

The University of Akron

From the Selected Works of Alan Newman

2004

Ohio Uniform Trust Code Takes Shape

Alan Newman, *University of Akron School of Law*



Available at: https://works.bepress.com/alan_newman/17/

The Ohio Uniform Trust Code Takes Shape

By Alan Newman, Reporter for the Ohio Uniform Trust Code Joint Committee of the Ohio Bankers League Legal, Legislative and Regulatory Committee and the Ohio State Bar Association Estate Planning, Trust, and Probate Law Section

The University of Akron School of Law

Copyright Acknowledgment: *This material is reprinted from the Probate Law Journal of Ohio with permission of Thomson Reuters. Copyright permission is on file.*

The Uniform Trust Code (UTC) has been under study in Ohio since shortly after its approval by the National Conference of Commissioners on Uniform State Laws in 2000. See, e.g., Susan S. Locke, et. al., *Uniform Trust Code*, 11 PLJO 49 (Mar./Apr. 2001); David M. English, *The Uniform Trust Code (2000) and Its Application to Ohio*, 12 PLJO 1 (Sept./Oct. 2001); and David M. English, *The Uniform Trust Code (2000) and its Application to Ohio*, 30 Capital University Law Review 1 (2000).

Substantial progress has been made towards the adoption of a modified version of the UTC in Ohio. At a meeting in December of 2003, a joint committee on the UTC consisting of representatives of the Estate Planning, Trust, and Probate Law Section of the Ohio State Bar Association and the Legal, Legislative, and Regulatory Committee of the Ohio Bankers League (OBL) completed the first part of its decision-making process for changes to be made to the UTC for the Ohio Uniform Trust Code (OUTC). The resulting initial draft of the OUTC is currently under review by the EPTPL section, the OBL, and the Ohio Association of Probate Judges. Based on preliminary discussions with the Legislative Services Commission of Ohio, the draft has been prepared to be enacted as part of newly created title 58 of the Revised Code, which would be devoted to trusts.

The primary purpose of this article is to summarize some of the more important provisions of the OUTC, particularly those that would change existing Ohio law. Generally, this summary is presented in the order in which the topics covered appear in the OUTC. A comprehensive list and discussion of changes the OUTC would make to existing Ohio law (and changes made to the UTC in drafting the OUTC) are included in a Report the author prepared for the Joint Committee. The Report, along with a draft of the OUTC, a second draft of the OUTC redlined to highlight changes made to the UTC in the

OUTC, and two related proposed new statutes, are accessible on the OSBA website at the following link:

- <http://osba.ohiobar.org/docushare/dscgi/ds.py/View/Collection-44>

General Effects of Enacting the OUTC

The OUTC is a comprehensive codification of the law of trusts. Because much of the current law of trusts in Ohio is case law, enactment of the OUTC would make Ohio trust law much more accessible – and certain – for lawyers, judges, trustees, settlors, beneficiaries, and the public. Enactment of the OUTC, however, would not eliminate the role of the common law in the continuing development of the law of trusts in Ohio. Rather, OUTC §5801.06 provides: “The common law of trusts and principles of equity supplement this Code, except to the extent modified by this Code or another statute of the Revised Code.” Thus, issues not covered by the OUTC would be resolved in the traditional, common law manner. According to the comment to 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 the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution.

While most of the provisions of the OUTC would codify existing Ohio law, other of its provisions would make law on subjects as to which there currently is none in Ohio. In addition, the OUTC would make a number of changes to existing Ohio law. many of which are discussed below.

Testamentary Trusts

The UTC is equally applicable to inter vivos and testamentary trusts. Chapter 2109 of the Revised Code includes numerous statutes applicable only to testamentary trusts. The Joint Committee decided that those statutes should not be affected by the OUTC, but that in other respects its provisions should apply to testamentary as well as inter vivos trusts. As a result, OUTC §5801.02 provides for the OUTC to apply to testamentary trusts to the extent provided by proposed new RC §2109.69, which

provides, in part, that: “The Ohio Uniform Trust Code, sections 5801.01 to 5811.06 of the Revised Code, applies also to testamentary trusts except to the extent that specific provision is made for them in sections 2109.01 to 2109.69 of the Revised Code or elsewhere in the Revised Code, or to the extent that it is clearly inapplicable to them.”

