, at the time the complaint for declaration of validity is filed under section 5817.03 of the Revised Code, either of the following applies:

(1) The settlor resides in, or is domiciled in, this state.

(2) The trust's principal place of administration is in this state.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.02 Action by Testator.

(A) A testator may file a complaint with the probate court to determine before the testator's death that the testator's will is a valid will subject only to subsequent revocation or modification of the will. The right to file a complaint for a determination of the validity of a testator's will under this chapter, or to voluntarily dismiss a complaint once filed, is personal to the testator and may not be exercised by the testator's guardian or an agent under the testator's power of attorney.

(B) A testator who desires to obtain a validity determination as to the testator's will shall file a complaint to determine the validity of both the will and any related trust.

(C) The failure of a testator to file a complaint for a judgment declaring the validity of a will shall not be construed as evidence or an admission that the will is not valid.

(D) A complaint for a determination of the validity of a testator's will shall be accompanied by an express written waiver of the testator's physician-patient privilege provided in division (B) of section 2317.02 of the Revised Code.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.03 Action by Settlor.

A) A settlor may file a complaint with the probate court to determine before the settlor's death that the settlor's trust is valid and enforceable under its terms, subject only to a subsequent revocation or modification of the trust. The right to file a complaint for a determination of the

validity of a settlor's trust under this chapter, or to voluntarily dismiss a complaint once filed, is personal to the settlor and may not be exercised by the settlor's guardian or an agent under the settlor's power of attorney.

(B) A settlor who desires to obtain a validity determination as to the settlor's trust shall file a complaint to determine the validity of both the trust and the related will.

(C) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust shall not be construed as evidence or an admission that the trust is not valid.

(D) A complaint for a determination of the validity of a settlor's trust shall be accompanied by an express written waiver of the settlor's physician-patient privilege provided in division (B) of section 2317.02 of the Revised Code.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.04 Jurisdiction; Venue.

(A) A complaint to determine the validity of a will or a trust shall be filed with the probate court. The probate judge, upon the motion of a party or the judge's own motion, may transfer the proceeding to the general division of the court of common pleas.

(B) The venue for a complaint under section 5817.02 of the Revised Code is either of the following:

- (1) The probate court of the county in this state where the testator is domiciled;
- (2) If the testator is not domiciled in this state, the probate court of any county in this state where any real property or personal property of the testator is located or, if there is no such property, the probate court of any county in this state.

(C) The venue for a complaint under section 5817.03 of the Revised Code is either of the following:

- (1) The probate court of the county in this state where the settlor resides or is domiciled;
- (2) If the settlor does not reside or is not domiciled in this state, the probate court of the county in this state in which the trust's principal place of administration is located.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.05 Testator Complaint; Party Defendants.

(A) A complaint under section 5817.02 of the Revised Code shall name as party defendants all of the following, as applicable:

- (1) The testator's spouse;
- (2) The testator's children;
- (3) The testator's heirs who would take property pursuant to section 2105.06 of the Revised Code had the testator died intestate at the time the complaint is filed;
- (4) The testator's beneficiaries under the will;
- (5) Any beneficiary under the testator's most recent prior will.

(B) A complaint under section 5817.02 of the Revised Code may name as a party defendant any other person that the testator believes may have a pecuniary interest in the determination of the validity of the testator's will.

(C) A complaint under section 5817.02 of the Revised Code may contain all or any of the following:

- (1) A statement that a copy of the will has been filed with the court;
- (2) A statement that the will is in writing;
- (3) A statement that the will was signed by the testator, or was signed in the testator's name by another person in the testator's conscious presence and at the testator's express direction;
- (4) A statement that the will was signed in the conscious presence of the testator by two or more competent individuals, each of whom either witnessed the testator sign the will, or heard the testator acknowledge signing the will;
- (5) A statement that the will was executed with the testator's testamentary intent;
- (6) A statement that the testator had testamentary capacity;
- (7) A statement that the testator executed the will free from undue influence, not under restraint or duress, and in the exercise of the testator's free will;
- (8) A statement that the execution of the will was not the result of fraud or mistake;
- (9) The names and addresses of the testator and all of the defendants and, if any of the defendants are minors, their ages;
- (10) A statement that the will has not been revoked or modified;
- (11) A statement that the testator is familiar with the contents of the will.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.06 Settlor Complaint; Party Defendants.

(A) A complaint under section 5817.03 of the Revised Code shall name as party defendants the following, as applicable:

- (1) The settlor's spouse;
- (2) The settlor's children;
- (3) The settlor's heirs who would take property pursuant to section 2105.06 of the Revised Code had the settlor died intestate at the time the complaint is filed;
- (4) The trustee or trustees under the trust;
- (5) The beneficiaries under the trust;
- (6) If the trust amends, amends and restates, or replaces a prior trust, any beneficiary under the settlor's most recent prior trust.

(B) A complaint under section 5817.03 of the Revised Code may name as a party defendant any other person that the settlor believes may have a pecuniary interest in the determination of the validity of the settlor's trust.

(C) A complaint under section 5817.03 of the Revised Code may contain all or any of the following:

- (1) A statement that a copy of the trust has been filed with the court;
- (2) A statement that the trust is in writing and was signed by the settlor;
- (3) A statement that the trust was executed with the intent to create a trust;
- (4) A statement that the settlor had the legal capacity to enter into and establish the trust;
- (5) A statement that the trust has a definite beneficiary or is one of the following:
 - (a) A charitable trust;
 - (b) A trust for the care of an animal as provided in section 5804.08 of the Revised Code;
 - (c) A trust for a noncharitable purpose as provided in section 5804.09 of the Revised Code.
- (6) A statement that the trustee of the trust has duties to perform;
- (7) A statement that the same person is not the sole trustee and sole beneficiary of the trust;
- (8) A statement that the settlor executed the trust free from undue influence, not under restraint or duress, and in the exercise of the settlor's free will;
- (9) A statement that execution of the trust was not the result of fraud or mistake;
- (10) The names and addresses of the settlor and all of the defendants and, if any of the defendants are minors, their ages;
- (11) A statement that the trust has not been revoked or modified;
- (12) A statement that the settlor is familiar with the contents of the trust.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.07 Service of Process.

(A) Service of process, with a copy of the complaint and the will, and a copy of the related trust, if applicable, shall be made on every party defendant named in the complaint filed under section 5817.02 of the Revised Code, as provided in the applicable Rules of Civil Procedure.

(B) Service of process, with a copy of the complaint and the trust, and a copy of the related will, if applicable, shall be made on every party defendant named in the complaint filed under section 5817.03 of the Revised Code, as provided in the applicable Rules of Civil Procedure.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.08 Hearing.

(A) After a complaint is filed under section 5817.02 or 5817.03 of the Revised Code, the court shall fix a time and place for a hearing.

(B) Notice of the hearing shall be given to the testator or settlor, as applicable, and to all party defendants, as provided in the applicable Rules of Civil Procedure.

(C) The hearing shall be adversarial in nature and shall be conducted pursuant to sections 2101.31 and 2721.10 of the Revised Code, except as otherwise provided in this chapter.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.09 Burden of Proof.

(A) The testator or settlor has the burden of establishing prima facie proof of the execution of the will or trust, as applicable. A person who opposes the complaint has the burden of establishing one or more of the following:

- (1) The lack of testamentary intent or the intent to create a trust, as the case may be;
- (2) The lack of the testator's testamentary capacity, or the settlor's legal capacity to enter into and establish the trust;
- (3) Undue influence, restraint, or duress on the testator or settlor;
- (4) Fraud or mistake in the execution of the will or trust;
- (5) Revocation of the will or trust.

(B) A party to the proceeding has the ultimate burden of persuasion as to the matters for which the party has the initial burden of proof.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.10 Declaration of Validity.

(A)(1) The court shall declare the will valid if it finds all of the following:

- (a) The will was properly executed pursuant to section 2107.03 of the Revised Code or under any prior law of this state that was in effect at the time of execution.
- (b) The testator had the requisite testamentary capacity, was free from undue influence, and was not under restraint or duress.
- (c) The execution of the will was not the result of fraud or mistake.

(2) After the testator's death, unless the will is modified or revoked after the court's declaration under division (A)(1) of this section, the will has full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request.

(B)(1) The court shall declare the trust valid if it finds all of the following:

- (a) The trust meets the requirements of section 5804.02 of the Revised Code.
- (b) The settlor had the legal capacity to enter into and establish the trust, was free from undue influence, and was not under restraint or duress.
- (c) The execution of the trust was not the result of fraud or mistake.

(2) Unless the trust is modified or revoked after the court's declaration, the trust has full legal effect.

(C) The court may, if it finds the will or trust to be valid, attach a copy of the valid document to the court's judgment entry, but failure to do so shall not affect the determination of validity of the will or trust.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.11 Effect of Declaration.

(A) Unless the will or trust is modified or revoked, and except as otherwise provided in this section, no person may contest the validity of a will or trust that is declared valid in a proceeding pursuant to this chapter.

(B) The failure to name a necessary defendant under division (A) of section 5817.05 of the Revised Code is not jurisdictional. A declaration of a will's validity under this chapter shall be binding upon all defendants who were named or represented, and properly served pursuant to division (A) of section 5817.07 of the Revised Code, notwithstanding the failure to name a necessary defendant. However, if a person is one who should have been named a party defendant in the action in which the will was declared valid and if the person was not named a defendant and properly served in that action, that person, after the testator's death, may contest the validity of a will declared valid.

(C) The failure to name a necessary defendant under division (A) of section 5817.06 of the Revised Code is not jurisdictional. A declaration of a trust's validity under this chapter shall be binding upon all defendants who were named or represented, and properly served pursuant to division (B) of section 5817.07 of the Revised Code, notwithstanding the failure to name a necessary defendant. However, if a person is one who should have been named a party defendant in the action in which the trust was declared valid and if the person was not named a defendant and properly served in that action, that person may contest the validity of a trust declared valid.

(D) In determining whether a person was a party defendant and properly served in an action to declare a will or trust valid under this chapter, the representation rules of Chapter 5803. of the Revised Code shall be applied, and a person represented in the action under those rules is bound by the declaration of validity even if, by the time of the testator's death, or the challenge to the trust, the representing person has died or would no longer be able to represent the person to be represented in the proceeding under this chapter.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.12 Subsequent Modification of Will

(A) After a declaration of a will's validity under division (A)(1) of section 5817.10 of the Revised Code, the will may be modified by a later will or codicil executed according to the laws of this state or another state, and the will may be revoked under section 2107.33 of the Revised Code or other applicable law.

(B) The revocation by a later will, or other document under section 2107.33 of the Revised Code, of a will that has been declared valid under division (A)(1) of section 5817.10 of the Revised Code does not affect the will or the prior declaration of its validity if the later will or other document is found by a court of competent jurisdiction to be invalid due to the testator's lack of testamentary capacity, or undue influence, restraint, or duress on the testator, or otherwise.

(C) The amendment by a later codicil of a will that has been declared valid under division (A)(1) of section 5817.10 of the Revised Code does not affect the will or the prior declaration of its validity except as provided by the codicil. However, the codicil is not considered validated under this chapter unless its validity is also declared as provided in this chapter.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.13 Subsequent Modification of Trust.

(A) After a declaration of a trust's validity under division (B)(1) of section 5817.10 of the Revised Code, the trust may be modified, terminated, revoked, or reformed under sections 5804.10 to 5804.16 of the Revised Code, or other applicable law.

(B) The modification, termination, revocation, or reformation by a new trust or other document of a trust that has been declared valid under division (B)(1) of section 5817.10 of the Revised Code does not affect the trust or the prior declaration of its validity if the later trust or other document is found by a court of competent jurisdiction to be invalid due to the settlor's lack of capacity, or undue influence, restraint, or duress on the settlor, or otherwise.

(C) An amendment of a trust that has been declared valid under division (B)(1) of section 5817.10 of the Revised Code does not affect the trust or the prior declaration of its validity except as provided by the amendment. However, the amendment is not considered validated under this chapter unless its validity is also declared as provided in this chapter.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

Sec. 5817.14 Information Not Admissible Evidence.

(A) The finding of facts by a court in a proceeding brought under this chapter is not admissible as evidence in any proceeding other than a proceeding brought to determine the validity of a will or trust.

(B) The determination or judgment rendered in a proceeding under this chapter is not binding upon the parties to that proceeding in any action that is not brought to determine the validity of a will or trust.

(C) The failure of a testator to file a complaint for a judgment declaring the validity of a will that the testator has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator.

(D) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust that the settlor has executed is not admissible as evidence in any proceeding to determine the validity of that trust or any other trust executed by the settlor.

History. Added by 132nd General Assembly File No. TBD, HB 595, § 1, eff. 3/22/2019.

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Chapter 3: NCCUSL Comments

The following Comments* on the Uniform Trust Code were prepared by its Reporter, David English, and approved by the National Conference of Commissioners on Uniform State Laws as explanation and illustration of the UTC. They apply equally to the Ohio Trust Code, as authoritative statements of the intent and application of the statute, except to the extent that Ohio has deviated from the UTC text. Those Ohio deviations are noted after each Comment to which they apply and are explained in the Report of the Joint Committee. In addition, in some instances references after UTC comments to Ohio changes that are discussed in the Report are to changes the OTC provision would make to existing Ohio law, rather than to changes in the OTC from the UTC text.

These UTC Comments are arranged by UTC section number. Generally, the UTC section number is the last four digits of the OTC section number. Thus, Ohio Rev. Code § 5802.01 is UTC § 201. Only the following OTC sections do not so correlate to UTC:

<u>OTC</u>	<u>UTC</u>
5801.01	103
5801.011	101
5801.03	104
5801.04	105
5801.05	106
5801.06	107
5801.07	108
5801.08	109
5801.09	110
5801.10	111
5804.18	none
5805.01	502
5805.02	503
5805.03	none
5805.05	501, 506
5805.06	505
5811.03	1106

Note also that the following UTC sections have been omitted from the OTC: § 112 (see Report § 9); § 204 (see Report § 11); § 1103; § 1104 (see § 3 of H.B. 416, under which the OTC's effective date was January 1, 2007); and § 1105 (see § 2 of H.B. 416 for a list of Ohio Rev. Code sections that will be repealed by H.B. 416).

* Used with permission of the National Conference of Commissioners on Uniform State Laws.

General Comment—Article 1. General Provisions and Definitions

The Uniform Trust Code is primarily a default statute. Most of the Code's provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 105(b). These include the duty of a trustee to act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds.

The remainder of the article specifies the scope of the Code (Section 102), provides definitions (Section 103), and collects provisions of importance not amenable to codification elsewhere in the Uniform Trust Code. Sections 106 and 107 focus on the sources of law that will govern a trust. Section 106 clarifies that despite the Code's comprehensive scope, not all aspects of the law of trusts have been codified. The Uniform Trust Code is supplemented by the common law of trusts and principles of equity. Section 107 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust's terms.

Changing a trust's principal place of administration is sometimes desirable, particularly to lower a trust's state income tax. Such transfers are authorized in Section 108. The trustee, following notice to the "qualified beneficiaries," defined in Section 103(13), may without approval of court transfer the principal place of administration to another State or country if a qualified beneficiary does not object and if the transfer is consistent with the trustee's duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. The settlor, if minimum contacts are present, may also designate the trust's principal place of administration.

Sections 104 and 109 through 111 address procedural issues. Section 104 specifies when persons, particularly persons who work in organizations, are deemed to have acquired knowledge of a fact. Section 109 specifies the methods for giving notice and excludes from the Code's notice requirements persons whose identity or location is unknown and not reasonably ascertainable. Section 110 allows beneficiaries with remote interests to request notice of actions, such as notice of a trustee resignation, which are normally given only to the qualified beneficiaries.

Section 111 ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. The terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court could properly approve.

The Uniform Trust Code does not prescribe the rules of construction to be applied to trusts created under the Code. The Code instead recognizes that enacting jurisdictions are likely to take a diversity of approaches, just as they have with respect to the rules of construction applicable to wills. Section 112 accommodates this variation by providing that the State's specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

Comment—Section 101. Short Title.

None.

Comment—Section 102. Scope.

The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 401-402. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts §§ 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 2, 5-16C (1959).

The Uniform Trust Code is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding. See, e.g., Uniform Probate Code § 5-411(a)(4).

[Note: For Ohio changes see Report Sec. 4.]

Comment—Section 103. Definitions.

A definition of "action" (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the Uniform Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.

The definition of "ascertainable standard" (paragraph (2)) was added to the Code by a 2004 amendment. The term was previously used only in and defined in Section 814. Other 2004 amendments add the term to Sections 103(11) and 504, necessitating the need to move the definition in Section 814 to the list of defined terms in Section 103 and thereby make it applicable throughout the Code.

"Beneficiary" (paragraph (3)) refers only to a beneficiary of a trust as defined in the Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained now or in the future. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become

beneficiaries merely because they receive compensation from the trust. *See* Restatement (Third) of Trusts Section 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 126 cmt. c (1959).

While the holder of a power of appointment is not considered a trust beneficiary under the common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust Code. Holders of powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust law and this Code is as defined in state property law and not federal tax law although there is considerable overlap between the two definitions.

A power of appointment is authority to designate the recipients of beneficial interests in property. *See* Restatement (Second) of Property: Donative Transfers Section 11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate. *See* Restatement (Second) of Property: Donative Transfers Section 11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period of time or until occurrence of some event. *See* Restatement (Second) of Property: Donative Transfers Section 11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of "beneficiary" excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

While all categories of powers of appointment are included within the definition of "beneficiary," the Uniform Trust Code elsewhere makes distinctions among types of powers. Under Section 302, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power. A "power of withdrawal" (paragraph (11)) is defined as a presently exercisable general power of appointment other than a power exercisable by a trustee and limited by an ascertainable standard, or a power which is exercisable by another person only upon consent of the trustee or a person holding an adverse interest. The exception for a power exercisable by a trustee that is limited by an ascertainable standard was added in 2004. For a discussion of this amendment, see the comment on the 2004 Amendment to Section 504, which made a related change.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (*see* Section 405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 110(b), also granted rights of a qualified beneficiary under the Code are charitable organizations expressly designated to receive distributions under the terms of a charitable trust but only if their beneficial interests sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust.

The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. *See* Restatement (Third) of Trusts Section 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 116-119 (1959). Except as limited by public

policy, the extent of a beneficiary's interest is determined solely by the settlor's intent. See Restatement (Third) of Trusts Section 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 127-128 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. See Restatement (Third) of Trusts Section 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 140, 142 (1959).

Under the Uniform Trust Code, when a trust has both charitable and noncharitable beneficiaries only the charitable portion qualifies as a "charitable trust" (paragraph (4)). The great majority of the Code's provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 405 and 413, a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of *cy pres*. Also, Section 411 allows a noncharitable trust to in certain instances be terminated by its beneficiaries while charitable trusts do not have beneficiaries in the usual sense. To the extent of these distinctions, a split-interest trust is subject to two sets of provisions, one applicable to the charitable interests, the other the noncharitable.

For discussion of the definition of "conservator" (paragraph (5)), see the definition of "guardian" (paragraph (7)).

To encourage trustees to accept and administer trusts containing real property, the Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" (paragraph (6)). Section 701(c)(2) authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

Under the Uniform Trust Code, a "guardian" (paragraph (7)) makes decisions with respect to personal care; a "conservator" (paragraph (5)) manages property. The terminology used is that employed in Article V of the Uniform Probate Code, and in its free-standing Uniform Guardianship and Protective Proceedings Act. Enacting jurisdictions not using these terms in the defined sense should substitute their own terminology. For this reason, both terms have been placed in brackets. The definition of "guardian" accommodates those jurisdictions which allow appointment of a guardian by a parent or spouse in addition to appointment by a court. Enacting jurisdictions which allow appointment of a guardian solely by a court should delete the bracketed language "a parent, or a spouse."

The phrase "interests of the beneficiaries" (paragraph (8)) is used with some frequency in the Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. Absent authority to do so in the terms of the trust, Section 108 prohibits a trustee from changing a trust's principal place of administration if the transfer would violate the trustee's duty to administer the trust at a place appropriate to the interests of the beneficiaries. Section 706(b) conditions certain of the grounds for removing a trustee on the court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section 801 requires the trustee to administer the trust in the

interests of the beneficiaries, and Section 802 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 1002(b) may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

“Jurisdiction” (paragraph (9)), when used with reference to a geographic area, includes a state or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. “Jurisdiction” is used in Sections 107 and 403 to refer to the place whose law will govern the trust. The term is used in Section 108 to refer to the trust’s principal place of administration. The term is used in Section 816 to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

The definition of “property” (paragraph (12)) is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. See Section 401 comment.

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of “qualified beneficiary” (paragraph (13)) to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 813 to define the class to be kept informed of the trust’s administration. Section 417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704. Prior to transferring a trust’s principal place of administration, Section 108(d) requires that the trustee give at least 60 days notice to the qualified beneficiaries.

The qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary’s interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Article 3 may be employed, including the possible appointment by the court of a representative to represent the beneficiary’s interest.

The qualified beneficiaries who take upon termination of the beneficiary’s interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of

appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 110 expands the definition of qualified beneficiaries to encompass this wider group. Section 110(b) grants the rights of qualified beneficiaries to charitable organizations expressly designated under the terms of a charitable trust and whose beneficial interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust. Section 110(c) also grants the rights of qualified beneficiaries to a person appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose. Section 110(d) is an optional provision granting the rights of a qualified beneficiary with respect to a charitable trust to the attorney general of the enacting jurisdiction.

The definition of "revocable" (paragraph (14)) clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor's death or the power of revocation is released. The consequences of classifying a trust as revocable are many. The Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor's debts (Section 505), the standard of capacity for creating a revocable trust (Section 601), the procedure for revocation (Section 602), the subjecting of the beneficiaries' rights to the settlor's control (Section 603), the period for contesting a revocable trust (Section 604), the power of the settlor of a revocable trust to direct the actions of a trustee (Section 808(a)), notice to the qualified beneficiaries upon the settlor's death (Section 813(b)), and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 1011(d)).

Because under Section 603(c) the holder of a power of withdrawal has the rights of a settlor of a revocable trust, the definition of "power of withdrawal" (paragraph (11)), and "revocable" (paragraph (14)) are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest although the definition of "power of withdrawal" excludes powers subject to an ascertainable standard, a limitation which is not present in the definition of "revocable."

The definition of "settlor" (paragraph (15)) refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401. Determining the identity of the "settlor" is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. See Section 602(b).

In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child's revocable trust would not be treated as one of the trust's settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child's proportionate contribution. Pursuant to Section 603(c), the child's power of withdrawal over the trust would also result in the child being treated as the settlor with respect to the portion of the trust attributable to the parent's contribution.

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. *See* Sections 505(a)(1), (3) (creditor claims against settlor of revocable trust), 602 (revocation or modification of revocable trust), and 604 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. *See* Section 505(a)(2) (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under Section 411 to terminate the trust with the beneficiaries' consent, the Uniform Trust Code also authorizes the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. *See* Sections 405(c) (standing to enforce charitable trust), 413 (doctrine of cy pres), and 706 (removal of trustee).

"Spendthrift provision" (paragraph (16)) means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 502. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 411, although the Code does not presume this result.

"Terms of a trust" (paragraph (18)) is a defined term used frequently in the Uniform Trust Code. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. *See* Restatement (Third) of Trusts Section 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. *See* Restatement (Third) of Trusts Section 4 cmt. f (Tentative Draft No. 1, approved 1996).

A manifestation of a settlor's intention does not constitute evidence of a trust's terms if it would be inadmissible in a judicial proceeding in which the trust's terms are in question. *See* Restatement (Third) of Trusts Section 4 cmt. b (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. b (1959). *See also* Restatement (Third) Property: Donative Transfers Sections 10.2, 11.1-11.3 (Tentative Draft No. 1, approved 1995). For

example, in many states a trust of real property is unenforceable unless evidenced by a writing, although Section 407 of this Code does not so require, leaving this issue to be covered by separate statute if the enacting jurisdiction so elects. Evidence otherwise relevant to determining the terms of a trust may also be excluded under other principles of law, such as the parol evidence rule.

“Trust instrument” (paragraph (19)) is a subset of the definition of “terms of a trust” (paragraph (18)), referring to only such terms as are found in an instrument executed by the settlor. Section 403 provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to Section 604(a)(2), the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information. Section 813(b)(1) requires that the trustee upon request furnish a beneficiary with a copy of the trust instrument. To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 1006 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 1106(a)(4) provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Uniform Trust Code apply to trust instruments executed before the effective date of the Code.

The definition of “trustee” (paragraph (20)) includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the Uniform Trust Code. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. See Restatement (Third) of Trusts Section 32 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 89 (1959). State banking statutes normally impose additional requirements before a corporation can act as trustee.

2004 Amendment. Section 103(2) adds a definition of “ascertainable standard.” The term was formerly used only in Section 814. Other 2004 amendments add the term to Sections 103(11) and 504. The amendment moves into this section the definition previously found in Section 814, thereby making it apply generally throughout the Code. Adding this definition required the renumbering of all subsequent definitions in the Section and corrections to cross-references to this Section throughout the Code and comments.

Section 103(11), the definition of “power of withdrawal,” is amended to exclude a possible inference that the term includes a discretionary power in a trustee to make distributions for the trustee’s own benefit which is limited by an ascertainable standard. For an explanation of the reason for this amendment, see the comment to the 2004 amendment to Section 504, which addresses a related issue.

Clarifying language is added to Section 103(13), the definition of “qualified beneficiary,” to make clear that the second category in the definition refers to termination of an interest that is not associated with termination of the trust.

[Note: Renumbered Ohio Rev. Code § 5801.01. For Ohio changes see Report Sec. 3.]

Comment—Section 104. Knowledge.

This section specifies when a person is deemed to know a fact. Subsection (a) states the general rule. Subsection (b) provides a special rule dealing with notice to organizations. Pursuant to subsection (a), a fact is known to a person if the person had actual knowledge of the fact, received notification of it, or had reason to know of the fact's existence based on all of the circumstances and other facts known to the person at the time. Under subsection (b), notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence.

"Know" is used in its defined sense in Sections 109 (methods and waiver of notice), 305 (appointment of representative), 604(b) (limitation on contest of revocable trust), 812 (collecting trust property), 1009 (nonliability of trustee upon beneficiary's consent, release, or ratification), and 1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. See Section 1005 (limitation of action against trustee following report of trustee).

This section is based on Uniform Commercial Code § 1-202 (2000 Annual Meeting Draft).

[*Note: Renumbered Ohio Rev. Code § 5801.03.*]

Comment—Section 105. Default and Mandatory Rules.

Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust. Because subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b).

Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409. Subsection (b)(12) makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. See Sections 604 (period of limitations for contesting validity of revocable trust), and 1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. For this duty, see Sections 801 and 814(a). Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve. Subsections (b)(2)-(3) are echoed in

Sections 404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), 801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 802(a) (trustee must administer trust solely in interests of the beneficiaries), 814 (trustee must exercise discretionary power in good faith and in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).

The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice, including requiring that a trustee furnish bond. Subsection (b)(6), (13). Additionally, should the jurisdiction adopting this Code enact the optional provisions on subject-matter jurisdiction and venue, subsection (b)(14) similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

Section 813 imposes a general obligation to keep the beneficiaries informed as well as several specific notice requirements. Subsections (b)(8) and (b)(9), which were placed in brackets and made optional provisions by a 2004 amendment, specify limits on the settlor's ability to waive these information requirements. With respect to beneficiaries age 25 or older, a settlor may dispense with all of the requirements of Section 813 except for the duties to inform the beneficiaries of the existence of the trust, of the identity of the trustee, and to provide a beneficiary upon request with such reports as the trustee may have prepared. Among the specific requirements that a settlor may waive include the duty to provide a beneficiary upon request with a copy of the trust instrument (Section 813(b)(1)), and the requirement that the trustee provide annual reports to the qualified beneficiaries (Section 813(c)). The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case, however, if such information is requested by a beneficiary and is reasonably related to the trust's administration.

Responding to the desire of some settlors that younger beneficiaries not know of the trust's bounty until they have reached an age of maturity and self-sufficiency, subsection (b)(8) allows a settlor to provide that the trustee need not even inform beneficiaries under age 25 of the existence of the trust. However, pursuant to subsection (b)(9), if the younger beneficiary learns of the trust and requests information, the trustee must respond. More generally, subsection (b)(9) prohibits a settlor from overriding the right provided to a beneficiary in Section 813(a) to request from the trustee of an irrevocable trust copies of trustee reports and other information reasonably related to the trust's administration.

During the drafting of the Uniform Trust Code, the drafting committee discussed and rejected a proposal that the ability of the settlor to waive required notice be based on the nature of the beneficiaries' interest and not on the beneficiaries' age. Advocates of this alternative approach concluded that a settlor should be able to waive required notices to the remainder beneficiaries, regardless of their age. Enacting jurisdictions preferring this alternative should substitute the language "adult and current or permissible distributees of trust income or principal" for the reference to "qualified beneficiaries" in subsection (b)(8). They should also delete the reference to beneficiaries "who have attained the age of 25 years."

Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

Neither subsection (b)(8) nor (b)(9) apply to revocable trusts. The settlor of a revocable trust may waive all reporting to the beneficiaries, even in the event the settlor loses capacity. If the settlor is silent about the subject, reporting to the beneficiaries will be required upon the settlor's loss of capacity. *See* Section 603.

In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008. Subsection (b)(10) of this section provides a cross-reference. Similarly, subsection (b)(7) provides a cross-reference to Section 708(b), which limits the binding effect of a provision specifying the trustee's compensation.

Finally, subsection (b)(11) clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a spendthrift restriction is allowed as provided in Article 5.

2001 Amendment. By amendment in 2001, subsections (b) (3), (8) and (9) were revised. The language in subsection (b)(3) "that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404.

Subsections (b)(8) and (9) formerly provided:

(8) the duty to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, and of their right to request trustee's reports and other information reasonably related to the administration of the trust;

(9) the duty to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.

The amendment clarifies that the information requirements not subject to waiver are requirements specified in Section 813 of the Code.

2003 Amendment. By amendment in 2003, subsection (b)(8) was revised. Under the previous provision, as amended in 2001, the presence of two "excepts" in the same sentence, the first in the introductory language to subsection (b) and the second at the beginning of subsection (b)(8), has caused considerable confusion. The revision eliminates the second "except" in (b)(8) without changing the meaning of the provision.

2004 Amendment. Sections 105(b)(8) and 105(b)(9) address the extent to which a settlor may waive trustee notices and other disclosures to beneficiaries that would otherwise be required under the Code. These subsections have generated more discussion in jurisdictions considering enactment of the UTC than have any other provisions of the Code. A majority of the enacting jurisdictions have modified these provisions but not in a consistent way. This lack of agreement and resulting variety of approaches is expected to continue as additional states enact the Code.

Placing these sections in brackets signals that uniformity is not expected. States may elect to enact these provisions without change, delete these provisions, or enact them with modifications. In Section 105(b)(9), an internal bracket has been added to make clear that an enacting jurisdiction may limit to the qualified beneficiaries the obligation to respond to a beneficiary's request for information.

The placing of these provisions in brackets does not mean that the Drafting Committee recommends that an enacting jurisdiction delete Sections 105(b)(8) and 105(b)(9). The Committee continues to believe that Sections 105(b)(8) and (b)(9), enacted as is, represent the best balance of competing policy considerations. Rather, the provisions were placed in brackets out of a recognition that there is a lack of consensus on the extent to which a settlor ought to be able to waive reporting to beneficiaries, and that there is little chance that the states will enact Sections 105(b)(8) and (b)(9) with any uniformity.

The policy debate is succinctly stated in Joseph Kartiganer & Raymond H. Young, *The UTC: Help for Beneficiaries and Their Attorneys*, Prob. & Prop., Mar./April 2003, at 18, 20:

The beneficiaries' rights to information and reports are among the most important provisions in the UTC. They also are among the provisions that have attracted the most attention. The UTC provisions reflect a compromise position between opposing viewpoints.

Objections raised to beneficiaries' rights to information include the wishes of some settlors who believe that knowledge of trust benefits would not be good for younger beneficiaries, encouraging them to take up a life of ease rather than work and be productive citizens. Sometimes trustees themselves desire secrecy and freedom from interference by beneficiaries.

The policy arguments on the other side are: that the essence of the trust relationship is accounting to the beneficiaries; that it is wise administration to account and inform beneficiaries, to avoid the greater danger of the beneficiary learning of a breach or possible breach long after the event; and that there are practical difficulties with secrecy (for example, the trustee must tell a child that he or she is not eligible for financial aid at college because the trust will pay, and must determine whether to accumulate income at high income tax rates or pay it out for inclusion in the beneficiary's own return). Furthermore, there is the practical advantage of a one-year statute of limitations when the beneficiary is informed of the trust transactions and advised of the bar if no claim is made within the year. UTC §§ 1005. In the absence of notice, the trustee is exposed to liability until five years after the trustee ceases to serve, the interests of beneficiaries end, or the trust terminates. UTC §§ 1005(c)

2005 Amendment. Subsection (b)(2) is revised to make the language consistent with the corresponding duties in Sections 801 and 814(a), which require that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) provided that the settlor could not waive the duty of a trustee to act in good faith and in accordance with the purposes of the trust. The amendment adds that also cannot waive the obligation to act in accordance with the terms of the trust and the interests of the beneficiaries.

The purpose of the amendment is to make the language consistent, not to change the substance of the section. Absent some other restriction, a settlor is always free to specify the trust's terms to which the trustee must comply. Also, "interests of the beneficiaries" is a defined term in Section 103(8) meaning the beneficial interests as provided in the terms of the trust, which the settlor is also free to specify.

[*Note: Renumbered Ohio Rev. Code § 5801.04. For Ohio changes see Report Sec. 5.*]

Comment—Section 106. Common Law of Trusts; Principles of Equity.

The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.

The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, *Statutory Construction* Section 52.05 (6th ed. 2000); Jack Davies, *Legislative Law and Process in a Nutshell* Section 55-4 (2d ed. 1986).

Comment Amended in 2005.

[*Note: Renumbered Ohio Rev. Code § 5801.05. For Ohio changes see Report Sec. 1.A.*]

Comment—Section 107. Governing Law.

This section provides rules for determining the law that will govern the meaning and effect of particular trust terms. The law to apply to determine whether a trust has been validly created is determined under Section 403.

Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime. This section does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time.

Paragraph (2) provides a rule for trusts without governing law provisions – the meaning and effect of the trust's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. *See Restatement (Second) of Conflict of Laws* §§ 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. *See Restatement (Second) of Conflict of Laws* § 6 (1971). Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

This section is consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the Hague Convention allows the settlor to designate the governing law. Hague Convention art. 6. Absent a designation, the Convention provides that the trust is to be governed by the law of the place having the closest connection to the trust. Hague Convention art. 7. The Convention also lists particular public policies for which the forum may decide to override the choice of law that would otherwise apply. These policies are protection of minors and incapable parties, personal and proprietary effects of marriage, succession rights, transfer of title and security interests in property, protection of creditors in matters of insolvency, and, more generally, protection of third parties acting in good faith. Hague Convention art. 15.

For the authority of a settlor to designate a trust's principal place of administration, see Section 108(a).

[*Note: Renumbered Ohio Rev. Code § 5801.06.*]

Comment—Section 108. Principal Place of Administration.

This section prescribes rules relating to a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. See Section 107 comment.

Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.

A concept akin to principal place of administration is used by the Office of the Comptroller of the Currency. Reserves that national banks are required to deposit with state authorities is based on the location of the office where trust assets are primarily administered. See 12 C.F.R. Section 9.14(b).

Under the Uniform Trust Code, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular state (Section 204). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

A settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the terms of the trust. Under subsection (a), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's

terms, as authorized by Section 107. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions.

Subsection (b) provides that a trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. "Interests of the beneficiaries," defined in Section 103(8), means the beneficial interests provided in the terms of the trust. Ordinarily, absent a substantial change or circumstances, the trustee may assume that the original place of administration is also the appropriate place of administration. The duty to administer the trust at an appropriate place may also dictate that the trustee not move the trust.

Subsections (c)-(f) provide a procedure for changing the principal place of administration to another state or country. Such changes are often beneficial. A change may be desirable to secure a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. See Section 105. To facilitate transfer in the typical case, where all concur that a transfer is either desirable or is at least not harmful, a transfer can be accomplished without court approval unless a qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in Section 103(13) but also to those granted the rights of qualified beneficiaries under Section 110. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the transfer must seek court approval.

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. Subsection (f) clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 704. Absent an order of succession in the terms of the trust, Section 704(c) provides the procedure for appointment of a successor trustee of a noncharitable trust, and Section 704(d) the procedure for appointment of a successor trustee of a charitable trust.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. See 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 615 (4th ed. 1989).

[*Note: Renumbered Ohio Rev. Code § 5801.07. For Ohio changes see Report Sec. 6.*]

Comment—Section 109. Methods and Waiver of Notice.

Subsection (a) clarifies that notices under the Uniform Trust Code may be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive. Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or

location is unknown and not reasonably ascertainable by the trustee. The section does not define when a notice is deemed to have been sent or delivered or person deemed to be unknown or not reasonably ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil procedure.

Under the Uniform Trust Code, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. See Sections 411 (termination of noncharitable irrevocable trust) and 704 (appointment of successor trustee). Subsection (b) of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary's behalf under the representation principles of Article 3.

To facilitate administration, subsection (c) allows waiver of notice by the person to be notified or sent the document. Among the notices and documents to which this subsection can be applied are notice of a proposed transfer of principal place of administration (Section 108(d)) or of a trustee's report (Section 813(c)). This subsection also applies to notice to qualified beneficiaries of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), and of a trustee's resignation (Section 705(a)(1)).

Notices under the Uniform Trust Code are nonjudicial. Pursuant to subsection (d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

[*Note: Renumbered Ohio Rev. Code § 5801.08.*]

Comment—Section 110. Others Treated as Qualified Beneficiaries.

Under the Uniform Trust Code, certain notices need be given only to the “qualified” beneficiaries. For the definition of “qualified beneficiary,” see Section 103(13). Among these notices are notice of a transfer of the trust's principal place of administration (Section 108(d)), notice of a trust division or combination (Section 417), notice of a trustee resignation (Section 705(a)(1)), and notice of a trustee's annual report (Section 813(c)). Subsection (a) of this section authorizes other beneficiaries to receive one or more of these notices by filing a request for notice with the trustee.

Under the Code, certain actions, such as the appointment of a successor trustee, can be accomplished by the consent of the qualified beneficiaries. See, e.g., Section 704 (filling vacancy in trusteeship). Subsection (a) only addresses notice, not required consent. A person who requests notice under subsection (a) does not thereby acquire a right to participate in actions that can be taken only upon consent of the qualified beneficiaries.

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the state's attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust, Under subsection (b), charitable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries under the Code. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee's discretion but that

are not named in the trust's terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote remainder interests. For further discussion of the definition of "qualified beneficiary," see Section 103 comment.

Subsection (c) similarly grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections 408 and 409.

"Attorney general" is placed in brackets in subsection (d) to accommodate jurisdictions which grant enforcement authority over charitable trusts to another designated official. Because states take various approaches to enforcement of charitable trusts, by a 2004 amendment subsection (d) was placed in brackets in its entirety. For a discussion, see 2004 Amendment below.

Subsection (d) does not limit other means by which the attorney general or other designated official can enforce a charitable trust.

2001 Amendment. By amendment in 2001, "charitable organization expressly designated to receive distributions" was substituted for "charitable organization expressly entitled to receive benefits" in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

2004 Amendment. Subsection (b) is amended to better conform this provision to the Drafting Committee's intent. Charitable trusts do not have beneficiaries in the usual sense. Yet, such trusts are often created to benefit named charitable organizations. Under this amendment, which is based on the definition of qualified beneficiary in Section 103, a designated charitable organization has the rights of a qualified beneficiary only if it holds an interest similar to that of a qualified beneficiary in a noncharitable trust. The effect of the amendment is to exclude charitable organizations that might receive distributions in the trustee's discretion even though not expressly mentioned in the trust's terms. Also denied the rights of qualified beneficiaries are charitable organizations that hold only remote remainder interests. The previous version of subsection (b) had a similar intent but the language could be read more broadly.

The placing of subsection (d) in brackets recognizes that the role of the attorney general in the enforcement of charitable trusts varies greatly in the states. In some states, the legislature may prefer that the attorney general be granted the rights of a qualified beneficiary. In other states, the attorney general may play a lesser role in enforcement. The expectation is that states considering enactment will adapt this provision to the particular role that the attorney general plays in the enforcement of charitable trusts in their state. Some states may prefer to delete this provision. Other states might provide that the attorney general has the rights of a qualified beneficiary only for trusts in which no charitable organization has been designated to receive distributions. Yet other states may prefer to enact the provision without change.

[*Note: Renumbered Ohio Rev. Code § 5801.09. For Ohio changes see Report Sec. 7.*]

Comment—Section 111. Nonjudicial Settlement Agreements.

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (see Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the

court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3.

Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the “interested persons” whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee’s administration, such as approval of a trustee’s report or resignation.

[*Note: Substantially revised as Ohio Rev. Code § 5801.10. For Ohio changes see Report Sec. 8.*]

Comment—Section 112. Rules of Construction.

This section is patterned after Restatement (Third) of Trusts § 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor’s death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual’s primary estate planning instrument. Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. See Restatement (Third) of Trusts § 25, Reporter’s Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be.

Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. *See* Restatement (Third) of Property: Donative Transfers § 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to “heirs” or “issue.” Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator’s lifetime.

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code §§ 21101-21630, enacted in 1994.

[*Note: Section omitted in Ohio, see Report Sec. 9.*]

General Comment—Article 2. Judicial Proceedings.

This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts in more than one State or country. This article is not intended to provide comprehensive coverage of court jurisdiction or procedure with respect to trusts. These issues are better addressed elsewhere, for example in the State’s rules of civil procedure or as provided by court rule.

Section 201 makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust’s principal place of administration. Section 202 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust. Sections 203 and 204 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

Comment—Section 201. Role of Court in Administration of Trust.

While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 111, the court is always available to the extent its jurisdiction is invoked by interested persons. The

jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute.

Contrary to the trust statutes in some States, the Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a particular trust be subject to continuing court supervision, the court's intervention will normally be confined to the particular matter brought before it.

Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however. *See* Restatement (Second) of Trusts §§ 187, 259 (1959). This section does not limit the court's equity jurisdiction. Beyond mentioning petitions for instructions and actions to declare rights, subsection (c) does not attempt to list the types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary. Such an effort is made in California Probate Code § 17200. Excluding matters not germane to the Uniform Trust Code, the California statute lists the following as items relating to the "internal affairs" of a trust: determining questions of construction; determining the existence or nonexistence of any immunity, power, privilege, duty, or right; determining the validity of a trust provision; ascertaining beneficiaries and determining to whom property will pass upon final or partial termination of the trust; settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers; instructing the trustee; compelling the trustee to report information about the trust or account to the beneficiary; granting powers to the trustee; fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation; appointing or removing a trustee; accepting the resignation of a trustee; compelling redress of a breach of trust by any available remedy; approving or directing the modification or termination of a trust; approving or directing the combination or division of trusts; and authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

[*Note: For Ohio changes see Report Sec. 10.*]

Comment—Section 202. Jurisdiction over Trustee and Beneficiary.

This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code § 7-103, upon which portions of this section are based, is instructive:

It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.

The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer.

The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries.

For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 556-573 (4th ed. 1989).

Comment—Section 203. Subject-Matter Jurisdiction.

This section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction for trust matters, whether denominated the probate court, chancery court, or by some other name, from other courts in a State that may on occasion resolve disputes concerning trusts. The section has been placed in brackets because the enacting jurisdiction may already address subject-matter jurisdiction by other statute or court rule. The topic also need not be addressed in States having unified court systems. For an explanation of types of proceedings which may be brought concerning the administration of a trust, see the Comment to Section 201.

[*For Ohio changes see Report Sec. 11.*]

Comment—Section 204. Venue.

This optional, bracketed section is made available for jurisdictions that conclude that venue for a judicial proceeding involving a trust is not adequately addressed in local rules of civil procedure. For jurisdictions enacting this section, general rules governing venue continue to apply in cases not covered by this section. This includes most proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the trust's principal place of administration. The general rules governing venue also apply when the principal place of administration of a trust is in another locale, but jurisdiction is proper in the enacting State.

[*Note: Section omitted in Ohio, see Report Sec. 11.*]

General Comment—Article 3. Representation.

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation. Representation is a topic not adequately addressed under the trust law of most States. Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but the coverage of this article is more complete.

Section 301 is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Code. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions.

Sections 302-305 cover the different types of representation. Section 302 deals with representation by the holder of a general testamentary power of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered by Section 603, which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). Section 303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. Section 304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

The provisions of this article are subject to modification in the terms of the trust. See Section 105. Settlers are free to specify their own methods for providing substituted notice and obtaining substituted consent.

[*Note: For Ohio changes see Report Sec. 12.*]

Comment—Section 301. Representation: Basic Effect.

This section is general and introductory, laying out the scope of the article.

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. Notice to the substitute has the same effect as if given directly to the other person. Subsection (a) does not apply to notice of a judicial proceeding. Pursuant to Section 109(d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure, which may require that notice not only be given to the representative but also to the person represented. For a model statute for the giving of notice in such cases, see Unif. Probate Code Section 1-403(3). Subsection (a) may be used to facilitate the giving of notice to the qualified beneficiaries of a proposed transfer of principal place of administration (Section 108(d)), of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), of a trustee's resignation (Section 705(a)(1)), and of a trustee's report (Section 813(c)).

Subsection (b) deals with the effect of a consent, whether by actual or virtual representation. Subsection (b) may be used to facilitate consent of the beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 411), agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (Section 704(c)(2)), and a beneficiary's consent to or release or affirmance of the actions of a trustee (Section 1009). A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because

the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pourover devise has authority under Section 303 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection. Subsection (b) implements cases such as *Barber v. Barber*, 837 P.2d 714 (Alaska 1992), which held that the refusal to allow an objection by an adult competent remainder beneficiary violated due process.

Subsection (c) implements the policy of Sections 411 and 602 requiring express authority in the power of attorney or approval of court before the settlor's agent, conservator or guardian may consent on behalf of the settlor to the termination or revocation of the settlor's revocable trust.

2004 Amendment. For an explanation of the new subsection (d) and of the bracketed language in subsection (c), see the comment to the amendment to Section 411.

Comment—Section 302. Representation by Holder of General Testamentary Power of Appointment.

This section specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute. Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, oftentimes of a trust intended to qualify for the federal estate tax marital deduction. See I.R.C. § 2056(b)(5). Without the exception for conflict of interest, the holder of the power could act in a way that could enhance the holder's income interests to the detriment of the appointees or takers in default, whoever they may be.

Comment—Section 303. Representation by Fiduciaries and Parents.

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Paragraph (6), which allows parents to represent their children, is more recent, having originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. See Section 103.

Paragraph (3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 411 and 602, an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

Comment—Section 304. Representation by Person Having Substantially Identical Interest.

This section authorizes a person with a substantially identical interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section is derived from Section 1-403(2)(iii) of the Uniform Probate Code, but with several modifications. Unlike the UPC, this section does not expressly require that the representation be adequate, the drafters preferring to leave this issue to the courts. Furthermore, this section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. Finally, this section does not apply to the extent there is a conflict of interest between the representative and the person represented.

Restatement (First) of Property §§ 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property § 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property § 185 cmt. b (1936).

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. See Restatement (First) of Property § 185 cmt. d (1936).

Comment—Section 305. Appointment of Representative.

This section is derived from Section 1-403(4) of the Uniform Probate Code. However, this section substitutes "representative" for "guardian ad litem" to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family. "Representative" is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.

General Comment—Article 4. Creation, Validity, Modification, and Termination of Trust.

Sections 401 through 409, which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in Section 402. Section 403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact. Section 404 forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. Section 405 recites the permitted purposes of a charitable trust. Section 406 lists some of the grounds for contesting a trust. Section 407 validates oral trusts. The remaining sections address what are often referred to as “honorary” trusts, although such trusts are valid and enforceable under this Code. Section 408 covers a trust for the care of an animal; Section 409 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

Sections 410 through 417 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 411), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 412), or by the court or trustee if continued administration under the trust’s existing terms would be uneconomical (Section 414). A trust may be reformed to correct a mistake of law or fact (Section 415), or modified to achieve the settlor’s tax objectives (Section 416). Trusts may be combined or divided (Section 417). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 410).

Section 413 codifies and at the same time modifies the doctrine of *cy pres*, at least as applied in most States. The Uniform Trust Code authorizes the court to apply *cy pres* not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. Section 413 also creates a presumption of general charitable intent. Upon failure of the settlor’s original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide. Furthermore, absent a contrary provision in the terms of the trust, limits are placed on when a gift over to a noncharity can take effect upon failure or impracticality of the original charitable purpose. The gift over is effective only if, when the provision takes effect, the trust property is to revert to the settlor and the settlor is still living, or fewer than 21 years have elapsed since the date of the trust’s creation.

The requirements for a trust’s creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. *See* Section 105(b)(1). Nor may the settlor negate the court’s ability to modify or terminate a trust as provided in Sections 410 through 416. *See* Section 105(b)(4). However, a settlor is free to restrict or modify the trustee’s power to terminate an uneconomic trust as provided in Sections 414, and the trustee’s power to combine and divide trusts as provided in Section 417.

Comment—Section 401. Methods of Creating Trust.

This section is based on Restatement (Third) of Trusts Section 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. See Section 103(12) (“property” defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor’s lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor’s death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. See Unif. Testamentary Additions to Trusts Act Section 1 (1991), *codified at* Uniform Probate Code Section 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). See *also* Restatement (Third) of Trusts Section 19 (Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. See Restatement (Third) of Trusts Section 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. See Restatement (Third) of Trusts Section 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 35-36 (1959).

The methods specified in this section are not exclusive. Section 102 recognizes that trusts can also be created by special statute or court order. See *also* Restatement (Third) of Trusts Section 1 cmt. a (Tentative Draft No. 1, approved 1996); Unif. Probate Code Section 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Unif. Probate Code Section 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts Section 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. See Restatement (Third) of Trusts Section 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts Section 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 14 cmt. h, 26 cmt. n (1959).

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor’s name as trustee. However, such reregistration is not necessary to create the trust. See, *e.g.*, *In re Estate of Heggstad*, 20 Cal. Rptr. 2d 433 (Ct. App. 1993); Restatement (Third) of Trusts Section 10 cmt. e (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 17 cmt. a (1959). A declaration of trust can be funded merely by attaching a schedule listing the assets that are to be subject to the trust without executing separate instruments of transfer. But such practice can make it difficult to later confirm title with third party transferees and for this reason is not recommended.

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, Section 701 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. See Restatement (Third) of Trusts Section 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph (3)), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. See Sections 302 (representation by holder of general testamentary power of appointment); 505(b) (creditor claims against holder of power of withdrawal); and 603(c) (rights of holder of power of withdrawal). For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers Sections 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

[*Note: For Ohio changes see Report Sec. 13.*]

Comment—Section 402. Requirements for Creation.

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. See Restatement (Third) of Trusts Section 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. See Section 103(18) (“terms of a trust” defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. See Section 601 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (b) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts Sections 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 112-122 (1959).

Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. See Restatement (Third) of Trusts Section 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to

interfere with the beneficiary's enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction's Statute of Uses. *See* Restatement (Third) of Trusts Section 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 67-72 (1959).

Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts Section 341 (1959).

Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. *See* Restatement (Third) of Trusts Section 46 (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts Section 122 (1959); Restatement (Second) of Property: Donative Transfers Section 12.1 cmt. e (1986).

[*Note: For Ohio changes see Report Secs. 13 and 14.*]

Comment—Section 403. Trusts Created in Other Jurisdictions.

The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* Sections 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* Section 600 (4th ed. 1987).

Section 403 extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 403, a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

Section 403 is comparable to Section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places in which the testator had a significant contact. Unlike the UPC, however, Section 403 is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the UPC, Section 403 validates a trust valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located.

The section does not supercede local law requirements for the transfer of real property, such that title can be transferred only by recorded deed.

Comment—Section 404. Trust Purposes.

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts §§ 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts §§ 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. See Restatement (Third) of Trusts § 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 60 cmt. a (1959). Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. See Restatement (Third) of Trusts § 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts § 62 (1959).

Pursuant to Section 402(a), a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 408 and 409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts § 27(2) (Tentative Draft No. 2, approved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious. See Restatement (Third) of Trusts § 27 cmt. b (Tentative Draft No. 2, approved 1999).

Section 412(b), which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. See Restatement (Third) of Trusts § 28 cmt. e (Tentative Draft No. 2, approved 1999).

[Note: For Ohio changes see Report Sec. 5.B.]

Comment—Section 405. Charitable Purposes; Enforcement.

The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts § 28 (Tentative Draft No. 3, 2001), and Restatement (Second) of Trusts § 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.

Charitable trusts are subject to the restriction in Section 404 that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. See Restatement (Third) of Trusts § 28 cmt. f (Tentative Draft No. 3, 2001).

Under subsection (b), a trust that states a general charitable purpose does not fail if the settlor neglected to specify a particular charitable purpose or organization to receive distributions. The court may instead validate the trust by specifying particular charitable purposes or recipients, or delegate to the trustee the framing of an appropriate scheme. See Restatement (Second) of Trusts § 397 cmt. d (1959). Subsection (b) of this section is a corollary to Section 413, which states the doctrine of *cy pres*. Under Section 413(a), a trust failing to state a general charitable purpose does not fail upon failure of the particular means specified in the terms of the trust. The court must instead apply the trust property in a manner consistent with the settlor's charitable purposes to the extent they can be ascertained.

Subsection (b) does not apply to the long-established estate planning technique of delegating to the trustee the selection of the charitable purposes or recipients. In that case, judicial intervention to supply particular terms is not necessary to validate the creation of the trust. The necessary terms instead will be supplied by the trustee. See Restatement (Second) of Trusts § 396 (1959). Judicial intervention under subsection (b) will become necessary only if the trustee fails to make a selection. See Restatement (Second) of Trusts § 397 cmt. d (1959). Pursuant to Section 110(b), the charitable organizations selected by the trustee would not have the rights of qualified beneficiaries under this Code because they are not expressly designated to receive distributions under the terms of the trust.

Contrary to Restatement (Second) of Trusts § 391 (1959), subsection (c) grants a settlor standing to maintain an action to enforce a charitable trust. The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests. For the law on the enforcement of charitable trusts, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. Hawaii L. Rev. 593 (1999).

[*Note: For Ohio changes see Report Sec. 21.*]

Comment—Section 406. Creation of Trust Induced by Fraud, Duress, or Undue Influence.

This section is a specific application of Restatement (Third) of Trusts § 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts § 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake.

This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415. See also Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 (Tentative Draft No. 3, 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

[*Note: For Ohio changes see Report Sec. 15.*]

Comment—Section 407. Evidence of Oral Trust.

While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is a higher standard than is in effect in many States. See Restatement (Third) of Trusts § 20 Reporter’s Notes (Tentative Draft No. 1, approved 1996).

Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish specifically to cite such provisions.

For the Statute of Frauds generally, see Restatement (Second) of Trusts §§ 40-52 (1959). For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts § 22 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 46-49 (1959). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts § 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts § 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts § 20 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts §§ 43-45 (1959).

[*Note: For Ohio changes see Report Sec. 16.*]

Comment—Section 408. Trust for Care of Animal.

This section and the next section of the Code validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section are valid and enforceable. For a discussion of the common law doctrine, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor’s death. Animals in gestation but not yet born at the time of the trust’s creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

Subsection (b) addresses enforcement. Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State’s attorney general or by a person deemed to have a special interest. See Restatement (Second) of Trusts § 391 (1959). But at

common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee's obligations.

Sections 408 and 409 close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. *See, e.g.*, Uniform Probate Code §§ 5-210(b), 5-414(a).

Subsection (c) addresses the problem of excess funds. If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. *See* Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control. *See* Section 105(a). While a trust for an animal is usually not created until the settlor's death, subsection (a) allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under Section 414. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. *See* Section 414(c).

This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

[*Note: For Ohio changes see Report Sec. 17.*]

Comment—Section 409. Noncharitable Trust Without Ascertainable Beneficiary.

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 408. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to 21 years, although that number is placed in brackets to indicate that States may wish to select a different time limit.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The lead-in language to the section recognizes that some special purpose trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will typically endeavor to facilitate perpetual care as opposed to care limited to 21 years as under this section.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 404 Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts § 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 62 cmt. w and § 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 124.7 (4th ed. 1987).

This section is similar to Section 408, although less detailed. Much of the Comment to Section 408 also applies to this section.

[*Note: For Ohio changes see Report Sec. 17.*]

Comment—Section 410. Modification or Termination of Trust; Proceedings for Approval or Disapproval.

Subsection (a) lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts Section 61 (Tentative Draft No. 3, approved 2001). Terminations under subsection (a) may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in Sections 411-414, which also address trust modification. Of these sections, all but Section 411 apply to charitable trusts and all but Section 413 apply to noncharitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under \$50,000 (Section 414), and a petition to approve or disapprove a proposed trust division or consolidation (Section 417). Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411 to terminate or modify a trust. Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (b) grants a settlor standing to petition the court under Section 413 to apply *cy pres* to modify the settlor's charitable trust.

2004 Amendment. For an explanation of why a portion of subsection (b) has been placed in brackets, see the comment to the 2004 Amendment to Section 411

[*Note: For Ohio changes see Report Sec. 18.*]

Comment—Section 411. Modification or Termination of Noncharitable Irrevocable Trust by Consent.

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 414 (termination or modification of uneconomic noncharitable trust), and 416 (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies.

Subsection (a), which was placed in brackets pursuant to a 2004 amendment, states the test for termination or modification by the beneficiaries with the concurrence of the settlor. For an explanation of why subsection (a) has been placed in brackets, see the 2004 comment at the end of this section.

Subsection (b) states the test for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust termination in Subsections (a)-(b) carries forward the *Claflin* rule, first stated in the famous case of *Claflin v. Claflin*, 20 N.E. 454 (Mass. 1889). Subsection (c) addresses the effect of a spendthrift provision. Subsection (d) directs how the trust property is to be distributed following a termination under either subsection (a) or (b). Subsection (e) creates a procedure for judicial approval of a proposed termination or modification when the consent of less than all of the beneficiaries is available.

Under this section, a trust may be modified or terminated over a trustee's objection. However, pursuant to Section 410, the trustee has standing to object to a proposed termination or modification.

The settlor's right to join the beneficiaries in terminating or modifying a trust under this section does not rise to the level of a taxable power. See Treas. Reg. Section 20.2038-1(a)(2). No gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.

The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. See Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally

been part of the law, although there are some notable exceptions. *Compare* Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), *with Hatch v. Riggs National Bank*, 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust, authority that could be exercised to radically alter the settlor's estate plan. In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (a), however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator's or guardian's authority to local law. Many conservatorship statutes recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. *See, e.g.*, Unif. Probate Code Section 5-411(a)(4). Because the Uniform Trust Code uses the term "conservator" to refer to the person appointed by the court to manage an individual's property (*see* Section 103(5)), a guardian may act on behalf of a settlor under this section only if a conservator has not been appointed.

Subsection (a) is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than subsection (b) of this section and Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Restatement Third, though, goes further than this Code in also allowing the beneficiaries to use trust modification as a basis for removing the trustee if removal would not be inconsistent with a material purpose of the trust. Under the Code, however, Section 706 is the exclusive provision on removal of trustees. Section 706(b)(4) recognizes that a request for removal upon unanimous agreement of the qualified beneficiaries is a factor for the court to consider, but before removing the trustee the court must also find that such action best serves the interests of all the beneficiaries, that removal is not inconsistent with a material purpose of the trust, and that a suitable cotrustee or successor trustee is available. *Compare* Section 706(b)(4), *with* Restatement (Third) Section 65 cmt. f (Tentative Draft No. 3, approved 2001).

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

Subsection (c) of this section deals with the effect of a spendthrift provision on the right of a beneficiary to concur in a trust termination or modification. By a 2004 amendment, subsection (c) has been placed in brackets and thereby made optional. Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. For examples, see Restatement (Second) of Trusts Section 337 (1959); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 1008 (Rev. 2d ed. 1983); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 337 (4th ed. 1989). This result is troublesome because spendthrift provisions are often added to instruments with little thought. Subsection (c), similar to Restatement (Third) of Trusts Section 65 cmt. e (Tentative Draft No. 3, approved 2001), does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.

Subsection (d) recognizes that the beneficiaries' power to compel termination of the trust includes the right to direct how the trust property is to be distributed. While subsection (a) requires the settlor's consent to terminate an irrevocable trust, the settlor does not control the subsequent distribution of the trust property. Once termination has been approved, how the trust property is to be distributed is solely for the beneficiaries to decide.

Subsection (e), similar to Restatement (Third) of Trusts Section 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Sections 338(2) & 340(2) (1959), addresses situations in which a termination or modification is requested by less than all the beneficiaries, either because a beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either unavailable or its application uncertain. Subsection (e) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

2003 Amendment. The amendment, which adds the language "modification or" to subsection (a), fixes an inadvertent omission. It was the intent of the drafting committee that an agent with authority or a conservator or guardian with the approval of the court be able to participate not only in a decision to terminate a trust but also in a decision to modify it.

2004 Amendments.

Section 411(a), Section 301(d), and Conforming Changes to Sections 301(c) and 410(b).

Section 411(a) was amended in 2004 on the recommendation of the Estate and Gift Taxation Committee of the American College of Trust and Estate Counsel (ACTEC). Enacting jurisdictions now have several options all of which are indicated by brackets:

- delete subsection (a), meaning that the state's prior law would control on this issue.
- require court approval of the modification or termination.
- make the provision prospective and applicable only to irrevocable trusts created on or after the effective date or to revocable trusts that become irrevocable on or after the effective date of the provision.
- enact subsection (a) in its original form.

Section 411(a), as originally drafted did not require that a court approve a joint decision of the settlor and beneficiaries to terminate or modify an irrevocable trust. The ACTEC Committee was concerned that:

- Section 411(a), without amendment, could potentially result in the taxation for federal estate tax purposes of irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification; and
- Because of the ability of a settlor under Section 301 to represent and bind a beneficiary with respect to a termination or modification of an irrevocable trust, Section 411(a) might result in inclusion of the trust in the settlor's gross estate. New Section 301(d) eliminates the possibility of such representation.

The Drafting Committee recommends that all jurisdictions enact the amendment to Section 301(d). The Drafting Committee recommends that jurisdictions conform Section 411(a) to prior law on whether or not court approval is necessary for the settlor and beneficiaries to jointly terminate or modify an irrevocable trust. If prior law is in doubt, the enacting jurisdiction may wish to make Section 411(a) prospective only. The enacting jurisdiction may also elect to delete Section 411(a).

States electing to delete Section 411(a) should also delete the cross-references to Section 411 found in Sections 301(c) and 410(b). These cross-references have therefore been placed in brackets. States electing to delete Section 411(a) should also not enact Section 301(d), which for this reason has similarly been placed in brackets.

Section 411(c)

Section 411(c), which by the 2004 amendment was placed in brackets and therefore made optional, provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. Several states that have enacted the Code have not agreed with the provision and have either deleted it or have reversed the presumption. Given these developments, the Drafting Committee concluded that uniformity could not be achieved. The Joint Editorial Board for Uniform Trusts and Estates Acts, however, is of the view that the better approach is to enact subsection (c) in its original form for the reasons stated in the comment to this Section.

[Note: For Ohio changes see Report Sec. 19.]

Comment 412. Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively.

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. Subsection (a) is similar to Restatement (Third) of Trusts Section 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts Section 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements Section 415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying *cy pres* to a charitable trust. See Section 413(a). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in Section 404 that a trust and its terms must be for the benefit of its beneficiaries. See *also* Restatement (Third) of Trusts Section 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. See Restatement (Second) of Trusts Section 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. See Restatement (Third) of Trusts Section 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various states have insisted on such a measure by statute. See, e.g., Mo. Rev. Stat. Section 456.590.1.

Upon termination of a trust under this section, subsection (c) requires that the trust be distributed in a manner consistent with the purposes of the trust. As under the doctrine of *cy pres*, effectuating a distribution consistent with the purposes of the trust requires an examination of what the settlor would have intended had the settlor been aware of the unanticipated circumstances. Typically, such terminating distributions will be made to the qualified beneficiaries, often in proportion to the actuarial value of their interests, although the section does not so prescribe. For the definition of qualified beneficiary, see Section 103(13).

Modification under this section, because it does not require beneficiary action, is not precluded by a spendthrift provision.

[*Note: For Ohio changes see Report Secs. 20 and 24.*]

Comment—Section 413. Cy Pres.

Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to Restatement (Third) of Trusts § 67 (Tentative Draft No. 3, 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails. See Restatement (Second) of Trusts § 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Under subsection (a), if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, the trust does not fail. The court instead must either modify the terms of the trust or distribute the property of the trust in a manner consistent with the settlor's charitable purposes.

The settlor, with one exception, may mandate that the trust property pass to a noncharitable beneficiary upon failure of a particular charitable purpose. Responding to concerns about the clogging of title and other administrative problems caused by remote default provisions upon failure of a charitable purpose, subsection (b) invalidates a gift over to a noncharitable beneficiary upon failure of a particular charitable purpose unless the trust property is to revert to a living settlor or fewer than 21 years have elapsed since the trust's creation. Subsection (b) will not apply to a charitable lead trust, under which a charity receives payments for a term certain with a remainder to a noncharity. In the case of a charitable lead trust, the settlor's particular charitable purpose does not fail upon completion of the specified trust term and distribution of the remainder to the noncharity. Upon completion of the specified trust term, the settlor's particular charitable purpose has instead been fulfilled. For a discussion of the reasons for a provision such as subsection (b), see Ronald R. Chester, *Cy Pres of Gift Over: The Search for Coherence in Judicial Reform of Failed Charitable Trusts*, 23 Suffolk U. L. Rev. 41 (1989).

The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.

For the definition of charitable purpose, see Section 405(a). Pursuant to Sections 405(c) and 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the charitable disposition. See Restatement (Second) of Trusts § 391 (1959).

[Note: For Ohio changes see Report Secs. 20 and 21.]

Comment—Section 414. Modification or Termination.

Subsection (a) assumes that a trust with a value of \$50,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure. Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. *See* Section 105 and Article 4 General Comment.

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. *See* Section 105(b)(4). Judicial termination under this subsection may be used whether or not the trust is larger or smaller than \$50,000.

When considering whether to terminate a trust under either subsection (a) or (b), the trustee or court should consider the purposes of the trust. Termination under this section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

Upon termination of a trust under this section, subsection (c) requires that the trust property be distributed in a manner consistent with the purposes of the trust. In addition to outright distribution to the beneficiaries, Section 816(21) authorizes payment to be made by a variety of alternate payees. Distribution under this section will typically be made to the qualified beneficiaries in proportion to the actuarial value of their interests.

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes §1.6 (2000).

While this section is not directed principally at honorary trusts, it may be so applied. *See* Sections 408, 409.

Because termination of a trust under this section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.

[Note: For Ohio changes see Report Sec. 22.]

Comment—Section 415. Reformation to Correct Mistakes.

Reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. Restatement (Third) of Property: Donative Transfers Section 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills.

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). *See also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521 (1982).

For further discussion of the rule of this section and its application to illustrative cases, see Restatement (Third) of Property: Donative Transfers Section 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

[*Note: For Ohio changes see Report Sec. 24.*]

Comment—Section 416. Modification to Achieve Settlor's Tax Objectives.

This section is copied from Restatement (Third) of Property: Donative Transfers § 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 415. Reformation under Section 415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax-saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (*see* Section 413), and the deviation doctrine for unanticipated circumstances (*see* Section 412).

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers § 12.2 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

[*Note: For Ohio changes see Report Sec. 24.*]

Comment—Section 417. Combination and Division of Trusts.

This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. *See* Section 105 and Article 4 General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts. Except for the requirement that the qualified beneficiaries receive advance notice of a proposed combination or division, this section is similar to Restatement (Third) of Trusts § 68 (Tentative Draft No. 3, 2001).

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. *See* Section 805 (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation-skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. *See* Section 414.

This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section 1009.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required. This is consistent with Section 813, which requires that the trustee keep the beneficiaries reasonably informed of trust administration, including the giving of advance notice to the qualified beneficiaries of several specified actions that may have a major impact on their interests.

Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers § 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. *See, e.g., In re Will of Marcus*, 552 N.Y.S. 2d 546 (Surr. Ct.1990) (combination); *In re Heller Inter Vivos Trust*, 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow*, 701 N.E. 2d 304 (Mass. 1998) (division).

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non-pro-rata distributions, see Section 816(22).

[*Note: For Ohio changes see Report Sec. 23.*]

General Comment—Article 5. Creditor's Claims; Spendthrift and Discretionary Trusts.

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. Section 501 applies if the trust does not contain a spendthrift provision or the spendthrift provision, if any, does not apply to the beneficiary's interest. Section 502 states the effect of a spendthrift provision. Unless a claim is being made by an exception creditor, a spendthrift provision bars a beneficiary's creditor from reaching the beneficiary's interest until distribution is made by the trustee. An exception creditor, however, can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the categories of exception creditors whose claims are not subject to a spendthrift restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's

death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. See Section 105(b)(5).

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

Comment Amended in 2004.

Comment—Section 501. Rights of Beneficiary's Creditor or Assignee.

This section applies only if the trust does not contain a spendthrift provision or the spendthrift provision does not apply to a particular beneficiary's interest. A settlor may subject to spendthrift protection the interests of certain beneficiaries but not others. A settlor may also subject only a portion of the trust to spendthrift protection such as an interest in the income but not principal. For the effect of a spendthrift provision on creditor claims, see Section 503.

Absent a valid spendthrift provision, a creditor may ordinarily reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. The interest may be too indefinite or contingent for the creditor to reach or the interest may qualify for an exemption under the state's general creditor exemption statutes. See (Third) of Trusts §56 (2003); Restatement (Second) of Trusts §§147-149, 162 (1959). Other creditor law of the State may limit the creditor to a specified percentage of a distribution. See, e.g., Cal. Prob. Code Section 15306.5. This section does not prescribe the procedures ("other means") for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the enacting State's laws on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the circumstances of a beneficiary and the beneficiary's family. See Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

2005 Amendment. A 2005 amendment changes "protected by" to "subject to" in the first sentence of the section. No substantive change is intended. The amendment was made to negate an implication that this section allowed an exception creditor to reach a beneficiary's interest even though the trust contained a spendthrift provision. The list of exception creditors and their remedies are contained in Section 503. Clarifying changes are also made in the comments and unnecessary language on creditor remedies omitted.

[*Note: Substantially revised as Ohio Rev. Code § 5805.05, for Ohio changes see Report Sec. 25.*]

Comment—Section 502. Spendthrift Provision.

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts § 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts §§ 152-153 (1959). For the definition of spendthrift provision, see Section 103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. See Restatement (Third) of Trusts § 58 cmt. b (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts § 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. See 11 U.S.C. § 541(c)(2).

Subsection (b), which is derived from Texas Property Code § 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. See, e.g., Uniform Probate Code § 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. See Restatement (Third) of Trusts § 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. See Restatement (Third) of Trusts § 58(2), approved 1999. This is a necessary corollary to Section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. See Restatement (Third) of Trusts § 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 152 cmt. i (1959).

[*Note: Substantially revised as Ohio Rev. Code § 5805.01, for Ohio changes see Report Sec. 25.*]

Comment—Section 503. Exceptions to the Spendthrift Provision.

This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction and specifies the remedies such exemption creditors may take to satisfy their claims.

The exception in subsection (b)(1) for judgments or orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959),

and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b)(1), unlike Section 504, does not authorize the spousal or child claimant to compel a distribution from the trust. Section 504 authorizes a spouse or child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution.

Subsection (b)(1) refers both to “support” and “maintenance” in order to accommodate differences among the States in terminology employed. No difference in meaning between the two terms is intended.

The definition of “child” in subsection (a) accommodates the differing approaches States take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define “child” will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State. For the definition of “state,” which includes Puerto Rico and other American possessions, see Section 103(17).

The definition of “child” in subsection (a) is not exclusive. The definition clarifies that a “child” includes an individual awarded child support in any state. The definition does not expressly include but neither does it exclude persons awarded child support in some other country or political subdivision, such as a Canadian province.

The exception in subsection (b)(2) for a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust is in accord with Restatement (Third) of Trusts Section 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(c) (1959). This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary’s obtaining services essential to the protection or enforcement of the beneficiary’s rights under the trust. *See* Restatement (Third) of Trusts Section 59 cmt. d (Tentative Draft No. 2, approved 1999).

Subsection (b)(3), which is similar to Restatement (Third) of Trusts Section 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts certain governmental claims from a spendthrift restriction. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges.

Acknowledging this diversity, subsection (c) does not prescribe a rule, but refers to other statutes of the State on whether particular claims are subject to or exempted from spendthrift provisions.

Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to

the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (b)(3). The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 157-157.5 (4th ed. 1987).

Subsection (c) provides that the only remedy available to an exception creditor is attachment of present or future distributions of present or future distributions. Depending on other creditor law of the state, additional remedies may be available should a beneficiary's interest not be subject to a spendthrift provision. Section 501, which applies in such situations, provides that the creditor may reach the beneficiary's interest under that section by attachment or "other means." Subsection (c), similar to Section 501, clarifies that the court has the authority to limit the creditor's relief as appropriate under the circumstances.

2005 Amendment. The amendment rewrote this section. The section previously provided:

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.

(c) A spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides.

[*Note: Substantially revised as Ohio Rev. Code § 5805.02, for Ohio changes see Report Sec. 25.*]

Comment—Section 504. Discretionary Trusts; Effect of Standard.

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors. The affect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard. See Section 814 comment.

For a discussion of the definition of “child” in subsection (a), see Section 503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary’s child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

Subsection (e), which was added by a 2004 amendment, is discussed below.

2004 Amendment

Section 504(e), 103(11)

Trusts are frequently drafted in which a trustee is also a beneficiary. A common example is what is often referred to as a bypass trust, under which the settlor’s spouse will frequently be named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax will be placed in the bypass trust, and the trustee, who will often be the settlor’s spouse, will be given discretion to make distributions to the beneficiaries, a class which will usually include the spouse/trustee. To prevent the inclusion of the trust in the spouse-trustee’s gross estate, the spouse’s discretion to make distributions for the spouse’s own benefit will be limited by an ascertainable standard relating to health, education, maintenance, or support.

The UTC, as previously drafted, did not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts §60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee’s creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary’s discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee’s discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary’s trustee’s interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The protection conferred by this subsection, however, is no greater than if the beneficiary had not been named trustee. If an exception creditor can reach the beneficiary's interest under some other provision, the interest is not insulated from creditor claims by the fact the beneficiary is or becomes a trustee.

In addition, the definition of "power of withdrawal" in Section 103 is amended to clarify that a power of withdrawal does not include a power exercisable by the trustee that is limited by an ascertainable standard. The purpose of this amendment is to preclude a claim that the power of a trustee-beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest as provided in Section 505(b). Similar to the amendment to Section 504, the amendment to "power of withdrawal" is being made because of concerns that Restatement (Third) of Trusts Section 60, comment g, otherwise might allow a beneficiary-trustee's creditors to reach the trustee's beneficial interest.

The Code does not specifically address the extent to which a creditor of a trustee/beneficiary may reach a beneficial interest of a beneficiary/trustee that is not limited by an ascertainable standard.

For the definition of "ascertainable standard," see Section 103(2).

[*Note: Substantially revised, for Ohio changes see Report Sec. 25.*]

Comment—Section 505. Creditor's Claim Against Settlor.

Subsection (a)(1) states what is now a well-accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts Section 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. *See* Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability*, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts*, 23 Del. J. Corp. L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 103(15).

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Subsection (b)(1) treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in Restatement (Third) of Trusts Section 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a \$10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the \$10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona Revised Statutes Section 14-7705(g) and Texas Property Code Section 112.035(e), subsection (b)(2) creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IOhio Rev. Code § Sections 2041(b)(2) or 2514(e) [greater of 5% or \$5,000], or IOhio Rev. Code § Section 2503(b) [\$10,000 in 2001].

The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1-13.7 (1986).

[*Note: Renumbered Ohio Rev. Code § 5805.06, for Ohio changes see Report Secs. 25 and 26.*]

Comment—Section 506. Overdue Distribution.

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor

claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

2001 Amendment. By amendment in 2001, "designated distribution date" was substituted for "required distribution date" in subsection (b). The amendment conforms the language of this section to terminology used elsewhere in the Code.

2005 Amendment. The amendment adds a clarifying definition of "mandatory distribution" in subsection (a), which is based on an Ohio proposal. The amendment:

tracks the traditional understanding that a mandatory distribution includes a provision requiring that a beneficiary be paid the income of a trust or receive principal upon termination;

correlates the definition of "mandatory distribution" in this section to the broad definition of discretionary trust used in Section 504. Under both Sections 504 and 506, a trust is discretionary even if the discretion is expressed in the form of a standard, such as a provision directing a trustee to pay for a beneficiary's support;

addresses the situation where the terms of the trust couple language of discretion with language of direction. An example of such a provision is "my trustees shall, in their absolute discretion, distribute such amounts as are necessary for the beneficiary's support." Despite the presence of the imperative "shall," the provision is discretionary, not mandatory. For a more elaborate example of such a discretionary "shall" provision, see Marsman. *Nasca*, 573 N.E. 2d 1025 (Mass. Ct. App. 1991).

is clarifying. No change of substance is intended by this amendment. This amendment merely clarifies that a mandatory distribution is to be understood in its traditional sense such as a provision requiring that the beneficiary receive an income or receive principal upon termination of the trust.

[*Note: Substantially revised as Ohio Rev. Code § 5805.05, for Ohio changes see Report Sec. 25.*]

Comment—Section 507. Personal Obligations of Trustee.

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. *See* Restatement (Third) § 5 cmt. k (Tentative Draft No.1, approved 1996); Restatement (Second) of Trusts § 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts § 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. § 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. See Hague Convention art. 11. See also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 179-80 (1997).

General Comment—Article 6. Revocable Trusts.

This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. Section 604 prescribes a statute of limitations on contest of revocable trusts.

Sections 601 and 604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. See Section 105. Sections 602 and 603, by contrast, are not so limited and are fully subject to the settlor's control.

Comment—Section 601. Capacity of Settlor of Revocable Trust.

This section is patterned after Restatement (Third) of Trusts § 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. See Section 407 and Comment.

The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable

trust, the settlor must have the capacity that would be needed to transfer the property free of trust. *See generally* Restatement (Third) of Trusts § 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers § 8.1 (Tentative Draft No. 3, 2001).

[*Note: For Ohio changes see Report Sec. 15.*]

Comment—Section 602. Revocation or Amendment of Revocable Trust.

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most States follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. *See* Restatement (Second) of Trusts § 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. *See* Restatement (Third) of Trusts § 63 cmt. c (Tentative Draft No. 3, 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See* Restatement (Third) of Trusts § 63 cmt. g (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts § 331 cmt. g and h (1959).

Subsection (b), which is similar to Restatement (Third) of Trusts § 63 cmt. k (Tentative Draft No. 3, 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property States, is to preserve the community character of property transferred to the trust. While community property does not prevail in a majority of States, contributions of community property to trusts created in noncommunity property States does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple move from a community to a noncommunity State. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all States, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Code concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property States in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property States. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property State. Joint trusts are often poorly drafted, confusing the dispositive provisions of the

respective settlors. Their use can also lead to unintended tax consequences. See Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345 (1997).

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most States is based not on fractional interest but on actual dollar contribution. See, e.g., Uniform Probate Code § 6-211. Most difficult may be determining a contribution rule for entireties property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living.

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice would be required pursuant to Section 603. While a trust is revocable and the settlor has capacity, Section 603(a) provides that the duties of the trustee, including the duty to keep the beneficiaries informed of administrative developments, are owed exclusively to the settlor. With respect to trusts having several settlors, Section 603(c) clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of developments, are owed to *all* settlors having capacity. Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

Subsection (c), which is similar to Restatement (Third) of Trusts § 63 cmt. h and i (Tentative Draft No. 3, 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. See Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-j (Tentative Draft No. 3, 2001).

This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or

amendment, subsection (g) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.

Under subsection (c), the settlor may revoke or amend a revocable trust by substantially complying with the method specified in the terms of the trust or by a later executed will or codicil or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, other methods, such as a physical act or an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. See Restatement (Third) of Property: Will and Other Donative Transfers § 7.2 cmt. e (Tentative Draft No. 3, 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, see Restatement (Third) of Trusts § 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, 2001).

A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., *Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will*, 46 A.L.R. 3d 487 (1972).

Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in Section 705.

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments.

Subsection (e), which is similar to Restatement (Third) of Trusts § 63 cmt. l (Tentative Draft No. 3, 2001), authorizes an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend that the revocable trust, and not the

power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee.

Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103. Consequently, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend a trust only if a conservator has not been appointed.

Many state conservatorship statutes authorize a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. *See, e.g.,* Uniform Probate Code § 411(a)(4). Subsection (f) ratifies this practice. Under the Code, a conservator may exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon approval of the court supervising the conservatorship. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly. Settlers concerned about revocation by a conservator may wish to deny a conservator a power to revoke. However, while such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. *See* Section 105(b)(13).

Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under Section 706. The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code.

If a conservator has not been appointed, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.

[*Note: For Ohio changes see Report Sec. 26.*]

Comment—Section 603. Settlor's Powers; Powers of Withdrawal.

This section recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust as long as the settlor has capacity.

If the settlor loses capacity, subsection (a) no longer applies, with the consequence that the rights of the beneficiaries are no longer subject to the settlor's control. The beneficiaries are then entitled to request information concerning the trust and the trustee must provide the beneficiaries with annual trustee reports and whatever other information may be required under Section 813. However, because this section may be freely overridden in the terms of the

trust, a settlor is free to deny the beneficiaries these rights, even to the point of directing the trustee not to inform them of the existence of the trust. Also, should an incapacitated settlor later regain capacity, the beneficiaries' rights will again be subject to the settlor's control.

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust, and the settlor has control over whether to take action against a trustee for breach of trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of trust occurring while the settlor had capacity will pass to the settlor's agent or conservator, who would succeed to the settlor's right to have property restored to the trust. Following the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. However, with respect to actions occurring prior to the settlor's death or incapacity, an action by the beneficiaries could be barred by the settlor's consent or by other events such as approval of the action by a successor trustee. For the requirements of a consent, see Section 1009.

Subsection (c) makes clear that a holder of a power of withdrawal has the same powers over the trust as the settlor of a revocable trust. Equal treatment is warranted due to the holder's equivalent power to control the trust. For the definition of power of withdrawal, see Section 103(11).

2001 Amendment. By a 2001 amendment, former subsection (b) was deleted. Former subsection (b) provided: "While a trust is revocable and the settlor does not have capacity to revoke the trust, rights of the beneficiaries are held by the beneficiaries." No substantive change was intended by this amendment. Former subsection (b) was superfluous. Rights of the beneficiaries are always held by the beneficiaries unless taken away by some other provision. Subsection (a) grants these rights to the settlor of a revocable trust while the settlor has capacity. Upon a settlor's loss of capacity, these rights are held by the beneficiaries with or without former subsection (b).

2003 Amendment. The purpose of former subsection (b), which was deleted in 2003, was to make certain that upon revocation of amendment of a joint trust by fewer than all of its settlors, that the trustee would notify the nonparticipating settlor or settlors. The subsection, which provided that "If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors having capacity to revoke the trust," imposed additional duties upon a trustee and unnecessarily raised interpretative questions as to its scope. The drafter's original intent is restored, and in a much clearer form, by repealing former subsection (b), and by amending Section 602 to add a subsection (b)(3) that states explicitly what former subsection (b) was trying to achieve.

2004 Amendment. The amendment places in brackets and makes optional the language in subsection (a) dealing with the settlor's capacity.

Section 603 generally provides that while a trust is revocable, all rights that the trust's beneficiaries would otherwise possess are subject to the control of the settlor. This section, however, negates the settlor's control if the settlor is incapacitated. In such case, the beneficiaries are entitled to assert all rights provided to them under the Code, including the right to information concerning the trust.

Two issues have arisen concerning this incapacity limitation. First, because determining when a settlor is incapacitated is not always clear, concern has been expressed that it will often be difficult in a particular case to determine whether the settlor has become incapacitated and the

settlor's control of the beneficiary's rights have ceased. Second, concern has been expressed that this section prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same. In the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated. Under Section 603, however, the remainder beneficiary's right to know commences on the settlor's incapacity.

Concluding that uniformity among the states on this issue is not essential, the drafting committee has decided to place the reference to the settlor's incapacity in Section 603(a) in brackets. Enacting jurisdictions are free to strike the incapacity limitation or to provide a more precise definition of when a settlor is incapacitated, as has been done in the Missouri enactment (Mo. Stat. Ann. § 456.6-603).

[*Note: For Ohio changes see Report Sec. 26.*]

Comment—Section 604. Limitation on Action Contesting Validity of Revocable Trust; Distribution of Trust Property.

This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death.

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (*see* Section 402), that undue influence, duress, or fraud was involved in the trust's creation (*see* Section 406), or that the trust had been revoked or modified (*see* Section 602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts § 774B (1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. *See* Section 106 (Uniform Trust Code supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 602, the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is three years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The three-year period is derived from Section 3-108 of the Uniform Probate Code. Three years is the maximum limit under the UPC for contesting a nonprobated will. Enacting jurisdictions prescribing shorter or longer time limits for contest of a nonprobated will should substitute their own time limit. To facilitate this process, the "three-year" period has been placed in brackets.

A trustee who wishes to shorten the contest period may do so by giving notice. Drawing from California Probate Code § 16061.7, subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and

informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting jurisdiction that it substitute its statutory time period for contesting a will following notice of probate. The 120-day period in subsection (a)(2) is subordinate to the three-year bar in subsection (a)(1). A contest is automatically barred three years after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. *See* Restatement (Second) of Trusts § 226 (1959). Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 60 days.

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of Article 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. *See* Section 109(a).

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 505(a)(3) and Comment. Whether a trustee can be held personally liable for creditor claims following distribution of trust assets is addressed in Uniform Probate Code § 6-102, which was added to that Code in 1998.

[*Note: For Ohio changes see Report Sec. 26.*]

General Comment—Article 7. Office of Trustee.

This article contains a series of default rules dealing with the office of trustee. Sections 701 and 702 address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 703 addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 704 through 707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 708 and 709 prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

Except for the court's authority to order bond, all of the provisions of this article are subject to modification in the terms of the trust. *See* Section 105.

Comment—Section 701. Accepting or Declining Trusteeship.

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. *Compare* Section 701(a), with Section 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts § 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 102 (1959). Consistent with Section 201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the Uniform Trust Code does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement (Third) of Trusts § 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 704.

A person designated as trustee who decides not to accept the trusteeship need not provide a formal rejection, but a clear and early communication is recommended. The appropriate recipient of the rejection depends upon the circumstances. Ordinarily, it would be appropriate to communicate the rejection to the person who informed the designee of the proposed trusteeship. If judicial proceedings involving the trust are pending, the rejection could be filed with the court. In the case of a person named as trustee of a revocable trust, it would be appropriate to communicate the rejection to the settlor. In any event, it would be best to inform a beneficiary with a significant interest in the trust because that beneficiary might be more motivated than others to seek appointment of a new trustee.

Subsection (c)(1) makes clear that a nominated trustee may act expeditiously to protect the trust property without being considered to have accepted the trusteeship. However, upon conclusion of the intervention, the nominated trustee must send a rejection of office to the settlor, if living and competent, otherwise to a qualified beneficiary.

Because of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42 U.S.C. § 9607. For a provision limiting a trustee's personal liability for obligations arising from ownership or control of trust property, see Section 1010(b).

Comment—Section 702. Trustee’s Bond.

This provision is consistent with the Restatement Third and with the bonding provisions of the Uniform Probate Code. See Restatement (Third) of Trusts § 34(3) and cmt. a (Tentative Draft No. 2, approved 1999); Uniform Probate Code §§ 3-604 (personal representatives), 5-415 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under this Code.

Despite the ability of the court pursuant to Section 105(b)(6) to override a term of the trust waiving bond, the court should order bond in such cases only for good reasons. Similarly, the court should rarely dispense with bond if the settlor directed that the trustee give bond.

This section does not attempt to detail all of the technical bonding requirements that the court may impose. Typical requirements are listed in the Uniform Probate Code sections cited above. The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition, and by the value of real property which the trustee, by express limitation of power, lacks power to convey without court authorization. Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

Subsection (c) clarifies that a regulated financial-service institution need not provide bond for individual trusts. Such institutions must meet detailed financial responsibility requirements in order to do trust business in the State, thereby obviating the need to post bonds in individual trusts. Subsection (c) is placed in brackets because the enacting jurisdiction may have already dealt with the subject in separate legislation, such as in its statutes on regulation of financial institutions. Instead of the phrase “regulated financial-service institution,” enacting jurisdictions may wish to substitute their own term for institutions qualified to engage in trust business in the State.

Comment—Section 703. Cotrustees.

This section contains most but not all of the Code’s provisions on cotrustees. Other provisions relevant to cotrustees include Sections 704 (vacancy in trusteeship need not be filled if cotrustee remains in office), 705 (notice of resignation must be given to cotrustee), 706 (lack of cooperation among cotrustees as ground for removal), 707 (obligations of resigning or removed trustee), 813 (reporting requirements upon vacancy in trusteeship), and 1013 (authority of cotrustees to authenticate documents).

Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are appointed to make certain that all family lines are represented in the trust’s management.

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and unless an odd number of trustees is

named deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this article, this section is freely subject to modification in the terms of the trust. *See* Section 105.

Much of this section is based on comparable provisions of the Restatement of Trusts, although with extensive modifications. Reference should also be made to ERISA § 405 (29 U.S.C. § 1105), which in recent years has been the statutory base for the most significant case law on the powers and duties of cotrustees.

Subsection (a) is in accord with Restatement (Third) of Trusts § 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. *See* Restatement (Second) of Trusts § 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts § 383 (1959).

Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 704 provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

Pursuant to subsection (c), a cotrustee must participate in the performance of a trustee function unless the cotrustee has properly delegated performance to another cotrustee, or the cotrustee is unable to participate due to temporary incapacity or disqualification under other law. Other laws under which a cotrustee might be disqualified include federal securities law and the ERISA prohibited transactions rules. Subsection (d) authorizes a cotrustee to assume some or all of the functions of another trustee who is unavailable to perform duties as provided in subsection (c).

Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different. Section 807, which is identical to Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Subsection (e) is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 105. Subsection (e) is based on language derived from Restatement (Second) of Trusts § 171 (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule § 171 (1992).

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question. However, the

protections provided by subsections (f) and (h) no longer apply if the action constitutes a serious breach of trust. In that event, subsection (g) may impose liability against a dissenting trustee for failing to take reasonable steps to rectify the improper conduct. The responsibility to take action against a breaching cotrustee codifies the substance of Sections 184 and 224 of the Restatement (Second) of Trusts (1959).

[*Note: For Ohio changes see Report Secs. 27, 28 and 29.*]

Comment—Section 704. Vacancy in Trusteeship; Appointment of Successor.

This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. *See also* Sections 701 (accepting or declining trusteeship), 705 (resignation), and 706 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

The disqualification of a trustee referred to in subsection (a)(4) would include a financial institution whose right to engage in trust business has been revoked or removed. Such disqualification might also occur if the trust's principal place of administration is transferred to a jurisdiction in which the trustee, whether an individual or institution, is not qualified to act.

Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e), the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts Section 34 cmt. e (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. e (1959).

Subsection (c) provides a procedure for filling a vacancy in the trusteeship of a noncharitable trust. Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to Section 705(a)(1), the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice as provided in Section 705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 706.

If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts Section 34 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. d (1959).

Subsection (d) specifies a procedure for filling a vacancy in the trusteeship of a charitable trust. Absent an effective designation in the terms of the trust, a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the

trust but only if the attorney general concurs in the selection. If the attorney general does not concur in the selection, however, or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by the court. For the reason why the reference to the Attorney General is placed in brackets, see 2004 Amendment below.

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 812.

2001 Amendment. Subsection (d), which creates a procedure for the filling of a vacancy in the trusteeship of a charitable trust, was added by a 2001 amendment.

2004 Amendment. The amendment to Section 704(d)(2) is a conforming amendment to the amendment to Section 110(d). Section 110(d) provides that the attorney general has the rights of a qualified beneficiary with respect to charitable trusts having a principal place of administration in the state. If the enacting jurisdiction elects to delete or modify Section 110(d), then the enacting jurisdiction may wish to also modify subsection Section 704(d)(2) of this Section, which requires that the attorney general concur in the selection of a successor trustee nominated by a designated charitable organization.

[*Note: For Ohio changes see Report Sec. 30 and 32.*]

Comment—Section 705. Resignation of Trustee.

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. See Restatement (Third) of Trusts § 36 (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts § 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the Drafting Committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

Restatement (Third) of Trusts § 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts § 106 cmt. b (1959), provide, similar to subsection (c), that a resignation does not release the resigning trustee from potential liabilities for acts or omissions while in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of facilitating a breach of trust by a cotrustee. See *Ream v. Frey*, 107 F.3d 147 (3rd Cir. 1997).