Default and Mandatory Rules

Most of the provisions of the OUTC are default rules that apply only to the extent that the settlor has not provided otherwise in the trust instrument. OUTC §5801.05. Division (b) of §5801.05, however, sets forth 14 rules that the settlor may not override. Five of the mandatory rules are discussed below (see **Modification and Termination, Office of the Trustee, and Trustee’s Duty to Keep the Beneficiaries Informed**). The other nine are: (i) the requirements for creating a trust; (ii) the duty of a trustee to act in good faith and in accordance with the purposes of the trust; (iii) the requirement that a trust have a purpose that is lawful, not contrary to public policy, and possible to achieve; (iv) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust; (v) the ineffectiveness of a clause purporting to exculpate a trustee for a breach of trust committed in bad faith or with reckless indifference, or that was included in the trust instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor; (vi) the rights of third parties in their dealings with the trustee; (vii) the periods of limitation for commencing a judicial proceeding; (viii) the court’s subject matter jurisdiction; and (ix) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

Nonjudicial Settlement Agreements

Before the UTC was being considered for adoption in Ohio, a committee of the OBL prepared a nonjudicial settlement agreement (NJSAs) statute for possible adoption in Ohio. The Joint Committee decided to include in OUTC §5801.11 a slightly modified version of the OBL’s NJSAs statute (which is based, in part, on a similar statute in Washington state) rather than the UTC’s NJSAs statute. Generally, the OBL’s NJSAs statute broadly authorizes NJSAs with respect to any trust matter except: (i) an early termination that would result in a distribution to a beneficiary that would not have been

made to the beneficiary's estate if the trust had continued and the beneficiary had died before its stated termination date; (ii) an agreement affecting the rights of a creditor without the creditor's consent; (iii) an agreement affecting the collection rights of federal, state, or local taxing authorities; or (iv) an agreement limiting the interest of a beneficiary in an effort to qualify the beneficiary for Medicaid.

Concerns over several of the NJSA provisions in the initial draft of the OUTC have been raised on behalf of the probate judges. Efforts are underway to address the judges' concerns with revisions to the NJSA statute. Among the issues being discussed are making it more clear that a NJSA cannot be used to accelerate a beneficiary's interest by terminating a trust early and providing that a party can submit a NJSA to the court for approval rather than simply filing it to obtain the effect of a final court order.

Representation

Chapter 5803 of the OUTC includes representation provisions under which another person may act on behalf of a minor, unborn, incapacitated, or unable-to-be-located beneficiary of a trust. Traditional forms of fiduciary representation are recognized. Thus, for example, a guardian may represent and bind a ward, a trustee may represent and bind the trust's beneficiaries, a personal representative of a decedent's estate may represent and bind persons interested in the estate, and an authorized agent may represent and bind the principal. OUTC §5803.03. Of perhaps more significance, the OUTC also recognizes virtual representation in three forms: parents may act on behalf of their minor and unborn children (OUTC §5803.03(6)), persons with substantially identical interests in the trust may act on behalf of each other (OUTC §5803.04), and the holder of a general testamentary power of appointment may act on behalf of both permissible appointees and takers in default (OUTC §5803.02). In each case, a prospective representative may act as such only to the extent there is no conflict of interest between the representative and the person represented. If there is such a conflict, or the court determines an interest is otherwise not represented, the court may appoint a representative. OUTC §5803.05.

The OUTC allows representatives to act on behalf of represented persons with respect to any matters arising under the Code, including the receipt of notice (OUTC

§5803.01(a)), the giving of consent (OUTC §5803.01(b)), and the resolution of disputes by either judicial proceedings (OUTC §5803.05) or nonjudicial settlement agreement (OUTC §5801.11(b)).

Charitable Trusts

Effecting a change in existing Ohio law (see *Three Bills, Inc. v. Parma*, 676 N.E.2d 1273 (Ohio Ct. App. 1996)), OUTC §5804.05(c) would allow the settlor of a charitable trust to enforce it.