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707.

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (see Section 603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

Comment—Section 706. Removal of Trustee.

Subsection (a), contrary to the common law, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to petition for

removal does not apply to a revocable trust while the settlor has capacity. Pursuant to Section 603(a), while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's exclusive control.

Trustee removal may be regulated by the terms of the trust. *See* Section 105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. *See* Rev. Rul. 95-58, 1995-2 C.B. 191.

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are similar to those found in Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term "interests of the beneficiaries" means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. *See* Section 103(8). Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee. *See* Restatement (Third) of Trusts Section 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. a (1959).

Subsection (b)(1), consistent with Restatement (Third) of Trusts Section 37 cmt. e and g (Tentative Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under Section 704 appointment of a successor trustee is not required.

Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999).

Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of

“interests of the beneficiaries,” see Section 103(8). “Unfitness” may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. “Unwillingness” includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. See Restatement (Third) of Trusts Section 37 cmt. e (Tentative Draft No. 2, approved 1999). A “persistent failure to administer the trust effectively” might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee’s failings. See Restatement (Third) of Trusts Section 37 cmt. f (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. f-g (1959). Because of the discretion normally granted to a trustee, the settlor’s confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor’s choice can weaken or dissolve if a substantial change in the trustee’s circumstances occurs. To honor a settlor’s reasonable expectations, subsection (b)(4) lists a substantial change of circumstances as a possible basis for removal of the trustee. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account. Before removing a trustee on account of changed circumstances, the court must also conclude that removal is not inconsistent with a material purpose of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

Subsection (b)(4) also contains a specific but more limited application of Section 411. Section 411 allows the beneficiaries by unanimous agreement to compel modification of a trust if the court concludes that the particular modification is not inconsistent with a material purpose of the trust. Subsection (b)(4) of this section similarly allows the qualified beneficiaries to request removal of the trustee if the designation of the trustee was not a material purpose of the trust. Before removing the trustee the court must also find that removal will best serve the interests of the beneficiaries and that a suitable cotrustee or successor trustee is available.

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee’s functions. Pursuant to Section 1004, the court may also award attorney’s fees as justice and equity may require.

[*Note: For Ohio changes see Report Sec. 31.*]

Comment—Section 707. Delivery of Property by Former Trustee.

This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee’s report. See Section 813(c).

There is ample authority in the Uniform Trust Code for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. See Sections 704(d) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 705(b) (in approving resignation, court may impose conditions necessary for protection of trust property), 706(c) (pending decision on petition for removal, court may order appropriate relief), and 1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

If the former trustee has died, the Uniform Trust Code does not require that the trustee's personal representative windup the deceased trustee's administration. Nor is a trustee's conservator or guardian required to complete the former trustee's administration if the trustee's authority terminated due to an adjudication of incapacity. However, to limit the former trustee's liability, the personal representative, conservator or guardian may submit a trustee's report on the former trustee's behalf as authorized by Section 813(c). Otherwise, the former trustee remains liable for actions taken during the trustee's term of office until liability is otherwise barred.

Comment—Section 708. Compensation of Trustee.

Subsection (a) establishes a standard of reasonable compensation. Relevant factors in determining this compensation, as specified in the Restatement, include the custom of the community; the trustee's skill, experience, and facilities; the time devoted to trust duties; the amount and character of the trust property; the degree of difficulty, responsibility and risk assumed in administering the trust, including in making discretionary distributions; the nature and costs of services rendered by others; and the quality of the trustee's performance. See Restatement (Third) of Trusts Section 38 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. b (1959).

In setting compensation, the services actually performed and responsibilities assumed by the trustee should be closely examined. A downward adjustment of fees may be appropriate if a trustee has delegated significant duties to agents, such as the delegation of investment authority to outside managers. See Section 807 (delegation by trustee). On the other hand, a trustee with special skills, such as those of a real estate agent, may be entitled to extra compensation for performing services that would ordinarily be delegated. See Restatement (Third) of Trusts Section 38 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. d (1959).

Because "trustee" as defined in Section 103(20) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances. The fact that a trust has more than one trustee does not mean that the trustees together are entitled to more compensation than had either acted alone. Nor does the appointment of more than one trustee mean that the trustees are eligible to receive the compensation in equal shares. The total amount of the compensation to be paid and how it will be divided depend on the totality of the circumstances. Factors to be considered include the settlor's reasons for naming more than one trustee and the level of responsibility assumed and exact services performed by each trustee. Often the fees of cotrustees will be in the aggregate higher than the fees for a single trustee because of the duty of each trustee to participate in administration and not delegate to a cotrustee duties the settlor expected the trustees to

perform jointly. See Restatement (Third) of Trusts Section 38 cmt. i (Tentative Draft No. 2, approved 1999). The trust may benefit in such cases from the enhanced quality of decision-making resulting from the collective deliberations of the trustees.

Financial institution trustees normally base their fees on published fee schedules. Published fee schedules are subject to the same standard of reasonableness under the Uniform Trust Code as are other methods for computing fees. The courts have generally upheld published fee schedules but this is not automatic. Among the more litigated topics is the issue of termination fees. Termination fees are charged upon termination of the trust and sometimes upon transfer of the trust to a successor trustee. Factors relevant to whether the fee is appropriate include the actual work performed; whether a termination fee was authorized in the terms of the trust; whether the fee schedule specified the circumstances in which a termination fee would be charged; whether the trustee's overall fees for administering the trust from the date of the trust's creation, including the termination fee, were reasonable; and the general practice in the community regarding termination fees. Because significantly less work is normally involved, termination fees are less appropriate upon transfer to a successor trustee than upon termination of the trust. For representative cases, see *Cleveland Trust Co. v. Wilmington Trust Co.*, 258 A.2d 58 (Del. 1969); *In re Trusts Under Will of Dwan*, 371 N.W. 2d 641 (Minn. Ct. App. 1985); *Mercer v. Merchants National Bank*, 298 A.2d 736 (N.H. 1972); *In re Estate of Payson*, 562 N.Y.S. 2d 329 (Surr. Ct. 1990); *In re Indenture Agreement of Lawson*, 607 A. 2d 803 (Pa. Super. Ct. 1992); *In re Estate of Ischy*, 415 A.2d 37 (Pa. 1980); *Memphis Memorial Park v. Planters National Bank*, 1986 Tenn. App. LEXIS 2978 (May 7, 1986); *In re Trust of Sensenbrenner*, 252 N.W. 2d 47 (Wis. 1977).

This Code does not take a specific position on whether dual fees may be charged when a trustee hires its own law firm to represent the trust. The trend is to authorize dual compensation as long as the overall fees are reasonable. For a discussion, see Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 Real Prop. Prob. & Tr. J. 1, 22-38 (1991).

Subsection (b) permits the terms of the trust to override the reasonable compensation standard, subject to the court's inherent equity power to make adjustments downward or upward in appropriate circumstances. Compensation provisions should be drafted with care. Common questions include whether a provision in the terms of the trust setting the amount of the trustee's compensation is binding on a successor trustee, whether a dispositive provision for the trustee in the terms of the trust is in addition to or in lieu of the trustee's regular compensation, and whether a dispositive provision for the trustee is conditional on the person performing services as trustee. See Restatement (Third) of Trusts Section 38 cmt. e (Tentative Draft No.2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. f (1959).

Compensation may be set by agreement. A trustee may enter into an agreement with the beneficiaries for lesser or increased compensation, although an agreement increasing compensation is not binding on a nonconsenting beneficiary. See Section 111(d) (matters that may be resolved by nonjudicial settlement). See also Restatement (Third) of Trusts Section 38 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 242 cmt. i (1959). A trustee may also agree to waive compensation and should do so prior to rendering significant services if concerned about possible gift and income taxation of the compensation accrued prior to the waiver. See Rev. Rul. 66-167, 1966-1 C.B. 20. See also Restatement (Third) of Trusts Section 38 cmt. g (Tentative Draft No. 2, approved 1999);

Restatement (Second) of Trusts Section 242 cmt. j (1959).

Section 816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. To provide a beneficiary with time to take action, and because of the importance of trustee's fees to the beneficiaries' interests, Section 813(b)(4) requires a trustee to provide the qualified beneficiaries with advance notice of any change in the method or rate of the trustee's compensation. Failure to provide such advance notice constitutes a breach of trust, which, if sufficiently serious, would justify the trustee's removal under Section 706.

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one-half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

Comment—Section 709. Reimbursement of Expenses.

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. *See* Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust).

Subsection (a)(1) clarifies that a trustee is entitled to reimbursement from the trust for incurring expenses within the trustee's authority. The trustee may also withhold appropriate reimbursement for expenses before making distributions to the beneficiaries. *See* Restatement (Third) of Trusts § 38 cmt. b (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 244 cmt. b (1959). A trustee is ordinarily not entitled to reimbursement for incurring unauthorized expenses. Such expenses are normally the personal responsibility of the trustee.

As provided in subsection (a)(2), a trustee is entitled to reimbursement for unauthorized expenses only if the unauthorized expenditures benefitted the trust. The purpose of this provision, which is derived from Restatement (Second) of Trusts § 245 (1959), is not to ratify the unauthorized conduct of the trustee, but to prevent unjust enrichment of the trust. Given this purpose, a court, on appropriate grounds, may delay or even deny reimbursement for expenses which benefitted the trust. Appropriate grounds include: (1) whether the trustee acted in bad faith in incurring the expense; (2) whether the trustee knew that the expense was inappropriate; (3) whether the trustee reasonably believed the expense was necessary for the preservation of the trust estate; (4) whether the expense has resulted in a benefit; and (5) whether indemnity can be allowed without defeating or impairing the purposes of the trust. *See* Restatement (Second) of Trusts § 245 cmt. g (1959).

Subsection (b) implements Section 802(h)(5), which creates an exception to the duty of loyalty for advances by the trustee for the protection of the trust if the transaction is fair to the beneficiaries.

Reimbursement under this section may include attorney's fees and expenses incurred by the trustee in defending an action. However, a trustee is not ordinarily entitled to attorney's fees and expenses if it is determined that the trustee breached the trust. *See* 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 245 (4th ed. 1988).

General Comment—Article 8. Duties and Powers of Trustee.

This article states the fundamental duties of a trustee and lists the trustee's powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This article was drafted where possible to conform with the 1994 Uniform Prudent Investor Act, which has been enacted in approximately two thirds of the States. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. The Uniform Trust Code also addresses a trustee's duties with respect to distribution to beneficiaries.

Because of the widespread adoption of the Uniform Prudent Investor Act, it was decided not to disassemble and fully integrate the Prudent Investor Act into the Uniform Trust Code. Instead, States enacting the Uniform Trust Code are encouraged to recodify their version of the Prudent Investor Act by reenacting it as Article 9 of this Code rather than leaving it elsewhere in their statutes. Where the Uniform Trust Code and Uniform Prudent Investor Act overlap, States should enact the provisions of this article and not enact the duplicative provisions of the Prudent Investor Act. Sections of this article which overlap with the Prudent Investor Act are Sections 802 (duty of loyalty), 803 (impartiality), 805 (costs of administration), 806 (trustee's skills), and 807 (delegation). For more complete instructions on how to enact the Uniform Prudent Investor Act as part of this Code, see the General Comment to Article 9.

All of the provisions of this article may be overridden in the terms of the trust except for certain aspects of the trustee's duty to keep the beneficiaries informed of administration (*see* Section 105(b)(8)-(9)), and the trustee's fundamental obligation to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries (*see* Section 105(b)(2)-(3)).

Comment—Section 801. Duty to Administer Trust.

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Code govern the trustee's duties. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure for accepting a trusteeship, see Section 701.

In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this article, particularly the obligation not to place the interests of others above those of the beneficiaries (Section 802), the duty to act with prudence (Section 804), and the duty to keep the qualified beneficiaries reasonably informed about the administration of the trust (Section 813).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 412 to modify or terminate the trust. Pursuant to Section 404, the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

For background on the trustee's duty to administer the trust, see Restatement (Second) of Trusts §§ 164-169 (1959).

Comment—Section 802. Duty of Loyalty.

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts Section 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 170-170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. *See* Section 103(8).

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. *See* Restatement (Second) of Trusts Section 379 cmt. a (1959).

Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit.

Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. *See* Restatement (Second) of Trusts Section 170 cmt. b (1959).

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary

to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. Section 9.12(a).

As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied.

Subsection (b)(5), which is derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction.

Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) is based on Cal. Prob. Code Section 16004(c). *See also* 2A Austin W. Scott & William F. Fratcher Section 170.25 (4th ed. 1987), which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts Section 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage*, 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity*, 21 Del. J. Corp. L. 5 (1996). *See also* Principles of Corporate Governance: Analysis and Recommendations Section 5.05 (American Law Inst. 1994).

Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial-service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the

fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.

Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account under Section 708 in setting the trustee's regular compensation. *See also* Uniform Prudent Investor Act Sections 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule Section 227 cmt. m (1992).

Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. Section 2510.3-21(e).

Subsection (g) addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) Section 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is

heavier than where he holds only a small fraction of the shares.” Similarly, the Department of Labor construes ERISA’s duty of loyalty to make share voting a fiduciary function. See 29 C.F.R. Section 2509.94-2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee’s trust-law duty of impartiality.

Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts Section 170 cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent’s estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4), is recognized as an exception to the duty of loyalty in a number of state statutes although deemed to be a breach of trust in Restatement (Second) of Trusts Section 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee’s responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to Section 709(b), the trustee has a lien against the trust property for any advances made.

2003 Amendment. The amendment revises subsection (f) to clarify that compensation received from a mutual fund for providing services to the fund is in addition to the trustee’s regular compensation. It also clarifies that the trustee obligation to notify certain of the beneficiaries of compensation received from the fund applies only to compensation received for providing investment management or advisory services. The amendment conforms subsection (f) to the drafters’ original intent.

Subsection (f) formerly provided:

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of [Article] 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 813 to receive a copy of the trustee’s annual report of the rate and method by which the compensation was determined.

2004 Amendment. Section 802(f) creates an exception to the prohibition on self-dealing for certain investments in mutual funds in which the trustee, or its affiliate, provides services in a capacity other than that as trustee. As originally drafted, Section 802(f) provided that the

exception applied only if the investment complied with the Uniform Prudent Investor Act and the trustee notified the qualified beneficiaries of the additional compensation received for providing the services. However, the Uniform Prudent Investor Act itself contains its own duty of loyalty provision (Section 5), thereby arguably limiting or undoing this exception to the UTC's loyalty provision. The amendment, by providing that the investment does not violate the duty of loyalty under the UTC if it "otherwise" complies with the Uniform Prudent Investor Act, is intended to negate the implication that the investment must also comply with the Uniform Prudent Investor Act's own duty of loyalty provision.

[*Note: For Ohio changes see Report Sec. 33.*]

Comment—Section 803. Impartiality.

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such authority, see Uniform Principal and Income Act § 104 (1997).

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. See Restatement (Second) of § 183 cmt. a (1959).

Comment—Section 804. Prudent Administration.

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. See Section 105. This section is similar to Section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard – "man of ordinary prudence would exercise in dealing with his own property" – regardless of the type or purposes of the trust. See Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

Comment—Section 805. Costs of Administration.

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. See Section 105. This section is similar to Section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard – “man of ordinary prudence would exercise in dealing with his own property” – regardless of the type or purposes of the trust. See Restatement (Second) of Trusts § 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

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[*Note: For Ohio changes see Report Sec. 34.*]

Comment—Section 806. Trustee’s Skills.

This section is similar to Section 7-302 of the Uniform Probate Code, Restatement (Second) of Trusts § 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

Comment—Section 807. Delegation by Trustee.

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. See also John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e).

[*Note: For Ohio changes see Report Sec. 28.*]

Comment—Section 808. Powers to Direct.

Subsection (a) is an application of Section 603(a), which provides that a revocable trust is subject to the settlor’s exclusive control as long as the settlor has capacity. Because of the settlor’s degree of control, subsection (a) of this section authorizes a trustee to rely on a written direction from the settlor even if it is contrary to the terms of the trust. The written direction of the settlor might be regarded as an amendment of the trust. Subsection (a) has limited application upon a settlor’s incapacity. An agent, conservator, or guardian has authority

to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in Section 602(e).

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts § 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts § 64(2) (Tentative Draft No. 3, 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. See Restatement (Second) of Trusts § 185 cmt. g (1959); Section 703(g)(duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. See ERISA § 404(c) (29 U.S.C. § 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. See Section 701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. See Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. See I.R.C. § 675(4).

[*Note: For Ohio changes see Report Sec. 35.*]

Comment—Section 809. Control and Protection of Trust Property.

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in Section 804. *See also* Sections 816(1) (power to collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See* Restatement (Second) of Trusts § 175 cmt. a, c and d (1959). This section, like the other sections in this part, is subject to alteration by the terms of the trust. *See* Section 105. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.

Comment—Section 810. Recordkeeping and Identification of Trust Property.

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) § 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. Section 816(7)(B), which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership interest to be reflected on the records of a third-party custodian would not be feasible. For this reason, subsection (c) waives separate recordkeeping for these types of assets. Under subsection (b), however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute.

Subsection (d), following the lead of a number of state statutes, allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.

Comment—Section 811. Enforcement and Defense of Claims.

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. *See also* Section 816(14) (power to pay, contest, settle, or release claims).

Comment—Section 812. Collecting Trust Property.

This section is a specific application of Section 811 on the duty to enforce claims, which includes a claim for trust property held by a former trustee or others, and a claim against a predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts § 223 (1959), this section only requires a successor trustee to redress breaches of trust “known” to have been committed by the predecessor. For the definition of “know,” see Section 104. Limiting the successor’s obligation to known breaches is a common feature of state trust statutes. *See, e.g.,* Mo. Rev. Stat. § 456.187.2.

As authorized by Section 1009, the beneficiaries may relieve the trustee from potential liability for failing to pursue a claim against a predecessor trustee or other person holding trust property. The obligation to pursue a successor trustee can also be addressed in the terms of the trust. *See* Section 105.

[*Note: For Ohio changes see Report Sec. 36.*]

Comment—Section 813. Duty to Inform and Report.

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. This duty, which is stated in subsection (a), is derived from Section 7-303(a) of the Uniform Probate Code, which was approved in 1969 and which has been enacted in about a third of the states. This provision of the UPC has also been enacted in states that have not otherwise enacted the Uniform Probate Code. *See, e.g.,* Cal. Prob. Code. Sections 16060-16061. Unlike the cited provision of the UPC, subsection (a) of this section limits the duty to keep the beneficiaries informed to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103(13). The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests unless they have made a request to the trustee.

For the extent to which a settlor may waive the requirements of this section in the terms of the trust, see Section 105(b)(8)-(9).

Subsection (a) requires that the trustee keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. This may include a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary’s rights and to prevent or redress a breach of trust. *See* Restatement (Second) of Trusts Section 173 cmt. c (1959). With respect to the permissible distributees, the duty articulated in subsection (a) would ordinarily be satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c). Otherwise, the trustee is not ordinarily under a duty to furnish information to a beneficiary in the absence of a specific request for the information. *See* Restatement (Second) of Trusts Section 173 cmt. d (1959). However, special circumstances may require that the trustee take affirmative steps to provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee’s own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. *See* Restatement (Second) of Trusts Section 173 cmt. d (1959). Furthermore, to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-

held business interests, and other assets that are difficult to value or to replace. *See In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988); *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). The trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer.

Subsection (a) also requires that the trustee promptly respond to the request of any beneficiary, whether qualified or not, for information related to the administration of the trust. Performance is excused only if compliance is unreasonable under the circumstances. Within the bounds of the reasonableness limit, this provision allows the beneficiary to determine what information is relevant to protect the beneficiary's interest. Should a beneficiary so request, subsection (b)(1) also requires the trustee to furnish the beneficiary with a complete copy of the trust instrument and not merely with those portions the trustee deems relevant to the beneficiary's interest. For a case reaching the same result, see *Fletcher v. Fletcher*, 480 S.E. 2d 488 (Va. Ct. App. 1997). Subsection (b)(1) is more expansive Section 7-303(b) of the Uniform Probate Code, which provides that "[u]pon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest...."

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question. "The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other hand, subsection (a) of this section requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee's attorney. There is authority for the view that the trustee is estopped from pleading attorney-client privilege in such circumstances. In the leading case, *Riggs National Bank v. Zimmer*, 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney's client: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client . . ." This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. *See* Louis H. Hamel, Jr., *Trustee's Privileged Counsel: A Rebuttal*, 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege*, 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood)*, 990 P.2d 591 (Cal. 2000); *Huie v. De Shazo*, 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. *See, e.g., United States v. Mett*, 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases "[t]here are no competing interests such as other stockholders or the intentions of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (1996).

To enable beneficiaries to protect their interests effectively, it is essential that they know the identity of the trustee. Subsection (b)(2) requires that a trustee inform the qualified beneficiaries within 60 days of the trustee's acceptance of office and of the trustee's name, address and telephone number. Similar to the obligation imposed on a personal representative following admission of the will to probate, subsection (b)(3) requires the trustee of a revocable trust to inform the qualified beneficiaries of the trust's existence within 60 days after the settlor's death. These two duties can overlap. If the death of the settlor happens also to be the occasion for the appointment of a successor trustee, the new trustee of the formerly revocable trust would need to inform the qualified beneficiaries both of the trustee's acceptance and of the trust's existence.

Subsection (b)(4) deals with the sensitive issue of changes, usually increases, in trustee compensation. Changes can include changes in a periodic base fee, rate of percentage compensation, hourly rate, termination fee, or transaction charge. Regarding the standard for setting trustee compensation, see Section 708 and Comment.

Subsection (c) requires the trustee to furnish the current beneficiaries and other beneficiaries who request it with a copy of a trustee's report at least annually and upon termination of the trust. Unless a cotrustee remains in office, the former trustee also must provide a report to all of the qualified beneficiaries upon the trustee's resignation or removal. If the vacancy occurred because of the former trustee's death or adjudication of incapacity, a report may, but need not be provided by the former trustee's personal representative, conservator, or guardian.

The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests. For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, *Fiduciary Accounting Guide* (2d ed. 1998).

Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

Subsection (e), which was added to the Code in 2004, is discussed in 2004 Amendment below.

2004 Amendment. Subsection (b)(2) and (b)(3) require that certain notices be sent by the trustee to the qualified beneficiaries within 60 days of the trustee's acceptance of office, or within 60 days after the creation of an irrevocable trust or the date a revocable trust becomes irrevocable. Subsection (e) is added to make clear the drafting committee's intent that these requirements are not to be retroactively applied to trustee acceptances of office occurring prior to the effective date of the Code and to trusts which have become irrevocable prior to the effective date.

[*Note: For Ohio changes see Report Sec. 37.*]

Comment—Section 814. Discretionary Powers; Tax Savings.

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's exercise of discretion must be in good faith consistent with the trustee's duty to administer the trust (see Section 801), the trustee's exercise must also be in accordance with the terms and purposes of the trust and the interests of the beneficiaries. "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust. See Section 103(8). Subsection (a) does not otherwise address the obligations of a trustee to make distributions, leaving that issue to the caselaw. Regarding the standards for exercising discretion and construing particular language of discretion, with numerous case citations, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). See also Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425 (1961). Under these standards, whether the trustee has a duty in a given situation to make a distribution depends on the exact language used, whether the standard grants discretion and its breadth, whether this discretion is coupled with a standard, whether the beneficiary has other available resources, and, more broadly, the overriding purposes of the trust. For example, distilling the results of scores of cases, the Restatement (Third) of Trusts concludes that there is a presumption that the "trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available." Restatement (Third) of Trusts Section 50 cmt. e & Reporter's Notes (Tentative Draft No. 2, 1999).

Subsection (a) requires a trustee exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Similar to Restatement (Second) of Trusts Section 187 (1959), subsection (a) does not impose an obligation that a trustee's decision be within the bounds of a reasonable judgment, although such an interpretive standard may be imposed by the courts if the document adds a standard whereby the reasonableness of the trustee's judgment can be tested. Restatement (Second) of Trusts Section 187 cmt. f (1959).

The obligation of a trustee to act in good faith is a fundamental concept of fiduciary law although there are different ways that it can be expressed. Sometimes different formulations appear in the same source. Scott, in his treatise on trusts, states that the court *will not* interfere with the trustee's exercise of discretion if the trustee "acts in good faith and does not act capriciously," but Scott then states that the trustee *will* interfere if the trustee "acts dishonestly or in bad faith, or where he acts from an improper motive." 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 187.2 (4th ed. 1988).

Sometimes different formulations are used in the same case:

[If] the "sole discretion" vested in and exercised by the trustees in this case...were exercised fraudulently, in bad faith or in an abuse of discretion, it is subject to...review. Whether good faith has been exercised, or whether fraud, bad faith or an abuse of discretion has been committed is always subject to consideration by the court upon appropriate allegations and proof.

In re Ferrall's Estate, 258 P.2d 1009 (Cal. 1953).

An abuse by the trustee of the discretion granted in the terms of the trust is a breach of trust that can result in surcharge. See Section 1001(b) (remedies for breach of trust). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity.

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 411-417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. See Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (see Comment to Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (b)(1) states the main rule. Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. See *generally* John J. Regan, Rebecca C. Morgan & David M. English, Tax, Estate and Financial Planning for the Elderly Section 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

Subsection (b)(2) addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The

applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support. See Treas. Reg. Section 20.2041-1(c)(2).

Subsection (c) deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

Subsection (d) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary.

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

2004 Amendment. The amendment substitutes "ascertainable standard" which is now a defined term in Section 103(2), for the former and identical definition in this section. No substantive change is intended.

[*Note: For Ohio changes see Report Secs. 38 and 39.*]

Comment—Section 815. General Powers of Trustee.

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in Section 816 as well as other powers described elsewhere in this Code. See Sections 108(c) (transfer of principal place of administration), 414(a) (termination of uneconomic trust with value less than \$50,000), 417 (combination and division of trusts),

703(e) (delegation to cotrustee), 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers and duties), 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers conferred by this Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

[*Note: For Ohio changes see Report Sec. 40.*]

Comment—Section 816. Specific Powers of Trustee.

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. See Section 105. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 815 and powers conferred elsewhere in the Code, which are listed in the Comment to Section 815. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a trustee duty that would otherwise apply. See, e.g., Sections 802(h) (exceptions to duty of loyalty) and 810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided in Section 811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 816(13) (power to decline property with possible environmental liability).

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule Section 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate that the sale be made with security.

Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 802(h)(4).

Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.

Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9.

Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts Section 193 (1959).

Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts Section 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts Section 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Article 9.

Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* Section 809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. Section 113.025. *See also* Sections 701(c)(2) (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811 requires that a trustee need take only “reasonable” steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See* Restatement (Second) of Trusts Section 192 (1959) (power to compromise, arbitrate and abandon claims).

Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 708. *See also* Section 709 (repayment of trustee expenditures). While prior court approval is not required, Section 813(b)(4) requires the trustee to inform the qualified beneficiaries in advance of a change in the method or rate of compensation.

Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries’ interests.

Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary’s interest in the trust. *See* Restatement (Second) of Trusts Section 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* Section 502.

Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary’s behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary.

Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Paragraph (23) authorizes a trustee to resolve disputes through mediation, arbitration or other methods of alternate dispute resolution. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111. In representing beneficiaries and others in connection with arbitration or in approving settlements obtained through mediation or other methods of ADR, the representation principles of Article 3 may be applied. Settlers wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, *Arbitration Rules for Wills and Trusts* (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 709 and Comment. *See also* Section 811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

[*Note: For Ohio changes see Report Secs. 40-43.*]

Comment—Section 817. Distribution upon Termination.

This section contains several independent provisions governing distribution upon termination. Other provisions of the Uniform Trust Code relevant to distribution upon termination include Section 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation of action against trustee).

Subsection (a) is based on Section 3-906(b) of the Uniform Probate Code. It addresses the dilemma that sometimes arises when the trustee is reluctant to make distribution until the beneficiary approves but the beneficiary is reluctant to approve until the assets are in hand. The procedure made available under subsection (a) facilitates the making of non-pro-rata distributions. However, whenever practicable it is normally better practice to obtain the advance written consent of the beneficiaries to a proposed plan of distribution. Similar to other notices under the Code, the right of a beneficiary to object may be barred by delivery of the proposal to another person if that other person may represent and bind the beneficiary as provided in Article 3.

The failure of a beneficiary to object to a plan of distribution pursuant to subsection (a) is not a release as provided in subsection (c) or Section 1009. A release requires an affirmative act by a beneficiary and is not accomplished upon a mere failure to object. Furthermore, a failure of a beneficiary to object does not preclude the beneficiary from bringing an action with respect to matters not disclosed in the proposal for distribution.

Subsection (b) recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

Subsection (c) is an application of Section 1009. Section 1009 addresses the validity of any type of release that a beneficiary might give. Subsection (c) is more limited, dealing only with releases given upon termination of the trust. Factors affecting the validity of a release include adequacy of disclosure, whether the beneficiary had a legal incapacity and was not represented under Article 3, and whether the trustee engaged in any improper conduct. See Restatement (Second) of Trusts Section 216 (1959).

Comment Amended in 2005.

General Comment—Article 9. Uniform Prudent Investor Act.

Because of the widespread adoption of the Uniform Prudent Investor Act, no effort has been made to disassemble and integrate the Uniform Prudent Investor Act into the Uniform Trust Code. States adopting the Uniform Trust Code that have previously enacted the Prudent Investor Act are encouraged to reenact their version of the Prudent Investor Act as Article 9 of the Uniform Trust Code. Reenacting the Uniform Prudent Investor Act as a unit will preserve uniformity with States that have enacted the Uniform Prudent Investor Act in free-standing form.

The Uniform Prudent Investor Act prescribes a series of duties relevant to the *investment and management* of trust property. The Uniform Trust Code, Article 8 contains duties and powers of a trustee relevant to the *investment, administration, and distribution* of trust property. There is therefore significant overlap between Article 8 and the Prudent Investor Act. Where the Uniform Prudent Investor Act and Uniform Trust Code are duplicative, enacting jurisdictions are encouraged to enact the Uniform Prudent Investor Act in this article but *without* the provisions already addressed in Article 8 of the Uniform Trust Code. The duplicative provisions of the Uniform Prudent Investor Act and Article 8 of this Code are as follows:

Prudent Investor Act Article 8

Special skills 2(f) 806

Loyalty 5 802

Impartiality 6 803

Investment costs 7 805

Delegation 9 807

Deleting these duplicative provisions leaves the following sections of the Uniform Prudent Investor Act for enactment in this article:

Section 1 Prudent Investor Rule

Section 2 (a)-(e) Standard of Care; Portfolio Strategy; Risk and Return Objectives

Section 3 Diversification

Section 4 Duties at Inception of Trusteeship

Section 8 Reviewing Compliance

Section 10 Language Invoking Standard of [Act]

[Note: For Ohio changes see Report Sec. 44.]

General Comment—Article 10. Liability of Trustees and Rights of Persons Dealing with Trustee.

Sections 1001 through 1009 identify the remedies for breach of trust, describe how money damages are to be determined, and specify potential defenses. Section 1001 lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in Article 8 or elsewhere in the Code. The remedies for breach of trust in Section 1001 are broad and flexible. Section 1002 provides how money damages for breach of trust are to be determined. The standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 1003 holds a trustee accountable for profits made from the trust even in the absence of a breach of trust. Section 1004 reaffirms the court's power in equity to award costs and attorney's fees as justice requires.

Sections 1005 through 1009 deal with potential defenses. Section 1005 provides a statute of limitations on actions against a trustee. Section 1006 protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. Section 1007 protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary's marriage or death. Section 1008 describes the effect and limits on the use of an exculpatory clause. Section 1009 deals with the standards for recognizing beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 1010 through 1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. Section 1010 negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 1011 negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Section 1012 protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section 1013 permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument.

Much of this article is not subject to override in the terms of the trust. The settlor may not limit the rights of persons other than beneficiaries as provided in Sections 1010 through 1013, nor interfere with the court's ability to take such action to remedy a breach of trust as may be necessary in the interests of justice. *See* Section 105.

Comment—Section 1001. Remedies for Breach of Trust.

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trust might breach include those contained in Article 8 in addition to those specified elsewhere in the Code.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* Section 106.

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See* Restatement (Second) of Trusts § 200 (1959). A person who may represent a beneficiary's interest under Article 3 would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly entitled to receive benefits under the terms of the trust, and other persons with a special interest. *See* Section 110 & Restatement (Second) of Trusts § 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 110(b), 408, 409.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts § 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts § 197 (1959). The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

The remedies identified in this section are derived from Restatement (Second) of Trusts § 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1002. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See* Restatement (Second) of Trusts § 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* Section 704(d) (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts § 243 (1959). For the factors to consider in setting a trustee's compensation absent breach of trust, see Section 708 and Comment. In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See* Restatement (Second) of Trusts § 243 cmt. c (1959).

The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under Section 1012. *See* Restatement (Second) of Trusts § 284 (1959).

Comment—Section 1002. Damages for Breach of Trust.

Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule § 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule §§ 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to §§ 205 and 208-211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts § 205 cmt. g (1959).

For purposes of this section and Section 1003, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8).

Subsection (b) is based on Restatement (Second) of Trusts § 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts § 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. See Restatement (Second) of Trusts § 258 cmt. e (195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? See Restatement (Second) of Trusts § 258 cmt. d (1959).

Comment—Section 1003. Damages in Absence of Breach.

The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts § 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration. See Restatement (Second) of Trusts § 203 cmt. a (1959).

A trustee is not an insurer. Similar to Restatement (Second) of Trusts § 204 (1959), subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

[Note: For Ohio changes see Report Sec. 45.]

Comment—Section 1004. Attorney’s Fees and Costs.

This section, which is based on Massachusetts General Laws chapter 215, § 45, codifies the court’s historic authority to award costs and fees, including reasonable attorney’s fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party’s costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party’s own fees, Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee’s failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts §§ 281-282 (1959). For the case law on the award of attorney’s fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 188.4 (4th ed. 1988).

[*Note: For Ohio changes see Report Sec. 46.*]

Comment—Section 1005. Limitation of Action Against Trustee.

The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. See Section 106.

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. See Section 603(a) (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813.

Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d).

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

[*Note: For Ohio changes see Report Sec. 47.*]

Comment—Section 1006. Reliance on Trust Instrument.

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. *See* Section 103(18) (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 415, provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

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Comment—Section 1007. Event Affecting Administration or Distribution.

This section, which is based on Washington Revised Code § 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. *See* Restatement (Second) of Trusts § 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

Comment—Section 1008. Exculpation of Trustee.

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

Subsection (b) disapproves of cases such as *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which held that an exculpatory clause in a trust instrument drafted by the trustee was valid because the beneficiary could not prove that the clause was inserted as a result of an abuse of a fiduciary relationship. For a later case where sufficient proof of abuse was present, see *Rutanan v. Ballard*, 678 N.E.2d 133 (Mass. 1997). Subsection (b) responds to the danger that the insertion of such a clause by the fiduciary or its agent may have been undisclosed or inadequately understood by the settlor. To overcome the presumption of abuse in subsection (b), the trustee must establish that the clause was fair and that its existence and contents were adequately communicated to the settlor. In determining whether the clause was fair, the court may wish to examine: (1) the extent of the prior relationship between the settlor and trustee; (2) whether the settlor received independent advice; (3) the sophistication of the settlor with respect to business and fiduciary matters; (4) the trustee's reasons for inserting the clause; and (5) the scope of the particular provision inserted. See Restatement (Second) of Trusts § 222 cmt. d (1959).

The requirements of subsection (b) are satisfied if the settlor was represented by independent counsel. If the settlor was represented by independent counsel, the settlor's attorney is considered the drafter of the instrument even if the attorney used the trustee's form. Because the settlor's attorney is an agent of the settlor, disclosure of an exculpatory term to the settlor's attorney is disclosure to the settlor.

[*Note: For Ohio changes see Report Sec. 48.*]

Comment—Section 1009. Beneficiary's Consent, Release, or Ratification.

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. See Restatement (Second) of Trusts § 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. See Restatement (Second) of Trusts § 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. See Restatement (Second) of Trusts § 216 cmt. k (1959). If the beneficiary's approval involves a self-dealing transaction, the approval is binding only if the transaction was fair and reasonable. See Restatement (Second) of Trusts §§ 170(2), 216(3) and cmt. n (1959).

An approval by the settlor of a revocable trust or by the holder of a presently exercisable power of withdrawal binds all the beneficiaries. See Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.

Comment—Section 1010. Limitation on Personal Liability of Trustee.

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract both disclose the representative capacity and identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts § 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. § 9607) or its state law counterparts, unless the trustee was personally at fault. *See also* Sections 701(c)(2) (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible liability for violation of environmental law).

Subsection (c) alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.

[*Note: For Ohio changes see Report Sec. 49.*]

Comment—Section 1011. Interest as General Partner.

Section 1010 protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. Section 1010 also absolves a trustee from liability for torts committed in administering the trust unless the trustee was personally at fault. It does not protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. That is the purpose of this section, which is modeled after Ohio Revised Code § 1339.65. Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership's contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability.

Certain exceptions apply. The section is not intended to be used as a device for individuals or their families to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity or if an interest is owned by the trustee's spouse or the trustee's descendants, siblings, parents, or the spouse of any of them.

Nor can a revocable trust be used as a device for avoiding claims against the partnership. Subsection (d) imposes personal liability on the settlor for partnership contracts and other obligations of the partnership the same as if the settlor were a general partner.

This section has been placed in brackets to alert enacting jurisdictions to consider modifying the section to conform it to the State's specific laws on partnerships and other forms of unincorporated businesses.

[*Note: For Ohio changes see Report Sec. 50.*]

Comment—Section 1012. Protection of Person Dealing with Trustee.

This section is derived from Section 7 of the Uniform Trustee Powers Act.

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see Section 104. This Code does not define "good faith" for purposes of this and the next section. Defining good faith with reference to the definition used in the State's commercial statutes would be consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 1013. Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 297 (4th ed. 1989).

Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under Restatement (Second) of Trusts § 321 (1959), the person delivering property to a trustee is liable if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property.

Subsection (d) extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office.

Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

Comment—Section 1013. Certification of Trust.

This section, derived from California Probate Code § 18100.5, is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Even absent this section, such requests are usually unnecessary. Pursuant to Section 1012(b), a third person proceeding in good faith is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection.

Third persons frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be distributed to third persons. A certification of trust is a document signed by a currently acting trustee that may include excerpts from the trust instrument necessary to facilitate the particular transaction. A certification provides the third party with an assurance of authority without having to disclose the trust's dispositive provisions. Nor is there a need for third persons who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession.

Subsections (a) through (c) specify the required contents of a certification. Subsection (d) clarifies that the certification need not include the trust's dispositive terms. A certification, however, normally will contain the administrative terms of the trust relevant to the transaction. Subsection (e) provides that the third party may make this a condition of acceptance. Subsections (f) and (g) protect a third party who relies on the certification. The third party may assume that the certification is true, and is not charged with constructive knowledge of the terms of the trust instrument even if the third party has a copy.

To encourage compliance with this section, a person demanding a trust instrument after already being offered a certification may be liable under subsection (h) for damages if the refusal to accept the certification is determined not to have been in good faith. A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Examples of such due diligence and legal requirements include (1) in connection with transactions to be executed in the capital markets where documentary standards have been established in connection with underwriting concerns; (2) to satisfy documentary requirements established by state or local government or regulatory agency; (3) to satisfy documentary requirements established by a state or local government or regulatory agency; and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation.

The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal are to be computed and whether attorney's fees might be recoverable. For a discussion of the meaning of "good faith," see Section 1012 Comment.

General Comment—Article 11. Miscellaneous Provisions.

None.

Comment—Section 1101. Uniformity of Application and Construction.

None.

[*Note: For Ohio changes see Report Sec. 51.*]

Comment—Section 1102. Electronic Records and Signatures.

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The Uniform Trust Code does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. See Section 109(a).

Comment—Section 1103. Severability Clause.

None.

[*Note: Section omitted in Ohio.*]

Comment—Section 1104. Effective Date.

None.

[*Note: Section omitted in Ohio. Under Sec. 3 of H.B. 416, OTC's effective date is January 1, 2007.*]

Comment—Section 1105. Repeals.

[*Note: Section omitted in Ohio. See Sec 2 of H.B. 416.*]

Comment—Section 1106. Application to Existing Relationships.

The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive

application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code § 8-101.

[Note: Renumbered Ohio Rev. Code § 5811.03.]

Chapter 4: Report on H.B. 416: The Ohio Trust Code as Enacted

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Chapter 4: Report on H.B. 416: The Ohio Trust Code as Enacted

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**Prepared for the Joint Committee on the Ohio Trust Code of the Legal, Legislative, and
Regulatory Committee of the Ohio Bankers League and the Estate Planning, Trust and
Probate Law Section of the Ohio State Bar Association**

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Background and Introduction

Members of the Estate Planning, Trust, and Probate Law (EPTPL) section of the Ohio State Bar Association and of the Legal, Legislative, and Regulatory (LLR) Committee of the Ohio Bankers League began studying the Uniform Trust Code (UTC) shortly after its approval by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000. A joint committee consisting of members of the EPTPL section and the LLR committee produced its first draft of the Ohio Uniform Trust Code in January 2004. As the Reporter for the Joint Committee, I prepared a report to accompany the first draft of the Ohio Uniform Trust Code. In August 2004 and February 2005, the Joint Committee produced second and third drafts of the Ohio Uniform Trust Code, each of which was accompanied by a revised report. The second and third drafts were based on comments and suggestions the Joint Committee received from its statewide dissemination of the first and second drafts and the reports that accompanied them, amendments made by NCCUSL to the UTC, and the Joint Committee's continued study of the UTC and its possible adoption in Ohio.

Based on the Joint Committee's third draft of the Ohio Uniform Trust Code, along with additional revisions to it requested by the Joint Committee, the Ohio Legislative Service Commission (LSC) prepared a bill (HB 416) that was introduced into the Ohio General Assembly in late 2005 for its consideration and possible enactment. (For the testimony of a principal sponsor of HB 416 to the House committee that considered the bill, see *Testimony of Rep. Mark Wagoner to House Civil and Commercial Law Committee*, 16 Probate Law Journal of Ohio 65

(January/February 2006.) HB 416, which had at least 42 sponsors, changed the name of the proposed trust code from the “Ohio Uniform Trust Code” to the “Ohio Trust Code” (OTC), because of changes made to the UTC in preparing the OTC. While HB 416 was being considered by the House Civil and Commercial Law Committee, and later by the Senate Judiciary Committee on Civil Justice, several amendments were made to it. The bill was passed by the House in February 2006, and by the Senate (and again by the House, because of amendments to it made in the Senate) in May 2006. This Report is prepared on the assumption that the bill will be signed by the Governor and become law in its current form. Under Section 3 of the bill, it will have a January 1, 2007 effective date.

This Report begins with a discussion of policy considerations related to enactment of the OTC. Next, it discusses how the OTC will be incorporated into the Revised Code. The Report then discusses many of the OTC’s provisions, in the same order as those provisions are included in the OTC. The focus of the discussion of OTC provisions is on those that will change existing Ohio law, or that are changes from the UTC itself. Thus, this Report does not provide a general explanation of the UTC. For such an explanation, see the article by the UTC Reporter, David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Missouri Law Review 143 (2002). The UTC itself, with comments, is available at: <http://utcproject.org/utc/DesktopDefault.aspx>.

A significant focus of this Report is on how enactment of the OTC will change existing Ohio law. It is likely, however, that it does not include every change adopting the OTC will make to Ohio law. Many of the changes it discusses were identified in Robert Brucken’s outline, *Changes in Ohio Law by Adoption of Uniform Trust Code*, for the December 2002 OSBA CLE program on the UTC, and in articles written by the UTC Reporter, David English: *The Uniform Trust Code (2000) and its Application to Ohio*, 30 Capital University Law Review 1 (2002) and *The Uniform Trust Code (2000) and Its Application to Ohio*, 12 Probate Law Journal of Ohio 1 (Sept./Oct. 2001). The OTC, however, is a broad codification of the law of trusts consisting of more than 100 separate statutes. While I have identified some changes the OTC will make in Ohio law that were not included in Mr. Brucken’s outline or Professor English’s articles, because of the great amount of time it would require to do so, I have not made a thorough, systematic analysis of each provision of the OTC in the context of existing Ohio statutory and case law to determine if each such provision is consistent with, different from, or simply not covered by, existing Ohio law. Examples of OTC provisions with respect to which I have not researched Ohio law to determine if enactment of the provision will change Ohio law include: (i) § 5808.02(C), which provides that a sale or other transaction between a trustee and a number of specifically described persons related to the trustee is presumed to be affected by a conflict of interest; (ii) § 5810.04, which provides that in judicial proceedings involving trusts, the court may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or the trust, as justice and equity may require; (iii) §§ 5807.02 and 5801.04(B)(6), which provide that the court may require a bond if it finds a bond necessary to protect the interests of the beneficiaries and that the settlor may not waive the court’s power to do so; (iv) §§ 5807.08 and 5801.04(B)(7), which provide that the court may increase or decrease the compensation of the trustee, as set forth in the trust instrument, if it determines that it is unreasonably high or low, and that the settlor may not waive the court’s power to do so; and (v) § 5803.05(C), which provides that in making decisions, a court appointed representative of minor, incapacitated, or unborn individuals, or of a person whose identity or location is unknown, may consider general benefit accruing to the living members of the individual’s family (rather than being limited, for example, to considering only the economic effects of the decision on the person being represented).

1. Policy considerations.

A. Codification of the common law of trusts. Much of the OTC is a codification of the existing common law of trusts, the adoption of which will not change Ohio law. Pre-OTC Ohio trust law, however, is relatively sparse and is found in scattered statutes and sometimes difficult to locate case law. Further, on some issues of trust law there is not well defined and accepted common law. In addition, as discussed throughout this Report, when the OTC becomes effective, it will make a number of changes in Ohio law. Perhaps equally important, with respect to issues addressed by the OTC but as to which there was no law in Ohio, adoption of the OTC provides law in circumstances where none previously existed. As a result of such factors, the adoption of the OTC should provide settlors, trustees, beneficiaries, lawyers, judges, and the general public with greater certainty and access to Ohio's trust law, and it should result in fewer situations in which courts are called upon to make trust law.

Adoption of the OTC, however, clearly will not eliminate the courts' role, or that of the common law and principles of equity, in the continuing development of the Ohio law of trusts. Of course, if and to the extent a statute in the OTC applies to an issue in a particular case, presumably the court would apply the statute. For issues not addressed by the OTC, § 5801.05 provides: "The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by [the OTC] or another section of the Revised Code." Thus, an issue not covered by the OTC will be resolved in the traditional common law manner. According to the comment to the comparable provision of the UTC (§ 106), the sources of the common law of trusts, including principles of equity, that will be of particular use in deciding questions not resolved by the UTC will be case law in the particular jurisdiction, the Restatement of Trusts, the Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution.

The comment to UTC § 106 also provides: "The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation." According to a recent Ohio Court of Claims case dealing with the Uniform Commercial Code, however, if a statute from a uniform act is not ambiguous, the court may not refer to the comments to interpret it differently, as the comments have not been enacted into law. *American Insurance Company v. Cuyahoga Community College District*, 774 N.E.2d 802 (Ohio Ct. Cl. 2002). Accordingly, the usefulness of the UTC's comments to interpret the OTC may be limited, at least in circumstances in which a provision of the UTC that has been enacted in Ohio arguably is inconsistent with the applicable UTC comment.

Recent cases from Mississippi and New Hampshire illustrate how codifying the law of trusts affects the role of the court in making trust law. In the Mississippi case (*Sligh v. First National Bank of Holmes County*, 704 So. 2d 1020 (Miss. 1997)), an uninsured spendthrift trust beneficiary who was driving under the influence of alcohol caused an accident that resulted in serious injuries to the plaintiffs, who obtained a judgment against the beneficiary and attempted to reach his interest in the spendthrift trust. In allowing them to do so, the Mississippi Supreme Court, on policy grounds, created a tort claimant exception to spendthrift protection. (Shortly after the decision in *Sligh*, the Mississippi legislature effectively overruled it by enacting new spendthrift legislation that did not include a tort claimant exception.)

In the New Hampshire case (*Scheffel v. Krueger*, 782 A.2d 410 (N.H. 2001)), the beneficiary of a spendthrift trust was charged with, and apparently convicted and imprisoned

for, sexually assaulting a minor child. The minor's mother obtained a default judgment against the beneficiary and tried to attach the beneficiary's interest in the spendthrift trust. In affirming the lower court's dismissal of the action, the New Hampshire Supreme Court noted that by statute in New Hampshire, spendthrift provisions preclude attachment of beneficiaries' interests by their creditors except in two specified circumstances, neither of which was applicable to the plaintiff's claim. In response to the plaintiff's argument that the legislature did not intend the statute to protect spendthrift trust beneficiaries from their tort creditors, the court noted that "[w]here the legislature has made specific exemptions, we must presume no others were intended." Finally, the court also rejected the plaintiff's public policy argument (that was supported by the Restatement of Trusts) that it should create a tort creditor exception to the statute: "In this State, the legislature has enacted a statute repudiating the public policy exception sought by the plaintiff. . . . This statutory enactment cannot be overruled, because '[I]t is axiomatic that courts do not question the wisdom or expediency of a statute.'" (As is the case under the UTC and the law in most states, the OTC does not include a tort creditor exception to spendthrift protection.)

Similarly, under the Restatement (Third) of Trusts, § 59 cmt. a, and § 59(b), a spendthrift provision will not prevent a set-off against a beneficiary's interest of amounts due to a trust from a beneficiary who served as trustee and breached a fiduciary duty. Under § 5805.01(C) of the OTC, however, spendthrift provisions are enforceable "except as otherwise provided in this chapter and in section 5810.04 of the Revised Code," and no other provision of the OTC excepts claims for a set-off from the spendthrift bar. Further, OTC § 5805.02(E) provides that the list of spendthrift exceptions in the OTC is exclusive. The OTC's clear statement of the effectiveness of a spendthrift provision, together with its explicit list of exceptions, arguably will preclude a court from creating an additional exception from the common law or principles of equity for a set-off against the interest of a beneficiary/trustee who has breached a fiduciary duty. (For a recent Ohio court of appeals case discussing a probate court's order that apparently permitted a set-off against the interest of a beneficiary who, while executor of the settlor's estate, had improperly disposed of trust assets, see *Great American Insurance Co. v. Thompson Trust*, 2006-Ohio-304.) The case is discussed in Alan Newman, *Powers of Withdrawal, Claims for Set-Off, and Spendthrift Protection*, 16 Probate Law Journal of Ohio 143 (May/June 2006))

An example of a circumstance in which the common law or principles of equity arguably would be applied under § 5801.05 to supplement the OTC is determining who is the "settlor" of a trust. Under OTC § 5805.06, creditors of the settlor of a trust can reach the settlor's beneficial interest in the trust. OTC § 5801.01(S) provides that "'settlor' means a person . . . who creates, or contributes property to, a trust. . . ." Absent from the OTC are rules for situations in which a person may be a settlor of a trust in substance, if not in form. Arguably, consistent with a comment to the comparable provision of the UTC (§ 103), § 801.05 would allow a court to apply such rules.

Finally, the mandatory rules provisions of OTC § 5801.04(B) also acknowledge the role the courts will continue to play in developing and applying trust law in Ohio after enactment of the OTC. Under those rules, in several contexts the court's role with respect to the administration of trusts may not be eliminated or reduced by the settlor. For example, in a variety of circumstances the court may terminate or modify a trust regardless of provisions in the instrument to the contrary. Similarly, the court may require, dispense with, or modify or terminate a bond, or adjust the trustee's compensation (if it is set unreasonably high or low in the instrument), without regard to the terms of the trust. Further, the settlor may not deprive

the court of subject-matter jurisdiction. More generally, OTC § 5801.04(B)(13) provides that the terms of the trust may not affect “the power of the court to take any action and exercise any jurisdiction that may be necessary in the interests of justice.” (See also OTC § 802.01(C), under which the court’s power extends to “any matter involving the trust’s administration, including a request for instructions and an action to declare rights.”)

B. Other policy considerations. Policy considerations underlie substantially all provisions of the OTC and the UTC. A discussion of policy issues raised and addressed by the UTC, as well as an explanation of many of its provisions, can be found in its official comments, which can be obtained from the website of the Uniform Law Commissioners at www.nccusl.org. In addition, the UTC Reporter, Professor David English of the University of Missouri-Columbia School of Law, has written extensively on the UTC and its policy issues. An outline Professor English prepared for state committees studying the UTC for possible adoption, entitled “Uniform Trust Code (2000): Overview and Key Provisions,” includes a discussion of UTC policy issues with respect to: (i) default and mandatory rules; (ii) procedural rules; (iii) principal place of administration; (iv) representation and nonjudicial settlements; (v) trust modification and termination; (vi) charitable trusts; (vii) spendthrift provisions and rights of beneficiaries’ creditors; (viii) revocable trusts; (ix) trustee removal; (x) trustee compensation; (xi) mutual fund investment; (xii) the duty to keep beneficiaries informed; (xiii) remedies for breach of trust; and (xiv) retroactivity. (For a more comprehensive discussion of the UTC’s policy issues by Professor English, see *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Missouri Law Review 143 (2002).) Because most, if not all, members of the Joint Committee already have reviewed Professor English’s outline in some detail, and because even a summary of the basic policy issues of the most significant provisions of the UTC would add considerable length to this Report, it does not include specific discussions of the UTC’s policy issues.

Rather, the primary focuses of this Report are on the changes the Joint Committee made to the UTC for the OTC, and on changes enactment of the OTC will make to existing Ohio law. In addition, to a limited extent policy considerations with respect to those changes are discussed in connection with the discussion of the changes themselves.

2. Structure.

Under HB 416, the OTC is incorporated into the Revised Code in accordance with a plan designed by Robert Brucken and Cal Kirchick under which new title 58 of the Revised Code is devoted to the OTC and other trust related statutes. Title 58 is structured as follows:

- A. Chapters 5801–5811: the OTC (with the Uniform Prudent Investor Act of RC §§ 1339.52–1339.61 included as Chapter 5809).
- B. Chapter 5812: the Uniform Principal and Income Act (RC §§ 1340.40 – 1340.91).
- C. Chapter 5813: the Institutional Trust Funds Act (RC §§ 1340.31 – 1340.37).
- D. Chapter 5814: the Uniform Transfers to Minors Act (RC §§ 1339.31 – 1339.39).
- E. As discussed in the remainder of this Report, some of the other provisions of Chapters 1339 and 1340 will be repealed in connection with the adoption of the OTC. The remaining provisions of Chapters 1339 and 1340 will be moved to Chapter 5815. All existing statutes in Chapters 1339 and 1340 will be repealed.

Consistent with this plan, the OTC sections discussed in this Report are numbered as they will appear in new title 58. In most cases, the OTC section numbers correspond to the numbering of the comparable provisions of the UTC. Thus, for example, UTC § 806 appears in the OTC, and is discussed in this Report, as § 5808.06.

3. Definitions (§ 5801.01).

A. Definition of beneficiary and current beneficiary. “Beneficiary” is defined in § 5801.01(C) to include not only a person with a present or future, contingent or vested, beneficial interest in a trust, but also a person who, “in a capacity other than that of trustee, holds a power of appointment over trust property.” The rationale for including holders of powers of appointment in the definition of beneficiary, as stated in the comment to the comparable provision of the UTC (§ 103), is “the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries.” An example of rights power holders will have as beneficiaries is the right to information about the trust. As discussed in section 37, below, § 5808.13 obligates the trustee to provide information to trust beneficiaries. While most of the trustee’s duties under that section are owed only to current beneficiaries of the trust, some are owed to all beneficiaries. Further, under § 5801.09, if notice is required to be given to current or qualified beneficiaries, the trustee also must give notice to any other beneficiary who has sent the trustee a request for notice. Because in most cases persons who hold non-fiduciary powers of appointment over trust assets also hold beneficial interests in the trust, the OTC’s treatment of holders of non-fiduciary powers as beneficiaries likely will have limited significance.

For other changes to the definitions of “beneficiary” and “current beneficiary” made while HB 416 was being considered by the House Civil and Commercial Law Committee, see section 7., below.

B. Definitions of conservator and guardian (§§ 5801.01(H) and (I)). The UTC uses “conservator” to refer to a fiduciary who manages the property of an incapacitated person, and “guardian” to refer to a fiduciary whose authority is with respect to personal care decisions for an incapacitated person. Because the Revised Code uses “guardian” in both of those contexts, OTC §§ 5801.01(H) and (I) use the terms “guardian of the estate” and “guardian of the person” instead of the UTC’s “conservator” and “guardian.”

“Guardian of the estate” and “guardian of the person” also are defined in the OTC to include a conservator appointed for the property or the person of a competent adult under RC § 2111.021. Thus, all references in the OTC to “guardian of the estate” or “guardian of the person” will apply to a conservator of property or of the person, if one has been appointed.

The provisions of the OTC that refer to a guardian of the estate or the person are: § 5803.03 (representation); § 5804.11(A) (modification or termination of noncharitable irrevocable trust by consent); § 5806.02(F) (revocation or amendment of, or distribution from, a revocable trust); § 5807.04(A)(6) (vacancy in trusteeship); § 5808.02(G)(2)(c) (transactions not precluded by trustee’s duty of loyalty); § 5808.13(C) (duty to inform and report); and § 5808.16(U)(1) and (3) (distributions to or for the benefit of an incapacitated beneficiary). Note that under § 5807.04(A)(6), if an individual trustee has a conservator of his or her property or person appointed, a vacancy in the trusteeship will result even though a conservator can only be appointed under RC § 2111.021 for a competent adult.

C. Other new defined terms. The OTC includes four other defined terms that are not included in the UTC: “beneficiary surrogate,” “current beneficiary,” “mandatory distribution,” and “wholly discretionary trust.” Each of these is discussed below in the section of the Report that discusses the subject to which it relates.

4. Application to testamentary trusts (§ 5801.02).

The UTC makes no distinction between testamentary and inter vivos trusts and clearly was designed to apply equally to both. If the Joint Committee had taken that approach for the OTC, Ohio trust law would be uniform and the OTC would apply in the same way to all Ohio trusts. That approach, however, would have made fundamental changes with respect to the role of the court in supervising testamentary trusts, required substantial changes to Chapter 21 of the Revised Code, and necessitated addressing and resolving issues of retroactivity as to existing testamentary trusts. Conversely, if the OTC were made applicable only to inter vivos trusts, there would be two bodies of trust law in Ohio, and the rights and duties of trust settlors, beneficiaries, and trustees would vary substantially depending on the kind of trust involved.

The Joint Committee decided to take a third approach. Section 5801.02 of the OTC provides, in part, that the OTC applies “to testamentary trusts to the extent provided by section 2109.69 of the Revised Code.” Under new § 2109.69:

(A) Subject to division (B) of this section, the provisions of Chapters 5801. to 5811. of the Revised Code apply to testamentary trusts except to the extent that any provision of those chapters conflicts with any provision of Chapter 2109. of the Revised Code, or with any other provision of the Revised Code, that applies specifically to testamentary trusts and except to the extent that any provision of Chapters 5801. to 5811. of the Revised Code is clearly inapplicable to testamentary trusts.

(B) Section 5808.13 of the Revised Code applies to testamentary trusts whether or not that section conflicts with any provision of Chapter 2109. of the Revised Code or any other provision of the Revised Code that applies specifically to testamentary trusts.

This approach leaves undisturbed such procedures in Chapter 2109 as those providing for the appointment of testamentary trustees, their bonds, and their inventories. In other respects, the OTC’s provisions will be applicable to testamentary as well as inter vivos trusts.

5. Default and mandatory rules (§ 5801.04).

A. In general. The OTC is primarily a default statute. Under § 5801.04(A), its provisions apply only to the extent the settlor has not provided otherwise in the terms of the trust. Section 5801.04(B) lists the exceptions that the settlor may not override in the terms of the trust. Three of the UTC’s mandatory rules have been modified in the OTC and are discussed in sections 5.B and 5.C, below. The other mandatory rules (that are included in both the UTC and the OTC) are:

- (1) the requirements for creating a trust;
- (2) the duty of the trustee to act in good faith and in accordance with the terms of the trust;

- (3) the requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- (4) the power of the court to modify or terminate a trust under the provisions of Chapter 5804;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust;
- (6) the power of the court to require, dispense with, modify, or terminate a bond;
- (7) the power of the court to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the effect of an exculpatory term under § 5810.08;
- (9) the rights of third persons who deal with the trustee;
- (10) periods of limitation for commencing a judicial proceeding;
- (11) the power of the court to take any action and exercise any jurisdiction that is necessary in the interests of justice; and
- (12) the subject-matter jurisdiction of the court for commencing a proceeding.

B. Requirement that a trust and its terms be for the benefit of its beneficiaries (§§ 5801.04(B) and 5804.04). Section 404 of the UTC provides, in part, that: "A trust and its terms must be for the benefit of its beneficiaries." Under UTC § 105(b) this requirement is mandatory and may not be overridden by the settlor. Because of concerns that these provisions of §§ 404 and 105(b) might undermine the trust being administered in accordance with the settlor's intent, the Joint Committee decided to delete the requirement that a trust and its terms be for the benefit of the beneficiaries from the mandatory rules of OTC § 5801.04(B) and to modify the corresponding language of OTC § 5804.04 to provide: "A trust exists, and its assets shall be held, for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust."

According to the comment to UTC § 404, and provisions of the Restatement (Third) of Trusts cited in that comment, the requirement that a trust and its terms be for the benefit of its beneficiaries is designed to preclude the settlor from including in the terms of the trust administrative or other nondispositive terms that do not reasonably relate to the trust's fundamental purpose of benefiting the beneficiaries in accordance with their interests as defined in the trust's terms. The Restatement cites two cases on this issue: *Colonial Trust Co. v. Brown*, 135 A. 555 (Conn. 1926), in which the settlor specified that improvements on trust property could not be more than three stories high or leased for more than a year, and *Matter of Pulitzer*, 249 N.Y.S. 87 (Surr. Ct. 1931), in which the settlor prohibited the trustee from selling closely held stock.

Professor John Langbein, a Uniform Law Commissioner and a member of the drafting committee for the UTC, has recently written an essay on the UTC's mandatory rules (*Mandatory Rules in the Law of Trusts*, 98 *Northwestern Law Review* 1105 (2004)). Professor Langbein's explanation for the mandatory benefit-of-the-beneficiaries rule of the UTC is as follows:

The dominant substantive principle of the law of gratuitous transfers is to carry out the donor's intent. (Footnote omitted.) This deference to the wishes of the settlor presupposes that the settlor propounded the trust and its terms for the purpose of benefiting the beneficiaries. That presupposition is almost always justified, since the settlor has shown that he or she cared enough about the beneficiaries to give them the beneficial interest in the trust property. When, however, a settlor imposes manifestly value-impairing restrictions on the use or disposition of the trust property, the requirement that the trust terms be for the benefit of the beneficiaries places an outside limit upon the normal rule of deference to the settlor's intent.

The Joint Committee's decision to delete the requirement that a trust and its terms be for the benefit of its beneficiaries from the mandatory rules of OTC § 5801.04(B) does not necessarily mean that what might be characterized as frivolous or capricious administrative or other nondispositive terms of the trust must be followed under all circumstances, however. Under OTC § 5804.12(B), the court is authorized to "modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or impair the trust's administration." (In that regard, however, the comment to the comparable provision of the UTC (§ 412) notes that it is a specific application of § 404's requirement that a trust and its terms be for the benefit of the beneficiaries, thus acknowledging the possibility that § 404 could be applied in circumstances not covered by § 412(b).)

C. *Duty to inform and report (§§ 5801.04(B)(8) and (9)).* The UTC provisions addressing the duties of the trustee to inform and report to the beneficiaries are set forth in § 813. Several changes have been made to those provisions in the OTC, as discussed in section 37, below.

Under UTC §§ 105(b)(8) and (9), two of the UTC's reporting requirements may not be overridden by the settlor:

(8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;

(9) the duty under Section 813(a) to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;

The OTC makes two changes to each of these two provisions. First, the beneficiaries to whom the information must be provided under the OTC are the "current beneficiaries," rather than all "qualified beneficiaries" or all "beneficiaries." "Current beneficiaries" is defined in new OTC § 5801.01(F) to mean, generally, beneficiaries who are current distributees or current permissible distributees of trust income or principal. Under OTC § 5801.01(Q) (and UTC § 103(12)), the term "qualified beneficiaries" is defined, generally, to include current beneficiaries and certain remainder beneficiaries whose interests are not remote.

Second, under OTC § 5801.04(C), the settlor may override the requirement that the current beneficiaries receive the information they otherwise would be entitled to receive under subdivisions (B)(8) and (9) by designating a "beneficiary surrogate" (which is a new defined term under OTC § 5801.01(D)) to receive information that otherwise would be provided to the beneficiary. The beneficiary surrogate is required to "act in good faith to protect the interests of the current beneficiaries for whom" the information is received. (Under § 5810.05, the two year statute of limitations on a beneficiary pursuing a claim against the trustee will run from the date the trustee sent a report to the beneficiary surrogate.)

The Joint Committee decided on the beneficiary surrogate procedure as an alternative to mandating that notices, reports, and other information be sent to current beneficiaries to allow settlors to restrict information beneficiaries receive about trusts in which they have interests. The beneficiary surrogate provisions of new OTC §§ 5801.04(B)(8) and (9) and 5801.04(C) are patterned after a similar approach taken by the District of Columbia in its recently enacted version of the UTC. The approach, being novel, is untested and, when used, likely will raise questions that are not addressed by the OTC. For example, what duties, powers, and potential liabilities would the surrogate (presumably a fiduciary) have? If a court proceeding involving the trust were commenced, would the beneficiary be a party with access to the court record? (A March 2004 Trusts & Estates article on “quiet trusts,” and the District of Columbia’s endorsement of them in its version of the UTC, suggests that a guardian ad litem could act for the beneficiary to make any necessary decisions and that the court record could be sealed.)

Note that the beneficiary may be entitled to some information with respect to the trust without regard to the OTC’s beneficiary surrogate procedure. For example, if distributions are made to or for the benefit of the beneficiary, federal law would require the trustee to furnish the beneficiary with a Schedule K-1 for the beneficiary’s use in preparing his or her income tax return. (RC §§ 1111.13(J) and (H), addressing the investment of trust funds in the trustee’s affiliated investment funds, may not require disclosure to a beneficiary for whom a beneficiary surrogate is serving, as disclosure under those sections is to be made “to all persons entitled to receive statements of account activity,” which presumably would be the beneficiary surrogate.)

6. Transfer of principal place of administration (§ 5801.07).

Two changes have been made to the UTC’s provisions for the transfer of the trust’s principal place of administration. First, under UTC § 108, if the trustee proposes to transfer the trust’s principal place of administration, it must notify the trust’s qualified beneficiaries; OTC § 5801.07 only requires that the trust’s current beneficiaries be notified. Second, the provision in UTC § 108(e) under which a qualified beneficiary can stop such a transfer by notifying the trustee of his or her objection has been deleted from the OTC (as has the corresponding requirement that the trustee’s notice of the transfer inform the beneficiaries of the date by which such an objection would have to be filed).

For a more thorough discussion of trust situs under the OTC, see Joanne E. Hindel, *Setting Your Sights on Trust Situs*, 16 Probate Law Journal of Ohio 135 (May/June 2006).

7. Others treated as current or qualified beneficiaries (§ 5801.09).

Under UTC § 110(b), a charitable organization expressly designated to receive distributions under the terms of a charitable trust (other than such an organization that holds only a remote remainder interest) has the rights of a qualified beneficiary under the UTC (for example, to receive notices and to participate in such actions as filling a vacancy in the trusteeship). As noted by the comment to UTC § 103, the rationale for this approach – instead of simply treating such a charitable organization as a qualified beneficiary of the trust – is that “[c]haritable trusts ... do not have beneficiaries in the usual sense.” UTC § 110(b) has been omitted from OTC § 5801.09.

However, as amended during its consideration by the House Civil and Commercial Law Committee, the OTC's definition of "beneficiary" in § 5801.01(C) includes "a charitable organization that is expressly designated in the terms of the trust to receive distributions." (Whether such a charitable organization will be a current, qualified, or more remote beneficiary will be determined in the same way as for other beneficiaries and will thus depend on its interest in the trust.) The definition excludes charitable organizations that are not expressly designated in the terms of the trust to receive distributions, but to whom the trustee, in its discretion, may choose to make distributions. (Formerly, the OTC's definition of "current beneficiary" under § 5801.01(F) included distributees and permissible distributees of trust income or principal, "other than a charitable organization not expressly designated in the trust instrument to receive distributions." In connection with the above described amendment of § 5801.01(C), the definition of "current beneficiary" was also amended to delete its now unnecessary charitable organization exclusion.)

Also omitted from the OTC is § 110(c) of the UTC, which grants the attorney general the rights of a qualified beneficiary with respect to a charitable trust.

8. Private settlement agreements (§ 5801.10).

A. Introduction. UTC § 111 includes provisions for nonjudicial settlement agreements (NJSAs). In lieu of those provisions, OTC § 5801.10 includes a private settlement agreement (PSA) statute based on a statute drafted by a committee of the Ohio Bankers League (OBL). The OTC PSA statute differs in many material respects from UTC § 111. While the OTC statute is based, in part, on statutes from Washington state (§§ 11.96A.210 – 250), it also includes many provisions that are not in the Washington statutes. The following is a discussion of differences between the OTC PSA statute and UTC § 111. See also, Joanne E. Hindel, *Private Settlement Agreements and Representation of Others: Ohioans Will Soon Have Greater Flexibility in the Administration of Trusts*, 15 Probate Law Journal of Ohio 8 (September/October 2004).

B. Parties, in general. UTC § 111 provides for "interested persons" to be parties to a NJSA, and defines "interested persons" as "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court." The comment to UTC § 111 provides: "Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define 'interested persons' whose consent is required to obtain a binding settlement...." The OTC statute specifies the parties who may enter into a PSA as (i) the settlor (if living and if no adverse income or transfer tax results would arise), (ii) all beneficiaries, (iii) all currently serving trustees, and (iv) creditors, if their interest would be affected by the agreement.

(1) **Settlor a party.** As mentioned, the OTC statute generally provides for the settlor to be a party to a PSA. At common law, the settlor of an irrevocable trust, who is not also a beneficiary of the trust, does not have an interest in the trust and would not be a party to an action with respect to the trust's administration. (Note, in that regard, that under UTC § 410(b), a proceeding to approve or disapprove a modification or termination under § 412 [because of unanticipated circumstances or inability to administer a trust effectively], § 414 [uneconomic trust], § 415 [reformation to correct mistakes], or § 416 [modification to achieve the settlor's tax objectives] may be brought by the trustee or a beneficiary, but not by the settlor.) Thus, requiring the settlor to be a party to a PSA imposes that requirement in

circumstances in which the settlor would not be a party if the settlement were reached in a judicial proceeding. (In Washington, unlike under the UTC, it appears that the settlor also is a necessary party to a judicial proceeding involving a trust. Wash. Stat. § 11.96A.030(4) and (5).)

(2) Creditors as parties. The OTC statute requires creditors to be parties to PSAs, “if their interest is to be affected by the agreement.” UTC § 111 does not directly address whether, and if so under what circumstances, creditors could be “interested persons” with respect to a NJSA who would be necessary parties to it.

C. *Matters that may be covered.* Under UTC § 111, a NJSA may be entered into with respect to any matter involving a trust, but “only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law.” By contrast, OTC § 5801.10(C) allows PSAs, “with respect to any matter concerning the construction of, administration of, or distributions under the trust instrument, the investment of income or principal held by the trustee or other matters,” subject to the following three limitations.

(1) Early terminations prohibited. First, a PSA may not be used to effect an early termination of a trust. (Note that under § 5801.10(I), this prohibition will not affect the ability to terminate or modify a trust under the statutes in Chapter 5804 that allow modification and termination in a variety of specific circumstances.)

(2) Changes in beneficial interests prohibited. Second, PSAs may not be used to change the “interests of the beneficiaries” in the trust. Under OTC § 5801.01(K), “interests of the beneficiaries” is a defined term that means “the beneficial interests provided in the terms of the trust.” Thus, a PSA cannot be used to change the beneficial interests of the beneficiaries in the trust. Because a change to the dispositive terms of a trust presumably would be a change in the beneficiaries’ beneficial interests in the trust, this limitation likely means that PSAs cannot be used to change the dispositive terms of a trust. Excepted from this limitation are PSAs entered into in connection with modifying a trust to qualify a gift to charity for the charitable deduction, or modifying a trust to qualify a gift for a noncitizen spouse for the marital deduction.

(3) Changes a court could not properly approve prohibited. The third limitation on PSAs is that they are only valid to the extent that they include terms and conditions that could be properly approved by the court under the OTC or other applicable law.

In addition, at the recommendation of the Ohio Attorney General’s Office, HB 416 was amended while under consideration by the House Civil and Commercial Law Committee to add new division (M) to § 5801.10. Generally, new division (M) provides that PSAs are not applicable to charitable trusts (unless the charitable interest is remote).

D. *Potential issues.* As mentioned, except as limited in the three ways described above, the OTC statute permits PSAs “concerning the construction of, administration of, or distributions under the trust instrument....” Allowing PSAs with respect to the construction of a trust instrument, but prohibiting PSAs that change the beneficiaries’ interests in the trust, could result in disputes over whether a PSA in connection with construing a trust instrument was in substance, if not in form, an invalid attempt to change the beneficiaries’ interests in the trust. Assuming the construction issue addressed in the PSA was a bona fide one, however, it would seem the better characterization of the PSA would be that it was determining the beneficiaries’ interests, not changing them. If the beneficiaries’ interests under the trust instrument are clear,

however, a PSA attempting to change them by “construction” presumably would be ineffective. (In that regard, note that under § 5801.10(E), PSAs are only final and binding on the parties if they comply with the limitations described above.)

A PSA addressing distributions under the trust instrument might also raise questions of its validity, given the prohibition on PSAs that change the beneficiaries’ interests in the trust. For example, if a trust instrument provided for half of the principal to be distributed to a beneficiary when he or she reached age 30 and the parties entered into a PSA to change the distribution age to 25, arguably the PSA would be invalid as having changed the beneficiary’s interest in the trust (particularly if the instrument calls for the beneficiary’s share to go to another if the beneficiary died before age 30). By contrast, a PSA that addressed the propriety of the trustee’s exercise of its discretion to make a distribution presumably would be valid.

9. Applying wills rules of construction to trusts (UTC § 112).

The OTC omits UTC § 112, which provides: “The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.” Part of the rationale for this section is that revocable trusts are increasingly being used as will substitutes, and thus the rules of construction applicable to wills should be applied to revocable trusts. (UTC § 112, however, applies not just to revocable trusts, but also to testamentary and irrevocable inter vivos trusts.)

Among the rules of construction applicable to wills that might be applicable to trusts if UTC § 112 were enacted are those applicable to lapse, ademption, abatement, the 120-hour survivorship requirement, the construction of class gifts, survivorship with respect to future interests, and the meaning of specific words, including “descendants,” “by representation,” and “heirs.” Under § 112, it is unclear whether the wills construction rules applicable to such matters would be applied to a trust in a given case, as by its terms § 112 applies only “as appropriate.” Professor English’s Capital Law Review article on the possible adoption of the UTC in Ohio notes the significance of the “as appropriate” language: “This phrase masks some very difficult questions. Not all will construction rules should necessarily be applied to trusts. Also, even those that should apply may require modification due to the legal distinctions between wills and trusts. There is a need for a consensus on which rules should apply, and once that issue has been determined, what they should say.”

Section 112 is bracketed in the UTC, meaning that it is presented as optional. The comment to § 112 states that instead of enacting § 112, a jurisdiction might want to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. Because of the uncertainties § 112 would introduce into Ohio law (and because of RC § 2107.01, which expressly defines “will” to exclude inter vivos trusts to overturn the applicability of the lapse rules to revocable trusts under *Dollar Savings and Trust Co. v. Turner*, 39 Ohio St. 3d 182 (1988)), § 112 was deleted from the OTC.

10. Judicial supervision of trusts (§ 5802.01(B)).

Because the Joint Committee decided that testamentary trusts should continue to be subject to continuing judicial supervision, the statement in UTC § 201(b) that trusts are not subject to such supervision unless ordered by the court has been modified in OTC § 5802.01(B)

to apply only to inter vivos trusts. Unlike the UTC, OTC § 5802.01(B) also includes a provision making it clear that judicial supervision of trusts created under circumstances requiring such supervision is not affected by the OTC: “Trusts created pursuant to a statute of the Revised Code, judgment, or decree are subject to continuing judicial supervision to the extent provided by such statute, judgment, or decree, or by court order.”

11. Subject-matter jurisdiction (§ 5802.03) and venue (UTC § 204).

The UTC’s subject-matter jurisdiction provisions of § 203 were replaced with the language of RC § 2101.24(B)(1)(b), which states that the probate division of the court of common pleas has concurrent jurisdiction with the court’s general division with respect to actions involving inter vivos trusts. UTC § 204, dealing with venue, was omitted from the OTC, as venue for trust matters is covered by Civil Rule 3.

12. Representation (Chapter 5803).

While Ohio law recognizes virtual representation in judicial proceedings (see, e.g., *Benner & Co. v. Atlas Remainder, Inc.*, 407 F.2d 219 (6th Cir. 1969)), Chapter 5803 of the OTC makes the doctrine available in other circumstances (including the receipt of required notices and the provision of consents), and specifies persons who may represent others. Generally, in the absence of a conflict of interest, (i) the holder of a general testamentary power of appointment may represent the interests of permissible appointees and takers in default, (ii) fiduciaries may represent those to whom they owe fiduciary duties (provided that a trustee may not represent a beneficiary in connection with a private settlement agreement), (iii) parents may represent minor or unborn children, and (iv) a person with a substantially identical interest may represent a minor, incapacitated, or unborn individual, or a person who cannot be located. For further discussion, see Joanne E. Hindel, *Private Settlement Agreements and Representation of Others: Ohioans Will Soon Have Greater Flexibility in the Administration of Trusts*, 15 Probate Law Journal of Ohio 8 (September/October 2004).

In response to concerns that UTC § 411(a) could cause the assets of irrevocable trusts to be included in the taxable estates of settlors under Internal Revenue Code sections 2036 and/or 2038, and in accordance with a recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel, the 2004 UTC amendments include a provision that prohibits the settlor from representing and binding a beneficiary with respect to the termination or modification of a trust under UTC § 411(a). That provision is included in the OTC as § 5803.01(D).

13. Trust creation (§§ 5804.01 and 5804.02).

UTC § 401 sets forth three methods for creating a trust: by transfer of property to a third person trustee, by declaration of the owner of property that the owner holds it as trustee, or by exercise of a power of appointment in favor of a trustee. In § 5804.01(D), the OTC adds “by court order” as a fourth method. For further discussion, see C. Terry Johnson, *A New Way to Establish and Fund a Living Trust: But How Do We Recognize the Trustee?*, 16 Probate Law Journal of Ohio 111 (March/April 2006).

Under UTC § 402(a), two of the requirements for the creation of a trust are that the settlor have capacity and that the settlor indicates an intention to create the trust. To accommodate such trusts as special needs trusts created for incapacitated persons, § 5804.02(A) excepts from those requirements trusts that are created by court order.

14. Certain issues with respect to the validity of trusts (§ 5804.02).

RC § 1335.01(A), which will be repealed in connection with enactment of the OTC, apparently invalidates trusts that were established for the exclusive use of their settlors. Under OTC § 5804.02(A)(5), a trust created by a settlor for the settlor's sole benefit is not invalid unless the settlor/sole beneficiary also is the sole trustee. Thus, it appears that the repeal of RC § 1335.01(A) will change Ohio law to allow a settlor to create a trust of which the settlor is the sole beneficiary, as long as the settlor is not also the sole trustee.

The provisions of RC §§ 1335.01(B) and (C), under which trusts are valid even if they have no corpus or if the sole current beneficiary also is the sole trustee, have been added to OTC § 5804.02 as divisions (D) and (E).

15. Grounds for challenging the validity of a trust (§§ 5804.06 and 5806.01).

The OTC, like the UTC, provides that the capacity required to create, amend, revoke, or add property to a revocable trust is the same as that required to make a will. (Similarly, at least one Ohio court has applied the test of testamentary capacity to a revocable trust: *Lah v. Rogers*, 707 N.E.2d 1208, 1214 n. 7 (Ohio Ct. App. 1998.)) A sentence that is not included in the comparable provision of the UTC (§ 406) has been added to OTC § 5804.06, which provides that a trust is void to the extent its creation was induced by fraud, duress, or undue influence. The added sentence provides that those terms have the same meaning for trust validity purposes as they have for purposes of determining the validity of a will.

16. Oral trusts (§ 5804.07).

Under prior Ohio law, to establish an oral trust, the evidence had to be "clear, certain and conclusive and must establish the existence of the trust beyond a reasonable doubt." *Hill v. Irons*, 113 N.E.2d 243 (Ohio 1953). Under OTC § 5804.07, the evidentiary standard an oral trust must meet to be valid is clear and convincing evidence.

17. Trusts for pets and other noncharitable trusts without ascertainable beneficiaries (§§ 5804.08 and 5804.09).

Under prior Ohio law, a "trust" for the care of a specific animal (and noncharitable trusts without ascertainable beneficiaries for other purposes that are not capricious) was not void only if the person designated to provide the care (or perform the other noncharitable purpose) was willing to do so and the trust did not violate the Rule Against Perpetuities. *In re Searight's Estate*, 95 N.E.2d 779 (Ohio App. 1950). Under OTC § 5804.08, a trust for the care of a specific animal is valid and enforceable (but only for animals alive during the settlor's lifetime, and for

no longer than the lives of such animals). Similarly, under OTC § 5804.09, other noncharitable trusts without ascertainable beneficiaries to enforce them also are enforceable, but for only 21 years. Enforcement of such trusts is by a person appointed in the terms of the trust, or if the settlor did not appoint one, by a person appointed by the court. (Unaffected by OTC § 5804.09 will be the ability of cemetery companies to hold property in trust for such purposes as the maintenance of gravesites, without the 21 year limitation. RC § 1721.12.)

18. Termination of trusts, in general (§ 5804.10(A)).

UTC § 410 provides that a trust terminates if none of its purposes remain to be achieved or if its purposes have become unlawful, contrary to public policy, or impossible to achieve. Two changes have been made to that section in OTC § 5804.10(A). First, the “contrary to public policy” language has been deleted, as the Joint Committee decided that if a trust (such as a special needs trust) was valid when created, it should not become invalid if a court at a future date determines that its purposes have become contrary to public policy. (The omission of the “contrary to public policy” language from § 5804.10(A) may not, however, preclude a court from terminating an existing trust if it finds its purposes have become contrary to public policy.) Second, UTC § 410(a) does not address how or by whom a determination that the purposes of a trust have become unlawful or impossible to achieve is to be made. Under the OTC, a trust will terminate upon a court making such a determination.

19. Modification of irrevocable noncharitable trust by consent (§ 5804.11).

A. Tax concern; court proceeding. Under UTC § 411(a) (and OTC § 5804.11(A)), a noncharitable irrevocable trust may be modified or terminated upon the consent of the settlor and all beneficiaries. In response to concerns that such a provision might result in the inclusion of irrevocable trust assets in the settlor’s estate for federal estate tax purposes under Internal Revenue Code sections 2036 and/or 2038, and at the recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel, under 2004 amendments to the UTC, an option for court action for a modification or termination under UTC § 411(a) has been included in the UTC. That provision has been included in OTC § 5804.11(A).

B. Authority of agent of settlor. The UTC provides that the settlor’s power to consent to a § 411(a) termination or modification may be exercised by an agent under a power of attorney if either the power of attorney or the terms of the trust authorize the agent to do so. OTC § 5804.11(A) prohibits the agent from doing so unless both the terms of the trust and the power of attorney authorize it.

C. Special needs trusts. Federal supplemental security income (SSI) requirements prohibit beneficiaries of self-settled special needs trusts (SNTs) from having the ability to terminate the trust. To address the possibility that the Social Security Administration might use § 5804.11(A) as a basis to deny SSI benefits to SNT beneficiaries, a sentence has been added to § 5804.11(A) that is not included in the UTC making it inapplicable to self-settled SNTs.

D. Modification or termination by beneficiaries. Under UTC § 411(b), a noncharitable irrevocable trust may be modified (or terminated) with the consent of all beneficiaries if the court concludes that modification (or termination) is not inconsistent with a

material purpose of the trust. OTC § 5804.11(B) changes the UTC statute in two respects. First, it is clear from the comment to UTC § 411, but not from the statute itself, that this power to modify may not be used to remove and replace the trustee; rather, the grounds for removing the trustee are set forth in UTC § 706. A provision has been added to OTC § 5804.11(B) explicitly stating that the power to modify under that section may not be exercised to remove and replace the trustee. Second, UTC § 411(c) provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. The Joint Committee modified that provision in the OTC to state that a spendthrift provision may, but shall not be presumed to, constitute a material purpose of the trust, and moved it into § 5804.11(B).

20. If administration of a trust, or if a charitable purpose of a trust, becomes wasteful (§§ 5804.12(B) and 5804.13(A)).

UTC § 412(b) provides that if the continuation of a trust on its existing terms would be impracticable or wasteful or impair the trust's administration, the court may modify its existing terms. Similarly, UTC § 413(a) provides that if a particular charitable purpose of a trust becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply cy pres to modify or terminate the trust. The corresponding provisions of the OTC have been changed to eliminate "wasteful" as a grounds for such a modification or termination.

21. Charitable trusts (§§ 5804.05(C) and 5804.13).

The OTC will change Ohio law governing charitable trusts in at least two respects. First, under OTC § 5804.05(C), the settlor of a charitable trust has standing to enforce the trust. By contrast, under *Three Bills, Inc., v. Parma*, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996), the settlor does not have standing to do so.

Second, under existing Ohio law if the charitable purpose of a trust fails (and the instrument does not address that contingency), cy pres may be applied to reform the trust to accomplish the settlor's charitable intent only if the court determines that the settlor had a general charitable intent in addition to the specific charitable intent that failed. If not, the trust assets revert to the settlor, if living, or the settlor's successors. *See Craft v. Schroyer*, 74 N.E.2d 589 (Ohio App. 1947). Under OTC § 5804.13(A), a general charitable intent is presumed, as the court cannot order a reversion or gift over unless the instrument expressly provides for one.

In many jurisdictions, the UTC would change existing law in that it provides that cy pres may be applied not just if the charitable purpose becomes impossible or unlawful, but also if it becomes impracticable. In Ohio, that expansion of the court's cy pres power may not effect a change in the law. According to the UTC Reporter, Professor David English, "Ohio applies cy pres only if the original charitable means have failed. However, there are numerous Ohio cases where inefficient charitable dispositions have been modified on account of unanticipated circumstances. Given this, there may be little or no difference between the U.T.C. and current Ohio law in practical effect." David M. English, *The Uniform Trust Code (2000) and its Application to Ohio*, 30 Capital University Law Review 1 (2002).

Because of administrative difficulties and concerns with respect to the clogging of title, UTC § 413(b) provides that if a trust's charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful and the instrument provides for a gift over to a

noncharitable beneficiary, the gift over will be valid only if the distribution is to be made to the settlor, while living, or to someone else within 21 years of the trust's creation. OTC § 5804.13 omits both of those limitations.

Finally, a provision has been added to OTC § 5804.13(A)(3) noting that, in accordance with RC § 109.25, the attorney general is a necessary party to cy pres judicial proceedings.

For further discussion of the OTC's charitable trust provisions, see Susan S. Locke, *The Ohio Trust Code and Charitable Interests*, 16 Probate Law Journal of Ohio 72 (January/February 2006).

22. Termination of uneconomic inter vivos trusts (§ 5804.14).

HB 416, which repeals RC § 1339.66, addresses the termination of uneconomic inter vivos trusts in OTC § 5804.14.

A. Differences between RC § 1339.66 and OTC § 5804.14. There are many:

(1) Court involvement. RC § 1339.66 allows the court to terminate a trust of less than \$100,000 of assets; OTC § 5804.14(A) allows the trustee to do so without court involvement. (At the recommendation of the Ohio Attorney General's Office, while HB 416 was being considered by the House Civil and Commercial Law Committee, § 5804.14 was amended to include new division (A)(2). Under it, the trustee may not terminate an uneconomic charitable trust without court involvement, unless the charitable interest is remote.)

(2) Modification or removal and replacement of trustee. For trusts with less than \$100,000 of assets, OTC § 5804.14(B) authorizes the court to modify the trust, or remove and replace the trustee, as well as terminate the trust. RC § 1339.66 has no similar provision.

(3) Standard. The standard for terminating, modifying, or removing and replacing the trustee of a trust under OTC § 5804.14 is similar to, but somewhat different from, the standard for terminating an uneconomic trust under RC § 1339.66. Under OTC § 5804.14, the trustee (for a termination by the trustee) or court (for a termination, modification, or removal of the trustee by the court) must only conclude "that the value of the trust property is insufficient to justify the cost of administration." By contrast, RC § 1339.66 requires a determination that: (a) it is no longer economically feasible to continue the trust, (b) the termination of the trust is for the benefit of the beneficiaries, and (c) the termination of the trust is equitable and practical.

(4) Notice. RC § 1339.66 requires notice to "all beneficiaries who are known and in being and who have vested or contingent interests in the trust." OTC § 5804.14(A) provides that for a termination by the trustee, notice must be given only to qualified beneficiaries (which, generally, do not include remote remainder beneficiaries).

(5) Distribution of assets of terminated trust. As recently amended, RC § 1339.66 provides guidance for the distribution, by order of the probate court, of the assets of a trust terminated under its provisions. The new language from the amendment has not been inserted directly into OTC § 5804.14(C) because, as discussed above, the OTC allows the trustee to terminate an uneconomic trust with assets of less than \$100,000 without court involvement. Therefore, the amendment language has been changed to allow the trustee, rather than the probate court, to determine how the assets of such a trust should be distributed. For trusts that are terminated by the court under § 5804.14(B), rather than the trustee, the amendment language on how to distribute the trust assets has been included in § 5804.14(D).

(6) Representation. The new amendment to RC § 1339.66 also includes a provision allowing virtual representation of minors, incapacitated or unborn persons, or persons whose identity or location is unknown or not reasonably ascertainable. That provision has been omitted from OTC § 5804.14 because virtual representation already is available under Chapter 5803 of the OTC.

(7) Easements for conservation or preservation. OTC § 5804.14(F) excludes easements for conservation or preservation from the trusts that may be terminated for being uneconomic. RC § 1339.66 does not address such easements. The UTC comment to § 414 explains the rationale for the corresponding provision of the UTC, as follows:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value....

B. Differences between OTC § 5804.14 and UTC § 414. Five changes have been made in OTC § 5804.14 to the UTC’s provisions for the modification or termination of an uneconomic trust. First, OTC § 5804.14 is expressly made applicable only to inter vivos trusts. The termination of uneconomic testamentary trusts will continue to be governed by RC § 2109.62. Second, in accordance with the dollar amounts of RC §§ 1339.66 and 2109.62, UTC § 414’s \$50,000 suggested cap for the termination of an uneconomic trust by the trustee has been changed to \$100,000 in OTC § 5804.14(A). Third, UTC § 414(b) allows the court to modify or terminate a trust, or remove and replace the trustee, if it determines the value of the trust property is insufficient to justify the cost of administration. This power of the court is not limited to trusts with assets of less than a stated amount. OTC § 5804.14(B) limits these powers of the court to trusts with assets of less than \$100,000. Fourth, because of the recent amendments to RC §§ 1339.66 and 2109.62, the provision in UTC § 414(c) that the trustee shall distribute the assets of a terminated uneconomic trust “in a manner consistent with the purposes of the trust” has been omitted and, generally, replaced by the new amendment’s provisions on that subject. Fifth, the provision of RC § 1339.66 that the existence of a spendthrift provision in a trust instrument does not preclude termination of an uneconomic trust has been included in OTC § 5804.14 as division (E).

23. Consolidation or division of trusts (§ 5804.17).

The OTC provides for the repeal of RC § 1339.67, and uses the UTC provision (§417) to address the consolidation or division of trusts in OTC § 5804.17. The principal differences between the two statutes are:

A. While both statutes allow the trustee, without involvement of the court, to consolidate or divide trusts, under OTC § 5804.17, notice must be given to qualified beneficiaries. By contrast, under RC § 1339.67, notice need not be given to beneficiaries unless court approval is sought.

B. With respect to the standard for consolidation or division, OTC § 5804.17 allows consolidation or division “if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.” Under RC § 1339.67, consolidation or division is allowed if: (i) it is in the best interests of the beneficiaries, (ii) it is equitable and practicable, and (iii) it will not defeat or substantially impair the accomplishment of the purpose of the trust or trusts or the interests of the beneficiaries under the trust or trusts.”

C. RC § 1339.67 includes a provision stating that trusts also may be consolidated or divided in accordance with the terms of “the governing instrument, under any other section of the Revised Code, at common law, or in equity.” There is no similar provision in OTC § 5804.17.

24. Other OTC provisions on modification and termination of trusts (Chapter 5804).

The OTC’s provisions on dividing or consolidating trusts, on terminating an uneconomic trust, on the modification and termination of an irrevocable noncharitable trust by consent, and on the termination of a trust when none of its purposes remain to be achieved or if its purposes have become unlawful, contrary to public policy, or impossible to achieve, are discussed above. The OTC includes a number of additional provisions with respect to the modification or termination of a trust. In § 5804.18, for example, the OTC provides that supplemental needs trusts described in 42 U.S.C. § 1396p(d)(4) are irrevocable (as long as the settlor is not authorized to revoke them), regardless of whether the settlor’s estate or heirs are named the trust’s remainder beneficiaries. This provision, which is intended to preclude arguments by the Social Security Administration that such trusts are revocable and thus disqualify their beneficiaries from receiving Supplemental Security Income, is discussed in Richard E. Davis, *Treatment of Supplemental Needs Trusts Under the OUTC*, 16 *Probate Law Journal of Ohio* 1 (September/October 2005) and Richard E. Davis and Stanley C. Kent, *The Impact of the Uniform Trust Code on Special Needs Trusts*, 1 *National Academy of Elder Law Attorneys Journal* 235 (2005).

For a more detailed discussion of the OTC’s various provisions on the modification and termination of irrevocable trusts, see Alan Newman and Jamie R. Minor, *The Modification and Termination of Irrevocable Trusts under the Ohio Uniform Trust Code*, 16 *Probate Law Journal of Ohio* 2 (September/October 2005). The article’s conclusion summarizes the OTC’s modification and termination provisions as follows:

The [OTC’s] modification and termination provisions will provide settlors, beneficiaries, and trustees with increased flexibility for dealing with problematic irrevocable trusts. Trust terms, even if unambiguous, may be reformed to correct mistakes, or modified to achieve the settlor’s tax objectives. To further the settlor’s trust purposes, dispositive as well as administrative provisions may be modified under the unanticipated circumstances doctrine. Further, the standard for application of the unanticipated circumstances doctrine has been reformulated to allow modifications to further the purposes of the trust without a showing that compliance with the terms of the trust will defeat or

substantially impair the accomplishment of its purposes. The cy pres doctrine will be available to save charitable trusts without a finding that the settlor had a general charitable intent or resort to the deviation doctrine. The court will be able to modify the terms of an uneconomic trust of less than \$100,000 of assets, or change its trustee, when terminating the trust is not appropriate. A termination or modification by consent of the settlor and beneficiaries, or by the beneficiaries if the material purpose requirement is satisfied, may be accomplished through use of the Code's representation provisions if a trust has minor, unborn, incapacitated, or unable to be located beneficiaries. Further, beneficiaries whose interests will be protected in connection with such a modification or termination may not prevent other beneficiaries from accomplishing it. In short, the [OTC's] modification and termination provisions may prove to be among its most useful.

25. Rights of creditors of beneficiaries (Chapter 5805).

Many changes have been made in Chapter 5805, dealing with the rights of creditors of trust beneficiaries, from the corresponding article of the UTC. As discussed in Richard E. Davis and Alan Newman, *Codify – Not Modify: Creditor Remedies and the Ohio Uniform Trust Code*, 15 Probate Law Journal of Ohio 17 (November/December 2004), in many cases the changes have been made to conform the OTC to existing Ohio law. (For additional discussions of issues affected by Chapter 5805, see (i) Stanley C. Kent and Richard E. Davis, *The Uniform Trust Code and Supplemental Needs Trusts*, 15 Probate Law Journal of Ohio 53 (January/February 2005); Daniel J. Hoffheimer and Natasha M. Cavanaugh, *The Uniform Trust Code and Asset Protection: The Discretionary/Support Distinction and Spendthrift Provisions*, 15 Probate Law Journal of Ohio 17 (November/December 2004); and Richard E. Davis, *Treatment of Supplemental Needs Trusts Under the OUTC*, 16 Probate Law Journal of Ohio 1 (September/October 2005).)

A. Spendthrift trusts. Generally, spendthrift provisions that restrain both voluntary and involuntary transfers of a beneficiary's interest are enforceable under existing Ohio law, the OTC, and the UTC. (In a departure from the UTC, which does not address the issue, § 5805.01(A) provides that spendthrift protection is available if the beneficiary may voluntarily transfer the beneficiary's interest, but only with the consent of a trustee who is not the beneficiary.) Thus, most creditors of a beneficiary of a spendthrift trust may not reach assets of the trust unless and until they are received by the beneficiary in a distribution from the trustee. (In another departure from the UTC, which does not address the issue, § 5805.01(C) provides that real property, or tangible personal property, that is owned by the trust, but properly made available for a beneficiary's use or occupancy under the terms of the trust, is not considered to have been distributed to the beneficiary for creditors' rights purposes.)

(1) Spendthrift exceptions. Consistent with existing Ohio law (see, e.g., *Albertson v. Ryder*, 621 N.E.2d 480 (Ohio App. 1993)), OTC § 5805.02 (like UTC § 503) excepts support claims of a current spouse or child from the spendthrift bar. (Section 5805.02(B)(1), after an amendment in the Senate that resulted from discussions between members of the Joint Committee and the OSBA's Family Law section limits the exception, however, by making such support claims spendthrift exceptions "only if distributions can be made for the beneficiary's support or the beneficiary is entitled to receive mandatory distributions under the terms of the trust.") As is the case under the UTC, an additional spendthrift exception under the OTC is for claims of the State or the United States, to the extent the Revised Code or federal law so provides.

Two additional spendthrift exceptions under the UTC have been omitted from OTC § 5805.02: an alimony claim of a former spouse and the claim of a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust. Not including alimony claims as a spendthrift exception is consistent with Ohio law. (See *Martin v. Martin*, 374 N.E.2d 1384, 1390 (Ohio 1978), which involved a discretionary support trust, but which relied on a Minnesota case that explicitly rejected an alimony exception to spendthrift protection for a beneficiary's mandatory income interest.) Probably the most common creditor of a beneficiary who will have provided services for the protection of the beneficiary's interest in the trust will be an attorney. While the claim of such an attorney has been deleted from the list of spendthrift exceptions in OTC § 5805.02, the OTC has been modified from the UTC to make it clear that the discretion of the court to order the payment of attorney's fees in proceedings involving the administration of a trust applies to spendthrift trusts. OTC § 5810.04. (For a recent Ohio court of appeals case discussing a probate court's order that apparently permitted a set-off against the interest of a beneficiary who, while executor of the settlor's estate, had improperly disposed of trust assets, see *Great American Insurance Co. v. Thompson Trust*, 2006-Ohio-304. No such set-off would be permitted under the OTC. See section 1.A., above. For further discussion, see Alan Newman, *Powers of Withdrawal, Claims for Set-Off, and Spendthrift Protection*, 16 Probate Law Journal of Ohio 143 (May/June 2006)).

Although UTC § 502(c) provides that creditors of a beneficiary of a spendthrift trust may not reach the beneficiary's interest or a distribution by the trustee before its receipt by the beneficiary except as set forth in article 5 of the UTC, it does not explicitly state that its list of spendthrift exceptions is exclusive. New division (E) to OTC § 5805.02 includes such a statement.

Like UTC § 503, as amended in 2005, the OTC provides that a spendthrift trust exception creditor may attach present or future distributions to or for the benefit of the beneficiary. Also like the UTC, OTC § 5805.02(D) provides that an exception creditor's award against a beneficiary's interest in a spendthrift trust may be limited by the court "to such relief as is appropriate under the circumstances." OTC § 5805.02(D), however, goes on to provide that in deciding whether to so limit a creditor's award, the court may consider, "among any other factors determined appropriate by the court the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support."

(2) Mandatory distributions from spendthrift trusts. Generally, the effect of a spendthrift provision is to preclude a beneficiary's creditor from reaching trust assets prior to their receipt by the beneficiary. To address the possibility of a trustee not making mandatory distributions to a beneficiary that his or her creditor could then reach, OTC § 5805.05(B), like UTC § 506, allows the creditor to reach a "mandatory distribution" if the trustee has not made it "within a reasonable time after the designated distribution date." Under § 5801.01(M), " 'mandatory distribution' means a distribution of income or principal, including a distribution upon termination of the trust, that the trustee is required to make to a beneficiary under the terms of the trust. Mandatory distributions do not include distributions that a trustee is directed or authorized to make pursuant to a support or other standard, regardless of whether the terms of the trust provide that the trustee 'may' or 'shall' make the distributions pursuant to a support or other standard." (This definition differs, although not substantively, from the definition of "mandatory distribution" added to the UTC in § 506(a) in a 2005 amendment.)

In *Domo v. McCarthy*, 612 N.E.2d 706 (Ohio 1993), the trust instrument provided for a terminating distribution to the beneficiary when he reached age 35. The trust also included a spendthrift clause which provided that title to principal was not to vest in any beneficiary until actual payment to the beneficiary, and that no beneficiary could alienate his interest prior to the actual receipt of property from the trust. The trial court held that when the beneficiary reached age 35, the trustee was required to satisfy the creditor's judgment from the trust property distributable to the beneficiary. On appeal, the trial court's judgment was reversed. According to the Supreme Court, the trust's spendthrift provision prevented the creditor from reaching the beneficiary's interest until the principal was actually transferred to the beneficiary. Because the beneficiary had not yet reached age 35, however, the issue of the trustee unreasonably delaying the distribution was not presented or addressed.

B. *In the absence of spendthrift protection.*

(1) UTC rules. If a trust does not include a spendthrift provision, UTC § 501 provides that the court may authorize the creditor to reach the beneficiary's interest by attachment of present or future distributions or by other means. UTC § 501 applies to both mandatory distributions and discretionary distributions (whether or not standards such as support are provided for such discretionary distributions). Thus, for example, in the absence of spendthrift protection, the court may allow a beneficiary's creditor to collect from the trust both distributions the trustee is required to make to the beneficiary, and distributions the trustee chooses to make in the exercise of its discretion. In exercising its authority, however, the court is authorized by UTC § 501 to "limit the [creditor's] award to such relief as is appropriate under the circumstances."

UTC § 504 addresses discretionary trusts. Regardless of whether a discretionary trust includes a spendthrift clause, and regardless of whether it includes one or more standards (for example, support, health, or education) for distributions, the general rule of UTC § 504(b) is that creditors of the beneficiary may not compel the trustee to exercise its discretion to make a distribution the creditor can reach. (That is the case even if the trustee has abused its discretion or failed to comply with a standard in not making a distribution.) Again, however, under UTC § 501, if the trustee exercises its discretion to make a distribution (and spendthrift protection is not available), the court may order the trustee to make all or part of the discretionary distribution to the creditor.

Many changes have been made to these UTC provisions in the OTC. Under the OTC, in the absence of spendthrift protection, different rules are provided for wholly discretionary trusts, mandatory distribution trusts, and discretionary trusts that are not wholly discretionary trusts.

(2) Wholly discretionary trusts. Under Ohio law, a creditor of a beneficiary of a purely discretionary trust may not reach the trust. *Domo v. McCarthy*, 612 N.E.2d 706, 710 (Ohio 1993); *Scott v. Bank One*, 577 N.E.2d 1077, 1081 (Ohio 1991). (In *Matthews v. Matthews*, 450 N.E.2d 278 (Ohio App. 1981), the court allowed a child support claim against the interest of a beneficiary of a discretionary support trust. In explicitly noting that the trust was not a purely discretionary trust, the court arguably indicated that had it been a purely discretionary trust, even a child support claimant would not have been able to reach the beneficiary's interest in the trust.)

OTC § 5805.03 provides that no creditor of a beneficiary of a “wholly discretionary trust” (the definition of which is attached as Appendix A) “may reach the beneficiary’s interest in the trust, or a distribution by the trustee before its receipt by the beneficiary, whether by attachment of present or future distributions to or for the benefit of the beneficiary, by judicial sale, by obtaining an order compelling the trustee to make distributions from the trust, or by any other means, regardless of whether the trust instrument includes a spendthrift provision.” Thus, under the OTC, no creditor, regardless of the nature of its claim or whether the instrument includes a spendthrift clause, may reach the interest of a beneficiary of a wholly discretionary trust. (Federal law, however, preempts state law. Under federal law, a claim by the United States for unpaid income taxes reaches distributions the trustee of a discretionary trust chooses to make to or for the benefit of a beneficiary/delinquent taxpayer. *United States v. Cohn*, 855 F. Supp. 572 (D. Conn. 1994).)

(3) Mandatory distribution trusts. At the other end of the spectrum from wholly discretionary trusts are trusts in which the trustee is directed to make mandatory distributions to the beneficiary. As described above, “mandatory distributions” are those the trustee is required to make, and do not include distributions subject to the exercise of the trustee’s discretion (without regard to whether standards for distributions are included in the instrument or whether the instrument provides that the trustee “may” or “shall” make such distributions). Thus, for example, if the beneficiary is entitled to receive periodic distributions of the trust income or a unitrust amount, or the beneficiary is entitled to receive part or all of the principal upon reaching a specified age, those amounts so distributable to the beneficiary would be mandatory distributions.

Under OTC § 5805.05(A): “To the extent that a trust which gives a beneficiary the right to receive one or more mandatory distributions does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary’s interest by other means.” However, the court also is authorized to “limit an award under this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the support needs of the beneficiary, the beneficiary’s spouse, and the beneficiary’s dependent children, or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary’s basic support.”

Because the beneficiary’s interest may be remote or contingent (for example, the trust principal is to be distributed to a child upon the parent’s death, unless the child predeceases the parent, in which case the distribution is to be made to the child’s children), § 5805.05(A), consistent with Restatement (Second) of Trusts, § 162, provides: “If in exercising its power under this section the court decides to order either a sale of a beneficiary’s interest or that a lien be placed on the interest, in deciding between the two types of action, the court shall consider among any other factors it considers relevant the amount of the claim of the creditor or assignee and the proceeds a sale would produce relative to the potential value of the interest to the beneficiary.”

(4) Discretionary trusts that are not wholly discretionary trusts. In *Bureau of Support v. Kreitzer*, 243 N.E.2d 83 (Ohio 1968), a parent created a trust for a child and gave the cotrustees the sole and absolute discretion to make distributions the trustee determined were necessary for the beneficiary’s care, comfort, maintenance, and general well-being. The beneficiary was an institutionalized mentally incompetent patient whose support was being

paid for by the state, which sued to compel the cotrustees to reimburse it for the cost of the beneficiary's care. In holding for the state, the Supreme Court determined that the destitute beneficiary could have compelled the cotrustees to provide for her support and that the state was subrogated to her right to do so. Several subsequent court of appeals cases have followed *Kreitzer*.

Ten years later, in *Martin v. Martin*, 374 N.E.2d 1384 (Ohio 1978), the Supreme Court decided a case in which a former spouse attempted to reach a beneficiary's interest in a discretionary support trust. The terms of the trust gave the trustees the sole and absolute discretion to distribute income and principal for the beneficiary's "comfort, care, support and education." In the event of an attempted alienation or attachment of the beneficiary's interest, the trustees were given the absolute and uncontrolled discretion to distribute income and principal for the "education, care, comfort, or support" of the beneficiary, the beneficiary's spouse, and the beneficiary's issue. In rejecting the trustees' argument that the discretionary nature of the trust precluded the beneficiary's creditors from reaching the trust property, the Supreme Court stated:

Application of the rationale of the *Kreitzer* case here leads to the conclusion that the trustees can be required, after attempted alienation or attachment, to distribute income or principal for purposes of 'education, care, comfort or support of such beneficiary or such beneficiary's spouse and/or issue,' and that debts incurred for the enumerated purposes are obligations which the trustees are required to discharge.

Because the former spouse's alimony claim was not a part of the support the trustees could be required to furnish the beneficiary, the Supreme Court denied her claim to reach the beneficiary's interest in the trust prior to its termination. (Because the beneficiary was entitled to receive the trust principal and accumulated income upon termination of the trust, the Court, however, affirmed the lower court's placing a lien on the beneficiary's interest in the trust.)

Subsequent to *Martin*, several court of appeals decisions have cited *Kreitzer*, *Martin*, or both for the proposition that creditors other than the state can assert *Kreitzer* type claims against discretionary trust interests of beneficiaries when their claims are for items covered by standards in the terms of the trust for distributions to or for the beneficiary. See, e.g., *Schierer v. Ostafin*, 1999 WL 493940 (Ohio App.); *Samson v. Bertok*, 1986 WL 14819 (Ohio App.); and *Buoscio v. Estate of Buoscio*, 2001 WL 1123960 (Ohio App.). None of these cases involved claims by creditors that were for items the trustee could have provided under standards in the terms of the trusts, and the *Kreitzer* rationale therefore was not applicable. See also *Bank One, Dayton, NA v. Ohio Dept. of Mental Retardation and Developmental Disabilities*, 1990 WL 27520 (Ohio App.).

In *Winter Haven Hospital, Inc. v. BancOhio National Bank*, 1993 WL 524898 (Ohio App.), a private hospital relied on *Kreitzer* in asserting a \$58,900 claim against the interest of a beneficiary of a \$97,000 discretionary support trust. In rejecting the creditor's claim, the court of appeals stated that the trustee "reasonably could conclude that payment of the debt would so deplete trust assets as to jeopardize [the beneficiary's] daily maintenance, the very purpose for which the trust was established." By contrast, in *Matthews v. Matthews*, 450 N.E.2d 278 (Ohio App. 1982), the court relied on *Kreitzer* and *Martin* in allowing a child support claimant to reach assets in a discretionary support trust for the debtor/beneficiary.

UTC § 504(b) provides, generally, that creditors of beneficiaries may not compel distributions from discretionary trusts, including those for the support, health, or education of the beneficiary, regardless of whether the trustee has abused its discretion or failed to comply

with a standard of distribution. While OTC § 5805.04(B) includes that general rule, an exception for *Kreitzer* type claims of the state, but not for claims of other creditors that are within the standards of the trust, is included in division (C). Consistent with *Society Bank National Association v. Cayuga County Department of Social Services*, 1993 WL 65747 (Ohio App.), the *Kreitzer* exception of 5805.04(C) applies only if the terms of the trust do not include a spendthrift provision.

The OTC also addresses two other issues with respect to discretionary trusts that are not wholly discretionary trusts. First, under § 5805.04(D), a child or current spouse of the beneficiary who has a judgment or court order for support may compel distributions the child or current spouse can reach, but only if the trustee has abused its discretion or failed to comply with a standard of distribution in not making the distribution, and only if distributions can be made for the beneficiary's support under the terms of the trust. (The corresponding provision of the UTC (§ 504(c)) also allows former spouses with alimony claims to compel discretionary distributions and does not limit the provision to trusts from which support distributions could be made for the beneficiary.) However, consistent with the opinion in *Matthews*, if the settlor has explicitly provided in the trust instrument that the beneficiary's spouse or children are excluded from benefiting from the trust, the spouse or child may not compel distributions they can reach. Second, OTC § 5805.04(E) includes a provision that is not included in the UTC that prohibits the judicial sale of a discretionary interest, regardless of whether it is subject to a spendthrift provision.

C. *When the beneficiary is the trustee or a cotrustee.* As originally drafted, the UTC arguably would have allowed a creditor of a beneficiary of a third-party created trust to reach the maximum amount the beneficiary/trustee could distribute for his or her own benefit. The OTC rejects that result if the beneficiary/trustee's power to make distributions for his or her own benefit is limited by an ascertainable standard relating to health, education, maintenance, or support. Under 2004 amendments to the UTC, that also is now the rule under the UTC. (HB 416, as originally introduced, addressed this subject in § 5805.04(F), with the language of the 2004 UTC amendment, and in § 5805.06(B)(3), with different language. While HB 416 was being considered by the House Civil and Commercial Law Committee, it was amended to delete § 5805.06(B)(3).)

D. *Creditor's claim against the settlor.* The OTC, like the UTC, rejects self-settled spendthrift trusts and generally allows a creditor of the settlor to reach the settlor's beneficial interest in the trust. In a departure from the UTC, § 5805.06(A)(3) provides a limited exception for certain supplemental needs trusts:

With respect to a trust described in 42 U. S. C. section 1396p(d)(4)(A) or (C), the court may limit the award of a settlor's creditor under division (A)(1) or (2) of this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the supplemental needs of the beneficiary.

Also like the UTC, OTC § 5805.06(B)(1) treats the holder of a power of withdrawal from a trust as the settlor of the trust for creditors' rights purposes, but only to the extent of the property subject to the power of withdrawal and only during the period it may be exercised. The UTC provides an exception for powers of withdrawal that lapse (for example, Crummey powers): the holder of such a power will continue to be treated as the settlor of a revocable trust only to the extent the property subject to the power exceeds the greater of the annual exclusion amount under IRC § 2503(b) (determined without regard to gift splitting) or the five

or five amount under IRC §§ 2041(b)(2) or 2514(e). To accommodate gift splitting, the OTC substitutes twice the annual exclusion amount if the donor was married at the time of the transfer to the trust. (For a recent Ohio case granting a creditor of a trust beneficiary the right to reach amounts the beneficiary could withdraw from the trust, see *Great American Insurance Co. v. Thompson Trust*, 2006-Ohio-304, which is discussed in Alan Newman, *Powers of Withdrawal, Claims for Set-Off, and Spendthrift Protection*, 16 Probate Law Journal of Ohio 143 (May/June 2006).)

26. Revocable trusts (Chapter 5806).

Numerous changes have been made to the UTC provisions on revocable trusts in the OTC. In at least two respects, the OTC will change Ohio law on revocable trusts.

A. *Presumption of revocability of trust.* Consistent with the UTC, under OTC § 5806.02(A), the settlor may revoke or amend a trust unless the instrument expressly provides that the trust is irrevocable. Existing law in Ohio, as in most states, is just the opposite: unless the settlor has retained the power to revoke or amend a trust, he or she may not do so. *Lourdes College of Sylvania, Ohio v. Bishop*, 703 N.E.2d 362 (Ohio Com. Pl. 1997). (This change will not apply retroactively, but will instead apply only to trusts created after the effective date of the OTC.)

B. *Manner of revoking or amending a revocable trust.* Under UTC § 602(c)(2)(A), if a revocable trust does not specify the means of revoking or amending the trust, or if the means specified are not expressly made exclusive, the settlor may revoke or amend the trust (i) by a later will or codicil that either expressly refers to the trust, or that specifically devises property that otherwise would have passed under the trust, or (ii) by any other method manifesting clear and convincing evidence of the settlor's intent. The OTC makes two changes to this provision. First, it rejects the use of a will or codicil as a general means of revoking or amending a revocable trust by expressly providing, in § 5806.02(C)(2), that a will or codicil cannot amend or revoke a revocable trust unless the terms of the trust allow such an amendment or revocation. This change to the UTC also will constitute a change in existing Ohio law. See *Estate of Davis*, 109 Ohio App.3d 181 (1996). Second, under OTC § 5806.02(C), if the settlor specifies a manner of revocation or amendment, it will be treated as the exclusive means of revoking or amending the trust even if the instrument does not expressly state that it is the exclusive means of doing so.

C. *Authority of agent of settlor of revocable trust (§ 5806.02(E)).* The UTC allows an agent of the settlor under a power of attorney to exercise the settlor's powers to revoke or amend the trust, or effect distributions of trust property, if the agent is so authorized by either the power of attorney or the terms of the trust. OTC § 5806.02(E) prohibits the agent from doing so unless both the trust terms and the power of attorney authorize it.

D. *Duties of trustee of revocable trust if the settlor is incapacitated (§§ 5806.03(A) and 5808.13(E)).* Under UTC § 603(a), while the settlor is competent, the trustee of a revocable trust owes duties only to the settlor, but upon the settlor's incapacity, the trustee also owes duties to the other beneficiaries of the trust (for example, remainder beneficiaries). OTC § 5806.03(A) provides that during the lifetime of the settlor of a revocable trust, the trustee's duties are owed only to the settlor, regardless of whether the settlor is competent.

Under the initial draft of HB 416, § 5801.01(R) defined “revocable,” in the context of a trust, as one that is “revocable by the settlor at the time of determination without the consent of the trustee or a person holding an adverse interest.” At the recommendation of the Joint Committee, the definition of “revocable” was amended while HB 416 was being considered by the House Civil and Commercial Law Committee in two ways. First, an additional sentence was added stating: “A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, is serving.” Thus, during the lifetime of the settlor of a revocable trust, the trustee will have no obligation to provide notices and information about the trust to other trust beneficiaries, regardless of whether the settlor is competent. See Alan Newman, *Revocable Trusts and Notice Provisions of the Ohio Uniform Trust Code*, 16 Probate Law Journal of Ohio 41 (November/December 2005). Second, the definition was amended to provide that a trust that may be revoked by the settlor with the consent of a person who does not hold an adverse interest will be treated as a revocable trust. Thus, for example, if a settlor creates a trust that the settlor may revoke with the consent of the trustee, the trust will be treated as a revocable trust if the trustee does not hold an adverse interest in the trust.

To address the possibility of a trustee of a revocable trust breaching its duty, and a recovery from the trustee being obtained after the settlor’s death or incapacity, § 5806.03(A) also provides for the apportionment of the recovery between the trust and the settlor, if the settlor is living, or between the trust and the settlor’s estate, if the settlor is deceased. (As originally introduced, HB 416 did not address how such an apportionment would be made. At the Joint Committee’s recommendation, while HB 416 was being considered by the House Civil and Commercial Law Committee, § 5806.03(A) was amended to provide that such an apportionment would be made by the court as it determines to be equitable under the circumstances.)

E. Contesting a revocable trust (§ 5806.04). In OTC § 5806.04, the provisions in UTC § 604 for contesting a revocable trust have been replaced, in their entirety, by the provisions of RC § 2305.121. The most significant difference between the two is that the limitation period for a contest under RC § 2305.121 is two years from the settlor’s death. By contrast, UTC § 604 bars contests on the earlier of (i) three years from the settlor’s death or (ii) 120 days after the trustee sent notice to the potential contestant.

F. Validity of revocable trusts and rights of creditors of the settlor of a revocable trust during the settlor’s lifetime. Generally, RC § 1335.01(A) provides that revocable trusts are valid, and that creditors of the settlor of such a trust may reach the settlor’s interest in it (or compel the settlor to exercise the power of revocation). HB 416 provides for the repeal of RC § 1335.01(A), as it is clear under the OTC that revocable trusts are valid, and creditors of the settlor of a revocable trust are authorized to reach the trust assets during the settlor’s lifetime by OTC § 5805.06(A)(1).

G. Rights of creditors of the settlor of a revocable trust after the settlor’s death. Under *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328 (1939), a creditor of a settlor of a revocable trust may not reach the trust’s assets after the settlor’s death. Consistent with the law of most states that have addressed the issue, under UTC § 505(a)(3), if the settlor’s probate

estate is inadequate, creditors of the settlor may reach the trust's assets (as may persons with claims for costs of administration of the settlor's estate, funeral expenses, and the support allowance for a surviving spouse and minor children), provided that the settlor may direct the source from which such liabilities will be paid. The OTC omits UTC § 505(a)(3), and thus does not address the *Schofield* issue one way or the other.

H. Creation of revocable trust by declaration. See section 13.

27. Cotrustees may act by majority decision (§ 5807.03(A)).

Under UTC § 703(a), "cotrustees who are unable to reach a unanimous decision may act by majority decision." Because that language arguably implies a duty to attempt to reach a unanimous decision, OTC § 5807.03(A) has been changed to provide that "if there are three or more cotrustees serving, they may act by majority decision."

28. Delegation (§§ 5807.03(E), 5808.07, and 5809.06).

Delegation issues can arise in two contexts: a delegation by one cotrustee to another, and a delegation by a trustee to a third party. With respect to delegations by trustees to third parties, the comment to UTC § 703 explains that "many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform." By contrast, in the context of a delegation among cotrustees, the comment states that the UTC assumes that "the settlor selected cotrustees for a specific reason and . . . this reason ought to control the scope of a permitted delegation to a cotrustee."

As a result, UTC § 703(e) prohibits a trustee from delegating to another trustee "the performance of a function the settlor reasonably expected the trustees to perform jointly." (Professor English's outline and discussion of key provisions of the UTC notes that this "standard is appropriate but may be difficult to apply in practice.") By contrast, UTC § 807(a), consistent with the Restatement (Third) of Trusts and the Uniform Prudent Investor Act, allows a trustee to delegate to a third party agent any "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances."

The OTC uses the UTC § 807(a) standard – allowing delegations of "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances" – in both the cotrustee and third party context. Thus, under the OTC, the standard for a permissible delegation is the same whether to a cotrustee or to a third party. Accordingly, OTC § 5808.07 has been revised to include cotrustees as well as agents in its provisions requiring, for example, that a delegating trustee exercise reasonable care, skill, and caution in selecting the delegatee, establishing the scope of the delegatee's duties, and monitoring the delegatee's actions.

29. Liability of trustee when there are cotrustees (§ 5807.03(F) and (G)).

UTC § 703(g) imposes on each trustee a duty to exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress one. Consistent with RC § 1339.43, a provision has been added to the comparable provision of the

OTC (§ 5807.03(G)) under which a trustee will not have that duty, and will not be liable for resulting losses, when one or more cotrustees have and exercise a power to direct. Similarly, § 5807.03(G) also negates that duty when other trustees act by majority vote. (Note, however, that the OTC provision under which a trustee who does not join in an action of another trustee is not liable for the action, § 5807.03(F), has been changed to refer to §§ 5807.03(C) and (E). The former generally obligates each trustee to participate in the performance of a trustee's function; the latter prohibits delegations except those that a prudent trustee of comparable skills could properly delegate under the circumstances. Under those sections, if other trustees, by majority vote, committed a breach, a cotrustee who did not participate would not be directly liable for the other trustees' action, but presumably could be liable if it impermissibly delegated its duty or neglected to participate in the performance of the trustee's functions.)

30. Vacancy in trusteeship; appointment of successor (§§ 5807.04(C) and (D)).

If a vacancy occurs in the trusteeship of a noncharitable trust, UTC § 704(c) provides for it to be filled first by a successor designated in the instrument, second by unanimous agreement of the qualified beneficiaries, and third by court order. OTC § 5807.04(C) provides that a person appointed by someone who is authorized by the instrument to designate a successor trustee will be second in priority to fill a vacancy in the trusteeship. The same change also has been made to OTC § 5807.04(D), which addresses filling a vacancy in the trusteeship of a charitable trust.

UTC § 704(d) provides that if there is a vacancy in a trusteeship of a charitable trust, one of the means of filling it is for the charitable organizations expressly designated to receive distributions under the terms of the trust to select a successor "if the attorney general concurs." The requirement that the attorney general concur is consistent with UTC § 110(c), which provides for the attorney general to have the rights of a qualified beneficiary with respect to charitable trusts. As discussed in section 7, above, however, UTC § 110(c) has been deleted from the OTC. Consistent with that deletion, the requirement that the attorney general concur with the designation of a successor trustee by the charitable organizations expressly designated to receive distributions under the terms of the trust also has been deleted from the OTC.

31. Removal of trustee (§ 5807.06(B)).

Following UTC § 706(b), OTC § 5807.06(B) provides that the court may remove the trustee if: "(a) the trustee has committed a serious breach of trust; (b) lack of cooperation among cotrustees substantially impairs the administration of the trust; or (c) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries."

UTC § 706(b)(4) also provides for removal of the trustee if "there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available." This UTC ground for removing a trustee, which is inconsistent with existing Ohio law, has been omitted from the OTC. For a discussion, see Joanne E. Hindel, *Trustee Removal*: 4.30 • Ohio Trust Code Manual

From the Common (Law) to the Controversial, 16 Probate Law Journal of Ohio 67 (January/February 2006), which analyzes Ohio case law and concludes that under it “removal of an inter vivos trustee requires a clear and convincing showing that removal is necessary to protect trust assets.” *Id.* at 71.

The removal of trustees of testamentary trusts is addressed by existing Ohio law in RC § 2109.24. Under it, the grounds for removal are “habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the trust demands it, or for any other cause authorized by law.” Under current § 2109.24, it is not clear whether it applies to trustees of inter vivos trusts. To avoid the possibility of a conflict between new § 5807.06 and § 2109.24, HB 416 was amended while being considered by the House Civil and Commercial Law Committee to add an amendment to § 2109.24 to clarify that it does not apply to the removal of trustees of inter vivos trusts.

32. Replacement of trustee in military service (§ 5807.04(C)).

The OTC provides for the repeal of RC § 1339.69. Under it, (i) a trustee in military service may be replaced, (ii) if the instrument provides for a successor, it controls, and (iii) if not, the trustee may designate a successor. OTC § 5807.04(C) addresses filling vacancies in a trusteeship more broadly; under it, if the instrument does not provide for a successor, the replaced trustee may not appoint one. Rather, the qualified beneficiaries, acting unanimously, may designate one, or the court may appoint one.

33. Duty of loyalty (§ 5808.02).

A. Voidable transactions (§ 5808.02(B)(1)). Generally, under UTC § 802(b), transactions involving trust property that a trustee enters into for its own account, or which are otherwise affected by a conflict of interest, are voidable by an affected beneficiary. Among the exceptions to that rule are transactions that were authorized by the terms of the trust. OTC § 5808.02(B)(1) makes that exception also applicable to transactions authorized by another provision of the Revised Code.

B. Transactions between a trustee and a beneficiary that do not concern trust property (UTC § 802(d)). UTC § 802(d) provides that: “A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.” Because of concerns about the application of this provision in the context of such situations as the commercial side of a corporate trustee engaging in home or car loan transactions with a beneficiary, the OTC omits UTC § 802(d).

C. Affiliated funds (§ 5808.02(E)). Because the disclosure and compensation issues arising from trustees investing in affiliated funds are addressed by RC §§ 1111.13 and 1339.44, the provisions of UTC § 802(f) on those subjects have been omitted from OTC § 5808.02(E).

D. Permitted transactions (§ 5808.02(G)). UTC § 802(h) includes a list of transactions between a trustee and a beneficiary that are not precluded by the trustee’s duty of loyalty, “if fair to the beneficiaries.” The provision does not explicitly state whether the listed

transactions are allowed unless the beneficiaries prove they are unfair, or whether the transactions are not allowed unless the trustee proves they are fair. OTC § 5808.02(G) places the burden of proof on beneficiaries: the listed transactions are permitted “unless the beneficiaries establish that they are unfair.”

The fourth of those permitted transactions allows deposits of trust funds in a regulated financial-services institution. OTC § 5808.02(G)(4) modifies the language permitting such deposits so that it applies to deposits in a regulated financial-services institution that is an affiliate of the trustee, rather than such an institution that is operated by the trustee.

Finally, another change made to § 5808.02(G) from the corresponding UTC provision is that it provides that the trustee’s duty of loyalty also does not preclude any transaction authorized by another section of the Revised Code.

34. Costs of administration (§ 5808.05).

The requirement of UTC § 805 that a trustee incur only reasonable costs has been qualified in OTC § 5808.05 by the addition of “except as otherwise permitted by law,” because that language was included in current RC § 1339.57, apparently when Ohio adopted the Uniform Prudent Investor Act.

35. Liability of trustee when another has a power to direct (§ 5808.08).

The OTC does not include the provisions of UTC § 808(b) on the liability of a trustee who follows directions it receives from another who has the authority to direct under the terms of the trust. Rather, OTC § 5808.08(B) cross references the existing Ohio statute on that subject (former RC § 1339.43, which is moved to § 5815.25 with the enactment of HB 416). (The provisions of § 5815.25 are not inserted into OTC § 5808.08(B) because they apply to executors of estates as well as to trustees of trusts.)

A significant difference between UTC § 808(b) and § 5815.25 is that the UTC provision does not protect a trustee who follows directions if the act the trustee is directed to perform “is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.” Section 5815.25, like RC § 1339.43, includes no such limitation on the protection afforded a trustee who follows directions from one with the authority to direct.

36. Collecting trust property (§ 5808.12).

UTC § 812 provides: “A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee.” The Joint Committee decided that the OTC should not use UTC § 812 to address this subject, but should instead address it with the provisions of RC § 1339.42 (which will be moved to § 5815.24 with the enactment of HB 416). Because RC § 1339.42 applies not just to trusts, but also to estates, guardianships, conservatorships, and other fiduciary relationships, however, its provisions are not inserted into the OTC. Rather, § 5808.12 includes a cross reference to § 5815.24.

Both UTC § 812 and RC § 1339.42 generally relieve a successor trustee from the duty of pursuing breach of fiduciary duty claims against a predecessor trustee unless the successor knows (or, in the case of RC § 1339.42, has “actual knowledge”) of the predecessor’s breach. UTC § 812, however, also provides for the general duty of a trustee to take reasonable steps to collect trust property held by any third person. RC § 1339.42 does not provide for such a duty (except, as mentioned, when a successor trustee has actual knowledge of a breach by a prior trustee). As a result, rather than simply cross referencing to the new version of RC § 1339.42 (§ 5815.24), OTC § 5808.12 provides that: “A trustee shall take reasonable steps to collect trust property held by third persons. The responsibility of a successor trustee with respect to the administration of the trust by a prior trustee shall be governed by section 5815.24 of the Revised Code.”

37. Duty of the trustee to inform and report (§ 5808.13).

A. *Duty to inform qualified or current beneficiaries.* The obligations of the trustee to inform the beneficiaries about the trust are set forth in UTC § 813 and OTC § 5808.13.

(1) Trustee’s duties to inform “qualified beneficiaries” under the UTC. Under UTC § 103(12) “qualified beneficiaries” are defined, generally, to include current beneficiaries and certain remainder beneficiaries whose interests are not remote. UTC § 813 provides the trust’s qualified beneficiaries with both general and specific rights to receive information from the trustee:

(a) § 813(a) imposes a general obligation on the trustee to keep the qualified beneficiaries reasonably informed with respect to the administration of the trust;

(b) § 813(b)(2) requires a newly serving trustee to notify the qualified beneficiaries of its acceptance of the trust and its name, address, and telephone number, within 60 days of its acceptance;

(c) § 813(b)(3) provides that within 60 days of a trustee learning of a new irrevocable trust, or of a revocable trust that has become irrevocable, the trustee must inform the qualified beneficiaries of the trust’s existence, the settlor’s identity, their rights to request a copy of the trust instrument, and their rights to receive trustee’s reports;

(d) § 813(b)(4) requires the trustee to notify the qualified beneficiaries, in advance, of any changes in the method or rate of the trustee’s compensation; and

(e) § 813(c) provides that if there is a vacancy in a trusteeship, trust reports must be sent to the qualified beneficiaries by the former trustee, and that a personal representative or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(2) Trustee’s duties to inform “current beneficiaries” under the OTC. OTC § 5801.01(F) generally defines “current beneficiaries” as those who are current distributees or permissible distributees of trust income or principal. Under OTC § 5808.13, the trustee’s duty to inform in each of the five circumstances listed above is owed only to the trust’s current beneficiaries. OTC § 5808.13, however, also includes in new division (E) a provision permitting the trustee to also provide information to other beneficiaries to whom the trustee is not required to report.

B. *Obligations owed to all beneficiaries.* Both the UTC and the OTC require the trustee to (i) promptly respond to any beneficiary's request for information related to the administration of the trust, (ii) furnish any beneficiary who requests it a copy of the trust instrument, and (iii) send current beneficiaries, and any other beneficiaries who request it, at least annually and at termination of the trust, reports of assets, liabilities, receipts and disbursements. With respect to (ii), the OTC includes a provision that is not a part of the UTC: if the settlor of a revocable trust has restated the terms of the trust, in the absence of litigation concerning the trust the trust instrument the trustee is required to furnish a copy of to a beneficiary who requests it is the restated instrument (and all amendments to it).

If there is a vacancy in a trusteeship (and there is not a cotrustee serving), the UTC provides that a report must be sent to qualified beneficiaries by the former trustee, but it does not specify the period the report must cover. Section 5808.13(C) provides that such a report is required from the former trustee for the period during which the former trustee served.

C. *Settlor's right to override the OTC's trustee reporting duties.* See section 5.C., above.

D. *Changes to existing Ohio law.* Existing Ohio law addresses the obligation of a trustee of an inter vivos trust to inform beneficiaries in RC § 1339.69, which is repealed with enactment of HB 416. There are many differences between RC § 1339.69 and OTC § 5808.13. For example, under RC § 1339.69, certain trust beneficiaries are entitled to request, in writing, and receive information about the trust, but no more often than once every six months. Under OTC § 5808.13(A), the trustee is obligated to keep the current beneficiaries informed about the administration of the trust, without first having received a request (written or otherwise) from a current beneficiary for such information. Further, OTC § 5808.13(A) also obligates the trustee to respond to any beneficiary's request for information about the trust without a stated limitation on how often a beneficiary may make such requests. (The trustee's duty to respond under OTC § 5808.13(A), however, is qualified by requiring the trustee to respond "unless unreasonable under the circumstances.") In addition to these general duties, under OTC § 5808.13(B) the trustee also is obligated to meet the specific notice requirements described in sections 37.A. and B., above. Finally, there is no provision in existing Ohio law for information a beneficiary is entitled to receive instead being provided to a beneficiary surrogate. See section 5.C., above.

For further discussion of the OTC's provisions on the trustee's duty to inform and report to beneficiaries, see Michael A. Ogline, *Notice Provisions of the Ohio Uniform Trust Code*, 15 Probate Law Journal of Ohio 119 (May/June 2005).

38. Discretionary powers of trustee (§ 5808.14(A)).

UTC § 814(a) provides: "Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

The OTC makes several changes to the UTC provision. Most notably, the OTC distinguishes between wholly discretionary trusts and other discretionary trusts. For the former, the trustee's exercise of its discretion is not subject to a reasonableness standard. For the latter, it is. Section 5808.14(A) provides:

The judicial standard of review for discretionary trusts is that the trustee shall exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.

39. Tax sensitive discretionary powers of trustee (§§ 5808.14(B), (C), and (D)).

HB 416 provides for the repeal of RC §§ 1340.21 through 1340.23, and addresses tax sensitive discretionary powers of the trustee in OTC §§ 5808.14(B), (C), and (D). The objectives of the statutes are similar, but the provisions for accomplishing those objectives differ in many respects. The following summarizes the principal differences.

A. Basic rule: limitation of beneficiary-trustee's discretionary power. To avoid a deceased trustee-beneficiary from having a general power of appointment over assets in the trust, the basic rule of each statute is that unless the trust instrument expressly provides otherwise, the power of a trustee-beneficiary to make discretionary distributions to him or herself is automatically limited by an ascertainable standard. In that regard, Internal Revenue Code § 2041(b)(1)(A) provides that “a power to consume ... property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.” Consistent with that provision of the Internal Revenue Code, § 5808.14(B)(1) limits the trustee-beneficiary's discretion to an “ascertainable standard,” and § 5801.01(B) defines an “ascertainable standard” as one relating to health, education, maintenance, or support (HEMS). By contrast, RC § 1340.22(B)(1) limits the trustee-beneficiary's discretion to an ascertainable standard, but does not define the standard as one related to HEMS. Subdivision (B)(2) of § 1340.22 defines certain commonly used terms as being related to HEMS, but if, for example, the trustee-beneficiary is simply given the discretionary power to make distributions to himself, without any standard, (B)(1) would only cause the discretion to be limited by an undefined ascertainable standard that arguably would not necessarily be one related to HEMS.

B. Trustee's discretion to distribute to satisfy trustee's legal obligations other than for support. Also to avoid a general power of appointment problem, both statutes provide that a trustee's discretion cannot be exercised so as to satisfy the trustee's legal obligation of support of another person. In that regard, RC § 1340.22(A)(2) is not limited to support (as is OTC § 5808.14(B)(2)), but also applies to the trustee's discretion to make distributions to satisfy the trustee's legal obligations for “other purposes.”

C. Exception for purely discretionary trusts. RC § 1340.22 includes an exception to the basic rules of the section. Division (E)(1) of § 1340.22 provides that the section does not apply to:

Any purely discretionary power to distribute either principal or income to or for the benefit of a beneficiary, other than a beneficiary who is also a fiduciary, that is exercisable in a fiduciary capacity in the sole and absolute discretion of the fiduciary and without any other direction or limitation as to its exercise or use set forth in the governing instrument.

OTC §§ 5808.14(B)–(D) do not include a similar exception.

D. Reciprocal trust limitation. RC §§ 1340.22(A)(3) and (B)(1) apply the ascertainable standard limitation if the fiduciary is a beneficiary of a reciprocal trust over which the beneficiary of the first trust (as fiduciary of the second trust) can make similar discretionary distributions to the fiduciary of the first trust. Thus, if A is the fiduciary of Trust #1 with the discretionary power to make distributions for B, and B is the fiduciary of Trust #2 with the discretionary power to make distributions for A, the ascertainable standard limitation would apply to each of their discretionary powers. There is no similar provision in OTC §§ 5808.14(B) - (D).

E. Limitation if beneficiary can remove and replace the trustee. Under RC § 1340.22(A)(4), if the beneficiary can remove and replace the fiduciary with the beneficiary or with another person who is related or subordinate to the beneficiary, and if the beneficiary has exercised both of those rights, then the successor fiduciary's power to exercise its discretion is subject to the section's ascertainable standard limitation. There is no similar provision in OTC §§ 5808.14(B) - (D).

F. Power of appointment or withdrawal exercisable in a non-fiduciary capacity. Under RC § 1340.22(E)(2), the section's limitation is not applicable to a power of appointment or withdrawal held by a beneficiary that is exercisable in an individual, rather than a fiduciary, capacity. While OTC §§ 5808.14(B) – (D) do not include a similar exception, their provisions are applicable only to the power of a trustee to make discretionary distributions. Thus, the OTC provisions should not apply to non-fiduciary powers of appointment or withdrawal, in which case this difference between the statutes is not consequential.

G. Surviving spouse as trustee of a marital deduction trust. Both RC § 1340.22 and OTC § 5808.14 provide that their ascertainable standard limitation on a trustee-beneficiary's discretionary powers generally does not apply to marital deduction trusts (because the assets of such trusts will be includible in the surviving spouses' gross estates anyway). Each statute includes an exception to the exception, but the exceptions to the exception are not the same. Under RC § 1340.22(E)(4), the ascertainable standard limitation is applicable (i.e., the exception to the general rule is not applicable) to marital deduction trusts for which reverse QTIP elections have been made. By contrast, under OTC § 5808.14(D)(1), the ascertainable standard limitation is applicable to all QTIP trusts, not just those as to which reverse QTIP elections have been made. The rationale for the OTC rule, as explained in the comment to UTC § 814 is:

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

H. Internal Revenue Code § 2503 minors trusts. OTC § 5808.14(D)(3) also includes an exception for IRC § 2503(c) trusts. There is no similar exception in RC § 1340.22. The UTC comment's explanation for the exception is:

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

Finally, to eliminate or minimize potential estate tax problems with existing trusts, HB 416 follows a similar approach to that taken when RC § 1340.22 was enacted: it includes in section 4 a statement of legislative intent, which will not be codified, that §§ 5808.14(B), (C), and (D) are a codification of fiduciary and trust law principles that previously were codified in RC § 1340.22.

40. Trustee's powers (§§ 5808.15 and 16).

Ohio is one of the few states that do not have a statutory list of trustee's powers. The OTC includes a list of general powers in § 5808.15 and a list of specific powers in § 5808.16.

41. Power of trustee to pledge trust property to guarantee loans (§ 5808.16(S)).

UTC § 816(19) authorizes the trustee to pledge trust property to guarantee third party loans to a beneficiary. OTC § 5808.16(S) omits that power, and substitutes for it the power to pledge property of a revocable trust to guarantee third party loans to the settlor or to others, as directed by the settlor.

42. Distributions to or for an incapacitated beneficiary (§ 5808.16(U)).

Because Ohio has not enacted the Uniform Custodial Trust Act, the UTC's authorization to distribute to the custodial trustee of an incapacitated beneficiary has been omitted from § 5808.16(U).

43. Non-pro-rata distributions (§ 5808.16(V)).

To provide needed flexibility and lessen the risk that a non-pro-rata distribution will be treated as a taxable sale, § 5808.16(V) authorizes the trustee, on the distribution of trust property or the division or termination of a trust, to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares.

44. Uniform Prudent Investor Act (Chapter 5809).

Article 9 of the UTC was reserved for an enacting jurisdiction's version of the Uniform Prudent Investor Act. HB 416 moves Ohio's version of the Act (RC §§ 1339.52 – 1339.61) to Chapter 5809 of the OTC. Several provisions of the Uniform Prudent Investor Act, however, already are included in other sections of the OTC. Those provisions are not duplicated in Chapter 5809. Thus, RC § 1339.53(C) (addressing trustees who have special skills or expertise)

has been omitted from Chapter 5809 because it is OTC § 5808.06; RC § 1339.55 (on the duties of loyalty and impartiality) has been omitted because they are addressed in OTC §§ 5808.02(A) and 5808.03; RC § 1339.57 (on investment costs) has been omitted because it is OTC § 5808.05; and part of RC § 1339.59(A) (on delegation) has been omitted because it is included in OTC § 5808.07(B).

RC § 1339.61 includes application, construction, and effective date provisions of the Ohio Uniform Prudent Investor Act. Generally, those provisions have been moved to OTC § 5809.08. Because, as discussed above, several provisions of the existing Ohio Uniform Prudent Investor Act are found in other sections of the OTC and are not duplicated in Chapter 5809, the provisions of OTC § 5809.08 refer not to Chapter 5809, but to the “Ohio Uniform Prudent Investor Act,” which is defined in OTC § 5809.01(A)(1) to include not only Chapter 5809, but also those other provisions of the OTC (§§ 5808.02(A), 5808.03, 5808.05, 5808.06 and 5808.07(B)).

45. Trustee’s profit from administration in the absence of a breach (§ 5810.03).

Under UTC § 1003(a), a trustee is accountable to affected beneficiaries for any profit made from the administration of the trust, even in the absence of a breach of trust. OTC § 5810.03(A) reverses that rule: “Absent a breach of trust, a trustee is not accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust.” (The comment to UTC § 1003(a) explains the provision as follows: “The principle on which a trustee’s duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts Section 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust’s administration. See Restatement (Second) of Trusts Section 203 cmt. a (1959).”)

46. Attorney’s fees and costs (§ 5810.04).

For a discussion of a change made to UTC § 1004 in OTC § 5810.04, see section 25.A.(1), above.

47. Limitation of action against trustee (§ 5810.05).

UTC § 1005(a) provides for a one year statute of limitation on a beneficiary’s breach of fiduciary duty action against a trustee. OTC § 5810.05(A) changes the limitations period to two years. As discussed in section 5.C., above, if a beneficiary surrogate has been designated to receive notices and reports on behalf of a beneficiary, OTC § 5810.05(A) has been modified to provide that the statute of limitations will run from the date the beneficiary surrogate was sent the information.

UTC § 1005(b) provides, in part, that a trustee's report constitutes adequate notice to start the limitations period if it provides sufficient information so that the beneficiary or representative "knows of the potential claim or should have inquired into its existence." OTC § 5810.05(B) changes the quoted language to "knows of the potential claim or should know of the existence of the potential claim."

UTC § 1005(c) provides that if an adequate notice is not given to start the limitations period, the beneficiary may commence a proceeding within five years of the first of three events to occur: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust. The OTC makes two changes in § 5810.05(C). First, the five year period is changed to four. Second, added to the list of events that will trigger the running of the limitations period is "(iv) the time at which the beneficiary knew or should have known of the breach of trust."

48. Exculpation of trustee (§ 5810.08).

Both the UTC (§ 1008(a)) and the OTC (§ 5810.08) prohibit an exculpation clause from protecting a trustee from liability for a breach made in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries, or if the clause was inserted in the trust as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

Under UTC § 1008(b), if an exculpatory clause was drafted or caused to be drafted by the trustee, it is invalid unless the trustee proves that it is fair under the circumstances and that its existence and contents were adequately communicated to the settlor. This provision is omitted from OTC § 5810.08.

49. Limitation on personal liability of trustee (§ 5810.10).

A. Changes in existing Ohio law.

(1) Contract liability. Both the UTC (§ 1010(a)) and the Revised Code (§ 1339.65(A)(2)) protect the trustee from personal liability for contracts properly entered into by the trustee that disclose the trustee's fiduciary capacity. As discussed in B., below, two minor changes have been made to OTC § 5810.10(A) from UTC § 1010(a) so that the OTC provision will conform to RC § 1339.65(A)(2); as modified, it will not change existing Ohio law.

(2) Tort liability. The OTC may change Ohio law with respect to the personal liability of a trustee for torts committed during the administration of the trust and obligations arising from the ownership or control of trust property. Under OTC § 5810.10(B), the trustee will have no personal liability for torts committed during the administration of the trust, or from obligations arising from the ownership or control of trust property, including violation of environmental law, unless the trustee "is personally at fault." Apparently, there is no similar statutory protection in Ohio.

(3) Trustee serving as general partner. The OTC also will change Ohio law with respect to the personal liability of a trustee if the trust holds a general partnership interest in a general or limited partnership. Generally, OTC § 5810.11 and RC § 1339.65(B) each protect a trustee from personal liability for contracts entered into or torts committed by a general or

limited partnership of which the trustee was a general partner. (The UTC comment, in fact, states that UTC § 1011 is modeled after RC § 1339.65.) Among the differences between the two statutes is that the protection is lost under RC § 1339.65(B)(2) if the trustee's spouse or any of his lineal descendants (as well as the trustee in a capacity other than trustee) holds any interest in the partnership. By contrast, OTC § 5810.11(C) also precludes protection if an interest in the partnership is held by one or more of the trustee's siblings or parents, or by a spouse of any of the trustee's descendants, siblings, or parents. Thus, enactment of the OTC will eliminate the protection of a trustee who serves as a general partner when one or more of these additional persons related to the trustee own an interest in the partnership.

Another difference is that RC § 1339.65(B) apparently does not provide protection to the trustee of an irrevocable inter vivos trust, as RC § 1339.65(B)(2) applies to "an executor, administrator, or trustee who acquires, in his fiduciary capacity, a general partnership interest upon the death of a general partner of a partnership, or a trustee of a revocable trust who, in his fiduciary capacity, is a general partner of a partnership . . ." OTC § 5810.11, which includes no similar limitation, will thus extend the protection afforded trustees who hold general partnership interests to irrevocable inter vivos trusts.

Because RC § 1339.65 applies to estates, guardianships, and other fiduciary relationships, HB 416 does not provide for its repeal. RC § 1339.65, however, also applies to both testamentary and inter vivos trusts. Since the contract and general partner liability issues with respect to trusts will be covered by OTC §§ 5810.10 and 5810.11, if the OTC is enacted RC § 1339.65 will be amended to exclude trusts from its coverage. Note that this approach will result in different statutory protections for trustees than for executors and other fiduciaries with respect to contracts entered into in a fiduciary capacity and partnerships of which the fiduciary is a general partner.

B. *Changes to the UTC in the OTC.* UTC § 1010(a) and RC § 1339.65(A)(2) protect the trustee from personal liability for contracts properly entered into by the trustee that disclose the trustee's fiduciary capacity. Consistent with RC § 1339.65(A)(2), OTC § 5810.10(A) makes two changes to the UTC provision. First, the trustee's protection under the statute is limited to contracts entered into on or after March 22, 1984. Second, the following sentence has been added to address what constitutes disclosure of the trustee's fiduciary capacity: "The words 'trustee,' 'as trustee,' 'fiduciary,' or 'as fiduciary,' or other words that indicate one's trustee capacity, following the name or signature of a trustee are sufficient disclosure for purposes of this division."

50. Liability of trustee holding a general partnership interest (§ 5810.11).

Generally, UTC § 1011(a) protects a trustee who holds a general partnership interest from personal liability on a contract entered into by the partnership if the trust's ownership of the general partnership interest in a fiduciary capacity is disclosed "in the contract or in a statement previously filed pursuant to the [Uniform Partnership Act or Uniform Limited Partnership Act]." OTC § 5810.11(A) omits the quoted language and substitutes for it the more detailed provisions on disclosure of the trustee's ownership of the general partnership interest in a fiduciary capacity from RC § 1339.65(B)(2).

51. Effect of other states' application and construction of the UTC (§ 5811.01).

UTC § 1101 provides that: "In applying and construing this Uniform Act, consideration *must* be given to the need to promote uniformity of the law with respect to its subject matter among States enacting it (emphasis added)." OTC § 5811.01 changes "must" to "may."

52. Repeals; amendment of RC § 2305.22.

HB 416 includes: (i) the sections of the Revised Code that will be repealed because their subjects are covered by provisions of the OTC (section 2 of HB 416) and (ii) the remaining sections of Chapters 1339 and 1340 that will be repealed and reenacted without change in new title 58 (section 1 of HB 416). As a result, the repealer section of the UTC, § 1105, has been omitted from the OTC.

Finally, because the limitations period for actions against a trustee is covered by OTC § 5810.05, HB 416 provides for RC § 2305.22 to be amended, as follows: "Sections 2305.03 to 2305.21, 1302.98, and 1304.35 of the Revised Code, respecting lapse of time as a bar to suit, do not apply in the case of a continuing and subsisting trust, nor to an action by a vendee of real property, in possession thereof, to obtain a conveyance of it the real property."

Respectfully submitted,

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Appendix A

Definition of Wholly Discretionary Trust

OTC § 5801.01(Y)

A “wholly discretionary trust” is defined in § 5801.01(Y):

- (1) Wholly discretionary trust means a trust to which all of the following apply:
 - (a) The trust is irrevocable.
 - (b) Distributions of income or principal from the trust may or shall be made to or for the benefit of the beneficiary only at the trustee’s discretion.
 - (c) The beneficiary does not have a power of withdrawal from the trust.
 - (d) The terms of the trust use “sole,” “absolute,” “uncontrolled,” or language of similar import to describe the trustee’s discretion to make distributions to or for the benefit of the beneficiary.
 - (e) The terms of the trust do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.
 - (f) The beneficiary is not the settlor, the trustee, or a cotrustee.
 - (g) The beneficiary does not have the power to become the trustee or a cotrustee.
- (2) A trust may be a wholly discretionary trust with respect to one or more but less than all beneficiaries.
- (3) If a beneficiary has a power of withdrawal, the trust may be a wholly discretionary trust with respect to that beneficiary during any period in which the beneficiary may not exercise the power. During a period in which the beneficiary may exercise the power, both of the following apply:
 - (a) The portion of the trust the beneficiary may withdraw may not be a wholly discretionary trust with respect to that beneficiary;
 - (b) The portion of the trust that the beneficiary may not withdraw may be a wholly discretionary trust with respect to that beneficiary.
- (4) If the beneficiary and one or more others have made contributions to the trust, the portion of the trust attributable to the beneficiary’s contributions may not be a wholly discretionary trust with respect to that beneficiary, but the portion of the trust attributable to the contributions of others may be a wholly discretionary trust with respect to that beneficiary. If a beneficiary has a power of withdrawal, then upon the lapse, release, or waiver of the power, the beneficiary is treated as having made contributions to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:
 - (a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code;
 - (b) If the donor of the property subject to the beneficiary’s power of withdrawal is not married at the time of the transfer of the property to the trust, the amount specified in section 2503(b) of the Internal Revenue Code;

(c) If the donor of the property subject to the beneficiary's power of withdrawal is married at the time of the transfer of the property to the trust, twice the amount specified in section 2503(b) of the Internal Revenue Code.

(5) Notwithstanding divisions (Y)(1)(f) and (g) of this section, a trust may be a wholly discretionary trust if the beneficiary is, or has the power to become, a trustee only with respect to the management or the investment of the trust assets, and not with respect to making discretionary distribution decisions. With respect to a trust established for the benefit of an individual who is blind or disabled as defined in 42 U.S.C. 1382c(a)(2) or (3), as amended, a wholly discretionary trust may include either or both of the following:

(a) Precatory language regarding its intended purpose of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs;

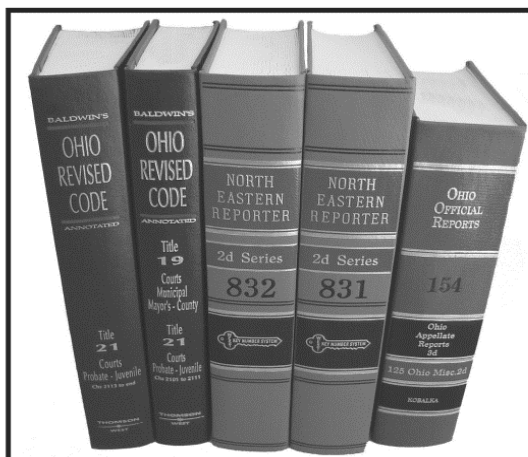
(b) A prohibition against providing food, clothing, and shelter to the beneficiary.

Chapter 5: The Ohio Trust Code: The Joint Committee's Proposal for Its First Amendment

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The Ohio Trust Code: The Joint Committee's Proposal for Its First Amendment

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The new Ohio Trust Code (the "OTC" or the "Code"), which was enacted in mid-2006, took effect on January 1, 2007. It was the product of several years of study and work by a joint committee of representatives of the OS-BA's Estate Planning, Trust, and Probate Law Section and the Ohio Bankers League Legal, Regulatory and Legislative Committee (the "Joint Committee"). Since the OTC's enactment, the Joint Committee's co-chairs, Bob Brucken and Joanne Hindel, and I have received many proposals for its amendment. Some of the proposals were technical in nature while others were substantive.

In the spring of 2007, I prepared a report listing the proposals, with a short discussion of each of them, which was circulated among the Joint Committee and the Executive Committee of the Ohio Probate Judges Association. In May, Mr. Brucken, Ms. Hindel, and I met to review the report. As co-chairs of the Joint Com-

mittee, Mr. Brucken and Ms. Hindel made recommendations with respect to each proposal. The report was then revised to include the recommendations, posted on the OSBA's website, and circulated to the Joint Committee, the Executive Committee of the Ohio Probate Judges Association, and those who had submitted the amendment proposals. A conference call among members of those three groups who chose to participate was held in June to discuss the report and recommendations. The participants in that call agreed with many of the recommendations, but decided to change others.

After the June conference call, I revised the report to reflect the decisions made by the participants in the call. The revised report also was posted on the OSBA's website and circulated among the same three groups. The next step was to draft language to make the agreed upon amendments. That process has been completed and, as of this writing, statutory text to effect the amendment has been delivered to the OSBA's and OBL's lobbyists for them to begin the process of having a bill to enact the amendment introduced in the General Assembly. This article summarizes the proposals that are included in the amendment and briefly discusses two that are being handled separately by committees of the Estate Planning, Trust, and Probate Law Section.

Information and Reporting Provisions

Several of the amendment proposals related to the OTC's provisions requiring trustees to inform and report to beneficiaries. New §5808.13 of the Revised Code sets forth those duties, while §§5801.04(B)(8) and (9) make certain of them mandatory and thus not waivable by the settlor in the terms of the trust. The Code's information and reporting provisions (as well as most of its other provisions) are applicable to existing as well as newly created trusts.

As discussed below (see paragraphs 20, 23, and 24), several proposals for amending the OTC's information and reporting provisions are included in the proposed amendment. Two other proposals will be taken up by a new committee of the OSBA's Estate Planning, Trust, and Probate Law Section. First, it was proposed that the OTC's information and reporting provisions apply only to trusts created after the amendment's effective date. Under this proposal, the trustee's duty to inform and report to beneficiaries of trusts created earlier would continue to be governed by pre-OTC law. Second, it was proposed that the settlor be allowed to waive all duties of the trustee to inform and report to beneficiaries. Because of the controversial nature of these proposals, the participants in the June conference call decided that they

should be considered separately from the more straightforward proposals that will be included in the proposed amendment.

Ability of an Agent under a Power of Attorney to Create a Trust

The OTC's provision describing the methods for creating a trust (§5804.01) does not provide that an authorized agent of the settlor acting under a power of attorney may create a trust for the settlor. In addition, §5804.02, which sets forth the requirements for the creation of a trust, requires that the settlor have capacity. Further, the OTC's provision addressing the ability of a duly authorized agent for the settlor of a revocable trust to exercise the settlor's powers refers to the settlor's powers "with respect to revocation, amendment, or distribution of trust property," but it does not address the creation of a revocable trust by an agent. While these provisions raise doubts as to whether an authorized agent can create a trust for a principal, the statutory form of power of attorney in §1337.18(A) states that "Unless expressly authorized in the power of attorney, a power of attorney does not grant authority to an agent to...create...a trust," thus implying that if expressly authorized to do so, an agent can create a trust for the settlor. The participants in the June conference call discussed this subject at length; noted that the ability to create a trust includes the ability to direct the disposition of trust property and raises potential conflict of interest issues (as, however, does the ability to amend a revocable trust, which, as stated, is allowed by the Code); also noted that a committee of the OSBA's Estate Planning, Trust, and Probate Law Section is studying Ohio's power of attorney statute; and concluded that this subject would be best addressed by that committee separately from the proposed amendment.

The remainder of this article discusses the changes included in the proposed amendment. Generally, the Joint Committee decided to include in the amendment straightforward changes as to which there was a broad consensus. The discussion below addresses the proposals included in the amendment in the order of the sections of the Revised Code that are affected.

1. §§2109.022 and 5815.25 (power to direct)

Prior to enactment of the OTC, the Revised Code addressed the subject of a fiduciary not being liable when others had a power to direct in two statutes, §§2109.022 and 1339.43. The two statutes were identical, except that §2109.022 defined fiduciary, in part, to mean "a trustee under any testamentary or other trust," while §1339.43

defined the term, in part, to mean, “a trustee under any testamentary, inter vivos, or other trust.” With the enactment of the OTC, §1339.43 was moved and renumbered to §5815.25, while §2109.022 was not changed. Because §2109.022 is duplicative of §5815.25, the proposed amendment repeals it.

2. §5801.01(Y) (definition of “wholly discretionary trust”)

Section 5801.01(Y) includes a lengthy definition of a “wholly discretionary trust.” Under division (Y)(5), the terms of a WDT that is a supplemental needs trust may include “a prohibition against providing food, clothing, and shelter to the beneficiary.” Rick Davis, a member of the Joint Committee, reported that from the perspective of supplemental needs trust (“SNT”) planning, “clothing” need not be included in such a prohibition to avoid adverse SNT consequences. As a result, the proposed amendment deletes “clothing” from §5801.01(Y)(5).

3. §5801.02 (scope of OTC)

Generally, §5801.02 provides, in part, that the OTC applies to inter vivos express trusts and to testamentary trusts to the extent provided by §2109.69.¹ In describing the inter vivos express trusts to which the OTC applies, §5801.02 provides that both “charitable and noncharitable” inter vivos express trusts are subject to the OTC. In describing the testamentary trusts to which the OTC applies, however, language specifically referencing both charitable and noncharitable trusts is not included. To make the statute internally consistent and avoid any question as to whether both charitable and noncharitable testamentary trusts are subject to the OTC, the proposed amendment inserts “charitable and noncharitable” in the provision of §5801.02 stating that the OTC applies to testamentary trusts.

4. §5801.06 (governing law)

The OTC’s governing law provision, §5801.06, addresses what law applies to determine “the meaning and effect of the terms” of the trust. It does not, however, expressly address what law governs the administration of the trust. Under the proposed amendment, §5801.06 will consist of two divisions. Division (A) will include the section’s current language addressing the law that will govern the meaning and effect of the trust’s terms. Division (B) will address what law governs trust administration:

(B) The administration of a trust is governed by the law designated in the terms of the trust to

govern trust administration. In the absence of a designation in the terms of the trust (i) the law of the trust’s principal place of administration governs the administration of the trust and (ii) if the trust’s principal place of administration is transferred to another jurisdiction under section 5801.07 of the Revised Code, the law of the new principal place of administration of the trust thereafter governs administration of the trust.²

5. §§5801.10, 5804.14, 5805.01(C), and 5805.03 (replacing “trust instrument” with “terms of the trust”)

The OTC generally uses “terms of the trust” to describe the provisions that govern the trust. “Terms of the trust” is a defined term that is not limited to the trust instrument, but also includes manifestations of the settlor’s intent “as may be established by other evidence that would be admissible in a judicial proceeding.”³ In some of the OTC’s provisions that depart from the UTC’s, the OTC uses the more limited “trust instrument” language. While in some instances that is appropriate,⁴ the OTC uses “trust instrument” a number of times in (i) the private settlement agreement statute (§5801.10), (ii) the small trust termination statute (§5804.14), (iii) the spendthrift provision statute (§5805.01(C)), and (iv) the wholly discretionary trust statute (§5805.03), when “terms of the trust” is more appropriate. The proposed amendment changes those references to the “trust instrument” to the “terms of the trust.”

6. §5801.10 (effect of a term or condition in a PSA that a court could not properly approve)

Section 5801.10(C) includes, in part, the following provision:

(C) ... [A private settlement] agreement is valid only to the extent that it does not effect a termination of the trust before the date specified for the trust’s termination in the trust instrument, does not change the interests of the beneficiaries in the trust except as necessary to effect a modification described in division (C)(5) or (6) of this section, and includes terms and conditions that could be properly approved by the court under Chapters 5801. to 5811. of the Revised Code or other applicable law.

Because that language could result in an entire PSA being invalid if it includes one or more improper terms or condi-

tions, the proposed amendment inserts the following language in §5801.10(C): “The invalidity of any provisions of an agreement under this division (C) does not affect the validity of other provisions of the agreement.”

7. *§5801.10(E) (PSAs; binding effect)*

Under §5801.10(B), creditors are necessary parties to a PSA (if their interests will be affected by the agreement). Such creditors are not referenced in §5801.10(E), however, which provides that PSAs (that comply with the limitations on their use) are “final and binding on the trustee, the settlor if living, all beneficiaries, and their heirs, successors, and assigns.” The proposed amendment adds to that list “creditors who are parties to the agreement.”

8. *§5801.11 (guardian of person or estate)*

A number of provisions of the OTC reference a guardian of the person or estate. For example, under §5803.03(A) and (B), a guardian of the person or estate may represent and bind the ward or the estate the guardian is responsible for. The OTC does not provide that such a guardian must act in accordance with Chapter 2111 of the Revised Code, if the guardian was appointed by an Ohio court, or by other applicable law, if the guardian was appointed elsewhere. The proposed bill does so by adding new §5801.11 to the Revised Code:

5801.11 Guardian of the Estate or Person. A guardian of the estate or person, in acting under Chapters 5801. to 5811. of the Revised Code, shall comply with the guardian’s duties under Chapter 2111. of the Revised Code or other applicable law.

9. *§5803.02 (representation by holder of a presently exercisable general power of appointment)*

Section 5803.02 provides that in the absence of a conflict of interest, the holder of a general testamentary power of appointment may represent and bind persons whose interests are subject to the power. Thus, notices that otherwise would have to be given to a person whose interest is subject to the power may instead be given to the powerholder, and a consent needed from a person whose interest is subject to the power may instead be obtained from the powerholder. Section 5803.02 applies only to holders of general testamentary powers; it does not apply to the holder of a presently exercisable general power.

Under §5806.03(B), however, the holder of a power of withdrawal (which is defined in §5801.01(O) as

a presently exercisable general power) is treated as the settlor of a revocable trust. Therefore, during the period a presently exercisable general power is exercisable, no one else would need to be given notices or would need to give their consent, because the holder of the presently exercisable general power would have complete control over the trust under §5806.03(A).

Because this likely is not well known or self evident, the proposed amendment will add the following sentence to §5803.02: “The rights of the holder of a presently exercisable general power of appointment are addressed in section 5806.03 of the Revised Code.”

10. *§5803.03(F) (representation of minors by ancestors other than parents)*

Section 5803.03(F) allows a parent (but no other relative) to represent the parent’s minor or unborn children, if neither a guardian for the child’s estate or person has been appointed (and there is not a conflict of interest between the parent and the child). While the Joint Committee decided not to propose amending the OTC to allow a grandparent or other relative to represent a minor or unborn child under §5803.03(F), the proposed amendment includes a reference in §5803.03(F) that another relative may be able to represent a minor or unborn child under §5803.04. Under §5803.04, a beneficiary who is a minor, an incapacitated individual, an unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by another beneficiary who has a substantially identical interest in the trust (to the extent there is not a conflict of interest between the representative and the person represented).

11. *§5804.02(C) (trust creation)*

Section 5804.02(C) provides, in part, that “[a] power in a trustee to select a beneficiary from an indefinite class is valid.” To provide greater flexibility, the proposed amendment will allow such a power to be given to “a trustee or other person.”

12. *§5804.02(D) (trust creation)*

Section 5804.02(D) refers to the execution of a trust. The proposed amendment will change it to refer to the execution of a trust instrument.

13. *§5804.02(E) (trust creation)*

Section 5804.02(E) addresses a circumstance in which “one or more other persons hold” an interest in the trust. The proposed amendment changes that language to “one or more other persons hold or holds” the trust interest.

14. §5804.11(A) (modification or termination by settlor and all beneficiaries)

Section 5804.11(A) provides, in part: “If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court *shall* enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust” (emphasis added).

As originally promulgated, UTC §411(a) provided: “A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.” In 2004, at the recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel (“ACTEC”), UTC §411(a) was amended. The amendment was made in response to concerns that in its original form, §411(a) might cause assets in irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification to be included in settlors’ gross estates for estate tax purposes. Section 5804.11(A), quoted above, tracks the language of the UTC amendment.

In its current form, §5804.11(A) mandates that the court approve a modification or termination consented to by the settlor and all of the beneficiaries. If a petition were presented to the court for such a modification or termination, the court’s role would be to determine that the settlor and all beneficiaries had, in fact, consented. Thus, if any beneficiaries’ consents were provided by representatives, the court would need to determine whether the representatives’ consents were effective (for example, whether there was a conflict of interest between the representative and the person represented).

The proposed amendment inserts in §5804.11(A) a specific reference to the requirement that, before a court approve a modification or termination by the settlor and all beneficiaries, it first determine that any consents given on behalf of beneficiaries by their representatives are valid under the OTC’s representation provisions.

In accordance with an alternative suggestion of the ACTEC Estate and Gift Tax Committee in response to the concern described above, §5804.11(A) also provides that it is applicable only to post-2006 trusts. However, because of the ability of the settlor and all beneficiaries to amend or modify trusts under pre-OTC Ohio law, and because §5804.11(A) allows such modifications or terminations only upon approval by the court, the Joint Committee concluded that it should not be necessary to

limit the division’s applicability to post OTC trusts. The proposed amendment therefore deletes that limitation.

15. §5804.13 (charitable trusts; cy pres)

Generally, §5804.13 provides that if a particular charitable purpose fails, the court may apply cy pres to modify or terminate the trust in a manner consistent with the settlor’s charitable purposes, except that a trust term that addresses that contingency and provides for distribution to a noncharitable beneficiary prevails over the court’s power to apply cy pres. Section 5804.13 does not expressly address trust instruments that provide for alternative charitable purposes or beneficiaries if a particular charitable purpose fails. The proposed amendment addresses that subject by adding the following emphasized language to §5804.13(B):

(B) A provision in the terms of a charitable trust for an **alternative charitable purpose** or for the distribution of the trust property to a non-charitable beneficiary prevails over the power of the court under division (A) of this section to apply cy pres to modify or terminate the trust.

16. §5804.14(D) (replacing “probate court” with “court”)

Section 5804.14(D) addresses the distribution of assets from an uneconomic small trust that is terminated early by the court. Twice it refers to the “probate court” rather than simply to the “court.” Because the general division of the court of common pleas has concurrent jurisdiction with the probate court over inter vivos trusts, the proposed amendment deletes “probate” from §5804.14(D).

17. §5804.17 (combination and division of trusts)

The OTC includes in §5804.17 the UTC’s statute on the combination or division of trusts. Former §1339.67 on that subject was repealed.

Former §1339.67 allowed a combination or division of trusts “if the consolidation or division is in the best interests of the beneficiaries...is equitable and practicable, and will not defeat or substantially impair the accomplishment of the purpose of the trust or trusts or the interests of the beneficiaries under the trust or trusts.” By contrast, the standard under new §5804.17 is that the combination or division “does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.” Because the standard under §5804.17 is more restrictive than under former §1339.67, the pro-

posed amendment changes §5804.17 to permit a combination or division that does not *substantially* impair the rights of any beneficiary or have a *material* adverse effect on the achievement of the purposes of the trust.

18. §5806.01 (capacity to create a revocable trust)

Section 5806.01 provides that the capacity to create a revocable trust (or amend, revoke, or add property to it) is the same as is required to make a will, but it does not specify that the required capacity must be that of the settlor. The proposed amendment will cause it to do so.

19. §5806.02(C) (revocation or amendment of revocable trust)

Section 5806.02(C) describes the means by which a settlor may revoke or amend a revocable trust. If the terms of the trust do not provide for an exclusive means of revocation or amendment, the analogous UTC provision (§602(c)) allows revocation or amendment by will or codicil or by any *other* method manifesting clear and convincing evidence of the settlor's intent. The OTC provision (§5806.02(C)) is patterned after the UTC provision, but it expressly does not allow amendment or revocation by will or codicil (unless the terms of the trust expressly allow it). Nevertheless, it refers to "any *other* method manifesting clear and convincing evidence of the settlor's intent (emphasis added)." The proposed amendment will delete "other" from that provision.

20. §§5806.03(A) and 5808.13 (trustee duties to other beneficiaries during settlor's lifetime, including the duty to inform and report)

Under §5806.03(A), the trustee's duties are owed exclusively to the settlor of a revocable trust while the settlor is living, regardless of whether the settlor is incapacitated. Generally, §5808.13 provides that the trustee must provide information to current beneficiaries and other beneficiaries who request it. The OTC does not expressly address whether the trustee's information and reporting duties under §5808.13 are owed to beneficiaries of a revocable trust other than the settlor during the settlor's lifetime. The proposed amendment resolves that uncertainty by inserting language in §5806.03(A) and adding a new division (G) to §5808.13, each of which expressly states that during the lifetime of the settlor of a revocable trust, the trustee's duties to inform and report under §5808.13 are owed exclusively to the settlor.

21. §5806.04 (accelerating the time bar for trust contests)

Section 5806.04 provides for a two year contest period (from the settlor's death) for revocable trusts. The period for contesting a will under §2107.76 is three months from the filing of the certificate with respect to notice having been given for the probate of the will. Because revocable trusts are used primarily as will substitutes, the proposed amendment changes the limitations period for contesting a trust to make it more comparable to that for contesting a will. This is accomplished by adding new division (E) to §5806.04:

(E) If the trustee sends a person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and that the person has the lesser of six months from the date the notice is sent or two years from the date of settlor's death in which to commence a proceeding described in division (A), that person's right to commence such a proceeding terminates at the earlier of six months after the notice is sent or two years from the settlor's death.⁵

(The proposed amendment will also make division (A) of §5806.04, which contains the general two-year limitations period for contesting a revocable trust, subject to the rule of new division (E).)

22. §5806.04(D) (reference to "grantor" in statute of limitations)

The OTC replaced the UTC provision on the limitations period for contesting a revocable trust with former §2305.121. It refers to the creator of the trust as the "grantor." The OTC refers to the creator of the trust as the "settlor." When former §2305.121 was moved to §5806.04, all of its references to "grantor" were changed to "settlor" except for one (in division (D)). The proposed amendment will also change that reference to "grantor" to "settlor."

23. §§5808.13(B)(1) and 5801.04(B)(9) (redacting the trust instrument before providing a copy to a beneficiary)

Under the default rule in §5808.13(B)(1), the trustee must provide a copy of the trust instrument to a beneficiary who requests it. (While that provision does not expressly state that the beneficiary is entitled to receive a copy of the entire trust instrument, without redaction, that is the plain meaning of (B)(1) [and of the defini-

tion of “trust instrument” in §5801.01(W)] and appears to be its intent. In that regard, the comment to the analogous provision of the UTC (§813) expressly states that a requesting beneficiary is entitled to receive a copy of the entire trust instrument.) In addition, under the default rule of §5808.13(A), “unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.”

The proposed amendment revises §5808.13(B)(1) to allow the trustee to furnish a beneficiary who requests a copy of the trust instrument with a redacted copy that includes only the provisions that the trustee determines are relevant to the beneficiary’s interest in the trust. The proposed amendment further provides, however, that if the beneficiary then requests a copy of the entire trust instrument, the trustee must provide it.

24. §5808.13(C) (when the duty to provide annual reports to beneficiaries is effective)

Under §5808.13(C), the trustee of an irrevocable trust is required to send an annual report with respect to its administration of the trust to each current beneficiary and to other beneficiaries who request it. While the OTC’s effective date generally is January 1, 2007, it is not clear whether the trustee’s duty to furnish annual reports to beneficiaries applies to trust fiscal years ending in 2006 or in 2007. Under the proposed amendment, the trustee must provide such annual reports for trusts’ years ending in 2007.

25. §5808.14(A) (judicial review of exercise of discretionary powers)

Section 5808.14(A) defines the judicial standard of review for discretionary trusts. Generally, it requires that trustees exercise discretionary powers reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. An exception is provided for wholly discretionary trusts (WDTs). For WDTs, a reasonableness standard is not to be applied to a court’s review of the exercise of discretion by the trustee. Section 5808.14(A) does not limit the WDT exception to discretionary distribution decisions. The proposed amendment will do so.

26. §5808.16(S) (power of trustee to pledge trust property)

Section 5808.16(S) gives the trustee the power to:

(S) Pledge the property of a revocable trust to guarantee loans made by others to the settlor of

the revocable trust, or, if the settlor so directs, to guarantee loans made by others to a third party.

In part because of differences between a “pledge of property” and a “guarantee of a loan,” the proposed amendment revises §5808.16(S) to read:

(S) Guarantee loans made by others to the settlor of a revocable trust and, if the settlor so directs, guarantee loans made by others to a third party, and mortgage, pledge, or grant a security interest in the property of a revocable trust to secure the payment of loans made by others to the settlor of the revocable trust and, if the settlor so directs, loans made by others to a third party.

27. §5808.16 (specific powers of trustee)

Section 5808.16 grants trustees 26 specific powers. The power to hire agents is not one of them. Although the power to hire agents is covered by the trustee’s broad, general power under §5808.15, and arguably is given by one or more of the specific powers granted by §5808.16, the proposed amendment adds new division (AA) to specifically authorize the trustee to hire agents, attorneys, and other professionals.

28. §5810.05 (limitation of action against trustee)

Section 5810.05 is the OTC’s statute of limitation for actions against a trustee. It does not address equitable principles that may affect the limitations period. The proposed amendment does so by adding new division (D):

(D) Nothing in Chapters 5801. to 5811. of the Revised Code shall limit the operation of any principle of law or equity that can bar claims, including the doctrines of laches, unclean hands, estoppel, and waiver.

29. §5810.13(A) (certification of trust)

Section 5810.13 includes provisions for the trustee to furnish third parties with a certification of trust, instead of the entire trust instrument. Division (A) of §5810.13 lists items to be included in a certification. The list includes the trust’s taxpayer identification number and “the manner of taking title to trust property.” The amendment will delete those two items.⁶

30. §5810.13(I) (certification of trust)

To make it clear that a certification of trust under

§5810.13 is separate and distinct from memoranda of trust under §5301.255 that are used for real estate purposes, the proposed amendment adds division (I) to §5810.13, which provides that trust certifications do not affect the validity or use of trust memoranda under §5301.255.

31. §5810.13(H) (certification of trust)

Section 5810.13(H) provides:

(H) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

The proposed amendment deletes division (H).

Notes

1. Generally, §2109.69(A) provides that the OTC applies to testamentary trusts except to the extent that it is inconsistent with a provision in Chapter 2109 or another provision of the Revised Code, or is clearly inapplicable to testamentary trusts. Under §2109.69(B), the OTC information and reporting requirements found in §5808.13 are applicable to testamentary trusts regardless of whether they are inconsistent with a provision in Chapter 2109 or another provision of the Revised Code.
2. Note that “principal place of administration” of a trust is not defined by the OTC (or by the Uniform Trust Code). According to the comment to the UTC’s provision on principal place of administration, §108:

Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust’s principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.
3. R.C. §§5801.01(V). According to the comment to UTC §103, the terms of a trust might be derived from, in addition to the trust instrument, “oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction.”
4. See, e.g., R.C. §§5801.01(D) (the definition of “beneficiary surrogate”) and 5801.04(C) (the provision for the settlor to waive notices to beneficiaries by appointing a beneficiary

- surrogate). Those provisions require that the designation of the beneficiary surrogate and the waiver be in the “trust instrument” rather than in the “terms of the trust.”
5. This language differs from, and is an improvement of, the language included in the material on the proposed amendment for delivery to the Legislative Service Commission. It will be provided to LSC when it prepares the amendment for introduction in the General Assembly.
 6. The possibility of deleting these two items from §5810.13(A) was not raised until after the June conference call described near the beginning of this article and after the preparation of the material on the proposed amendment for delivery to the Legislative Service Commission. On the assumption that neither of these items is necessary for a trust certification, that mandating the provision of the trust’s taxpayer identification number to third parties in certifications is problematic, and that deleting these items from the list would not be objectionable, the Joint Committee’s co-chairs intend to request the Legislative Service Commission to delete them when it prepares the bill for enactment of the amendment.

Chapter 6: EPTPL Section Reports to the OSBA Council of Delegates for Fall 2009 and Spring 2011

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EPTPL Section Report to the OSBA Council of Delegates for Fall 2009

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 to the six following proposals:

4 A. A proposal to add new Ohio Revised Code Section 5809.03.1 to modify a
5 trustee's duties with respect to life insurance policies held as trust assets.
6 Proposal is attached as Exhibit A;

7 B. A proposal to enact a new section R.C. 5808.18 of the Ohio Trust Code that
8 would authorize a trustee who has discretionary powers to distribute principal
9 of a trust to exercise its discretion by distributing all or part of the first trust
10 principal in further trust for the benefit of one or more beneficiaries of the
11 original trust, subject to certain conditions and limitations as set forth in the
12 proposed section, and to amend section 5801.10(I) by adding a new paragraph
13 (4) to coordinate the provisions of the two sections. Proposal is attached as
14 Exhibit B;

15 C. A proposal to amend a provision of Ohio's income tax on trusts so as to allow
16 a credit to "resident" Trusts for income taxes paid to other states. Proposal is
17 attached as Exhibit C;

18
19 D. A proposal to make amend the anti-lapse statute, R.C. 2107.52 as it relates to
20 wills, to enact a statute to create an anti-lapse statute applicable to trusts, and
21 to add provisions to the Ohio Trust Code to grant statutory authority to a
22 trustee to make distributions directly to the heirs of a deceased trust
23 beneficiary, rather than through the deceased beneficiary's estate. Proposal is
24 attached as Exhibit D;

25
26 E. A proposal to enact the Uniform Power of Attorney Act in Ohio, as
27 modified. Proposal is attached as Exhibit E; and

28 F. A proposal to enact R.C. 5810.14 relating to Titling of Assets in Trust Form
29 and R.C. 5301.071 (E) relating to the Validity of Instruments. Proposal is
30 attached as Exhibit F.

31
32
33
34
35

Respectfully submitted,

36
37

William J. McGraw III, *Troy*
Chair

38 **EXHIBIT A**

39 **5809.03.1. Duties of a trustee with respect to life insurance policies.**

40 (A) Unless otherwise provided by the terms of the trust, the duties of a trustee with
41 respect to the acquisition, retention or ownership of a life insurance policy as a trust
42 asset do not include a duty:

43 (1) To determine whether any such policy is or remains a proper investment;

44 (2) To diversify the investment in such policy relative to other such policies or
45 to any other trust assets;

46 (3) To exercise or not any option, right or privilege available under such
47 policy, including the payment of premiums unless there are sufficient cash
48 or other readily marketable trust assets from which to pay such premiums,
49 or, if not, other trust assets that were designated by the settlor or other
50 person transferring such assets to the trust to be used for such purpose,
51 regardless of whether such exercise or non-exercise results in the lapse or
52 termination of such policy;

53 (4) To investigate the financial strength or changes in the financial strength of
54 the life insurance company maintaining such policy; or

55 (5) To inquire about changes in the health or financial condition of the insured
56 or insureds under such policy.

57 (B) Neither the trustee, nor the attorney who drafted a trust, nor any person who
58 consulted with regard to the creation of a trust, shall, absent fraud, be liable to the
59 beneficiaries of the trust or to any other person for any loss arising from the absence
60 of these duties.

61 (C) Unless otherwise provided by the terms of the trust, the provisions of this section
62 apply to a trust established before or after the effective date of this section and to a
63 life insurance policy acquired, retained or owned by a trustee before or after the
64 effective date of this section.

65 **Executive Summary**

66 The EPTPL Council believes that the Ohio Uniform Prudent Investor Act (ORC
67 Chapter 5809), as presently constituted, imposes duties upon trustees of trusts
68 holding life insurance policies as trust assets that in most cases neither the settlor nor
69 the trustee (whether institutional or individual) of the trust intended or wanted. The
70 EPTPL Council believes Ohio should join at least ten other states in adopting
71 specific legislation to modify these duties, while allowing the settlor to specifically
72 impose such duties in the trust instrument if so desired. To accomplish this goal, the

73 EPTPL recommends that proposed ORC Section 5809.03.01 attached as Exhibit A
74 be enacted.

75 **Rationale for the Proposal**

76 The EPTPL Council has determined that the Ohio Trust Code, including Ohio's
77 Uniform Prudent Investor Act, imposes overly onerous duties with respect to
78 trustees' administration of life insurance policies, subjects trustees in such instances
79 to an unwarranted greater risk of liability, and unnecessarily increases costs of trust
80 administration, relief from all of which would be appropriate. Therefore, the EPTPL
81 Council recommends adopting a new statute exempting trustees from certain duties
82 prescribed by the Ohio Trust Code, including Ohio's Uniform Prudent Investor Act,
83 with respect to life insurance policies held as trust assets.

84 The enactment of Ohio's Uniform Prudent Investor Act (ORC Chapter 5809)
85 codified and expanded the role and duties of Ohio trustees. Specifically, ORC §
86 5809.02 provides the default standard of care to which all trustees must adhere while
87 carrying out their fiduciary duties. This default standard reads as follows:

88 ***5809.02 Standard of Care – Portfolio Strategy – Risk and Return Objectives***

89 (A) *A trustee shall invest and manage trust assets as a prudent investor would, by*
90 *considering the purposes, terms, distribution requirements, and other circumstances*
91 *of the trust. In satisfying this requirement, the trustee shall exercise reasonable*
92 *care, skill, and caution.*

93 (B) *A trustee shall make a reasonable effort to verify facts relevant to the investment*
94 *and management of trust assets.*

95 (C) *A trustee's investment and management decisions respecting individual trust assets*
96 *shall not be evaluated in isolation but in the context of the trust portfolio as a whole*
97 *and as part of an overall investment strategy having risk and return objectives*
98 *reasonably suited to the trust.*

99 (D) *Among circumstances that a trustee shall consider in investing and managing*
100 *trust assets are the following as are relevant to the trust or its beneficiaries:*

101 (1) *The general economic conditions;*

102 (2) *The possible effect of inflation or deflation;*

103 (3) *The expected tax consequences of investment decisions or strategies;*

104 (4) *The role that each investment or course of action plays within the overall*
105 *trust portfolio, which may include financial assets, interests in closely held*
106 *enterprises, tangible and intangible personal property, and real property;*

107 (5) *The expected total return from income and appreciation of capital;*

- 108 (6) *Other resources of the beneficiaries;*
- 109 (7) *Needs for liquidity, regularity of income, and preservation or appreciation*
110 *of capital;*
- 111 (8) *An asset's special relationship or special value, if any, to the purposes of*
112 *the trust or to one or more of the beneficiaries.*

113 In examining the foregoing statute from the perspective of the ubiquitous traditional
114 irrevocable life insurance trust (a trust whose assets consist primarily of life insurance
115 contracts intended to exempt the death benefits of which from federal estate tax), the
116 EPTPL Council determined that such trustees would be required to engage in a more
117 involved and at times unnecessary annual review process that diverges from long-
118 standing trust administration practices. For instance, in addition to the intended
119 duties of sending annual *Crummey* notices to trust beneficiaries to avoid adverse gift
120 tax consequences and paying the required policy premiums, the standard of ORC
121 § 5809.02 potentially requires trustees of such trusts to perform at least the following
122 duties:

- 123 1. Determine whether investment of trust assets primarily, or often
124 solely, in life insurance policies violates the duty of investment
125 diversification.
- 126 2. Determine whether the duty of diversification required at a
127 minimum multiple life insurance policies rather than one sole
128 policy, and at a maximum whether non-life insurance assets must
129 also be included as trust investments;
- 130 3. Determine whether the policy or policies held in the trust were, and
131 continued to remain, proper investments, even though the trustee
132 was directed by the settlor to acquire such policy(ies);
- 133 4. Determine what to do when the settlor fails to properly fund the
134 trust to pay the current premium; e.g., borrow cash value to pay the
135 premium, surrender or partially surrender the policy, convert to
136 paid-up insurance, use other trust assets to pay the premium, reduce
137 the death benefit, etc.
- 138 5. Review and ensure that any given policy's cash balance was
139 properly allocated and invested;
- 140 6. Ensure that the insurance company of each policy is and remains
141 financially stable enough to satisfy its claim obligations now and in
142 the future;
- 143 7. Determine whether the policy(ies) in the trust should be exchanged
144 for new polices that might offer the same or similar death benefit at

145 a lower cost after accounting for acquisition expenses, surrender
146 charges, and potential loss of cash value; and

147 8. Review the health of the insured and make any necessary
148 adjustments based on sudden declines or improvements.