The OUTC would also change Ohio law when the charitable purpose of a trust fails and the instrument does not provide for that contingency. Under *Craft v. Schroyer*, 74 N.E.2d 589 (Ohio Ct. App. 1947), the court may apply cy pres to reform the trust to accomplish the settlor's charitable intent only if it first determines that the settlor had a general charitable intent in addition to the specific charitable intent that failed. By contrast, under OUTC §5804.13, the settlor's general charitable intent is presumed, thus allowing cy pres to be applied, unless the instrument expressly provides for a reversion to the settlor or a gift over to other beneficiaries. (Under UTC §413(b), a provision in an instrument providing for such a reversion or gift over is valid only if the distribution will be made to the settlor during the settlor's life, or to someone else within 21 years of the trust's creation. The Joint Committee decided to delete those limitations from the OUTC.)

Trusts for the Care of an Animal

Generally, to be valid a noncharitable trust must have an ascertainable beneficiary who can enforce it. See OUTC §5804.02(a)(3). Ohio, however, like many other states, recognizes so-called "honorary trusts" under which a gift to care for a specific animal will not be invalid if the trustee is willing to serve. *In re Searight's Estate*, 95 N.E.2d 779 (Ohio Ct. App. 1950). Greater certainty with respect to the ability of a pet owner to use a trust to provide for the care of the pet is afforded by OUTC §5804.08. Under it, a trust to provide care for an animal that is alive during the settlor's lifetime is valid for the lifetime of the animal. If the settlor appoints someone to enforce the trust, he or she may do so; if

not, the court may appoint someone to do so upon the request of anyone with an interest in the welfare of the animal.

Modification and Termination

Because trusts are being created for longer periods of time (especially in jurisdictions like Ohio in which the Rule Against Perpetuities may not limit the duration of a trust) and because of the belief that a greater number of trusts are being created by non-lawyers, the UTC (and the OUTC) are designed to provide more flexibility with respect to the modification and termination of trusts than does the common law, while still respecting the paramount objective of honoring the settlor's intent. See UTC Article 4, General Comment. This balance has been struck by retaining, but loosening in several respects, the traditional, common law framework for modifying and terminating trusts.

For example, in many jurisdictions (and under OUTC §5804.11(b)), a trust may be terminated by the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. If the trust instrument includes a spendthrift provision, however, termination may be unavailable because in some jurisdictions spendthrift protection is conclusively treated as a material purpose of the trust. By contrast, under OUTC §5804.11(c), the presence of a spendthrift provision in the instrument may constitute a material purpose of the trust, but it will not be presumed to do so.

Several of the OUTC's provisions relaxing – to a limited, defined extent – the common law rules with respect to modifying and terminating trusts would expand the court's ability to modify trusts in Ohio. First, the court's ability to modify a trust because of circumstances unanticipated by the settlor would apply to dispositive as well as administrative terms of the trust. OUTC §5804.12(a). Second, the OUTC authorizes the court to reform testamentary trusts, as well as inter vivos trusts, when there has been a mistake of fact or law, even if the will or inter vivos trust is unambiguous. OUTC §5804.15. Finally, the court may modify a trust to achieve the settlor's tax objectives, if it determines that doing so is not contrary to the settlor's probable intention. OUTC §5804.16. Note that under OUTC §5801.05(b)(4), the court's powers to modify or terminate a trust are mandatory rules that the settlor may not waive or override.

OUTC §5804.14 includes the UTC's provision on the termination of an uneconomic inter vivos trust and provides for the repeal of the existing statute of the Revised Code on that subject (RC §1339.66). The most significant change this would make in Ohio law is that the trustee, without court involvement, would be able to terminate an uneconomic inter vivos trust of less than \$100,000 of assets. The separate Revised Code statute authorizing the court to terminate an uneconomic testamentary trust (RC §2109.62) would not be affected by enactment of the OUTC.

Rights of Creditors of Beneficiaries (Including the Settlor) of an Irrevocable Trust

Generally, spendthrift provisions are valid under OUTC §5805.02(c) to prevent a creditor or assignee of a beneficiary of a third-party created trust from reaching the beneficiary's interest, or an amount due to the beneficiary before he or she receives it. If the trustee withholds a mandatory distribution due to a beneficiary beyond a reasonable time after the designated distribution date, however, the beneficiary's creditors or assignees may reach it. OUTC §5805.06.