149 These duties, and the increased liability they bring, threaten the overall utility of
150 traditional irrevocable life insurance trusts (“ILITs). Often non-institutional third
151 parties serve as ILIT trustees. In most instances such trustees lack the knowledge,
152 training and resources to fulfill the above duties, which are normally not even desired
153 by the settlor of the trust, or will become overwhelmed if they serve as trustee of
154 multiple ILITs. Institutional trustees, who have the sophistication to appreciate such
155 duties, must charge significant fees to be adequately compensated for performing
156 such (normally not desired) duties, or for taking the risk of the settlor being
157 uncooperative in allowing the trustee to perform them at all. The unfortunate and
158 foreseeable result is that ILIT administration is costly, risky and impractical, thus
159 giving informed potential trustees pause before accepting the role of trustee, and
160 unformed trustees a minefield of potential liability to navigate.

161 Although some relief from these problems theoretically could lie in ILIT trustees
162 delegating review and analysis duties to third parties pursuant to R.C. § 5808.07, or
163 relying on R.C. § 5809.02’s standard as written in hopes that an ILIT’s unique
164 characteristics would absolve the trustee from liability for failure to diversify, that
165 still leaves it to practitioners to draft around or out of Chapter 5809’s requirements as
166 permitted by R.C. § 5809.01(C). A far more practical solution, and the one
167 recommended by the EPTPL Council, is to enact a “savings statute” that specifically
168 exempts trustees from certain duties with regard to life insurance policies held as
169 trust assets, without concern as to whether such trust was an “ILIT”. The drafter of
170 the trust would be free to modify the limited trustee duties under the savings statute if
171 greater duties were desired.

172 As of the date of this Report, the EPTPL Council is aware of ten other states that
173 have enacted such “savings” legislation that limits to varying degrees the duties owed
174 by trustees with respect to life insurance policies held as trust assets, and limits the
175 liability of such trustees to the trust beneficiaries and others due to the limitation on
176 such duties. Although each state’s legislation varies, there are several common
177 aspects: all apply automatically without election, and almost all provide that the
178 holding of certain life insurance policies are exempt from the trustee’s otherwise
179 required duties of investment diversification and suitability, and the determination as
180 to whether or not to exercise any available policy options. Attached to this Report as
181 Exhibit B is a chart comparing each state’s statute in terms of when the statute
182 applies, which policies fall within the statute’s scope, what specific acts of the ILIT
183 trustee are protected from liability, and whether the statute protects the trustee from
184 liability to beneficiaries for loss with respect to a policy.

185 After reviewing the statutes passed by the other states, the EPTPL Council
186 recommends the adoption of ORC 5809.03.01 attached as Exhibit A. With respect
187 to the proposed new statute, the EPTPL Council makes the following comments:

188 1. The EPTPL Council has determined that the statute works better as
189 a part of the Ohio Uniform Prudent Investor Act (Chapter 5809)
190 than as a part of the Specific Powers of Trustee (ORC §5808.16).

191 2. The EPTPL Council has determined that the statute should only
192 apply to the insurance policies in the trust, not the underlying assets
193 comprising the cash value or funding of the policies, so there is no
194 extension of the relief from trustee duties with respect to such
195 underlying policy assets under the statute.

196 3. The EPTPL Council has determined that it is advisable to provide
197 relief from the duty to pay premiums in subdivision (A)(3), but
198 only if the trustee does not hold sufficient cash or readily
199 marketable assets with which to pay the premiums, or other
200 sufficient assets which were designated by the settlor or transferor
201 to be used for the purpose of premium payment.

202 4. Finally, the EPTPL Council has determined that the statute should
203 specify that relief from liability should only apply in the absence of
204 fraud.

Comparison of Various States' ILIT Trustee Liability Statutes

<u>Provision</u>	<u>AL</u>	<u>DL</u>	<u>MD</u>	<u>ND</u>	<u>PA</u>	<u>SC</u>	<u>TN</u>	<u>VA</u>	<u>WV</u>	<u>WY</u>	<u>#</u>
Applies automatically	X	X	X	X	X	X	X	X ¹	X	X	10
Except as otherwise provided in the trust instrument			X			X	X		X	X	5
Applies to trusts in existence prior to the statute	X		X	X	?	X	?	X ¹			7
Applies to trusts in existence prior to the statute if Trustee gives notice		X							X ²	X	3
Applies to any policy								X			1
Any policy contributed by settlor	X										1
Any policy purchased upon settlor's request	X										1
Does not apply to replacement policy purchased by Trustee				X							
Policy on settlor's life		X	X	X	X	X	X			X	7
Policy on settlor's spouse		X	X	X	X	X	X			X	7
Policy on settlor's children			X	X		X	X				4
Policy on settlor's grandchildren			X	X			X				3
Policy on settlor's parents				X		X	X				3
Trustee may											
- acquire		X	X	X	X	X	X	X	X	X	9
- retain	X	X	X	X	X		X	X	X	X	9
- own			X	X			X				3
the policy without regard to											
- lack of diversification	X	X	X	X	X	X	X	X	X	X	10
- the terms and conditions of the policy	X						X				2
- whether the policy is or remains a proper investment		X	X	X	X	X	X	X	X	X	9
- financial strength or changed thereto of the life ins. Company		X			X		X			X	4
- determination of whether to exercise any policy option available		X	X	X		X	X	X ³	X	X	8
- change in health or financial condition of the insureds		X								X	2
- exercise nonforfeiture provisions available in policy					X						1
"Trustee not liable to any beneficiary for loss"	X	X		X		X	X		X		6

¹ Only if acquired by gift - otherwise language must be included in trust instrument

² And settlor does not object w/i 60 days

³ Except those essential to the continuation of the life insurance

205 **EXHIBIT B**

206 **§5808.18 Trustee’s powers to distribute trust principal in further trust.**

207 (A) Unless the trust instrument expressly provides otherwise and subject to the
208 limitations set forth in this section:

209 (1) A trustee of a trust (the “first trust”) who has absolute power under the
210 terms of the first trust to make distributions of principal to one or more current
211 beneficiaries, may exercise the power by distributing all or any part of the principal
212 subject to the power, and all or any part of any income that is not otherwise currently
213 required to be distributed, to the trustee of another trust (the “second trust”) that is for the
214 benefit of one or more current beneficiaries of the first trust. The second trust may be a
215 trust under the same trust instrument or under a different governing instrument, including
216 a governing instrument created by the trustee of the first trust. A trustee of the first trust
217 who is authorized to make distributions to the trustee of a second trust pursuant to the
218 provisions of this division (A) may do so at any time, whether or not the trustee of the
219 first trust would otherwise have made a distribution at such time to, or for the benefit of,
220 any beneficiary pursuant to the terms of the first trust.

221 (2) In determining whether the trustee has absolute power to make
222 distributions of principal to any current beneficiary and the identity of the current
223 beneficiaries, the following provisions shall apply:

224 (a) An absolute power to distribute principal shall include any power
225 to make distributions of principal that is not limited by reasonably definite standards or
226 ascertainable standards, whether or not the word “absolute” is used.

227 (b) A power to make distributions of principal for purposes such as
228 best interests, welfare, comfort or happiness, or words of similar import, when not
229 otherwise limited by reasonably definite or ascertainable standards, shall constitute an
230 absolute power not limited by reasonably definite standards or ascertainable standards,
231 regardless of any requirement to take into account other resources of the current
232 beneficiary or beneficiaries to whom such distributions may be made.

233 (c) If the current beneficiaries of the first trust are defined, in whole or
234 in part, as a class of persons, such class shall include any person who falls within the
235 class of persons after the distribution to the second trust.

236 (d) A power to make distributions “for the benefit of” a beneficiary
237 shall be considered a power to make distributions “to” that beneficiary.

238 (3) If property is distributed pursuant to the authority described in this
239 division (A), the governing instrument for the second trust may, without limitation:

240 (a) grant a power of appointment to one or more of the beneficiaries
241 for whose benefit the property was so distributed, including a power to appoint trust
242 property to the power holder, the power holder’s creditors, the power holder’s estate, the

243 creditors of the power holder's estate or any other person, whether or not such person is a
244 beneficiary of the first trust or the second trust, and

245 _____ (b) _____ provide that, at a time or upon an event specified in such governing
246 instrument, the remaining trust property shall thereafter be held for the benefit of the
247 beneficiaries of the first trust upon terms and conditions that are substantially identical to
248 the terms and conditions of the trust instrument for the first trust, except that any current
249 beneficiary or beneficiaries for whose benefit the property could have been, but was not,
250 so distributed may be excluded.

251 _____ (c) _____ For purposes of this paragraph (3):

252 _____ (i) _____ the phrase "terms and conditions" shall refer only to those
253 terms and conditions which govern the interests of the beneficiaries; and

254 _____ (ii) _____ charitable organizations that are not expressly designated
255 in the first trust to receive distributions but to whom the trustee of the first trust may, in
256 the discretion of the trustee (or in the discretion of any other person directing the trustee
257 and acting in a fiduciary capacity), at any time make a distribution shall be
258 considered beneficiaries of the first trust.

259 (B) _____ Unless the trust instrument expressly provides otherwise and subject to the
260 limitations set forth in this section, a trustee of a trust (the "first trust") who has authority,
261 other than absolute power as described in division (A) of this section, under the terms of
262 the first trust to make current distributions of principal to one or more current
263 beneficiaries may exercise the power by distributing all or any part of the principal
264 subject to the power, and all or any part of any income that is not otherwise required to be
265 distributed, to the trustee of another trust (the "second trust"). The second trust may be a
266 trust under the same trust instrument or under a different governing instrument, including
267 a governing instrument created by the trustee of the first trust. This power may be
268 exercised whether or not there is a current need to distribute trust principal under any
269 standard contained in the first trust. The exercise of a trustee's power under this division
270 (B) shall be valid only if the governing instrument for the second trust does not materially
271 change the interests of the beneficiaries of the first trust. For purposes of this division
272 (B), a power to make distributions "for the benefit of" a beneficiary shall be considered a
273 power to make distributions "to" that beneficiary.

274 (C) _____ The exercise of the power to distribute to a second trust under either
275 division (A) or (B) of this section shall be subject to the following additional limitations
276 in this division (C).

277 (1) _____ The distribution to the trustee of the second trust shall not result in the
278 reduction, limitation or modification of any beneficiary's (a) current right to a mandatory
279 distribution of income or principal of the first trust, (b) current mandatory annuity or
280 unitrust interest in the property of the first trust, or (c) right annually to withdraw a
281 percentage of the value of the first trust or a specified dollar amount, provided that such
282 mandatory or annual right has come into effect with respect to the beneficiary. For

283 purposes of the foregoing sentence, a beneficiary's current right to a distribution of
284 income shall not be considered to be mandatory if, under the terms of the first trust,
285 current distributions of principal may be made to any person other than such current
286 beneficiary.

287 (2) If any transfer to the first trust qualified (or, without regard to the
288 provisions of division (A) or (B) of this section, would have qualified) for a marital or
289 charitable deduction, for federal income, gift or estate tax purposes under the Internal
290 Revenue Code of 1986, as amended, or for purposes of any state income, gift, estate or
291 inheritance tax, the governing instrument for the second trust may not include or omit any
292 term which, if included in or omitted from the trust instrument for the first trust, would
293 have prevented the first trust from qualifying for such deduction, or would have reduced
294 the amount of such deduction, under the same provisions of the Internal Revenue Code of
295 1986, as amended, or under the same provisions of the applicable state law with respect
296 to which the transfer to the first trust so qualified.

297 (3) If any transfer to the first trust has (or, without regard to the provisions of
298 division (A) or (B) of this section, would have) been treated as a gift qualifying for the
299 exclusion from gift tax described in Section 2503(b) of the Internal Revenue Code of
300 1986, as amended, the governing instrument for the second trust may not include or omit
301 any term which, if included in or omitted from the trust instrument for the first trust,
302 would have prevented gifts to the first trust from so qualifying under the same provisions
303 of Section 2503 of the Internal Revenue Code of 1986, as amended, with respect to which
304 the transfer to the first trust so qualified.

305 (4) If the assets of the first trust include any shares of stock in an S
306 corporation as defined in Section 1361 of the Internal Revenue Code of 1986, as
307 amended, and the first trust is (or, without regard to the provisions of division (A) or (B)
308 of this section, would be) a permitted shareholder under the provisions of said Section
309 1361, the governing instrument for the second trust may not include or omit any term
310 which, if included in or omitted from the trust instrument for the first trust, would have
311 prevented the first trust from qualifying as a permitted shareholder of shares of stock in
312 an S corporation under the same provisions of such Section with respect to which the first
313 trust so qualified.

314 (5) If any transfer to the first trust has (or, without regard to the provisions of
315 division (A) or (B) of this section, would have) been treated as a gift qualifying for a zero
316 inclusion ratio for purposes of the federal generation skipping transfer tax under the
317 provisions of Section 2642(c) of the Internal Revenue Code of 1986, as amended, the
318 governing instrument for the second trust may not include or omit any term which, if
319 included in or omitted from the trust instrument for the first trust, would have prevented
320 the transfer to the first trust from so qualifying.

321 (6) If the assets of the first trust include any interest subject to the minimum
322 distribution rules of Section 401(a)(9) of the Internal Revenue Code of 1986, as amended,
323 and the Treasury Regulations issued thereunder, the governing instrument for the second
324 trust may not include or omit any term which, if included in or omitted from the trust

325 instrument for the first trust, would have shortened the maximum distribution period
326 otherwise allowable under said Section 401(a)(9) and Treasury Regulations with respect
327 to such interest under the first trust.

328 (7) If the trust instrument for the first trust expressly indicates an intention to
329 qualify for any federal or state tax deduction, exemption, exclusion or other tax benefit
330 not otherwise listed in the provisions of this division (C) (any such deduction, exemption,
331 exclusion or other tax benefit being referred to in this subdivision as a “tax benefit”), or if
332 the terms of the trust instrument for the first trust are clearly designed to enable the first
333 trust to qualify for a tax benefit, and if the first trust did qualify (or, without regard to the
334 provisions of division (A) or (B) of this section, would have qualified) for any tax
335 benefit, the governing instrument for the second trust may not include or omit any term
336 which, if included in or omitted from the trust instrument for the first trust, would have
337 prevented the first trust from qualifying for such tax benefit.

338 (8) The distribution to the trustee of the second trust shall not result in any of
339 the following:

340 (a) an increase in, or a change in the method of determining, the
341 compensation of the trustee unless such increase in, or change in the method of
342 determining, the compensation of the trustee has been consented to by all of the persons,
343 other than the trustee of the second trust, who are current beneficiaries of the second trust
344 or is approved by the court having jurisdiction over the trust; provided, however, that an
345 increase in compensation arising solely because the duration of the second trust is longer
346 than the duration of the first trust shall not be considered an increase in, or change in the
347 method of determining, the compensation of the trustee; or

348 (b) a reduction in the standard of care applicable to the actions of the
349 trustee of the first trust or the second trust or an exoneration of the trustee of the first trust
350 or the second trust from liability for actions taken in bad faith or with willful disregard of
351 the duties of either such trustee, including by increasing the extent to which such trustee
352 is entitled to indemnification from the trust, as provided in the terms of the first trust and
353 under Ohio law.

354 (D) The exercise of the power to distribute trust income or principal to the
355 trustee of a second trust under either division (A) or (B) of this section shall be by an
356 instrument in writing, signed by the trustee and filed with the records of the first trust.

357 (E) The exercise of the power to distribute trust income or principal to the
358 trustee of a second trust under either division (A) or (B) of this section shall not be
359 exercised in a manner contrary to the provisions of Revised Code Section 2131.08 to the
360 extent applicable to the first trust, taking into account the provisions of Revised Code
361 Section 2131.09(B) to the extent applicable to the first trust. Solely for purposes of
362 applying the provisions of Revised Code Sections 2131.08 and 2131.09(B) under this
363 division (E), the exercise of the power to distribute trust income or principal to the trustee
364 of a second trust under either division (A) or (B) of this section shall be considered the

365 exercise of a power of appointment other than a general power of appointment within the
366 meaning of Revised Code Section 2131.09(B)(4).

367 (F) The trustee of the first trust shall notify all current beneficiaries of the first
368 trust, in writing, of the intended distribution to the trustee of a second trust pursuant to
369 division (A) or (B) of this section no later than thirty (30) days prior to such distribution.
370 If all current beneficiaries waive the thirty (30) day period from receipt of notice, the
371 distribution may be made prior to the expiration of thirty (30) days from the date upon
372 which notice has been given to all current beneficiaries. The trustee's giving of notice of
373 an intended distribution under this division (F) and the waiver or expiration of the thirty
374 (30) day period from receipt of notice shall not limit the right of any beneficiary to object
375 to the exercise of the trustee's power to distribute trust principal as provided in other
376 applicable provisions of the Ohio Trust Code.

377 (G) A person other than the trustee who has a power, exercisable in a fiduciary
378 capacity, to direct the trustee to make distributions of principal which, if held by the
379 trustee, would be described in either division (A) or (B) of this section, may exercise such
380 power by directing the trustee to make a distribution under division (A) or (B) of this
381 section, whichever of such divisions would be applicable if such person were the trustee,
382 subject to all of the limitations of this section that apply to a trustee's exercise of such
383 power.

384 (H) The exercise of the power to distribute trust income or principal to the
385 trustee of a second trust under division (A) or (B) is not prohibited by a spendthrift clause
386 or by a provision in the trust instrument that prohibits amendment or revocation of the
387 trust.

388 (I) For purposes of Revised Code section 5808.14(A), a trustee who acts
389 reasonably and in good faith in exercising the power to distribute trust income or
390 principal to the trustee of a second trust in accordance with division (A) or (B) of this
391 section, shall be presumed to have acted in accordance with the terms and purposes of the
392 trust and the interests of the beneficiaries.

393 (J) Nothing in this section is intended to create or imply a duty to exercise a
394 power to distribute income or principal of a trust and no inference of impropriety shall
395 arise as a result of a trustee not exercising the power to make distributions to the trustee
396 of a second trust under division (A) or (B) of this section.

397 (K) If the first trust is a testamentary trust established under the will of a
398 testator who was domiciled in Ohio at the time of the testator's death, the power to
399 distribute trust income or principal to the trustee of a second trust under either division
400 (A) or (B) of this section may be exercised only if approved by the court, if any, having
401 jurisdiction over the testamentary trust.

402 (L) Divisions (A) and (B) of this section shall not apply to either of the
403 following:

404 (1) any trust during any period that the trust may be revoked or amended by
405 its settlor; or

406 (2) any trustee with respect to any portion of the first trust as to which such
407 trustee is also the settlor.

408 (M) If, and to the extent that, a trustee makes distributions pursuant to division
409 (A) or (B) of this section to the trustee of a second trust, then for purposes of section
410 5801.01(W) of the Revised Code, the governing instrument for the second trust shall be
411 deemed to be an amendment of the trust instrument signed by the settlor of the first trust,
412 even if such governing instrument is signed by a person other than such settlor.

413 (L) The provisions of this section shall not be construed to limit the power of
414 any trustee to distribute trust property in further trust, whether such power arises under
415 the terms of the trust instrument, under any other section of this Title, under another
416 statute or under common law. The terms of a trust instrument may confer upon the
417 trustee the power, or upon any other person acting in a fiduciary capacity the power to
418 direct the trustee, to make distributions in further trust that are broader or more limited
419 than, or that conflict with, the provisions of this section, may provide for different
420 requirements for notice to beneficiaries of the trust of the trustee's exercise of such
421 power, may waive any requirement of notice to the beneficiaries of the exercise of such
422 power and may otherwise include such terms and conditions governing the distribution in
423 further trust as the settlor of the trust shall determine.

424 (M) Division (A) of this section is intended to be a codification of the common
425 law of the State of Ohio in effect prior to the enactment of this section and shall apply to
426 distributions, whenever made, from any trust governed by Ohio law or having its
427 principal place of administration in Ohio, whether such trust was created before, on or
428 after the date of enactment. Division (B) of this section shall apply to distributions made
429 on or after the date of enactment from any trust governed by Ohio law or having its
430 principal place of administration in Ohio, whether such trust was created before, on or
431 after the date of enactment.

432

433 **Also amend Revised Code Section 5801.10(I) by adding a new paragraph (4) at the**
434 **end of that section as follows:**

435 (I) Nothing in this section affects any of the following:

436

437 (4) The power of the trustee to make distributions pursuant to
438 the provisions of section 5808.18 of the Revised Code.

439 **Rationale for Proposal:**

440 **Overview and Background**

441 The power of a trustee to exercise its discretion to make distributions of principal of a
442 trust to one or more current beneficiaries by distributing some or all of that principal to
443 another trust for the benefit of one or more of those current beneficiaries is commonly
444 referred to as “decanting.” This is a power that arguably exists under certain
445 circumstances at common law and there has been a movement around the country in the
446 last few years to codify such power and to expand the scope of it to facilitate its use. To
447 date, the following states have enacted so-called “decanting” statutes: New York,
448 Tennessee, Delaware, Alaska, South Dakota, Florida, New Hampshire, North Carolina,
449 Arizona. To our knowledge Missouri, South Carolina and Minnesota are each presently
450 working on such a statute and no doubt there are other states considering it. New York
451 first enacted its statute in 1992, primarily to facilitate planning with older trusts that
452 predate, and thus are not subject to, the federal generation skipping transfer tax. The
453 original New York statute recites that it is intended to be a codification of common law.
454 Florida’s statute is also intended to be a codification of common law. In New York, there
455 is a current proposal being prepared to revise its statute to make its applicability broader.

456 To our knowledge there is no case law in Ohio on the issue of whether a trustee’s
457 discretion to distribute trust principal may be exercised in further trust. Florida has long
458 had common law set forth in *Phipps v. Palm Beach Trust*, 142 Fla. 782 (1940) that
459 establishes the principle that a trustee with absolute discretion to distribute the principal
460 of a trust among a class of beneficiaries has the authority to distribute principal of the
461 trust into a new trust for one or more of those beneficiaries. New York also has case law
462 predating its statute that supports this principle. *See Matter of Spear*, 553 N.Y.S.2d 985
463 (Surrogate’s Ct. NY County 1990).

464 The assumption of the Estate Planning, Trust and Probate Section Council (the “Section
465 Council”) in proposing this statute is that the common law of Ohio would allow a trustee,
466 who has full discretion to distribute principal to a beneficiary or among a class of
467 beneficiaries, to make a distribution in further trust for the beneficiary or for one or more
468 members of the class of beneficiaries, without court approval or the consent of any
469 beneficiary, but subject to any applicable limitations on duration or vesting of interests in
470 trust and other limitations that would also be applicable to exercises of powers of
471 appointments.

472 One basis in common law for this assumption, some argue, is founded in the definition of
473 powers of appointment found in §11.1 of the Restatement 2d of Property (Donative
474 Transfers) (“Restatement 2d”) which provides “a power of appointment is authority,
475 other than as a incident of the beneficial ownership of property, to designate recipients of
476 beneficial interests in property.” Comment d. to that section specifically states that a
477 trustee’s unlimited discretionary power to make distributions to or for a beneficiary or a
478 group of beneficiaries is a power of appointment. The Restatement 2d further provides in
479 §19.3 that, absent a provision to the contrary in the instrument creating a power of
480 appointment, a power of appointment may be exercised in further trust for one or more
481 objects of the power. Under this analysis, all of the other principles governing, and
482 limitations on, exercises of powers of appointment would also apply to a trustee’s
483 exercise of its distribution power by distributing in further trust. Examples of such
484 principles and limitations are that a power may only be exercised in favor of objects of

485 the power and that the exercise of a power of appointment is valid only to the extent that
486 interests created by the power vest within any applicable perpetuities period. New
487 York’s current statute, in fact, treats a trustee’s broad discretion to distribute as a limited
488 power of appointment.

489 Using common law principles governing powers of appointment as a basis for a common
490 law decanting power is called into question by the upcoming publication of the
491 Restatement 3d of Property (Wills and Other Donative Transfers) (“Restatement 3d”)
492 which will provide at §17.1 that “a power of appointment is a power that enables the
493 donee of the power, acting in a non-fiduciary capacity, to designate recipients of the
494 beneficial ownership interests in the appointive property.” Comment g to that section
495 purports to distinguish fiduciary powers because they are subject to fiduciary standards,
496 while acknowledging that a fiduciary distribution power is subject to other principles
497 governing exercises of powers such as those mentioned above. The power of a trustee
498 with absolute discretion to distribute principal to a beneficiary or beneficiaries is,
499 nonetheless, always subject at least to the standard of good faith and usually to the
500 standard of reasonableness. In contrast, no good faith or reasonableness standards govern
501 the exercise of a limited power of appointment held in a non-fiduciary capacity.

502 Because of the lack of specific case authority in Ohio for the principle that the power to
503 distribute in further trust is inherent in a trustee’s broad discretionary power to make
504 distributions, it would be helpful to have statutory authority that specifically
505 acknowledges the trustee’s inherent authority to make such distributions. In addition, the
506 Section Council is proposing provisions making the statutory power of the trustee
507 somewhat broader than common law would allow while including in the statute, certain
508 limitations on the exercise of the power that will prevent the existence of the power from
509 having adverse tax consequences.

510 **Statutes in Other States**

511 The statutes of New York (currently) and Florida permit decanting only if the trustee has
512 absolute discretion to make principal distributions to the beneficiary or beneficiaries.
513 Florida’s statute uses the term absolute power, but treats standards such as “welfare,”
514 “comfort,” “best interests,” “happiness” and the like as giving the requisite amount of
515 discretion. Other states’ statutes, to a varying degree, allow a trustee whose discretion is
516 subject to standards (even strict ascertainable standards relating to the maintenance,
517 support, health and education of the beneficiaries), to make distributions in further trust,
518 in some cases with very little limitation. The Section Council has reviewed all of the
519 statutes passed to date and also the proposed revisions to the New York statute. We have
520 taken a fairly conservative approach relative to these statutes, have tried to incorporate
521 provisions that we believe are important and, we think, have improved upon many of the
522 provisions in the other statutes.

523 **Issues Addressed in the Proposed Section**

524 A number of issues have been considered in preparing the proposed statute. One
525 overriding goal is to allow trust to trust distributions at least to the extent we believe

526 those distributions would be permitted by common law. As a corollary to that principle,
527 the statute should validate prior trust to trust distributions that are consistent with the
528 principles of the statute or common law. We have attempted to achieve this by a recital
529 to the effect that the relevant parts of the statute are intended to be an enactment of the
530 common law of Ohio and shall apply to distributions, whenever made, from any trust
531 governed by Ohio law, whenever created.

532 The proposed statute also allows a trustee whose discretion is limited by standards to
533 make distributions in further trust, but only if such distributions do not materially change
534 the interests of the beneficiaries in the first trust. This limitation was considered by the
535 Section Council to be necessary to maintain the settlor's intent where specific standards
536 for distribution are included in the terms of the trust.

537 The proposed statute puts limitations on the exercise the so-called decanting power that
538 will insure that the power will not prevent trusts from qualifying for certain tax benefits
539 under federal gift, estate, generation-skipping transfer and income tax laws or similar tax
540 laws of Ohio or other states whose taxes may apply to a trust. In addition, it prohibits the
541 exercise of the power from increasing the trustee's compensation or lowering the
542 trustee's standard of care with respect to the trust, from postponing the vesting of
543 interests beyond the vesting period required under the original trust and from expanding
544 the class of beneficiaries to whom the trustee may make distribution.

545 **Conforming Amendment to Section 5801.10(I)**

546 An amendment to section 5801.10(I) is proposed to make it clear that the provisions in
547 that section regarding private settlement agreements do not affect the powers of the
548 trustee granted in the proposed new section 5808.18.

590 **EXHIBIT D**

591 **§ 2107.52. Antilapse; failure of testamentary provision**

592 (A) As used in this section:

593 (1) "Class member" includes an individual who fails to survive the testator
594 but who would have taken under a devise in the form of a class gift had the individual
595 survived the testator.

596 (2) "Descendant of a grandparent," as used in division (B) of this section,
597 means an individual who qualifies as a descendant of a grandparent of the testator or of
598 the donor of a power of appointment under the (i) rules of construction applicable to a
599 class gift created in the testator's will if the devise or exercise of the power is in the form
600 of a class gift or (ii) rules for intestate succession if the devise or exercise of the power is
601 not in the form of a class gift.

602 (3) "Descendants," as used in the phrase "surviving descendants" of a
603 deceased devisee or class member in divisions (B)(1) and (2) of this section, mean the

604 descendants of a deceased devisee or class member who would take under a class gift
605 created in the testator's will.

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

608 (5) "Devisee" includes (i) a class member if the devise is in the form of a
609 class gift, (ii) an individual or class member who was deceased at the time the testator
610 executed the testator's will as well as an individual or class member who was then living
611 but who failed to survive the testator, and (iii) an appointee under a power of appointment
612 exercised by the testator's will.

613 (6) "Per stirpes" means that the shares of the descendants of a devisee who
614 does not survive the testator are determined in the same way they would have been
615 determined under section 2105.06(A) of the Revised Code if the devisee had died
616 intestate and unmarried on the date of the testator's death.

617 (7) "Stepchild" means a child of the surviving, deceased, or former spouse
618 of the testator or of the donor of a power of appointment, and not of the testator or donor.

619 (8) "Surviving," in the phrase "surviving devisees" or "surviving
620 descendants," means devisees or descendants who survived the testator by at least one
621 hundred twenty hours.

622 (9) "Testator" includes the donee of a power of appointment if the power
623 is exercised in the testator's will.

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

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

632 (2) If the devise is in the form of a class gift, other than a devise to "issue,"
633 "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a
634 class described by language of similar import, a substitute gift is created in the surviving
635 descendants of any deceased devisee. The property to which the devisees would have
636 been entitled had all of them survived the testator passes to the surviving devisees and the
637 surviving descendants of the deceased devisees. Each surviving devisee takes the share to
638 which the surviving devisee would have been entitled had the deceased devisees survived
639 the testator. Each deceased devisee's surviving descendants who are substituted for the
640 deceased devisee take, per stirpes, the share to which the deceased devisee would have
641 been entitled had the deceased devisee survived the testator. For the purposes of this
642 paragraph, "deceased devisee" means a class member who failed to survive the testator

643 by at least one hundred twenty hours and left one or more surviving descendants.

644 (C) In the application of this section, each of the following apply:

645 (1) Attaching the word “surviving” or “living” to a devise, such as a gift
646 “to my surviving (or living) children,” is not, in the absence of other language in the will
647 or other evidence to the contrary, a sufficient indication of intent to negate the application
648 of division (B) of this section.

649 (2) Attaching other words of survivorship to a devise, such as “to my
650 child, if my child survives me,” is, in the absence of other language in the will or other
651 evidence to the contrary, a sufficient indication of intent to negate the application of
652 division (B) of this section.

653 (3) A residuary clause is not a sufficient indication of an intent to negate
654 the application of division (B) of this section unless the will specifically provides that,
655 upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass
656 under the residuary clause.

657 (4) Unless the language creating a power of appointment expressly
658 excludes the substitution of the descendants of an appointee for the appointee, a surviving
659 descendant of a deceased appointee of a power of appointment can be substituted for the
660 appointee under this section, whether or not the descendant is an object of the power.

661 (D) Except as provided in divisions (A) through (C) of this section, each of the
662 following apply:

663 (1) A devise, other than a residuary devise, that fails for any reason
664 becomes a part of the residue.

665 (2) If the residue is devised to two or more persons, the share of a
666 residuary devisee that fails for any reason passes to the other residuary devisee, or to
667 other residuary devisees in proportion to the interest of each in the remaining part of the
668 residue.

669 (3) If a residuary devise fails for any reason in its entirety, the residue
670 passes by intestate succession.

671 (E) This section applies only to outright devises and appointments. Devises and
672 appointments in trust, including to a testamentary trust, are subject to section ____ of the
673 Revised Code.

674 (F) The amendment to this section applies to wills of decedents who die after
675 ____ [insert effective date of statute].

676 The existing statute in the Ohio Revised Code that is recommend to be replaced in its
677 entirety reads as follows:

678 **§2107.52 Death of devisee or legatee.**

679 ~~—(A) As used in this section, "relative" means an individual who is related to a testator~~
680 ~~by consanguinity and an heir at law designated pursuant to section 2105.15 of the~~
681 ~~Revised Code.~~

682 ~~—(B) Unless a contrary intention is manifested in the will, if a devise of real property or~~
683 ~~a bequest of personal property is made to a relative of a testator and the relative was dead~~
684 ~~at the time the will was made or dies after that time, leaving issue surviving the testator,~~
685 ~~those issue shall take by representation the devised or bequeathed property as the devisee~~
686 ~~or legatee would have done if he had survived the testator. If the testator devised or~~
687 ~~bequeathed a residuary estate or the entire estate after debts, other general or specific~~
688 ~~devises and bequests, or an interest less than a fee or absolute ownership to that devisee~~
689 ~~or legatee and relatives of the testator and if that devisee or legatee leaves no issue, the~~
690 ~~estate devised or bequeathed shall vest in the other devisees or legatees surviving the~~
691 ~~testator in such proportions as the testamentary share of each devisee or legatee in the~~
692 ~~devised or bequeathed property bears to the total of the shares of all of the surviving~~
693 ~~devisees or legatees, unless a different disposition is made or required by the will.~~

694 **Rationale for proposal:**

695 Ohio courts have interpreted the existing Will anti-lapse statute differently based on the
696 determination of whether a “contrary intention is manifested in the Will.” The proposed
697 revised statute, specifically section C, provides additional guidance to the courts in
698 interpreting the Will and applying this anti-lapse statute. As a rule of construction, the
699 scrivener of the Will can clearly draft around the application of the statute by including
700 specific language regarding the distribution of certain assets if the intended beneficiary
701 does not survive the testator. Further, with the addition of the proposed anti-lapse statute
702 applicable to trusts, that statute must be more complex to apply to more circumstances
703 than present with Wills, so this proposed revised Will statute conforms with the new
704 proposed trust statute.

705 **Sec. _____ . Survivorship with respect to future interests under terms of trust;**
706 **substitute takers**

707 (A) As used in this section:

708 (1) “Beneficiary” means the beneficiary of a future interest and includes a
709 class member if the future interest is in the form of a class gift.

710 (2) “Class member” includes an individual who fails to survive the
711 distribution date by at least one hundred twenty hours but who would have taken under a
712 future interest in the form of a class gift had the individual survived the distribution date
713 by at least one hundred twenty hours.

714 (3) “Descendant of a grandparent of the transferor” means a person who
715 would qualify as a descendant of a grandparent of the transferor under the rules of

716 construction that would be applicable to a class gift under the transferor's will to the
717 transferor's grandparent's descendants.

718 (4) "Descendants," in the phrase "surviving descendants" of a deceased
719 beneficiary or class member in divisions (B)(2)(a) and (B)(2)(b) of this section, mean the
720 descendants of a deceased beneficiary or class member who would take under a class gift
721 created in the trust.

722 (5) "Distribution date," with respect to a future interest, means the time
723 when the future interest is to take effect in possession or enjoyment. The distribution date
724 need not occur at the beginning or end of a calendar day, but can occur at a time during
725 the course of a day.

726 (6) "Future interest" includes an alternative future interest and a future
727 interest in the form of a class gift.

728 (7) "Future interest under the terms of a trust" means a future interest that
729 was created by a transfer creating a trust or to an existing trust, or by an exercise of a
730 power of appointment to an existing trust, directing the continuance of an existing trust,
731 designating a beneficiary of an existing trust, or creating a trust.

732 (8) "Per stirpes" means that the shares of the descendants of a beneficiary
733 who does not survive the distribution date by at least one hundred twenty hours are
734 determined in the same way they would have been determined under section 2105.06(A)
735 of the Revised Code if the beneficiary had died intestate and unmarried on the
736 distribution date.

737 (9) "Revocable trust" means a trust that was revocable immediately before
738 the settlor's death by the settlor alone or by the settlor with the consent of any person
739 other than a person holding an adverse interest. A trust's characterization as revocable is
740 not affected by the settlor's lack of capacity to exercise the power of revocation,
741 regardless of whether an agent of the settlor under a power of attorney, or a guardian of
742 the person or estate of the settlor, was serving.

743 (10) "Stepchild" means a child of the surviving, deceased, or former
744 spouse of the transferor and not of the transferor.

745 (11) "Surviving," in the phrase "surviving beneficiaries" or "surviving
746 descendants" in divisions (B)(2)(a) and (B)(2)(b) of this section, means beneficiaries or
747 descendants who survived the distribution date by at least one hundred twenty hours.

748 (12) "Transferor" means (i) the donor and donee of a power of
749 appointment, if the future interest was in property as a result of the exercise of a power of
750 appointment; (ii) the testator, if the future interest was devised by will; or (iii) the settlor,
751 if the future interest was conveyed by inter vivos trust.

752 (B) Unless a contrary intent appears in the instrument creating a future interest
753 under the terms of a trust, each of the following applies:

754 (1) A future interest under the terms of a trust is contingent on the
755 beneficiary's surviving the distribution date by at least one hundred twenty hours.

756 (2) If a beneficiary of a future interest under the terms of a trust does not
757 survive the distribution date by at least one hundred twenty hours, and if the beneficiary
758 was a grandparent of the transferor, a descendant of a grandparent of the transferor, or a
759 stepchild of the transferor, the following apply:

760 (a) If the future interest is not in the form of a class gift and the deceased
761 beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's
762 surviving descendants. They take, per stirpes, the property to which the beneficiary
763 would have been entitled had the beneficiary survived the distribution date by at least one
764 hundred twenty hours.

765 (b) If the future interest is in the form of a class gift, other than a future
766 interest to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives,"
767 or "family," or a class described by language of similar import, a substitute gift is created
768 in the deceased beneficiary's or beneficiaries' surviving descendants. The property to
769 which the beneficiaries would have been entitled had all of them survived the distribution
770 date by at least one hundred twenty hours passes to the surviving beneficiaries and the
771 surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the
772 share to which the surviving beneficiary would have been entitled had the deceased
773 beneficiaries survived the distribution date by at least one hundred twenty hours. Each
774 deceased beneficiary's surviving descendants who are substituted for the deceased
775 beneficiary take, per stirpes, the share to which the deceased beneficiary would have been
776 entitled had the deceased beneficiary survived the distribution date by at least one
777 hundred twenty hours. For the purposes of this paragraph, "deceased beneficiary" means
778 a class member who failed to survive the distribution date by at least one hundred twenty
779 hours and who left one or more surviving descendants.

780 (C) In the application of this section, each of the following apply:

781 (1) Describing a class of beneficiaries as "surviving" or "living," without
782 specifying when the beneficiaries must be surviving or living, such as a gift "for my
783 spouse for life, then to my surviving (or living) children," is not, in the absence of other
784 language in the trust instrument or other evidence to the contrary, a sufficient indication
785 of intent to negate the application of division (B)(2) of this section.

786 (2) Subject to division (C)(1) of this section, attaching words of
787 survivorship to a future interest under the terms of a trust, such as (i) "for my spouse for
788 life, then to my children who survive my spouse," or (ii) "for my spouse for life, then to
789 my then living children" is, in the absence of other language in the trust instrument or
790 other evidence to the contrary, a sufficient indication of intent to negate the application of
791 division (B)(2) of this section. Words of survivorship include words of survivorship that
792 relate to the distribution date or to an earlier or an unspecified time, whether those words
793 of survivorship are expressed in condition-precedent, condition subsequent, or any other
794 form.

795 (3) A residuary clause in a will is not a sufficient indication of an intent
796 contrary to the application of this section, whether or not the will specifically provides
797 that lapsed or failed devises are to pass under the residuary clause. A residuary clause in a
798 revocable trust instrument is not a sufficient indication of an intent contrary to the
799 application of this section unless the distribution date is the date of the settlor's death and
800 the revocable trust instrument specifically provides that, upon lapse or failure, the
801 nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

802 (D) If, after the application of divisions (B) and (C) of this section, there is no
803 surviving taker, and a contrary intent does not appear in the instrument creating the future
804 interest, the property passes in the following order:

805 (1) If the future interest was created by the exercise of a power of
806 appointment, the property passes under the donor's gift-in-default clause, if any, which
807 clause is treated as creating a future interest under the terms of a trust.

808 (2) If no taker is produced by the application of division (D)(1) of this
809 section and the trust was created in a nonresiduary devise in the transferor's will or in a
810 codicil to the transferor's will, the property passes under the residuary clause in the
811 transferor's will. For purposes of this division (D)(2), the residuary clause is treated as
812 creating a future interest under the terms of a trust.

813 (3) If no taker is produced by the application of division (D)(1) or division
814 (D)(2) of this section, the transferor is deceased, and the trust was created in a
815 nonresiduary gift under the terms of a revocable trust of the transferor, the property
816 passes under the residuary clause in the transferor's revocable trust instrument. For
817 purposes of this division (D)(3), the residuary clause in the transferor's revocable trust
818 instrument is treated as creating a future interest under the terms of a trust.

819 (4) If no taker is produced by the application of divisions (D)(1) through
820 (D)(3) of this section, the property passes to those persons and in such shares as would
821 succeed to the transferor's intestate estate under the intestate succession law of the
822 transferor's domicile if the transferor died on the distribution date. Notwithstanding
823 division (A)(12) of this section, for purposes of this division (D)(4), if the future interest
824 was created by the exercise of a power of appointment, "transferor" means the donor if
825 the power was a nongeneral power or the donee if the power was a general power.

826 (E) This section applies to all trusts that became irrevocable on or after
827 [insert effective date of statute]. This section does not apply to any trust that was
828 irrevocable before [insert effective date of statute], even if property was added to
829 the trust on or after [insert effective date of statute].

830 **Rationale for proposal:**

831 Trusts have become more and more prevalent part of the average Ohio resident's estate
832 plan. As a testamentary instrument to distribute assets at death, it has become a common
833 "will-substitute." Consequently, it is appropriate to make the same anti-lapse rule of
834 construction apply to trusts as applies to Wills. It is believed that most Ohio attorneys

835 already think that anti-lapse rules apply to deceased trust beneficiaries in the same
836 manner as in Wills. A majority of Ohio residents would prefer that a gift to a child would
837 be distributed to the child's children (the trust settlor's grandchildren) should the child
838 die before his parent. Under current Ohio common law, the trust gift would be distributed
839 to the deceased child's probate estate and distributed pursuant to the terms of the child's
840 Will, if any, otherwise pursuant to the intestacy statute, which includes the deceased
841 child's surviving spouse. Again, most trust settlers would prefer to have assets distributed
842 to descendants rather than sons-in-law and daughters-in-law.

843 Unlike a Will that applies at the death of a testator, a trust can create a future interest to
844 benefit someone after the death of another beneficiary. For example, if a husband creates
845 a trust for the lifetime benefit of his surviving wife, then upon the wife's death to his
846 three children in equal shares. If all three children are alive when their father dies, but one
847 of the children dies during their father's wife's life, then most trust settlers would prefer
848 to have one-third of the trust distributed to the deceased child's children (settlor's
849 grandchildren) rather than to the deceased child's probate estate. That probate estate may
850 pass to a spouse who has long since remarried.

851 However, because the current Ohio common law treats that remainder interest in the child
852 as a vested remainder, the proposed trust anti-lapse statute cannot divest those deceased
853 beneficiary's rights for irrevocable trusts that exist prior to the enactment of the statute.
854 Consequently, there will be trusts that exist after the statute for which trustees must
855 distribute to the deceased trust beneficiary's estate. The third and final proposed statute
856 adds discretionary authority to a trustee to make distributions to the deceased trust
857 beneficiary's identifiable heirs.

858 **Sec. 5808.17 Distribution upon termination**

859 (A) Upon termination or partial termination of a trust, the trustee may send to the
860 beneficiaries a proposal for distribution. The right of any beneficiary to object to the
861 proposed distribution terminates if the beneficiary does not notify the trustee of an
862 objection within thirty days after the proposal was sent but only if the proposal informed
863 the beneficiary of the right to object and of the time allowed for objection.

864 (B) Upon the occurrence of an event terminating or partially terminating a trust,
865 the trustee shall proceed expeditiously to distribute the trust property to the persons
866 entitled to it, subject to the right of the trustee to retain a reasonable reserve for the
867 payment of debts, expenses, and taxes.

868 (C) A release by a beneficiary of a trustee from liability for breach of trust is
869 invalid to the extent that it was induced by improper conduct of the trustee or that the
870 beneficiary, at the time of the release, did not know of the beneficiary's rights or of the
871 material facts relating to the breach.

872 (D) If a beneficiary who was entitled to receive a distribution is deceased, the
873 beneficiary's death did not terminate the beneficiary's right to receive the distribution,
874 and an administration of the beneficiary's estate is open, the trustee shall make the

875 distribution to the personal representative of the beneficiary's estate. If a beneficiary who
876 was entitled to receive a distribution is deceased, the beneficiary's death did not terminate
877 the beneficiary's right to receive the distribution, and an administration of the
878 beneficiary's estate is not open, the trustee may, without liability, make the distribution
879 directly to the beneficiary's heirs or devisees, without requiring the opening or re-
880 opening of estate administration proceedings, if the trustee does not know of an adverse
881 claim to the distribution and one of the following applies:

882 (1) The beneficiary's estate was administered as an intestate estate in the
883 jurisdiction in which the beneficiary was domiciled at death and the trustee (i) distributes
884 the personal property included in the distribution to the person or persons who were
885 determined to be the heirs of the beneficiary in that administration, in the same manner
886 that the personal property would have been distributed if it had been part of the
887 beneficiary's intestate estate, and (ii) distributes the real property included in the
888 distribution to the person or persons the trustee reasonably determines were the
889 beneficiary's heirs under the statutes of descent and distribution, in effect at the time of
890 the beneficiary's death, of the jurisdiction or jurisdictions in which the real property is
891 located.

892 (2) The beneficiary's estate was administered as a testate estate in the
893 jurisdiction in which the deceased beneficiary was domiciled at death and the trustee (i)
894 distributes the personal property included in the distribution to the residuary devisee or
895 devisees under the beneficiary's will, in the same manner that the personal property
896 would have been distributed in that administration if it had been part of the beneficiary's
897 testate estate, and (ii) distributes the real property included in the distribution to the
898 person or persons the trustee reasonably determines would have received the real
899 property under the law of the jurisdiction or jurisdictions in which the real property is
900 located.

901 (3) Neither division (D)(1) nor division (D)(2) of this section applies, the
902 beneficiary's death occurred at least six months before the trustee makes the distribution,
903 and each of the following applies:

904 (a) the trustee determines that the beneficiary had created a trust
905 during the beneficiary's life that remained in existence at the beneficiary's death;

906 (b) the beneficiary had executed a will that the trustee reasonably
907 determines would have been admitted to probate if it had been offered for probate;

908 (c) the beneficiary's will described in division (D)(3)(b) of this
909 section devised the residue of the beneficiary's estate to the trustee of the trust described
910 in division (D)(3)(a) of this section to be held under the terms of that trust; and

911 (d) the trustee makes the distribution to the trustee of the trust
912 described in division (D)(3)(a) of this section.

913 (4) Neither division (D)(1), division (D)(2), nor division (D)(3) of this
914 section applies, the beneficiary's death occurred at least six months before the trustee

915 makes the distribution, and each of the following applies:

916 (a) the trustee, exercising reasonable diligence, determines that an
917 administration of the beneficiary's estate has not been commenced in the jurisdiction in
918 which the trustee reasonably determines the beneficiary was domiciled at death;

919 (b) the trustee does not know of an administration of the
920 beneficiary's estate having been commenced in any other jurisdiction;

921 (c) the trustee does not know of a purported last will and testament
922 of the beneficiary; and

923 (d) the trustee (i) distributes the personal property included in the
924 distribution to the person or persons the trustee reasonably determines were the
925 beneficiary's heirs under the statutes of descent and distribution, in effect at the time of
926 the beneficiary's death, of the jurisdiction in which the trustee reasonably determines the
927 beneficiary was domiciled at death and (ii) distributes the real property included in the
928 distribution to the person or persons the trustee reasonably determines were the
929 beneficiary's heirs under the statutes of descent and distribution, in effect at the time of
930 the beneficiary's death, of the jurisdiction or jurisdictions in which the real property is
931 located.

932 (E) The trustee's protection from liability for making distributions under division
933 (D) of this section shall have no effect on the ability of third parties to pursue claims
934 against the recipients of such distributions.

935 **Rationale for Proposal:**

936 Most Ohio residents want to avoid probate administration at their death, so trusts are
937 becoming the primary instrument for testamentary distribution of assets. The above
938 proposed statute applies to trusts that become irrevocable after the date the statute is
939 enacted. Therefore, there needs to be a statute that applies to the irrevocable trusts that
940 exist prior to the effective date of the statute.

941 Exhibit C above is the proposed amendment to add new divisions (D) and (E) to trust
942 distribution statute (R.C. §5808.17) to allow trustees to make distributions for a deceased
943 beneficiary directly to his or her estate beneficiaries, if an estate administration is not
944 open, instead of requiring the opening or reopening of an administration of the
945 beneficiary's estate.

946 If there is an open administration of the beneficiary's estate, the trustee must make the
947 distribution to the personal representative of the estate.

948 If there is not an open estate administration, the trustee may safely make the distribution
949 to the heirs or devisees of the deceased beneficiary as long as the trustee does not know
950 of an adverse claim, and subdivision (D)(1), (D)(2), (D)(3), or (D)(4) applies.

951 Divisions (D)(1) and (2) address cases in which the deceased beneficiary's estate had

952 been administered as an intestate estate ((D)(1)) or as a testate estate ((D)(2)).

953 Division (D)(3) addresses cases in which there was a funded revocable trust with a pour
954 over will that did not need to be probated.

955 Division (D)(4) addresses cases in which there has not been an administration of the
956 deceased beneficiary's estate and the trustee does not know of a purported will of the
957 deceased beneficiary. Both divisions (D)(3) and (4) require that six months have elapsed
958 since the beneficiary's death before the trustee safely can make the distribution to the
959 trustee of the funded revocable trust or on the basis of the beneficiary having died
960 intestate without his or her estate having been administered.

3009 **EXHIBIT F**

3010 **§ 5810.14 Transferring Personal Property to the Trustee of a Trust**

3011 (A) Personal property may be transferred to a trustee as authorized by section 5804.01 of
3012 the Revised Code by executing the necessary written instrument identifying the personal
3013 property transferred and identifying the trustee by name, followed by the designation
3014 trustee.

3015 (B) The future transfer of personal property to a trustee as a designated beneficiary
3016 (including but not limited to a transfer on death designation or payable on death
3017 designation), participation in a joint ownership arrangement or any other contractual
3018 transfer arrangement, made by executing the necessary written instrument identifying the
3019 trustee by name, followed by the designation trustee shall be deemed to be a transfer of
3020 the personal property to the trustee serving at the time of the future transfer. A
3021 certification of trust (under section 5810.13 of the Revised Code) may establish the
3022 identity of the trustee and any succession of trustees.

3023 (C) A written instrument transferring personal property to a trust or a written instrument
3024 providing for the future transfer of personal property to a trust, by identifying the trust
3025 without identifying the trustee, shall be deemed to be a transfer of the personal property
3026 to the trustee serving at the time of transfer. A certification of trust (under section
3027 5810.13 of the Revised Code) may establish the identity of the trustee and any succession
3028 of trustees.

3029 (D) An instrument of transfer under this section may but is not required to contain
3030 additional identifying information including the trust name, the name of the settler, the
3031 date of trust creation and the date of applicable trust amendments.

3032 (E) Nothing in this section is intended to affect the operation of section 5301.03 of the
3033 Revised Code.

3034 (F) Nothing in this section is intended to affect or be in conflict with Revised Code
3035 Section 5301.071 (E) "Validity of instruments" which addresses transfers of real property
3036 to or from trusts and trustees.

3037 (G) This section is declarative of existing law.

3038 **§ 5301.071 Validity of instruments.**

3039 No instrument conveying real estate, or any interest therein, and of record in the
3040 office of the county recorder of the county within this state in which such real estate is
3041 situated shall be deemed defective nor shall the validity of such conveyance be affected
3042 because:

3043 (A) The dower interest of the spouse of any grantor was not specifically
3044 released but such spouse executed said instrument in the manner provided in Section
3045 5301.01 of the Revised Code.

3046 (B) The officer taking the acknowledgement of such instrument having an
3047 official seal did not affix such seal to the certificate of acknowledgement.

3048 (C) The certificate of acknowledgement is not on the same sheet of paper as
3049 the instrument.

3050 (D) The executor, administrator, guardian, assignee, or trustee making such
3051 instrument signed or acknowledged the same individually instead of in his representative
3052 or official capacity.

3053 (E) The grantor or grantee of the instrument is a trust rather than the trustee or
3054 trustees of the trust, provided that the trust named as grantor or grantee has been duly
3055 created under the laws of the state of its existence at the time of the conveyance and a
3056 memorandum of trust complying with Section 5301.255 of the Revised Code and
3057 containing a description of the real property conveyed by such instrument is recorded in
3058 the office of the county recorder in which the instrument of conveyance is recorded.
3059 Upon compliance with the preceding sentence, a conveyance to a trust shall be deemed to
3060 be a conveyance to the trustee or trustees of the trust in furtherance of the manifest
3061 intention of the parties. This subsection (E) shall be given retroactive effect to the fullest
3062 extent permitted under Article II, Section 28, of the Ohio Constitution; provided,
3063 however, that this subsection (E) shall not be given retroactive or curative effect if to do
3064 so would invalidate or supersede any instrument conveying real estate, or any interest
3065 therein, recorded in the office of the county recorder in which such real estate is situated
3066 prior to the date of recording of a curative memorandum of trust or the effective date of
3067 this statute, whichever event occurs last.

3068 **Rationale for Proposal:**

3069 Currently, many Ohio citizens utilize revocable and irrevocable trust agreements as part
3070 of the estate planning process. Attorneys and others recommend that persons who create
3071 such trusts should do some or all of the following:

- 3072 1. Re-register personal property from individual names into the names of the
3073 trustees of trusts;
- 3074 2. Create new deeds wherein the Grantees would be the trustees of one or
3075 more trusts; and
- 3076 3. Create beneficiary designations for insurance proceeds, retirement plan
3077 proceeds and payable on death (“POD and TOD”) arrangements naming a
3078 trust as a beneficiary.

3079 There is currently no statutory guidance regarding the proper way to register an
3080 asset into the name of the trustees of a trust or to designate a trust as beneficiary. By way
3081 of example, some practitioners have prepared deeds transferring real estate from an
3082 individual to the “Tom Smith Trust” and not to: “Tom Smith, Trustee of the Tom Smith
3083 Trust”. Pursuant to Ohio common law, any transfer to a “trust” and not to the “trustee of

3084 the trust” is void. Many recorded deeds transferring real estate to a “trust” and not to a
3085 “trustee” are currently void and substantial cost may be required to correct these deeds.
3086 Further, there is no statutory guidance regarding the re-registration of accounts at
3087 financial institutions, brokerage firms or other “custodians” from an individual’s name to
3088 the trustee of that individual’s trust.

3089 In order to provide clarity regarding the naming of trustees and/or trusts as current
3090 registered owners or future owners of personal property, the Estate Planning, Trust and
3091 Probate Law Council is proposing new Revised Code Section 5810.14 which will then
3092 provide a safe harbor for practitioners and the citizens of Ohio to use when implementing
3093 their estate plans by funding their trusts. New Section 5810.14 incorporates the use of
3094 the Certification of Trust currently provided by Revised Code Section 5810.13 to cure
3095 any confusion which may exist as the result of registering intangible personal property
3096 (stock certificates, brokerage accounts, CDs, accounts at financial institutions, etc.) into
3097 the name of the “trust” instead of the “trustees” of the trust. The language of the
3098 proposed statute also clarifies the manner in which the identity of the “currently-serving”
3099 trustee of a trust referenced in a beneficiary designation or other similar instrument is
3100 proven by utilizing a Certification of Trust already included in the “Ohio Trust Code” at
3101 Revised Code Section 5810.13. Frequently, the person or entity serving as trustee at the
3102 time such a beneficiary designation is created will be different than when the payment is
3103 made upon the death of the insured, contributor to an IRA, participant in a profit-sharing
3104 plan, etc. Prospectively, new Section 5810.14 will provide guidance to financial
3105 institutions, attorneys, financial planners and Ohio citizens by providing a statutorily
3106 suggested method of registration of assets into “trust” form and efficiently identifying the
3107 proper “then-serving trustee”.

3108 New Revised Code Section 5301.071(E) incorporates the use of a Memorandum
3109 of Trust (currently sanctioned by Ohio Law) to allow deeds which would otherwise be
3110 void (pursuant to the common law) to become cured and valid upon filing of such a
3111 Memorandum with the County Recorder’s Office where the previously “void” deed was
3112 recorded. As a result, an efficient and relatively low-cost procedure which is not
3113 currently statutorily recognized will be provided to Ohio citizens and their advisors to
3114 replace the inefficient and relatively expensive procedure involving costly title searches,
3115 re-opening of estates of grantors who have died and similar expensive processes. In
3116 addition, the provisions of new Revised Code Section 5301.071(E) also provide a
3117 statutorily sanctioned procedure for preparing deeds wherein the intended grantee is
3118 meant to be a “trustee”.

3119 If the proposed legislation is approved and enacted, the process of estate planning and the
3120 funding of trusts for Ohio citizens will be made more efficient, more uniform and less
3121 costly.

EPTPL Section Report to the OSBA Council of Delegates for Spring 2011

Report of the Estate Planning, Trust and Probate Law Section

1 *To the Council of Delegates:*

2 The Joint Committee on the Ohio Trust Code of the EPTPL Section of the OSBA and the
3 LLR Committee of the Ohio Bankers League has received several suggestions for
4 improvements in that Code, has met several times by conference call to discuss them, and
5 unanimously (both private practice lawyers and lawyer trust-bankers) has recommended
6 enactment of the OTC improvements below. The OBL LLR Committee has approved
7 them, the EPTPL Section Council has approved them, and the last step in the approval
8 process is their approval by the OSBA Council of Delegates, which we hereby request
9 and recommend the following:

10 A. A proposal to amend RC 5801.10 to clarify that private settlement agreements
11 can be entered into by some, but not all, parties and will still be binding against
12 those parties. Further, a proposal to amend RC 5810.09 and 5801.10 to clarify that
13 private agreements among parties that do not follow the provisions of 5801.10 are
14 still valid.

15 B. A proposal to amend R.C. 5801.10 to ensure that it contains the same standard
16 to determine “the material purpose of the trust” and is consistent with the standard
17 found in the statute on trust modification (R.C. 5804.11(B).

18 C. A proposal to amend R.C. 5804.11 to codify the rule of the NCCUSL
19 Comment that the court may consider extrinsic evidence of the intent of the
20 settlor.

21 Respectfully submitted,

22 **William J. McGraw**, *Troy*
23 Chair

24 **EXHIBIT A**

25 **5801.10 Agreement among interested parties regarding trust matters.**

26 ***

27 (B) The parties to an agreement under this section shall be ~~all~~any two or more of the
28 following, or their representatives under the representation provisions of Chapter 5803 of
29 the Revised Code, except that only the settlor and any trustee are required to be parties to
30 an amendment of any revocable trust:

31 ***

32 (E) Any agreement entered into under this section that complies with the requirements of

33 division (C) of this section shall be final and binding on ~~the trustee, the settlor if living,~~
34 ~~all beneficiaries, creditors who are~~ parties to the agreement or represented by parties to
35 the agreement, whether by reason of Chapter 5803 or otherwise, and their heirs,
36 successors, and assigns, but shall have no effect on any trustee, settlor, beneficiary or
37 creditor who is not a party to the agreement or represented by a party to the agreement .

38 ***

39 (N) This section does not prohibit some or all of the persons who could enter into an
40 agreement under this section from entering into agreements that are not described in this
41 section and that are governed by other law, including common law. Nothing in this
42 section shall limit or negate any consents, releases or ratifications, whether under Section
43 5810.09 of the Revised Code or otherwise, relating to any agreement described in this
44 section or governed by other law.

45 **5810.09 Beneficiary consent to conduct constituting breach.**

46 A trustee is not liable to a beneficiary for breach of trust if the beneficiary or the
47 beneficiary's representative under the representation provisions of Chapter 5803 of the
48 Revised Code consented to the conduct constituting the breach, released the trustee from
49 liability for the breach, or ratified the transaction constituting the breach, unless the
50 consent, release, or ratification of the beneficiary or representative was induced by
51 improper conduct of the trustee or, at the time of the consent, release, or ratification, the
52 beneficiary or representative did not know of the beneficiary's rights or of the material
53 facts relating to the breach.

54 This section applies regardless of whether the conduct being consented to, released or
55 ratified constitutes one or more breaches of fiduciary duty, violates one or more
56 provisions of the Revised Code, or is taken without required court approval.

57 **Rationale for proposal**

58 **Permit limited or non-PSAs.** The Committee recommends permitting limited Private
59 Settlement Agreements (where not all beneficiaries join), and clarifying that non-PSA
60 arrangements that by consent, release or ratification function similarly to PSAs are also
61 permitted.

62 **EXHIBIT B**

63 **5801.10 Agreement among interested parties regarding trust matters.**

64 ***

65 (C) . . . Matters that may be resolved by private settlement agreement include, but are not
66 limited to, all of the following:

67 ***

68 (4) Modifying the trust instrument, if the modification is not inconsistent with any
69 ~~dominant~~ material purpose [or objective] of the trust.

70 **Rationale for proposal**

71 **Correct a reference.** The Committee recommends correction of a cross-reference in the
72 PSA statute (RC 5801.10) that is intended to track the statute on trust modification (RC
73 5804.11(B) by amending the former to track the latter:

74 **EXHIBIT C**

75 **R.C. 5804.11 Termination or modification of noncharitable irrevocable trust.**

76 ***

77 (B) A noncharitable irrevocable trust may be terminated upon consent of all of the
78 beneficiaries if the court concludes that continuance of the trust is not necessary to
79 achieve any material purpose of the trust. A noncharitable irrevocable trust may be
80 modified, but not to remove or replace the trustee, upon consent of all of the beneficiaries
81 if the court concludes that modification is not inconsistent with a material purpose of the
82 trust. A spendthrift provision in the terms of the trust may, but is not presumed to,
83 constitute a material purpose of the trust. In determining what constitutes a material
84 purpose of a trust a court may, but is not required to, consider extrinsic evidence
85 indicating a settlor's intent at the time the instrument was executed.

86 **Rationale for proposal**

87 **Use of extrinsic evidence.** The Committee recommends an addition to the statute on
88 trust termination or modification (RC 5804.11) to codify the rule of the NCCUSL
89 Comment that the court may consider extrinsic evidence of the intent of the settler.

Chapter 7: Report of EPTPL Section on Tax Gap Bill

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MEMORANDUM

from: **J. Michael Cooney**

January 26, 2011

TO: Ohio State Bar Association
Estate Planning, Trust & Probate Law Section Council

RE: Estate Tax Formula Clause Bill

You will recall that at our January meeting in 2010, the Section Council supported a bill designed to clarify confusion resulting from the effect of the repeal of the federal estate tax effective December 31, 2009, on allocation of assets based on formula clauses. Our 2010 proposed legislation had three parts:

1. Expand existing authority regarding private settlement agreements to allow the interested parties to reach agreement on the application of these estate tax-based formulas provided all trustees and all beneficiaries agree.
2. Clarify existing authority for courts to modify a trust to specifically cover estate tax formulas.
3. Add a rule of construction interpreting federal estate tax formulas as if the person died on December 31, 2009, unless (i) the Will or trust specifically addresses the application of the formula in the event of repeal; or (ii) all necessary parties agree otherwise through a private settlement agreement (see 1. above); or (iii) a court directs otherwise (see 2. above).

Because the federal estate tax was re-enacted in late December 2010, for 2010 decedents, with an opt-out election, our Committee has considered the best approach going forward. There were a number of views represented in the Committee. After discussion, the Committee recommends not providing any rule of construction to cover the situation in which an estate elects out of application of the 2010 federal estate tax, but continuing the effort to expand private settlement agreement authority and to clarify the authority for court modification.

Our Committee was divided on the right course of action. The following is a summary of our discussion

1. Private Settlement Agreement Expansion. The opposition to this within the Committee was based on the view that because of potential federal gift tax consequences, this may be a trap for the unwary, as compared with a judicial decision on the meaning of the terms. A majority of the Committee believes that it is, nevertheless, desirable. If intent can be discerned from the document, broadening authority for private settlement agreements may allow deviation from settlor's intent, which could give rise to a gift tax issue.

January 26, 2011

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2. Judicial Authority. With respect to judicial authority, the Committee ultimately was unanimous in support of retaining that language, although a concern was expressed regarding the danger of being too specific with respect to the authority.

3. Rule on Effect of Election on Allocation. With respect to a rule regarding the effect of an election out of estate tax on allocation of assets under a formula using federal estate tax terms, there was significant support within the Committee for a rule of construction to the effect that an election out of estate tax and into carry-over basis would have no effect on the division of assets pursuant to a formula using federal estate tax terms. However, the Committee decided to drop any such provision. Experience over the past 12 months has made us realize more fully that there are a multitude of formulas in use, some of which are clear and some of which are not. The view of those who felt that trying to address all situations, no matter what the formula, by a clear and simple rule could lead to more problems than it solved, carried the day within the Committee. The Section Council needs to consider this issue itself. A copy of the draft statute is attached.

/plb

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Chapter 8: EPTPL Section Report to the OSBA Council of Delegates for Fall 2015

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As amended by the Council of Delegates November 7, 2003

REPORT OF THE ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

To the Council of Delegates:

The Estate Planning, Trust and Probate Law (EPTPL) Section hereby respectfully requests your favorable consideration of eight legislative proposals, which may be summarized as follows:

- A. To add a new division (M)(3) to Section 5801.10 of the *Ohio Revised Code* to clarify that the section does not bar agreements allowed by Section 109.232 of the *Ohio Revised Code*.
- B. To add Section 5802.04 of the *Ohio Revised Code* to clarify how litigation concerning inter vivos trusts is commenced.
- C. To amend Section 5803.02 of the *Ohio Revised Code* to allow a holder of a limited power of appointment to represent the objects of the power to the same extent that the holder of a general power of appointment may currently represent the objects of the power or the takers in default of exercise of the power.

-
- D. To add a new division (F) to Section 5804.02 of the *Ohio Revised Code* to allow an agent under a power of attorney to create a trust for the principal under certain circumstances and subject to limitations.

65 **PROPOSAL A: TO AMEND OHIO LAW TO CLARIFY THAT AGREEMENTS**
66 **ALLOWED BY ONE SECTION OF THE REVISED CODE ARE NOT BARRED BY**
67 **ANOTHER.**

68
69 **Summary and Rationale for Proposal**
70

71 Section 109.232 of the *Ohio Revised Code* permits agreements correcting charitable
72 remainder trusts that are similar to the private settlement agreements authorized by Section
73 5801.10 of the *Ohio Revised Code*. However, agreements under Chapter 109 generally
74 cannot meet the requirements for agreements under Chapter 5801 of the *Ohio Revised Code*,
75 because Section 5801.10(M) of the *Ohio Revised Code* bars most agreements involving
76 charitable interests. It is therefore uncertain whether agreements under Chapter 109 are thus
77 barred by Chapter 5801. The Section Council proposes to clarify that agreements under
78 Chapter 109 are permissible by adding new subdivision (3) to division (M) of Section
79 5801.10 of the *Ohio Revised Code* as shown in redlined format below.
80

81 **Text of the Proposal**
82

83 5801.10

84
85 (M) Subject to divisions (B)(2) and (C)(7) of this section, this section does not apply to
86 any of the following:

87
88 * * *

89
90 (3) An agreement pursuant to section 109.232 of the *Ohio Revised Code*.
91

92 **PROPOSAL B: TO AMEND OHIO LAW TO CLARIFY HOW LITIGATION**
93 **CONCERNING INTER VIVOS TRUSTS IS COMMENCED.**
94

95 **Summary and Rationale for Proposal**
96

97 Uncertainty has been expressed, particularly among court staff, how litigation
98 involving inter vivos trusts may be commenced. Section 5801.08(D) of the *Ohio Revised*
99 *Code* provides that notice of judicial proceedings must be given as provided in the Civil
100 Rules, but does not speak specifically of commencement of an action. The Section Council
101 therefore proposes to supply the omission by enactment of a new section of the *Ohio Revised*
102 *Code* as shown in redlined format below.
103

104 **Text of the Proposal**

105

106 [5802.04](#)

107

108 [An action brought under the *Ohio Trust Code* is a civil action, subject to the Ohio](#)
109 [Rules of Civil Procedure, and unless it involves a testamentary or other trust that already is](#)
110 [subject to court supervision, is commenced by filing a complaint.](#)

111

112 **PROPOSAL C: TO AMEND OHIO LAW TO ALLOW A HOLDER OF A LIMITED**
113 **POWER OF APPOINTMENT TO REPRESENT THE OBJECTS OF THE POWER**
114 **TO THE SAME EXTENT THAT THE HOLDER OF A GENERAL POWER OF**
115 **APPOINTMENT MAY CURRENTLY REPRESENT THE OBJECTS OF THE**
116 **POWER OR THE TAKERS IN DEFAULT OF EXERCISE OF THE POWER.**

117

118 **Summary and Rationale for Proposal**

119

120 Section 5803.02 of the *Ohio Revised Code* allows the holder of a general power of
121 appointment to represent and bind persons whose interests, as permissible appointees, takers
122 in default or otherwise are subject to the power (assuming no conflicting interests). To
123 facilitate settlement agreements and litigation, the Section Council proposes to extend
124 representation by also allowing the holder of a limited power of appointment to represent the
125 permissible appointees only. For example, the holder of a power to appoint property to
126 anyone except the holder, the holder's creditors, the holder's estate or creditors of the
127 holder's estate (a common tax-oriented power) would be able to represent any person except
128 the four exceptions to the power that are stated in its grant, avoiding the obvious issue of how
129 you sue or settle with almost the entire world. Takers in default under such powers would not
130 be represented by the holder. The Section Council thus proposes to amend 5803.02 of the
131 *Ohio Revised Code* as shown in redlined format below.

132

133 **Text of the Proposal**

134

135 5803.02

136

137 To the extent there is no conflict of interest between the holder of a general
138 testamentary power of appointment and the persons represented with respect to the particular
139 question or dispute, the holder may represent and bind persons whose interests, as
140 permissible appointees, takers in default or otherwise, are subject to the power. [To the extent](#)
141 [there is no conflict of interest between the holder of a limited testamentary power of](#)
142 [appointment or a presently exercisable limited power of appointment and the persons](#)
143 [represented with respect to the particular question or dispute, the holder may also represent](#)
144 [and bind persons whose interests as possible appointees are subject to the power.](#) The rights
145 of the holder of a presently exercisable general power of appointment are governed by
146 Section 5806.03 of the *Ohio Revised Code*.

147

148 **PROPOSAL D: TO AMEND OHIO LAW TO ALLOW AN AGENT UNDER A**
149 **POWER OF ATTORNEY TO CREATE A TRUST FOR THE PRINCIPAL UNDER**

150 **CERTAIN CIRCUMSTANCES AND SUBJECT TO LIMITATIONS.**

151

152 **Summary and Rationale for Proposal**

153

154 The new Ohio Uniform Power of Attorney Act provides in Sections 1337.42 and
155 1337.58 of the *Ohio Revised Code* that (under stated conditions) an agent may create a trust
156 for the principal. The *Ohio Trust Code* appears to make that impossible, by requiring for trust
157 creation under Sections 5804.02(A)(1) and (2) that the settlor is competent and intends to
158 create the trust. The Section Council would resolve the conflict by permitting trust creation,
159 an important planning device, subject to the existing safeguards in Sections 1337.42 and
160 1337.58 of the Revised Code. The Section Council thus proposes to amend Section 5804.02
161 of the *Ohio Revised Code* by adding a new division (F) as shown in redlined format below:

162

163 **Text of the Proposal**

164

165 5804.02

166

167 (F) An agent under a power of attorney may create a trust for the principal, whether or
168 not the principal has capacity to create the trust and indicates an intention to create
169 the trust, but only as provided in sections 1337.21 to 1337.64 of the *Ohio Revised*
170 *Code*, including sections 1337.42 and 1337.58 of the *Ohio Revised Code* and their
171 limitations on creation of trusts and on gifts of property of the principal and the duty
172 of the agent to attempt to preserve the principal's estate plan.

Chapter 9: EPTPL Section Reports to the Council of Delegates for Spring 2013 and Spring 2014

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EPTPL Section Report to the OSBA Council of Delegates for Spring 2013

74 **REPORT OF THE ESTATE PLANNING, TRUST AND PROBATE LAW SECTION**

75

76 *To the Council of Delegates:*

77

78 The Estate Planning, Trust and Probate Law (“EPTPL”) Section hereby
79 respectfully requests your favorable consideration of three legislative proposals. Those
80 three legislative proposals, the substance and rationale for each of which is described in
81 further detail below, may be summarized as follows:

82

83 1. To add new ORC § 2127.012 to facilitate the sale of real estate by a guardian
84 without a court-supervised land sale proceeding if all appropriate interested parties
85 provide written consent and the sale price is at least 80% of a recent, appraised value.

86

87 2. To amend ORC § 5302.23(B) and amend ORC § 5302.24 to provide that a “transfer
88 on death” (“TOD”) designation in favor of a titleholder’s spouse shall be revoked by
89 operation of law if the titleholder and such spouse are later divorced, or if they obtain a
90 dissolution or annulment of their marriage.

91

92 3. To amend various provisions of Ohio’s Parentage Act (ORC Chapter 3111), to
93 amend Ohio’s laws of inheritance with respect to after-born children by amending ORC §
94 2105.14 and ORC § 2107.34, and by adding new ORC § 5801.12, all with a view toward
95 accommodating so-called “assisted reproductive technologies” (“ART”) and updating Ohio
96 law to recognize and clarify the inheritance rights of children born as a result of ART.

97

98

Respectfully submitted,

99

Kevin G. Robertson, Cleveland
Chair

100

101

102

103

104

105

106 **PROPOSAL #1: TO AMEND OHIO LAW TO FACILITATE SALES OF LAND BY A**
107 **GUARDIAN WITHOUT RESORT TO LAND SALE PROCEEDINGS, PROVIDED**
108 **THAT INTERESTED PARTIES CONSENT AND THAT THE SALE PRICE IS AT**
109 **LEAST 80% OF APPRAISED VALUE**

110

111 **Summary and Rationale for Proposal**

112

113 Currently a guardian’s only option for selling real estate owned by the ward is to
114 implement a land sale proceeding under ORC § 2127.10. Land sale proceedings can be time
115 consuming, complicated and expensive. Administrators of decedent’s estates generally must
116 also file a land sale action in order to sell real property. However, there is a simplified method of
117 obtaining authority to sell real estate from a decedent’s estate. Under ORC § 2127.011, the heirs
118 of a decedent’s estate may consent to a sale if the consents are filed with the probate court, as
119 long as none of the heirs is a minor.

120 The proposed language of new ORC § 2127.012 would allow the option of selling real
121 estate from the guardianship estate by filing the same type of consents as in a decedent's estate.
122 Proposed ORC § 2127.012 is modeled after existing ORC § 2127.011 and requires consents by
123 the ward's next-of-kin who would otherwise be required to be notified of the sale in a land sale
124 proceeding. The consents must be filed with the probate court. Minimum selling price,
125 appraisement requirements and bonding requirements are included to protect the ward. If
126 enacted, ORC § 2127.012 will make it simpler for guardians to sell a ward's real estate, put
127 safeguards into place, and conserve the ward's assets by making the process simpler and less
128 expensive than a land sale proceeding.
129

130 **Text of the Proposal**

131
132 2127.012. (A) In addition to the other methods provided by law a guardian of the estate may sell
133 at public or private sale, grant options to sell, exchange, re-exchange, or otherwise dispose of any
134 parcel of real estate belonging to the estate at any time at prices and upon terms as are consistent
135 with this section and may execute and deliver deeds and other instruments of conveyance if all
136 the following conditions are met:
137

138 (1) The ward's spouse and all persons entitled to the next estate of inheritance from the
139 ward in the real property, give written consent to a power of sale for a particular parcel of real
140 estate or to a power of sale for all the real estate belonging to the estate. Each consent to a power
141 of sale provided for in this section shall be filed in the probate court.
142

143 (2) Any sale under a power of sale authorized pursuant to this section shall be made at a
144 price of at least eighty per cent of the appraised value, as set forth in an approved inventory if the
145 real estate was appraised within two years of the filing of the consents. If the value of the real
146 estate in an approved inventory was not determined by an appraisement, or the appraisement was
147 completed more than two years prior, the real property shall be appraised and a sale shall be
148 made at a price of at least eighty per cent of the appraised value.
149

150 (3) No power of sale provided for in this section is effective if the ward's spouse or any
151 next-of kin is a minor. No person may give the consent of the minor that is required by this
152 section.
153

154 (4) Upon filing consents under this section, the guardian shall execute such bond or
155 additional bond payable to the state in an amount that the court considers sufficient, having
156 regard to the amount of real property to be sold, its appraised value, the amount of the original
157 bond given by the guardian, and the distribution to be made of the proceeds arising from the sale.
158

159 (B) A ward's spouse who is the guardian of the estate may sell real estate to himself
160 pursuant to this section.
161
162
163
164
165

166 **PROPOSAL #2: TO AMEND OHIO LAW TO PROVIDE THAT REAL ESTATE**
167 **TRANSFER ON DEATH DESIGNATIONS IN FAVOR OF TITLEHOLDER’S SPOUSE**
168 **ARE REVOKED BY OPERATION OF LAW IN THE EVENT OF DIVORCE,**
169 **DISSOLUTION OR ANNULMENT**

170
171 **Summary and Rationale for Proposal**
172

173 The proposed statutory change to ORC § 5302.23(B) would automatically revoke a
174 transfer on death beneficiary designation, made by the owner for the owner’s spouse, if the
175 owner and his or her spouse are subsequently divorced, obtain a dissolution of the marriage, or
176 have the marriage annulled.
177

178 Currently, the statutes for transfer on death designations for real estate do not address this
179 issue. However, similar provisions addressing the effects of the termination of marriage on
180 spousal beneficiary designations or on ownership rights already exist in several different
181 contexts, including: wills (ORC § 2017.33(D)); beneficiary designations under life insurance
182 policies, annuities, POD accounts, IRA’s, employer death benefit plans, etc. (ORC §
183 5815.33(B)(1)); personal property held as joint tenants with rights of survivorship
184 (5315.34(A)(1); and real estate survivorship tenancy (ORC § 5302.20(C)(5)). The proposed
185 statutory language mirrors the language in these statutes and will produce results which are
186 consistent with other facets of asset transfer.
187

188 The automatic termination of a transfer on death beneficiary designation for a spouse in
189 the event of legal separation was also considered. However, of the four statutes cited above,
190 only one (wills) dealt with the effect of a legal separation. The Section decided not to
191 recommend an automatic termination of a spouse’s beneficiary designation in the event of a legal
192 separation for various reasons, including (1) the parties are still considered to be legally married
193 to one another, (2) legal separation is often used as an estate planning device to retain the marital
194 deduction, (3) title examiners would be burdened with looking at and interpreting the contents of
195 the legal separation document, and (4) if the parties intended to terminate the designation
196 because of the legal separation, they could file with the county recorder: (i) an affidavit of
197 termination, or (ii) a new transfer on death affidavit naming a different beneficiary.
198

199 If the proposal to add paragraph (12) to ORC § 5302.23(B) is enacted, this necessitates
200 some minor changes to ORC § 5302.24. Generally, ORC § 5302.24 as currently written states
201 that the new (12/28/09) statutes on transfer on death affidavits do not affect transfer on death
202 deeds and transfer on death beneficiary designations made under the old (pre-12/28/09) statutes.
203 This would make newly proposed ORC § 5302.23(B)(12) ineffective as to transfer on death
204 deeds and beneficiary designations executed and recorded prior to 12/28/09. Accordingly, in
205 order to make the newly proposed ORC § 5302.23(B) effective in all cases, the Section
206 recommends the modifications to ORC § 5302.24 as indicated.
207

208 **Text of the Proposal**
209

210 5302.23. Designating transfer on death beneficiary
211

212 * * *

213

214 (B) * * *

215

216 (12) If, after a transfer on death designation affidavit or a transfer on death deed is recorded
217 under which the owner's spouse is designated as a transfer on death beneficiary, the owner of the
218 real property subject to such affidavit or deed and such owner's spouse are divorced, obtain a
219 dissolution of the marriage, or have the marriage annulled, then the designation of the owner's
220 spouse as a transfer on death beneficiary under such instrument shall be terminated and the
221 spouse shall be deemed to have predeceased the owner of the real property.

222

223

224

225 5302.24. Affect of Revised Code sections 5302.22, 5302.222, and 5302.23

226

227 ~~Sections~~ Except as otherwise provided in section 5302.23(B)(12), sections 5302.22, 5302.222,
228 and 5302.23 of the Revised Code do not affect any deed that was executed and recorded prior to
229 the effective date of this section December 28, 2009, or any transfer on death beneficiary
230 designation made, pursuant to section 5302.22 of the Revised Code as it existed prior to the
231 effective date of this section December 28, 2009. If that deed or designation is valid on the day
232 prior to the effective date of this section December 28, 2009, the deed or designation continues to
233 be valid on and after the effective date of this section December 28, 2009. A grantee of that deed
234 need not execute a transfer on death designation affidavit that designates the same transfer on
235 death beneficiary or beneficiaries as in the deed unless the grantee chooses to do so.

236

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250 **PROPOSAL #3: TO AMEND OHIO LAW TO UPDATE THE PARENTAGE ACT, AND**
251 **RELEVANT PROBATE CODE AND TRUST CODE PROVISIONS, TO RECOGNIZE**
252 **AND CLARIFY INHERITANCE RIGHTS OF CHILDREN BORN AS A RESULT OF**
253 **ASSISTED REPRODUCTIVE TECHNOLOGIES (“ART”)**

254
255 **Summary and Rationale for Proposal**
256

257 Ohio’s law on the inheritance rights of children born using assisted reproductive
258 technologies or “ART” is very unclear for two reasons. The first reason is that the parentage
259 statute of ORC Chapter 3111 defines the parent/child relationship for only two types of
260 children born through ART, those born using non-spousal artificial insemination and those
261 born using donated embryos. The EPTPL Section Council (the “Council”) believes that the
262 parentage chapter needs to be a universal gamete statute that defines the parent/child
263 relationship for children born through any type of ART (“ART children”), including those
264 born using technologies that may be developed in the future.

265
266 The second reason is that the statutes governing intestacy, wills and trusts either do
267 not address (or do not clearly address) the inheritance rights of all ART children, including
268 those born posthumously. The changes to the parentage chapter should clarify the inheritance
269 rights of those ART children born during the lifetime of the intended parents. In essence, such
270 children will be treated like other children born without the use of ART. Changes to the
271 statutes governing the laws of intestacy, wills and trusts are therefore necessary to clarify the
272 inheritance rights of only those ART children born posthumously.

273
274 Below are explanations and text for each of the proposed statutory changes related to this
275 proposal.

276
277 **Part A - Explanation and Text**
278

279 ORC Section 3111.01(A) currently provides that ORC Sections 3111.01 to 3111.85
280 establish the parent and child relationship for Ohio law and confer and impose certain rights and
281 obligations in connection with such relationship. This cross-reference to ORC Section 3111.85
282 was not amended to reflect the adoption of either the artificial insemination statute of ORC
283 Sections 3111.86-96 or the embryo donation statute of ORC Section 3111.97. The proposed
284 statutory change expands the cross-reference in ORC Section 3111.01(A) from ORC Section
285 3111.85 to ORC Section 3111.97 to include these two new statutes. The Council feels that this
286 change is necessary since these additional sections clearly define the parent/child relationship
287 for some types of ART children and will (with the adoption of this proposal) define it for all
288 types of ART children.

289
290 3111.01 Parent and child relationship defined.

291
292 (A) As used in sections 3111.01 to ~~3111.85~~3111.97 of the Revised Code, “parent and child
293 relationship” means the legal relationship that exists between a child and the child’s natural or
294 adoptive parents and upon which those sections and any other provision of the Revised Code

295 confer or impose rights, privileges, duties, and obligations. The “parent and child
296 relationship” includes the mother and child relationship and the father and child relationship.

297

298 (B) The parent and child relationship extends equally to all children and all parents,
299 regardless of the marital status of the parents.

300

301 **Part B – Explanation and Text**

302

303 ORC Section 3111.88 currently contains the definitions used in Ohio’s artificial
304 insemination statute. These definitions address only one form of ART, namely non- spousal
305 artificial insemination. In order to define the inheritance rights of all ART children, the
306 definitions in the parentage statute must be expanded to include all forms of ART, not just non-
307 spousal artificial insemination.

308

309 The proposed statutory change deletes the definitions of “Artificial insemination” and
310 “Non-spousal artificial insemination” and replaces them with a broad definition of “Assisted
311 reproductive technologies.” The proposed change also adds or changes various definitions.
312 The “Notice of revocation” definition is added to facilitate a change made in ORC Section
313 3111.92 that permits a spouse to withdraw his or her consent to ART. The definition of
314 “Donor” is expanded to include any individual who supplies any type of genetic material for
315 any type of ART procedure, not just semen for non-spousal artificial insemination. The
316 definition of “Supervising physician” is added to identify the one physician who is ultimately
317 responsible for the ART process set forth in ORC Section 3111.91. The definition of
318 “Recipient” has been expanded to include anyone who receives genetic materials that is then
319 used to cause a pregnancy, not just a woman who has been artificially inseminated.

320

321 ~~3111.88 Non-spousal artificial insemination definitions.~~ Definitions for Assisted
322 Reproductive Technologies.

323

324 As used in sections 3111.88 to 3111.96 of the Revised Code:

325

326 ~~(A) “Artificial insemination” means the introduction of semen into the vagina, cervical~~
327 ~~canal, or uterus through instruments or other artificial means.~~ Assisted reproductive
328 technologies,” sometimes referred to as “ART,” means any medical or scientific technology or
329 method designed to assist one or more persons to cause a pregnancy through means other
330 than by sexual intercourse. Assisted reproductive technologies shall include all technologies
331 currently designed to impregnate a woman other than by sexual intercourse that exist as of the
332 date of the enactment of this section or that may be developed in the future.

333

334 (B) “Donor” means ~~a man~~ any individual (1) who voluntarily supplies ova or semen for a non-
335 ~~spousal artificial insemination~~ that is used to cause a pregnancy by means other than by sexual
336 intercourse and (2) does not intend to raise the resulting child as his or her own.

337

338 ~~(C) “Non-spousal artificial insemination” means an artificial insemination of a woman with~~
339 ~~the semen of a man who is not her husband.~~ Notice of revocation” means a writing signed by a

340 person that indicates his or her desire to revoke a consent previously given by such person to
341 the use of assisted reproductive technologies.

342
343 (D) “Physician” means ~~a person~~ an individual who is licensed pursuant to Chapter
344 ~~4731.4731~~ of the Revised Code to practice medicine or surgery or osteopathic medicine or
345 surgery in ~~this~~ the state.

346
347 (E) “Recipient” means ~~a woman who has been artificially inseminated with the~~ an individual
348 who received ova or semen ~~off~~ from a donor. to be used to cause a pregnancy by means other
349 than sexual intercourse.

350
351 (F) “Supervising physician” means the physician performing or supervising the assisted
352 reproductive technologies procedure in accordance with section 3111.90 of the Revised Code.

353 354 **Part C – Explanation and Text**

355
356 ORC Section 3111.89 currently states that ORC Sections 3111.88 to 3111.96 are
357 intended to cover only non-spousal artificial insemination. It also states that these sections do
358 not deal with the artificial insemination of a wife with the semen of her husband or with
359 surrogate motherhood. Since this legislative proposal is designed to have the parentage
360 statute apply to all forms of ART, this section needs to be updated to reflect this change. The
361 statute will now provide that except as provided in the proposed ORC Sections 3111.92 –
362 3111.94, the provisions of ORC Section 3111.88 - .96 will not apply to married couples
363 utilizing their own genetic materials.

364 365 3111.89 Coverage of provisions.

366
367 Sections 3111.88 to 3111.96 of the Revised Code deal with ~~non-spousal artificial insemination~~
368 ~~for the purpose of impregnating~~ the use of assisted reproductive technologies designed
369 to impregnate a woman so that she can bear a child that she intends to raise as her
370 child. ~~These~~ Except as provided in sections 3111.92 to 3111.94 of the Revised Code, these
371 sections do not deal with the artificial insemination of a wife with the semen of her husband
372 or with ~~cover~~ the use of assisted reproductive technologies involving a married couple utilizing
373 their own ova and semen or involving surrogate motherhood or embryo donation.

374 375 **Part D – Explanation and Text**

376
377 ORC Section 3111.90 currently provides that non-spousal artificial insemination
378 shall be performed by a physician or by a person who is under the control or supervision of a
379 physician. The proposed statutory change extends this requirement to the use of any ART, not
380 simply non-spousal artificial insemination.

381 3111.90 Physician supervision.

382

383 ~~A non-spousal artificial insemination~~Any use of assisted reproductive technologies shall be
384 performed by a physician or by a person who is under the supervision and control of a
385 physician. Supervision requires the availability of a physician for consultation and direction,
386 but does not necessarily require the personal presence of the physician who is providing the
387 supervision.

388

389 **Part E – Explanation and Text**

390

391 ORC Section 3111.91 currently provides that a physician or a person under the control
392 of a physician may assist with non-spousal artificial insemination only if certain information
393 is acquired and steps are taken within one year prior to the supplying of semen. The
394 proposed change reflects the fact that the artificial insemination statute is being changed to
395 a universal gamete statute, so that such information must be acquired prior to using any form
396 of ART, not just non-spousal insemination. The proposed change also clarifies that the person
397 who is required to collect certain medical information and to determine certain laboratory
398 studies are acceptable is the “supervising physician.”

399

400 **3111.91 Medical history and physical examination of donor.**

401

402 (A) ~~In a non-spousal artificial insemination~~When employing any assisted reproductive
403 technologies, fresh or frozen semen or ovum may be used, provided that the requirements of
404 division (B) of this section are satisfied.

405

406 (B)(1) A physician, physician assistant, clinical nurse specialist, certified nurse practitioner,
407 certified nurse-midwife, or person under the supervision and control of ~~the supervising~~
408 physician may use fresh ova or semen for purposes of ~~a non-spousal artificial~~
409 ~~insemination~~employing any assisted reproductive technologies only if within one year prior to
410 the supplying of ~~the semen~~such genetic material, all of the following occurred:

411

412 (a) A complete medical history of the donor, including, but not limited to, any available
413 genetic history of the donor, was obtained by a physician, a physician assistant, a clinical nurse
414 specialist, or a certified nurse practitioner.

415

416 (b) The donor had a physical examination by a physician, a physician assistant, a clinical nurse
417 specialist, or a certified nurse practitioner.

418

419 (c) The donor was tested for blood type and RH factor.

420

421 (2) A physician, physician assistant, clinical nurse specialist, certified nurse practitioner,
422 certified nurse-midwife, or person under the supervision and control of ~~the supervising~~
423 physician may use frozen ova or semen for purposes of ~~a non-spousal artificial~~
424 ~~insemination~~employing any assisted reproductive technologies only if all the following
425 apply:

426

- 427 (a) The requirements set forth in division (B)(1) of this section are satisfied;
428
429 (b) In conjunction with the supplying of ~~the such genetic material (ova or semen), the~~
430 ~~semen genetic material or the~~ blood of the donor was the subject of laboratory studies that the
431 ~~supervising physician involved in the non spousal artificial insemination~~ considers
432 appropriate. The laboratory studies may include, but are not limited to, venereal disease
433 research laboratories, karotyping, GC culture, cytomegalo, hepatitis, kem-zyme, Tay- Sachs,
434 sickle-cell, ureaplasma, HLTV-III, and chlamydia.
435
436 (c) The ~~supervising physician involved in the non spousal artificial insemination~~ determines
437 that the results of the laboratory studies are acceptable results.
438
439 (3) Any written documentation of a physical examination conducted pursuant to division
440 (B)(1)(b) of this section shall be completed by the individual who conducted the examination.
441

442 **Part F – Explanation and Text**

443
444 ORC Section 3111.92 currently provides that a married woman who desires to use non-
445 spousal artificial insemination may only do so if both she and her husband sign a written
446 consent. The proposed statutory change expands this consent requirement to the use of all
447 forms of ART. It also provides that a consenting spouse may withdraw such consent at any
448 time prior to the last step being taken to impregnate the spouse or third party. The Council
449 feels that this right of revocation is necessary given the fact that so much can change (the
450 marital relationship, the desire to have more children, etc.) between the time that a spouse's
451 consent is given and the time that steps are taken to impregnate a woman using ART.

452
453 3111.92 Consent by both spouses.

454
455 ~~The non spousal artificial insemination of a married woman may occur only if both she and~~
456 ~~her husband sign a written consent to the artificial insemination as described in section~~
457 ~~3111.93 of the Revised Code.~~

458
459 ~~Effective Date: 03-22-2001~~

460 The use of any assisted reproductive technologies by a married couple may occur only if both
461 spouses sign a written consent meeting the requirements of section 3111.93(A) of the
462 Revised Code and that consent is not revoked. At any time prior to taking the last step to
463 impregnate the spouse or third party, either spouse may revoke such consent pursuant to a
464 notice of revocation delivered to the supervising physician, which notice shall become
465 effective upon receipt by the supervising physician. The spouse revoking such consent shall
466 also make a reasonable effort to deliver the notice of revocation to his or her spouse. Upon
467 receipt of the notice of revocation, the supervising physician shall not permit any frozen
468 embryos to thaw or permit the fertilization of any ova unless written consent is thereafter
469 obtained from both spouses. Notwithstanding anything in Chapter 3111 of the Revised Code
470 to the contrary, the spouse who properly delivers the notice of revocation to the supervising
471 physician shall not legally be regarded as the natural parent of any child thereafter

472 conceived using any assisted reproductive technology, the consent for which was revoked by
473 such spouse.

474

475 **Part G – Explanation and Text**

476

477

478

479

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483

484

3111.93 Provisions of consent form.

485

486

487

488

(A) Prior to ~~a non-spousal artificial insemination~~ the use of assisted reproductive technologies,
the supervising physician associated with it shall do the following:

489

490

491

492

(1) Obtain the written consent of the recipient on a form that the physician shall provide. The
written consent shall contain all of the following information and statements, some of which
describe obligations and restrictions which are hereby imposed upon the supervising physician:

493

494

495

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502

(a) The name and address of the recipient and, if married, his or her husbandspouse;

503

504

505

506

(b) The name of the physician;

507

508

509

510

511

512

513

(c) The proposed location of the performance of the ~~artificial insemination~~ assisted reproductive
technologies procedure;

514

515

516

517

(d) A statement that the recipient and, if married, his or her husbandspouse consent to the
~~artificial insemination~~ assisted reproductive technologies procedure;

517

(e) If desired, a statement that the recipient and, if married, his or her husbandspouse consent
to more than one ~~artificial insemination~~ assisted reproductive technologies procedure if
necessary;

517

(f) A statement that the donor shall not be advised by the supervising physician or
another person performing the ~~artificial insemination~~ assisted reproductive technologies
procedure as to the identity of the recipient or, if married, his or her husbandspouse and that
the recipient and, if married, his or her husbandspouse shall not be advised by the physician
or another person performing the ~~artificial insemination~~ assisted reproductive technologies
procedure as to the identity of the donor, unless the donor otherwise agrees in writing;

(g) A statement that the supervising physician is to obtain necessary ova or semen from a
donor and, subject to any agreed upon provision as described in division (A)(1)(n) of this
section, that the recipient and, if married, his or her husbandspouse shall rely upon the
judgment and discretion of the supervising physician in this regard;

518 (h) A statement that the recipient and, if married, his or her husbandspouse understand that
519 the supervising physician cannot be ~~responsible~~supervising for the physical or mental
520 characteristics of any child resulting from the ~~artificial insemination~~assisted reproductive
521 technologies procedure;

522
523 (i) A statement that there is no guarantee that the recipient will become pregnant as a
524 result of the ~~artificial insemination~~assisted reproductive technologies procedure;

525
526 (j) A statement that the ~~artificial insemination~~assisted reproductive technologies
527 procedure shall occur in compliance with sections 3111.88 to 3111.96 of the Revised
528 Code;

529
530 (k) A brief summary of the ~~paternity~~parentage consequences of the ~~artificial~~
531 ~~insemination~~assisted reproductive technologies procedure as set forth in section 3111.95 of
532 the Revised Code;

533
534 (l) The signature of the recipient and, if married, his or her husbandspouse;

535
536 (m) If agreed to, a statement that the ~~artificial insemination~~assisted reproductive technologies
537 procedure will be performed by a person who is under the supervision and control of the
538 supervising physician;

539
540 (n) Any other provision that the physician, the recipient, and, if married, his or her
541 husbandspouse agree to include.

542
543 (2) Sign such consent form acknowledging those obligations and restrictions described in
544 section 3111.93(A)(1) of the Revised Code.

545
546 (3) Upon request, provide the recipient and, if married, his or her husbandspouse with the
547 following information to the extent the physician has knowledge of it:

548
549 (a) The medical history of the donor, including, but not limited to, any available genetic
550 history of the donor and persons related to him by consanguinity, the blood type of the donor,
551 and whether he has an RH factor;

552
553 (b) The race, eye and hair color, age, height, and weight of the donor; (c)
554 The educational attainment and talents of the donor;

555 (d) The religious background of the donor;

556
557 (e) Any other information that the donor has indicated may be disclosed.

558
559 (B) After each ~~non-spousal artificial insemination of a woman~~assisted reproductive
560 technologies procedure, the supervising physician ~~associated with it~~ shall note the date of the
561 ~~artificial insemination~~assisted reproductive technologies procedure in the supervising
562 physician's records pertaining to the woman and the ~~artificial insemination~~assisted
563 reproductive technologies procedure, and retain this information as provided in section

564 3111.94 of the Revised Code.

565

566 **Part H – Explanation and Text**

567

568 ORC Section 3111.94 currently requires a physician to retain the consents and
569 information required to be obtained under ORC Section 3111.93 for a certain period of time.
570 This section also provides that such information provided to the recipient shall be open for
571 inspection by the recipient (and if married, her husband) until the ART child reaches age 21.
572 Information about the donor that was not provided to the recipient must be retained for at
573 least five years after the artificial insemination.
574

575 The proposed statutory change imposes a duty on the supervising physician to
576 retain any notice of revocation delivered under ORC Section 3111.92 until the ART child
577 attains the age of 21 years. It also grants an ART child who has attained the age of 18
578 years the right to inspect the information provided to the recipient until the ART child has
579 reached age 21.

580

581 3111.94 Confidentiality.

582

583 (A) The supervising physician ~~who is associated with a non spousal artificial~~
584 ~~insemination~~ shall place the written consent obtained pursuant to division (A)(1) of section
585 3111.93 of the Revised Code, information provided to the recipient and, if married, his or her
586 ~~husband~~spouse pursuant to division (A)(~~23~~) of that section, other information concerning the
587 donor that the supervising physician possesses, and other matters concerning the ~~artificial~~
588 ~~insemination~~assisted reproductive technologies procedure in a file that shall bear the name of
589 the recipient. This file shall be retained by the supervising physician in ~~the physician's~~his or
590 her office separate from any regular medical chart of the recipient, and shall be confidential,
591 except as provided in divisions (B) and (C) of this section. This file is not a public record
592 under section 149.43 of the Revised Code.
593

593

594 (B) The written consent form and information provided to the recipient and, if married, his
595 or her ~~husband~~spouse pursuant to division (A)(~~23~~) of section 3111.93 of the Revised Code
596 and, if applicable, any notice of revocation delivered to the supervising physician pursuant
597 to section 3111.92 of the Revised Code shall be open to inspection only until the child born as
598 ~~the result of the non spousal artificial insemination~~assisted reproductive technologies
599 procedure is twenty-one years of age, and only to the recipient ~~or, if married, her husband~~and,
600 if married, his or her spouse, and to the child born as the result of assisted reproductive
601 technologies at any time after attaining the age of eighteen years, upon request to the
602 supervising physician.
603

603

604 (C) Information pertaining to the donor that was not provided to the recipient and, if married,
605 his or her ~~husband~~spouse pursuant to division (A)(~~23~~) of section 3111.93 of the Revised
606 Code and that the supervising physician possesses shall be kept in the file pertaining to
607 the ~~non spousal artificial insemination~~assisted reproductive technologies procedure for at least
608 five years from the date of the ~~artificial insemination~~assisted reproductive technologies

609 procedure. At the expiration of this period, the supervising physician may destroy such
610 information or retain it in the file.

611

612 The supervising physician shall not make this information available for inspection by any
613 person during the five-year period or, if the supervising physician retains the information after
614 the expiration of that period, at any other time, unless the following apply:

615

616 (1) A child is born as a result of the ~~artificial insemination~~assisted reproductive technologies
617 procedure, an action is filed by the recipient, ~~or his or her husband if she is married~~spouse, or
618 a guardian of the child in the domestic relations division or, if there is no domestic relations
619 division, the general division of the court of common pleas of the county in which the office of
620 the physician is located, the child is not twenty-one years of age or older, and the court
621 pursuant to division (C)(2) of this section issues an order authorizing the inspection of
622 specified types of information by the recipient, husband, or guardian;

623

624 (2) Prior to issuing an order authorizing an inspection of information, the court shall determine,
625 by clear and convincing evidence, that the information that the recipient, husband, or guardian
626 wishes to inspect is necessary for or helpful in the medical treatment of the child born as a
627 result of the ~~artificial insemination~~assisted reproductive technologies procedure, and shall
628 determine which types of information in the file are germane to the medical treatment and are
629 to be made available for inspection by the recipient, ~~husband~~his or her spouse, or guardian in
630 that regard. An order only shall authorize the inspection of information germane to the medical
631 treatment of the child.

632

633 **Part I – Explanation and Text**

634

635 ORC Section 3111.95 currently defines the parent/child relationship only for ART
636 children born through the use of non-spousal artificial insemination. It provides that a
637 married woman who is the subject of the non-spousal artificial insemination shall be the
638 mother. It also provides that if she is married and her husband consents to the insemination,
639 the husband shall be treated as the father. It further provides that the donor shall not be treated
640 as a parent.

641

642 The proposed statutory change establishes the parent/child relationship for all ART
643 children, even those born posthumously. It provides that a recipient shall be regarded as the
644 natural parent of all ART children born before or after the recipient's death. His or her
645 spouse also becomes a natural parent if such person consented to the ART procedure and if a
646 notice of revocation has not been filed by such spouse. It further provides that a donor of any
647 genetic material will not be considered a parent of any ART child born using such genetic
648 material.

649

650 3111.95 ~~Husband considered natural father — child natural child.~~ Parent and Child
651 Relationship Involving Children Born Through Assisted Reproductive Technologies.

652

653 This section defines the parent and child relationship for children born through the use of any
654 assisted reproductive technologies, including all such children born posthumously, and shall

655 apply notwithstanding any provision in Chapter 3111 of the Revised Code to the contrary.
656 The inheritance rights of such children are specifically limited as described in sections
657 2105.14, 2107.34 and 5801.12 of the Revised Code.

658
659 ~~(A) If a married woman is the subject of a non-spousal artificial insemination and if~~
660 ~~her husband consented to the artificial insemination, the husband shall be treated in law and~~
661 The recipient shall be legally regarded as the natural father of a child conceived as a result of
662 the artificial insemination, and a child so conceived shall be treated in law and regarded as the
663 natural child of the husband parent of any and all children born before or after the recipient's
664 death as a result of any assisted reproductive technologies procedure in which the recipient
665 was involved. A presumption that arises under division (A) of section 3111.02 or division
666 (A)(1) or (2) of section 3111.03 of the Revised Code is conclusive with respect to this
667 ~~father~~ parent and child relationship, and no action or proceeding under sections 3111.01 to
668 3111.18 or sections 3111.38 to 3111.54 of the Revised Code shall affect the relationship.

669
670 ~~(B) If a woman is the subject of a non-spousal artificial insemination~~ If the recipient is
671 married and if his or her spouse consented to the assisted reproductive technologies procedure
672 in which the recipient was involved, and a notice of revocation has not been filed by the
673 spouse in accordance with section 3111.92 of the Revised Code, the consenting spouse shall
674 be legally regarded as the natural parent of any and all children born before or after the
675 recipient's death as a result of such assisted reproductive technologies procedure, and any child
676 or children so born shall legally be treated as the natural child of the spouse. A presumption
677 that arises under division (A) of section
678 3111.02 or division (A)(1) or (2) of section 3111.03 of the Revised Code is conclusive with
679 respect to this parent and child relationship, and no action or proceeding under sections
680 3111.01 to 3111.18 or sections 3111.38 to 3111.54 of the Revised Code shall affect the
681 relationship.

682
683 ~~(C) If a recipient utilizes assisted reproductive technologies to have one or more~~
684 children, the donor shall not be ~~treated in law or legally~~ regarded as the natural ~~father of a child~~
685 ~~conceived~~ parent of any and all children born as a result of the ~~artificial insemination, and~~
686 ~~assisted reproductive technologies procedure, and any child so conceived~~ born shall not be
687 ~~treated in law or legally~~ regarded as the natural child of the donor. No action or proceeding
688 under sections 3111.01 to 3111.18 or sections 3111.38 to
689 3111.54 of the Revised Code shall affect these consequences.

690 **Part J – Explanation and Summary**

691
692
693 ORC Section 3111.96 currently provides that the failure of a physician or other
694 person to comply with the statutory requirements of ORC Sections 3111.88 to 3111.95 does
695 not affect the legal rights of the recipient, the recipient's spouse or the donor. The proposed
696 statutory change simply expands this noncompliance statute to the use of any form of ART.

697
698 3111.96 Noncompliance.
699

700 The failure of a supervising physician or person under the supervision and control of a
701 supervising physician to comply with the applicable requirements of sections
702 ~~3111.88~~3111.88 to ~~3111.95~~3111.95 of the Revised Code shall not affect the legal status,
703 rights, or obligations of a child conceived ~~as a result of a non-spousal artificial insemination~~
704 through the use of any assisted reproductive technology, a recipient, a ~~husband~~recipient's
705 spouse who consented to the ~~non-spousal artificial insemination of his wife~~use of an assisted
706 reproductive technology by the recipient, or the donor. If a recipient ~~who is, and if married~~
707 and his or her husband's spouse, make a good faith effort to ~~execute~~comply with the written
708 consent ~~that is in compliance with requirements~~ of section ~~3111.93~~3111.93 of the Revised
709 Code relative to ~~a non-spousal artificial insemination~~an assisted reproductive technology
710 procedure, the failure of the written consent to so comply shall not affect the ~~paternity~~
711 ~~consequences~~parental determinations set forth in ~~division (A) of section 3111.95~~3111.95 of the
712 Revised Code.

713

714 **Part K – Explanation and Text**

715

716 ORC Section 2105.14 currently provides that descendants of an intestate that are
717 “begotten” before the intestate’s death but born thereafter will inherit from the intestate estate.
718 The term “begotten” is not defined and may be difficult to interpret with the advent of
719 ART, especially when genetic materials and embryos can be frozen for years.

720

721 The proposed change maintains the intent of the statute and provides that no descendant
722 of an intestate shall inherit unless living at the time of the death of the intestate or born
723 within 300 days thereafter. Therefore, no posthumously-born ART child born more than 300
724 days after the intestate’s death will inherit from that intestate’s estate.

725

726 2105.14 Inheritance Rights of Posthumous child to inherit~~Child~~.

727

728 ~~Descendants of an intestate begotten before the intestate’s death, but born after the intestate’s~~
729 ~~death, in all cases will inherit as if born in the lifetime of the intestate and surviving the~~
730 ~~intestate; but in no other case can a person inherit~~No descendant of an intestate shall inherit
731 under Chapter 2105 of the Revised Code unless living at the time of the death of the intestate.
732 or born within 300 days thereafter.

733

734 **Part L – Explanation and Text**

735

736 ORC Section 2107.34 is in the will chapter of Ohio law. It currently provides that
737 “afterborn” children are entitled to receive a share of a probate estate equal to what he or she
738 would have received under the laws of intestacy. It is not clear whether this would apply to
739 posthumously-born ART children. While they are certainly “afterborn” children since they are
740 born after the execution of the will, they may not be the “children” of the testator based on
741 Ohio’s current parentage statute (ORC Section 3111.95). Ohio case law suggests that where
742 the intent of the testator is not clear, the court will look to the law of intestacy, which provides
743 only for “begotten” children. Therefore, it is unclear under current Ohio law whether a
744 posthumously-born ART child would inherit an intestate share of the estate under the will

745 statute of ORC Section 2107.34 or whether such child would not be entitled to inherit at
746 all under the “begotten” statute of ORC Section 2105.14.

747

748 The proposed change to ORC Section 2107.34 clarifies the rights of
749 posthumously-born ART children to inherit under a will. It provides that any person born
750 more than 300 days after the death of the testator will not inherit under a will unless the will
751 clearly provides otherwise. It states further that if the will in fact provides otherwise, such
752 person must be born within of period of one year and 300 days from the testator’s death
753 regardless of any longer duration specified in the will. The Council feels it is necessary to
754 impose this time period in order to balance the goals of accommodating a testator’s intent with
755 the goal of ensuring the prompt and orderly administration of estates.

756

757 2107.34 Afterborn or pretermitted heirs.

758

759 If, after making a last will and testament, a testator has a child born alive, or adopts a
760 child, or designates an heir in the manner provided by section ~~2105.15~~2105.15 of the Revised
761 Code, or if a child or designated heir who is absent and reported to be dead proves to be
762 alive, and no provision has been made in such will or by settlement for such pretermitted child
763 or heir, or for the issue thereof, the will shall not be revoked; but unless it appears by such will
764 that it was the intention of the testator to disinherit such pretermitted child or heir, the devise
765 and legacies granted by such will, except those to a surviving spouse, shall be abated
766 proportionately, or in such other manner as is necessary to give effect to the intention of the
767 testator as shown by the will, so that such pretermitted child or heir will receive a share equal
768 to that which such person would have been entitled to receive out of the estate if such
769 testator had died intestate with no surviving spouse, owning only that portion of the
770 testator’s estate not devised or bequeathed to or for the use and benefit of a surviving spouse. If
771 such child or heir dies prior to the death of the testator, the issue of such deceased child or heir
772 shall receive the share the parent would have received if living.

773

774 If such pretermitted child or heir supposed to be dead at the time of executing the will has
775 lineal descendants, provision for whom is made by the testator, the other legatees and devisees
776 need not contribute, but such pretermitted child or heir shall take the provision made for the
777 pretermitted child’s or heir’s lineal descendants or such part of it as, in the opinion of the
778 probate judge, may be equitable. In settling the claim of a pretermitted child or heir, any
779 portion of the testator’s estate received by a party interested, by way of advancement, is a
780 portion of the estate and shall be charged to the party who has received it.

781

782 Notwithstanding anything in Chapter 2107 of the Revised Code to the contrary, any
783 person born more than 300 days after the death of a testator shall not inherit under a will as a
784 child, grandchild or other heir unless the will clearly provides otherwise. If a will clearly
785 provides that such a posthumously born heir shall inherit under the will, then notwithstanding
786 anything in the will to the contrary, such heir will inherit only if born within a period of
787 one year and 300 days from the date of the testator’s death. This provision shall specifically
788 not apply to the terms of a testamentary trust.

789

790 Though measured by Chapter 2105. of the Revised Code, the share taken by a pretermitted
791 child or heir shall be considered as a testate succession. This section does not prejudice the
792 right of any fiduciary to act under any power given by the will, nor shall the title of innocent
793 purchasers for value of any of the property of the testator's estate be affected by any right
794 given by this section to a pretermitted child or heir.
795

796 **Part M – Explanation and Text**

797
798 ORC Section 2109.301 provides instructions to the administrator or executor of an
799 estate regarding the timing and filing of an accounting of the estate assets to the probate court.
800 Under the current law, a final account shall be rendered to the court within six months of the
801 date of the appointment of the executor or administrator unless one of five exceptions apply to
802 extend the administration beyond six months automatically.
803

804 The proposed statutory change provides for a sixth exception. If a will has provided
805 inheritance rights to posthumously-born ART children, then the executor will be permitted to
806 extend the estate automatically.
807

808 **2109.301 Administrator or executor rendering account.**

809
810 (A) An administrator or executor shall render an account at any time other than a time
811 otherwise mentioned in this section upon an order of the probate court issued for good
812 cause shown either at its own instance or upon the motion of any person interested in the
813 estate. Except as otherwise provided in division (B)(2) of this section, an administrator or
814 executor shall render a final account within thirty days after completing the administration
815 of the estate or within any other period of time that the court may order.
816

817

818 (B)

819
820 1) Every administrator and executor, within six months after appointment, shall render a final
821 and distributive account of the administrator's or executor's administration of the estate unless
822 one or more of the following circumstances apply:
823

824

825 **(f) The decedent's will provides that children born through assisted reproductive technologies**
826 **will inherit under the will, as provided pursuant to section 2107.34 of the Revised Code.**
827

828 ~~(g)~~ For other reasons set forth by the administrator or executor, subject to court approval, it
829 would be detrimental to the estate and its beneficiaries or heirs to file a final and distributive
830 account.
831

832

833

834

835

836 **Part N – Explanation and Text**

837

838 Under current Ohio law, the right of ART children to inherit under a trust agreement is
839 very unclear. In part, this is because the parentage statute of ORC Chapter 3111 currently
840 establishes the parent/child relationship only for those children born using non-spousal
841 artificial insemination and embryo donation. It does not establish such a relationship for
842 children born using other forms of ART. It is also unclear because the trust agreement itself
843 may not specify the inheritance rights of ART children, especially those born posthumously,
844 and it is virtually impossible to predict what the settlor would have intended in those cases.
845

846 The proposed statutory changes clarify the rights of an ART child to inherit under a
847 trust by adding a new section to the Ohio Trust Code, ORC Section 5801.12. This
848 section covers only the inheritance rights of posthumously-born ART children. With the
849 changes to ORC Section 3111.95 described above, ART children born during the lifetime of a
850 settlor would be treated like any other child born without the use of ART. Their rights to
851 inherit under a trust would be clear and no additional statutory change would be necessary to
852 clarify these rights.
853

854 The proposed trust statute is divided into two parts, one that applies when the trust
855 agreement is silent on the inheritance rights of posthumously-born ART children and one when
856 it is not. If the trust agreement is silent on the issue, then in order to inherit under the trust
857 the ART child must be born within 300 days after the death of the settlor or after the date of
858 the event that caused a class of beneficiaries to close under the terms of the trust
859 agreement, whichever is applicable. This rule is consistent with the proposed change to the
860 law of intestacy and the law of wills described above.
861

862 If the trust agreement provides that a posthumously-born ART child will inherit
863 under the trust, the Council feels that it is important to establish a time limit by when the ART
864 child must be born in order to inherit. The Council feels that this time limit is necessary to
865 balance the settlor's goal of providing for posthumously-born ART children with other factors,
866 such as the desire of other trust beneficiaries to receive their distributions and the need to
867 provide clarity and efficiency in the administration of the trust. Therefore, the proposed
868 section allows the settlor to establish a time period when a posthumously-born ART child must
869 be born in order to inherit under the trust, but sets a maximum time period of 5 years from the
870 date of the death of the settlor or the date of the event that caused the class to close, whichever
871 is applicable.
872

873 5801.12 Beneficial Rights of Persons Born Through Assisted Reproductive Technologies.

874
875 Notwithstanding any provisions in the Revised Code to the contrary, the provisions set forth
876 below shall govern the beneficial rights under a revocable or irrevocable trust of any child
877 born through the use of any assisted reproductive technology as defined in section 3111.88 of
878 the Revised Code or embryo donation. These provisions shall also apply to the exercise of any
879 power of appointment granted under such trust instrument and to any other power to otherwise
880 expand the class of beneficiaries.
881

882 (A) No child of a settlor described above born more than 300 days after the death
883 of the settlor of a revocable or irrevocable trust instrument shall be considered the settlor's
884 child under such trust instrument (or under the exercise of any power to appoint trust assets in
885 favor of the settlor's children or to any other power to otherwise expand the class of
886 beneficiaries) unless the terms of such trust clearly provide otherwise. No other person
887 born through the use of any assisted reproductive technology as defined in section 3111.88
888 of the Revised Code or embryo donation more than 300 days after the date of the event that
889 caused a class of beneficiaries to close under the terms of a trust shall be included in such
890 class unless the terms of such trust clearly provide otherwise.

891
892 (B) If the terms of a trust provides for a child or other person born through the use of
893 any assisted reproductive technology (as defined in section 3111.88 of the Revised Code) or
894 embryo donation and further provide for a time period for when a such child or other person
895 must be born in order to benefit under the terms of the trust, then such time period shall
896 control, subject to a maximum time period of 5 years from the date of the death of the
897 settlor or the date of the event that caused the class to close, whichever is applicable. If the
898 terms of the trust provide for a child or other person born through the use of any assisted
899 reproductive technology (as defined in section 3111.88 of the Revised Code) or embryo
900 donation but do not provide a time period for when such a child or other person must be born
901 in order to benefit under the terms of the trust, then such child or other person must be born
902 within a period of one year and 300 days from the date of the death of the settlor or the date of
903 the event that caused the class to close, whichever is applicable.
904

EPTPL Section Report to the OSBA Council of Delegates for Spring 2014

To the Council of Delegates:

The Estate Planning, Trust and Probate Law (“EPTPL”) Section hereby respectfully requests your favorable consideration of a legislative proposal. That proposal, the substance and rationale for which is described in further detail below, may be summarized as follows:

To add ORC section 5802.04 so as to clarify and confirm when the terms of a trust may direct that the trustee and/or beneficiaries must settle disputes by arbitration.

Respectfully submitted,

John D. Clark, Arbitration Sub-Committee, Chair
Michael Cooney, Chair of EPTPL

Proposed Statute

R. C. 5802.04 Arbitration of trust disputes —

(A) A provision in the terms of a trust, excluding a testamentary trust, requiring the arbitration of disputes, other than disputes of the validity of all or a part of a trust, between or among the beneficiaries and a fiduciary under the trust, or any combination of such persons or entities, is enforceable.

(B) Unless otherwise specified in the terms of the trust, a trust provision requiring arbitration shall be presumed to require binding arbitration under Ohio Revised Code Chapter 2711.

Summary and Rationale for Proposal

Ohio courts have applied a presumption favoring arbitration when the claim in dispute falls within the scope of the arbitration provision. See, e.g., *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 470. Arbitration agreements are generally favored in the law as a less costly and more efficient method of settling disputes. *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706 (8th Dist. 2004), citing *Gerig v. Kahn*, 95 Ohio St.3d 478 (2002); *Kelm v. Kelm*, 92 Ohio St.3d 223 (2001). Nevertheless, the courts have reiterated that because arbitration is a matter of contract, a court should not compel a party to arbitrate a dispute that he has not agreed to arbitrate. *Shumaker v. Saks, Inc.*, Cuyahoga App. No. 86098, 2005-Ohio-4391, citing *Teramar Corp. v. Rodier Corp.*, 40 Ohio App.3d 39 (1987); *ABM Farms v. Woods*, 81 Ohio St.3d 498 (1998).

Courts in several states have found ways to deny a trust settlor's intent of mandating arbitration of disputes despite clear language in the document - citing that a trust is not a contract; and thus, beneficiaries cannot be bound to the arbitration provision included in the trust.

In response to those court decisions, Florida and Arizona each passed legislation to uphold the requirement of arbitration in a will or trust. In an effort to remain consistent with

those states, the proposed Ohio law does not permit alternative dispute resolution provisions to apply when determining the validity of the instrument itself. The law would apply only to disputes involving administration among trustees and beneficiaries.

Currently, ORC Section 5801.10(H) provides that if a Private Settlement Agreement contains a provision requiring binding arbitration of any disputes arising under the agreement, then that arbitration provision is enforceable.

However, the OSBA Section on Estate Planning, Trust and Probate Law determined that arbitration for disputes involving wills and testamentary trusts should not be required. Rather, those disputes should be before the probate court, which should retain jurisdiction. Because *inter vivos* trusts do not require administration before the court, the settlor of such trust should be permitted to determine the method of alternative dispute resolution in the terms of the trust itself, in order for greater confidentiality and efficiency. A fundamental tenant of trust law allows a trust settlor to put terms and conditions on how and when a beneficiary inherits; including the existence of a no contest clause, which if violated could remove such beneficiary. Consequently, a trust provision in which the trust settlor requires a beneficiary to arbitrate disputes regarding administration, and not validity of the trust itself, should be viewed as a condition precedent to the beneficiary accepting assets from the trust.

Chapter 10: Select Proposals of the EPTPL Section Reports to the OSBA Council of Delegates from Spring 2016, Spring 2019, and Summer 2020

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Proposals 3 and 4 from the EPTPL Section Report to the OSBA Council of Delegates for Spring 2016

2641 **PROPOSAL 3: TO AMEND OHIO LAW TO CLARIFY THAT THE EXCEPTION TO**
2642 **THE ANTI LAPSE STATUTES ONLY APPLIES TO MULTI-GENERATIONAL CLASS**
2643 **GIFTS.**

2644
2645 **Summary and Rationale for Proposal:**
2646

2647 Section 2107.52 of the Ohio Revised Code provides that when a will makes a gift to a class and a
2648 member of the class predeceases the testator that a substitute gift will be made to the descendants
2649 of the deceased class member. Section 2107.52(B)(2)(b) provides an exception to the general rule
2650 when the class is defined as “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,”
2651 “relatives,” or “family,” or a class described by language of similar import. Comparable language
2652 relating to class gifts under a trust is found in Section 5808.19(B)(2)(b)(ii) of the Ohio Revised
2653 Code.

2654
2655 This language derives from Section 2-603(b)(2) of the Uniform Probate Code, the official
2656 comment to which provides:

2657
2658 **Class Gifts.** In line with modern policy, subsection (b)(2) continues the
2659 pre-1990 Code’s approach of expressly extending the antilapse protection to these
2660 gifts. Subsection (b)(2) applies to single-generation class gifts ... in which one or
2661 more class members fail to survive the testator (by 120 hours) leaving descendants
2662 who survive the testator (by 120 hours); in order for the section to apply, it is not
2663 necessary that any of the class members survive the testator (by 120 hours).
2664 Multiple-generation class gifts, i.e., class gifts to “issue,” “descendants,” “heirs of
2665 the body,” “heirs,” “next of kin,” “relatives,” “family,” or a class described by
2666 language of similar import are excluded, however, because antilapse protection is
2667 unnecessary in class gifts of these types. They already contain within themselves
2668 the idea of representation, under which a deceased class member’s descendants are
2669 substituted for him or her. (Emphasis added.)

2670
2671 The court in *Castillo v. Ott*, 2015-Ohio-905 (6th Dist.) held that “children” was a class described
2672 by “language of similar import” to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of
2673 kin,” “relatives,” or “family.” The court then held that this prevented a substitute gift for the
2674 descendants of a deceased child. The Castillo decision is contrary to the policy of the statute and
2675 comments to the Uniform Probate Code, upon which this section is based, because “children” is a
2676 single-generation gift and each of the other classes described in Section 2107.52(B)(2)(b) are
2677 multi-generational.

2678
2679 Section 5808.19 is the analogous antilapse provision for trusts. For consistency, it is necessary to
2680 amend Section 5808.19 comparably.

2681
2682 Accordingly, the Section Council proposes to clarify that the exception to the antilapse protection
2683 applicable to class gifts in wills and trusts only applies to gifts to multi-generational classes.
2684

2685 **Text of the Proposal:**

2686

2687 2107.52

2688

2689 * * *

2690

2691 (B)

2692

2693 * * *

2694

2695 (2) Unless a contrary intent appears in the will, if a devisee fails to survive the testator
2696 and is a grandparent, a descendant of a grandparent, or a stepchild of either the
2697 testator or the donor of a power of appointment exercised by the testator's will,
2698 either of the following applies:

2699

2700 * * *

2701

2702 (b) If the devise is in the form of a class gift, other than a devise to "issue,"
2703 "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or
2704 "family," or a class described by language of similar import that includes
2705 more than one generation, a substitute gift is created in the surviving
2706 descendants of any deceased devisee. The property to which the devisees
2707 would have been entitled had all of them survived the testator passes to the
2708 surviving devisees and the surviving descendants of the deceased devisees.
2709 Each surviving devisee takes the share to which the surviving devisee would
2710 have been entitled had the deceased devisees survived the testator. Each
2711 deceased devisee's surviving descendants who are substituted for the
2712 deceased devisee take, per stirpes, the share to which the deceased devisee
2713 would have been entitled had the deceased devisee survived the testator. For
2714 purposes of division (B)(2)(b) of this section, "deceased devisee" means a
2715 class member who failed to survive the testator by at least one hundred
2716 twenty hours and left one or more surviving descendants.

2717

2718 5808.19

2719

2720 * * *

2721

2722 (B)

2723

2724 * * *

2725

2726 (2) Unless a contrary intent appears in the instrument creating a future interest under
2727 the terms of a trust, each of the following applies:

2728

2729 * * *

2730

2731 (b) If a beneficiary of a future interest under the terms of a trust does not survive
2732 the distribution date by at least one hundred twenty hours and if the
2733 beneficiary is a grandparent of the transferor, a descendant of a grandparent
2734 of the transferor, or a stepchild of the transferor, either of the following
2735 applies:

2736 * * *

2737
2738
2739 (ii) If the future interest is in the form of a class gift, other than a future
2740 interest to "issue," "descendants," "heirs of the body," "heirs," "next
2741 of kin," "relatives," or "family," or a class described by language of
2742 similar import that includes more than one generation, a substitute
2743 gift is created in the surviving descendants of the deceased
2744 beneficiary or beneficiaries. The property to which the beneficiaries
2745 would have been entitled had all of them survived the distribution
2746 date by at least one hundred twenty hours passes to the surviving
2747 beneficiaries and the surviving descendants of the deceased
2748 beneficiaries. Each surviving beneficiary takes the share to which
2749 the surviving beneficiary would have been entitled had the deceased
2750 beneficiaries survived the distribution date by at least one hundred
2751 twenty hours. Each deceased beneficiary's surviving descendants
2752 who are substituted for the deceased beneficiary take, per stirpes,
2753 the share to which the deceased beneficiary would have been
2754 entitled had the deceased beneficiary survived the distribution date
2755 by at least one hundred twenty hours. For purposes of division
2756 (B)(2)(b)(ii) of this section, "deceased beneficiary" means a class
2757 member who failed to survive the distribution date by at least one
2758 hundred twenty hours and left one or more surviving descendants.

2759
2760 **PROPOSAL 4: TO AMEND OHIO LAW TO ALLOW A LIVING SETTLOR TO**
2761 **DETERMINE THE VALIDITY OF HIS OR HER TRUST, JUST AS A LIVING**
2762 **TESTATOR MAY DETERMINE THE VALIDITY OF HIS OR HER WILL UNDER**
2763 **CURRENT LAW, TO MAKE SOME MODIFICATIONS TO THE PROVISIONS FOR**
2764 **TESTATORS, AND TO COORDINATE THE TWO SETS OF PROVISIONS INTO A**
2765 **SINGLE CHAPTER.**

2766
2767 **Summary and Rationale for Proposal:**

2768
2769 Ohio statutory law currently allows a living testator to file a declaratory judgment action in probate
2770 court seeking a determination that the will is valid. Except to the extent that the will is amended
2771 after a favorable determination, the procedure gives a testator an effective means of protecting his
2772 or her will from a post-mortem challenge based on allegations that the testator was influenced
2773 unduly or lacked testamentary capacity.

2774
2775 Without such a procedure, Professor John Langbien claims that "Our probate procedure [would]
2776 follow[] a "worst evidence" rule. We insist that the testator be dead before we investigate the

2777 question whether he had capacity when he was alive.”¹ In other words, because the testator is
2778 living, he or she is available as a witness, which improves the evidence available to the fact-finder
2779 and thus the chance that a correct determination as to validity is made as compared with a post-
2780 mortem contest.

2781
2782 Ohio enacted the “antemortem probate” proceeding for wills in 1979 when a will was the primary
2783 instrument to dispose of one’s assets at death. Estate planning has evolved so that the inter vivos,
2784 or living, trust is now commonly used in estate planning. The proposal updates Ohio statutory law
2785 to allow a living settlor to likewise seek the same determination with respect to his or her trust.
2786 Accordingly, the Section Council recommends adoption of its proposal.

2787 **Text of the Proposal (all language new):**

2788
2789 **Chapter 5817. ESTABLISHMENT OF WILL AND TRUST VALIDITY BEFORE DEATH**

2790
2791 **5817.01**

2792
2793 **As used in this Chapter:**

2794
2795
2796 (A) “Beneficiary under a Trust” means a person that has a present or future beneficial interest
2797 in a trust, whether vested or contingent, or that, in a capacity other than that of trustee,
2798 holds a power of appointment over trust property, but does not include the class of
2799 permitted appointees among whom the power holder may appoint. “Beneficiary under a
2800 trust” includes a charitable organization that is expressly designated in the terms of the
2801 trust to receive distributions, but does not include any charitable organization that is not
2802 expressly designated in the terms of the trust to receive distributions, but to whom the
2803 trustee may in its discretion make distributions.

2804
2805 (B) “Beneficiary under a will” means any person designated in a will to receive a testamentary
2806 disposition of real or personal property. “Beneficiary under a will” includes one that, in a
2807 capacity other than that of executor, holds a power of appointment over estate assets, but
2808 does not include the class of permitted appointees among whom the power holder may
2809 appoint. “Beneficiary under a will” includes a charitable organization that is expressly
2810 designated in the terms of the will to receive testamentary distributions, but does not
2811 include any charitable organization that is not expressly designated in the terms of the will
2812 to receive distributions, but to whom the executor may in its discretion make distributions.

2813
2814 (C) “Court” means the probate court of the county in which the complaint under section
2815 5817.02 or 5817.03 of the Revised Code is filed.

2816
2817 (D) “Related Trust” means, for purposes of this Chapter, a trust for which:

2818
2819 (1) the testator is the settlor of the trust, and

¹ Langbien, *Undue Influence: The Epic Battle for the Johnson and Johnson Fortune*, 103 Yale L. J. 2039-2048, 2044 (1994).

2820 (2) the trust is named as a beneficiary in the will in accordance with section 2107.63
2821 of the Revised Code.
2822
2823 (E) “Related Will” means, for purposes of this Chapter, a will for which:
2824
2825 (1) the testator is the settlor of a trust, and
2826
2827 (2) the will names the trust as a beneficiary in accordance with section 2107.63 of the
2828 Revised Code.
2829
2830 (F) “Trust” means, for purposes of this Chapter, an inter vivos revocable or irrevocable trust
2831 instrument which, at the time the complaint for declaration of validity is filed under section
2832 5817.03 of the Revised Code, either of the following applies:
2833
2834 (1) the settlor resides in, or is domiciled in this state; or
2835
2836 (2) the trust’s principal place of administration is in this state.
2837
2838 5817.02
2839
2840 (A) A testator may file a complaint with the probate court to determine before the testator's
2841 death that the will is a valid will subject only to subsequent revocation or modification.
2842 The right to file a complaint for a determination of the testator’s will under this Chapter,
2843 or to voluntarily dismiss a complaint once filed, is personal to the testator and may not be
2844 exercised by the testator’s guardian or an agent under the testator’s power of attorney.
2845
2846 (B) A testator who desires to obtain a validity determination, as to testator’s will, shall file a
2847 complaint to determine the validity of both the will and any related trust.
2848
2849 (C) The failure of a testator to file a complaint for a judgment declaring the validity of a will
2850 shall not be construed as evidence or an admission that the will is not valid.
2851
2852 (D) A complaint for a determination of the validity of testator’s will shall be accompanied by
2853 an express written waiver of the testator’s physician-patient privilege provided in section
2854 2317.02(B) of the Revised Code.
2855
2856 5817.03
2857
2858 (A) A settlor may file a complaint with the probate court to determine before the settlor's death
2859 that the trust is valid and enforceable under its terms, subject only to a subsequent
2860 revocation or modification of the trust. The right to file a complaint for a determination of
2861 the settlor’s trust under this Chapter, or to voluntarily dismiss a complaint once filed, is
2862 personal to the settlor and may not be exercised by the settlor’s guardian or an agent under
2863 the settlor’s power of attorney.
2864

2865 (B) A settlor who desires to obtain a validity determination, as to settlor's trust, shall file a
2866 complaint to determine the validity of both the trust and the related will.

2867

2868 (C) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust
2869 shall not be construed as evidence or an admission that the trust is not valid.

2870

2871 (D) A complaint for a determination of the validity of settlor's trust shall be accompanied by
2872 an express written waiver of the settlor's physician-patient privilege provided in section
2873 2317.02(B) of the Revised Code.

2874

2875 5817.04

2876

2877 (A) A complaint to determine the validity of a will or trust shall be filed with the probate court.
2878 The probate judge, upon the motion of a party or the judge's own motion, may transfer the
2879 proceeding to the general division of the common pleas court.

2880

2881 (B) The venue for a complaint under section 5817.02 of the Revised Code is:

2882

2883 (1) the probate court of the county of this state where the testator is domiciled; or

2884

2885 (2) if the testator is not domiciled in this state, the probate court of any county of this
2886 state where any real property or personal property of the testator is located and, if
2887 none, the probate court of any county of this state.

2888

2889 (C) The venue for a complaint under section 5817.03 of the Revised Code is:

2890

2891 (1) the probate court of the county of this state where the settlor resides or is domiciled;
2892 or

2893

2894 (2) if the settlor is not domiciled in this state, and does not reside in this state, the
2895 probate court of the county of this state in which is located the trust's principal
2896 place of administration.

2897

2898 5817.05

2899

2900 (A) A complaint under section 5817.02 of the Revised Code must name as party defendants:

2901

2902 (1) the testator's spouse;

2903

2904 (2) the testator's children;

2905

2906 (3) testator's heirs who would take property pursuant to section 2105.06 of the Revised
2907 Code had the testator died intestate at the time the complaint is filed;

2908

2909 (4) the beneficiaries under the will; and

2910

- 2911 (5) any beneficiary under the most recent prior will.
2912
- 2913 (B) A complaint under section 5817.02 of the Revised Code may name as party defendants any
2914 other person the testator believes may have a pecuniary interest in the determination of the
2915 validity of testator's will.
2916
- 2917 (C) A complaint under 5817.02 of the Revised Code may contain all or any of the following:
2918
- 2919 (1) a statement that a copy of the will has been filed with the court;
2920
- 2921 (2) a statement that the will is in writing;
2922
- 2923 (3) a statement that the will was signed by the testator, or was signed in the testator's
2924 name by another person in the testator's conscious presence and at the testator's
2925 direction;
2926
- 2927 (4) a statement that the will was signed in the conscious presence of the testator by
2928 two or more competent individuals, each of whom either witnessed the testator sign
2929 the will, or heard the testator acknowledge signing the will;
2930
- 2931 (5) a statement that the will was executed with testamentary intent;
2932
- 2933 (6) a statement that the testator had testamentary capacity;
2934
- 2935 (7) a statement that the testator was free from undue influence, was not under restraint
2936 or duress, and executed the will in the exercise of the testator's free will;
2937
- 2938 (8) a statement that the execution of the will was not the result of fraud or mistake;
2939
- 2940 (9) the names and addresses of the testator and all of the defendants and, if minors, the
2941 ages of the defendants;
2942
- 2943 (10) a statement that the will has not been revoked or modified; and
2944
- 2945 (11) a statement that the testator is familiar with the contents of the will.
2946
- 2947 5817.06
2948
- 2949 (A) A complaint under section 5817.03 of the Revised Code must name as party defendants:
2950
- 2951 (1) the settlor's spouse;
2952
- 2953 (2) the settlor's children;
2954
- 2955 (3) settlor's heirs who would take property pursuant to section 2105.06 of the Revised
2956 Code had the settlor died intestate at the time the complaint is filed;

- 2957 (4) the trustees,
2958
2959 (5) the beneficiaries under the trust; and
2960
2961 (6) if the trust amends, amends and restates, or replaces a prior trust, any beneficiary
2962 under the most recent prior trust.
2963
2964 (B) A complaint under section 5817.03 of the Revised Code may name as party defendants any
2965 other person the settlor believes may have a pecuniary interest in the determination of the
2966 validity of settlor's trust.
2967
2968 (C) A complaint under section 5817.03 of the Revised Code may contain all or any of the
2969 following:
2970
2971 (1) a statement that a copy of the trust has been filed with the court;
2972
2973 (2) a statement that the trust is in writing and was signed by the settlor;
2974
2975 (3) a statement that the trust was executed with the intent to create a trust;
2976
2977 (4) a statement that the settlor had the legal capacity to enter into and establish the trust;
2978
2979 (5) a statement that the trust has a definite beneficiary or is one of the following: a) a
2980 charitable trust, b) a trust for the care of an animal, as provided in section 5804.08
2981 of the Revised Code, or c) a trust for a noncharitable purpose, as provided in section
2982 5804.09 of the Revised Code;
2983
2984 (6) a statement that the trustee has duties to perform;
2985
2986 (7) a statement that the same person is not the sole trustee and sole beneficiary;
2987
2988 (8) a statement that the settlor was free from undue influence, was not under restraint
2989 or duress, and executed the trust in the exercise of the settlor's free will;
2990
2991 (9) a statement that execution of the trust was not the result of fraud or mistake;
2992
2993 (10) the names and addresses of the settlor and all of the defendants and, if minors, the
2994 ages of the defendants;
2995
2996 (11) a statement that the trust has not been revoked or modified; and
2997
2998 (12) a statement that the settlor is familiar with the contents of the trust.
2999

3000 5817.07

3001

3002 (A) Service of process, with a copy of the complaint and will, or will and related trust, if
3003 applicable, shall be made on every party defendant named in the complaint filed under
3004 section 5817.02 of the Revised Code, as provided in the applicable rules of civil procedure.

3005

3006 (B) Service of process, with a copy of the complaint and trust, or trust and related will, if
3007 applicable, shall be made on every party defendant named in the complaint filed under
3008 section 5817.03 of the Revised Code, as provided in the applicable rules of civil procedure.

3009

3010 5817.08

3011

3012 (A) After a complaint is filed under section 5817.02 or 5817.03 of the Revised Code, the court
3013 shall fix a time and place for a hearing.

3014

3015 (B) Notice of the hearing shall be given to the testator or settlor and to all party defendants, as
3016 provided in the applicable rules of civil procedure.

3017

3018 (C) The hearing shall be adversarial in nature and shall be conducted pursuant to sections
3019 2721.10 and 2101.31 of the Revised Code, except as otherwise provided in this Chapter.

3020

3021 5817.09

3022

3023 The testator or settlor has the burden of establishing prima facie proof of the execution of the will
3024 or trust. A person who opposes the complaint has the burden of establishing one or more of the
3025 following: the lack of testamentary intent, lack of capacity, undue influence, fraud, duress,
3026 mistake, or revocation. A party to the proceeding has the ultimate burden of persuasion as to the
3027 matters for which the party has the initial burden of proof.

3028

3029 5817.10

3030

3031 (A) The court shall declare the will valid if it finds that the will was properly executed pursuant
3032 to section 2107.03 of the Revised Code or under any prior law of this state that was in
3033 effect at the time of execution and that the testator had the requisite testamentary capacity,
3034 was free from undue influence, mistake, or fraud, and that testator was not under restraint
3035 or duress. After the testator's death, unless the will is modified or revoked after the
3036 declaration, the will has full legal effect as the instrument of the disposition of the testator's
3037 estate and shall be admitted to probate upon request.

3038

3039 (B) The court shall declare the trust valid if it finds that the trust meets the requirements of
3040 section 5804.02 of the Revised Code, that the settlor had legal capacity to enter into and
3041 establish the trust, and that the settlor was free from undue influence, mistake, or fraud,
3042 and that settlor was not under restraint or duress. Unless the trust is modified or revoked
3043 after the declaration, the trust has full legal effect.

3044

3045 (C) The court may, if it finds the will or trust to be valid, attach a copy of the valid document
3046 to the court's judgment entry but, failure to do so shall not affect the determination of
3047 validity.

3048
3049 5817.11

3050
3051 (A) Unless the will or trust is modified or revoked, and except as otherwise provided in this
3052 section, no person may contest the validity of a will or trust declared valid in a proceeding
3053 pursuant to this Chapter.

3054
3055 (B) The failure to name a necessary defendant under section 5817.05(A) of the Revised Code
3056 is not jurisdictional and a determination of a will's validity shall be binding upon all
3057 defendants who were named, or represented, and properly served notwithstanding the
3058 failure to name a necessary defendant. However, if a person is one who should have been
3059 named a party defendant in the action in which the will was declared valid, and if the person
3060 was not named a defendant and properly served in that action, that person may, after the
3061 testator's death, contest the validity of a will declared valid.

3062
3063 (C) The failure to name a necessary defendant under section 5817.06(A) of the Revised Code
3064 is not jurisdictional and a determination of a trust's validity shall be binding upon all
3065 defendants who were named, or represented, and properly served notwithstanding the
3066 failure to name a necessary defendant. However, if a person is one who should have been
3067 named a party defendant in the action in which the trust was declared valid, and if the
3068 person was not named a defendant and properly served in that action, that person may
3069 contest the validity of a trust declared valid.

3070
3071 (D) In determining whether a person was a party defendant and properly served in an action to
3072 declare a will or trust valid under this Chapter, the representation rules of Chapter 5803
3073 shall be applied, and a person represented in the action under such rules is bound by the
3074 declaration of validity even if, by the time of the testator's death, or the challenge to the
3075 trust, the representing person has died or would no longer be able to represent the person
3076 represented in the proceeding under this Chapter.

3077
3078 5817.12

3079
3080 (A) After a declaration of validity under section 5817.07(A) of the Revised Code, a will may
3081 be modified by a later will or codicil executed according to the laws of this state or another
3082 state, and the will may be revoked under section 2107.33, or other applicable law.

3083
3084 (B) Revocation by a later will, or other document, by section 2107.33 of the Revised Code, of
3085 a will that has been declared valid under section 5817.10(A) of the Revised Code, does not
3086 affect the will or the prior declaration of its validity if the later will or other document is
3087 found to be invalid due to testator's lack of capacity, undue influence, or otherwise, by a
3088 court of competent jurisdiction.

3089

3090 (C) Amendment by a later codicil of a will that has been declared valid under section
3091 5817.10(A) of the Revised Code does not affect the will or the prior declaration of its
3092 validity except as provided by the codicil. However, the codicil is not also validated under
3093 this chapter of the Revised Code unless its validity is also declared under this chapter.

3094
3095 5817.13

3096
3097 (A) After a declaration of validity under section 5817.07(B) of the Revised Code, a trust may
3098 be modified, terminated, revoked, or reformed under section 5804.04 of the Revised Code,
3099 or other applicable law.

3100
3101 (B) Revocation by a new trust, or other document, of a trust that has been declared valid under
3102 section §5817.10(B) of the Revised Code does not affect the trust or the prior declaration
3103 of its validity if the later trust or other document is found to be invalid due to settlor's lack
3104 of a capacity, undue influence, or otherwise, by a court of competent jurisdiction.

3105
3106 (C) An amendment of a trust that has been declared valid under section 5817.10(B) of the
3107 Revised Code does not affect the trust or the prior declaration of its validity except as
3108 provided by the amendment. However, the amendment is not also validated under this
3109 chapter of the Revised Code unless its validity is also declared under this chapter.

3110
3111 5817.14

3112
3113 (A) The finding of facts by a probate court in a proceeding brought under this Chapter is not
3114 admissible as evidence in any proceeding other than one brought to determine the validity
3115 of a will or trust.

3116
3117 (B) The determination or judgment rendered in a proceeding under this Chapter is not binding
3118 upon the parties to that proceeding in any action not brought to determine the validity of a
3119 will or trust.

3120
3121 (C) The failure of a testator to file a complaint for a judgment declaring the validity of a will
3122 the testator has executed is not admissible as evidence in any proceeding to determine the
3123 validity of that will or any other will executed by the testator.

3124
3125 (D) The failure of a settlor to file a complaint for a judgment declaring the validity of a trust
3126 the settlor has executed is not admissible as evidence in any proceeding to determine the
3127 validity of that trust or any other trust executed by the settlor.

3128

Proposals 4 and 5 from the EPTPL Section Report to the OSBA Council of Delegates for Spring 2019

5097 surviving spouse and minor children, or leaving minor children and no surviving
5098 spouse, the surviving spouse, minor children, or both shall be entitled to receive, subject
5099 to division (B) of this section, in money or property the sum of forty thousand dollars
5100 as an allowance for support. If the surviving spouse selected ~~one or more automobiles~~
5101 **more than one automobile** under section 2106.18 of the Revised Code, the allowance
5102 for support prescribed by this section shall be reduced by the value of the automobile
5103 having the lowest value ~~if more than one automobile is~~ so selected. The money or
5104 property set off as an allowance for support shall be considered estate assets.
5105

5106 This proposed amendment definitively establishes that the allowance for support and an
5107 automobile are available to a surviving spouse without discounting the allowance. As
5108 historically provided in the previous statutes, the allowance for support in the proposed Section
5109 2106.13(A) is discounted only if multiple automobiles are selected by a surviving spouse.
5110

5111 **PROPOSAL 4: To repeal division (B)(2) of RC 5805.06 in its entirety to terminate a**
5112 **creditor's rights to trust assets after the lapse of powers of withdrawal held by the trust**
5113 **beneficiary.**

5114
5115 **Summary and Rationale of Proposal**

5116
5117 Creditor rights after lapse of powers of withdrawal are to be terminated

5118
5119 RC 5805.06(A) subjects assets of revocable trusts to the rights of creditors of the settlor
5120 of the trust during the life of the settlor. RC 5805.06(B) treats beneficiaries who have the right
5121 to withdraw assets from the trust for a limited period of time as settlors with respect to the
5122 assets that can be withdrawn and treats beneficiaries who once had withdrawal rights as settlors
5123 to a limited extent.

5124
5125 The EPTPL Section Council recommends the repeal of RC 5805.06(B)(2). The result
5126 would be that, upon the lapse of the power of withdrawal, the trust interest of the former power
5127 holder would no longer be available to his creditors under RC 5805.06(B)(1). The EPTPL
5128 Section Council believes this appropriate since the trust property is no longer available to the
5129 power holder. The provision to be repealed was copied from the Uniform Trust Code. Many
5130 of the other states which have adopted the Uniform Trust Code also have deleted that provision.

5131
5132 **Text of the Proposal**

5133
5134 (B) For purposes of this section, all of the following apply:

5135
5136 (1) The holder of a power to withdraw is treated in the same manner as the
5137 settlor of a revocable trust to the extent of the property subject to the power during the
5138 period the power may be exercised.

5139
5140 ~~(2) Upon the lapse, release or waiver of the power of withdrawal, the holder is~~
5141 ~~treated as the settlor of the trust only to the extent the value of the property affected by~~
5142 ~~the lapse, release or waiver exceeds the greater of the following amounts:~~

5143
5144 (a) ~~The amount specified in section 2041(b)(2) or 2514(e) of the Internal~~
5145 ~~Revenue Code;~~

5146
5147 (b) ~~If the donor of the property subject to the holder's power of withdrawal is~~
5148 ~~not married at the time of the transfer of the property to the trust, the amount specified~~
5149 ~~in section 2503(b) of the Internal Revenue Code;~~

5150
5151 (c) ~~If the donor of the property subject to the holder's power of withdrawal is~~
5152 ~~married at the time of the transfer of the property to the trust, twice the amount specified~~
5153 ~~in section 2503(b) of the Internal Revenue Code.~~

5154
5155 (2) None of the following shall be considered an amount that can be distributed
5156 to or for the benefit of the settlor:

5157
5158 (a) Trust property that could be, but has not yet been, distributed to or for the
5159 benefit of the settlor only as a result of the exercise of a power of appointment held in
5160 a nonfiduciary capacity by any person other than the settlor;

5161
5162 (b) Trust property that could be, but has not yet been, distributed to or for the
5163 benefit of the settlor of a trust pursuant to the power of the trustee to make distributions
5164 or pursuant to the power of another in a fiduciary capacity to direct distributions, if and
5165 to the extent that the distributions could be made from trust property the value of which
5166 was included in the gross estate of the settlor's spouse for federal estate tax purposes
5167 under section 2041 or 2044 of the Internal Revenue Code or that was treated as a
5168 transfer by the settlor's spouse under section 2514 or 2519 of the Internal Revenue
5169 Code;

5170
5171 (c) Trust property that, pursuant to the exercise of a discretionary power by a
5172 person other than the settlor, could be paid to a taxing authority or to reimburse the
5173 settlor for any income tax on trust income or principal that is payable by the settlor
5174 under the law imposing the tax.

5175
5176 **PROPOSAL 5: To amend RC 5804.11(B) to clarify that the nomination of an individual**
5177 **or corporate entity in a trust agreement as a future or successor trustee may be changed**
5178 **by the court or by a private settlement agreement.**

5179
5180 **Summary and Rationale of Proposal**

5181
5182 Trustee removal bar is more clearly limited to currently serving trustees.

5183
5184 The Ohio Trust Code denies to a court power to remove a trustee except for cause, RC
5185 5804.11(B) and 5807.06. Further, since under RC 5801.10(C), a private settlement agreement
5186 may contain only provisions that could be properly approved by a court, a private settlement
5187 agreement cannot be used to remove a trustee except for cause.

5188

5189 Some consider it uncertain whether a nomination of a future or successor trustee is subject to
5190 this bar, that is, whether a future or successor trustee can be “removed” even before he assumes
5191 office. For example, a trust may provide for the surviving spouse to be trustee and for a named
5192 bank to become successor trustee when the surviving spouse dies, resigns or is disabled. May
5193 the court or a private settlement agreement change that successor to a different bank, or to an
5194 individual?
5195

5196 The EPTPL Section Council recommends that the statute be clarified to confirm that a future
5197 or successor trustee named in a trust agreement may be changed by the court or by a private
5198 settlement agreement. To effect this change, the Council recommends a two-word addition to
5199 the statute as follows:
5200

5201 **Text of the Proposal**
5202

5203 RC 5804.11(B). A noncharitable irrevocable trust may be terminated upon consent of
5204 all of the beneficiaries if the court concludes that continuance of the trust is not
5205 necessary to achieve any material purpose of the trust. A noncharitable irrevocable
5206 trust may be modified, but not to remove or replace the currently serving trustee, upon
5207 consent of all of the beneficiaries if the court concludes that modification is not
5208 inconsistent with a material purpose of the trust. A spendthrift provision in the terms
5209 of the trust may, but is not presumed to, constitute a material purpose of the trust. In
5210 determining what constitutes a material purpose of a trust, a court may but is not
5211 required to consider extrinsic evidence indicating a settlor’s intent at the time the
5212 instrument was executed.
5213

5214 The above sentence generating the uncertainty was added in the Ohio version of the Uniform
5215 Trust Code to limit the power of the court to remove currently serving trustees to removal for
5216 cause. It was not intended further to limit the power of the court or the use of private settlement
5217 agreements with respect those who had yet even become trustees (how would you remove a
5218 future or successor trustee only for cause, where he has never had an opportunity to misbehave,
5219 may not even know of his nomination and may never become trustee because he may die or
5220 decline to serve, or the trust may terminate prior to his taking office?). Further authority that
5221 a bar to removal of a trustee does not apply to one who has not yet become trustee is found in
5222 the celebrated case *Marbury v. Madison*, 1 Cranch (5 U.S.)137 (1803).
5223

Proposal 4 from the EPTPL Section Report to the OSBA Council of Delegates for Summer 2020

819
820 (7) The conduct of the persons involved in the proceedings related to the circumstances
821 concerning the deceased person, his/her estate and other family members.

822
823 (8) The length of time that has elapsed since the original or last disposition.

824
825 (9) There shall be no disinterment or other change of the original or last disposition unless
826 the court makes a finding of compelling reasons based upon a substantial change of
827 circumstances since the original or last disposition. A change of circumstances shall include,
828 but not be limited to, a change to the physical or environmental conditions of the cemetery or
829 other location of the decedent's bodily remains or the surrounding area, the financial condition
830 of the cemetery, a change related to the residence of the deceased person's family members or
831 burial arrangement for said family members but shall not include a mere change of the
832 representative who has been assigned the right to direct the disposition of the decedent's body.

833
834 (C) Except to the extent considered under division (B)(3) of this section, the following
835 persons do not have a greater claim to the right of disposition than such persons otherwise have
836 pursuant to law: (1) A person who is willing to assume the responsibility to pay for the
837 declarant's or deceased person's funeral, burial, cremation, or final disposition; (2) The
838 personal representative of the declarant or deceased person.

839
840 **PROPOSAL 4: A PROPOSAL TO ENACT A NEW SECTION OF THE OHIO TRUST**
841 **CODE, ESTABLISHING AN OPTIONAL PROCESS FOR RESOLVING CLAIMS ON**
842 **CONCLUSION OF A TRUSTEE'S ADMINISTRATION OF AN OHIO**
843 **IRREVOCABLE INTER VIVOS TRUST.**

844
845 **Summary and Rationale of Proposal**

846
847 As recently as a few decades ago, nearly all trusts were "testamentary" trusts -- established
848 under a will, not taking effect until the death of the settlor, and subject to the supervision of a
849 probate court. When the trustee of such a trust was concluding its administration of the trust,
850 the trustee would prepare a "final account," documenting all transactions of the trustee since
851 the previous account. As part of the filing, the trustee would seek the court's approval of the
852 account and a release of the trustee from any claims concerning its administration of the trust.
853 The court typically would provide notice and a copy of the account to beneficiaries of the trust
854 and provide them an opportunity to file any objections to the account or to any other matter
855 concerning the administration of the trust. If no such objections were filed by the deadline
856 stated in the notice, the court typically would approve the account, releasing the trustee from
857 claims.

858
859 These days, as we know, "inter vivos" trusts -- established under a trust agreement or
860 declaration (not a will) and taking effect during the lifetime of the settlor -- are far more
861 common than testamentary trusts. Most inter vivos trusts do not involve any filings with the
862 probate court. In fact, in the client's eye, that is one of the primary advantages of an inter vivos
863 trust: it allows the settlor to accomplish his or her trust objectives without exposing private
864 financial or personal matters to the public eye.

865
866 Many inter vivos trusts are administered by individual persons, such as a trusted family
867 member of the settlor or a lawyer or accountant. Other inter vivos trusts are administered by
868 professional trustees. But whoever is serving as trustee is often taking on difficult issues such
869 as tax matters, family dysfunction, a closely held business in which some family members are
870 involved, or other beneficiary issues such as tender age, financial irresponsibility, spousal or
871 creditor issues, or substance abuse. The trustee is often placed in a difficult position by dealing
872 with these and other trust matters. Even adroit performance of the trustee's duties can
873 sometimes create friction or worse with the affected beneficiaries. Those issues can, in turn,
874 ripen into disputes. Therefore, when a trustee of an inter vivos trust is concluding his
875 administration of the trust, it makes sense that he would seek to bring to orderly closure any
876 issues that may have arisen in the course of that administration or that may arise after the
877 trustee's involvement with the trust concludes.

878
879 With this objective in mind, a few professional trustees have in recent years been requiring
880 trust beneficiaries to sign written agreements, containing not only releases of the trustee but
881 broad indemnification provisions, before concluding administration of Ohio irrevocable trusts.
882 This practice has led to controversy, with some critics claiming trustee overreach.

883
884 The purpose of this proposed legislation is to provide a fair, optional process under which the
885 trustee of an Ohio irrevocable, inter vivos trust may seek the same kind of finality and closure
886 that is available to trustees of Ohio testamentary trusts, while affording beneficiaries a
887 reasonable opportunity, as they would have in the probate court, to assert any objections or
888 claims they might have concerning the trust without being subjected to indemnification
889 clauses. Somewhat similar statutes have been enacted recently in both Kentucky and Indiana.
890 Some highlights of the proposed Ohio statute are:

- 891
- 892 1. The statute applies only to Ohio irrevocable trusts. It does not apply to a revocable
893 trust so long as it remains revocable. It also does not apply to a testamentary trust
894 subject to the supervision of a probate court.
895
 - 896 2. The statute applies to two scenarios involving conclusion of a trustee's administration
897 of an irrevocable trust: (a) when the trust is to terminate as a result of one or more
898 "trust-terminating distributions" or (b) when the trustee is resigning, or has been
899 removed, and will be departing the administration and delivering the trust assets to a
900 successor trustee.
901
 - 902 3. The statute establishes a purely optional process. A trustee who is about to make trust-
903 terminating distributions, or who is resigning or has been removed, may, but is not
904 required to, use the process established in the statute.
905
 - 906 4. If the trustee elects to use the process established in the statute, he must send a written
907 notice, and up to four years of trustee reports, to specified persons, including at least
908 all of the current beneficiaries of the trust.
909

- 910 5. The statute prohibits the trustee who elects to use the statutory process from including
911 an indemnification clause in the written notice or trustee reports or in any
912 documentation served with the notice and reports.
913
- 914 6. The written notice must include a number of specific items of information, including
915 an exhibit showing the assets of the trust, and must describe the action proposed by the
916 trustee: terminating distributions to named beneficiaries or delivery of the trust assets
917 to a named successor trustee. The notice must also provide the name, address and
918 telephone number of the trustee, so that those receiving the notice will know to whom
919 they may direct any objections they have concerning the proposed action or the
920 administration of the trust.
921
- 922 7. The process affords those receiving the notice 45 days in which to provide the trustee
923 with written notice of any objection to the trustee's proposed action or any other
924 objection concerning the trustee's administration of the trust.
925
- 926 8. If the trustee receives no written objections within the 45-day period:
927
- 928 a. The notice and trustee's reports will be considered approved by each notice
929 recipient;
930
- 931 b. The trustee must, within a reasonable period of time after expiration of the objection
932 period, distribute or deliver the assets as proposed in the notice; and
933
- 934 c. Those who received the notice and reports will be barred from bringing a claim
935 against the trustee, and from challenging the validity of the trust, to the same extent,
936 and with the same preclusive effect, as if the court had entered a final order
937 approving and settling the trustee's full account of its administration of the trust.
938

939 The proposed statute represents the EPTPL Section Council's response to the need for an
940 optional, orderly process for resolving claims on the conclusion of a trustee's administration of
941 an Ohio irrevocable inter vivos trust. The process established under the statute balances the
942 trustee's desire for finality with trust beneficiaries' need for meaningful notice, information and
943 an opportunity to object.
944

945 **Text of the Proposal**

946 Optional Process for Resolving Claims on Conclusion of Trust Administration

947

948

949 (A) A trustee may but is not required to use the provisions of division (C) or division (D)
950 of this section, as applicable, when concluding the trustee's administration of an irrevocable
951 trust. This section does not apply to a testamentary trust subject to the supervision of a probate
952 court. Except as otherwise provided in the Revised Code or other applicable law, including
953 the common law, the provisions of divisions (C) or (D) of this section may be used in
954 combination with or in lieu of other options or proceedings available under the Revised Code
955 or other applicable law, including the common law.

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(B) As used in this section:

(1) "Applicable reporting period" means the most recent four (4) years as of the date of preparation of a notice authorized by division (C) or division (D) of this section or, if the trust became irrevocable during such four (4) year period, the period from the date the trust became irrevocable to the date of preparation of the notice. If the trustee sending the notice accepted the trusteeship during the period described in the preceding sentence, the "applicable reporting period" shall be from the date of its acceptance to the date of preparation of the notice.

(2) "Departing trustee" means a trustee who is resigning or has been removed as trustee of a trust.

(3) "Distributions objection period" means a forty-five (45) day period for providing the trustee of the noticing trust with objections under paragraph (3) of division (C) of this section. The period commences with the date the notice and trustee's reports described in division (C) of this section are served on the recipient.

(4) "Noticing trust" means a trust whose trustee is serving or has served a notice and trustee reports under division (C) or division (D) of this section

(5) "Person" has the meaning set forth for that term in section 5801.01 of the Revised Code.

(6) Resignation or removal necessary parties" means the persons described in subparagraphs (a), (b) and (c) of this paragraph (6) of division (B). Those persons include:

(a) The following persons:

(i) In the case of a trustee resignation:

- A. If the trust terms identify one or more persons to whom notice of the trustee's resignation must be provided, the persons so identified and any other persons who are current beneficiaries of the trust, determined as of the date of the notice described in division (D) of this section; or
- B. If the trust terms do not identify any persons to whom notice of the trustee's resignation must be provided, the qualified beneficiaries of the trust, determined as of the date of the notice described in division (D) of this section.

(ii) In the case of a trustee removal, the persons, if any, to whom notice of trustee removal is required to be provided under the trust terms and any other persons who are current beneficiaries of the trust, determined as of the date of the notice described in division (D) of this section.

1003
1004 (b) Any co-trustee of the trust; and
1005
1006 (c) The successor trustee if one has been appointed or designated as provided in the
1007 trust terms or otherwise appointed as provided in section 5807.04(C) of the
1008 Revised Code or pursuant to other applicable law.
1009
1010 (7) "Successor trustee" means a person, not previously serving as a co-trustee, who is
1011 to replace the departing trustee following the departing trustee's resignation or removal.
1012
1013 (8) "Terminating distributions necessary parties" means:
1014
1015 (a) The current beneficiaries of the trust, determined as of the date of the notice
1016 described in division (C) of this section;
1017
1018 (b) If the trust-terminating distributions include one or more mandatory distributions
1019 under the terms of the trust, all other persons living at the date of the notice who were
1020 current beneficiaries of the trust immediately prior to the triggering event that is the
1021 basis for the mandatory distributions; and
1022
1023 (c) Any co-trustee of the trust.
1024 (9)"Triggering event" means any event, such as a death, age attainment or other
1025 circumstance, that has occurred and that is the basis for a mandatory distribution
1026 under the terms of the trust.
1027
1028 (10) "Trust-terminating distributions" means distributions that, when completed,
1029 will distribute the remaining net assets of a trust and thereby effectively terminate
1030 the trust, including, without limitation, any such distributions that are made pursuant
1031 to section 5808.18 of the Revised Code or under any similar statutory or common
1032 law applicable to the trust.
1033
1034 (11) "Trustee indemnification clause" means a provision that indemnifies the
1035 trustee against loss arising from a claim relating to the trustee's administration of the
1036 trust.
1037 (12) "Trustee's report" means a report as described in section 5808.13(C) of the
1038 Revised Code.
1039
1040 (13) "Trustee succession objection period" means a forty-five (45) day period for
1041 providing to the departing trustee objections under paragraph (3) of division (D) of
1042 this section. The period commences with the date the notice and trustee's reports
1043 described in division (D) of this section are served on the recipient.
1044
1045 (C) When a trust is to terminate as a result of trust-terminating distributions and the trustee
1046 elects to use the provisions of this division, the trustee, within a reasonable period of time after
1047 the event or determination that requires or authorizes such distributions, shall serve on the
1048 terminating distributions necessary parties, and may serve on other persons who the trustee

1049 reasonably believes may have an interest in the trust, the documents and information described
1050 in subparagraphs (a) and (b) of paragraph (1) of this division (C).

1051

1052 (1) The documents and information to be served include:

1053

1054 (a) A written notice, executed by or on behalf of the trustee, that includes the following
1055 information:

1056

1057 (i) The date of the notice, corresponding to the date the notice is being sent;

1058

1059 (ii) A description of the terms of the trust that require or authorize the trust-
1060 terminating distributions or a citation to any statute that requires or authorizes the
1061 distributions;

1062

1063 (iii) If any of the proposed trust-terminating distributions is mandatory under the
1064 terms of the trust, a description of any triggering event that is the basis for such
1065 distribution;

1066

1067 (iv) A description of the proposed trust-terminating distributions that includes the
1068 names of the proposed distributees and a description, in general or specific terms,
1069 of the assets proposed for distribution to each;

1070

1071 (v) A description of the distributions objection period and the name, mailing address,
1072 email address if available and telephone number of the person or office associated
1073 with the trustee to which any written objections should be sent;

1074

1075 (vi) A description of the process, described in paragraph (2) of this division (C), that
1076 will be followed if the trustee receives no written objections within the
1077 distributions objection period;

1078

1079 (vii) A description of the process, described in paragraph (3) of this division (C), that
1080 will be followed if the trustee receives a written objection within the distributions
1081 objection period;

1082

1083 (viii) A statement of the impending bar of claims against the trustee, as described in
1084 paragraph (5) of this division (C), that will result if an objection is not timely
1085 made;

1086

1087 (ix) A statement that the trustee may rely upon the written statement of a recipient of
1088 the notice that such person consents to the proposed trust-terminating
1089 distributions and irrevocably waives the right to object to the distributions and
1090 any claim against the trustee for matters disclosed in the notice or the trustee's
1091 reports served with it and all other matters pertaining to the trustee's
1092 administration of the trust;

1093

1094 (x) A statement that the trustee may complete the distributions described in the notice
1095 prior to the expiration of the distributions objection period if all of the persons on
1096 whom the notice was served deliver to the trustee written consents and irrevocable
1097 waivers of the kind described in Paragraph (1)(a)(ix) of this division (C);
1098
1099 (xi) An exhibit showing the assets on hand at the date the notice is prepared and their
1100 respective values as shown in the regularly kept records of the trustee; and
1101
1102 (xii) An estimate of any assets, income, taxes, fees, expenses, claims or other items
1103 reasonably expected by the trustee to be received or disbursed before completion
1104 of the trust-terminating distributions but not yet received or disbursed, including
1105 trustee fees remaining to be paid.
1106
1107 (b) One or more trustee's reports covering the applicable reporting period.
1108
1109 (2) If no written objection is received by the trustee within the distributions objection
1110 period;
1111
1112 (a) The notice and trustee's reports served pursuant to paragraph (1) of this division (C)
1113 shall be considered approved by each recipient of the notice and reports;
1114
1115 (b) The trustee, within a reasonable period of time following the expiration of the
1116 distributions objection period, shall distribute the assets as provided in the notice; and
1117
1118 (c) Any person who was served such notice and reports shall be barred from bringing a
1119 claim against the trustee, and from challenging the validity of the trust, as provided in
1120 paragraph (5) of this division (C).
1121 (5) of this division (C).
1122
1123 (3) If, after being served the notice and trustee's reports described in paragraph (1) of this
1124 division (C), a qualified beneficiary or any other recipient of the notice wishes to object to
1125 matters disclosed in the notice or trustee's reports served or any other matter pertaining to
1126 the trustee's administration of the trust, such person shall provide written notice of the
1127 objection to the trustee of the noticing trust within the distributions objection period. If the
1128 trustee receives a written objection within the distributions objection period, the trustee
1129 may:
1130
1131 (a) Submit the written objection to the court for resolution and charge the expense of
1132 commencing, conducting and concluding such a proceeding as ordered by the court; or
1133
1134 (b) Resolve the objection with the objecting person by accepting a withdrawal of such
1135 person's objection or by written instrument, a written agreement as described in section
1136 5801.10 of the Revised Code, or other means. Any agreement or other written
1137 instrument executed by the objecting party pursuant to this paragraph (3)(b) may
1138 include a release and a trustee indemnification clause, along with other terms agreed to

1139 by the parties. Reasonable expenses related to such written instrument or written
1140 agreement shall be charged to the trust.

1141
1142 Within a reasonable time after resolution of all timely objections under this paragraph (3),
1143 the trustee shall distribute the remaining trust assets as provided in the notice, subject to
1144 any modifications provided for in the terms of the court order, written instrument, written
1145 agreement or other document setting forth the resolution of each such objection.

1146
1147 (4) The trustee may rely upon the written statement of a recipient of the notice and trustee's
1148 reports served under this division (C) that the recipient consents to the proposed trust-
1149 terminating distributions, irrevocably waives the right to object to the distributions, and
1150 irrevocably waives any claims against the trustee for breach of trust as to matters disclosed
1151 in the notice and trustee's reports and all other matters pertaining to the trustee's
1152 administration of the trust. The distributions described in the notice may be completed
1153 prior to the expiration of the distributions objection period if all of the persons on whom
1154 the notice and trustee's reports were served have delivered to the trustee similar written
1155 consents and irrevocable waivers.

1156
1157 (5) Any person who was served a notice and trustee's reports that comply with the
1158 requirements of paragraph (1) of this division (C) and who either consented to the
1159 proposed trust-terminating distributions or failed to timely provide the trustee a written
1160 objection as described in paragraph (3) of this division (C) is barred from bringing a claim
1161 against the trustee for breach of trust as to matters disclosed in the notice and trustee's
1162 reports and all other matters pertaining to the trustee's administration of the trust, and from
1163 challenging the validity of the trust, to the same extent and with the same preclusive effect
1164 as if the court had entered a final order approving and settling the trustee's full account of
1165 its entire administration of the trust, notwithstanding the limitations periods otherwise
1166 applicable under section 5810.05 of the Revised Code. If all of the terminating
1167 distributions necessary parties and all qualified beneficiaries of the trust have been served
1168 a notice and trustee's reports that comply with the requirements of paragraph (1) of this
1169 division (C) and have either consented to the proposed trust-terminating distributions or
1170 failed to timely provide the trustee a written objection as described in paragraph (3) of this
1171 division (C), all other beneficiaries of the trust, including but not limited to persons who
1172 may succeed to the interests in the trust of the beneficiaries served, shall be barred to the
1173 same extent and with the same preclusive effect as provided in the first sentence of this
1174 paragraph. The bar of claims under this paragraph (5) of division (C) applies to each
1175 person barred, his or her personal representatives and assigns, and his or her heirs who are
1176 not beneficiaries of the noticing trust.

1177
1178 (6) Any beneficiary who receives trust assets as a result of a trust-terminating distribution
1179 described in the notice described in paragraph (1) of this division (C) and who is barred
1180 from bringing claims under paragraph (5) of this division (C) may be required to return
1181 all or any part of the value of the distribution if the trustee determines that the return of
1182 assets is necessary to pay, or reimburse the trustee for payment of, taxes, debts, or
1183 expenses of the trust, including, but not limited to, reasonable expenses incurred by the
1184 trustee in obtaining the return of assets under this division. The beneficiary shall return

1185 such part or all of the value of the distribution expeditiously upon receipt of a written
1186 notice from the trustee requesting the return of assets under this division.

1187

1188 (D) When a trustee resigns or is removed from an irrevocable trust pursuant to the terms of the
1189 trust or otherwise, the departing trustee that elects to use the provisions of this division (D),
1190 within a reasonable period of time after such resignation or removal, shall serve on the
1191 resignation or removal necessary parties, and may serve on other persons who the trustee
1192 reasonably believes may have an interest in the trust, the documents and information
1193 described in subparagraphs (a) and (b) of paragraph (1) of this division (D).

1194

1195 (1) The documents and information to be served include:

1196

1197 (a) A written notice, executed by or on behalf of the departing trustee, that includes the
1198 following information:

1199

1200 (i) The date of the notice, corresponding to the date the notice is being sent;

1201

1202 (ii) A description of any terms of the trust or the Revised Code relevant to the
1203 resignation or removal of the departing trustee and the provisions, if
1204 applicable, regarding the appointment or designation of the successor
1205 trustee;

1206

1207 (iii) A description of any actions taken by the departing trustee, the beneficiaries
1208 of the trust or other required parties pertaining to the resignation or removal
1209 of the departing trustee and, if applicable, the appointment or designation
1210 of the successor trustee;

1211

1212 (iv) The name and address of the successor trustee, if one has been appointed or
1213 designated;

1214

1215 (v) If applicable, a statement confirming the successor trustee's acceptance of
1216 the trusteeship;

1217

1218 (vi) A description of the trustee succession objection period and the name,
1219 mailing address, email address if available and telephone number of the
1220 person or office associated with the departing trustee to which any written
1221 objections should be sent;

1222

1223 (vii) A description of the process, described in paragraph (2) of this division
1224 (D), that will be followed if the departing trustee receives no written
1225 objections within the trustee succession objection period;

1226

1227 (viii) A description of the process, described in paragraph (3) of this division
1228 (D), that will be followed if the departing trustee receives a written
1229 objection within the trustee succession objection period;

1230

- 1231 (ix) A statement of the impending bar of claims against the departing trustee,
1232 as described in paragraph (5) of this division (D), that will result if an
1233 objection is not timely made;
1234
1235 (x) A statement that the departing trustee may rely upon the written statement
1236 of a recipient of the notice that such person consents to the delivery of the
1237 net assets of the trust to the successor trustee, or to one or more co-trustees
1238 as applicable, and irrevocably waives the right to object to the delivery of
1239 the assets and any claim against the departing trustee for matters disclosed
1240 in the notice or the trustee's reports served with it and all other matters
1241 pertaining to the departing trustee's administration of the trust;
1242
1243 (xi) A statement that the departing trustee may complete the delivery of the net
1244 assets of the trust to the successor trustee, or to one or more co-trustees as
1245 applicable, prior to the expiration of the trustee succession objection period
1246 if all of the persons on whom the notice was served deliver to the trustee
1247 written consents and irrevocable waivers of the kind described in
1248 Paragraph (1)(a)(x) of this division (D);
1249
1250 (xii) An exhibit showing the assets on hand at the date the notice is prepared
1251 and their respective values as shown in the regularly kept records of the
1252 trustee; and
1253
1254 (xiii) An estimate of any assets, income, taxes, fees, expenses, claims or other
1255 items reasonably expected by the departing trustee to be received or
1256 disbursed before delivery of the net assets of the trust to the successor
1257 trustee, or to one or more co-trustees as applicable, but not yet received or
1258 disbursed, including trustee fees remaining to be paid, reports covering the
1259 applicable reporting period.
1260
1261 (b) One or more trustee's reports covering the applicable reporting period.
1262
1263 (2) If no written objection is received by the departing trustee within the trustee
1264 succession objection period:
1265
1266 (a) The notice and trustee's reports served pursuant to paragraph (1) of this division
1267 (D) shall be considered approved by each recipient of the notice and reports;
1268
1269 (b) The departing trustee, within a reasonable period of time following the expiration
1270 of the trustee succession objection period, shall deliver the net trust assets to the
1271 successor trustee or to one or more co-trustees as applicable; and
1272
1273 (c) Any person who was served such notice and reports shall be barred from bringing
1274 a claim against the trustee, and from challenging the validity of the trust, as
1275 provided in paragraph (5) of this division (D).
1276

1277 (3) If, after being served the notice and trustee's reports described in paragraph (1) of
1278 this division (D), a qualified beneficiary or any other recipient of the notice wishes
1279 to object to matters disclosed in the notice or trustee's reports served or any other
1280 matter pertaining to the departing trustee's administration of the trust, such person
1281 shall provide written notice of the objection to the departing trustee within the
1282 trustee succession objection period. If the departing trustee receives a written
1283 objection within the trustee succession objection period, the departing trustee may:
1284
1285 (a) Submit the written objection to the court for resolution and charge the expense of
1286 commencing, conducting and concluding such a proceeding as ordered by the
1287 court; or
1288
1289 (b) Resolve the objection with the objecting person by accepting a withdrawal of such
1290 person's objection or by written instrument, a written agreement as described in
1291 section 5801.10 of the Revised Code, or other means. Any agreement or other
1292 written instrument executed by the objecting party pursuant to this paragraph
1293 (3)(b) may include a release and a trustee indemnification clause, along with other
1294 terms agreed to by the parties. Reasonable expenses related to such
1295 written instrument or written agreement shall be charged to the trust.
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1301
1302 Within a reasonable time after resolution of all timely objections under this paragraph (3),
1303 the departing trustee shall deliver the net trust assets to the successor trustee, or to one or
1304 more co-trustees as applicable, subject to any modifications provided for in the terms of
1305 the court order, written instrument, written agreement or other document setting forth the
1306 resolution of each such objection.
1307
1308 (4) The departing trustee may rely upon the written statement of a recipient of the notice and
1309 trustee's reports served under this division (D) that the recipient consents to, and
1310 irrevocably waives the right to object to, the departing trustee's resignation or removal, the
1311 appointment of the successor trustee, if applicable, and delivery of the net assets of the trust
1312 to the successor trustee or to one or more co-trustees as applicable, and irrevocably waives
1313 any claims against the departing trustee for breach of trust as to matters disclosed in the
1314 notice and trustee's reports and all other matters pertaining to the departing trustee's
1315 administration of the trust. The delivery of the net assets of the trust to the successor
1316 trustee, or to one or more co-trustees as applicable, may be completed prior to the
1317 expiration of the trustee succession objection period if all of the persons on whom the
1318 notice and trustee's reports were served have delivered to the departing trustee similar
1319 written consents and irrevocable waivers.
1320
1321 (5) Any person who was served a notice and trustee's reports that comply with the requirements
1322 of paragraph (1) of this division (D) and who either consented to the delivery of the net

1323 assets of the trust to the successor trustee or one or more co-trustees as applicable or failed
1324 to timely provide the departing trustee a written objection as described in paragraph (3) of
1325 this division (D) is barred from bringing a claim against the departing trustee for breach of
1326 trust as to matters disclosed in the notice and trustee's reports and all other matters
1327 pertaining to the departing trustee's administration of the trust, and from challenging the
1328 validity of the trust, to the same extent and with the same preclusive effect as if the court
1329 had entered a final order approving and settling the departing trustee's full account of its
1330 entire administration of the trust, notwithstanding the limitations periods otherwise
1331 applicable under section 5810.05 of the Revised Code. If all of the resignation or removal
1332 necessary parties and all qualified beneficiaries of the trust have been served a notice and
1333 trustee's reports that comply with the requirements of paragraph (1) of this division (D) and
1334 have either consented to the delivery of the net assets of the trust to the successor trustee
1335 or failed to timely provide the trustee a written objection as described in paragraph (3) of
1336 this division (D), all other beneficiaries of the trust, including but not limited to persons
1337 who may succeed to the interests in the trust of the beneficiaries served, shall be barred to
1338 the same extent and with the same preclusive effect as provided in the first sentence of this
1339 paragraph. The bar of claims under this paragraph (5) of division (D) applies to each person
1340 barred, his or her personal representatives and assigns, and his or her heirs who are not
1341 beneficiaries of the noticing trust. Any person who is barred under the preceding sentences
1342 of this paragraph from bringing a claim against the departing trustee is barred to the same
1343 extent from bringing a claim against the successor trustee for failure to object to a matter
1344 that is subject to the bar of claims against the departing trustee.

1345
1346 (E) The trustee's substantial compliance in good faith with the requirements concerning the
1347 contents of the notices described in divisions (C) and (D) shall be deemed sufficient.

1348
1349 (F) If a notice and trustee's reports under division (C) or division (D) of this section are served
1350 upon the personal representative for the estate of a deceased beneficiary of the noticing
1351 trust or upon the trustee of a subtrust that is a beneficiary of the noticing trust and upon one
1352 or more beneficiaries of the estate or subtrust whose fiduciary is served, and if both the
1353 fiduciary of the estate or subtrust and a beneficiary of that estate or subtrust who are served
1354 consent to the proposed distributions or delivery of assets described in the notice or fail to
1355 object within the applicable objection period, the beneficiary of the estate or subtrust who
1356 is subject to the claims bar with respect to the administration of the noticing trust shall be
1357 barred to the same extent from bringing a claim against the fiduciary of the estate or
1358 subtrust for failure to object to a matter that is subject to the bar of claims against the trustee
1359 of the noticing trust.

1360
1361 (G) The notices and trustee's reports served by the trustee under the terms of divisions (C) and
1362 (D) shall be served on a person by:

1363
1364 (1) Handing them to the person; or

1365
1366 (2) Leaving them;

1367

- 1368 (a) At the person's office with a clerk or other person in charge or, if no one is in charge,
1369 in a conspicuous place in the office; or
1370
1371 (b) At the person's dwelling or usual place of abode with someone of suitable age and
1372 discretion who resides there; or
1373
1374 (3) Mailing them to the person's last known address by United States mail, in which event
1375 service is complete upon mailing; or
1376
1377 (4) Delivering them to a commercial carrier service for delivery to the person's last known
1378 address within three calendar days, in which event service is complete upon delivery
1379 to the carrier; or
1380
1381 (5) Sending them by electronic means to a facsimile number or e-mail address provided by
1382 the person to be served or his or her attorney, in which event service is complete upon
1383 transmission, but is not effective if the trustee of the noticing trust learns that they did
1384 not reach the person.
1385
1386 (H)No trustee shall request or include a trustee indemnification clause in the notice and
1387 trustee's reports served under division (C) or division (D) or in any documentation served
1388 by the trustee with the notice and trustee's reports. However, in the event such notice and
1389 trustee's reports are served and a written objection is received by the trustee within the
1390 applicable objection period, a trustee indemnification clause may be included in an
1391 agreement or other written instrument executed by the objecting party pursuant to
1392 paragraph (3)(b) of division (C) or paragraph (3)(b) of division (D).
1393

1394 **PROPOSAL 5: A PROPOSAL TO AMEND R.C. §§ 3013.05, 3013.06,**
1395 **3105.171(A)(6)(A)(V) AND 2106.22 IN ORDER TO ALLOW FOR SPOUSES TO**
1396 **VOLUNTARILY ENTER INTO A POSTNUPTIAL AGREEMENT AND TO**
1397 **VOLUNTARILY MODIFY OR TERMINATE AN ANTENUPTIAL OR**
1398 **POSTNUPTIAL AGREEMENT.**
1399

1400 **Rationale for the Proposal**
1401

1402 For over 130 years in Ohio, spouses have been legally capable of entering into agreements
1403 with each other as if unmarried except to the extent an agreement alters the legal relations
1404 between the spouses. Legal relations between spouses are those rights and responsibilities that
1405 exist solely by reason of the marriage (e.g., right to inherit, election against the will, right to
1406 administer the estate, property division, spousal support, etc.). Currently, in Ohio, for spouses
1407 to have an enforceable agreement between themselves that alters their legal relations, such
1408 agreement must have been entered into prior to the marriage and once entered into cannot be
1409 amended or terminated irrespective of the spouses' desire to do so or changes in circumstances.
1410 The validity and enforceability of antenuptial agreements in Ohio are governed by a long
1411 history of judicial decisions.
1412

Chapter 11: Forms for Use with the Ohio Trust Code

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Chapter 11: Forms for Use with the Ohio Trust Code

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Forms for Drafting

I. Revocable Trust, OTC Special Provisions

A. *Presumption of Revocability.*

Ohio Rev. Code § 5806.02(A) makes trusts created after the effective date of OTC (January 1, 2007) revocable and amendable unless the trust instrument provides otherwise. Good practice will be to continue to specifically state that a trust is revocable; for a form see § V., below. If a trust is to be irrevocable, for example, for tax reasons, it is necessary to include an express statement like the following:

Trust Irrevocable. This trust is irrevocable and may not be amended or revoked.

B. *Waiver of Notices and Information.*

A principal change made by OTC is in reporting by the trustee to the beneficiaries, where there has been sparse known Ohio law. OTC contains two types of notice and information requirements, those that cannot be changed in the trust instrument and those that can. Many clients may want to change the latter. Following are these requirements and a responsive form for inclusion in the trust instrument for those clients who want to minimize notices and information required to be given by the trustee, for example, to give the trustee “wiggle room” depending on the circumstances of each beneficiary.

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1. Notice of existence of trust.

OTC requires the trustee to notify the current beneficiaries of existence of an irrevocable trust or death of the settlor of a revocable trust, Ohio Rev. Code § 5808.13(B)(3). The current beneficiaries are generally the single income beneficiary or the several spray beneficiaries, Ohio Rev. Code § 5801.01(F). The notice must identify the settlor and inform the current beneficiaries of their rights to request a copy of the trust instrument and to receive or request trust reports. This requirement may be waived in the trust instrument for any current beneficiary who has not attained age 25, Ohio Rev. Code § 5801.04(B)(8), and it is waived for them in the form below. Note that it cannot be waived for other current beneficiaries.

2. Notice of acceptance of trustee.

OTC requires the trustee to notify the current beneficiaries of its acceptance of a trust, Ohio Rev. Code § 5808.13(B)(2). This could be included with the preceding notice for a new trust, but would be a separate notice when there is a change of trustee. This requirement may also be waived in the trust instrument for any current beneficiary who has not attained age 25, Ohio Rev. Code § 5801.04(B)(8), and it is waived for them in the form below. Note that it cannot be waived for other current beneficiaries.

3. Copy of trust instrument.

OTC requires the trustee to send a copy of part or all of the trust instrument to any beneficiary (not just a current beneficiary) who requests it, Ohio Rev. Code § 5808.13(B)(1). This requirement may be waived in the trust instrument, and it is waived in the form below. Note that it cannot be waived for current beneficiaries, Ohio Rev. Code § 5801.04(B)(9).

4. Compensation.

OTC requires the trustee to notify the current beneficiaries of any change in the method or rate of its compensation, Ohio Rev. Code § 5808.13(B)(4). This requirement may be waived in the trust instrument, and it is waived in the form below.

5. Annual reports.

OTC requires the trustee to send an annual trust report to the current beneficiaries and also to other beneficiaries who request it. The report is “of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets and, if feasible, their respective market values.” Ohio Rev. Code § 5808.13(C). This requirement may be waived in the trust instrument, and it is waived in the form below.

6. Other information.

OTC requires the trustee to keep the current beneficiaries “reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests,” Ohio Rev. Code § 5808.13(A). This requirement may be waived in the trust instrument, and it is waived in the form below.

7. Response to requests of beneficiaries.

OTC requires the trustee to respond to requests for information from any beneficiary “for information related to the administration of the trust,” Ohio Rev. Code § 5808.13(A). This requirement may be waived in the trust instrument, but only for non-current beneficiaries, Ohio Rev. Code § 5801.04(B)(9). It is waived in the form below, to the extent permitted by law.

8. Beneficiary surrogates.

OTC authorizes the settler to waive the trustee’s otherwise non-waivable reporting duties to current beneficiaries by designating a “beneficiary surrogate” to receive information about the trust on behalf of the beneficiary, Ohio Rev. Code § 5801.04(C). For a form designating a surrogate, see § C immediately below.

Responding to these Ohio requirements by waiving them is tricky, as the law of another state may become applicable (for example, the client may move to another state or only the place of trust administration may be moved there) where the requirements differ or different limitations apply to waivers, or Ohio may revise its law. The following form for inclusion in the trust instrument attempts to maximize these waivers both in Ohio and in other states:

Notices and Information. I hereby to the full extent permitted by law waive any provisions of law otherwise requiring the Trustee to notify any beneficiary (i) of existence of this trust or of its becoming irrevocable on my death, (ii) of acceptance and identification of a Trustee, (iii) of any change in the method or rate of determining the Trustee’s compensation and (iv) of any right to receive or request the Trustee’s reports. I also to the full extent permitted by law waive any provisions of law otherwise requiring the Trustee to furnish to any beneficiary (i) a copy of the trust instrument on request and (ii) trust reports and other information periodically or on request.