The common law recognizes an exception to spendthrift protection for claims of necessities providers. The OUTC, however, follows the UTC in not doing so (see OUTC §5805.03 and the comment to UTC §503), because a necessities exception would likely be used most often by the state in seeking reimbursement for Medicaid or other governmental assistance it had provided to a spendthrift trust beneficiary. OUTC §5805.03(c) acknowledges the possibility that a spendthrift clause may not bar such a claim by providing an exception to spendthrift protection for claims of the State of Ohio (or the United States) to the extent the Revised Code (or federal law) so provides. However, by not including a necessities exception to spendthrift protection, the OUTC itself does not provide the authority for such a claim to be made successfully.

A second exception to spendthrift protection under the OUTC is for claims of a child or spouse of a trust beneficiary who has a judgment or court order against the beneficiary for support or maintenance. OUTC §5805.03(b). This exception is consistent with current Ohio law, *Albertson v. Ryder*, 621 N.E.2d 480 (Ohio Ct. App. 1993) (child support), as well as with Restatement (Second) of Trusts §157, Restatement (Third) of

Trusts §59, federal bankruptcy law, and the law of many other states. See comment to UTC §503. (Note, however, that the OUTC, unlike the UTC, allows a spendthrift clause to bar the claim of a former spouse for alimony.) Finally, the OUTC also allows judgment creditors of a beneficiary who have provided services for the protection of the beneficiary's interest in the trust to reach distributions to or for the benefit of the beneficiary even if the instrument includes a spendthrift clause. OUTC §5805.03(b).

If distributions to the beneficiary are subject to the trustee's discretion, including for support, generally the beneficiary's creditors may not compel distributions regardless of whether the trustee has abused its discretion. OUTC §5805.04(b). Again, there is an exception for a beneficiary's child or spouse (but not for a former spouse) who has a judgment or court order for support or maintenance. Such a child or spouse may compel a distribution, but only upon a finding that the trustee has not complied with a standard of distribution or has abused a discretion. OUTC §5805.04(c).

Under the OUTC, a creditor of a beneficiary who is able to reach the beneficiary's interest in a third-party created trust – because the instrument does not include a spendthrift clause, the creditor's claim is not barred by such a clause, or the creditor is a child or spouse who can compel a distribution from a discretionary trust for the beneficiary – often would not be able to reach the maximum amount distributable to the beneficiary. Rather, the OUTC grants the court discretion to limit the creditor's award “to such relief as is appropriate under the circumstances.” OUTC §5805.01; see also OUTC §5805.04(c)(2). According to the comment to UTC §501, “[i]n exercising its discretion to limit relief, the court may appropriately consider the support needs of a beneficiary and the beneficiary's family.”

Consistent with the UTC (but not with statutes recently enacted in Alaska, Delaware, Rhode Island, and Nevada), OUTC §5805.05(a)(2) follows existing Ohio law (see *Miller v. Ohio Department of Human Services*, 664 N.E.2d 619 (Ohio Ct. App. 1995), as well as the common law in most other states, in allowing the creditors of the settlor of an irrevocable trust to reach the maximum amount the trustee could distribute to the settlor.

Revocable Trusts

The OUTC would make several changes to the law in Ohio with respect to revocable trusts. For example, if an instrument creating a trust does not specify whether it is revocable or irrevocable, in Ohio (as in most other states), it is irrevocable. *Lourdes College of Sylvania, Ohio v. Bishop*, 703 N.E. 362 (Ohio Com. Pl. 1997). By contrast, OUTC §5806.02(a), which would have prospective effect only, provides that a trust is revocable unless expressly made irrevocable. As explained by the comment to UTC §602, the rationale for this change is that a trust instrument that does not specify whether it is revocable or irrevocable “was likely drafted by a nonprofessional, who intended the trust as a will substitute.

Second, under existing Ohio law, after the death of the settlor of a revocable trust his or her creditors may not reach the trust assets. *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119 (Ohio 1939). By contrast, under OUTC §5805.05(a)(3), if the settlor’s probate estate is inadequate a creditor whose claim has been finally allowed under Chapter 2117 of the Revised Code may do so (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. To facilitate the distribution of revocable trust assets after the settlor’s death, OUTC §5805.05(a)(4) provides that a trustee that distributes the trust assets to its beneficiaries will not be liable for claims, costs, expenses, and support allowance that cannot be paid from the probate estate unless the trustee had first received a written notice from the personal representative of the settlor’s probate estate that the estate was inadequate to make those payments. In the case of such distributions, however, the beneficiaries who received them will be liable for their proportionate shares of the inadequacy.