If the notice and information requirements of OTC are generally appropriate for the client, you may still want to modify specific requirements. For example, to waive the requirements for younger beneficiaries only, you may insert in each of the two sentences of the preceding form after “any beneficiary” the limiting phrase “under age 25.”

The effect of this provision under the particular circumstances will depend on what law applies to it to limit the effect of these waivers, both which state and (if state law changes) whether its old or new law applies.

For forms for giving of these notices by the trustee and for waiver of them by beneficiaries, see the Forms for Establishment and Administration Section below.

During the life of the settlor of a revocable trust, these notice and information requirements apply only to the settlor. Ohio Rev. Code §§ 5801.01(R), 5806.03(A), and 5808.13(G).

C. *Appointment of Surrogate for Notice Purposes.*

Ohio Rev. Code § 5801.04(C) provides that the trust instrument may designate a surrogate to receive notices, information or reports otherwise required to be provided to one or more current beneficiaries under Ohio Rev. Code §§ 5801.04(B)(8) and (B)(9). The surrogate is then authorized to receive or request the notices, information or reports in place of the beneficiary and is required to act in good faith to protect the interests of the beneficiary; that is, the surrogate also becomes a fiduciary, with the usual fiduciary duties and liabilities.

Beneficiary Surrogate. I hereby appoint [names, etc.] singly and successively in that order as Surrogate to receive and request notices, information and reports to all [or identified] current beneficiaries otherwise required to be provided to them, with the powers and responsibilities provided by the Ohio Trust Code.

D. *Governing Law, Place of Administration.*

Ohio Rev. Code § 5804.03 provides that a trust is validly created if its creation complies with the law of the jurisdiction where the trust instrument is executed or of any of certain other connected jurisdictions. It is useful in the trust instrument to identify one of those jurisdictions validating the creation of the trust.

Ohio Rev. Code § 5801.06(A) permits (within public policy limits) the trust instrument to designate the law governing the meaning and effect of the trust terms. Given that contacts with several states may be involved and the future mobility of clients and their interests, it is wise also to designate that law in the trust instrument.

Ohio Rev. Code § 5801.06(B) authorizes the trust instrument to designate the principal place of administration of the trust and the law governing trust administration. The trust instrument should do that too.

Ohio Rev. Code § 5801.07(C) authorizes the trustee to transfer the principal place of administration of the trust to another jurisdiction, and Ohio Rev. Code § 5801.07(D) requires the trustee to notify the current beneficiaries of an intended transfer. The transfer may be made 60 days after notice unless beneficiaries who object obtain a court order prohibiting it. In some states, the UTC, as adopted, requires notice to remaindermen as well and permits beneficiaries to veto the transfer without submitting the matter to a court and, in those states, a waiver of the notice requirement may generally be appropriate. One may also prefer waiver of the Ohio notice requirement to avoid

the statutory 60-day waiting period and possible pre-transfer objection. The sentence bracketed in the form below may be included to waive the notice, in Ohio or elsewhere.

If the place of administration is changed, the law of the new place of administration becomes the law of administration of the trust unless the trust instrument provides otherwise. Ohio Rev. Code § 5801.06(B).

Governing Law, Place of Administration. The validity of the trusts established under this agreement and the construction of their terms are governed by the law of the State of Ohio. The principal place of administration of these trusts is also the State of Ohio and their administration is governed by the law of the State of Ohio, but the Trustee may change the principal place of administration from time to time to another jurisdiction and thereafter the law of the new jurisdiction governs their administration. [The Trustee need not give notice to the beneficiaries of any transfer of the principal place of administration to another jurisdiction.]

For a form for notice of change of place of administration, see Forms for Establishment and Administration, § IV.B., below.

E. Authority of Settlor's Agent Under Power of Attorney.

Ohio Rev. Code § 5806.02(E) permits the settlor's powers "with respect to revocation, amendment or distribution of trust property" to be exercised by the agent under his power of attorney, but only if "expressly authorized" by *both* the trust instrument and the power. If the agent is intended to be authorized to exercise these powers for the settlor, the trust instrument may contain the following:

Rights Reserved. I reserve the rights to myself and to my agent under power of attorney (a) to add property to this trust during my life, with the consent of the Trustee, (b) to add property on my death, by my will, beneficiary designation or otherwise, and (c) by written instrument delivered to the Trustees, to withdraw property and to amend or revoke this agreement.

Note that the power of attorney must also expressly authorize the agent to exercise these powers. To do that, meet the requirements of Ohio Rev. Code § 1337.42(A)(1).

F. Post-Death Payment of Claims, Expenses and Taxes.

Ohio Rev. Code § 5805.06(A) is missing Uniform Trust Code § 505(a)(3), that provides in other UTC states for payment of claims against and expenses of administration of the estate of the settlor of a revocable trust from the trust after his death. Ohio case law on the matter is uncertain; see Krall and Mesnard, "Legal Uncertainty with Respect to Creditor Claims against Non-Probate Assets," 24 PROB. L. J. 322 (May/June 2014). If the probate estate may be small, because substantially all assets may be transferred to the trust before death, and if it is not intended that the resulting insolvency of the probate estate impede payment of claims and expenses (or claim of death tax deductions for them), the following provision may be included in the trust agreement:

Death Costs. The Trustee shall pay from the augmented trust upon my death before its disposition after my death all (or such amounts as my Personal Representatives direct) of my following death costs:

- a. my debts which are allowed as claims against my estate,
- b. my funeral expenses without regard to legal limitations,
- c. the expenses of administering my estate,
- d. the estate, inheritance and other death taxes (except generation-skipping transfer taxes), and interest and penalties thereon, due because of my death with respect to all property passing under my will or under this agreement, and
- e. any cash gifts made in my will or any codicil.

The Trustee may make any such payment either to my Personal Representatives or direct to the payee. The Trustee shall not pay such death costs from non-taxable employee benefits or from property received under a limited power of appointment which prohibits such use. The Trustee shall charge such payments against the residue of the trust, and shall charge any such death tax (and interest and penalties thereon) against only the portion of the residue generating such tax.

G. Spendthrift Provision.

Ohio Rev. Code § 5805.01 validates a spendthrift provision (for beneficiaries other than the settlor, see Ohio Rev. Code § 5805.06) that meets rather minimal requirements, subject to several exceptions in Ohio Rev. Code § 5805.02. The clause must use the term “spendthrift trust” or “words of similar import” and must restrain “both voluntary and involuntary transfer of a beneficiary’s interest.” Most trusts should include the provision; those that should not include it are those where creditor problems seem unlikely, and the more likely possibility is that the beneficiary may indeed later want to assign away his or her interest, for example, for tax purposes. A revocable trust may include the following:

Spendthrift Provision. After my death no interest in income or principal shall be anticipated, encumbered, assigned or subject to claims of creditors, spouses, former spouses or others.

H. Trustee Administrative Powers.

OTC reverses the common-law tradition, in Ohio and elsewhere, that a trustee has only those powers granted in the trust instrument, with almost no powers granted by statute. Ohio Rev. Code §§ 5808.15 and 5808.16 grant to a trustee a comprehensive set of administrative powers. Other powers are granted by the Ohio Uniform Prudent Investor Act, now part of OTC, the Ohio Uniform Principal and Income Act, now Ohio Rev. Code § 5812.01 et seq. and the Ohio Revised Uniform Fiduciary Access to Digital Assets Act, now Ohio Rev. Code Chapter 2137. Thus, it is no longer necessary to include a boilerplate list of administrative

powers in the trust instrument; indeed, relying on the statute instead gives you a flexible set of powers that may even be improved by future statutory amendment rather than frozen at the signing of the trust instrument, and that is easily accessible to third parties. However, it may be helpful to those using the trust instrument to identify the statutory base of the powers of the trustee. The following may be inserted in the trust instrument in lieu of the former customary boilerplate list of powers:

Trustee Powers. The Trustee has all of the powers granted by the Ohio Trust Code, the Ohio Uniform Principal and Income Act and the Ohio Revised Uniform Fiduciary Access to Digital Assets Act (including access to contents of communications), as amended and in effect at the time of exercise of the power, except as limited in this agreement.

The trust instrument may add exceptions, where certain powers in OTC should be denied to the trustee, for example, for specific tax reasons. Ohio Rev. Code § 5808.15(A) specifically authorizes the trust instrument to limit the statutory powers. However, the statutory powers were drawn to avoid most tax difficulties and, in most cases, it should not be necessary to limit them. Several items noted below are possible exceptions or additions to the statutory powers.

I. Action by Majority of Trustees.

Ohio Rev. Code § 5807.03(A) provides that three or more trustees may act by majority decision. If unanimity is intended, it must be stated.

Action by Multiple Trustees. When three or more trustees are serving, they shall act only on the agreement of all of them.

J. Delegation of Trustee Duties and Powers.

Ohio Rev. Code § 5808.07 provides that the trustee may delegate his duties and powers. If it is intended that the trustee may act only personally, that limitation must be stated.

Delegation of Trustee Duties and Powers. I intend that the Trustee perform all of his duties and powers personally, and not delegate any of them to others except where absolutely necessary to accomplish the purposes of these trusts.

K. Powers to Direct or Veto Trustee.

Ohio Rev. Code §§ 5808.08 and 5815.25 provide that the trust instrument may grant powers of direction or veto over the administration of the trust to others, who are sometimes called Trust Advisers. The trustee may follow the directions given without liability, and the person directing the trustee becomes the fiduciary who is responsible to the beneficiaries. The trustee is also without liability for inaction if he or she has recommended action and his or her recommendation is vetoed. The following are examples of grant in the trust instrument of a power to direct and of a veto power:

Power to Direct Trustee. I appoint [name, etc.] to direct the trustee with respect to purchase, retention or sale of trust investments. The Trustee shall follow his directions, shall take no such action without his directions, and in either case is not liable for losses resulting therefrom. He shall act in good faith and is liable for any loss that results from breach of his fiduciary duty to the beneficiaries. If he dies, resigns, waives his powers or is disabled, the Trustee shall act without any direction.

Trust Adviser. I appoint my spouse to serve in a fiduciary capacity as Trust Adviser when my spouse is not a Trustee. My spouse may resign at any time with or without cause. My spouse may also waive the powers of the Trust Adviser [granted elsewhere in the trust instrument] in whole or in part for any period, or modify or cancel such waiver, and the Trustee shall act within the limits of such waiver without any approval. If my spouse dies, resigns or is disabled, the Trustee shall act without any approval. My spouse may not exercise any incident of ownership over any policy of insurance on the life of my spouse, but such incidents may be exercised by the Trustee without any approval.

L. *Diversification of Investments.*

OTC recodifies the Ohio Uniform Prudent Investor Act (effective in 1999) as Ohio Rev. Code § 5809.01 *et seq.*, a part of OTC. Ohio Rev. Code § 5809.03 grants broad investment powers to trustees, and Ohio Rev. Code § 5809.01(C) authorizes the trust instrument to expand or limit those powers. Ohio Rev. Code § 5809.03(B) requires diversification of investments. In cases where diversification is not desired, for example, an interest in a family company is to be retained, it is appropriate to limit it:

Diversification of Investments. The Trustee may retain as a proper trust investment any interest in a business enterprise in which my family and I have been actively involved, including [identify enterprise], without regard to whether it is otherwise a proper trust investment or to rules requiring diversification of trust investments and without liability for depreciation in value, even though its acquisition or retention or its proportion of the trust assets might otherwise not be prudent.

Substantially the foregoing provision was suggested by the court in *Wood v. US Bank*, 160 Ohio App. 3d 831 (Hamilton Cty. 2005), and approved in *National City Bank, Trustee v. Noble, Trustee*, 2005-Ohio 6484 (App. Cuyahoga Cty. 2005). See Galloway, "The First Case to Interpret Ohio's UPIA Clarifies Trustees' Duty to Diversify," 16 PROB. L.J. 51 (Nov./Dec. 2005); and Galloway, "A Second Ohio Case Interprets UPIA's Duty to Diversify," 16 PROB. L.J. OHIO 117 (Mar./Apr. 2006).

M. *Retention of Stock of Trustee Bank.*

Ohio Rev. Code § 1111.13 restricts the power of a bank trustee to invest in, retain and vote shares of its own stock or stock of its corporate parent held in its trusts, subject to the terms of the trust instrument. It is common for Ohio trust instruments to waive the conflict of interest in retention of the stock. OTC is silent, so the retention waiver may be added in the instrument as follows:

Retention of Bank Securities. The Trustee may retain and vote securities of a bank that is Trustee, its parent or other affiliates of its parent issued in their corporate capacity even though a conflict of interest may exist.

N. Allocations Between Principal and Income.

The Ohio Uniform Principal and Income Act, enacted in 2003, has been moved to new Ohio Rev. Code Title 58 as its Chapter 12. Ohio Rev. Code § 5812.02(A)(1) provides that its provisions may be altered by the trust instrument. Ohio trust instruments have commonly expressly granted the trustee discretion to allocate receipts and disbursements between principal and income. This was necessary when Ohio had no visible subject law, and continued so under our first Principal and Income Act (enacted in 1987) because of its inflexibility. The current act contains (in the author's opinion) all of the flexibility necessary for effective administration, including the power of adjustment in Ohio Rev. Code § 5812.03, so that nothing need be included in the trust instrument unless a particular unusual allocation is desired, for example, that small stock dividends be allocated to income (under Ohio Rev. Code § 5812.18(C)(1) they are allocated to principal). However, one who believes that custom is difficult to overcome may include the following in the trust instrument:

Principal and Income. The Trustee may allocate receipts and disbursements between principal and income as provided by the Ohio Uniform Principal and Income Act, including its power to adjust [or otherwise as the Trustee determines to be in the best interests of the beneficiaries and to minimize the taxes imposed on them and on these trusts].

The bracketed grant of discretionary allocation power beyond that in the statute may create difficult income, gift and estate tax problems for the grantor, trustee or beneficiaries and should be included only after careful review of its tax effects. Note that, without the bracketed material, the provision is simply an accurate statement of the result whether or not it is included in the trust instrument, that is, the provision adds nothing except the additional space to print it.

O. Tax Benefit Adjustments Between Principal and Income.

Mismatches between trust accounting and tax laws may result in apparently unwarranted benefits to either trust principal or income beneficiaries. A common example is claim of decedent's estate administration expenses (paid from principal) as income tax deductions, reducing the income tax of the income beneficiary even though payment of the expense reduced the principal held for the remaindermen. Many states have by statute or decision required these adjustments. There has been no visible Ohio law on the subject, but it has been common in trust instruments to bar adjustments for such benefits, reasoning that the adjustments are too complex to be useful within the usual family context.

Ohio Rev. Code § 5812.47 requires such adjustments when a marital or charitable deduction is otherwise imperiled, and makes them discretionary in other cases. One who wishes simply to bar them in those other cases may include the following in the trust agreement:

Tax Benefit Adjustments. The Trustee shall not make income and principal adjustments for tax benefits as permitted by the Ohio Uniform Principal and Income Act except to preserve an estate tax marital or charitable deduction.

P. *Removal of Trustee, Appointment of Successor.*

Ohio Rev. Code § 5807.06 provides for removal of the trustee for stated causes by the court. There is no authorization in OTC of removal by the beneficiaries, see Ohio Rev. Code § 5804.11(B). The trust instrument may authorize removal for cause by the beneficiaries, expand or contract the statutory causes for removal or provide even for removal without cause. An example of the latter is the following:

Removal of Trustee. My spouse may remove any trustee then acting, with or without cause, and appoint any one of more of my children or any bank with its principal office situated within the United States as successor trustee.

Q. *Tax Limitations on Trustee Powers.*

Ohio Rev. Code § 5808.14 provides helpful limitations on the powers given to trustees in the trust instrument, to avoid income, gift and estate tax issues from overbroad powers. Its limits apply unless the trust instrument expressly indicates otherwise (if you do not want these limitations to apply, you may negate them). If you want to be certain that these limits will always apply for tax purposes, even if, for example, the trust situs may be changed, their application might be expressly confirmed.

Tax Limitations on Trustee Powers. I intend that all of the provisions of § 5808.14 of the Ohio Trust Code apply to limit the powers otherwise granted to the Trustees as may be required by tax law.

R. *Digital Assets.*

2016 H.B. 432 enacted the Ohio Revised Uniform Fiduciary Access to Digital Assets Act as new Ohio Rev. Code Chapter 2137. For details see Watson, "Let's Cut to the Chase: How Does this Digital Assets Law Really Work?" 27 *Prob. L.J.* 115 (Jan./Feb. 2017); and Lenz, "Practical Planning and Administration for Digital Assets under the Ohio Fiduciary Access to Digital Assets Act," 27 *Prob. L.J.* 176 (July/Aug. 2017). The act grants fiduciaries access to only the catalog of information unless the governing instrument grants further authority to access the contents as well. It is thus advisable to grant that further authority in the will or trust instrument. For examples of that grant of authority see the forms for complete trust instruments and wills in §§ V and VI below.

S. *Potential Trust Contest.*

You may consider making the trust post-death contest proof. New Ohio Rev. Code Chapter 5817 enacted by 2018 HB 595 authorized a pre-death court proceeding (or a PSA) to “validate” both the trust and its companion pour-over will. See the detailed explanation of it in chapter 10A of this book.

II. *Pour-Over Will, OTC Special Provisions*

Although most or even all known assets may be transferred to the revocable trust, a will is generally needed to sweep up any loose assets and to provide for payment of claims and expenses from the trust.

A. *Gift to Trust.*

The trust will be the residuary (or perhaps only) beneficiary named in the will, and the trust instrument will be incorporated by reference into the will if the gift would otherwise fail (for example, the trust is contested, see D below).

I give [all the residue of] my estate to the Trustees then acting under my revocable Trust Agreement under which I am the initial Trustee, dated today. My estate [The residue] shall be added to the trust held under that Agreement, and administered under its provision in effect at my death. If necessary to give effect to this gift, and not otherwise, the Agreement as it now exists is incorporated by reference.

B. *Payment of Post-Death Claims, Expenses and Taxes.*

The will may then provide for payment from the trust of all death costs, both to provide a source for their payment and to assure that the payments are deductible for estate tax purposes.

Death Costs. All of (a) my debts which are allowed as claims against my estate, (b) my funeral expenses without regard to legal limitations, (c) the expenses of administering my estate, and (d) the estate, inheritance and other death taxes (except generation-skipping transfer taxes), including interest and penalties thereon, due because of my death with respect to all property passing under this will shall be paid either from the residue of my estate or from the property passing under my said Trust Agreement, as my Personal Representatives direct. All such death taxes on property not passing under this will shall be paid from or recovered from that property, in the proportions provided by applicable law.

C. *Executor Administrative Powers.*

OTC reverses the common law tradition, in Ohio and elsewhere, that a trustee has only the powers granted in the trust instrument. Ohio Rev. Code §§ 5808.15 and 5808.16 grant to a trustee a comprehensive set of administrative powers.

See form at § I.H., above. The same administrative powers may by will be conferred on the personal representative, in lieu of the former customary boilerplate list of powers.

Powers of Personal Representatives. My Personal Representatives shall have all of the powers granted to trustees by the Ohio Trust Code and to fiduciaries by the Ohio Uniform Principal and Income Act, Ohio Transfers to Minors Act and Ohio Revised Uniform Fiduciary Access to Digital Assets Act (including access to content of communications), as amended and in effect at the time of exercise of the power. In addition, my Personal Representatives may make distribution of the residue by distribution directly to any beneficiary who is then entitled to distribution under my said Trust Agreement.

D. Incorporation by Reference of Trust Instrument.

Usually a pour-over will accompanies a revocable trust, making the trust the residuary beneficiary of the will under Ohio Rev. Code § 2107.63. It is advisable not only to make the trust beneficiary under the will, but also to incorporate its terms by reference into the will. If for any reason the trust itself fails to qualify as beneficiary, for example, it has been revoked or the latest trust instrument cannot be found, the gift still does not fail because the terms of the trust (if they can be established, for example by an earlier instrument) are incorporated into the will and the trust is administered as a testamentary trust.

There are of course problems here. First, the trust version so incorporated is only the version in existence at the signing of the will, so further post-will amendments are not included. Second, Ohio Rev. Code § 2107.05, authorizing the incorporation, requires that a copy of the trust instrument be filed with the court, and the parties will not want that filing (unless necessary to avoid failure of the trust) because they prefer the privacy of private trusts that are generally not filed with any court.

2018 HB 595 has amended Ohio Rev. Code § 2107.05 to clarify this procedure. It provides guidance on how a trust instrument may be incorporated by reference into a will. It further excuses court filing of the trust instrument with the court until and unless the gift to the trust is otherwise determined to be ineffective.

Incorporation by reference of the trust instrument into the will is effected by the third sentence of the residuary clause of the will form at page 9.20 of this book, as follows:

If necessary to give effect to this [residuary] gift, but not otherwise, the Trust Agreement as it now exists is incorporated by reference.

E. Identity of Executor and Trustee.

Prompt probate administration will be facilitated when the same person is both executor and trustee. If personal liability issues are not of concern, he or she may upon his or her probate appointment distribute the entire probate estate to himself or herself as trustee (apparently by only his or her private intent, as there is no transfer between two separate legal entities as owners), and

administer all as trustee, including paying claims and expenses and making distribution. A probate inventory and a very simple accounting that shows all inventories assets distributed in kind to the trust will perfect the simplified probate administration. For further explanation see Brucken, "Simplified Probate," 23 Prob. L. J. 30 (Sept/Oct 2012).

III. Irrevocable Gift Trust

A. *Statement of Irrevocability.*

Ohio Rev. Code § 5806.02(A) makes trusts created after the effective date of OTC revocable and amendable unless the trust instrument provides otherwise. Thus, if the trust is to be irrevocable, for example, for tax reasons, it is necessary to include an express statement like the following:

Trust Irrevocable. This trust is irrevocable and may not be amended or revoked.

B. *Consent of Settlor to Modification or Termination.*

Ohio Rev. Code § 5804.11(A) provides that during the life of the settlor his or her consent is required to modify or terminate a trust. Concerns have been expressed that his retained right to block such action by withholding consent may trigger federal estate tax under I.R.C. §§ 2036 and 2038 and Ohio estate tax under Ohio Rev. Code §§ 5731.06 and 5731.08. See Newman, "The Modification and Termination of Irrevocable Trusts Under the Ohio Uniform Trust Code," 16 *Prob. L.J.* 2 (Sept./Oct. 2005). OTC as first enacted limited application of Ohio Rev. Code § 5804.11(A) to new trusts, but this limitation was deleted by 2008 H.B. 499 as unnecessary because the section simply codifies prior Ohio case law. Although it appears that this retained right of the settlor is a common-law right that long antedates taxes and has never triggered them, if it remains a concern for the settlor, he or she may release it in the trust instrument.

Consent of Settlor to Modification or Termination. I hereby release any right I may otherwise have to consent to modification or termination of this trust, under the Ohio Trust Code or otherwise, leaving such matters solely to judgment of the beneficiaries.

C. *Other Provisions.*

The other provisions of an irrevocable trust may be the same as the post-death provisions above for administration and beneficiaries of a revocable trust.

IV. Special Duty Trusts

A. *Legacy Trust*

Ohio Rev. Code Chapter 5816 contains the Ohio Legacy Trust Act. Subject to detailed requirements, it permits a settlor to create a spendthrift trust for his own personal benefit to avoid claims of most future creditors. For further

information see Loeffler and Sullivan, "Ohio's Quiet Revolution: The Ohio Asset Management Modernization Act of 2012," 23 *Prob. L.J.* 103 (Jan./Feb. 2013); Stegman and Layman, "The Legacy Trust Act as a Vehicle for Advanced Estate Planning," 23 *Prob. L.J.* 238 (July/Aug. 2013).

B. *Trust for Pet.*

Ohio Rev. Code § 5804.08 authorizes creation of a trust for the care of one or more animals. See Ogline, "Trusts for the Care of Animals: Estate Planning Goes to the Dogs," 18 *Prob. L.J.* 9 (Sept./Oct. 2007); and Stolarsky, "Ohio Animal Trusts," 18 *Prob. L.J.* 172 (Mar./Apr. 2008). The following is extracted with permission from a trust instrument prepared by Michael Ogline of Alliance.

Trust for Pets. The trustee shall distribute the animals described on the attached schedule, or any other animals in my care at my death, to such person or persons as the trustee shall determine, considering my wishes that if possible they be kept together. The trustee shall distribute income and principal of this trust to such person or persons who have ownership or possession of, or are otherwise providing care for, any or all of those animals, including but not limited to individuals, kennels, stables, doctors of veterinary medicine, veterinary medical hospitals or clinics and animal shelters as the trustee determines. The primary purpose of this trust is to provide for the care of those animals consistent with the level of care I have provided for them, and the interests of remaindermen are of secondary importance only. The trustee shall make distributions to the person or persons who are providing care for those animals in amounts sufficient that they not incur any personal expense, including income taxes they pay on the amounts paid to them, in providing such care. Any income not so paid shall be accumulated and added to the principal of the trust. Further, I appoint [name] as Trust Protector to enforce this trust as provided by the Ohio Trust Code. This trust shall terminate upon the death of the last to die of those animals, and shall then be distributed to [remaindermen].

C. *Charitable Trust.*

A charitable organization may be established as a trust or as a not for profit corporation. The following are examples operative provisions for charitable trust.

Charitable Trust Provisions. The Trustee shall make distributions of income and principal from the trust exclusively for religious, charitable, scientific, literary and educational purposes as defined in § 501(c)(3) of the Internal Revenue Code of 1986 and in corresponding provisions of any applicable future United States internal revenue laws (the "Code"), including distributions to support activities and projects of organizations operated exclusively for such religious, charitable, scientific, literary and educational purposes; Any part of the income not so paid shall be added to principal.

No part of the principal or income of the trust shall inure to the benefit of or be distributable to its trustees, officers or private individuals, but the trust may pay reasonable compensation for services

rendered and make distributions in furtherance of its purposes stated above. The trust shall not carry on propaganda or otherwise attempt to influence legislation to such extent as would result in the loss of its exemption under § 501(c)(3) of the Code. The trust shall not participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of or in opposition to any candidate for public office. It is intended that the trust shall be exempt from federal income taxation under § 501(a) of the Code as an organization described in § 501(c)(3) of the Code. The trust shall not carry on any activities not permitted to be carried on by an organization (a) exempt from federal income tax under § 501(c)(3) of the Code; (b) contributions to which are deductible for federal income tax purposes under § 170(c)(2) of the Code; (c) bequests to which are deductible for federal estate tax purposes under § 2055(a)(2) of the Code; and (d) gifts to which are deductible for federal gift tax purposes under § 2522(a)(2) of the Code. This trust agreement shall be construed accordingly, and all powers and activities hereunder shall be limited accordingly.

V. Complete Documents—Revocable Trust Agreement

JOHN JONES TRUST AGREEMENT

This Trust Agreement is dated this ____ day of ____, 20__ and is by JOHN JONES, of Cleveland, Ohio, referred to in the first person as the Settlor and in the third person (with my successors) as the Trustees. The Trustees agree to administer all property transferred to them in trust as provided in this agreement.

ARTICLE I. DURING MY LIFE AND UPON MY DEATH

1. Rights Reserved. I reserve the rights to myself and to my agent under power of attorney (a) to add property to this trust during my life, with the consent of the Trustees; (b) to add property to this trust on my death, by my will, beneficiary designation or otherwise; and (c) by written instrument delivered to the Trustees, to withdraw property and to amend or revoke this agreement.

2. Payments During My Life. The Trustees shall pay the net income and principal of the trust as I may direct. However, during any periods while I am disabled, the Trustees shall pay to me such amounts of the net income and principal as they deem proper for my welfare, and also may (but are not required to) pay to my spouse and to each of my children in fact partially or wholly dependent upon me such amounts of the net income and principal as the Trustees deem proper for their welfare. Any excess income shall be added to principal.

3. Upon My Death. Upon my death the Trustees shall collect all property then added to the trust by my will, beneficiary designation or otherwise. After paying from the augmented trust the “Death Costs” identified below, the Trustees shall hold the remaining trust assets as directed in the balance of this agreement.

ARTICLE II. DISPOSITION AFTER MY DEATH

1. Trust for Spouse. If my spouse survives me, after my death the Trustees shall pay to my spouse the net income of the trust, and also pay to my spouse such amounts of its principal as they deem proper for the welfare of my spouse and children. Upon the death of my spouse, my spouse may appoint the trust (except any part received by the trust by disclaimer by my spouse and the proceeds of any insurance policies on the life of my spouse) to or for the benefit of any of my lineal descendants, their spouses and charitable organizations.

2. Division Among Lineal Descendants. Any part of the trust my spouse does not or cannot effectively appoint shall upon the death of my spouse be distributed as provided in this paragraph. If my spouse does not survive me, upon my death the entire trust shall be distributed as provided in this paragraph. In either case, that distribution is in equal shares among my children who are then living, and the lineal descendants then living of a child not then living shall take the share, per stirpes, that such child would have received if such child were then living. However, the share of any beneficiary who has not then attained age 25 shall be retained in a separate trust for such beneficiary under the following paragraph.

3. Trusts for Young Beneficiaries. The Trustees shall pay to a beneficiary for whom a separate trust is held under this agreement such amounts of the net income and principal of his trust as they deem proper for his, his spouse's or his children's welfare, and any income not so paid shall be added to the principal of his trust. Each such beneficiary shall be paid his trust at age 25. If a beneficiary dies before that age, upon his death the balance of his trust shall be paid to such persons and in such shares as if such beneficiary had then owned such property and had then died intestate, unmarried and domiciled in the State of Ohio, according to its laws of inheritance then in effect; and the share of any beneficiary who has not then attained age 25 shall be retained in a separate trust for such beneficiary under this paragraph.

4. Distributions. The Trustees shall make required payments of income to my spouse at least quarterly. The Trustees shall make discretionary payments for a person's "welfare" from time to time in such amounts as they deem proper for his support, health (including lifetime residential or nursing home care), education, advancement in life (including assistance in the purchase of a home or the establishment or development of any business or professional enterprise which the Trustees believe to be reasonably sound), tax planning, happiness and general well-being, even to the exhaustion of the trust from which such payments are made. However, the Trustees, based upon information reasonably available to them, shall make such payments for a person's welfare only to the extent his reasonably available income, principal and parental support are insufficient in their opinion for such purposes, and shall take into account his accustomed manner of living, age, health, marital status and any other factor they consider important. I request (but do not require) that if my spouse or children receive a distribution for the welfare of another person they use such distribution for such purposes.

5. Definitions. In this agreement:

a. Spouse. My spouse is my wife, MARY JONES. Any other person's "spouse" includes only a spouse then married to and living with him as husband and wife, or a spouse who was married to and living with him as husband and wife at his death whether or not thereafter remarried.

b. Children, Lineal Descendants. My children are my son BILL JONES and my daughter SALLY JONES and any other children hereafter legitimately born to or adopted by me. "Child" and "lineal descendant" include only legitimates whose parents are married to each other at the time of conception or birth, persons lawfully adopted and the lineal descendants of such legitimates and persons, even if any such lineal descendant is later adopted by others.

c. Powers of Appointment. Property subject to a power of appointment shall be paid to, or retained by the Trustees or paid to any trustee under any will or trust agreement for the benefit of, such one or more permissible appointees, in such amounts and proportions, granting such interests, powers and powers of appointment, and upon such conditions including spendthrift provisions as the holder of such power appoints in his will or in a trust agreement revocable by him until his death, but only if such will or trust agreement specifically refers to such power.

6. Spendthrift Provision. After my death no interest in income or principal shall be anticipated, encumbered, assigned, or subject to claims of creditors, spouses, former spouses or others.

7. Potential Duration. The rule against perpetuities shall not apply to any interest under this agreement.

8. Governing Law, Place of Administration. The validity of the trusts established under this agreement and the construction of their terms are governed by the law of the State of Ohio. The principal place of administration of these trusts is also the State of Ohio and their administration is governed by the law of the State of Ohio, but the Trustees may change the principal place of administration from time to time to another jurisdiction and thereafter the law of the new jurisdiction governs their administration.

ARTICLE III. ADMINISTRATION

1. Trustee Powers. The Trustees have all of the powers granted by the Ohio Trust Code, Ohio Uniform Principal and Income Act and Ohio Revised Uniform Fiduciary Access to Digital Assets Act (including access to contents of communications), all as amended and in effect at the time of exercise of the power, except as follows:

a. Approvals. During my life except while I am disabled, the Trustees shall buy and sell trust investments only with my written approval. While I am disabled and after my death, the Trustees shall exercise those powers without approval.

b. Diversification of Investments. The Trustees may retain as a proper trust investment any interest in a business enterprise in which my family and I have been actively involved, including Jones Manufacturing Company, without regard whether it is otherwise a proper trust investment or to rules requiring diversification of investments, and without liability for depreciation in value, even though its acquisition or retention or its proportion of the trust assets might otherwise not be prudent.

c. Trustee Bank Securities. The Trustees may retain and vote securities of a bank that is Trustee, its parent or other affiliates of its parent issued in their corporate capacity even though a conflict of interest may exist.

d. Tax Benefit Adjustments. The Trustees shall not make income and principal adjustments for tax benefits as permitted by the Ohio Uniform Principal and Income Act except to preserve an estate tax marital or charitable deduction.

2. Marital Deduction. A "Marital Deduction Interest" is any part of the trust for my spouse for which my Personal Representatives are granted a federal or any state estate tax marital deduction. I intend that such marital deductions are allowed for a Marital Deduction Interest, and this agreement shall be construed and all powers shall be exercised consistent with such intent. For example, the Trustees shall not allocate any receipt to principal or any disbursement to income if such allocation understates the net income of such Interest under applicable law; the Trustees shall withdraw and distribute to my spouse at least annually all income of any retirement plan or individual retirement account payable to such Interest; and upon the written demand of my spouse, the Trustees shall convert its unproductive or underproductive property into productive property within a reasonable time. The Trustees may but are not required to divide a Marital Deduction Interest into a separate trust.

3. Death Costs. The Trustees shall pay from the trust as augmented upon my death before its disposition after my death all (or such amounts as my Personal Representatives direct) of my following death costs:

- a. my debts which are allowed as claims against my estate,
- b. my funeral expenses without regard to legal limitations,
- c. the expenses of administering my estate,
- d. the estate, inheritance and other death taxes (except generation-skipping transfer taxes), and interest and penalties thereon, due because of my death with respect to all property passing under my will or under this agreement, and
- e. any cash gifts in my will or any codicil.

The Trustees may make any such payment either to my Personal Representatives or direct to the payee. The Trustees shall not pay such death costs from non-taxable employee benefits or from property received under a limited power of appointment which prohibits such use. The Trustees shall charge such payments against the residue of the trust, and shall charge such death taxes (and interest and penalties thereon) against only the portion of the residue generating such tax. Upon the death of my spouse, no death taxes payable from a Marital Deduction Interest because of my spouse's death shall be charged against Non-GST Property of such Interest unless all other property of such Interest is first exhausted.

4. The Trustees. The following provisions also apply to the Trustees:

- a. Succession. If I cease to be Trustee, I appoint my spouse as Trustee. If my spouse does not become or ceases to be Trustee, I appoint my children (one at a time by order of age, eldest first) singly and successively in that order as Trustees.

b. Appointment by My Spouse. My spouse (during my life or after my death) may remove any Trustee then acting, with or without cause, and appoint any one or more of my children or any bank with its principal office situated within the United States as successor Trustee.

c. Limit on Payments of Principal. To comply with tax law, I direct that neither my spouse nor any successor Trustee appointed by my spouse may make any payment of principal to my spouse under any provision of this agreement for any purpose except for the support and health of my spouse.

d. Compensation, Bond. My spouse, my children and I shall serve as Trustees without compensation, but each may be reimbursed for expenses incurred on behalf of these trusts. Each bank as Trustee shall receive reasonable compensation. Each Trustee shall serve without bond.

5. Notices and Reports. I hereby to the full extent permitted by law waive any provisions of law otherwise requiring the Trustee to notify any beneficiary (i) of existence of this trust or of its becoming irrevocable on my death, (ii) of acceptance and identification of a Trustee, (iii) of any change in the method or rate of determining the Trustees' compensation and (iv) of any right to receive or request the Trustees' reports. I also to the full extent permitted by law waive any provisions of law otherwise requiring the Trustees to furnish to any beneficiary (i) a copy of the trust instrument on request and (ii) trust reports and other information periodically or on request.

Signed at Cleveland, Ohio.

John Jones, Settlor and Trustee

VI. Complete Documents—Pour-Over Will

WILL OF JOHN JONES

I, JOHN JONES, of Cleveland, Ohio, make this Will and revoke all my prior Wills and Codicils.

My spouse is my wife MARY JONES. My children are my son BILL JONES and my daughter SALLY JONES and any other children hereafter legitimately born to or adopted by me. I intentionally make no gift to my children in this Will if my spouse survives me.

ARTICLE I. TANGIBLE PERSONAL PROPERTY

I give to my spouse my personal effects, jewelry, collections, household furnishings and equipment, automobiles and all other non-business tangible personal property. If my spouse does not survive me, I give this property to my children who survive me, divided among them as they agree. If neither my spouse nor any child of mine survives me, this property shall pass with the residue of my estate.

If any of my children are minors at my death, my Personal Representatives may distribute to them such portion of their shares as my Personal Representatives deem appropriate for them to receive, and the balance of their shares shall pass with the residue of my estate.

ARTICLE II. RESIDENCES

I give to my spouse my entire interest in any real property, condominium, cooperative apartment, or similar housing unit, used by us as a permanent or seasonal residence, subject to any mortgage or other lien. If my spouse does not survive me, such interests shall pass with the residue of my estate.

ARTICLE III. RESIDUE OF MY ESTATE

I give all the residue of my estate to the Trustees then acting under my revocable Trust Agreement under which I am the initial Trustee, dated today. The residue shall be added to the Trust held under that Agreement, and administered under its provisions in effect at my death. If necessary to give effect to this gift, but not otherwise, the Agreement as it now exists is incorporated by reference. I do not by this Item exercise any powers of appointment.

ARTICLE IV. PERSONAL REPRESENTATIVES

1. Appointment and Bond. I nominate my spouse and my children (one at a time by order of age, eldest first) singly and successively in that order as Personal Representatives. Each may nominate alternate, successor, additional, or ancillary Personal Representatives to serve with him or in his place. Each (whether named by me or by power of nomination) shall serve without bond and have all of the powers and immunities granted to my Personal Representatives by this Will or by law.

2. Independent Administration. I authorize my Personal Representatives to administer my estate privately and independently, without filing inventories, appraisals or accountings or obtaining orders or directions of any court, except as this clear intent is thwarted by law.

3. Powers of Personal Representatives. My Personal Representatives shall have all of the powers granted to trustees by the Ohio Trust Code and to fiduciaries by the Ohio Uniform Principal and Income Act, Ohio Transfers to Minors Act and Ohio Revised Fiduciary Access to Digital Assets Act (including access to contents of communications), as amended and in effect at the time of exercise of the power. In addition, my Personal Representatives may make distribution of the residue by distribution directly to any beneficiary who is then entitled to distribution under my said Trust Agreement.

4. Death Costs. All of (a) my debts which are allowed as claims against my estate, (b) my funeral expenses without regard to legal limitations, (c) the expenses of administering my estate, and (d) the estate, inheritance and other death taxes (except generation-skipping transfer taxes), including interest and penalties thereon, due because of my death with respect to all property passing under this Will shall be paid either from the residue of my estate or from the property passing under my said Trust Agreement, as my Personal Representatives direct. All such death taxes on property not passing under this Will shall be paid from or recovered from that property, in the proportions provided by applicable law.

ARTICLE V. GUARDIANS AND CUSTODIANS

I nominate my spouse and my sister JANE SMITH singly and successively in that order, as guardians of the person and property of my children, each without bond, and as successor to me as custodian of property for my children under the Ohio Transfers to Minors Act or other applicable law.

I sign this Will at Cleveland, Ohio, this _____ day of _____, 20__.

John Jones

While the Maker of this Will and we were all present together, the Maker signed it as the Maker's Will, and at the Maker's request we each signed it as a witness. We each believe the Maker to be age 18 or older, of sound mind and under no constraint or undue influence.

_____ residing at _____

_____ residing at _____

STATE OF OHIO
COUNTY OF CUYAHOGA

We, the Maker and the witnesses whose names are signed to the attached instrument dated _____, 20____, being first duly sworn, do hereby declare to the undersigned authority that, while we were all present together, the Maker signed the instrument as the Maker's Will, that the Maker signed willingly and that the Maker executed it as the Maker's free and voluntary act for the purposes therein expressed; and that each of the witnesses, at the request of the Maker, in the presence and hearing of the Maker and of each other, signed it as a witness, and that to the best of the knowledge of each, the Maker was at that time age 18 or older, of sound mind and under no constraint or undue influence.

John Jones

Witness

Witness

Subscribed, sworn to and acknowledged before me by John Jones, the Maker, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, 20____.

Notary Public

Forms for Establishment and Administration

I. Creation of Trust

A. *Transfer to Trustee.*

A trust is not a legal entity, like a corporation, a LLC or even a partnership. Thus, to create a trust one transfers specific identified assets to a trustee, Ohio Rev. Code §§ 5804.01(A) and 5810.14. The trustee is the legal entity that receives the assets and holds legal title to them.

Transfer to: Tom Trustee, Trustee under Sam Settlor Trust
Agreement dated [date]

B. *Blind Trust.*

Ohio Rev. Code § 5301.03 provides that a transfer to a trustee that does not identify the trust does not put third parties on inquiry of the existence of a trust or the powers or lack of powers of the trustee. Thus, trust assets are often recorded or registered in this form for both simplicity and privacy. However, where there are multiple trusts, separate records must be maintained to establish which trust holds the assets.

Transfer to: Tom Trustee, Trustee.

C. *Self-Declared Trust.*

Ohio Rev. Code § 5804.01(B) reminds us that, if the settlor is also the trustee (as is common with a revocable trust), no transfer is necessary, since one does not transfer assets to oneself and the trust itself is not an entity. However, it is still necessary to provide evidence of the settlor's intent to subject specific assets to the trust. That may be done by "transferring" the assets to the settlor "as trustee" or by listing them in the trust instrument or in an attachment to it. See Johnson, "A New Way to Establish & Fund a Living Trust: But How Do We Recognize the Trustee?" 16 *Prob. L.J.* 111 (Mar./Apr. 2006).

D. *Transfer to Trust as an Entity.*

A transfer to the "Sam Settlor Trust" may be a nullity, as no such legal entity would exist to receive title to the asset. However, it could also be interpreted as intended as a short-form way to transfer assets to the then current trustee, who must be the intended transferee if creation of a trust is intended. Some courts have so treated it, and other courts have invalidated it, so one problem is that you may not know whether the transfer is effective until a court rules on it. Not good practice. Brucken, "Who Is a Trust?" 26 *PROB. L. J.* 69 (Nov/Dec 2105). Recently amended Ohio Rev. Code § 5301.071 and enacted Ohio Rev. Code § 5810.14 provide a procedure to correct such a defective title.

E. *Creation by Agent Under Power of Attorney.*

Ohio Rev. Code § 5806.02(E) authorizes exercise by an agent under a proper power of attorney of the settlor's rights to modify or terminate a revocable trust. Ohio Rev. Code § 5804.02(F) was added by 2016 HB 432 also to authorize the agent to create a trust for the principal. The Ohio Uniform Power of Attorney Act also provides for trust creation, modification and termination by the agent, subject to the limitations in Rev. Code §§ 1337.42(A)(1) and 1337.58(C) on gifts by the agent under the power and the requirement that the agent follow the estate plan of the principal.

Ohio Rev. Code §§ 1337.42(A)(1) and 1337.58(C) also authorize an agent under a power of attorney to add property of the principal to his existing revocable trust.

F. *Creation by Court Order.*

Ohio Rev. Code § 5804.01(D) recognizes creation of a trust by a court order. Courts have been creating trusts from awards and settlements for injured plaintiffs and for Medicare qualification purposes, including various forms of special needs trusts. *See Davis, "Treatment of Supplemental Needs Trusts Under the OUTC," 16 Prob. L.J. 17 (Sept./Oct. 2005).*

II. Notice to Beneficiaries of Existence of Trust

A. *Notice of Existence of Irrevocable Trust (and Acceptance of Trustee), Ohio Rev. Code § 5808.13 (B)(2) and (3).*

To [current beneficiary]:

Sam Settlor created an irrevocable trust under trust agreement with me as trustee dated [date]. You are a beneficiary of the trust. This is your formal notice of the existence of the trust, of my identity as trustee of the trust and of your rights to request a copy of the trust instrument and to receive annual reports on the trust.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

B. *Notice of Existence of Formerly Revocable Trust (and Acceptance of Trustee), Ohio Rev. Code § 5808.13(B)(2) and (3).*

To [current beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date] and the trust then became irrevocable. You are a beneficiary of the trust. This is your formal notice of the existence of the trust, of my

identity as the current trustee of the trust and of your rights to request a copy of the trust instrument and to receive annual reports on the trust.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

C. *Time Bar for Trust Contest, Ohio Rev. Code § 5806.04.*

Ohio Rev. Code § 5806.04 provides an automatic two-year (from the settlor's death) limit for post-death trust contests, as did its predecessor Ohio statute. It also offers an alternative notice procedure to shorten the period to six months after giving notice. The notice may be in the following form:

To [beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date] and the trust then became irrevocable. You are a beneficiary of the trust. This is your formal notice of the existence of the trust and of my identity as the current trustee of the trust. Enclosed is a copy of the trust instrument. The time allowed for commencing an action to contest the validity of the trust or of any amendment, revocation or transfer to it that was made during Sam's lifetime expires two years after his death or (if earlier) six months from the date on which I send this notice to you.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

III. Relationship with Beneficiaries

A. *Duties Owed Only to Settlor While Trust Is Revocable.*

All of the trustee's duties to beneficiaries, including the notice and information requirements of Ohio Rev. Code § 5808.13, are owed only to the settlor of a revocable trust while the trust is revocable, whether or not the settlor has legal capacity to exercise his or her rights of revocation, etc., Ohio Rev. Code §§ 5801.01(R), 5806.03(A), and 5808.13(G). In this regard, OTC treats a revocable trust as essentially the equivalent of a will that is ambulatory until death.

The trust terms may raise a question whether the trust is revocable, for example, if there are restrictions on the settlor's rights. Ohio Rev. Code § 5801.01(R) defines revocable trusts to include those requiring the consent of another person for exercise by the settlor of his or her reserved rights if that person has no adverse interest in the trust.

B. *Copy of Trust Instrument, Ohio Rev. Code § 5808.13(B)(1).*

At the request of *any* beneficiary (current, qualified or otherwise), the trustee must furnish to him or her a copy of the trust instrument, Ohio Rev. Code § 5808.13(B)(1). In addition, in the notice to current beneficiaries of the existence of the trust required by Ohio Rev. Code § 5808.13(B)(3), the trustee must state that the beneficiary has the right to request a copy; and if the trustee sends a notice to accelerate the time bar for contest of a revocable trust under Ohio Rev. Code § 5806.04, it must be accompanied by a copy.

If the trust was revocable and was restated during the life of the settlor, only the restated trust instrument (and any subsequent amendments) need be furnished, Ohio Rev. Code § 5808.13(B)(1). Unless the beneficiary specifically requests the entire trust instrument, the trustee may furnish a redacted copy that includes only those provisions that the trustee determines are relevant to the beneficiary's trust interest but, if the beneficiary then requests a copy of the entire trust instrument, the trustee must then supply it, Ohio Rev. Code § 5808.13(B)(1).

The foregoing provisions may all be waived in the trust instrument. However, Ohio Rev. Code § 5808.13(A) requires that the trustee shall promptly respond to a beneficiary's request for trust information, and a request will likely ask for a copy of the trust instrument. Ohio Rev. Code § 5801.04(B)(9) makes the requirement that the trustee respond to the request of a current beneficiary for trust information non-waivable in the trust instrument.

A form for waiver of these requirements in the trust instrument to the extent they can be waived is included above in Forms for Drafting, § I.B.

C. *Annual Reports, Ohio Rev. Code § 5808.13(C).*

Annual reports are required by Ohio Trust Code § 5808.13(C) unless validly waived by the settlor in the terms of the trust (see § 5801.04(B)(8) and (9)). For waiver in the trust instrument see the Forms for Drafting § I.B., above. The first annual reports under OTC were due in 2008 for calendar year 2007, when OTC became effective.

Not all beneficiaries receive annual reports. The report must be given to each "current" beneficiary. Under § 5801.01(F), a current beneficiary is a person who is then "a distributee or permissible distributee of trust income or principal" as opposed to remainder beneficiaries who will or may be distributees only in the future. Section 5808.13(C) also requires the trustee to give reports to other beneficiaries who request them, and the trustee may but need not also give copies to other beneficiaries even if they do not request them, § 5808.13(E). A beneficiary may waive reports, § 5808.13(D).

Not all trustees need to do annual reports. Reports for a revocable trust are required only to the settlor, § 5806.03, and if the settlor is the trustee, he or she need not give reports to himself or herself. A widow as trustee and sole current beneficiary of QTIPable A and B trusts created by her late husband need not give

reports to herself; and if she later becomes senile and one or more of her children become successor trustees or even become additional current beneficiaries, they probably will not give reports (that she could not understand) to her either. The child who becomes successor trustee may want to give reports to his or her siblings, however, whether or not they are current beneficiaries, and if someone else is serving as an agent for the widow under a durable power of attorney, or is appointed guardian for the widow, the successor trustee should furnish her reports to the agent or guardian.

The annual report is to be “of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee’s compensation, a listing of the trust assets, and, if feasible, the trust assets’ respective market values,” § 5808.13(C). It need not, however, be a formal accounting. Here is what the National Conference of Commissioners on Uniform State Laws says about the reports in its official Comment to § 813 of the Uniform Trust Code, on which OTC is based:

The Uniform Trust Code employs the term “report” instead of “accounting” in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust’s income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

The trustee who complies with this reporting requirement receives the benefit of § 5810.05(A), releasing the trustee from liability to the beneficiary for matters disclosed in the report two years after sending the report to him or her. That will be the case if the report “adequately discloses the existence of a potential claim for breach of trust and informs the [recipient] of the time allowed for commencing a proceeding against a trustee,” § 5810.05(A).

The following is an example of a notice and annual report prepared by the author that he believes would comply with the requirement and start the running of the time bar if the material attached to it contains the necessary information on the trust property, liabilities, receipts, disbursements and trustee fees (for example, bank or broker statements may not identify all assets, the checking account entries may not identify all fees or other transactions and neither may identify liabilities, which may be addressed in the text of the form or in another attachment to it). It is offered as an example for trustees that have not already prepared their own forms.

ANNUAL REPORT OF SAM SETTLOR TRUST

To [current beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date]. The trust then became irrevocable and I became trustee. You are a beneficiary of the trust. This is your 2018 annual report of the trust property, liabilities, receipts and disbursements, including the source

and amount of the trustee's compensation, listing of the trust assets and their respective market values. The report is in the form of the attached copies of the twelve 2018 monthly statements of the bank [broker] that is custodian for the trust assets, of the 2018 checkbook entries for the bank account maintained for the trust and of the schedule K-1 tax information for your personal federal income tax return. Also attached is a separate list of any trust property, liabilities, receipts, disbursements and trustee fees not identified in the other attachments.

Please examine this report carefully and direct any questions or concerns to me. Under Ohio law you have two years after my sending of this report to commence any proceeding on it against me.

Date: _____

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

For further information on trust notices and information see Brucken, "Do We Shoot the Trustee? Omitting Notices and Information Required by R.C. 5808.13," 25 *Prob. L.J.* 225 (May/June 2015); and Brucken, "Can Trusts Really Be Secret?" 26 *Prob. L.J.* 22 (Sept./Oct. 2015).

D. *Request by Beneficiary for Reports, Notices and Other Information, Ohio Rev. Code §§ 5801.09(A), 5808.13(B)(1), and 5808.13(C).*

To Tom Trustee:

I am a beneficiary of the Sam Settlor trust, as a child of his who will receive a share of the trust upon the death of the current beneficiary who is my mother Mary Settlor. I hereby direct you to give to me also all reports, notices and other trust information to be given to my mother as current beneficiary of the trust, as provided by law and to the extent not waived by the trust instrument. I also request a copy of the trust instrument.

Steve Settlor
789 Main Street
Anytown, Ohio 44444
Phone 216-987-6543

E. *Waiver by Beneficiary of Reports, Notices and Other Information, Ohio Rev. Code § 5808.13(D).*

To Tom Trustee:

I am a current beneficiary of the trust created by Sam Settlor by trust agreement with [himself as initial trustee] dated [date]. I hereby waive the right to an annual report of the trust and to all notices and other trust information otherwise required to be furnished to me. I understand that I may withdraw this waiver at any time with respect to future reports and other information.

[signed by current beneficiary]

IV. Other Administrative Matters

A. *Notice of Change in Compensation, Ohio Rev. Code § 5808.13(B)(4).*

To [current beneficiary]:

As trustee of the Sam Settlor trust created by him by trust agreement dated [date], I am changing the method or rate of my compensation [state change]. The change will be effective [future date].

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

B. *Notice of Transfer of Place of Administration, Ohio Rev. Code § 5801.07(D).*

To [current beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date]. The trust then became irrevocable and I became trustee. You are a beneficiary of the trust. Its principal place of administration has been Anytown, Ohio at my office there. This gives you notice that I am moving to Wherever, Illinois on or about [date, that is at least sixty days after giving the notice], and that the principal place of administration of the trust will then become my new office in Wherever, identified below.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

After [date]
456 Main Street
Wherever, Illinois 66666
Phone: 312-123-4567

C. *Notice of Combination of Trusts, Ohio Rev. Code § 5804.17.*

To [qualified beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date]. The trust then became irrevocable and I became trustee. You are a beneficiary of the trust. The trust instrument creates two separate but identical trusts for the current benefit of [beneficiary]. To simplify administration and reduce costs, including the trustee fee, I have determined to combine the two trusts into a single trust. This is your formal notice of that combination.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

No court approval is required, but under some circumstances the trustee may want to request approval by the beneficiaries, for example, by a private settlement agreement under Ohio Rev. Code § 5801.10.

D. Notice of Division of Trust, Ohio Rev. Code § 5804.17.

To [qualified beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date]. The trust then became irrevocable and I became trustee. You are a beneficiary of the trust. The trust instrument creates a single trust for the current benefit of [beneficiary], for part of which I have elected treatment as qualified terminable interest property for Ohio estate tax purposes to obtain a marital deduction and avoid payment of Ohio estate tax. To achieve further income and estate tax benefits for the beneficiaries, I have determined to divide the single trust into two separate trusts, one of which is subject to the QTIP election and will be included in the estate of [beneficiary] for Ohio estate tax purposes upon her death, and the other of which will not be so included. This is your formal notice of that division.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

E. Certification of Trust, Ohio Rev. Code § 5810.13.

A certification of trust is intended to be used by the trustee as a probate court certificate of appointment is used by an executor or administrator, to prove his or her authority to third parties. The statute permits third parties to rely on it without incurring liability if they have no knowledge that it is incorrect, without any duty of further inquiry.

To [person other than a beneficiary]:

I am sole trustee of the Sam Settlor trust. I hereby certify the following:

1. The trust was created by Sam Settlor by trust agreement dated [date], it has continued to exist since then and it now exists.

2. The trustee's powers include all powers granted by the Ohio Trust Code, Ohio Uniform Principal and Income Act and Ohio Revised Uniform Fiduciary Access to Digital Assets Act, as amended and in effect at the time of exercise of the power, with minor exceptions not pertinent to this transaction.

3. The trust became irrevocable on the death of Sam Settlor. It has not thereafter been revoked, modified or amended.

4. Ohio Revised Code § 5810.13(F) provides that you may act in reliance on this certification without liability to any other person for so acting unless you know that it is incorrect, and that you may assume without inquiry that it is correct if you do not know of any error in it.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

If there are co-trustees, the certification must also state the authority of all or less than all trustees to certify and to exercise the powers of the trustees.

F. Memorandum of Trust, Ohio Rev. Code § 5301.255.

A memorandum of trust has become a more useful document with enactment of 2007 S.B. 134, effective January 17, 2008. It deleted requirements that the memorandum identify the settlor and be signed by him or her that thus had required the instrument to be prepared before the settlor's death. A memorandum of trust now must contain only the same material as a trust certification. Its principal differences are that it may (but need not) also contain a legal description of specific real property, and that it must be acknowledged by the trustee in the same form as a deed. Although there is no requirement that a trust certification be recordable or be recorded, a Recorder may decline to record it unless it is acknowledged (so that it is also a memorandum of trust). However, it is designed for use with financial assets such as stocks and bonds in the same manner as a probate court certificate of appointment is used by an executor or administrator. With real estate, one might instead use (and record) a memorandum of trust.

Forms for Construction and Modification and Change of Trustee

I. Construction

A. *By PSA. Example: Trust Construction (Inclusion of Adopted Children).*

This is a private settlement agreement dated [date] to settle the uncertain status of adopted children under the trust agreement of John.

1. On [date] John declared a trust under a trust agreement. John died on [date], and upon his death the trust became irrevocable. John was the original trustee, Jack was appointed in the trust agreement as successor trustee upon John's death, and Jack has served since then.
2. Mary is the widow of John and the sole income beneficiary of the trust. Bill and Sally are the only children of John and Mary, and both are competent adults.
3. Bob and Louise are the only children of Bill; Bob is natural born and Louise is adopted. Jane and Dick are the only children of Sally; Jane is natural born and Dick is adopted. Bob and Louise are both competent adults, and Jane and Dick are both minors.
4. The trust agreement provides that its entire income is now paid to Mary and that, upon her death, the remaining trust assets are distributable to the then living lineal descendants of John and Mary, per stirpes, with the shares of those who have not then attained age 25 continuing in trust for them until they attain that age.
5. The trust agreement contains (at § [number]) the following provision with respect to the status of adopted children as beneficiaries under the trust agreement:

Adopted children shall be treated the same as natural born children. I intend by this provision to exclude adopted children from benefit hereunder.
6. The parties are uncertain which sentence of this conflicting provision was intended to override the other.
7. The parties desire now to determine the status of adopted children, to provide now for certainty and to avoid any later controversy. They desire to do so now when it is not clear who gains and who loses by the determination, to facilitate settlement now by all parties. This private settlement agreement is authorized by Ohio Rev. Code § 5801.10(C).
8. Bob and Louise are the only adult natural born or adopted grandchildren of Mary now living. They enter into this agreement, not only for themselves, but also as representatives of the class consisting of Jane and Dick, the only living minor natural born or adopted grandchildren of Mary, and all future natural born or adopted grandchildren and other lineal

descendants of Mary. All possible beneficiaries of the trust are, thus, parties to this agreement, and all join in it, either individually or by representation as provided by Ohio Rev. Code § 5803.04.

9. All parties agree that for all purposes of the trust agreement, adopted children shall be treated exactly the same as natural born children. Thus, for example, if Bill does not survive Mary, his one-half share of the trust assets shall be received equally by both of his children, Bob and Louise; and if Sally does not survive Mary, her one-half share shall be received equally by both of her children, Jane and Dick.
10. Jack, as trustee signs, this agreement only to acknowledge receipt of it.

[signed by Mary, Bill, Sally, Bob,
Louise and Jack]

Whether the adult natural born and adopted children adequately represent the minor natural born and adopted children respectively so that virtual representation is effective to bind the minors in the PSA may depend on further analysis of the facts, including the personal relationships as well as the legal interests of the various parties.

B. PSAs in Court.

A PSA will sometimes be filed with a court, possibly to challenge it (for example, by a beneficiary who was omitted from it or claims he or she was fraudulently induced to join it), but more likely to obtain a court order “blessing” it. In the blessing situation, one or more parties may file in court because the trustee insists on the assurance of a court order, there may be doubt whether the result of the PSA can be validly effected without a court order or for other reasons peculiar to the facts. For example, Ohio Rev. Code § 5801.10(C) appears to invalidate a PSA that terminates a trust prematurely or changes the interests of the beneficiaries, but a court order can do either under Ohio Rev. Code § 5804.11, even a court order simply approving a PSA and ordering it into effect.

In many cases, there will be practical and psychological reasons for first negotiating a PSA before going to court. It is often easier to settle before litigation has hardened the positions of the parties and even to negotiate settlement before a matter is ripe for litigation when there are no evident winners or losers. With the signed PSA in hand, any of the parties may then file it in court for a quick, simple and probably inexpensive court approval. The PSA may (and should) provide that as to all parties it is a waiver of service of summons, entry of appearance and answer to any complaint filed with any court, and that all parties agree to urge the court to approve the PSA and order it into effect.

The following additional paragraph may be used in any PSA to accomplish this:

If this agreement is filed in any court, each of the parties to this agreement (individually or by representation, virtual or otherwise) hereby waives service of summons, enters his or her appearance in the

proceeding and for his or her answer to the complaint or other pleading therein approves this agreement and joins in request that the court approve it and order it into effect. This agreement shall itself serve as such waiver of service, entry of appearance and answer, without the necessity of filing any other pleading therein.

A short form of complaint may be filed in court, with the PSA attached, identifying the PSA, alleging that all required parties are parties to the PSA (individually or by representation, virtual or otherwise), noting that they have all waived service, entered appearance and answered in the PSA and requesting the court to approve the PSA and order it into effect. A responsive judgment entry may be filed with the complaint. See forms at §§ D. and E. below for examples of the complaint and judgment entry. That is it! The court will, of course, satisfy itself that all necessary parties are indeed parties to the PSA and that the court has authority to approve the terms of the PSA and, with those determinations, may promptly sign and file the tendered judgment entry.

C. *PSAs as Enforceable Contracts.*

There may be expected or unintended issues of whether a PSA is valid as a PSA. For example, some or even all of the issues determined by the PSA may arguably be ones not permitted to PSAs (as noted above, a PSA cannot terminate a trust or change its beneficial interests). It may be difficult to distinguish between changing beneficial interests and only construing them.

If for any reason the agreement is not valid as a PSA, Ohio Rev. Code § 5801.10(N) provides that it may still be valid as a contract, enforceable by and against those who are parties to it, individually or by representation, virtual or otherwise (Ohio Rev. Code Chapter 5803, providing for virtual representation, is not limited to PSAs). The following additional paragraph may be used in any PSA to reference this:

If this agreement is ineffective as a statutory private settlement agreement as to any person not properly a party to it or as to any issue otherwise determined by it, it shall nevertheless be fully enforceable by and against all those who are parties to it (individually or by representation, virtual or otherwise) and with respect to all issues those parties have agreed to determine by it. Pursuant to § 5810.09 of the Ohio Trust Code, § 1009 of the Uniform Trust Code or other applicable law, we each hereby ratify the acts of the trustee performed as directed by this agreement and release the trustee from any liability to us for administering the trust as provided in this agreement.

D. *Complaint for Court Approval of PSA.*

The following is a complaint for court approval of the foregoing PSA for trust construction (see § I.A., above), that assumes the PSA also contains the foregoing provision for filing in court (see § I.B., above) to facilitate court approval of it. A responsive judgment entry to be entered by the court follows, see § I.E., below.

In the Court of Common Pleas
Probate Division
[Name] County, Ohio

Mary,
Bill,
Sally,
Bob,
Louise,
Plaintiffs,

v.

Jane,
Dick,
Jack,
Defendants.

Complaint for Approval of Private Settlement Agreement

1. Plaintiffs are parties to this action and to the private settlement agreement (the “agreement”) attached to this complaint and incorporated in it, in their various capacities stated in the agreement.

2. Defendants Jane and Dick are both minors under age 16, and are represented in the agreement and in this action by plaintiffs Bob and Louise as stated in the agreement.

3. Defendant Jack is the current trustee of the trust declared by John under a trust agreement dated [date], which trust is the subject of this action.

4. All living persons interested in the trust and in the agreement are parties to this action, and all other persons interested in the trust and in the agreement whether or not now living are properly represented in the agreement and in this action.

5. The Court has jurisdiction of this action under Ohio Trust Code § 5802.03.

6. The agreement provides in paragraph [identify provision that copies form in § I.B. above] that if the agreement is filed in any court, each of the parties to it (individually or by representation, virtually or otherwise) waives service of summons, enters his or her appearance in the proceeding and for his or her answer to the complaint or other pleading therein approves the agreement and joins in its request that the court approve it and order it into effect. The agreement further provides that the agreement shall itself serve as such waiver of service, entry of appearance and answer, without the necessity of filing any other pleading therein.

Wherefore, plaintiffs request judgment approving the agreement and ordering it into effect.

Respectfully submitted,

Attorney at Law

Although the minors did not sign the PSA, they are parties to it by virtual

representation and are joined as defendants in the court action. Ohio Rev. Code § 5801.08(D) provides that service of process is as required by the Civil Rules. Civ. R. 4.2(B) provides that service of summons on a minor under age 16 may be by service on his or her parent with whom he or she lives, and that service on the minor is not required unless he or she is age 16 or 17. Civ. R. 4(D) provides that the parent may waive service. In this case, Sally as the parent of Jane and Dick may waive service by a separate waiver filed with the complaint. Jack as trustee has already waived service in the agreement.

This example takes what may be an aggressive approach to virtual representation. The stated facts are that there are an adult and a minor natural born grandchildren and an adult and a minor adopted grandchildren; thus, the adult natural born grandchild virtually represents the minor natural born grandchild, and the adult adopted grandchild virtually represents the minor adopted grandchild. In each case, the adult and minor each have a “substantially identical interest” as required by Ohio Rev. Code § 5803.04. Moreover, even if this virtual representation is not effective in the PSA, the minors are before the court, their mother may virtually represent them as parent under Ohio Rev. Code § 5803.03(F) and the court can bind them.

E. Judgment of Court Approval of PSA.

In the Court of Common Pleas
Probate Division
[Name] County, Ohio

Mary, et al.,

Plaintiffs,

v.

Jane, et al.,

Defendants.

Judgment Approving Private Settlement Agreement

This matter is before the Court on the complaint and its attached private settlement agreement (the “agreement”). The Court finds the following:

1. Plaintiffs are parties to this action and to the agreement in their various capacities stated in the agreement.
2. Defendants Jane and Dick are both minors under age 16, and are represented in the agreement and in this action by plaintiffs Bob and Louise, who have in the agreement on their behalf waived service of summons and joined in the prayer of the complaint. Their mother Sally has also waived service on her as their custodial parent.
3. Defendant Jack is the current trustee of the trust declared by John under a trust agreement dated [date], which trust is the subject of this action. He has in the agreement waived service of summons and joined in the prayer of the complaint.

4. All living persons interested in the trust and in the agreement are parties to this action, and all other persons interested in the trust and in the agreement whether or not now living are properly represented in the agreement and in this action. All necessary parties are thus before the Court.

5. The Court has jurisdiction of this action under Ohio Trust Code § 5802.03.

The Court therefore finds that the agreement is proper, approves it, confirms that it binds all trust beneficiaries and orders that the trustee shall administer the trust pursuant to its provisions. The costs of this action shall be paid by the trustee from the trust.

Judge

II. Modification

A. *By PSA. Example: Modification of Trust (Age of Distribution).*

This is a private settlement agreement dated [date] to modify the trust terms under the trust agreement of John.

1. On [date] John declared a trust under a trust agreement. John died on [date], and upon his death the trust became irrevocable. John was the original trustee, Jack was appointed in the trust agreement as successor trustee upon John's death and Jack has served since then.
2. Mary, the widow of John, was the sole income beneficiary of the trust until her death on [date]. Upon her death, separate equal trusts were created for their two children Bill and Sally, and each child became the sole income beneficiary of his or her separate trust.
3. The trust agreement provides that a child is to receive all of the income of his or her separate trust, and also such additional amounts of its principal as the trustee determines to be in the best interests of the child. Each child receives the balance of his or her trust at age 25. If a child dies before age 25, his or her trust passes to his or her children, or if none, to his or her sibling.
4. Bill is now age 26, Sally is now age 23, and both are competent adults. Each now has one child, each under age 18.
5. Bill and Sally agree that the trusts of each of them shall continue for an additional period, so that final principal distribution of their respective trusts shall be made to each at age 30.
6. Bill and Sally further agree that if either of them dies during the extended trust period after he or she attains age 25, his or her trust at death shall be paid to his or her estate.

7. Bill and Sally enter into this agreement, not only for themselves, but also as representatives of the class consisting of their two living minor children and all of their respective unborn future children. That class is not disadvantaged by this trust modification, so there is no conflict of interest in their representation.
8. All parties agree that the trust agreement is hereby modified to provide that the separate trust for Bill shall continue until he attains age 30, and that the separate trust for Sally shall continue until she attains age 30; and if either dies after attaining age 25, his or her trust at death shall be paid to his or her estate.
9. If this agreement is filed in any court, each of the parties to this agreement (individually or by representation, virtual or otherwise) hereby waives service of summons, enters his or her appearance in the proceeding and for his or her answer to the complaint or other pleading therein approves this agreement and joins in request that the court approve it and order it into effect. This agreement shall itself serve as such waiver of service, entry of appearance and answer, without the necessity of filing any other pleading therein.
10. If this agreement is ineffective as a statutory private settlement agreement as to any person not properly a party to it or as to any issue otherwise determined by it, it shall nevertheless be fully enforceable by and against all those who are parties to it (individually or by representation, virtual or otherwise) and with respect to all issues those parties have agreed to determine by it. Pursuant to § 5810.09 of the Ohio Trust Code, § 1009 of the Uniform Trust Code or other applicable law, we each hereby ratify the acts of the trustee performed as directed by this agreement and release the trustee from any liability to us for administering the trust as provided in this agreement.

[signed by Bill, Sally and Jack]

The unusual remainder interest to the estate upon death during the extended trust period seems necessary to accommodate three requirements: a PSA is not permitted to “change the interests of the beneficiaries,” Ohio Rev. Code § 5801.10(C); the parents cannot represent their descendants if there is a conflict of interest with them, Ohio Rev. Code § 5803.03; and the parties will not want the PSA to invite adverse income, gift and estate tax consequences.

B. By Agreement with Attorney General.

I.R.C. §§ 170(f)(2), 2055(e)(2) and 2522(c)(2) permit deductions for gifts to charitable remainder trusts and charitable lead trusts only if they comply with prescribed formats. I.R.C. § 2055(e)(3) recognizes certain reformations of noncompliant trusts. Ohio Rev. Code § 129.232 authorizes such reformations. It provides for amendment of the trust instrument by the trustee with the approval of the Attorney General, the settlor (if living) and each beneficiary named in the trust instrument. It does not require court action, but permits it, including where all approvals are not obtained for a private agreement.

Ohio Rev. Code § 5801.10(M) provides that a PSA is not available for a trust that creates charitable interests, and Ohio Rev. Code § 109.25 provides that the Attorney General is a necessary party to any court action to modify such a trust. The result is that modification of a charitable remainder trust or charitable lead trust cannot be accomplished by a PSA, but may proceed under Ohio Rev. Code 109.232, and requires (in addition to approval of the beneficiaries) either approval by the Attorney General or approval by the court in an action to which the Attorney General is a party. An amendment to Ohio Rev. Code 5801.10 by 2016 HB 432 confirms this.

Necessary parties to an Ohio Rev. Code § 109.232 reformation include all trust beneficiaries, as in any PSA. However, as to charities, only those charities that are named in the trust instrument need be included. For example, if Knowledgeable University is the named remainderman of a charitable remainder trust, other charities that might take the remainder by application of *cy pres* if KU's interest fails need not be included.

III. Change of Trustee

A. *Resignation of Trustee: Notice of Resignation of Trustee, Ohio Rev. Code § 5807.05(A)(1).*

To [qualified beneficiary]:

I hereby notify you that I am resigning as trustee of the Sam Settlor trust created by him by trust agreement dated [date], effective thirty days after giving this notice or upon the later appointment and acceptance of a successor trustee.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

This notice must also be sent to the settlor, if living, and to any co-trustees. Notice of acceptance of the successor trustee should be sent to the current beneficiaries under Ohio Rev. Code § 5808.13(B)(2), see the form at § III.D., below. Where the trust instrument appoints the successor trustee, and he or she is willing and able to serve, no court proceeding or private settlement agreement is necessary, Ohio Rev. Code § 5807.04(C)(1). If no successor is appointed in the trust instrument, or if the appointed successor will not serve, the successor may be appointed by all of the qualified beneficiaries by a private settlement agreement under Ohio Rev. Code § 5807.04(C)(3), see the form at § III.E., below, or by court proceedings under Ohio Rev. Code § 5807.04(C)(4).

B. *Removal of Trustee, Ohio Rev. Code § 5807.06.*

OTC does not provide for removal of a trustee by the beneficiaries or others unless that power is conferred in the trust instrument. However, the court may remove a trustee, for cause, as provided in Ohio Rev. Code § 5807.06.

C. *Appointment of Successor Trustee, Ohio Rev. Code § 5807.04.*

I am the person authorized by RC § 5807.04 to appoint a successor trustee to succeed Tom Trustee who has resigned as trustee of the Sam Settlor trust created by Sam by trust agreement dated [date]. I hereby appoint my son Terry Trustee as such successor trustee.

[signed by Tom Trustee]

Ohio Rev. Code § 5807.04(C) provides the persons who can appoint successors and their order of priority. It does not require that a court make the appointment.

D. *Notice of (Acceptance of) Successor Trustee, Ohio Rev. Code § 5808.13(B)(2).*

To [current beneficiary]:

Sam Settlor created an irrevocable trust under trust agreement with Tom Trustee as initial trustee dated [date]. You are a beneficiary of the trust. This is your formal notice that Tom died [or resigned] on [date], and that I have become successor trustee of the trust.

Terry Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

See the form at § III.A., above, for notice of resignation of trustee under Ohio Rev. Code § 5807.05(A)(1) and its note on appointment and acceptance of a successor trustee.

E. *PSA: Successor Trustee (Resignation of Trustee, Declination of Named Successor and Appointment of Successor Trustee).*

This is a private settlement agreement dated [date] by which Ben is appointed successor trustee under the trust agreement of John.

1. On [date] John declared a trust under a trust agreement of that date. John died on [date], and upon his death the trust became irrevocable. John was the original trustee, Jack was appointed in the trust agreement as successor trustee upon John's death and Jack has served since then.
2. Jack hereby resigns as trustee, as permitted by Ohio Rev. Code § 5807.05(A)(1), and by this agreement gives notice of his resignation to the qualified beneficiaries of the trust, who by this agreement acknowledge the notice and waive the statutory 30-day notice period.
3. Sam, named in the trust agreement as successor trustee to Jack, hereby declines the appointment, as permitted by Ohio Rev. Code § 5807.01(B).
4. The trust agreement designates no other successor trustee and designates no person to appoint successor trustees.

5. To fill the resultant vacancy in trusteeship, Ben is hereby appointed as successor trustee by unanimous agreement of the qualified beneficiaries of the trust, as authorized by Ohio Rev. Code § 5807.04(C)(3).
6. Ben hereby accepts appointment as successor trustee. This agreement is the required notice to the current beneficiaries of his acceptance. Ben's address and telephone number are [insert].
7. The resignation of Jack, declination of Sam and appointment and acceptance of Ben are all effective upon signing of this agreement by Jack, Sam, Ben and all qualified beneficiaries of the trust, which qualified beneficiaries are the following:
 - Mary, the widow of John, the sole income beneficiary of the trust;
 - Bill and Sally, the only children of Mary and John, both of whom are competent adults who would be the remainder beneficiaries of the trust if Mary died on this date.
8. If this agreement is filed in any court, each of the parties to this agreement (individually or by representation, virtual or otherwise) hereby waives service of summons, enters his or her appearance in the proceeding and for his or her answer to the complaint or other pleading therein approves this agreement and joins in request that the court approve it and order it into effect. This agreement shall itself serve as such waiver of service, entry of appearance and answer, without the necessity of filing any other pleading therein.
9. If this agreement is ineffective as a statutory private settlement agreement as to any person not properly a party to it or as to any issue otherwise determined by it, it shall nevertheless be fully enforceable by and against all those who are parties to it (individually or by representation, virtual or otherwise) and with respect to all issues those parties have agreed to determine by it. Pursuant to § 5810.09 of the Ohio Trust Code, § 1009 of the Uniform Trust Code or other applicable law, we each hereby ratify the acts of the trustee performed as directed by this agreement and release the trustee from any liability to us for administering the trust as provided in this agreement.

[signed by Mary, Bill, Sally, Jack, Sam and Ben]

F. Future Successor Trustees.

The Ohio Trust Code denies to a court power to remove a trustee except for cause, Ohio Rev. Code §§ 5804.11(B) and 5807.06. Further, a private settlement agreement may contain only provisions that could be properly approved by a court, Ohio Rev. Code § 5801.10(C), so it also cannot remove a trustee except for cause. Some have considered it uncertain whether a nomination of a future or

successor trustee is subject to this bar, that is, whether a future or successor trustee can be “removed” even before he assumes office. For example, a trust may provide for the surviving spouse to be trustee and for a named bank to become successor trustee when she dies, resigns or is disabled and a successor may be required. May the court or a private settlement agreement change that successor to a different bank, or to an individual?

By 2021 HB 7, eff. 8-17-21, the statute has been clarified to confirm that such a future or successor trustee may be changed by the court or by a private settlement agreement, by an underscored two-word addition to Ohio Rev. Code § 5804.11(B) as follows: “A noncharitable irrevocable trust may be modified, but not to remove or replace the currently serving trustee, upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.” This sentence previously generating the uncertainty was added in the Ohio version of the Uniform Trust Code to limit the power of the court to remove currently serving trustees to removal for cause, and it was not intended further to limit the power of the court or the use of private settlement agreements with respect those who had not yet even become trustees; how would you remove a future or successor trustee only for cause, where he has never had an opportunity to misbehave, may not even know of his nomination and may never yet become trustee because he may die or decline to serve or the trust may terminate? Ohio Rev. Code § 5801.10(B) requires only that “the currently serving trustees” be parties to such an agreement, so that a named future or successor trustee may not even be a party to it or be aware of its nomination or of the proceeding to change it. This amendment simply adds to Ohio Rev. Code § 5804.11(B) these two words from Ohio Rev. Code § 5801.10(B). Further authority that a bar to removal of a trustee should not apply to one who has not yet even become trustee is the celebrated case *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803); rarely can one cite such august authority for a current trust issue! For further information see Brucken, “When It’s Not Removal of a Trustee,” 27 *PLJO* 159 (March/April 2017).

Forms for Termination and Distribution

I. Termination

A. *Notice of Termination of Small Trust, Ohio Rev. Code § 5804.14(A).*

To [qualified beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date]. The trust then became irrevocable and I became trustee. You are a beneficiary of the trust. The trust now has a value of less than \$100,000, and I have concluded that the value of the trust property is insufficient to justify the cost of administration. The trust will be distributed [state distribution plan]. This is your formal notice of that termination and distribution.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

If the value of the trust is \$100,000 or greater, termination requires court approval under Ohio Rev. Code § 5804.11 and cannot be effected under a private settlement agreement, Ohio Rev. Code § 5801.10(C), but could be effected by a nonstatutory PSA under Ohio Rev. Code § 5801.10(N).

B. *Limiting Small Trust Termination, Ohio Rev. Code § 5804.14(A).*

The trust instrument may override OTC on small trust termination. For example, if the settlor wants a different size threshold or a higher standard for such termination, he or she may so provide.

The trustee may not terminate any of these trusts under Ohio Revised Code § 5804.14 or other similar applicable law unless its value is then less than \$25,000, and then only if the trustee concludes that its continuation will benefit the trustee and others providing paid services to the trust substantially more than it will benefit the trust beneficiaries and that the beneficiaries will be actually benefit personally from ownership of the trust property.

C. *Termination by PSA, Ohio Rev. Code § 5801.10(C).*

Ohio Rev. Code § 5801.10(C) provides that in Ohio a trust cannot be terminated early by the beneficiaries by a PSA. This limitation is not in the Uniform Trust Code or in its adoption by other states. Thus, it may be possible to change the situs of the trust to another state, and then terminate it by PSA under the law of that state. It is also possible to terminate a trust prematurely by a non-statutory PSA, that is, a simple contract, Ohio Rev. Code § 5801.10(N).

D. Termination by Court, Ohio Rev. Code § 5804.11.

Ohio Rev. Code § 5801.10(C) provides that a private settlement agreement may not “effect a termination of the trust before the date specified for the trust’s termination in the trust instrument.” However, a court may terminate a trust under other Ohio Trust Code sections; for example, termination under Ohio Rev. Code § 5804.11(B) when all beneficiaries consent and the court “concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.” The following sample complaint* is drawn under that section.

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
[NAME] COUNTY, OHIO

JACK JONES, Trustee under Trust
Agreement of John Doe dated
January 1, 1981
Street address
City, Ohio Zip Code

Plaintiff,

vs.

MARY DOE
Street address
City, Ohio Zip Code

and

BILL DOE
Street address
City, Ohio Zip Code

and

SALLY DOE TABOR
Street address
City, Ohio Zip Code

and

BOB DOE, individually and as
virtual representative of Dick and
Jane Tabor and of all future born
grandchildren and other lineal
descendants of John and Mary
Doe
Street address
City, Ohio Zip Code

CASE NO.

JUDGE [NAME]

**COMPLAINT FOR
TERMINATION OF TRUST**

* The editors thank Wayne C. Dabb Jr. of Baker Hostetler, Cleveland, for his editing of the complaint to reflect preferred Ohio litigation practice.

and

LOUISE DOE, individually and as virtual representative of Dick and Jane Tabor and of all future born grandchildren and other lineal descendants of John and Mary Doe.

Street address
City, Ohio Zip Code

and

DICK TABOR, a minor under the age of sixteen, c/o his mother Sally Doe Tabor
Street address
City, Ohio Zip Code

and

JANE TABOR, a minor under the age of sixteen, c/o her mother Sally Doe Tabor
Street address
City, Ohio Zip Code

and

ALL FUTURE BORN
GRANDCHILDREN AND OTHER
LINEAL DESCENDANTS OF JOHN
AND MARY DOE

Defendants.

1. This is an action for the termination of the trust of John Doe under a written Trust Agreement dated January 1, 1980 ("the Trust"). A true copy of the Trust Agreement is attached hereto as Exhibit 1.
2. John Doe died on January 1, 1981, and upon his death the Trust became irrevocable.
3. John Doe was the original trustee of the Trust and, upon his death, Plaintiff Jack Jones was appointed in the Trust Agreement as successor trustee. Plaintiff Jack Jones has served as successor trustee since that time.
4. Plaintiff Jack Jones brings this action at the request of John Doe's widow and children.
5. Defendant Mary Doe, the widow of John Doe, is the sole income beneficiary of the Trust, and is now age seventy-five.

6. Defendants Bill Doe and Sally Doe Tabor are the only children of John and Mary Doe, and are both adults over the age of twenty-five. Defendants Bill Doe and Sally Doe Tabor are both remainder beneficiaries of the Trust.

7. Defendants Bob Doe and Louise Doe are the only children of Defendant Bill Doe. Defendants Bob Doe and Louise Doe are both adults over the age of twenty-five, and both are remainder beneficiaries of the Trust. They are sued individually and as the virtual representatives of Defendants Dick and Jane Tabor, the minor children of Defendant Sally Tabor, and of all future born grandchildren and other lineal descendants of John and Mary Doe, pursuant to RC 5803.04.

8. Defendants Dick and Jane Tabor are the only children of Defendant Sally Doe Tabor. Defendants Dick and Jane Tabor are both minors under age sixteen, and both are remainder beneficiaries of the Trust.

9. Defendants Mary Doe, Bill Doe, Sally Doe Tabor, Bob Doe, Louise Doe, Dick Tabor, and Jane Tabor are all of the living persons who are or may be beneficiaries of the Trust.

10. All future born grandchildren and other lineal descendants of John and Mary Doe who may become beneficiaries of the Trust are virtually represented in this action by Defendants Bob Doe and Louise Doe.

11. Thus, all possible beneficiaries of the Trust are before the Court.

12. As evidenced by the written Consent attached hereto as Exhibit 2, all of the beneficiaries of the Trust have consented to the termination of the Trust and the distribution of its assets one-third each to Defendants Mary Doe, Bill Doe, and Sally Doe Tabor.

13. Under the terms of the Trust Agreement, the material purposes of the Trust were to provide income to John Doe's widow, Defendant Mary Doe, until her death and, upon her death to distribute the remaining trust assets to the then living lineal descendants of John and Mary Doe, per stirpes, with the shares of those who have not then attained age twenty-five continuing in trust for them until they attain that age. The pertinent provisions of the Trust Agreement read as follows:

[Copy pertinent text of Trust Agreement]

14. One-third of the assets of the Trust are more than adequate to provide for the needs of Defendant Mary Doe for the remainder of her life, and the remaining assets of the Trust may now be distributed to Defendants Bill Doe and Sally Doe Tabor, who are the only children of John Doe and Mary Doe, and who are both over the age of twenty-five.

15. The trust agreement contains a spendthrift provision in Section [number], but spendthrift protection is not a material purpose of the trust.

16. As a result, the continuance of the trust is not necessary to achieve any material purpose of the trust.

17. Accordingly, the Court is authorized by Ohio Revised Code § 5804.11(B) to terminate the Trust.

Wherefore, plaintiff demands judgment ordering that the trust be terminated and that its assets be distributed one-third each to Plaintiff Bill Doe and Defendants Mary Doe and Sally Doe Tabor.

Respectfully submitted,

Attorney at Law

It might facilitate trust termination by court order if the widow had created her own revocable trust to receive her one-third share of the terminating trust, so that continuance of her husband's trust is not necessary to provide her with continuing trustee management. Indeed, she may have created her own revocable trust at the same time that her husband signed his. This might also be pleaded, and the prayer could request an order directing payment of her share direct to her own trust.

E. Blocking Court Termination of Trust, Ohio Rev. Code §§ 5804.11(B) and 5804.12.

Ohio Rev. Code §§ 5804.11(B) authorizes a court to terminate a trust if “continuance of the trust is not necessary to achieve any material purpose of the trust.” Ohio Rev. Code § 5804.12 authorizes court termination if “termination will further the purposes of the trust.” If the settlor firmly believes that the trust should never be so terminated, the trust instrument may attempt to block termination by providing that continuation of the trust is itself a material purpose.

I hereby declare that continuation of these trusts as provided in this trust instrument is itself a material purpose of these trusts, and that neither the beneficiaries nor any court may terminate them before the times stated and thus frustrate this material purpose.

II. Distribution

A. Court Instructions, Ohio Rev. Code § 5802.03.

The Ohio Trust Code continues unchanged the jurisdiction of the Probate Division of the Court of Common Pleas over testamentary trusts, and its concurrent jurisdiction with the General Division over inter vivos trusts. Ohio Rev. Code § 5802.03 tracks Ohio Rev. Code § 2101.24(B)(1)(b) in confirming that jurisdiction over inter vivos trusts. Thus, all prior practice for obtaining court instructions from those courts continues to apply.

B. Notice of Proposed Distribution, Ohio Rev. Code § 5808.17(A).

To [beneficiary receiving distribution]:

As trustee of the Sam Settlor trust created by him by trust agreement dated [date], I propose to make the distribution from it to you [and to the other beneficiaries now entitled to distribution] described in the attached schedule. If you object to the distribution, you must notify me of your objection within 30 days after this proposal was sent to you, when your right to object otherwise terminates.

Tom Trustee
1234 Main Street
Anytown, Ohio 44444
Phone: 216-123-4567

C. Final Accounting, Ohio Rev. Code §§ 5808.17(B) and 2109.303.

A final accounting must be prepared and furnished to the beneficiaries in order to obtain their effective receipt and release. If the trust is testamentary, the accounting must also be filed with the probate court, Ohio Rev. Code § 2109.303; and the trustee may also elect to file an accounting for an inter vivos trust if he or she wants a judicial release. An account filed with the court for a testamentary trust must follow the form prescribed by that court; an account filed with the court for an inter vivos trust may be attached to a complaint asking for its approval, and may be in any form; and an account furnished only to the beneficiaries may also be in any form.

To foreclose a particular issue, the accounting must sufficiently present the issue to the beneficiaries, Ohio Rev. Code § 5810.05. For good examples of accounting formats that are likely to meet this requirement, see the National Fiduciary Accounting Standards and Model Account Formats (1984) prepared jointly by the ABA, American Bankers Association, ACTEC, AICPA, National Center for State Courts, National College of Probate Judges and JEBUPC, found at this website: www.actec.org/assets/1/6/National_Accounting_Standards_and_Model_Account_Formats.pdf. See also Whitman and English, *Fiduciary Accounting and Trust Administration Guide*, published by ALI-ABA.

D. Receipts and Releases, Ohio Rev. Code § 5808.17(C).

To Tom Trustee:

I am a beneficiary of the trust created by Sam Settlor by trust agreement with [himself as initial trustee] dated [date]. I hereby acknowledge receipt from Tom Trustee, the current trustee of the trust, of the assets and cash shown as distributed by him to me in the attached list [in his final accounting of his administration of the trust as he has furnished it to me. I hereby approve that accounting as to all matters adequately disclosed in it, and hereby release Tom as trustee and individually from all liability to me with respect to those matters.]

[signed by beneficiary]

If no accounting is prepared, or if a release is not requested, this form may be a receipt for stated assets and cash only, omitting the bracketed reference to an accounting and to the release based on it.

There are both advantages and disadvantages in the trustee requesting a release. The release may avoid the cost and delay of court accounting and encourage prompt identification and resolution of known outstanding issues. It may also create ill will with the beneficiaries, encourage them to raise issues otherwise not pursued and result in their obtaining their own counsel (who may find other issues to justify the expense and delay of their retention). Many Ohio banks historically often have not generally requested releases from their beneficiaries for these reasons. A general rule is that there is no general rule, it always depends on the facts of the specific trust.

If the beneficiary declines to sign a requested release, the trustee may distribute without one and rely on the statute of limitations in Ohio Rev. Code § 5810.05, offer to explain the accounting to the beneficiary and to discuss it with him or seek court approval of the accounting and release by the court.

E. Statute of Limitations, Ohio Rev. Code § 5810.05.

If the beneficiary does not give a release, the statute of limitations on assertion of claims by him or her is two years after the trustee sends the accounting to him or her, to the extent that the accounting “adequately discloses the existence of a potential claim for breach of trust” and informs him or her of this time bar. Ohio Rev. Code § 5810.05(A).

If the trustee does not provide an accounting, or if the accounting does not adequately disclose a matter and the time bar, the statute of limitations on assertion of claims does not run until four years after the termination of office of the trustee, termination of the trust or termination of the beneficiary’s interest in the trust or after such earlier time as the beneficiary knew or should have known of the matter. Ohio Rev. Code § 5810.05(C). Both time bars are also subject to earlier termination by laches, unclean hands, estoppels, or waiver. Ohio Rev. Code § 5810.05(D).

F. Complaint for Court Approval of Final Accounting.

In the Court of Common Pleas
Probate Division
[Name] County, Ohio

Jack, Trustee,
Plaintiff,

v.

Bill Jones,
Sally Jones,
Bill Jones, Executor,
Defendants.

Complaint for Approval of Final Accounting

1. Plaintiff is the current trustee of the trust declared by John Jones under a trust agreement dated [date], that became irrevocable upon his death on [date].

2. Mary Jones, the widow of John Jones and after his death the sole current beneficiary of the trust, died on [date]. Bill Jones is Executor of her estate by appointment of this Court and as such fiduciary is a defendant in this action.

3. The trust by its terms paid all of its income to Mary Jones until her death. The trust then became distributable outright to the children of John Jones, who are defendants Bill Jones and Sally Jones, both of whom survived Mary Jones and are now competent adults.

4. These defendants are the only persons who now have any interest in the trust.

5. The Court has jurisdiction of this action under Ohio Trust Code § 5802.03.

6. Plaintiff has paid all of the trust income for the period prior to the death of Mary Jones either to her during her life or after her death to defendant Bill Jones as Executor of her estate, as required by the trust instrument.

7. Plaintiff now proposes to distribute all of the remaining trust property equally to defendants Bill Jones and Sally Jones as required by the trust instrument.

8. Plaintiff presents the attached accounting as his full and complete accounting of his administration of the trust

Wherefore, plaintiff requests judgment approving the accounting and ordering distribution of all of the remaining trust property equally to defendants Bill Jones and Sally Jones.

Respectfully submitted,

Attorney at Law

The parties could avoid the delay and expense of judicial accounting by a private accounting, with or without releases. However, if the trustee requires a release but one or more of the beneficiaries will not give it, the trustee may seek judicial release instead.

G. Judgment of Court Approval of Final Accounting.

In the Court of Common Pleas
Probate Division
[Name] County, Ohio

Jack, Trustee,
Plaintiff,

v.

Bill, *et al.*,
Defendants.

Judgment Approving Final Accounting

This matter is before the Court on the complaint and its attached final accounting. The Court finds the following:

1. Plaintiff is the current trustee of the trust declared by John Jones under a trust agreement dated [date], that became irrevocable upon his death on [date].
2. Mary Jones, the widow of John Jones and after his death the sole current beneficiary of the trust, died on [date]. Bill Jones is Executor of her estate by appointment of this Court and as such fiduciary is a defendant in this action.
3. The trust by its terms paid all of its income to Mary Jones until her death. The trust then became distributable outright to the children of John Jones, who are defendants Bill Jones and Sally Jones, both of whom survived Mary Jones and are now competent adults.
4. These defendants are the only persons who now have any interest in the trust.
5. The Court has jurisdiction of this action under Ohio Trust Code § 5802.03.
6. Plaintiff has paid all of the trust income for the period prior to the death of Mary Jones either to her during her life or after her death to defendant Bill Jones as Executor of her estate, as required by the trust instrument.
7. Plaintiff must now distribute all of the remaining trust property equally to defendants Bill Jones and Sally Jones as required by the trust instrument.
8. The attached accounting prepared by plaintiff is a full and complete accounting of his administration of the trust.

The Court therefore finds that the accounting is proper, approves it and orders that the trustee shall distribute all of the remaining trust property equally to Bill Jones and Sally Jones. The costs of this action, including court costs, the fiduciary fee of the trustee and the fees of his attorneys, shall be paid by the trustee from the trust.

Judge

III. Simplified Procedure on Termination

2022 SB202 (effective 4-3-23) has enacted a new simplified non-court procedure for termination and distribution of inter vivos trusts and for change of trustees of them. Its goal is to provide appropriate trust information to the trust beneficiaries and to provide their full release to the exiting trustee, without the delay and expense of public court accounting or voluminous private accounting. The details are in new Ohio Rev. Code §§ 5801.20 to 5801.24. The statute details what information must be furnished, to

which beneficiaries, what time periods apply for acceptance or challenge by the beneficiaries, how challenges may be adjudicated or settled, and the effect of the resultant release. Ohio trust bankers joined with Ohio lawyers in preparing and sponsoring the legislation, and it is anticipated that Ohio banks will make general use of the statutory procedure and develop their own forms for use under it. The procedures are, of course, available to individual trustees as well. The procedures are optional; that is, the trustee may elect to use them, to go to court for judicial accounting and release, or to use any other procedure that it may think appropriate.

The statute was proposed, prepared, and sponsored by the EPTPL Section of the OSBA, and the Section Report on it to the OSBA Council of Delegates in July 2020 appears on the OSBA website as accepted by the Council. For further description of the statute and comment on it by its principal draftsman, see Ramer, "A New Statutory Solution for Concluding Administration of Ohio Irrevocable Trusts," 33 *Probate Law J.* 128 (Jan./Feb. 2023); and Ramer, "Exit in an Orderly Fashion Revisited: A Proposed Statutory Solution for Ohio Irrevocable Trusts," 30 *Prob. Law J.* 149 (Mar./Apr. 2020).

Background of the statute: Controversy has arisen in Ohio over the increasing local role of East Coast banks with their accustomed practice of public court accountings and their presented alternative of voluminous private releases. Rosenwald and Whitman, "Releases Prior to Estate and Trust Distributions: Are They Useful?" 23 *Prob. Law J.* 270 (July/Aug 2013) comments on a representative case involving what some judges determined to be abusive procedures. Moore and Furniss, "The Trustee's Toolkit: Use of Releases in Achieving Finality," 24 *Prob. Law J.* 181 (Jan./Feb. 2014) suggests less abusive use of then existing law. Brucken, "Releasing the Trustee," 28 *Prob. Law J.* 67 (Nov./Dec. 2017) offers the then new Kentucky law and the experience under it as a model for Ohio, and indeed our new statute is based on it.

Chapter 12: Additional OTC Forms and Other Useful Trust Forms

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Chapter 12:

Additional OTC Forms and Other Useful Trust Forms

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I. Forms Specific to the Ohio Trust Code

A. *Principal Place of Administration of Trust (§ 5801.06, § 5801.07).*

A settlor may authorize the beneficiaries to change the place of administration of the trust.

Form A

Change of Principal Place of Administration. A majority in interest of the current beneficiaries may change the principal place of administration of this trust by giving written notice to the Trustee provided that the Trustee has administrative operations in the place to which the beneficiaries desire to change.

A settlor may authorize the beneficiaries to veto a change of the principal place of administration.

Upon receipt of a notice proposing a change in place of administration, a majority in interest of the current beneficiaries may disapprove the change in principal place of administration of this trust by giving written notice to the Trustee before the effective date of the change. Such disapproval shall be binding to prevent the Trustee from changing the place of administration.

B. *Division or Delegation of Duties (§ 5807.03(E), § 5808.07, § 5809.06).*

The Ohio Trust Code provides for the division or delegation of duties amongst the Trustees. However, the settlor may wish to prevent such delegation or limit the delegation, so that the person appointed as Trustee is the one acting.

Form B-1

No Delegation or Division of Duties. The trustees shall not divide or delegate duties notwithstanding the provisions of Ohio Revised Code §§5807.03(E), 5808.07, and 5809.06.

Form B-2

Limited Delegation of Investment and Management Functions. The Trustees may delegate investment and management functions pursuant to Ohio Revised Code §5809.06. No other division or delegation of duties shall be permitted.

C. Authorize Engagement and Hiring of Agents, Attorneys, Accountants, Advisors, Etc. (§ 5808.16).

Form C

Authorization to Employ Agents. The Trustee shall be entitled to employ, engage, and dismiss such agents, attorneys, accountants, counsel, clerical help, bookkeepers, or experts, as the Trustee shall deem to be advisable for the handling and management of the trust estate herein created. The Trustee may rely upon information or advice furnished by such persons and may pay such persons reasonable compensation therefore, upon such terms and conditions as the Trustee shall deem proper. In addition, the Trustee shall be entitled to reasonable compensation for the Trustee's services in the handling and management of the trust estate herein created without reduction for payments made to such persons.

D. Authorization to Make Gifts.

A Trust Instrument may authorize the Trustee to make gifts.

Form D

Authorization to Make Gifts. The Trustee shall be authorized to make gifts, grants or other transfers without consideration, from the trust estate during my lifetime, either outright or in Trust, to any one or more of my descendants and/or any spouses of my descendants, including any descendants who may serve as Trustee hereunder; provided, however, that the aggregate fair market value of any such gifts to any donee in any calendar year shall not exceed the amount of the Federal Gift Tax Exclusion available to me in such year. In the case of a minor donee, the gift may be made either directly to him or her or to any person then serving as his or her custodian under the Ohio Transfers to Minors Act or the Transfers to Minors Act of any other jurisdiction, so that the gift will qualify for such exclusion.

E. Start or Enter into New Business Enterprises.

Although the statutory powers authorize the Trustee to retain investments in closely held businesses, the statutory powers do not include authority to start or enter into a new business enterprise.

Form E

New Business Enterprise. To start or enter into any business enterprise in any form, including but not limited to corporations, limited liability companies, general partnerships, limited partnerships or any other recognized form of business organization; to delegate all or part of the management thereof; to invest funds of the Trust Estate therein; to convert such business from one form to another; to enlarge, diminish, to change the scope or nature of the activities of any business; to employ such officers, managers, employees, or agents as the Trustee deems advisable in the management of the business, including electing or employing directors, officers, or employees to take part in the management of the business and to pay such person or persons reasonable compensation; and to rely upon the reports of certified public accountants as to the operations and financial condition of the business without independent investigation; all in such manner, and for such time and on such terms as the Trustee shall see fit.

F. Copy of Trust.

A copy of the trust instrument is required to be provided to those beneficiaries who request it, unless waived by the Settlor. § 5808.13(B)(1); § 5801.04(B)

Form F-1

Waiver of Duty to Provide Copy of Trust. The Trustee is not required to provide a copy of the trust instrument to beneficiaries who may request it, hereby specifically waiving the provisions of Ohio Rev. Code § 5808.13(B).

A Settlor may also authorize the Trustee to provide a copy and redact portions.

Form F-2

Redacted Copy of the Trust. If a copy of the Trust is requested by any beneficiary, the Trustee is authorized to provide a copy of the Trust and redact portions not applicable to the requesting beneficiary.

G. Appointment of Surrogate for Notice Purposes with Specific Waiver.

The Settlor may waive some of the Trustee's reporting duties by designating a "beneficiary surrogate" to receive the information about the Trust on behalf of a beneficiary. Ohio Rev. Code § 5801.04.

Form G

Appointment of Beneficiary Surrogate. Pursuant to Ohio Revised Code § 5801.04(C), Settlor appoints _____ as beneficiary surrogate for _____, to receive any notices, information, or reports required to be provided to such beneficiary. Accordingly, Settlor waives the provisions of Ohio Revised Code § 5801.04(B)(8) and (9) as to the named beneficiary.

H. *Revocation or Amendment.*

A Settlor may specify a method of revocation or amendment in the trust instrument. § 5806.02(C). If not specified, then clear and convincing evidence is required as proof of Settlor's intent to revoke or amend the Trust. The Settlor may also permit revocation or amendment pursuant to a power of attorney, provided that such power must be expressly authorized both in the trust instrument and in the power of attorney. § 5806.02(E).

Form H-1

Suggested Form for Power of Attorney Language

Revocable Living Trust. With regard to that certain Revocable Living Trust created by me as Settlor and _____ as Trustee, dated _____, my agent under this Power of Attorney is hereby expressly authorized and empowered (a) to designate the Trustee of such Trust as the beneficiary of property, (b) to add property to the Trust with the consent of the Trustee and (c) by written instrument delivered to the Trustee, to withdraw any property held hereunder and to modify, amend or revoke the Trust, provided that the duties of the Trustee may not be increased or its fees reduced without the consent of the Trustee.

A Settlor may also permit the revocation, amendment, or power to add property to a Trust by a guardian.

Form H-2

Guardian Actions. Pursuant to the provisions of Ohio Revised Code § 5806.02(F), I hereby authorize any duly appointed guardian to revoke, amend, add property to or distribute property from this Trust without requiring an authorizing court order.

A Settlor may also choose to make a spendthrift provision a "material purpose" of the Trust, making it more difficult to terminate or otherwise modify a Trust if the beneficiary has any creditor issues. § 5804.11.

Form H-3

Spendthrift Provisions as a Material Purpose. All spendthrift provisions in this Trust constitute a material purpose of this Trust.

I. *Arbitration, Mediation and Private Settlement Agreement Provisions.*

The Trustee has the power to resolve disputes concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedures for alternative dispute resolution. § 5808.16(W). The Settlor should consider whether alternate dispute resolution is appropriate or whether the court should resolve the disputes.

Form I-1

No Alternative Dispute Resolution. I desire that any dispute concerning the interpretation of this Trust, its administration or any rights under this trust be resolved in a court of competent jurisdiction and the Trustee shall not have the power to force the parties to use mediation, arbitration or other procedure for alternative dispute resolution notwithstanding the provisions of Ohio Rev. Code § 5808.16(W).

The Settlor may also deny the right to use a private settlement.

Form I-2

No Private Settlement Agreement. No beneficiary, Trustee, or other interested party may enter into a private settlement agreement concerning the construction of this trust, administration of this trust, or distributions under this trust instrument, or any other matter capable of being handled under a private settlement agreement. My intention is that any disputes be resolved through court proceedings.

2018 HB 595 has clarified the validity of trust provisions authorizing or requiring arbitration of trust disputes. See chapter 10a of this book for a form requiring it.

J. Trustee Fee Change and Calculation.

The Settlor may want to require the Trustee to clearly show a calculation as to how the fee is charged and a specific calculation each time a fee is taken.

Form J-1

Trustee Fee Calculations. If Trustee fees are charged by the Trustee, the Trustee shall clearly show the current beneficiaries a calculation as to how the fee is charged each time a fee is taken.

The Settlor may require qualified beneficiaries to agree to changes in trustee compensation.

Form J-2

Trustee Fees. If Trustee fees are charged by the Trustee, all qualified beneficiaries must agree to changes in compensation. [Instead of requiring consent of all qualified beneficiaries, the trust could require agreement of a majority of the qualified beneficiaries or a majority in interest of the qualified beneficiaries.]

K. Trustee Actions.

If there are more than two co-trustees, the co-trustees may act by majority decision. If the Settlor desires unanimous agreement of trustees on some or all decisions, the Settlor must so state in the document.

Form K-1

Unanimous Decisions. All trustees must consent to the exercise of any power, duty, distribution, or other action taken as trustees under this Trust Agreement.

The Settlor may also dispense with the need to fill a co-trustee vacancy. § 5807.03; § 5807.04

Form K-2

Co-Trustees. If any co-trustee is unable to serve as co-trustee, the remaining co-trustee or co-trustees may serve without the appointment of a successor co-trustee.

II. Other Useful Trust Forms (Including Questions for Clients and Drafting Tips)

A. *Trust for Children, Grandchildren, and Issue.*

Questions for Clients and Drafting Tips:

1. The “One Pot” Trust v. Separate Shares?

A “One Pot” Trust is just that: the Trustee administers the Trust as one fund and makes distributions to the beneficiaries (generally for a beneficiaries’ health, maintenance, education, or support). In a “One Pot” scenario, a child who goes to Harvard utilizes more of the fund than a child who wants to go to community college or technical school. For this reason, the authors favor separate shares, where each beneficiary has his or her own portion of the Trust.

2. Distribution Powers.

- Broad discretionary distribution powers until the child reaches a certain age, or is a wholly discretionary trust most appropriate?
- Common standards of distribution: care, comfort, maintenance, support, health and education.
- Specific education provisions: tuition for elementary, middle school, high school, or college; room and board; apartment rental and food allowance; book expenses, lab fees, and other registration fees; reasonable spending allowance; reasonable mode of transportation.
- Upon graduating from college or graduate school, does the beneficiary receive a bonus?
- Assist the child in purchasing a home? If so, do you limit the amount distributed to a certain percent of the purchase price for a down payment on a reasonably priced and affordable home?
- Extra distribution for a wedding, wedding expenses, honeymoon or other use at the discretion of the child: is there a maximum dollar amount?
- Assist the child in investing or establishing their own business: should a written business plan be required? Does the Trustee have to insure a reasonable degree of success for the business? Do you require outside investors or partners in the business?

3. Slowing Distributions, Making Partial Distributions, or Terminating the Trust?

- At what point do you turn off the broad distribution powers, if you do at all? For example, do you stop care, comfort, maintenance, and support at age 30, so that a child is not just living off of the Trust fund? Is it dependent upon graduating from college? Even if you stop distributions for care, comfort, maintenance, and support, do you continue to provide for education expenses and health expenses, including health insurance?

- Do you make partial distributions of principal upon achieving certain ages (e.g. $\frac{1}{3}$ at 25, $\frac{1}{2}$ at 30, 35, etc.).
- Do you terminate the Trust upon a child attaining a certain age? Upon the consent of a family member? Upon graduating from college or having a full-time job? Do you require a child to have their own estate or financial plan?

Form A-1

TRUST FOR CHILDREN (Separate fund option)

A. After the death of the Grantor and upon the death of the Grantor's spouse, _____, and in default of the effective exercise of the limited power of appointment granted hereinabove, the Trustee shall divide the Trust Estate into as many equal shares as there are children of the Grantor then living and children of the Grantor then deceased but with issue surviving them at that time.

1. One of such equal shares shall be held for the benefit of the surviving issue of each deceased child of the Grantor, subject to the terms and conditions of the Grandchildren's Trust, hereinafter set forth.

2. One of such equal shares shall be held for the use and benefit of each of the Grantor's then living children, and the Trustee in its sole and absolute discretion, shall use and expend from the income and the principal thereof so much as it determines is necessary for the care, comfort, maintenance and education of each of the Grantor's said children until he or she attains the age of twenty one (21) years. Income not so used shall be accumulated and added to the principal annually. When each of the said children, respectively, attains the age of twenty one (21) years, the Trustee shall pay to him or her the net income from his or her share of the Trust Estate in convenient installments and such principal from the Trust Estate as the Trustee deems necessary for his or her education or welfare or to aid him or her in the event of any accident or emergency until he or she attains the age of thirty five (35) years, at which time the Trust shall terminate as to each such child, and the Trustee shall pay over to him or her all of the then remaining principal of his or her share of the Trust Estate, and any accrued income thereon, absolutely freed and discharged of any and all Trusts hereunder; provided, however, that when each such child attains the age of twenty five (25) years, he or she shall have the right to withdraw one third ($\frac{1}{3}$) of the then remaining principal of his or her share of the Trust Estate as then constituted, upon making a written demand to the Trustee therefor; provided further, however, that when each such child attains the age of thirty (30) years, he or she shall have the right to withdraw one half ($\frac{1}{2}$) of the then remaining principal of his or her share of the Trust Estate as then constituted, upon making a written demand to the Trustee therefor.

3. In the event that any of the Grantor's children die during the continuance of the Trust herein created for his or her benefit, the Trustee shall hold and dispose of the then remaining principal of his or

her share of the Trust Estate, and any accrued income thereon, to his or her then surviving issue, subject to the terms of the Grandchildren's Trust hereinafter set forth. In the event that such child of the Grantor dies survived by no issue, the Trustee shall divide the then remaining principal of his or her share of the Trust Estate, and any accrued income thereon, among the other original share or shares of the Trust Estate and shall hold the same in trust or distribute the same in the same manner as such original share or shares were held or distributed.

4. In addition to its other powers over the use of principal for the benefit of the Grantor's children as hereinabove set forth, the Trustee shall have the right to use further principal of each child's share for his or her benefit to aid him or her in purchasing a home, in continuing education, including not only college, but post graduate studies, to provide funds to enter a business or to set up a professional office. It is the Grantor's desire that the Trustee make reasonable inquiry into the business enterprise which the child may want to enter to see if there is a reasonable chance of success for the child before granting the use of principal hereinabove set forth.

Form A-2

ONE FUND OPTION

Upon the death of the survivor of the Grantor and Grantor's spouse, , and in default of the effective exercise of the limited power of appointment granted hereinabove, the Trustee shall hold the said Trust Estate as one fund for the use and benefit of all of Grantor's then living children and the issue of any deceased children, and the Trustee in its sole and absolute discretion, shall use and expend from the income and principal thereof so much as it determines to be necessary for their care, comfort, maintenance, support, education and general well-being, until the youngest of Grantor's living children attains the age of twenty five (25) years, at which time the Trustee shall divide the entire remaining principal of the Trust Fund and any accrued income thereon into as many equal shares as there are children of the Grantor then living and children of the Grantor then deceased but with issue surviving them at that time.

Form A-3

TRUST FOR GRANDCHILDREN AND OTHER YOUNGER BENEFICIARIES

The equal share attributable to any deceased child of the Grantor shall be divided into as many equal shares as there are children of the deceased child of the Grantor then living ("grandchildren") and children of the deceased child of the Grantor then deceased but with issue surviving them at that time ("issue").

1. The equal share for the surviving issue shall be divided on a per stirpes basis and administered according to the terms and conditions of this Grandchildren's Trust as if such issue were a living grandchild.

2. The equal share for a living grandchild shall be administered for the benefit of such grandchild and the Trustee in its sole and absolute discretion shall use and expend from the income and the principal thereof so much as it determines is necessary for the care, comfort, maintenance and education until he or she attains the age of twenty-one (21) years. Income not so used shall be accumulated and added to the principal annually. When each of the said grandchildren, respectively, attains the age of twenty-one (21) years, the Trustee shall pay to him or her the net income from his or her share of the Trust Estate in convenient installments and such principal of the Trust Estate as the Trustee deems necessary for his or her education or welfare or to aid him or her in the event of any accident or emergency until he or she attains the age of thirty-five (35) years, at which time the Trust shall terminate as to each such grandchild, and the Trustee shall pay over to him or her all of the then remaining principal of his or her share of the Trust Estate, and any accrued income thereon, absolutely freed and discharged of any and all Trusts hereunder; provided, however, that when each such grandchild attains the age of twenty-five (25) years, he or she shall have the right to withdraw one-third ($\frac{1}{3}$) of the then remaining principal of his or her share of the Trust Estate as then constituted, upon making a written demand to the Trustee therefor; provided, however, that when each such grandchild attains the age of thirty (30) years, he or she shall have the right to withdraw one-half ($\frac{1}{2}$) of the then remaining principal of his or her share of the Trust Estate as then constituted, upon making a written demand to the Trustee therefor.

3. In the event that any of the Grantor's grandchildren die during the continuance of the Trust with issue of their own, such grandchild's share shall continue to be held for the benefit of their issue, subject to the terms and conditions of this Grandchildren's Trust. In the event that such grandchild of the Grantor dies survived by no issue, the Trustee shall add such deceased grandchild's share to the share or shares of his or her siblings to be held for such siblings or for the children of any deceased siblings subject to the terms and conditions of this Grandchildren's Trust.

4. The Trustee, in addition to its other powers over the use of principal for the benefit of the Grantor's grandchildren as hereinabove set forth, shall have the right to use further principal of each grandchild's share for his or her benefit to aid him or her in purchasing a home and in continuing education, including not only college, but post graduate studies, to provide funds to enter a business or to set up a professional office. It is the Grantor's desire that the Trustee make reasonable inquiry into the business enterprise which the grandchild may want to enter to see if there is a reasonable chance of success for the grandchild before granting the use of principal hereinabove set forth.

Form A-4

EDUCATION EXPENSES AND BONUS PAYMENTS FOR DEGREES AND MARRIAGE

1. Payment of educational expenses include one hundred percent (100%) of all tuition, books, room, board, fees and providing such child with a reasonable mode of transportation in the discretion of the Trustee.
2. If such child receives an associate's degree from an accredited college or university, the Trustee shall distribute Ten Thousand Dollars (\$10,000.00) (to be increased by the rate of increase in inflation from April 2013 to the date of such graduation) to such child absolutely and free of Trust.
3. Upon graduation from a four (4) year undergraduate accredited college or university, the Trustee shall distribute Twenty-Five Thousand Dollars (\$25,000.00) (to be increased by the rate of increase in inflation from April 2013 to the date of graduation) to such child absolutely and free of Trust.
4. In the event that a child marries, the Trustee shall distribute Twenty-Five Thousand Dollars (\$25,000.00) (to be increased by the rate of inflation from April 2013 to the date of such marriage) to such child absolutely and free of Trust.

B. Marital Trust.

Questions for Clients and Drafting Tips:

- Do you distribute all of the income to the surviving spouse which is required for a QTIP marital deduction? Or do you distribute only part of the income? If so, what percentage or dollar amount?
- Do you leave distribution of income in the total discretion of the Trustee?
- Do you provide for principal distribution in the event of the need of surviving spouse for health, maintenance, education and support or do you use non-ascertainable standards?

Form B-1

MARITAL TRUST

A. After the death of the Grantor, the Trust Estate allocated to the Marital Trust shall be held and disposed of as follows:

Option 1 DISCRETIONARY INCOME & PRINCIPAL

1. The Trustee is authorized, in its sole and absolute discretion, to use so much or all of the income of the Marital Trust as it deems advisable to or for the benefit of the Grantor's spouse, _____. Any income not so distributed shall be accumulated and added to the principal of the

Trust Estate annually. In addition, the Trustee, in its sole and absolute discretion, is authorized to distribute such principal of the Marital Trust, even to the exhaustion thereof, to or for the benefit of the Grantor's said spouse, for said spouse's health, maintenance, support, and education.

Option 2

MANDATORY INCOME & DISCRETIONARY PRINCIPAL

1. The Trustee shall distribute to the Grantor's spouse the entire net income from the Marital Trust, at least annually. In addition thereto, the Trustee shall distribute the principal of the Marital Trust, even to the exhaustion of the Marital Trust, to or for the benefit of the Grantor's spouse, for his/her health, maintenance, education and support.

Option 3

OPTIONAL FIVE AND FIVE POWER

1. After the death of the Grantor, the Grantor's spouse, _____, during said spouse's lifetime, shall have the right to withdraw annually from the principal of the Marital Trust an amount not to exceed the greater of five thousand dollars (\$5,000.00) or five percent (5%) of the principal of the Marital Trust. This right is noncumulative and, if not exercised during the calendar year, such right shall lapse.

B. After the death of the Grantor and upon the death of the Grantor's spouse, _____, the Trustee shall allocate the rest, residue and remainder of the Marital Trust to the _____ Trust hereunder [or make distribution absolutely and free of trust to named beneficiaries].

C. *Family "One Pot" Trust for Spouse and Children.*

Questions for Clients and Drafting Tips:

- What needs of the surviving spouse are to be met? Does the spouse need funds for health, maintenance, education, and support, or should it be totally discretionary distributions?
- Do you provide the spouse with a limited right of withdrawal (five percent of the principal of the Trust annually or \$5,000.00 whichever is greater)? We are not constrained by being limited to the five and five power of withdrawal provisions, since we are not trying to qualify the Trust for marital deduction or Q-TIP treatment; we can use greater withdrawal powers such as the greater of 10% or \$10,000.00 per year.
- What needs of the children are to be met? Health, education, maintenance and support?
- Are spousal rights cut off upon remarriage or co-habitation with a person of the opposite sex? How about same sex co-habitation? How do you define the terms?

Form C

FAMILY TRUST FOR SPOUSE AND CHILDREN

A. The Trustee shall distribute to or for the benefit of Grantor's spouse _____, any part or all of the Family Trust net income and such principal as the Trustee determines necessary or appropriate for said spouse for his/her care, comfort, maintenance, education, health and support. Grantor's spouse shall be the primary beneficiary of this Trust.

B. Provided that the above referenced needs of Grantor's spouse are met, the Trustee may distribute such income or principal of the Family Trust to or for the benefit of any one or more of Grantor's children as secondary beneficiaries, or to the spouses of Grantor's children as additional secondary beneficiaries for their health, maintenance, education and support. Should one or more of Grantor's children die prior to Grantor's death, the surviving spouse and such descendants of a deceased child of Grantor shall continue to be secondary beneficiaries.

The above referenced discretion to make or withhold distributions of income and principal as to the permissible distributees is an absolute discretion to be exercised in accordance with the Trustee's best judgment. At the end of any tax year, any income that is not distributed shall be added to the principal.

D. Powers of Appointment.

Questions for Clients and Drafting Tips:

- To whom do you grant the power of appointment? Spouses? Children? Descendants?
- How is the power exercised? By Will? By a written declaration delivered to the Trustee?
- If it is a limited power of appointment, what persons, classes of persons or institutions may be the beneficiaries of such exercise? Children, descendants, spouses of children or descendants, charities?
- Do you grant a general power of appointment to be exercised in favor of any beneficiary without limitation?

Form D-1

TESTAMENTARY LIMITED POWER OF APPOINTMENT

Upon the death of the Grantor's spouse, in the event the Grantor's spouse survives the Grantor, the entire principal and any accrued income thereon shall be paid to or continued in further trust for the benefit of such person or persons among the Grantor's descendants, and upon such estates and conditions, in such manner, and at such times as the Grantor's spouse may appoint by specific reference by Will;

provided, however, that no appointment shall be made to the Estate of the Grantor's spouse, said spouse's creditors, or the creditors of the spouse's estate. The Trustee may rely upon any instrument admitted to probate in any jurisdiction as the Last Will of the Grantor's said spouse. However, if the Trustee has no written notice of the existence of such a Will within a period of three (3) months after the date of Grantor's spouse's death, then the Trustee may presume that the spouse died without having effectively exercised the limited power of appointment herein conferred, and the Trustee shall not be liable to any person acting in accordance with such presumption which shall be conclusive for all purposes.

Form D-2

TESTAMENTARY GENERAL POWER OF APPOINTMENT

Upon the death of the Grantor's spouse, in the event the Grantor's spouse survives the Grantor, such portion or all of the remaining trust estate shall be paid to or continued in further trust for the benefit of such person or persons, charities, said spouse's estate, creditors including creditors of said spouse or said spouse's estate, and upon such estates and conditions, in such manner, and at such times as the Grantor's spouse may appoint by specific reference by Will or in a written declaration filed with the Trustee making specific reference to this power; provided, however, that no appointment shall be made to the Estate of the Grantor's spouse, said spouse's creditors, or the creditors of the spouse's estate. The Trustee may rely upon any instrument admitted to probate in any jurisdiction as the Last Will of the Grantor's said spouse. However, if the Trustee has no written notice of the existence of such a Will within a period of three (3) months after the date of Grantor's spouse's death, then the Trustee may presume that the spouse died without having effectively exercised the limited power of appointment herein conferred, and the Trustee shall not be liable to any person acting in accordance with such presumption which shall be conclusive for all purposes.

Form D-3

LIMITED POWER OF APPOINTMENT EXERCISABLE BY WILL OR WRITTEN DECLARATION

Upon the death of the Grantor's spouse, in the event the Grantor's spouse survives the Grantor, the entire principal and any accrued income thereon shall be paid to or continued in further trust for the benefit of such person or persons among the Grantor's descendants, and upon such estates and conditions, in such manner, and at such times as the Grantor's spouse may appoint by specific reference by Will or in a writing signed by Grantor's spouse and delivered to the Trustee; provided, however, that no appointment shall be made to the Estate of the Grantor's spouse, said spouse's creditors, or the creditors of the spouse's estate. The Trustee may rely upon any instrument admitted to probate in any jurisdiction as the Last Will and Testament of the

Grantor's said spouse. However, if the Trustee has no written notice of the existence of such a Will or written instrument within a period of three (3) months after the date of Grantor's spouse's death, then the Trustee may presume that the spouse died without having effectively exercised the limited power of appointment herein conferred, and the Trustee shall not be liable to any person acting in accordance with such presumption which shall be conclusive for all purposes.

Form D-4

EXERCISE OF POWER OF APPOINTMENT BY WRITTEN DECLARATION

STATE OF OHIO)
COUNTY OF _____)

EXERCISE OF POWER
OF APPOINTMENT by Written Declaration

The undersigned, _____, beneficiary of a Trust contained in Article ___ of the _____ Trust dated _____, hereby exercises, by notice to the Trustees of said Trust, _____ and _____, his special power of appointment contained in Article ___ of said Trust as follows:

Effective at the death of the undersigned, I hereby exercise my special power of appointment by appointing the remaining principal and any accumulated income of my share of the Trust contained in the _____ Trust dated _____, to the Successor Trustees of my trust, the _____ Trust, originally dated _____, last amended the ___ day of _____, _____. The assets hereby appointed shall be added to and become a part of shares held under said _____ Trust for the benefit of my spouse and children or shares in my trust held for the benefit of the lineal descendants of my children should any of my children die prior to my death.

The execution of this exercise of special power of appointment is dated this ___ day of _____, 20__.

Sworn to before me and subscribed in my presence this ___ day of _____, 20__.

Notary Public

E. Unitrust for Beneficiary.

With uncertain levels of income produced by Trust investments, clients may wish to provide a Unitrust distribution for a beneficiary, instead of net income. Rather than be limited to what may be a meager income flow, the Unitrust concept allows the Trustee to invest in a diversified manner for future generations consistent with the Modern Portfolio Theory imbedded in the Prudent Investor Act, ORC § 5809.01 et seq.

Questions for Clients and Drafting Tips:

- What should be the annual Unitrust distribution percentage?
- How is the Unitrust amount calculated?
- Annual Unitrust calculation and adjustment? Source of the payment of the Unitrust amount (cash, in kind)?
- Prorated for initial year and last year of the Trust?

Form E

UNITRUST

1. I direct that the Trustee distribute a Four Percent (4%) Unitrust amount (defined below) to _____, no less frequently than quarterly. The obligation of the Trustee to pay the Unitrust amount shall terminate with the regular payment next preceding the death of _____. No additional distributions from the Trust Estate shall be authorized.

2. The Unitrust amount shall mean the net fair market value of the assets of the Trust valued as of the last business day of each taxable year of the Trust (the "valuation date").

3. Frequency and Source of Payment. The Unitrust amount shall be paid in equal quarterly installments at the end of each calendar quarter from income and, to the extent income is not sufficient, from principal. Any income of the Trust for a taxable year in excess of the Unitrust amount shall be added to principal.

4. Incorrect Valuation. If, for any year, the net fair market value of the Trust assets is incorrectly determined, then within a reasonable period after the value is finally determined for Federal tax purposes, the Trustee shall pay to the beneficiary (in the case of an undervaluation) or receive from the beneficiary (in the case of an overvaluation) an amount equal to the difference between the Unitrust amount properly payable in the Unitrust amount actually paid.

5. Proration. In determining the Unitrust amount, the Trustee shall prorate the same on a daily basis for the first taxable year in which the beneficiary is entitled to payment of the Unitrust amount. The obligation of the Trustee to pay the Unitrust amount for the last taxable year of the beneficiary's death shall terminate with the regular payment next preceding the death of the beneficiary.

F. *Residence Trust for Spouse.*

Questions for Clients and Drafting Tips:

- May the spouse occupy the residence rent-free?
- Does the spouse pay ordinary occupancy expense (typically gas, electric, water, sewer, cable, telephone)?
- Does the spouse pay taxes, insurance and routine maintenance? What about special assessments?
- Who pays for major repairs and replacements? From what funds?
- Is a dollar amount allocated to the Residence Trust from which expenses are to be paid, either directly or as a contingency fund in case the spouse does not pay them?
- Does the spouse's lifetime occupancy rights cease if he or she does not pay the stipulated expenses?
- Is the spouse permitted to buy the residence from the Trust for fair market value? This would allow the spouse to establish a new cost basis for the residence. This power of substitution allows the residence trust to be a Grantor trust for income tax purposes under the provisions of Internal Revenue Code § 672 et seq.

Form F

RESIDENCE TRUST FOR SPOUSE

1. The Trustee is authorized and directed to allow the Grantor's surviving spouse _____ to use such home or homes held as a part of the Residence Trust without payment of rent thereof during the surviving spouse's lifetime or so long as the surviving spouse continues to use such home or homes. The Trustee is authorized, but not required, to pay from the principal of the Marital Trust (above) its proportionate share of any mortgage interest or principal payments, taxes, insurance premiums, maintenance costs, ordinary repairs and replacements and make expenditures for reasonable improvements.

2. With the written consent of the Grantor's spouse, or when he or she permanently ceases to use any such home, the Trustee may sell such home and, upon the surviving spouse's written request, the proceeds of such sale (or the Trustee's portion of such proceeds) shall be used by the Trustee to the extent required, in the discretion of the Trustee to purchase or acquire another home (including a separate residence, a cooperative apartment, a condominium or any other form of dwelling required by the surviving spouse), taking title in the name of the Trustee and allowing the surviving spouse to use such home on the terms set forth above.

3. If any such home is sold and the surviving spouse does not request acquisition of another home, the proceeds of such sale shall, in proportion to the respective interests in such home which were held in

any trust hereunder, become part of the principal of the Marital Trust, to be administered and distributed in accordance with the Marital Trust provisions above, exclusive of the provisions of this Residence Trust, provided however, that in such event the surviving spouse may request the Trustee to pay for the surviving spouse all or a portion of the rent payable with respect to any type of dwelling selected by the surviving spouse, and the Trustee is authorized to comply in its discretion with such request in whole or in part, using income or principal of the Marital Trust, taking into account the financial resources of the surviving spouse and the mutual desire that the surviving spouse be in a position to enjoy the standard of living which the Grantor and such surviving spouse enjoyed as of the date of this Trust.

4. No party dealing with the Trustee shall be required to ascertain whether or not any of the requirements relating to the sale or purchase of any real property have been complied with; nor shall any such party be required to look to the application of the proceeds of any sale; and such parties may deal with the Trustee as having full and complete, independent power and authority to consummate any purchase or sale hereunder.

5. Notwithstanding anything to the contrary hereinabove contained in this Residence Trust, the surviving spouse shall, at any time, have the power to acquire any residence held hereunder and used as such spouse's primary residence by substituting property of an equivalent value to any residence held in this Residence Trust with such value being measured at the time of the substitution. This right of substitution shall be limited to a residence. Grantor's spouse may also acquire the residence by purchasing such residence from the Residence Trust. Such purchase may include the execution of a Promissory Note and mortgage executed and delivered by the Grantor's spouse to the Trustee for the purchase price of the residence on such terms and conditions as are commercially reasonable. The Mortgage may be an open-end mortgage providing for additional advancements to Grantor's spouse.

G. Residence Trust Provision for Guardians and Children.

Questions for Clients and Drafting Tips:

- Is the occupancy of the house to be rent free by the guardian and his or her family?
- Despite the fact the guardian may no longer be serving as guardian, does the client wish the house held in trust for occupancy by the former guardian and his family until the youngest child reaches a certain age (e.g. 21, 25 or 30).
- At the termination of the residence sub-trust, what happens to the residence? Is it sold? Is it distributed to children? Option to purchase by children or guardian?
- How much money is to be allocated to the residence trust fund? Take into account annual operating expenses of the home.
- Who is to pay the utilities, taxes, insurance, maintenance and repairs?

Form G-1

RESIDENCE SUB-TRUST FOR GUARDIANS AND CHILDREN

A. Provided _____ has been appointed Guardian of the person and estate of any minor children of Grantor, the Trustee is directed to allow guardian and any spouse or children of said guardian to use the real property located at _____, Ohio without payment of rent, until such time as the youngest child of Grantor attains the age of twenty-five (25).

B. The Trustee is authorized to pay from the allocation of funds to the Residence Sub-Trust, any mortgage interest or principal payments, taxes, insurance premiums, maintenance costs, ordinary repairs, utilities and make expenditures for reasonable improvements and repairs.

C. Upon the youngest child of Grantor attaining the age of twenty-five (25), the Trustee is directed to sell such residence for its then fair market value and allocate the net proceeds of such sale in accordance with paragraph A.3 of the Family Trust provisions as hereinabove set forth. The Trustee shall also allocate the remaining cash held in the Residence Sub-Trust to the Family Trust to be disposed of in accordance with paragraph A.3 of the Family Trust.

D. No party dealing with the Trustee shall be required to ascertain whether or not any of the requirements relating to the sale or purchase of any real property have been complied with; nor shall any such party be required to look to the application of the proceeds of any sale; and such parties may deal with the Trustee as having full and complete, independent power and authority to consummate any purchase or sale hereunder.

Form G-2

CHILDREN'S AND GUARDIANS' RESIDENCE TRUST

(Another Version)

A. After the death of the survivor of Grantor and Grantor's spouse, if any interest in residential real property is a part of the Trust Estate, the Trustee shall hold such property and the sum of money stipulated in paragraph B, 1, above in a separate trust under the following terms and conditions with the sum of money to be held by the Trust in a Children's Residence Trust Fund:

1. The residence shall be held for the personal benefit of and actual use by Grantor's children, and the Guardians of any minor children of Grantor (all of whom are collectively known as "beneficiaries" hereunder) until the youngest child of Grantor attains the age of twenty-one (21) years. All of the beneficiaries shall be permitted to live in the residence rent-free during such time. All of the cost of mortgage payments, maintaining and repairing the residence, including but not limited to property taxes, fire and property insurance, utilities, upkeep of grounds, pools, security and other amenities, continuance of daily or weekly information services, including, newspapers, magazines, and

other periodicals, shall be paid out of the Children's Residence Trust fund hereinbefore created. The Guardians may continue to reside in the residence rent-free until the youngest child of Grantor attains the age of twenty-one (21), at which time the Guardians shall either vacate the residence or begin paying a reasonable rent for continuation of the privilege of living in the residence. At the time the youngest child of Grantor attains the age of twenty-one (21), in the sole and absolute discretion of the Trustee hereunder, the residence may either be sold by the Trustee or the residence may be retained in the Residence Trust for such period of time as the Trustee shall decide, with the primary consideration being the best interest of all of Grantor's children. At such time as the residence is sold, the net proceeds of the sale of such residence shall be divided equally among the Trust created for each of the Primary Beneficiaries (Grantor's children) and added to the principal thereof. The remaining amount held in the Children's Residence Trust Fund shall be divided equally among Grantor's then surviving children and the people who have served as guardians of Grantor's minor children, said amount to be divided and distributed equally per capita and free of Trust.

2. Grantor directs that if the residential real property is to be offered for sale by the Trustee, the Trustee shall offer it for sale at the value to be determined by an independent appraisal to such of Grantor's children as are living at the time of such offer. Each of Grantor's children shall have sixty (60) days from the time of such offer in which to state in writing whether they wish to buy said property. If by the end of such sixty (60) day period, more than one of them have stated their wishes to buy said property, the Trustee shall determine by lot the one to whom such sale is to be made, unless all of Grantor's children who wish to buy the property agree within the ensuing thirty (30) day period to make the purchase jointly in which case the Trustee shall sell said property at said value to such children either as joint tenants with right of survivorship or as tenants in common as they shall specify in such agreement. If only one of Grantor's children has stated the desire to purchase said property, the Trustee shall sell it to him or her at the appraised value. Each such sale shall be conducted upon such terms as the Trustees in their discretion shall determine. If none of Grantor's children so wish to buy said property, the Trustee shall sell the same to such person or persons at such price and on such other terms as the Trustee deems most advantageous.

H. Cottage Trust.

Questions for Clients and Drafting Tips:

- Terms of usage generally: Who will be able to use the property? How long for each beneficiary? Responsibility of beneficiaries for expenses? Allocate expenses according to usage?
- Termination of usage by spouse: age, death, remarriage?
- Authorization for sale of property required by whom?

- Use of tangibles.
- The unfunded Trust: who pays expenses? Will the non-payment of expenses constitute an event of default leading to termination of use?
- Issues relating to spousal use: consent requirements if the residence is to be sold; permitted participation of the spouse in any decision regarding new cottage/vacation home; companion or significant other use? New spouse use? Terminate on co-habitation?
- Issues relating to use by children: allocation of periods of use.
- Options to purchase.

Form H

COTTAGE TRUST

A. The Trustee is authorized and directed to allow the Grantor's surviving spouse _____ to use the real property located at _____ (the "Cottage") held as a part of the Cottage Trust without payment of rent thereof during the surviving spouse's lifetime or so long as the surviving spouse continues to use such Cottage. As a condition to the rent free use of the Cottage by _____, he shall pay any real estate taxes and assessments, insurance premiums, maintenance, costs, utilities, ordinary repairs and replacements and permanent capital improvements expenditures as he may choose to make or he may elect to cause such items to be paid from the income of the Marital Trust, and if needed from the principal of the Marital Trust.

B. With the written consent of Grantor's spouse, and subject to the Option to Purchase as hereinafter set forth, the Trustee may sell the Cottage and, upon the written request of Grantor's spouse, the proceeds of such sale shall be used by the Trustee to the extent required, in the discretion of the Trustee, to purchase or acquire another vacation residence (including a separate residence, a cooperative apartment, a condominium or any other form of dwelling required by said spouse) taking title in the name of the Trustee and allowing said spouse to use such vacation home on the terms set forth above.

C. If any such Cottage or replacement vacation residence is sold and Grantor's spouse does not request acquisition of another vacation home, the proceeds of such sale shall become part of the principal of the Marital Trust, to be administered and distributed in accordance with the Marital Trust provisions above, exclusive of the provisions of this Cottage Trust.

D. In the event that the Cottage is at any time sold while it is in this Trust, Grantor's children _____ and _____ shall have the right and option to purchase the Cottage at its fair market value at such time. Notice of such option shall be given to said children along with the fair market value sale price. Such children shall have ninety (90) days within which to decide to exercise their option to purchase. If only one exercises the option to purchase, the Cottage shall be sold to such child.

If both exercise the Option to Purchase, both children shall take title in equal shares to such Cottage. The purchase price shall be paid in cash or partial cash and partial note and mortgage with all the customary prorations. Notice of exercise of the Option to Purchase shall be in writing, signed and dated by such child and delivered to the Trustee.

E. No party dealing with the Trustee shall be required to ascertain whether or not any of the requirements relating to the sale or purchase of any real property have been complied with; nor shall any such party be required to look to the application of the proceeds of any sale; and such parties may deal with the Trustee as having full and complete, independent power and authority to consummate any purchase or sale hereunder.

F. Upon the death of the Grantor's spouse _____, in the event the Grantor's spouse survives the Grantor, the entire principal of the Cottage Trust shall be paid to or continued in further trust for the benefit of such person or persons among the Grantor's descendants, and upon such estates and conditions, in such manner, and at such times as the Grantor's spouse may appoint by specific reference by Will or in a written declaration filed with the Trustee making specific reference to this power; provided, however, that no appointment shall be made to the Estate of the Grantor's spouse, said spouse's creditors, or the creditors of the spouse's estate. The Trustee may rely upon any instrument admitted to probate in any jurisdiction as the Last Will of the Grantor's said spouse. However, if the Trustee has no written notice of the existence of such a Will within a period of three (3) months after the date of Grantor's spouse's death, then the Trustee may presume that the spouse died without having effectively exercised the limited power of appointment herein conferred, and the Trustee shall not be liable to any person acting in accordance with such presumption which shall be conclusive for all purposes.

G. 1. At the death of the Grantor's spouse, _____, and in default of the effective exercise of the limited power of appointment hereinabove granted, the Cottage and its contents shall be distributed absolutely and free of trust to Grantor's children _____ and _____, in equal shares.

2. Should one of such children die prior to the death of Grantor's spouse, _____, and in default of the effective exercise of the limited power of appointment hereinabove granted, the Trustee shall distribute absolutely and free of trust the Cottage or replacement vacation home and its contents as follows, provided that none of the beneficiaries have rejected this gift pursuant to the provisions set forth in paragraph G.2.c below:

a. One-half ($\frac{1}{2}$) absolutely and free of trust to Grantor's surviving child.

b. One-half (½) distributed in equal shares to each surviving child of a deceased child of the Grantor (grandchildren of the Grantor). Should any of such grandchildren be under the age of twenty-one (21), the share of such Cottage or replacement vacation home shall be held for them pursuant to the terms and conditions of the Grandchildren's Trust, hereinafter set forth.

c. Should one of Grantor's children die prior to the death of Grantor's spouse, _____, prior to distribution of the Cottage or replacement vacation home as set forth in paragraph G.2,a and b above, the Trustee shall have the Cottage or replacement vacation home appraised and the appraised value communicated to each beneficiary. The beneficiary shall then have ninety (90) days to determine whether or not to accept or reject distribution of the Cottage or replacement vacation home and its contents. If the beneficiary rejects the gift of the Cottage or replacement vacation home the undivided interest in the Cottage or replacement vacation home and its contents, notice shall be given to the other beneficiaries of the opportunity to accept the rejected gift. If the beneficiaries accepting the stipulated gift wish to accept the rejected gift, then they shall notify the Trustee in writing of their acceptance of a rejected gift and their understanding that an equalizing amount of cash will be distributed from their share of the residuary trust estate to the beneficiary who rejected the gift. If the other beneficiaries accept the rejected gift, the interest in the Cottage or replacement vacation home and its contents which was accepted shall be distributed to the accepting beneficiaries and an equalizing distribution of cash shall be made to the beneficiary rejecting the gift of the undivided interest in the Cottage or replacement vacation home and its contents. The equalizing distribution of cash shall be made from the Family Trust from the share of the beneficiary accepting the rejected gift.

d. Should all beneficiaries reject the gift or should the interest rejected by one or more beneficiaries not be accepted by the other beneficiaries then the Cottage shall be sold for the best price reasonably attainable and the net proceeds of sale distributed in accordance with paragraph ___ of the Trust, herein.

I. Incentive Trust for Behavioral Modification.

Questions for Clients and Drafting Tips:

- If the client is encouraging a child to be drug and alcohol free, must the child, as a condition to receiving a distribution from the Trust (perhaps a terminating distribution) be required to consent to drug and alcohol testing?
- If a child is required to seek gainful employment, will the Trustee match a certain percentage of wages with a distribution from the Trust? Should the child be required to submit a W-2 or if they have their own business, sufficient proof and evidence to show earnings from self-employment. Exception made for stay-at-home moms or dads?
- In order to receive a final terminating distribution from the Trust, must a child be required to show that they have done their own estate and financial planning?

Form I-1

INCENTIVE TRUST FOR PAYMENT OF EDUCATIONAL EXPENSES, DRUG-FREE LIVING, CRIMINAL HISTORY AND NO DISABILITY

1. After each child graduates from high school, the Trustee shall provide ninety percent (90%) of the cost of a child's higher education including, but not limited to room, board, books, tuition, fees, a reasonable spending allowance and providing a reasonable mode of transportation. As a condition to providing ninety percent (90%) of such costs, the child must provide the remaining ten percent (10%) of the cost of all of the stipulated items. The Trustee shall continue to pay post graduate education expenses until the termination of the Trust, under the same terms and conditions.
2. In addition after each child graduates from high school, the Trustee shall make distributions for the health, support and maintenance of such child through the attaining of an undergraduate college degree and shall continue such payments for six (6) months after graduation from college. In addition, the trustee shall make distributions for accident, illness, permanent disability or other emergency affecting such child. [This could also be extended to post graduate study].
3. At the time each such child attains the age of twenty-five (25), the Trust shall terminate as to such child and the remaining principal and any accrued income of such child's share shall be distributed absolutely and free of Trust to such child provided that the child meets the following conditions:
 - a. The child must submit to a drug test and have clean results from such drug test.
 - b. Have no felony convictions.
 - c. Not be permanently disabled.
4. If the child fails to meet any of the above conditions, the Trustee shall allocate the remaining trust assets from such child's share to the Wholly Discretionary Trust as hereinafter set forth.

Form I-2

Another Version of Incentive Trust

1. Income and Principal. While the Grantor's children are living, the Trustee shall be authorized to distribute to any one or more of the Grantor's children such part or all of the net income or principal of their respective trusts as the Trustee shall determine in its sole discretion, without restriction as to purposes or amounts, provided that the child falls within one of the following descriptive subparagraphs:
 - a. The child is a full time student at an accredited college, university, vocational school or similar institution and maintains the equivalent of a grade point average of 2.5 or better on a scale in which 4.0 is an "A"

grade, and the child's course of study is progressing towards the completion of an undergraduate or other degree at the rate of a full time student;

b. The child is employed full time in an occupation to which the child devotes at least 35-40 hours of work per week or the child is pursuing a career, which is socially productive on a full-time basis, such as a career as an artist or a musician, to be determined solely by the Trustee in the Trustee's discretion;

c. The child is disabled and such disability prevents him or her from being a productive and self-supporting member of society as determined by the Trustee in the Trustee's sole discretion;

d. The child is pursuing an educational, scientific or charitable goal which the Trustee has determined, in its sole discretion, is in the best interest of the child and the general public and which makes the child a productive member of society as determined by the Trustee in the Trustee's sole discretion; or

e. The child is occupied full-time caring for other family members such as children or other relatives and the Trustee determines in its sole discretion that such obligation reasonably precludes the child from earning a living (an example of such occupation would include motherhood).

It is the Grantor's intent that a child not receive distributions of income or principal from the trust if the child is not complying with the provisions of one or more of the foregoing five paragraphs, provided, however, that the Trustee may make distributions of income or principal to any child or his or her lineal descendants in the event of medical (including psychiatric) emergency, as the Trustee shall determine, in its sole discretion.

Form I-3

INCOME MATCHING DISTRIBUTIONS

After a child attains age eighteen (18) and if the child is employed full time, the Trustee shall pay to the child each calendar year an amount, but not in excess of the income of the child's portion of this Exempt Trust, equal to the child's gross income from employment during such calendar year (hereinafter referred to as "income matching.") The Trustee shall have the absolute discretion to determine whether the child is employed full time. The term "gross income" includes both gross earnings from employment and gross earnings if self-employed. The term "gross income" shall not include passive income, such as interest, stock dividends or rentals, if the capital producing such passive income was received by the grandchild as a gift or inheritance. The Trustee may require the child to provide such tax and/or employment verification, including tax returns, as the Trustee deems reasonable to determine the child's gross income and the Trustee may establish such budgets and reserves as the Trustee considers reasonable. If the child declines to provide such verification, the grandchild shall not be entitled to

distributions from the Trust under this subparagraph with respect to the year for which the child has declined to provide such verification. Payments shall be made first out of income and then out of principal.

J. *Disposition of Tangible Personal Property*

Questions for Clients and Drafting Tips:

- Are there any items that the client would want his or her children to have, even if his or her spouse is still living (this is especially applicable in second marriage situations)?
- After the death of both husband and wife, is it appropriate to allow the children to decide upon distribution with the Trustee deciding any disputes?
- Should you refer to the ability to attach a later list to the Trust (unlike a Will, a Grantor can attach a later list showing distribution instructions of specific items)?
- Do you employ a “round robin” distribution selection process, drawing numbers to determine order or some other procedure?
- Do equalization of unequal distributions with cash?

Form J-1

DISPOSITION OF TANGIBLE PERSONAL PROPERTY

After the death of the Grantor, the Trustee shall distribute all of the tangible personal property of the Trust, including but not limited to personal effects and belongings of the Grantor, furniture and household furnishings and any motor vehicles, boats, motors and watercraft, to Grantor’s spouse _____, if he/she survives Grantor. If _____ does not survive the Grantor, the Trustee shall distribute all of such personal effects and tangible personal property to Grantor’s children as they may agree, or in the absence of their agreement, as the Trustee shall determine, in the Trustee’s sole discretion. Grantor may keep with this Trust a memorandum regarding Grantor’s wishes concerning disposition of Grantor’s personal effects and tangible personal property. Grantor directs the Trustee to follow such memorandum in making the distributions or tangible personal property to Grantor’s children, grandchildren and others as may be specified in said memorandum.

Form J-2

ASSIGNMENT OF TANGIBLE PERSONAL PROPERTY

The undersigned hereby assigns any and all interest in his/her personal effects and tangible personal property either now owned or hereafter acquired to _____ and _____, Co-Trustees of the _____ Revocable Living Trust dated the ___ day of _____, 20__.

IN WITNESS WHEREOF, _____ has executed this Assignment on the ___ day of _____, 20__.

WITNESS

GRANTOR

NAME

ACCEPTANCE OF ASSIGNMENT

The undersigned, Co-Trustees of the _____ Revocable Living Trust dated the ___ day of _____, 20__, hereby confirm that all tangible personal property and personal effects have been assigned to the undersigned as Trustees this ___ day of _____, 20__.

The undersigned hereby agree to accept all other after acquired personal effects and tangible personal property as such items are acquired by _____.

WITNESS

GRANTOR

NAME

NAME

K. Trust for Pets.

Ohio has specific authorization for Trusts for Pets under Ohio Trust Code § 5804.08.

Questions for Clients and Drafting Tips:

- Identify what types of pets and if possible, names of pets or provide other identification for the pets.
- Identify a custodian for the pets who will be in charge of the care and housing of the pets.
- Specify any special dietary instructions (brands or types of pet foods, etc).
- Does the client wish to use a specific veterinarian?
- Provide a sum of money to be held in the Trust and distributed to the custodian for care, feeding, housing and maintenance of the pets.
- If the pets are show animals, provide any specific instructions for showing the animal, including specific shows at which the client wishes the pets to be shown.
- Provide for what happens if the pets get old, ill, diseased, etc.
- Disposition of remains?

- If the custodian resigns, dies or is otherwise unable to continue to serve as custodian, provide for a successor custodian or a method to appoint a successor custodian.
- At the death of the last pet, provide for disposition of any remaining funds in the Pet Trust (e.g. Humane Society or other charity for animals) or shall the money go to specific persons or the custodian?

Form K

TRUST FOR PETS

1. Grantor and Grantor's spouse own many dogs, a number of which are show dogs. The primary purpose of this trust shall be to provide for their needs, and as such, shall be considered a Trust for Pets under Section 5804.08 of the Ohio Trust Code. Grantor has derived much enjoyment from owning and showing dogs. Grantor directs that _____ be authorized to have custody of all dogs and shall be authorized to breed and show all of Grantor's dogs. In caring for the dogs, Grantor directs that Dr. _____, DVM, of _____, Ohio, continue to care for all of Grantor's dogs or they shall be cared for by such other veterinarian as designated by _____. Eventually, any dog may be euthanized due to age, infirmity or poor health as certified by the veterinarian in charge as in the best interest of such dog.
2. Grantor directs that the Trustee make a Thirty Thousand Dollars (\$30,000.00) per year distribution to _____ in bi-weekly installments while she is caring for the dogs. Such amounts shall be annually increased for inflation from and after the year _____.
3. It is Grantor's intent that _____ maintain the dogs at her residence and that the dogs never go to a kennel.
4. At such time as _____ is disabled, deceased or otherwise unable or unwilling to care for the dogs, the Thirty Thousand Dollars (\$30,000.00) per year distribution to her shall cease. Her husband _____ is designated to have custody of and be in charge of the dogs and to receive the Thirty Thousand Dollars (\$30,000.00) per year distribution.
5. If both _____ and _____ are unable or unwilling to fulfill their duties herein, the rest, residue and remainder of the trust estate shall be distributed to _____. The Trustee shall have the discretion to either distribute the surviving dogs or to sell or dispose of the dogs in the sole and absolute discretion of the Trustee.
6. If not earlier terminated pursuant to Paragraph 5 above, upon the death of the last dog living at the time of the death of Grantor, the trust shall terminate and the remaining principal and any accrued income shall be distributed absolutely and free of trust to _____.

L. Decanting.

Section 5808.18 of the Ohio Revised Code allows for “decanting.” The decanting statute allows a Trustee to transfer assets from a less optimum Trust, to a Trust that contains more favorable provisions. It is important that you review the statutory requirements for decanting, as the ability of the Trustee to decant to a second trust may be limited by the distribution standards set forth in the first trust.

Form L

DECANTING

Grantor specifically authorizes the Trustee to distribute the principal and accumulated, but undistributed income of this Trust or any Trust created hereunder, in further trust as may be permitted under the laws of the state of Ohio or the laws of any jurisdiction governing the administration of this Trust at such time, and regardless of whether such laws existed at the time of execution of this Trust. Such authorization includes, but is not limited to, the distribution of assets to a Trust that benefits fewer than all of the beneficiaries under this Trust or any Trust created hereunder or that otherwise alters the beneficial interests of one or more beneficiaries. The purposes of such a distribution in Trust would include, but not be limited to, a beneficiary’s addiction, disability, creditor problems, marital problems, medical condition or personal accumulation of wealth. In the event this Trust is the recipient of deferrable retirement benefits as defined in the Internal Revenue Code, the Trustee may decant to a Trust that will qualify for the most preferential tax treatment available for such benefits, in the sole and absolute discretion of the Trustee.

M. Trust Protector.

The use of Trust Protectors is becoming increasingly popular in Trust documents. The reason: Trusts are lasting longer and longer and the use of Trust Protectors provides flexibility to what may otherwise be an inflexible arrangement. The concept of a Trust Protector is codified under Section 5808.08 of the Ohio Revised Code.

Form M

TRUST PROTECTOR

A. The Trust Protector of this Trust shall be _____. In the event that _____ is unable to serve, then any other attorney at the law firm of _____ shall serve as the Trust Protector of this Trust. The Trust Protector shall serve in a non-fiduciary capacity. The Trust Protector may be removed at any time and for any reason by a majority of the then current beneficiaries.

B. The Trust Protector shall be authorized to terminate this Trust instrument (in whole or in part) whenever the Trust Protector deems it advisable for any valid reason, in her sole discretion. If a Trust is terminated, the Trustee shall distribute any remaining trust property to those individuals designated in Article I above.

C. The Trust Protector shall be authorized to amend this Trust

instrument, if, in the sole and uncontrolled discretion of the Trust Protector, she determines that the continuation of the Trust or its continuation in its original form would be unduly burdensome, uneconomical, inefficient or unwise for any valid reason, including legislative changes, changes in tax laws or any other justifiable reason. The Trust Protector shall be further authorized to change the principal place of administration of the Trust.

D. The Trust Protector shall be authorized to remove or replace the Trustee. The Trust Protector shall be further authorized to direct the Trustee to exercise the decanting power, if any, provided under applicable law.

E. The Trust Protector shall not exercise any power or discretion in favor of the Trust Protector, for the Trust Protector's benefit, or for the benefit of any person to whom the Trust Protector is related or subordinate within the meaning of Internal Revenue Code Section 672(c). Nothing in this Trust instrument shall be construed as causing the Trust Protector to possess a general power of appointment within the meaning of Internal Revenue Code Sections 2041 and 2514.

F. The Trust Protector serving under this instrument is entitled to receive reasonable compensation for services rendered, taking into consideration: the market rate for similar services in the jurisdiction in which the Trust Protector serves; the breadth and nature of the powers, authorities, and discretions granted to the Trust Protector; the amount of time the Trust Protector will likely devote to assisting the Trust and the Trustee; and the trust property's current value and the projected amount of appreciation. The Trust Protector is entitled to reimbursement for all expenses incurred in the performance of its duties as Trust Protector, including reasonable travel expenses. Serving in the capacity of Trust Protector does not prevent the Trust Protector from also providing legal services on behalf of the Trust or the trust beneficiaries. If the Trust Protector is providing professional services, the Trust Protector is entitled to charge its normal and customary fees for services provided or to be provided, in addition to the Trust Protector's ordinary compensation as Trust Protector.

N. Third Party Catastrophe Trust for Children.

As estate planning attorneys, we get calls from friends or clients who have knowledge of a tragic accident that has taken the lives of parents of minor children. The person calling you wishes to establish an educational fund for the children. The problem becomes one of providing an appropriate and legal vehicle for such educational funds.

Questions for Clients and Drafting Tips:

- Who should be the grantor of the trust? The grantor of the trust could be an individual or interested relative or friend of the family.
- Who should be the trustee?

- Should the educational trust funds be held in a “one pot” trust or divided and allocated in individual shares?
- At what age should the trust fund terminate? If a “one pot” trust, the termination date would be the youngest child attaining a certain age?
- If a beneficiary dies during the continuance of the trust, if a “separate share” trust, what happens to the beneficiary’s share? Does it lapse? Does it merge with the other shares?
- If all beneficiaries die before receiving their share, should the funds be paid to a default charitable beneficiary?

Form N

[_____] CHILDREN EDUCATIONAL TRUST

THIS AGREEMENT, effective the ___ day of _____, 20___, by and between _____, hereinafter referred to as the “Grantor,” and _____ BANK, hereinafter referred to as the “Trustee.”

W I T N E S S E T H :

WHEREAS, _____ Employee _____ and his wife _____ lost their lives in a tragic accident on _____, 20___. They left ___ children surviving, _____, age ___, _____, age ___, _____, age ___ and _____, age ___ (hereinafter referred to collectively as the “Children” or individually as a “Child”).

WHEREAS, the Grantor wishes to provide for the educational and other needs of the Children through the establishment of this Trust.

NOW, THEREFORE, Grantor and Trustee hereby agree as follows:

1. Trustee agrees to administer all assets transferred to this trust in accordance with the provisions of this Agreement.
2. This Trust shall be irrevocable.
3. All contributions to the Trust may, but are not required to, be held in a common fund until such time as the Trustee determines that there are sufficient funds allocated to divide the funds into funds for each of the Children. All funds contributed shall be allocated equally to the separate trust funds established for the Children, unless the donor directs the funds be allocated to a fund for a specific Child in which case the Trustee shall honor the donor’s intent.
4. The Trustee shall hold the trust funds for the benefit of each Child and shall use income or principal from each child’s share of the trust funds primarily for educational needs, including but not limited to tuition, room, board, books, fees and a reasonable spending allowance. Such distributions may be made for purposes of reimbursement of the educational expenses listed herein or to pay off or pay down an educational loan or loans. The Trustee may also use the income or principal from each child’s share of the trust for the provision of a policy of health insurance, and may use such funds in the event of an accident, illness or other emergency affecting such child where cash would be of some use.

5. Distributions to the Children from their individual trust funds shall be made pursuant to recommendations by both the Trustee and the President of _____ or his or her designee.
6. At such time as each of the Children attain the age of thirty (30), the remaining balance in his or her trust fund shall be distributed as follows:
 - a. One-half (1/2) shall be distributed absolutely and free of trust to such Child attaining the age of thirty (30).
 - b. One-half (1/2) shall be divided among the other surviving Children and distributed to them if they have attained the age of thirty (30), or if they have not attained the age of thirty (30), shall be allocated to such Child's trust fund share to be held hereunder and administered as hereinabove set forth.
7. If any of the Children die before attaining the age of thirty (30), the remaining principal and accrued income in their individual trust fund shall be divided among the other surviving Children and distributed to them or if such children have not attained the age of thirty (30), shall be allocated to such Child's share to be held hereunder and administered as hereinabove set forth.
8. If all of the Children die before the termination of this Trust, then the balance of the remaining trust funds shall be distributed absolutely and free of trust to a charitable organization selected by the Grantor with such organization to be a qualifying charity under Section 501(C)(3) of the Internal Revenue Code.

ARTICLE II: TERMS AND CONDITIONS

- A. The beneficial interest in this Trust, held hereunder, shall not be alienated or disposed of or in any manner encumbered while in the possession of the Trustee. Should any beneficiary alienate, charge, dispose of or encumber his or her interest in the Trust, either the income or principal thereof, before the same shall have been delivered to him or her under the provisions of this agreement, or should any creditor of any beneficiary of the Trust attempt to seize any funds in the Trust in the hands of the Trustee, and thereby deprive any beneficiary of the enjoyment hereof, the trust as to the beneficiary whose interest may be so affected shall thereupon cease and terminate, and shall thereafter during the remainder of the life of said beneficiary, be held and distributed by the Trustee according to its absolute discretion, and thereafter the Trustee shall pay to such beneficiary or for his or her maintenance and support from such interest in the Trust, only such sums as in the absolute discretion of the Trustee shall by it be deemed fit and proper.
- B. In the disbursement of funds to be paid to or for the use and benefit of any beneficiary who shall be a minor, the Trustee may make payments for the same to the guardian or such other person as may have custody of the person of the minor at the time such payments are made, and when a minor has attained sufficient age to make it probable

that the money will be properly expended, may pay directly to the minor, to be used for the purposes set forth herein, and the receipt of any such person shall be a full acquittance of the Trustee as to any amounts so paid.

C. The Trustee is directed to provide copies of periodic trust accountings and reports to Grantor and the Guardians of the minor Children.

ARTICLE III: TRUSTEE POWERS

A. The Trustee shall have all the powers granted by the Ohio Trust Code and the Ohio Uniform Principal and Income Act, as amended and in effect at the time of the exercise of the power.

B. Grantor hereby empowers Trustee to amend the Trust from time to time for any reason deemed appropriate by the Trustee. The Trustee is also empowered to appoint the trust property into further trust for the benefit of one or more of the Children. In exercising the power of amendment and the power of appointment, the Trustee shall endeavor to honor the original intent of the Trust as expressed herein to benefit the Children. The Grantor further intends that the power to amend and the power to appoint shall be used only for compelling reasons and in unexpected and/or exceptional circumstances.

C. In addition, the Trustee shall be entitled to reasonable compensation for the Trustee's services in the handling and management of the trust estate herein created. Trustee may from time to time waive its right to compensation. It is the Trustee's intent at the date of execution of this Trust to only charge for out of pocket expenses.

ARTICLE IV: OHIO TRUST

This Trust shall be considered as an Ohio Trust and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of that State.

ARTICLE V: MISCELLANEOUS

A. If the Trustee determines that continuation of any trust being administered under this agreement is contrary to the best interest of the beneficiaries thereof by reason of (1) changes in legislation, or (2) unforeseen changes in circumstances, or (3) because the value of this trust's assets are at such a level that, in the sole discretion of the Trustee, the continued administration thereof would be financially burdensome, then the Trustee, in the Trustee's sole discretion, may terminate such trust and distribute the principal thereof, and any income accumulated therein, to the person or persons then entitled to receive the income and principal therefrom.

B. In the event that _____ BANK shall at any time be merged with, consolidated with, be operated under joint agreement with, or be sold or transferred to any other corporation, association, subsidiary or trust company, or be reorganized into a new corporation, association, subsidiary or trust company, such corporation, association, subsidiary or trust company succeeding to the fiduciary powers and services of the

Trustee shall, without any further act on the part of the parties hereto, be substituted in the place and stead of _____ BANK as fiduciary hereunder.

C. Notwithstanding anything in this Agreement to the contrary, the Grantor is hereby given the power to remove and replace any Trustee serving hereunder.

Any rights and duties of Grantor hereunder shall inure to the benefit of and be binding on Grantor's successors and assigns.

Chapter 13: Forms under 2018 Omnibus Bill, 2018 HB 595

Robert M. Brucken
Retired Partner, Baker Hostetler
Cleveland, Ohio

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Chapter 13: Forms under 2018 Omnibus Bill, 2018 HB 595

Robert M. Brucken

Retired Partner, Baker Hostetler
Cleveland, Ohio

I. Predeath Validation of Will and Trust

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Forms for Predeath Validation of Wills and Trusts

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Chairman, EPTPL Committee for
Validation of Wills and Trusts before
Death

HB 595, effective March 22, 2019, has “reformed” the Ohio law on predeath validation of wills and extended it to trusts too. Some of us believe this is one of the most important additions to Ohio law since the Medieval Statute of Wills and Statute of Uses created wills and trusts respectively. It is a very useful tool in appropriate cases to prevent future contests, and in other appropriate cases to force them to issue currently. For details of the new statute see Lehman, “Ohio Provides New Tool to Protect the Client’s Will and Trust,” 29 *PLJO* 51 (Jan/Feb 2019).

When you do predeath validation, the testator/settlor is still living, is presumably the plaintiff and is his own star witness for validation. The judge or jury may see him live, hear him tell what he wants and why and understand and buy his story. Moreover, he has substantial leverage over his family or other beneficiaries; if they do not join in seeking validation, he may reduce or eliminate their benefits by amending the will and trust, or even reduce or eliminate further lifetime giving to them. These features may make the procedure attractive where contest is expected, possible or even just feared.

There are at least two basic scenarios for predeath validation. One assumes that the parties will all agree on it, either because they actually agree or for the reasons stated in the preceding paragraph. Let's call that "consent validation." The other assumes that one or more parties will not join in it, or are expected to refuse to join, so that it will occur only if a "real" case is filed and perhaps even tried. Let's call that "adversary validation." Different formats for the complaint and allied papers are appropriate for each of these two scenarios.

We thus offer two sets of forms, one for consent validation and the other for adversary validation. Both sets of forms assume a pour-over will with most or all of the dispositive provisions in a separate revocable trust of the testator/settlor that is the residuary beneficiary under the will. The forms for consent validation have been prepared by Bob Brucken, and the forms for adversary validation have been prepared by Richard Kolb, in both cases with input from Ralph Lehman. These three authors present a spectrum of experience in trial and office practice and experience.

Both scenarios require that *all* heirs and other beneficiaries be named as parties, with service of process on each. This will include all future potential beneficiaries as well as current ones. Civil Rule 4 provides for methods of service and for waiver of service by competent parties individually and where service on them on behalf of other parties is otherwise required under the Rule. After service or waiver, minors, incompetents, and unborn and unknown beneficiaries will generally be represented virtually by other parties under Ohio Rev. Code Chapter 5803. Ohio Rev. Code § 5817.11 provides that failure to join and serve a party does not invalidate the proceeding, but that the omitted party is not bound by the resultant validation order and may later contest the will or trust.

Consent validation. The forms for consent validation (complaint, answer, and medical release) assume that all heirs and other beneficiaries will sign-off on the will and trust. They further assume that the heirs and other beneficiaries (current or future) are the spouse and lineal descendants, with no provisions for friends or charities, though the same consent procedure is available if there were such additional parties (but the forms would require editing to include them). The answer, a separate one for each defendant, waives service, answers, and admits all the allegations of the complaint and joins in its prayer and waives any trial or hearing or notice of them. Thus, the complaint attempts to include all allegations intended to be admitted in the answer so that the court has the proper foundation in the pleadings for its judgment of validity of the will and trust.

A more private procedure may be to do a private settlement agreement (PSA) for predeath validation. Ohio Rev. Code § 5801.10(C) authorizes a PSA to do anything a court can do, so the statute supports this "end run." Further, in appropriate cases, the completed PSA could be presented to the court for blessing. A skeletal complaint could be filed with the PSA attached. If the will and trust agreement are not attached to the PSA, perhaps the court will not require them to be filed with the complaint. The PSA itself would state that service of process is waived, that the PSA is itself the answer of each defendant, and that all join in the prayer for validation. For forms for this portion of the PSA see Brucken, "Private Settlement Agreement Forms," 18 *PLJO* 123 (Jan/Feb 2008), available to EPTPL Section members on the OSBA website.

Adversary validation. Under the Pre-Death Validation Statute discussed above, a settlor can bring an action to validate his trust while he is still alive and, of course, the great advantage of this is that the judge can hear directly from the settlor himself, thus allowing an assessment of his mental capacity, reasons for making changes, reasons for excluding a particular beneficiary, etc.

Ohio has had a statute allowing the pre-death validation of wills for many years, but in this attorney's experience, it was little used, perhaps because elderly people do not like to get into disputes with their relatives. Notwithstanding, I suspect pre-death validations of trusts will see greater use.

I am suggesting below a template for use in pre-death validity cases. The easiest way to approach this topic is to provide language for the complaint and next to it, an explanation of the complaint language. The explanation will be in CAPITAL LETTERS.

This template may be used as a starting point, but you still will have to tailor it to the unique facts of your case.

This template spends a lot of space identifying necessary parties. It also includes the **statutory requirements** of such as providing a medical waiver, naming prior beneficiary(s), and attaching a copy of the will and trust. If you fail to take these steps, I believe you subject your validity determination to future challenge.

Consent validation complaint. © 2019 by Robert M. Brucken. All rights reserved with intent that this form may freely be copied and used professionally by practitioners.

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
[NAME] COUNTY, OHIO

Testator/Settlor
Plaintiff

CASE NO.

vs.

JUDGE [NAME]

Heirs
Beneficiaries under will
Beneficiaries under trust
Defendants

COMPLANT FOR VALIDATION
OF WILL AND TRUST

1. This is an action for validation of the will and trust of Testator/Settlor pursuant to chapter 5817 of the Revised Code. Plaintiff (Testator/Settlor) is a resident of this County and venue is proper in this Court under section 5818.04 of the Revised Code.

2. Filed with this complaint is the will of Testator/Settlor dated [date] that he intends as his will. The will was signed by Testator/Settlor in the conscious presence of Testator/Settlor by two competent individuals, each of whom witnessed Testator/Settlor sign the will. Testator/Settlor executed the will with testamentary intent, had testamentary capacity, was free from undue influence, was not under restraint or duress and signed in the exercise of his free will. Execution of the will was not the result of fraud or mistake, it has not been revoked or modified and Testator/Settlor is quite familiar with its contents.

3. Filed also with this complaint is a true copy of the written declaration of trust of Testator/Settlor dated [date] that states the terms of the trust thus created by Testator/Settlor, which trust is the beneficiary under the residuary clause of the will. Testator/Settlor is the

settlor and trustee of the trust. The declaration of trust was signed by Testator/Settlor with the intent to create a trust, Testator/Settlor had the legal capacity to enter into and establish the trust, the trustee of the trust has duties to perform, the same person is not the sole trustee and sole beneficiary of the trust, and Testator/Settlor executed the declaration of trust free from undue influence, was not under restraint or duress and signed in the exercise of his free will. Execution of the trust was not the result of fraud or mistake, it has not been revoked or modified and Testator/Settlor is quite familiar with its contents.

4. [Names] are Testator's/Settlor's spouse, children and the other persons who would inherit from Testator/Settlor under chapter 2105 of the Revised Code were he to die intestate on the date of filing of this complaint.

5. [Names] are the persons who are the beneficiaries under the will, including Testator/Settlor as the trustee of the trust that is the residuary beneficiary under the will. These same defendants are also the beneficiaries under Testator's/Settlor's most recent prior will dated [date].

6. [Names] are the persons who are beneficiaries of the trust. Testator/Settlor is the only current trust beneficiary, [names] are the beneficiaries who would become current beneficiaries if Testator/Settlor were to die on the date of filing of this complaint and [names] are other potential future trust remainder beneficiaries. Persons not yet born may also become potential future trust remainder beneficiaries. All trust beneficiaries who are minors or have not yet been born are virtually represented under chapter 5803 of the Revised Code by the living, adult competent trust beneficiaries.

7. All living heirs, beneficiaries of the estate and beneficiaries of the trust are named as defendants.

8. All beneficiaries under plaintiff's immediately prior will and trust instrument are among the beneficiaries under plaintiff's current will and trust instrument identified in paragraphs 2 and 3 of this complaint and are included as defendants in this action.

9. All named defendants have waived service of summons and entered their appearances, are properly before the Court and have joined in the prayer of this complaint.

10. Plaintiff states that the will was properly executed pursuant to section 2107.03 of the Revised Code, that Testator/Settlor had the requisite testamentary capacity, was free from undue influence and was not under restraint or duress, and that the execution of the will was not the result of fraud or mistake.

11. Plaintiff states that the trust meets the requirements of section 5804.02 of the Revised Code, that Testator/Settlor had the legal capacity to enter into and establish the trust, was free from undue influence and was not under restraint or duress, and that the execution of the trust was not the result of fraud or mistake.

Wherefore, plaintiff demands judgment declaring the will and trust valid as provided in chapter 5817 of the Revised Code.

Respectfully submitted,

Attorney for Plaintiff

Consent validation answer. © 2019 by Robert M. Brucken. All rights reserved with intent that this form may freely be copied and used professionally by practitioners.

WAIVER OF SERVICE, ANSWER AND JOINDER IN
PRAYER OF COMPLAINT

1. [Name], defendant in this action, hereby waives service of summons upon him and enters his appearance in this action.

2. For defendant's answer to the complaint, he admits as true each and every allegation of the complaint.

3. Defendant further waives any hearing or trial of this case, or any notice of any hearing or trial of it, and waives filing with the court of any medical records release or copies of the pertinent will and trust instrument.

Wherefore, defendant joins in the prayer of the complaint and demands judgment declaring the will and trust of plaintiff valid as provided by chapter 5817 of the Revised Code.

Defendant (or attorney for defendant)

Adversary validation complaint. © 2019 by Richard L. Kolb. All rights reserved with intent that this form may freely be copied and used professionally by practitioners.

IN THE PROBATE COURT OF _____ COUNTY, OHIO

In the Matter of the Will and Trust of
John Smith.

Case No. _____

John Smith
address

JUDGE _____

Plaintiff

**COMPLAINT TO DECLARE VALIDITY OF WILL
AND TRUST**

-vs-

xxxxxxxxxx (0000000)

Heirs at law

405 Madison Avenue,
Toledo, Ohio 43604

-and-

PH: (419) _____

FX: (419) _____

Beneficiaries under will

_____@gmail.com

Attorney for Plaintiff

-and-

Executor under will

-and-

Beneficiaries of Plaintiffs most recent prior will

-and-

Beneficiaries under trust

-and-

Beneficiaries of Plaintiffs most recent prior trust

-and-

Attorney General of Ohio (if necessary)

Defendants

NOW COMES John Smith, the Plaintiff, by and through his attorney, xxxxxxx, who submits his Complaint to declare the validity of his will and trust as follows:

This Court has authority to declare the validity of a person's will and/or trust during his lifetime pursuant to sections 5817.02 and 5817.03 (IDENTIFY THE SPECIFIC CODE SECTION TO MAKE IT EASIER ON THE JUDGE) of the Ohio Revised Code.

1. Attached at Exhibit A is a copy of John Smith's current will ("will") dated _____ and also attached at Exhibit B is a copy of John Smith's current trust ("trust") dated _____.
2. [Names] are John Smith's spouse, children and the other persons who would inherit from him under section 2105.06 of the Ohio Revised Code were he to die intestate on the date of filing of this Complaint.
3. [Names] are the persons who are the beneficiaries under the will.
4. [Names] of the persons who are the beneficiaries under Plaintiff's most recent prior will. (THIS WOULD INCLUDE THE PRIOR BENEFICIARIES WHO HAVE FALLEN OUT OF FAVOR – THEY ARE NECESSARY PARTIES UNDER 5817.05 AND THE MOST LIKELY PERSONS TO CONTEST THIS PROCEEDING.)
5. [Name] is the executor named in the will.
6. [Names] are the persons who are beneficiaries of the trust. Plaintiff is the only current trust beneficiary; [names] are the beneficiaries who would become current beneficiaries if Plaintiff were to die on the date of filing of this Complaint and [names] of other potential future trust remainder beneficiaries. Persons not yet born may also become potential future trust remainder beneficiaries. All trust beneficiaries who are minors or have not yet been born are virtually represented under Chapter 5803.03 of the Ohio Revised Code by the living, adult competent trust beneficiaries.
7. [Names] of the persons who are the beneficiaries under Plaintiff's most recent prior trust. (THIS WOULD INCLUDE THE PRIOR BENEFICIARIES WHO HAVE FALLEN OUT OF FAVOR – THEY ARE NECESSARY PARTIES UNDER 5817.06 AND THE MOST LIKELY PERSONS TO CONTEST.)
8. (The Ohio Attorney is named because the will or trust provides for a charitable gift.) (YOU SHOULD NAME THE ATTORNEY GENERAL WHEN THERE IS A CHARITABLE GIFT)
9. Pursuant to Ohio Revised Code Sections 5817.02(D) and 5817.03(D), a medical waiver for Plaintiff is attached hereto. (THIS MEDICAL WAIVER REQUIREMENT IS MANDATORY)
10. The above parties are named as Defendants only because Plaintiff believes it is necessary to name them under Ohio law. Whether they wish to respond to this Complaint is entirely up to them. (THIS INVITES DEFENDANTS TO DEFAULT. I USE IT FREQUENTLY IN WILL AND TRUST CONTESTS AND IT WORKS. IT SIMPLIFIES THE CASE BY REDUCING THE NUMBER OF PARTIES AND ATTORNEYS)
11. Plaintiff states that the will was properly executed pursuant to Section 2107.03 of the Ohio Revised Code, and that the trust meets the requirements of Section 5804.02 of the Ohio Revised Code.

12. Plaintiff's will is in writing and signed by John Smith; it was properly witnessed and was executed with testamentary intent. Plaintiff further states that his trust is in writing, executed with the intent of creating a trust, names specific beneficiaries; further the trustee has duties to perform, and the same person is not the sole trustee and sole beneficiary.
13. Plaintiff further states that both documents were signed when he had legal capacity and was free of both undue influence and duress; further they were signed as a result of his free will and were not the product of fraud or mistake. Further, neither document has been revoked or modified, and Plaintiff is familiar with the contents of both documents.
14. Possible additional factual allegation: John Smith is fully capable of living alone, handling his finances, driving, entering into contracts, making medical decisions, voting, making gifts and making other dispositions of his assets.) (IF THESE ALLEGATIONS ARE TRUE, THEY MAKE THE CASE STRONGER ON THE COMPETENCY ISSUE.)

WHEREFORE, Plaintiff demands that this Court declare that Plaintiff's will and trust (Exhibits A and B) are valid.

Respectfully submitted,

xxxxxxx

Attorney for Plaintiff

PRAECIPE

TO THE CLERK:

Please issue summons for service upon each Defendant listed in the caption of this Complaint together with a copy of the Complaint and Exhibits A and B by Certified Mail, return receipt requested.

xxxxxxx

Attorney for Plaintiff

Medical records release.

AUTHORIZATION TO RELEASE PROTECTED HEALTH INFORMATION

I authorize the use or disclosure of the protected health information ("PHI") as described below. By authorizing the use or disclosure of the PHI described below, I authorize the custodian of the PHI (1) to open the PHI for review or inspection by the person(s) identified below, and (2) to furnish the person(s) identified below with a copy of the PHI if he or she so requests.

Date _____ Patient Name _____

DOB _____ Social Security Number _____

Description of PHI requested (provide a specific and meaningful description of the information sought, including dates of service where applicable):

All medical records from xxx until xxx

I authorize _____ *Name of healthcare provider or other records custodian* _____ to release and/or disclose the PHI described above.

I authorize the healthcare provider or other records custodian to release and/or disclose the PHI described above to:

Law Office of xxxxx, Address xxx
The name or other specific person or class of persons, to whom the healthcare provider or other records custodian may make the use or disclosure

The purpose of this request to release and/or disclose the PHI described above is:

Pending personal injury litigation Other pending litigation Potential medical malpractice litigation

Other (describe) _____

I do do not authorize the recipient to redisclose the PHI described above.

I understand that I have the right to revoke this Authorization, in writing, at any time by so notifying the requesting person. Such revocation will not affect actions taken by the requesting person prior to the date he or she received the written revocation.

I understand the information to be disclosed may include information relating to sexually transmitted disease, AIDS or HIV. It may also include information about behavioral or mental health services, and treatment or testing for alcohol or drug abuse.

I understand that my health care provider cannot condition medical treatment on whether I sign this Authorization.

This Authorization will expire upon the occurrence of the termination of litigation in the XXXXXXXX County Probate Court.

 X

Signature of patient or patient's authorized representative *Date*

If signed by patient's authorized representative, describe representative's authority:

- Patient is a minor; I am the patient's parent and natural guardian.
- Patient is a minor; I am the patient's guardian, appointed by the _____ County Juvenile Court.
- Patient is a ward; I am the patient's guardian, appointed by the _____ County Probate Court.
- The patient is deceased. I am the patient's surviving spouse or I am the executor or administrator of the patient's estate, appointed by the Montgomery County Probate Court.
- I am the patient's agent, as designated in the patient's Durable Power of Attorney for Health Care.
- I am the patient's agent, empowered to make the foregoing request, as designated in the patient's general durable power of attorney.
- Other (describe) _____

This Authorization to Release Medical Records is designed to meet the requirements of a valid authorization, as specified by the Standards for Privacy of Individually Identifiable Health Information (the HIPAA Privacy Rule), 45 C.F.R., Parts 160 and 164.

Note: A photocopy or facsimile copy shall have the same effect as the original

II. Arbitration of Trust Disputes

It is not uncommon for trust instruments to contain a provision requiring that trust disputes between the trustee and the beneficiaries be determined by arbitration rather than by court proceedings. Arbitration provides privacy and may be faster and less costly than litigation. However, doubts have been expressed whether trust beneficiaries are bound by such provisions, because they are not parties to the trust instrument, and the provisions are generally enforced as bilateral contracts, binding the parties to them (only). Some courts have held the provisions to be enforceable as conditions attached to the gifts to the beneficiaries. See Furniss, “New Arbitration Statute Provides Additional Options for Settlers,” 29 *PLJO* 62 (Jan/Feb 2019).

The enforceability of the provisions in Ohio has been confirmed by 2018 HB 595, enacting new Ohio Rev. Code § 5802.05. The statute requires arbitration under Ohio Rev. Code Chapter 2711 unless otherwise specified in the terms of the trust. The following is a sample trust arbitration clause published by the American Arbitration Association (2012 revision) on its website (www.adr.org) for use in wills and noncommercial trusts:

In order to save the cost of court proceedings and promote the prompt and final resolution of any dispute regarding the interpretation or administration of my trust, I direct that any such dispute shall be settled by arbitration administered by the American Arbitration Association under its AAA Wills and Trusts Arbitration Rules and Mediation Procedures then in effect. Nevertheless, the following matters shall not be arbitrable: questions regarding my competency, attempts to remove a fiduciary or questions concerning the amount of bond of a fiduciary. The arbitrators shall be practicing lawyers licensed to practice law in the state whose laws govern my trust and whose practice has been devoted primarily to wills and trusts for at least ten years. The arbitrators shall apply the substantive law (and the law of remedies, if applicable) of the state whose laws govern my trust. The arbitrators’ decision shall not be appealable to any court, but shall be final and binding on any and all persons who have or may have an interest in my trust, including unborn or incapacitated persons, such as minors or incompetents. Judgment on the arbitrators’ award may be entered in any court having jurisdiction thereof.

Chapter 14: Ohio's Wholly Discretionary Trust

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Third-party settled special needs trusts, if carefully drafted, are safe in Ohio. In the time that has elapsed since the enactment of the Ohio Trust Code, it has become clear that Ohio's wholly discretionary trust (WDT) is the only safe vehicle to provide trust benefits for a disabled beneficiary who is the recipient of means tested public benefits, such as Medicaid and Supplemental Security Income. Even for disabled beneficiaries who are receiving Social Security Disability Income (SSDI), which is not means tested, a modified version the WDT is often the best vehicle, because of its protective nature. The WDT is actually little more than a codification of the common law pure discretionary trust described in § 155 of Restatement (Second) of Trusts.

I. Why the WDT Was Added to the OTC

Prior to the enactment of the Ohio Trust Code, Ohio had the national reputation as possibly being the most hostile jurisdiction for special needs planning, and some believed that planning for disabled beneficiaries through the use of third-party funded trusts was not even possible in our state. This was based upon the Ohio Supreme Court decision in *Young v. Ohio Dep't of Human Services*, 76 Ohio St. 3d 547, 688 N.E.2d 908 (1996), which included an infamous dissent that such trusts were basically against the public policy of the state of Ohio, and a continually changing policy regarding trusts at the Department that included as many as eight rule changes in a four year period.

* Over the last 15 years, the author has written many articles dealing with special needs trusts for the *Probate Law Journal of Ohio*, sometimes with coauthors. Much of the text of this chapter has been taken verbatim from some of these articles. The last portion regarding practice tips originally appeared in an article titled, "SNT Drafting Tips from Recent Cases and Hearing Decisions," coauthored with my partner Jennifer L. Lile from the March/April 2014 issue (endnotes have been omitted).

The Ohio's Medicaid agency, using various names over the years, had waged an aggressive multi-year battle against third-party settled special needs trusts that resulted in a handful of reported decisions in which the trusts were generally not considered to be resources available to their beneficiaries unless the trust had a distribution standard that referred to the support needs of its beneficiary. During the course of this litigation, the Department made several revisions to its trust rule, seeking to find the bar that would prevent beneficiaries of third-party settled special needs trust from qualifying for Medicaid.

In 2002, the Ohio Department of Job and Family Services promulgated what is essentially the current version of its trust rule, Ohio Admin. Code § 5160:1-3-05.2, which, on its face, appears to treat virtually every third-party settled trust as a countable resource for Medicaid purposes. In 2003, the Ohio legislature codified that rule in Ohio Rev. Code § 5163.21, in large part to prevent further administrative tinkering in this area. This rule regards the trust corpus of a third-party settled trust as being an available resource of the beneficiary "if the trust permits the trustee to expend principal or corpus or assets of the trust for the applicant/recipient's medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes." Under this rule, the issue was the meaning of the word "permits." Clearly, a purely discretionary trust grants to the trustee the power to make a distribution for any purpose, including those proscribed by the rule (i.e., care, care, comfort, maintenance, health, welfare, general well-being). Does that mean that all such trusts are countable resources? There is at least one decision, *Pack v. Osborn* at the trial level and at its first pass through the Fifth District Court of Appeals, that took that position. Or does the trust expressly need to mention one of those proscribed purposes in its distribution provision? Many practitioners believed that in order to pass muster under this rule, a third-party trust had to expressly forbid distributions of principal for the beneficiary's "medical care, care, comfort, maintenance, health, welfare, general well-being." If that were to be the interpretation, what type of distributions actually would be permitted, since "comfort" and "well-being" are extremely broad standards?

It was at this time, in this environment, that the Uniform Trust Code was being considered for possible enactment in Ohio. In an attempt to protect special needs trust planning in Ohio, the UTC joint committee recommended that Ohio supplement its enactment of the Uniform Trust Code by adding a statutory safe harbor pure discretionary trust (the WDT) against which no creditor remedies are available and which requires a heightened standard for judicial review of a trustee's exercise of discretion by dispensing with any reasonableness standard that might otherwise apply. The rights of beneficiaries of pure discretionary trusts are sufficiently nebulous to fall short of being judicially recognized as constituting property interests for creditors' rights purposes. The primary reason for the inclusion of the WDT in the Ohio Trust Code was to codify the protection afforded by the common law pure discretionary trust, but also to create a trust from which a beneficiary would almost certainly not be able to compel a distribution for support.

After enactment of the OTC, but before its January 1, 2007, effective date, along came the lower court decision in *Pack v. Osborn*. This case was so important because the trust under review in that case not only was a common law pure discretionary trust, but also seemed to fit within the statutory definition of the WDT, including the allowable use of

precatory language. The trial court in *Pack v. Osborn* appeared to adopt an interpretation that viewed as an available resource any third-party trust that does not prohibit the trustee from making the above expenditures. Since the Osborn Trust failed to do so, the trial court found that the trust could be interpreted to permit distributions for the proscribed purposes, thereby failing to meet the statutory requirements and resulting in the trust being countable as a resource of its beneficiary. The Fifth District upheld that decision. Both decisions were based upon an incorrect application of basic trust law, and both ignored mandatory provisions of federal Medicaid law. It was critically important that the decision in that case be reversed on appeal to the Ohio Supreme Court, as an adverse decision would have had devastating consequences to the use of WDTs as third party-settled SNTs. Realizing the potential impact of this case, the National Academy of Elder Law Attorneys, the Ohio State Bar Association, and the Down Syndrome Association of Central Ohio joined the case as amici curiae in *Pack v. Osborn* and exhaustively briefed the nature of a pure discretionary trust and the federal Medicaid availability requirement that prohibits states from counting as resources those things that the beneficiary could not use for support needs.

Fortunately, the Supreme Court reversed and remanded, and in dicta the Court stated that a beneficiary's interest in the newly enacted WDT was not a countable resource because of the inability of the beneficiary to compel a distribution. It is only slightly hyperbolic to state that the implications of the decision are stunningly breathtaking, in that the case instantly cleared away the conditions that had been brewing a perfect storm in Ohio. The important point to be gleaned from the Court's decision is that a trust that follows the statutory definition of a wholly discretionary trust under Ohio Rev. Code § 5801.01(Y) has been recognized as a legislatively protected trust that will not impede its beneficiary's eligibility for Medicaid benefits. Since that decision, properly drafted WDTs in the form suggested below have accomplished the desired result; however, several Medicaid Administrative Appeal decisions have nixed those trusts that made reference to any one of the proscribed purposes in the definition of "special needs" or "supplemental needs."

II. Ohio's Status as a § 1364 State

In order to take advantage of a temporary 90 percent federal Medicaid share, in August 2016, Ohio became a so-called § 1634 state. Previously, Ohio was one of a small handful of § 209(b) states in which Medicaid eligibility was made by the state agency, separate and apart from SSI determinations made by the Social Security Administration. As a result of this change, a disabled individual who qualifies for SSI benefits now automatically receives Medicaid. This change eliminates the need for the Ohio Department of Medicaid to review trusts of which the applicant is a beneficiary.