Third, under *Estate of Davis*, 671 N.E.2d 1302 (Ohio Ct. App. 1996), a settlor who reserves the power to revoke or amend the trust during his lifetime, but who does not specify a means for doing so, may amend it by later executing a will that refers to the trust and provides for a different disposition of trust assets. By contrast, OUTC §5806.02(c)(2) provides that a revocable trust may not be amended or revoked by a will or codicil, even if the will or codicil refers to the trust or specifically devises property that

otherwise would be distributed under the terms of the trust, unless the trust's terms expressly authorize that means of amendment or revocation.

OUTC chapter 5806 contains a number of other noteworthy provisions on revocable trusts. First, OUTC §5806.01 provides that the capacity required to create, amend, revoke, or add property to a revocable trust is the same as that required to execute a valid will. Second, the Revised Code's existing statute of limitation on contesting a revocable trust (RC §2305.121) has been inserted into OUTC §5806.04 in lieu of the corresponding provision of the UTC. Third, under the UTC, if the settlor of a revocable trust becomes incapacitated, the trustee owes duties and must account to other beneficiaries. See UTC §603(a) and its comment. By contrast, OUTC §5806.03(a) provides that the trustee's duties are owed only to the settlor during his or her lifetime, regardless of capacity. Fourth, if the settlor of a revocable trust has appointed an agent under a power of attorney, OUTC §5806.02(e) allows the agent to exercise the settlor's powers with respect to the trust only to the extent the agent is expressly so authorized by both the terms of the trust and the power.

Finally, the OUTC, like the UTC, generally treats the holder of a power of withdrawal as a settlor of a revocable trust, thus allowing the holder's creditors to reach the maximum amount the holder could withdraw from the trust. OUTC §5805.05(b)(1); see OUTC §5805.05(a)(1). The OUTC includes two significant exceptions to this rule. First, to accommodate the use of Crummey trusts, upon the lapse, release, or waiver of the power, the holder is treated as the settlor only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of (i) the \$5,000 or 5% amount, or (ii) the annual exclusion amount, under the estate and gift tax provisions of the Internal Revenue Code. OUTC §5805.05(b)(2). Second, a beneficiary/trustee of a third-party created trust (e.g., a surviving spouse who is the trustee and beneficiary of a unified credit shelter/bypass trust created by a deceased spouse) will not be treated as the settlor of the trust if his or her power to make distributions to himself or herself is limited by an ascertainable standard related to his or her health, education, support, and maintenance. OUTC §5805.05(b)(3). (It is anticipated that this provision of the initial draft of the OUTC will be corrected to be consistent with the language used in OUTC §5808.14(b)(1) to describe the ascertainable standard.)

Office of the Trustee

Under OUTC §5807.02, the court is given great latitude in determining whether, and if so in what amount, a trustee will be required to provide a bond. Similarly, OUTC §5807.08 allows the court to set the trustee's compensation differently than as specified in the instrument if the court determines that the trustee's specified compensation is unreasonably high or low (or that the trustee's duties are substantially different from those contemplated when the trust was created). The court's powers over the trustee's bond and compensation are mandatory rules that may not be waived or overridden by the settlor in the instrument.

With respect to cotrustees, OUTC §5807.03 allows a majority to act. If one does not serve or continue to serve, the other(s) may act for the trust (OUTC §5807.03(b)), and the vacancy need not be filled unless the instrument so provides or there is no remaining trustee (OUTC §§5801.05(a) and 5807.04(b)). If a vacancy occurs that is required to be filled, and the instrument does not effectively provide for the successor, the qualified beneficiaries, by unanimous vote, may appoint a successor. OUTC §5807.04(c)(3). (Generally, "qualified beneficiaries" include all beneficiaries other than those who hold remote remainder interests. See OUTC §5801.03(13).) Only if the qualified beneficiaries are unable to agree on a successor would it be necessary to have a judicial proceeding to appoint one. Similarly, unless the instrument provides otherwise, a trustee may resign without approval of the court if it gives at least 30 days' notice to the qualified beneficiaries, the settlor (if living), and all cotrustees. OUTC §5807.05(a).