It is well settled that SSI criteria must be used for Medicaid eligibility determinations. Under 42 U.S.C. § 1396a(a)(10)(C)(i)(III) and § 1396a(a)(r)(2)(A), Medicaid eligibility criteria may not be more restrictive than the methodology used to determine SSI eligibility. In its review, SSA also applies the state's trust law. Because SSI criteria must be used by both SSA and the state Medicaid agency, reviews of third-party trusts made by the Ohio Department of Medicaid should in all cases match exactly reviews made by the Social Security Administration. Unfortunately, that was not the case.

The Social Security Administration's Programs Operations Manual System (POMS) dictates how third-party settled trusts should be analyzed for Supplemental Security Income and Medicaid purposes. Those rules were substantially revised effective May 11, 2018; however, the rule applicable to the countability of third party trusts was virtually unchanged.

The new POMS provision governing third-party settled trusts, SI 01120.200, discusses "availability" in the context of trusts established by third parties. (D)(1)(a) of that section states:

If an individual (claimant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes.

Subparagraph (b) of that section expands upon the ability of a beneficiary to terminate the trust:

A trust beneficiary generally does not have the power to terminate a trust. However, in some instances, the trust beneficiary may have the authority to terminate the trust and gain access to the trust assets or direct the use of the trust principal. Specific trust provisions may allow the trust beneficiary to act on his or her own or to order actions by the trustee. The trust beneficiary's ability to use the trust principal for support and maintenance, together with his or her equitable ownership in the trust principal, makes the trust principal a resource to the trust beneficiary.

The POMS can be found on the internet at <https://secure.ssa.gov/poms.nsf/home!readform>.

It is never possible to predict when the Ohio Department of Medicaid might have occasion to review the trust of a Medicaid recipient, or when any given beneficiary's SSI eligibility might end. In drafting third party settled trusts for disabled beneficiaries, therefore, the drafter should continue to make sure that the requirements for third-party trusts under Ohio Rev. Code § 5163.21(G) are satisfied.

III. Requirements of a Wholly Discretionary Trust

The definition of the WDT is set forth in § 5801.01(Y)(1). While the definition is both lengthy and complex, its basic requirements are quoted below:

(Y)(1)(a) The trust is irrevocable.

(b) Distributions of income or principal from the trust may or shall be made to or for the benefit of the beneficiary only at the trustee's discretion.

(c) The beneficiary does not have a power of withdrawal from the trust.

(d) The terms of the trust use "sole," "absolute," "uncontrolled," or language of similar import to describe the trustee's discretion to make distributions to or for the benefit of the beneficiary.

(e) The terms of the trust do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.

(f) The beneficiary is not the settlor, the trustee, or a cotrustee.

(g) The beneficiary does not have the power to become the trustee or a cotrustee.

(Y)(4) If the beneficiary and one or more others have made contributions to the trust, the portion of the trust attributable to the beneficiary's contributions may not be a wholly discretionary trust with respect to that beneficiary, but the portion of the trust attributable to the contributions of others may be a wholly discretionary trust with respect to that beneficiary. If a beneficiary has a power of withdrawal, then upon the lapse, release, or waiver of the power, the beneficiary is treated as having made contributions to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:

*(Y)(5).... Notwithstanding divisions (Y)(1)(f) and (g) of this section, a trust may be a wholly discretionary trust if the beneficiary is, or has the power to become, a trustee only with respect to the management or the investment of the trust assets, and not with respect to making discretionary distribution decisions. *With respect to a trust established for the benefit of an individual who is blind or disabled as defined in 42 U.S.C. 1382c(a)(2) or (3), as amended, a wholly discretionary trust may include either or both of the following:**

(a) Precatory language regarding its intended purpose of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs;

(b) A prohibition against providing food and shelter to the beneficiary. [Emphasis added.]

Appendix I: Sample WDT to Serve as Supplemental Needs Trust

The form that follows is designed to be used for third-party settled supplemental needs trusts other than those created pursuant to Ohio Rev. Code § 5815.25 (formerly Ohio Rev. Code § 1339.51).

The form is not designed to be used for:

- Self-settled SNTs created pursuant to 42 U.S.C. § 1396p(d)(4)(A) for three reasons. First, those trusts are exempt from being counted as resources for Medicaid purposes pursuant to Ohio Rev. Code § 5163.21(F)(1); second, the WDT cannot be self-settled (however, division [Y][4] contemplates that a trust can be only partially self-settled, so that the non-self-settled portion could be a WDT); and third, self-settled trusts are, and always have been, subject to the claims of the settlor's creditors, so the protection afforded by a wholly discretionary trust would not be available. Regarding the third point, however, it should be noted that Ohio Rev. Code § 5805.06(3) specifically allows courts to limit awards to creditors of (d)(4)(A) trusts.
- Section 5815.28 supplemental services trusts. These trusts are also exempt from being counted as available resources by § 5163.21(F)(4).
- Third-party settled "sole benefit" trusts created pursuant to the authority of 42 U.S.C. § 1396p(c)(2)(B)(iii) or (iv). These trusts typically are created by a settlor seeking his or her own Medicaid eligibility, and transfers into these trusts carry no period of ineligibility. Ohio Admin. Code § 5101.1-39-07 requires that a "sole benefit" trust "must, by the explicit terms of [the]...trust...be required to expend all the transferred resources for the benefit of the individual during that individual's life expectancy." The satisfaction of that requirement violates the prohibition against distribution standards contained in the definition of the wholly discretionary trust.

Article 1 Administration of Trust

Property that is to be held as or disposed under the terms of this Agreement will be administered according to the following provisions.

A. **Administration During Lifetime of Beneficiary.** The Trustee will administer the trust as a Wholly Discretionary Trust for the benefit of my daughter, Betty Boop (the "Beneficiary"), during her lifetime as follows:

1. **Discretionary Distributions.** The Trustee may distribute to, or use for the benefit of, the Beneficiary such amounts of income and/or principal as the Trustee, using sole, absolute and uncontrolled discretion, may determine. The Trustee may choose to make no distributions whatsoever. The Trustee will add to the principal of this trust the balance of net income not so distributed. In no event may the Beneficiary serve as the Trustee or Co-Trustee.
2. **Precatory Statement of Intended Purpose.** The Beneficiary is disabled and will likely rely on public benefit programs for much of her life. I know that she will have supplemental and special requirements, including a need for advocacy,

which will not be provided by the publicly funded programs. It is my desire, but not my direction, that the Trustee, in the exercise of the Trustee's sole, absolute, and uncontrolled discretion, provide supplemental goods and services (including by way of illustration and not limitation, recreational and vacation opportunities away from places of residence, expenses for traveling companions, if requested or necessary, entertainment expenses and social services expenses) for the benefit of the Beneficiary which will enrich and make more enjoyable her life and provide her dignity and grace, enhance her day to day existence, and allow her the highest possible development of her abilities, but in a manner that will not supplant or jeopardize benefits she may receive from public assistance programs. Even though the Beneficiary will very likely be eligible for Social Security Disability Income benefits based upon my work record at some future point, which benefits I realize are not means tested, I nevertheless believe that those benefits should be used to provide for her basic support needs, and that because of the Beneficiary's impairments, she would benefit greatly from the protections afforded by a wholly discretionary trust throughout her lifetime. This paragraph is to be construed as being a precatory statement of my intent in creating the Wholly Discretionary Trust, and not as providing standards to guide the Trustee in exercising discretion to make distributions to or for the benefit of the Beneficiary.

[NOTE: There has been much litigation regarding the use of precatory language, and whether specific words are in fact precatory or whether they do, in fact, set forth a distribution standard. There is no bright line test, so extreme caution must be exercised in the use of precatory language. It is for this reason that the last sentence of the previous paragraph was included—a precatory statement of the precatory nature of the underlying precatory statement!

AVOID ANY USE OF ANY ONE OR MORE OF "MEDICAL CARE, CARE, COMFORT, MAINTENANCE, HEALTH, WELFARE, GENERAL WELL-BEING, AS INCLUSION OF ANY OF THOSE PURPOSES, PARTICULARLY IN THE DEFINITION OF "SPECIAL NEEDS" OR "SUPPLEMENTAL NEEDS," COULD RESULT IN THE TRUST BEING TREATED AS A COUNTABLE RESOURCE OF ITS BENEFICIARY UNDER OHIO'S MEDICAID TRUST RULE, O.A.C. SEC. 5160:1-3-05.2.

ALSO AVOID THE USE OF "SPECIAL NEEDS," REFERRING INSTEAD TO "SUPPLEMENTAL NEEDS," PARTICULARLY IN THE NAME OF THE TRUST. BECAUSE THE EXEMPT CATEGORY THREE SELF-SETTLED d(4)(A) TRUST IS REFERRED TO AS A "SPECIAL NEEDS TRUST," IT IS NOT UNCOMMON FOR A CATEGORY FOUR THIRD PARTY-SETTLED TRUST TO BE INCORRECTED ANALYZED UNDER THE "SPECIAL NEEDS TRUST" RULES FOR CATEGORY THREE TRUSTS. THIS PROBLEM IS SIGNIFICANT, AS CATEGORY THREE TRUSTS ARE REQUIRED TO HAVE A MEDICAID PAYBACK PROVISION, AND SOME PROPERLY DRAFTED WTDs HAVE BEEN TREATED AS COUNTABLE SIMPLY BECAUSE THE USE OF "SEPCIAL NEEDS TRUST" IN THE TITLE CAUSED THE CASEWORKER AND HEARING OFFICER TO INSIST THAT THE TRUST INCLUDE A PAYBACK PROVISION. A PAYBACK PROVISION IS NEVER REQUIRED IN A CATEGORY FOUR THIRD-PARTY SETTLED TRUST.

3. Irrevocability. This trust is irrevocable and cannot be amended. If, however, any provision of this Agreement disqualifies or would disqualify the Beneficiary from eligibility for Medicaid or Supplemental Security Income for which she would otherwise be entitled, or if this trust fails to qualify as a Wholly Discretionary Trust as defined in O.R.C. Sec. 5801.01(Y), as that section may be amended from time to time, the Trustee is authorized to amend this trust: (a) to preserve (or obtain) the Beneficiary's eligibility for Medicaid, Supplemental Security Income, or any other type of means tested public benefit that may come into existence in the future; or, (b) to qualify the trust as a Wholly Discretionary Trust. The Trustee may also amend this trust in writing from time to time expressly to state any such additional power or authority, and also to limit or grant powers, as are deemed reasonably necessary to obtain or preserve favorable tax treatment, to address new laws or regulations that affect the Beneficiary or the Beneficiary's eligibility for public benefits; provided, however, that the Trustee may not amend this Trust in any manner that would: (i) have the effect of permitting the Beneficiary to prevail in an action by the Beneficiary to compel a distribution, (ii) permit the Beneficiary or any other person disqualified from serving as Trustee to be able to serve as Trustee, or (iii) shift any beneficial interests created under the Agreement. In no event may any such amendment otherwise affect, enlarge or shift any beneficial interests. The Trustee may renounce in whole or in part any portion of this limited right of amendment, which renouncement will be binding upon all co-Trustees and successor Trustees. The Wholly Discretionary Trust will terminate only pursuant to subparagraph 4 ("Poison Pill") of this Paragraph, or upon the death of the Beneficiary. In addition, the Trustee may administer separately for the Beneficiary, the trust property contributed by anyone other than me, from the property contributed by me.

4. Additions to Trust. I reserve to myself and to any other person properly acting on my behalf the right to add property to any trust estate with the written consent of the Trustee, to add such property by Will or an express trust, and to cause the Trustee to be named as beneficiary or contingent beneficiary of any policies of insurance on my life. Any other person may add property to the trust estate during such person's lifetime estate with the written consent of the Trustee, by Will or by an express trust. All such property and insurance proceeds added to the trust estate pursuant to the provisions of this paragraph will be held, managed, and disposed of in accordance with the provisions of this Trust Agreement.

5. Poison Pill. If it is finally determined that the Wholly Discretionary Trust is an available resource of the Beneficiary for Medicaid purposes, the Trustee must terminate the Wholly Discretionary Trust and distribute the remaining trust assets in the manner set forth in Paragraph B of this Article.

[optional so-called "mandatory poison pill"—see Ohio Admin. Code § 5160:1-3-05.2(C)(4)(c)(iv). This provision is not needed if the drafter is absolutely certain that the trust meets all of the requirements of a WDT, and if those reviewing the trust properly apply the Medicaid trust rule. The practitioner can control the former, but not the latter! Because a

properly drafted WDT is not a countable resource if its beneficiary, the poison pill provision is not needed. Unfortunately, in the review process by governmental agencies, Ohio's Medicaid trust rules are frequently misconstrued. Inclusion of the poison pill provision provides an important safeguard against that problem.

Most experienced SNT planners include a "poison pill" provision in their third-party settled SNTs in order to take advantage of the above-quoted provision. Immediately upon the promulgation of the current trust rule, ODJFS informally took the position that it would never require the trustee to "pull the trigger" on the poison pill provision in properly drafted SNTs, as the beneficiary would be eligible for Medicaid in either event. With the Supreme Court's affirmative statement in *Pack v. Osborn*, "With the enactment of 2006 Sub. H.B. 416, effective January 1, 2007, pure discretionary trusts are now legislatively recognized and sanctioned. R.C. 5801.01(Y) ("wholly discretionary trust" defined)," the poison pill should not be needed in a WDT. While no one can say for sure what it means to be "legislatively recognized and sanctioned," it appears as though that is a good thing. Nevertheless, county Medicaid caseworkers and county prosecutors are used to seeing, and may still be looking for, a poison pill provision in trust documents that they review, so as a practical matter, it may be prudent to continue to include that provision.]

6. Defense of Trust. The Trustee will vigorously defend with all available resources, through all available judicial appeals, any attempt by the Beneficiary to compel a distribution from the Wholly Discretionary Trust.

[NOTE: The inclusion of this provision is intended to make it easier for the beneficiary to demonstrate that it would be cost prohibitive to obtain a "final" court order regarding the inability to force a distribution, one of a number of factors that would cause what might otherwise be treated as a countable resource and unavailable. The inclusion of this provision also is reassuring to the trustee, in that it clearly permits the trustee to expend trust corpus on a vigorous defense of the exercise of its discretion, a course of action that it might otherwise be reluctant to pursue. The inclusion of this provision, along with the inapplicability of a reasonableness standard for WDTs should make it much easier for a beneficiary to satisfy Ohio Admin. Code § 5160:1-3-05.2(C)(4)(c)(ix).]

7. Savings Provision. The trust created by this article is intended to be a Wholly Discretionary Trust as defined in Section 5801.01(Y) of the Ohio Revised Code, and its provisions should be construed accordingly.

B. Termination of Trust. This Wholly Discretionary Trust will terminate upon the death of the Beneficiary or, during the Beneficiary's lifetime if it is finally determined that it is an available resource of the Beneficiary for Medicaid purposes.

- a) **Termination During Lifetime of Beneficiary.** If the Wholly Discretionary Trust terminates during the lifetime of the Beneficiary, the Trustee will distribute the remaining trust property to the me and any other persons who made contributions to the Trust, in proportion to our respective individual contributions.

b) Termination Following Death of Beneficiary. If the Wholly Discretionary Trust terminates because of the death of the Beneficiary, the Trustee will pay all or any expenses of the Beneficiary's funeral, and expenses related to the administration and distribution of the trust; then, distribute any remaining principal and accrued income of the Beneficiary's trust as follows:

(1) to Betty Boop's then-living descendants, per stirpes; however, if there are no then living descendants of the Beneficiary, then,

(2) to one or more charitable organizations selected by the Trustee with particular emphasis on the advocacy and support of persons who are autistic or who are burdened by other developmental disabilities.

(3) With respect to the distribution of trust property pursuant to subparagraph (a) above, the Trustee will distribute trust property to descendants (other than the Betty Boop) who have attained age thirty-five (35) outright and free of trust, and to descendants under the age of thirty-five (35) according to the provisions of Article V below.

Appendix II: Sample Letter of Wishes

Noted to Practitioners: A WDT is not permitted to set forth a distribution standard to provide guidance to the trustee regarding the manner in which the trust is to be administered, otherwise the trust would not qualify as a wholly discretionary trust. A limited exception permits a statement of precatory intent, but only if the beneficiary is “disabled” as defined in the Social Security Act. Any statement in the trust agreement giving guidance to the manner in which the trustee is to exercise its discretion over a WDT might result in the trust not qualifying as a wholly discretionary trust. The two primary benefits of the wholly discretionary trust are, (1) no creditor remedies under the Ohio Trust Code are available, and (2) no reasonableness standard applies in evaluating the trustee’s exercise of its extended discretion. A wholly discretionary trust that cannot contain precatory language provides no guidance whatsoever to the trustee. Most settlors who choose to use a WDT do so for a reason, and the trustee can do a better job if that reason is known.

A trust settlor can, however, provide the trustee with a “letter of wishes.” The term “letter of wishes” is preferable to “letter of intent” because of the UTC provisions that require the trustee to administer the trust in accordance with the settlor’s intent. Regardless of what it is called, there is always the risk that an ancillary document might be construed as being a term of the trust, but that result might be less likely if the word “intent” is avoided. Ohio Rev. Code § 5801.01(V) defines “Terms of a Trust” as follows: “(V) ‘Terms of a trust’ means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” While a letter of wishes is a good way to provide the trustee with a degree of guidance, it is important that any such letter clearly state that it is not to become a part of the trust and that it is not in any way binding on the trustee.

The following sample letter addresses a trust that contains a WDT for a disabled beneficiary, as well as a WDT for a beneficiary who is not disabled. Such letters should never be a form, and need to be customized for each individual situation. When a corporate trustee is involved, the letter should first be reviewed by the trustee.

Sample Letter of Wishes

Date: June 30, 2018

To: Keep-It-Forever Trust Company, Trustee

Re: Mary Nightwine Revocable Trust

As part of the Mary Nightwine Revocable Trust dated May 31, 2015, (“Trust”) I have provided for my residuary estate to be divided into per stirpital shares for my descendants. While my son Yahooey is to receive his share outright, the shares for my daughters Yippee and Yappee are both to be held in separate trusts, each of which is a wholly discretionary trust. Because a wholly

discretionary trust is not permitted to contain a distribution standard, or, unless the beneficiary is disabled, a precatory statement of intent, I have chosen this format as a vehicle to express to you my wishes and desires.

I have been advised that this letter of wishes will not become a term of the trust and will not be legally binding upon Keep-It-Forever Trust Company or any other trustee who might at any time be serving, especially since my use of the word wishes means something less than my intent. Nevertheless, it is my hope that you will give significant weight to my wishes in the exercise of the broad discretion that I have given you as to the wholly discretionary trusts. Furthermore, should the time come that you are not serving as trustee of either trust prior to termination, it is my request that this letter accompany the trust agreement when the trusteeship is transferred to your successor, not because this letter is a part of the trust, but because any successor trustee needs to be aware of the concerns I am conveying to you. As this letter of wishes is not a part of the trust agreement, ***it is my request that it not be given to any beneficiary who requests a copy of the trust agreement***, unless you believe that providing a copy will facilitate your administration of the trusts in the desired manner.

Trust for Yippee

I have concerns regarding the financial status of both Yappee and Yippee, as well as Yippee's mental health. Yippee has been incarcerated in the past and has experienced psychosis issues. Because of the scope and the severity of her mental problems, Yippee has been determined to be disabled, which is why the trust sets forth the permitted expression of my precatory intent with respect to her only. Yippee receives Medicaid, however in the very near future she will have been disabled for two full years and will also then be eligible for Medicaid. In order for her to become eligible for Medicaid, her own assets were transferred to a self-settled (d)(4)(A) trust, of which Yahooey is currently serving as Trustee. You should consult with Yahooey regarding Yippee's needs, and you should periodically determine how best to provide for her medical needs, in light of her impending Medicare eligibility. Even if the time comes that Yippee is not receiving means tested benefits, because of her mental situation she will continue to need the protection afforded by a wholly discretionary trust. Because of its inclusion of a Medicaid payback provision, it might be best if the corpus of that trust is exhausted before significant principal distributions are made from this one.

Yappee's Trust

Yappee has not worked for many years, and she has been experiencing financial difficulties throughout that time period (and even before), resulting in very substantial unpaid federal tax liabilities. In addition to Yappee's creditor issues, she suffers from severe alcoholism. (Yippee has also experienced alcoholism issues in the past, but she participated in a Cleveland Clinic intensive outpatient program, and she is currently sober.) I have wanted Yappee to undergo similar treatment, but she has been unwilling. It is my hope that you will be successful in doing what I have been unable to do during my lifetime—force Yappee to get the help she needs to deal with her alcoholism and to face her issues, and in order to accomplish that, I included in the trust an article relating to substance abuse. I have been providing much of Yappee's support in recent years, which in hindsight might have, at least in part, facilitated her alcoholism. I believe that

Yappee will place great pressure upon you for distributions from her trust, and it is my hope that you will implement the substance abuse article and administer the wholly discretionary trust very frugally unless and until she is willing to undergo a treatment program, and become and remain sober. I have provided for a distribution to Yappee of \$50,000 at the time of my death and another \$50,000 on the first anniversary of my death in an attempt to lessen those pressures; however, it is very possible that those distributions could be lost to federal tax liens. You should consider outright distributions to Yappee only if her difficulties with both alcohol and the IRS truly appear to be behind her.

Yappee's and Yippee's situations will undoubtedly fluctuate during the administration of their respective trusts. It is my hope, but not my direction, that you apply for the benefit of Yappee and Yippee all of the income from their respective trusts and as much principal as you determine reasonably necessary for their needs, absent compelling circumstances indicating that this would be unwise (e.g., if a distribution of income or principal would result in all or substantially all of the distribution being subject to the claims of creditors), keeping in mind, however, that I would also not want to be helping to facilitate her drinking problem. As trustee, you should not hesitate in asking Yappee or Yippee to submit to drug or alcohol testing or to provide you with copies of their income tax returns or other financial records if you feel that your examination of those records would assist you in carrying out my intention as expressed in this letter. Please do not hesitate in withholding distributions that you feel might help Yappee (or Yippee) seek the help that they might need.

Following my incapacity or death, I ask that you consult with my son, Yahooey before making any significant decisions regarding distributions to Yappee or Yippee. While you are not required to follow Yahooey's instructions, it is my suggestion that you give his input at least some degree of deference.

Appendix III: Drafting Tips

Third-Party Trusts

In Ohio, it is becoming increasingly clear that a common law pure discretionary trust or a wholly discretionary trust that meets the definition set forth in Ohio Rev. Code § 5801.01(Y) is the only method of creating a third-party settled trust that will not be treated as an available resource of its beneficiary. This type of trust succeeded for its intended purpose in *Pack v. Osborn*, 117 Ohio St. 3d 14, 881 N.E.2d 237 (2008). Of the trusts under discussion, this may be the easiest to draft; nevertheless, careful attention to drafting is needed, as the following decisions illustrate.

1. *Practice Tip One: What's in a Name? Carefully Consider the Titles of Your Trusts*

The terms “special” or “supplemental” are often used interchangeably. The Social Security Administration (“SSA”) refers to self-settled d(4)(A) and d(4)(C) trusts as “special needs trusts,” and both the ODJFS trust rule, Ohio Admin. Code § 5160:1-3-27.1, and the Medicaid trust statute, Ohio Rev. Code § 5163.21, use the term “special needs trust” to refer only to the self-settled (d)(4)(A) trust. The term “special needs trust” appears nowhere in the definition or description of the category 4 third-party settled trust. The term “supplemental needs trust,” which is not defined in the Ohio Rev. Code or in the Ohio Admin. Code, is often used to refer to a trust that gives the trustee unlimited discretionary authority to make distributions. While those two terms are often used interchangeably, labeling as a “special needs trust,” what is actually a sole benefit trust or a supplemental needs trust may inadvertently cause this type of confusion, even though to do so is not wrong. While it is the terms of the trust that should determine how it will be treated for Medicaid eligibility, rather than its name, the following discussion illustrates how merely the title of a third-party settled trust may invite trouble.

In Administrative Appeal Decision AA-10417, decided May 30, 2013 (Clermont DCJFS), the underlying state hearing decision incorrectly analyzed the subject trust as a category 3 trust. In that case, the applicant’s parents had created a third-party trust that was funded with \$749,535. The county caseworker referred the trust to the Assistant Prosecuting Attorney from Clermont County, pursuant to ODJFS policy, who determined that the trust was an available resource, because it did not have the payback provision required of exempt category 3 special needs trusts. The Administrative Appeal decision correctly noted that the trust should be reviewed as a category 4 trust.

The trusts under review in State Hearing Decision 5051353349, decided August 14, 2013 (Shelby County), and in Administrative Appeal Decision AA-4841, decided December 10, 2009 (Mahoning CDJFS), were also incorrectly reviewed as exempt special needs trusts rather than as category 4 trusts. In at least three other State Hearing Decisions, 5040280256, decided December 11, 2013 (Lake County), 5044169919, decided July 24, 2013 (Clermont County), and 5081996257, decided August 20, 2013 (Franklin County), the hearing officer correctly reviewed the trusts as third-party trusts, yet pointed out the perceived “error” of those trusts being labeled as special needs trusts.

2. ***Practice Tip Two: Clearly Identify Precatory Language***

The statutory definition of the wholly discretionary trust set forth in Ohio Rev. Code § 5801.01(Y) expressly permits the inclusion of precatory language, but only if the trust's beneficiary is disabled, as defined by federal law. Because the inclusion of anything that goes beyond a precatory an impermissible instruction or statement of intent could cause a trust to lose its protected status as a wholly discretionary trust, it is important that such statements be clearly identified as being simply precatory, to reduce the chances of the precatory language being characterized as a distribution standard. In Administrative Appeal Decision AA-11345, decided March 14, 2013 (Coshocton CDJFS), the distribution provision of the trust under review read:

The Trustee shall pay or apply for the benefit of [Appellant] for her lifetime such amounts from the principal or income, or both, of this Trust up to the whole thereof, as the Trustee, in the Trustee's sole and absolute discretion, may from time to time deem necessary or advisable for the satisfaction of [Appellant's] special non-support needs, if any....

The Grantor's intent by this Trust is to create a purely discretionary supplemental care fund for the benefit of [Appellant] and not to displace financial assistance that may otherwise be available to her. Illustrative of the kinds of supplemental, non-support disbursements that would be appropriate for the Trustee to make from this Trust for [Appellant] include: 2.1.1 sophisticated medical or dental or diagnostic work or treatment for which there are not funds otherwise available, including plastic surgery or other non-necessary medical procedures....

In finding that the trust was not countable, the hearing officer generously stated:

Despite the phrasing of section 2.1 and 2.1.1 of the trust, the trust meets the requirements of R.C. 5801.01(Y)(1) and specifically does not contravene (Y)(1)(e) which talks about the terms of the trust not providing any standards to guide the trustee in exercising the discretion to make distributions to or for the benefit of the beneficiary. That language in section 2.1.1 appears to be mere suggestions and standards to guide the trustee in exercising his/her discretion.

The inclusion of "special non-support needs" in the distribution language itself clearly is not precatory, and the inclusion of "sophisticated medical" in the statement of intent invites trouble, as does any reference to the proscribed purposes of "medical care, care, comfort, maintenance, health, welfare, general well-being, or any combination of these purposes" listed in Ohio Rev. Code § 5163.21(G)(2).

If the beneficiary is receiving means tested benefits, a precatory statement could read as follows:

The beneficiary is disabled and will rely on public benefit programs for much of her life. I will not always be there to help her and oversee her care. I know that she will have supplemental and special requirements, including a need for advocacy, which will not be provided by the publicly funded programs. It is my desire, but not my direction, that the trustee, in the exercise of the trustee's sole, absolute, and uncontrolled discretion, provide supplemental goods and services for the benefit of my daughter which will provide her dignity and grace, enhance her day to day existence, and allow her the highest possible

development of her abilities, but in a manner that will not supplant or jeopardize benefits she may receive from public assistance programs. This paragraph shall be construed as being a precatory statement of my intent in creating this trust, and not as providing standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.

Nearly identical language was treated as precatory in Administrative Appeal Decision AA-10546, decided October 17, 2012 (Huron CDJFS).

3. *Practice Tip Three: Use Precatory Language to Identify Settlor's Intent and Purpose for Creating the Trust*

Some disabled beneficiaries are not recipients of means-tested public benefits, but may nevertheless be in need of the protection afforded by a spendthrift trust because of the nature of their disability. If the settlor does not make clear, perhaps by the use of precatory language, that the beneficiary would benefit from the protections of a Special Needs Trust, regardless of his or her need for governmental aid, there can be unintended consequences, as illustrated by the following case.

In 2013, an Indiana appellate court terminated a special needs trust on the basis that its beneficiary was not receiving Supplemental Security Income or Medicaid, and the trust's settlor, the mother of the beneficiary, had made a mistake in providing for a supplemental needs trust for one of her children. *Raper v. Haber*, 987 N.E.2d 545, 2013 WL 1871280 (Ind. App.). Upon the death of the trust's settlor, her revocable trust was to be divided into three equal shares, with the shares for two of her children to be distributed outright, and the share for the third child, Haber, to be held in a pure discretionary trust to be used for Haber's "'supplemental care'... 'in addition to the benefits she otherwise receives as a result of her handicap or disability.'" Haber at *1. The court noted, "Haber had apparently been diagnosed with bipolar disorder." Following a serious dispute among the three siblings, one of the two children entitled to immediate distribution filed a motion for the supplemental trust to be terminated, with no notice being given to the other child who was also entitled to immediate distribution. The opinion stated:

In their petition, they stated that "the settlor of the Trust intended her children to be treated equally" but asserted that the amendments to the Trust—which "expressly create[d] a special needs trust for Haber's share" of the Trust remains following Irene's death—allowed for no distributions to be made to Haber. (App.9). They also asserted that Irene "mistakenly believed that Haber was the recipient of need-based governmental aid" and had established a trust for Haber upon the "mistaken belief" that it was necessary to protect Haber's right to receive government assistance. Because Haber did not receive need-based governmental aid, they asked that the Trust be terminated and that the corpus be distributed to Haber. The trial court granted the motion and terminated the Trust, finding that "the Trust was mistakenly drafted as a 'special needs trust' "and that "in order to fulfill the intent of the Settlor, the Trust should be terminated."

The issue on appeal was the trial court's refusal to permit the third child, who objected to the termination and who had found out about the judicial termination only after it had occurred, to intervene. The relevant dispositive provisions of the trust for Haber's benefit, which were quoted in the Appellant's brief, were as follows:

- i. The... Trustee may distribute to, or use for the benefit of, JILL ANNE HABER, such amounts of income and/or principal as the Successor Trustee, using his sole, absolute and uncontrolled discretion may determine. The Successor Trustee may choose to make no distribution whatsoever.
- ii. It is the Grantor's wish, but not her direction, that the Successor Trustee, in the exercise of his sole, absolute, and uncontrolled discretion, use the property in the fund of Jill's Trust for JILL ANNE HABER, to provide supplemental goods and services, which may not otherwise be available to her.

Appellant's Brief at 4, Haber (No. 81A01-1206-TR-262). The Appellant's brief also provided the following facts, which, although relevant, were not mentioned by the Indiana Court of Appeals in its decision:

The Harveys argue that the Irene M. Raper Trust is a Special Needs Trust, which was "erroneously designed" to protect Haber's eligibility for need-based government aid. *Id.* at 8. This argument is incorrect. Irene M. Raper designed the Trust in a way to provide for a flow of discretionary distributions to Haber in a controlled manner. *Id.* at 21-40. Irene M. Raper did not want Haber to receive a lump sum payment at her death. *Id.* The Trust was not erroneously designed, nor did Irene M. Raper mistakenly believe that Haber was the recipient of need-based government aid. *Id.* at 43. Instead, Irene M. Raper included flexible provisions in her Trust, to direct the trustee to take into account all resources available to Haber, including both needs-based and non-needs-based public benefits. *Id.* at 21-40.

The Trust provisions themselves do not distinguish needs-based government assistance from non-needs-based government assistance, such as Social Security Disability benefits. *Id.* Additionally, the Trustee is given broad discretion to make expenditures and distribution for Haber's benefit, but with the intention that the Trustee could not be compelled to make any particular distributions. *Id.* The distributions made by the Trustee were to supplement the benefits and income of all kinds that Ms. Haber received from other sources. *Id.* at 21-40, 43.

This argument is supported by the Harveys' allegations in their Conservatorship proceeding, namely that Haber suffers from bipolar disorder and is "unable to manage her property" and "manage her finances." *Id.* at 44. The purposes of the trust are also consistent with the findings that the Court made in its Order appointing the conservators for Haber, namely that Haber herself "acknowledged her current lack of management capacity and desires assistance with her personal and business affairs." *Id.*

Haber at *8.

An earlier case from California also involved an action to terminate a supplemental needs trust created for a beneficiary who suffered from a bi-polar disorder. In *Balian v. Balian*, 179 Cal.App.4th 1505, 102 Cal.Rptr.3d 470, two supplemental needs trusts were created for the decedent's two daughters, both of whom were disabled, with one

receiving means-tested Supplemental Security Income and the other receiving Social Security Disability Income (“SSDI”), which is not means tested. While the trial court refused to order the termination of the bi-polar daughter’s trust who was receiving SSDI, the appellate court remanded the case for further review. While we do not know from the case whether or not the trust was terminated following remand, the fact that the trust settlor referred only to the preservation of means tested benefits may have resulted in the other protective features of the trust being lost to that daughter.

The lesson from these two cases is that when drafting trusts for a beneficiary who is not receiving means tested public benefits, in the permitted precatory statement of intent, the settlor should state the fact that he or she is aware that the beneficiary is not receiving such benefits, but nevertheless needs the protection afforded by a wholly discretionary trust.

If the beneficiary is not receiving means tested benefits, the precatory language should be modified to include language such as, “I am aware that my daughter is receiving SSDI which is not means tested, however because of the nature of her disability I believe that she needs the protection afforded by a wholly discretionary trust.”

4. *Practice Tip Four: Avoid the Use of “Shall”*

The use of the word “shall,” as opposed to “may,” can be interpreted as limiting the trustee’s discretion, as illustrated by Administrative Appeal Decision AA-12429, decided August 20, 2013 (Franklin CDJFS). The relevant dispositive provision in the trust at issue in that decision read as follows:

My Trustee shall pay or apply for the benefit of [appellant] for her lifetime such amounts of income or principal or both, of this Special Needs Trust, up to the whole thereof, as the Trustee, in her sole and absolute discretion may from time to time deem advisable for the satisfaction of [the appellant’s] ‘special on-support needs (defined below), if any.’ Administrative Appeal Decision AA-12429, at p. 2.

While the primary errors were in referencing a distribution standard and in granting to the trustee only simple discretion, either one of which would have prevented the trust from qualifying as a wholly discretionary trust, the hearing officer focused on the use of the word “shall”:

[T]he trust uses the mandatory term “shall” as opposed to the permissive term “may” when outlining the distribution of the trust. In interpreting the Osborn decision on remand, the Fifth Appellate District stated, “Her [the beneficiary’s] right to receive any assets from the trust rested upon the sole discretion of the trustee; no “shall” language is utilized. Administrative Appeal Decision AA-12429, at p. 4.

Bryan A. Gartner, the editor-in-chief of *Black’s Law Dictionary*, includes five meanings for the word “shall” in his ninth edition of the dictionary. Mr. Gartner, in “Shall We Abandon Shall?” *ABA Journal* (Aug. 2012), refers to “shall” as a “chameleon-hued word” and notes that it is imprecise and “[i]n most legal instruments [it] violates the presumption of consistency.” This Practice Tip, therefore, is one that should be kept in mind for all types of drafting. In addition to having unintended consequences in the context of drafting Special Needs Trusts, the use of the word “shall” invites confusion.

5. *Practice Tip Five: Assume That Any Language Can be Construed to Be a Distribution Standard*

Ohio Admin. Code §§ 5160:1-3-27.1(c)(4)(b) and Ohio Rev. Code § 5163.21(G)(2) set forth certain words that when used in the distribution standard will cause a trust to be treated as an available resource of its beneficiary. The proscribed purposes are “medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of those purposes.”

Administrative Appeal Decision AA-9222, decided February 16, 2012 (Ashland CDJFS), unfortunately did not recite the specific distribution provision of the trust under review; however, it appears that the provision referred to the “best interests” of the beneficiary. The inclusion of those words very likely caused the trust not to qualify as a wholly discretionary trust; yet, the trust did not reference the proscribed purposes of “medical care, care, comfort, maintenance, health, welfare, [or] general well-being,” so the earlier decision denying Medicaid was reversed. Ohio Rev. Code § 5163.21(G)(2):

The trust in question does not expressly grant the trustee discretion to expend assets for the Appellant for the purposes stated in the rule [i.e. medical care, care, comfort etc.]; in other words, there is not a support standard contained therein. The “best interests” language in the trust itself does not make this trust other than a purely discretionary trust and therefore the trustee could not expend these assets for Appellant’s medical care. Administrative Appeal Decision AA-9222, at p. 2. (Emphasis added).

A less favorable result occurred in Administrative Appeal Decision AA-3252, decided October 17, 2008 (Erie CDJFS). The distribution in that trust provided:

The Trustee shall pay to or apply for the benefit of the Beneficiaries, so much of the net income and so much of the principal up to the whole thereof, of the trust estate during said Beneficiaries’ lifetimes, as the Trustee shall deem appropriate, in the sole and absolute discretion of the Trustee. The Trustee may pay more to or apply more for one Beneficiary than the other and may omit distribution to a Beneficiary entirely during the continuance of this trust. The Trustee, in exercising said trustee’s discretionary authority with respect to the payment of the income or principal of the trust estate to any beneficiary, shall take into consideration any income or other resources available to such beneficiary from sources outside the trust that may be known to the trustee.

While most of us would not feel that the second and third sentences set forth a distribution standard that relates to the beneficiary’s care, comfort, etc., the hearing officer, in denying the appeal, thought otherwise:

It is true that this statement does not contain any of the standard-setting terms used in the rule, such as “medical care, care, comfort, maintenance, health, welfare, general well-being.” But we disagree with the appellant’s narrow interpretation of the rule that would require any of those exact words.

We ultimately agree with the hearing officer’s conclusion that the trust, although admittedly not wordy, does contain an arguable standard in its second and third sentences.

[A] mandate that would hardly be needed if the testator truly intended to give total discretion to the trustee.

This case serves as an illustration that the inclusion of language requiring a trustee to consider a beneficiary's other resources could be (incorrectly) interpreted as creating a distribution standard, even though no express reference was made to the proscribed purposes set forth in the Medicaid trust rule and statute. The mandatory federal "available" requirements clearly prohibit such an interpretation, yet in this administrative appeal, such an incorrect result was reached.

6. *Practice Tip Six: Be Careful in Defining Special or Supplemental Needs*

The proscribed purposes of care, comfort, well-being, etc., should not be included anywhere in the trust document, even in an attempt to define special or supplemental needs, as their inclusion can result in the finding of a distribution standard. The following cases illustrate the problems that can arise when practitioners include a definition of special or supplemental needs in the trust instrument, which definition is then construed to be an ascertainable standard.

The trust under review in Administrative Appeal AA-12429 (August 20, 2013) [discussed above under the "shall" discussion] not only referenced "special needs" in the distribution provision, but included a definition of that term that the hearing officer determined was too broad:

The dispositive language of the trust in this case states:

My Trustee shall pay or apply for the benefit of [appellant] for her lifetime such amounts of income or principal or both, of this Special Needs Trust, up to the whole thereof, as the Trustee, in her sole and absolute discretion may from time to time deem advisable for the satisfaction of [the appellant's] 'special non-support needs (defined below), if any.

The trust defines "special non-support needs" as the "requisites for maintaining [appellant's] good health, safety and welfare, when, in the discretion of the Trustee, such requisites are not being provided by any public agency, office or department of the state where she lives or of the United States, or are not otherwise being provided by other sources available to her." The trust goes on to give examples of special non-support needs, "sophisticated medical or dental or diagnostic work or treatment for which funds are not otherwise available including plastic surgery or other non-necessary medical procedures; private rehabilitative training, dental care; recreation and transportation. "The issue is whether the Trust has defined special needs so broadly as to permit the trustee to expend trust assets for the appellant's "medical care, care, comfort, maintenance, health, welfare, general well-being, or a combination of these purposes," thus making the trust available as a resource under the 5101:1-39-27.1(c)(4).

* * *

In this case, the Trust specifically defines "special non-support needs" as the "requisites for maintaining [appellant's] good health, safety and welfare" providing an ascertainable standard for the use of the Trustee's discretion.

Administrative Appeal Decision AA-12429, at p. 2, 4.

In State Hearing Decision 504280256, decided September 17, 2013 (Lake County), the hearing officer described the trust as follows:

Paragraph 4 of the trust states that the trustee shall pay in her absolute discretion such amounts of the net income and/or principal deemed necessary or advisable for the Appellant's special needs.

The trust (Paragraph 4A) defines special needs refers [*sic*] to the requisites for maintaining the Appellant's good health, safety and welfare when, in the discretion of the trustee such requisites are not being provided by a public agency with the term special needs including: housing, meals, personal care, and other necessities of life, together with such training, special equipment, personal care, health and health-related care, including but not necessarily limited to medical, dental and optical care....

State Hearing Decision 504280256, at p. 11.

While this trust is not a pure or a wholly discretionary trust because of its inclusion special needs in its distribution standard, the reference to the beneficiary's "good health" was sufficient to cause the trust to be available. The hearing officer, however, demonstrated a lack of understanding of *Pack v. Osborn* by making the following statement, as a wholly discretionary trust references neither permissible nor impermissible distributions:

A Category 4 trust requires that there be a clear statement requiring the trustee to use a portion of the trust for a purpose other than the medical care, care, comfort, maintenance, welfare or general well-being of the individual, then that portion of the trust is not counted as an available resource. State Hearing Decision 504280256, at p.5.

No such clear statement is required; rather, the distribution standard cannot list any of those stated purposes. Under federal law, it is only when the SSI or Medicaid recipient has the power to compel a distribution for the beneficiary's support that the trust's corpus is available. There is no need to affirmatively deny the trustee of the power to make distributions for the proscribed purposes. Unfortunately, some of the hearing officers who hear appeals or other triers of fact are not aware of the requirements of federal law.

Finally, in Administrative Appeal Decision AA-12110, decided July 24, 2013 (Clermont CDJFS), the department reviewed a trust with a problematic "special needs" definition. The decision provides:

The dispositive language of the trust in this case states:

The Trustee shall pay or apply to [appellant] for his lifetime, amounts from principal or income, up to the whole, as the Trustee in Trustee's discretion may from time to time deem necessary or advisable for the satisfaction of the Grantor's child's special needs."

The trust language up to this point appears to meet the rule requirement. The issue is the definition of special needs set forth in the trust. The trust defines "special needs" as the "requisites for maintaining [appellant's] good health, safety, recreational and educational opportunities, comfort and welfare, when, in the sole discretion of the Trustee, such requisites are not deemed provided by any public agency, office or department of the State of Ohio, or of any other state or of the United States." The trust specifically indicates that "special needs" include medical and dental expenses clothing, education, transportation and dietary needs.

Administrative Appeal Decision AA-12110, at p. 2.

The trust was found to be countable.

7. ***Practice Tip Seven: Use Language Making It Virtually Impossible (or Cost Prohibitive) for a Beneficiary to Compel a Distribution***

A third-party trust that would otherwise be available because of its distribution standard will nevertheless be treated as not being available to the beneficiary if the beneficiary either is unsuccessful in an attempt to compel a distribution judicially, or if the beneficiary can demonstrate that it would be cost prohibitive to bring such an action.

Pack v. Osborn, 117 Ohio St. 3d 14, 881 N.E.2d 237 (2008), stands for the proposition that a beneficiary lacks the ability to compel a distribution from a pure discretionary trust that contains no distribution standard, and that such a trust cannot be treated as countable. The trust need not expressly prohibit distributions for the proscribed purposes. In Administrative Appeal Decision AA-11720, decided May 30, 2013 (Franklin CDJFS), the trust under review was determined not to be countable based upon the cost of bringing an action to compel a distribution:

Appellant’s counsel argued that pursuant to ORC 5115.151(G), which is the same as 1-39- 27.1(c)(4), the trust was not countable because there was evidence introduced that it would be cost prohibitive to force the trustee to distribute money to Appellant. There is, in fact, a letter from an Estate and Trust law firm indicating that Appellant’s cost of bringing a civil action to force distribution would equal approximately what the trust is actually worth. Administrative Appeal Decision AA-11720, at p. 4.

It is unlikely, however, that this finding was the sole reason for the result, as the hearing officer’s characterization of the trust makes it appear to be a pure discretionary trust. Therefore, even if it had not been cost-prohibitive for the beneficiary to bring an action attempting to compel a distribution, such an action would likely have been unsuccessful under *Pack v. Osborn*. The authors suggest including in wholly discretionary trusts the following provision: “The trustee shall vigorously defend with all available resources, through all available judicial appeals, any attempt by the beneficiary to compel a distribution from this trust.” The inclusion of this provision is intended to make it easier for the beneficiary to demonstrate that it would be cost prohibitive to obtain a “final” court order regarding the inability to force a distribution. The inclusion of this provision also is reassuring to the trustee, in that it clearly permits the trustee to expend trust corpus on a vigorous defense of the exercise of its discretion, a course of action that it might otherwise be reluctant to pursue.

8. ***Practice Tip Eight: Do Not Draft Conditional Poison Pills***

A third-party settled trust that would otherwise be treated as being available will be treated as being not available if it contains a mandatory so-called “poison pill” provision.

A trust will generally not be considered an available resource in the following circumstance:

If the trust contains a clear statement requiring the trustee to terminate the trust if it is counted as an available resource, then it is not counted as an available resource. *Terms of a trust granting discretion to terminate the trust do not qualify as a clear statement requiring the trustee to terminate the trust.* O.A.C. 5160:1-3-27.1(c)(4)(c)(iv). [Emphasis added.]

Although the trust under review in Administrative Appeal Decision AA-12110, decided July 24, 2013 (Clermont CDJFS), was treated as being available, the result could have been different had its poison pill provision not been conditional. The poison pill in that trust read as follows:

Notwithstanding anything to the contrary contained in other provisions of this trust, if the existence of this trust has the effect of rendering the special needs beneficiary ineligible for any federal, state or local financial assistance benefits to which [appellant] would be otherwise entitled; or in the event that this trust is rendered illegal by any law or by the decision of any court, then in such case the Trustee shall terminate this trust; provided, however, that before terminating this trust under the provisions of this Article, the Trustee shall obtain an opinion from a licensed Ohio attorney familiar with trusts involving beneficiaries who have disabilities, to the following effect: (i) that the governmental claim or denial of benefits in question is valid, and (ii) that the change in law has rendered it likely that [appellant] will be denied government benefits and (iii) that amendment to the trust will be insufficient to restore such benefits.

In finding that this provision was not the required “clear statement,” the hearing officer wrote:

[W]e cannot find that this provision is “contains a clear statement requiring the trustee to terminate the trust.” While the language of the provision, “shall,” is mandatory, the provisos added afterward make the direction less clear. Therefore, we find that this provision does not render the Trust unavailable.

The poison pill was even more off the mark in State Hearing Decision 544169919, decided July 24, 2013 (Clermont County). The trust in that appeal contained what appeared to be contradictory provisions in this regard:

Article VIII—Revocable Trust: Grantor may amend or terminate the Trust at any time. In the event the Trust results in the Appellant’s ineligibility for public assistance, the Trustee, after obtaining legal opinion, may terminate the trust and distribute the assets.

Article X—Failsafe Provision: if the Trust renders the special needs individual ineligible for public assistance, the Trustee “*shall* terminate the trust provided, however, that before terminating the trust under the provisions of this Article, the Trustee shall obtain an opinion from a licensed Ohio attorney familiar with trusts involving beneficiaries who have disability....” Specific items are listed in the Article that must be included in the legal opinion.

State Hearing Decisions 54169919, at p. 7.

The hearing officer wrote that the “may” in Article VIII and the “shall” in Article X resulted in the instructions not being “clear” as required under Ohio Admin. Code § 5101:1-39-27.1(c)(4)(c)(iv). Additionally, the applicant failed to demonstrate that the requirements set forth in Article X had been met.

To avoid the problems illustrated by decision, a poison pill provision could simply state, “If it is finally determined that this trust is an available resource of the beneficiary for Medicaid purposes, the trustee shall terminate the trust and distribute the remaining trust assets in the manner set forth in [drafter to insert cross reference to lifetime termination provision]” While a poison pill provision is never needed in a wholly discretionary trust, inclusion of such a provision lessens the chances that a category 4 rules will be applied incorrectly.

9. Practice Tip Nine: Make Sure the Trust Is Irrevocable

In State Hearing Decision 5044169919, decided July 24, 2013 (Clermont County), the trust under review was treated as being available for the following reason, “Although also designated by the Appellant’s Attorney as a ‘wholly discretionary trust,’ the R.C. regulations require a wholly discretionary trust be ‘irrevocable,’ which the Appellant’s Trust is not.”

The subject trust was created under the revocable trust of the applicant’s deceased father, and it appears likely that the hearing officer was unaware of the fact that a nominal revocable trust becomes irrevocable upon the settlor’s death, however the reason could also lie in the fact that a trust that is irrevocable under the Ohio Trust Code may remain revocable under Ohio Admin. Code § 5160:1-3-27.1(B)(6) and (10). To be irrevocable, the trust cannot be terminated by a court and may only terminate upon the occurrence of an event outside the control or direction of the beneficiary or the grantor. To assure that a trust is irrevocable both under the Ohio Trust Code and the Medicaid trust rule, the trust could state,

This trust is irrevocable and cannot be revoked by the grantor or the beneficiary or terminated by a court. This trust shall terminate only upon [insert the occurrence of an event that is outside of the control or direction of the beneficiary, grantor, or trustee, e.g., “the death of the beneficiary.”]

10. Practice Tip Ten: Know How, Know Where, and Know When to Modify a Trust

Depending upon the terms of the trust and the facts of the situation, reformations can be accomplished by means of decanting, or they can be achieved judicially based upon changed circumstances, mistake of law, or mistake of fact. The authors caution against relying upon a modification based upon the consent of all beneficiaries without court involvement or by means of a private settlement agreement, as those methods require the consent of the disabled beneficiary, and the giving of that consent could be treated in a similar manner as a disclaimer (where the affirmative act of the disclaimant is treated as an improper transfer). Similarly, a modification by consent or by a private settlement agreement cannot be accomplished without the affirmative action of the Medicaid or SSI applicant/beneficiary, and the act of consent could conceivably also be treated as an improper transfer. It was because of this concern that Ohio Rev. Code § 5804.11(A) was amended to make that section inapplicable to self-settled (d)(4)(A) payback trusts, yet the same concern exists for third party supplemental needs or sole benefit trusts.

When reformation is needed because of the death of the trust’s settlor, if the settlor died in a jurisdiction other than that of the disabled beneficiary, it might be possible to effect a reformation in either jurisdiction, particularly if the trustee has the power to change the governing law. (Timing may also be a critical factor). If the disabled beneficiary is not currently receiving means-tested public benefits, a reformation later might sometimes be better than one made at the time of the settlor’s death.

This issue arose in *In Re Ruby Owen Trust*, 2012 Ark.App. 381 (2012). In that case, the trust settlor died in Arkansas, with a disabled daughter who resided in Alaska but who was not receiving means-tested benefits. The trustee’s request to modify a non-SNT to include SNT provisions was rejected, with the court summarizing the trust and the modification action:

On February 23, 2009, Ruby Owen created the Ruby G. Owen Trust for the benefit of her nine grandchildren, including her granddaughter, Kristian Owen, a resident of Alaska. The trust allows the trustee to distribute as much income and principal to Kristian as the trustee deems advisable, but it also instructs the trustee to remain mindful of and to always consider other resources available to Kristian. According to the trust, preservation of principal is a priority.

In March 2010, approximately one year after creation of the trust, Kristian was diagnosed with schizophrenia, and a guardian was appointed for her. Ruby Owen, the grantor, died one month later, in April 2010. In June 2011, PBNB, as successor trustee, filed a petition asking the trial court to consent to modification of the trust into a special-needs trust, so that Kristian might qualify for public benefits, reserving the trust assets for assistance not provided by the government.

Owen Trust, at *1-2.

If any trust seemed to be a perfect candidate for reformation, this was it. Unfortunately, the court held that a modification for the purpose of securing government assistance would violate Arkansas public policy, a policy that, at least in part, appeared to be aimed at the abusive use of self-settled trusts.

In the case *In re Kroll*, 41 Misc. 3d 954, 971 N.Y.S.2d 863 (2013), the trustee decanted a trust six days before the beneficiary's 21st birthday, after which the decanting would not have been possible under the New York statute, because at that time the beneficiary's interest converted from being discretionary to mandatory. The New York statute also required 30 days' notice of the decanting to the beneficiaries, which notice can be waived by a beneficiary with capacity or by a guardian, but the trust agreement in question permitted a parent to sign any waivers on behalf of a beneficiary under a disability. The trustee decanted the invaded trust to third-party supplemental needs trust virtually simultaneously with the required notice and waiver by the beneficiary's father. The opinion states that the New York Attorney General objected on behalf of New York's Medicaid agency:

The AG argue[d] that [the beneficiary's] right to demand a principal distribution vested in him on his 21st birthday, any appointed trust would be a self-settled trust and, as such, is required to contain a payback provision.

Kroll, at 957.

While the trustee in Kroll cut it close, the parties involved with the trust in Administrative Appeal Decision AA-12115, decided on July 16, 2013 (Allen CDJFS), apparently did not recognize the need to seek reformation before applying for Medicaid. In that situation, the 49-year-old applicant was the beneficiary of a third-party trust created by his parents, now deceased. The trust provided:

This trust for KENNETH WARNECKE shall be a "luxury" trust only. Said LOIS HEMKER shall serve without bond and shall have the same Trustee powers as set forth in Article VII of this Agreement.

* * *

[T]he Trustee may use such income or principal for the support, maintenance and health of said beneficiary. [Emphasis in decision.]

The earlier decision denying Medicaid eligibility was obviously affirmed.

11. Practice Tip Eleven: Urge Clients Not to Disinherit a Disabled Child

Some clients are comfortable leaving the share of a disabled child to one or more of the other children, in the expectation or upon the promise of the other child to “take care” of the disabled child. First, there is no assurance that the disabled child will be the last survivor, but secondly, the expectation or promise upon which the plan of disinheritance is based often does not work out. That was the case in *Kalfin v. Kalfin*, 2013 WL 5621149 (Cal.App. 4 Dist.).

Judith A. Kalfin (Judith) appeals from the judgment in favor of her younger sister, Debra R. Kalfin (Debra), in this breach of contract and financial abuse action. Debra is blind and disabled and has suffered from numerous serious medical conditions throughout her life, frequently relying on her father, Harry Kalfin (Harry) for financial support. A few months before his death, Harry amended his long-established estate plan from one dividing the bulk of his sizeable estate equally between his two daughters, to one leaving virtually the entire estate to Judith in exchange for her promise to take care of Debra and make sure she would have everything she needed for as long as she lived. After Harry died, Judith declined to provide any financial assistance to Debra, and Debra filed this action. The jury awarded Debra approximately \$1,400,000 in compensatory damages and \$260,000 in punitive damages.

Despite credible evidence that Judith assured her father that she would care for her sister following his death, after he did die, Judith claimed that her promise to her father to financially support her disabled sister was too indefinite to constitute a contract. The Court did not buy it, and Debra was awarded nearly \$1.5 million.

In summary, careful attention to (a) the requirements of Ohio’s wholly discretionary trust set forth in Ohio Rev. Code § 5801.01(Y); (b) the safeguards listed in Ohio Rev. Code § 5163.21(G)(4); and (c) the issues discussed above that have caused problems for Medicaid applicants should result in effective supplemental needs trusts.

Chapter 15: Trust Administration under the Ohio Trust Code

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I. Trust Acceptance

Under the OTC, an individual or entity considering the assumption of a trusteeship should review the trust document and be sure to correctly identify the:

- Type of trust under consideration;
- Parties to the trust;
- Trust's purposes;
- Trustee's duties;
- Potential for conflicts of interest;
- Existence and identity of co-fiduciaries and other involved parties;
- Profitability of acceptance; and
- Actions that determine acceptance.

A. *Types of Trusts.*

1. *Inter vivos/revocable/living/grantor/self-declared trust.*

The OTC contains provisions addressing the presumption of revocability of a trust; specifics on the manner of revoking or amending a trust; the limitation period for contesting a trust; the authority of an agent of the settlor to exercise powers regarding the trust and its assets; and the duties of the trustee both when the settlor is incapacitated and with respect to creditors of the settlor.

The Code also contains a definition of revocable under § 5801.01(R).

2. **Testamentary.**

The Code only applies to testamentary trusts to the extent the provisions do not conflict with any provision of Chapter 2109 and as long as any provision of the Code is not clearly inapplicable to testamentary trusts. § 2109.69.

3. **Irrevocable.**

a. *Wholly discretionary trusts.*

The Code creates a new form of irrevocable trust under § 5801.01(Y)(1): the wholly discretionary trust. Trustees should become familiar with this type of trust and its protection from creditors.

b. *Charitable trusts.*

The Code defines a charitable trust under § 5801.01(E) and changes Ohio law by giving the settlor standing to enforce the trust and by allowing a court to presume the settlor had a general charitable intent in a cy pres action.

4. **Other trusts.**

The Code creates some new types of trusts (such as trusts for the care of an animal) and codifies the law regarding trusts already available under Ohio law (these include oral trusts and noncharitable trusts without ascertainable beneficiaries).

B. *Parties to a Trust.*

1. **Settlor.**

The Code defines settlor under § 5808.01(S).

2. **Trustee.**

The Code defines trustee under § 5808.01(X).

3. **Beneficiaries.**

The Code defines different classes of beneficiaries. It is very important to ascertain the individuals within these classes as trustee duties with respect to these classes will vary significantly.

- a. Current beneficiary 5801.01(F).
- b. Qualified beneficiary 5801.01(Q).
- c. Beneficiary surrogate 5801.01 (D).
- d. Beneficiary 5801.01(C).

The Code defines “interests of the beneficiaries” under § 5801.01(K). This definition is narrow and not intuitive. It means the beneficial interests under the terms of the trust, and not what the beneficiaries (or the court, for that matter) believe is in their best interests.

Note that notice to, or consent from, beneficiaries may be accomplished by a third party under the representation provisions of Chapter 5803.

4. Guardians.

The Code follows Ohio law regarding definitions for guardians and includes a conservator appointed for the property or the person of a competent adult.

- a. Of the person 5801.01(I).
- b. Of the estate 5801.01(H).

C. Purpose of the Trust.

- 1. Section 5804.04 sets forth valid non-charitable trust purposes.
- 2. Section 5804.05 sets forth valid charitable trust purposes and gives the settlor the ability to maintain a proceeding to enforce the trust.

D. Trustee Duties.

1. Loyalty.

Sections 5808.01 and 5808.02 outline the trustee’s duty to administer a trust in accordance with its terms and purposes and the interests of the beneficiaries; and the duty of loyalty. This duty of loyalty encompasses the ability of a corporate trustee to engage in other transactions with a trust beneficiary that do not concern trust property and therefore do not pose any threat to the trustee’s duty to administer a trust solely in the interests of the beneficiaries.

2. Impartiality and prudence.

The duties of impartiality under § 5808.03 and of prudent administration under § 5808.04, mirror those contained within the Prudent Investor Act and apply to all aspects of trust administration. Similarly, the duties to incur only reasonable costs (§ 5808.05), to use special skills or expertise in the administration of trusts (§ 5808.06) and to engage in delegation (§ 5808.07) are the same duties imposed under the Prudent Investor Act.

3. Control and protection of trust property.

Now codified, are the duties to control and protect trust property (§ 5808.09) and keep adequate records and identification of trust property (§ 5808.10).

4. Investment management under Uniform Prudent Investor Act.

Recodified under Chapter 5809 of the Code, are the provisions of the Uniform Prudent Investor Act that require a trustee, within a reasonable time after accepting a trusteeship or receiving trust assets, to review the trust assets and ensure that the assets are administered in accordance with all aspects of the Uniform Prudent Investor Act.

5. Addressing actions of a prior trustee.

While a trustee has a general duty to collect trust property from a former trustee under § 5808.12, there is no duty to pursue breach of fiduciary duty claims against the former trustee except under certain circumstances. This section cross-references former § 1339.42 now restated under § 5815.24.

6. Handling claims of and against the trust.

Under § 5808.11 the trustee is under a duty to take reasonable steps to enforce claims of the trust and defend claims against the trust.

7. Duty to inform and report.

The duty to inform and report represents the most significant change in administrative practice under the Ohio Trust Code. § 5808.13 details the requirements imposed upon the trustee unless changed under the terms of the trust instrument.

There are a number of circumstances that require the trustee to provide notice to others regarding the creation, existence, resignation and even termination of trusts. There are also circumstances during administration that require notice. In most cases, the notice is required to be given to particular classes of beneficiaries, but in some cases, others are entitled to notice as well.

If a trustee accepts trustee duties on creation of an irrevocable trust; continues as trustee of a previously revocable, now irrevocable, trust; or becomes successor trustee of either a revocable or irrevocable trust already in existence, certain information must be given to the current beneficiaries of the trust.

In the first two instances, within 60 days of acceptance of the trusteeship of a newly created irrevocable trust or continuation as trustee of a now irrevocable trust, the trustee must notify the current beneficiaries of the existence of the trust, the identity of the settlor, their right to request a copy of the governing trust agreement and their right to reports. § 5808.13(B)(3).

In the third instance, when a trustee becomes successor trustee of a trust already in existence and previously administered by another (such as a Declaration of Trust), the trustee must within 60 days of assumption of the duties as trustee, provide current beneficiaries with the trustee's name, address and telephone number. § 5808.13(B)(2).

E. Potential Conflicts of Interest.

1. With co-fiduciaries.

The Code addresses circumstances where one co-trustee may not agree with the actions of other co-trustees under § 5807.03.

2. Through self-dealing.

The Code addresses the possibility of a trustee profiting from the administration of the trust without any breach of fiduciary duty in § 5810.03.

3. Through retention of bank trustee's stock or transactions with affiliates.

Notwithstanding the general duty of loyalty, a corporate trustee may still retain its own stock pursuant to Ohio Rev. Code § 1111.13(A)(2) but only if authorized by the trust instrument (or by court order) and directed by a co-fiduciary or investment advisor. Ohio Rev. Code § 1111.13(C) authorizes voting of bank stock but voting decisions are passed through to the beneficiaries. Ohio Rev. Code § 1111.15 authorizes transactions with affiliates.

F. Co-Trustees and Other Related Parties.

1. Actions when there are co-trustees.

The Code changes Ohio law under § 5807.03 by allowing a majority to take action when three or more co-trustees are serving.

This same provision also spells out the duty of a co-trustee to prevent another from committing a breach of trust.

2. Delegation of trustee duties.

The Code allows the delegation of duties and powers to both a co-trustee and a third party using the same standard for permissible delegation under § 5808.07.

3. Authority of agent of settlor.

For an agent to exercise the settlor's powers, the Code specifies that both the trust document and the POA must give the agent the ability to handle trust matters on behalf of the settlor under § 5806.02.

G. Profitability.

1. Compensation.

The Code provides under § 5807.08 for the trustee to receive reasonable compensation when a fee clause is not contained in the document.

2. Disclosure of fees.

The Code does not impose a duty upon the trustee at inception of the trusteeship or acceptance as successor trustee to disclose fees to the beneficiaries but, under § 5808.13(C), the trustee's annual reports to beneficiaries must include the source and amount of the trustee's compensation. Also, under § 5808.13(B)(4), if the rate of compensation is changed during the administration of the trust, the trustee is under a duty to inform the current beneficiaries before the change takes place.

H. Acceptance of Trusteeship.

While, in most cases, acceptance of the trusteeship will be by signature signifying acceptance by the trustee, it is possible that accepting delivery of trust property, without rejecting trusteeship within a reasonable time, could be construed as acceptance under § 5807.01(A).

Note also that the Code gives a nominated trustee the ability to inspect property to determine potential liability under environmental law without actually accepting the trusteeship first under § 5807.01(C)(2).

II. Trust Administration

In addition to reviewing a trust document for acceptance of the trusteeship, as noted above, a person or entity should review certain additional aspects of the trusteeship both before acceptance and during administration. These include:

- A review of the trustee's powers;
- The unique nature of any of the trust's assets and general investment management;
- Any potential or pending litigation; and
- The existence of exculpatory language regarding certain actions taken by the trustee.

Once a trusteeship has been accepted, there are additional aspects of trust administration that should be clearly understood by the trustee. These include:

- Standards for trustee discretionary actions;
- Triggering events that will change trustee duties;
- Revocation or amendment by the settlor or someone else on behalf of the settlor;

- The ability to remove the trustee;
- The ability to change the *situs* of trust administration;
- Trust modifications with court authorization; and
- The appropriateness of entering into private settlement agreements.

A. *Trustee Powers.*

1. General trustee powers.

Section 5808.15 provides the trustee with the ability to exercise all powers over the trust property that an unmarried competent owner has over individually owned property and to exercise all other powers appropriate to achieve proper investment, management and distribution of the trust property.

While this section provides a good “fall-back” in the event of a dispute, corporate trustees will look for more specific powers within the four corners of the document prior to acceptance of trusteeship.

A logical approach to the analysis of the trust terms is to determine first:

- a. Is the trust subject to interpretation under Ohio law?
- b. Does the Code apply to the trust?
- c. Do any trust terms override the Code?
- d. Do any trust terms add powers missing from the Code?
- e. Do any trust terms deviate from existing Code powers?

2. Specific trustee powers.

Section 5808.16 provide specific trustee powers that should be examined and fully understood by anyone considering acceptance of a trusteeship.

The following represents a typical checklist of a corporate trustee and references those powers covered within § 5808.16 and those that are not specified by the statute.

a. *Collection, acquisition and exchange.*

Section 5808.16(A)-(C) give every trustee the ability to collect trust property, accept or reject additions; acquire or sell property for cash or credit at public or private sale and exchange, partition or otherwise change the character of trust property. The settlor can modify any and all of these powers.

Section 5808.02(G)(2)(c) waives the conflict of interest in purchasing securities from an estate where the same entity is both the executor and trustee.

b. Borrow, mortgage or pledge trust property.

Section 5808.16(E) gives the trustee the ability to borrow money, with or without security, and mortgage or pledge trust property for a period that can extend beyond the duration of the trust.

Corporate trustees are also often interested in determining whether, as trustee, the power exists to borrow from their own affiliate commercial department or sell property or borrow funds from another trust.

This provision does not preclude either ability, therefore it is possible to rely upon this statutory power. In addition, § 5808.02(G)(2)(c) provides trust to trust sale authority and Ohio Rev. Code § 1111.15 encompasses bank loan authority.

c. Continue or dissolve a business entity.

Section 5808.16(F) gives the trustee the ability to continue any form of business or enterprise, and take most any action regarding that enterprise such as merging, dissolving or changing its form.

d. Exercise rights of an absolute owner of securities.

Section 5808.16(G) gives the trustee the ability to vote proxies, hold securities in nominee name, pay calls and other assessments and deposit the securities with a depository.

Most corporate trustees will look for these specific powers so having them by virtue of this statutory provision will be of great help. Caution should be exercised upon review, that these powers have not been removed or modified by the settlor.

e. Administer real property.

Section 5808.16(H)-(M) address many aspects of administering real property in trust. These include the ability to make repairs or improvements, grant easements, enter into leases and options for sale even beyond the term of the trust, insure the property and abandon property as well as engage in all aspects of inspection for environmental hazards.

Most corporate trustees do look for the ability to execute deeds or leases, manage, subdivide or lease beyond the term of the trust, disclaim an interest in property that has environmental hazards or abandon property.

The trustee might also look for specific powers allowing beneficiaries to use real property, such as a residence, without any obligation to pay taxes, insurance or a fair market value for

rent. These powers must be specifically enumerated in the document as they are not encompassed in the specific statutory powers under the Code.

f. *Claims by or against the trust; hiring of agents.*

Section 5808.16(N) gives the trustee the ability to pay or contest any claim, settle a claim by or against the trust or release a claim belonging to the trust.

Many corporate trustees look for the specific authority to handle claims. The Code also imposes a duty upon trustees to take reasonable steps to enforce claims of the trust and to defend claims against the trust.

Often the difficulty for trustees lies in the determination of who pays for the enforcement or defense of those claims.

Section 5808.16(O) addresses this concern by authorizing the trustee to pay taxes, assessments, compensation of the trustee and of employees and agents of the trust and other expenses incurred in the administration of the trust.

A word of caution to thoroughly review the trust document to determine whether this authority to incur expenses of the trust, including the ability to pay a reasonable trustee's fee, is modified by the settlor.

Also note that while this provision gives the trustee the ability to pay agents of the trust, it does not actually give the trustee the ability to hire agents. Under § 5808.07 a trustee is authorized to delegate to agents or co-trustees duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances.

Under § 5808.16(AA) the trustee is authorized to employ brokers, agents, appraisers, accountants, investment advisors, etc., at the expense of the trust.

The trustee might also want specific language allowing the trustee to consult with legal counsel at the expense of the trust and to incur no liability for acting on advice of counsel with respect to matters that a legal opinion may cover. Section 5808.07(C), however, should protect the trustee who relies upon advice of counsel as long as the delegation to an attorney was properly done.

g. *Powers affecting tax matters of the trust.*

Sections 5808.16(O)-(P) give the trustee the ability to exercise elections regarding federal, state and local taxes and pay taxes of the trust.

The ability to elect to allocate the GST exemption to shares or all of the trust is given by federal law.

h. *Take action with respect to retirement plans and other contracts.*

Section 5808.16(Q) gives the trustee the ability to select a mode of payment under any employee benefit or retirement plan, annuity or life insurance policy and exercise rights regarding such assets.

i. *Loans and pledges of trust property.*

Sections 5808.16(R) and (S) give the trustee the ability to make loans out of trust property, including loans to a beneficiary, and pledge property in guarantee of loans made to the settlor.

These powers are often looked for by corporate trustees so having the default statutory provision is very useful. Note however, that the trustee must still have specific authority from the settlor before guaranteeing loans made by others to a third party (someone other than the settlor).

j. *Appointment of ancillary trustee.*

Section 5808.16(T) is the provision that allows the trustee to hire a trustee to act in another jurisdiction with respect to property located in that other jurisdiction.

k. *Payments for or on behalf of disabled beneficiaries.*

Section 5808.16(U) covers the ability of the trustee to make payments for a legally disabled beneficiary or for a beneficiary that the trustee believes is incapacitated. This provision specifies the appropriate means of payment to or for that beneficiary.

l. *Distribution on division or termination.*

Section 5808.16(V) gives the trustee the ability to make distributions in divided or undivided interests and allocate particular assets in proportionate or disproportionate shares.

Note that this provision does not specifically authorize the trustee to make distributions in cash or in kind.

Section 5808.16(Z) gives the trustee the ability to exercise powers appropriate to wind up the administration of the trust on termination.

m. *Resolve disputes and prosecute or defend actions and claims.*

Sections 5808.16(W) and (X) give the trustee the ability to resolve a dispute concerning interpretation of the trust by mediation, arbitration or other ADR procedure and prosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of duties.

These are important provisions for the trustee, often because when disputes regarding administration arise, the trustee is met with resistance from the beneficiaries as to whether or not legal fees for defense of trustee actions are properly payable from the trust.

Note also, under § 5801.04, the settlor is not allowed to insert trust terms limiting the power of the court to take any action or exercise any jurisdiction over the trust.

This ability to resolve disputes does not include the ability to avoid them in the first place. In other words, this power does not indemnify or protect a trustee by ensuring that certain actions taken by a trustee in the exercise of its discretion will be binding upon parties to the trust. If a trustee wants this sort of protection, specific protection in that regard must still be set forth in the document.

Under § 5810.08, exculpation clauses cannot protect a trustee from liability for a breach made in bad faith.

n. *Combine or divide trusts.*

The Code gives a trustee the ability under § 5804.17 to consolidate or divide trusts but, before doing so, the trustee must notify qualified beneficiaries. It is available as long as the result will not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.

This provision can be modified by the settlor, including the need to provide notices to the beneficiaries.

o. *Resignation of trustee.*

The Code, under § 5807.05, gives the trustee the ability to resign even if the trust terms do not so provide. The statutory provision requires that the trustee give at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all co-trustees. The trustee can also always apply to the court for approval to resign.

B. *Unique Assets and the Duty of Investment Management.*

1. *Application of Uniform Principal and Income Act.*

The Uniform Principal and Income Act, restated under §§ 5812.01 to 5812.52, provides default provisions for the handling of many types of unique assets. These include:

- a. Guidance on characterizing receipts as income or principal;
- b. Guidance on accounting for business or other activities;
- c. Handling rental property;
- d. Handling the obligation to pay money;
- e. Handling insurance policies and similar contracts;
- f. Handling deferred compensation, annuities and similar payments;
- g. Handling liquidating assets;
- h. Handling minerals, water, and other natural resources;
- i. Handling timber;
- j. Handling derivatives and options; and
- k. Handling asset-backed securities.

2. *Investment management under the Uniform Prudent Investor Act.*

The Uniform Prudent Investor Act, recodified under Chapter 5809 of the Code, imposes upon the trustee the duty to manage trust assets in accordance with the requirements and standards of the Act.

Unless the trust agreement specifically provides otherwise, these requirements include the duty to manage trust assets as a prudent investor would, to consider risk and return objectives reasonably suited to the trust and to diversify trust assets.

3. *Additional authority under Ohio Trust Code.*

a. Specific trustee powers.

As noted above under Specific Trustee Powers (Trust Administration, § A.2.), the Code gives a trustee the following powers to:

- i. Continue or dissolve a business entity;
- ii. Administer real property;
- iii. Take action with respect to retirement plans and other contracts; and
- iv. Make loans or pledges of trust property.

b. General partnership interests.

The Code, under § 5810.11, eliminates the protection of a trustee who serves as a general partner when one or more of certain persons related to the trustee own an interest in the partnership.

With enactment of the Code, different statutory protections for trustees than for executors and other fiduciaries under § 5815.35 (formerly § 1339.65), exist with respect to contracts entered into in a fiduciary capacity and partnerships of which the fiduciary is a general partner.

C. Potential or Pending Litigation.

See the section above under Trust Administration, § A.2.m. regarding resolving disputes and prosecuting or defending actions and claims.

D. Exculpatory Provisions.

Under § 5810.08 an exculpatory clause protecting a trustee from liability for a breach made in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not valid. Further, the trustee cannot insert an enforceable exculpatory clause into the trust terms that was drafted as a result of an abuse of a fiduciary or confidential relationship to the settlor.

The trustee is allowed to draft or cause an exculpatory clause to be drafted.

E. Trustee Discretionary Actions.

1. General standard.

Section 5808.14(A) provides the general standard that the trustee is to exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

2. Exceptions to general standard.

a. Distributions for one's own benefit.

A non-settlor trustee/beneficiary must apply an ascertainable standard to discretionary distributions to himself or herself.

Ascertainable standard is defined under § 5801.01(B) as a standard relating to an individual's health, education, support or maintenance within the meaning of I.R.C. § 2041(b)(1)(A) or 2514(c)(1).

b. Distributions to satisfy a legal obligation.

A trustee cannot make discretionary distributions that satisfy a legal obligation of support owed by the trustee personally.

c. Wholly discretionary trusts.

A court is not to apply a reasonableness standard to its review of the trustee's exercise distribution decisions in a wholly discretionary trust.

A "WDT" is defined in § 5801.01(Y).

3. Exceptions to the exceptions.

a. Marital trusts.

If the spouse is acting as trustee of a trust for which a marital deduction was allowed, there is no need to limit the power of the spouse-trustee to make discretionary distributions for the spouse's benefit since these trusts will be includable in the surviving spouse's estate regardless. See § 5808.14(D)(1).

b. Revocable trusts.

Since the settlor has the power to revoke, the trust is automatically includable in the settlor's estate, so here too, there is no need to limit the discretionary distribution standard. See 5808.14(D)(2).

c. 2503(c) Minors trusts.

The exclusion of the § 2503(c) minors trust is necessary to avoid loss of gift tax benefits. See § 5808.14(D)(3).

4. Use of co-trustees.

If there are multiple trustees, independent co-trustees can exercise a power that is prohibited for one of the trustees. See § 5808.14(C).

F. Triggering Events That Change Trustee Duties.

1. Death of settlor.

When a revocable trust becomes irrevocable and someone is serving as trustee other than the settlor, the trustee must notify the current beneficiaries within 60 days of the identity and death of the settlor, the existence of the trust, their right to a copy of the trust agreement and to reports. The Code provision referencing a "copy" of the trust instrument refers to the amended and restated agreement, if one exists, and amendments to it, not the original agreement and amendments to it. Section 5808.13(B)(1) provides that, unless the beneficiary expressly requests a copy of the entire trust instrument, the trustee may furnish a copy of a redacted trust instrument that includes only those provisions

that the trustee determines are relevant to the beneficiary's interest in the trust. But if the beneficiary then still asks for a copy of the entire trust instrument, the trustee must provide it.

If the settlor was serving as trustee and dies, and the successor trustee accepts, the successor trustee must, within 60 days, advise the current beneficiaries of the trustee's name, address and telephone number.

Some of these notice requirements can be changed by the settlor.

At the death of the settlor of a revocable trust, the creditors of the settlor cannot reach trust assets unless the trust terms so provide.

2. Acceptance of trusteeship.

If an irrevocable trust is created and the trustee assumes trusteeship or becomes the successor trustee, the trustee has certain notice requirements.

Under the first situation, the trustee must notify the current beneficiaries within 60 days of acceptance of the appointment as trustee, the existence of the trust, the identity of the settlor and the beneficiaries' rights to a copy of the trust agreement and reports.

Under the second situation, the successor trustee must notify the current beneficiaries of the trustee's name, address and telephone for contact purposes.

Some of these notice requirements can be changed by the settlor.

3. Termination of small trust.

If a trustee determines that the value of the trust is insufficient to justify the cost of administration and the trust has a value of under \$100,000, the trustee can terminate the trust after having given notice to the qualified beneficiaries. Notice of the distribution plan need not be given under the statute but it is good practice to submit that to the beneficiaries as well and get their approval prior to termination.

4. Trustee resignation.

If a trustee decides to resign, notice of the intent to resign must be given to qualified beneficiaries, the settlor and any co-trustees at least 30 days before the resignation is effective.

5. Change in trust *situs*.

The trustee has the ability to change the trust's place of administration but must provide current beneficiaries with at least 60 days advance notice. This notice must contain the new place of administration, new contact information for the trustee, the reason for the change and the date on which the change will be effective.

Note that changing the principal place of administration will not always change the law governing the trust's administration. Under § 5801.06(B) the administration of a trust is governed by the law designated in the terms of the trust but if the trust terms are silent, then the law of the trust's principal place of administration governs the administration of the trust and can be changed if the trustee changes the place of administration.

6. Combining or dividing trusts.

If a trustee wants to combine two or more trusts or divide one trust into two or more, notice of the intent to do so must be given to the qualified beneficiaries. The trustee may, but does not have to, advise the beneficiaries that there will be no adverse impact on their rights or the purposes of the trust.

7. Change in trustee fees.

If a trustee wants to change the method or rate of compensation, the new rate or method must be provided to the current beneficiaries. The notice must be given in advance of the change.

8. Requests by beneficiaries.

While a trustee has an ongoing duty to keep current beneficiaries informed about administration of the trust and provide them with reports, this duty is only owed to beneficiaries who are not current beneficiaries upon their request.

G. Revocation or Amendment.

Under the Code, every trust document is presumed to be revocable (and amendable) unless it specifies that it is irrevocable. However, the method of revocation should still be spelled out in the document and if so, it remains the exclusive means of revoking the trust.

Trustee should be sure to identify the appropriate means of revocation or amendment and also identify whether the settlor has given anyone else, such as an attorney-in-fact, the ability to amend or revoke on their behalf.

H. Removal of Trustee.

The Code codifies Ohio law by allowing a court to remove an inter vivos trustee for specific reasons enumerated in § 5807.06. The trust terms can, of course, expand upon those reasons.

The trustee should identify the trust terms addressing removal and the parties who can exercise that right.

I. Change in Trust Situs.

Most trusts contain terms identifying the controlling law with respect to the validity, construction and administration of trust terms. As mentioned in the previous section addressing changes in trustee duties, a trustee has the ability, unless expressly prohibited under the terms of the trust, under § 5801.07 to change the place of trust administration and thereby the law applicable to trust administration.

This presents unique planning opportunities and can benefit all parties to a trust.

The trustee can only make this change if doing so is in accord with the trustee's continuing duty to administer the trust at a place appropriate to its purposes, administration and the interests of the beneficiaries.

J. Trust Modifications Through Court Authorization.

1. Initiated by the settlor and the beneficiaries.

If the settlor *and* all beneficiaries decide that they want to modify an irrevocable, noncharitable trust, they can petition the court to approve such an action. Under § 5804.11(A), the court must approve the petition even if modification is inconsistent with a material purpose of the trust. However, the court then must find that all consents, including any given by representatives of beneficiaries under Chapter 5803, are valid and that all parties giving consent are competent to do so.

This applies to trusts that become irrevocable before, as well as after, the effective date of the Code but is not applicable to Special Needs Trusts.

The trustee in this situation, can, but need not be a party to, such a petition. The trustee can petition the court on behalf of the other parties, however.

The trustee need also not consent to the action but must follow the court order of modification.

2. By consent of all beneficiaries.

If the beneficiaries wish to modify a trust, they must petition the court for approval. Under § 5804.11(B), the court must conclude that modification of the trust is not inconsistent with a material purpose of the trust. Modification cannot be to replace or remove the trustee.

This petition can be made even for trusts that are irrevocable prior to the effective date of the Code and can be made by either the beneficiaries or the trustee.

3. On petition of a trustee or beneficiary.

a. Due to unanticipated circumstances.

Under § 5804.12 (A), the trustee or a beneficiary might petition the court to modify the administrative or dispositive terms of a trust because of circumstances not anticipated by the settlor. In order to grant such a petition, the court must find that modification will further the purposes of the trust.

b. Existing terms impair or are impracticable.

Under § 5804.12(B), the trustee or a beneficiary might petition the court to modify the administrative terms of a trust because continuation under its existing terms is impracticable or will impair the trust's administration.

c. Under the cy pres doctrine.

Under § 5804.13, a *cy pres* action is available to modify charitable trusts without the necessity of a court finding that the settlor had a general charitable intent. If there is an alternative charitable purpose set forth in the trust terms, this will prevail over the court's ability to apply *cy pres* to modify or terminate the trust.

d. To remove or replace the trustee.

Under § 5804.14, on petition of a beneficiary of a trust that has a value of less than \$100,000, a court can remove or replace the trustee.

e. To conform to settlor's intention.

Under § 5804.15, a court may reform the terms of a trust, even if they are unambiguous, to conform to the settlor's intention, but only if there is clear and convincing evidence that there was a mistake of fact or law in expression or inducement.

f. To achieve the settlor's tax objectives.

Under § 5804.16, the court can modify the terms of the trust to achieve the settlor's tax objectives and can provide that the modification is retroactive in effect.

K. Entering into Private Settlement Agreements.

One of the most exciting aspects of the Code is the ability for trustees, beneficiaries, settlors if available and creditors if appropriate, to enter into a private settlement agreement about certain matters pertaining to the administration of a trust.

There are restrictions on using such agreements to terminate a trust early, change beneficial interests or engage otherwise in activity that a court would not sanction, but as more trustees and others consider the possibilities, this tool in trust administration may become very popular. Effective March 22, 2012, § 5801.10 will contain a new provision (N) that will make it clear that parties to a trust can enter into an agreement not governed by § 5801.10 and such a private agreement (not a private settlement agreement) will still be a valid agreement under the common law. In addition, further changes will make it clear that a private settlement agreement will be available to some but not necessarily all of the parties to a trust.

The ability to use virtual representation has been expanded beyond court proceedings through the Code. As long as there is no conflict of interest, specified persons may represent others, thus making the ability to use private settlement agreements more compelling.

III. Trust Termination and Distribution

Trust termination is, of course, distinguishable from account termination. It is possible that a trustee might resign or be removed which could result in a trusteeship terminating but not the underlying trust.

A trust can terminate by action of the settlor, the trustee or others, by its terms or circumstances, or by court determination.

A. Termination Triggering Events.

1. Settlor revocation.

Under § 5806.02(A), if the trust terms do not address revocability, the settlor retains the right to revoke the trust. This will apply only to trusts created after the effective date of the enactment of the Code.

If the manner of revocation is identified in the trust terms, then only that manner is effective for revocation.

On occasion, someone other than the settlor, on the settlor's behalf, seeks to revoke the trust when the settlor is no longer capable of doing so.

If a representative of the settlor, such as an attorney-in-fact, seeks to revoke the trust, the ability of an agent to do so must be set forth in both the trust and Power of Attorney documents pursuant to § 5806.02(E).

Distribution of trust assets should be made pursuant to direction of the settlor or his representative.

2. **Expiration by trust terms.**

The most common form of trust termination is by trust terms such as death of the settlor or beneficiaries, age attainment of beneficiaries, the completion of a term of years for trust duration or other events spelled out in the trust terms. Termination can also occur as a result of exhaustion of trust *corpus*.

Distribution will be accomplished pursuant to trust terms as well.

B. Initiated Termination.

1. **By consent of settlor and all beneficiaries.**

If the settlor *and* all beneficiaries decide that they want to terminate an irrevocable, noncharitable trust, they can petition the court to approve such an action. Under § 5804.11(A), the court must approve the petition even if termination is inconsistent with a material purpose of the trust.

This is not applicable to Special Needs Trusts.

The trustee in this situation, can, but need not be a party to, such a petition. The trustee can petition the court on behalf of the other parties, however.

The trustee need also not consent to the action but must follow the court order of termination if issued by the petitioned court.

Distribution will be pursuant to court order which will follow the direction of the settlor and all beneficiaries.

2. **By consent of all beneficiaries.**

If the settlor is not available and the beneficiaries wish to terminate a trust, they must petition the court for approval. Under § 5804.11(B), the court must conclude that continuance of the trust is not necessary to achieve any material purpose of the trust. The court also has the opportunity to consider extrinsic evidence indicating the settlor's intent at the time the trust was executed in determining what constitutes the material purpose of the trust.

This petition can be made even for trusts that are irrevocable prior to the effective date of the Code and can be made by either the beneficiaries or the trustee.

Should the trustee take a position in favor or against a petition for termination? A finding that a trust no longer serves a material purpose does not necessarily mean that it has no remaining function whatsoever. Should the trustee defend the continuance of the trust under that circumstance in order to uphold the wishes of the settlor or should the trustee simply remain neutral and allow the beneficiaries to make their case to the court?

If the trustee opposes termination, or even remains neutral, should the trust pay for the cost of the petition by the beneficiaries? Section 5810.04 gives the court the authority to award costs, expenses and reasonable attorney's fees to any party, to be paid from the trust or from another party.

Section 5804.11(B) specifically states that a spendthrift provision may, but shall not be presumed to, constitute a material purpose of the trust.

If a finding for termination is made by the court, the trustee is obligated to distribute the property as agreed upon by the beneficiaries.

3. On petition of others.

a. Unanticipated circumstances.

Under § 5804.12, the trustee or a beneficiary might petition the court to terminate a trust because of circumstances not anticipated by the settlor. In order to grant such a petition, the court must find that termination will further the purposes of the trust.

If a beneficiary petitions the court and the trustee does not agree with the beneficiary's reasons, should the trustee object in order to fulfill its obligation to carry out the wishes of the settlor?

If the court grants such a petition, the duty falls upon the trustee to distribute the trust in a manner consistent with the purposes of the trust.

b. Uneconomic trust.

Under § 5804.14, the trustee of a trust with a value of less than \$100,000 may terminate the trust, *without court approval*, if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

This cannot be done with certain charitable trusts or with trusts having certain charitable beneficiaries.

Distribution under § 5804.14(C), should be in accordance with any provision specified in the trust terms, if available, or among the beneficiaries in accordance with their respective beneficial interests and in a manner the trustee determines is equitable.

C. Distribution on Termination.

1. Distribution proposal.

Often a trustee is reluctant to make a distribution until all the beneficiaries have approved the distribution proposal. A trustee is not obligated, however, to submit a proposal for distribution.

By submitting a proposal, along with notification to the beneficiary of the right to object to the proposal and the time-frame within which to make that objection (30 days after the proposal was sent), a trustee can terminate a beneficiary's right to object after the stated time frame. See § 5808.17.

In practice, a trustee can send a proposal to all affected beneficiaries, advise them that they must review and advise of their objection within 30 days of receipt of the proposal. If the trustee receives no notice of objection, distribution can proceed.

Keep in mind that failing to object to a proposal for distribution does not constitute a release by a beneficiary since a release requires an affirmative act. In addition, a beneficiary can still bring an action for matters not disclosed in the proposal for distribution. But submitting a proposal and requesting any objections, does allow the trustee to proceed expeditiously to distribute the trust property.

2. Beneficiary releases.

Under § 5808.17, beneficiaries can release trustees from liability for breach of trust at termination as long as the release was not induced by improper conduct of the trustee or inadequate disclosure to the beneficiary of material facts relating to the breach. The trustee can draft the release.

Effective March 22, 2012, § 5810.09 will clarify that beneficiary consents, releases, and ratifications are valid even if the trustee conduct being consented to, released, or ratified constitutes one or more breaches of fiduciary duty, violates one or more provisions of the Ohio Rev. Code or is taken without required court approval.

IV. Trustee Liability

A. Breach of Trust.

1. Definition.

Breach of trust is defined under § 5810.01(A) as a violation by a trustee of a duty the trustee owes to a beneficiary.

2. Remedies for breach.

Section 5810.01(B) lists the remedies for breach:

- a. Compel performance or enjoin the trustee from acting;
- b. Compel a redress or void the act;
- c. Order an accounting; reduce or deny compensation; and
- d. Suspend, remove or replace the trustee.

3. Damages for breach.

Section 5810.02 identifies the damages available for a breach:

- a. Make the trust whole;
- b. Disgorge any profit; and
- c. Obtain contributions from co-trustees if also culpable.

B. Absence of Breach.

1. Profit allowed.

Section 5810.03(A) allows the trustee to retain any profit made from the administration of a trust as long as there is no breach of trust.

2. No liability for loss/lack of profit.

Section 5810.03(B) does not hold a trustee accountable for loss or depreciation in value of trust property or for not having made a profit absent a breach of trust.

C. Actions Against the Trustee.

1. Limitations period with report.

Section 5810.05(A) limits a beneficiary action against a trustee to two years after the date the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the limitations period.

In light of this provision, trustees should make it a practice to include a statement with all trustee reports advising of the applicable limitations period for commencing an action for matters covered within the report.

2. Limitations period without report.

Section 5810.05(C) extends the limitations period to four years if no report is provided. The statute sets forth the triggering events for the four-year period which generally commences with the death of the beneficiary or some other event terminating rights as a beneficiary.

D. Trustee Defenses.

1. Trustee actions.

a. Reliance on trust terms.

Section 5810.06 protects the trustee from breach if the acts were in reasonable reliance upon the terms of the trust.

b. Reliance upon events.

Section 5810.07 relieves a trustee who has exercised reasonable care to ascertain the happening of an event that affects the administration of a trust but lacks knowledge of its occurrence.

2. Trust terms.

a. Terms limit liability.

The terms of a trust under § 5810.08 can relieve the trustee of liability as long as the terms do not exculpate for bad faith or reckless indifference by the trustee.

b. Terms inserted as a result of abuse.

Also under § 5810.08, the trustee cannot abuse a confidential relationship with the settlor and thereby obtain a release in the terms of the trust.

3. Beneficiary actions.

a. Consent.

Under § 5810.09, beneficiary consent will relieve a trustee from liability for breach.

b. Release.

Similarly, under § 5810.09, a valid release by a beneficiary will absolve the trustee of liability.

c. Ratification.

And finally, under § 5810.09, ratification by the beneficiary will relieve the trustee of liability.

d. Beneficiary knowledge.

In a.-c. above, the beneficiary's involvement must not have been induced by improper conduct of the trustee and the beneficiary must have known of their rights and the material facts relating to the breach.

E. Personal Liability.

1. Fiduciary capacity disclosed.

A trustee, under § 5810.10(A), is not personally liable on a contract if the fiduciary capacity is disclosed.

2. Personal fault for torts.

Under § 5810.10(B), a trustee is personally liable for torts committed during administration if the trustee is personally at fault.

3. Interest as general partner.

Section 5810.11(A) provides detailed provisions on disclosure of the trustee's ownership of the general partnership interest in a fiduciary capacity.

F. Good Faith Dealings with Trustee.

1. Scope of authority.

Under § 5810.12, any person can rely in good faith upon the representations that a trustee is not improperly exercising or exceeding trustee authority.

2. Extent of powers.

Similarly, under § 5810.12(B), any person is not required to determine the extent of a trustee's powers under the trust terms.

3. Proper application.

So too, under § 5810.12(C), any person delivering assets to a trustee does not have to ensure their proper application.

4. Current status of trustee.

Finally, under § 5810.12(D), any person dealing with a trustee can rely upon the representation that a trustee is the current trustee even if, in fact, that person is a former trustee.