The OUTC authorizes the court (upon the request of the settlor, a cotrustee, or a beneficiary) to remove a trustee in three circumstances: (i) if the trustee has committed a serious breach of trust, (ii) if cotrustees do not cooperate and their failure to do so substantially impairs the administration of the trust, or (iii) if "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." OUTC §5807.06(b). ("Interests of the beneficiaries" is a defined term under OUTC §5801.03 that means the beneficial interests provided in the trust's terms.) A UTC provision (§706(b)(4)) expanding the traditional grounds for removing a trustee to

situations in which, among other things, there has been a substantial change in circumstances or all qualified beneficiaries request the removal, is not included in the OUTC.

Trustee's Duty to Keep the Beneficiaries Informed

OUTC §5808.13(a) includes two general reporting obligations of the trustee. First, the trustee is required “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.” (Under the UTC, this duty is owed not just to current beneficiaries, but to all qualified beneficiaries. As mentioned above, “qualified beneficiaries” generally include all beneficiaries other than those who hold remote remainder interests.) Second, “[u]nless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.”

Five specific reporting obligations of the trustee are listed in OUTC §§5808.13(b) and (c):

1. If a beneficiary requests a copy of the trust instrument, the trustee is required to furnish it promptly.
2. Within 60 days of accepting a trusteeship, the trustee is required to (i) notify the current beneficiaries that the trustee is serving, and (ii) provide the current beneficiaries with the trustee’s name, address, and telephone number.
3. Within 60 days of the creation of an irrevocable trust, or of a revocable trust becoming irrevocable, the trustee is required to notify the current beneficiaries of (i) the trust’s existence, (ii) the identity of the settlor, (iii) their right to request a copy of the trust instrument, and (iv) their right to receive accountings.
4. If there will be a change in the method or rate of the trustee’s compensation, the trustee is required to notify the current beneficiaries in advance.

5. The trustee is required to send trust accountings to the current beneficiaries, and to any other beneficiaries who request them, at least annually and at the termination of the trust.

(Under the UTC, the reporting obligations described in items 2, 3, and 4, above, are owed to all qualified beneficiaries, rather than just to current beneficiaries.)

OUTC §§5801.05(b)(8) and (9) set forth the trustee reporting rules that are mandatory. First, the trustee’s “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 the trust” may not be waived or overridden by the settlor. Second, the trustee’s duty to notify current beneficiaries who are at least 25 years old “of the existence of the trust, of the identity of the trustee, and of their right to request trustee’s reports” also may not be waived or overridden.

According to the comment to UTC §105, the settlor “may waive . . . the duty to provide a beneficiary upon request with a copy of the trust instrument . . . , and the requirement that the trustee provide annual reports” However, consistent with the first mandatory duty described in the preceding paragraph, the comment goes on to provide that: “The furnishing of a copy of the entire trust instrument and preparation of annual reports may be required in a particular case . . . if such information is requested by a beneficiary and is reasonably related to the trust’s administration.” If a beneficiary is under the age of 25, the settlor may waive all of the trustee’s specific duties to report to the beneficiary, including even the duty to inform the beneficiary of the existence of the trust. However, again because of the trustee’s mandatory duty to respond to the request of any beneficiary for trustee’s reports and other information reasonably related to the administration of the trust, the comment notes that if such a beneficiary “learns of the trust and requests information, the trustee must respond.”

Under the proposed new statute in Chapter 2109 to make the OUTC generally applicable to testamentary trusts, the OUTC’s trustee reporting duties would be applicable to testamentary as well as inter vivos trusts.

Trustee Powers

Ohio is one of the few states that does not have a statutory list of trustee's powers. The OUTC includes a list of general powers in §5808.15 and a list of specific powers in §5808.16.

Liability of Trustees

Chapter 5810 of the OUTC includes a variety of provisions with respect to the liability of trustees (and the rights of persons who deal with the trustee). Included are statutes addressing (i) available remedies for a breach of trust, including the court's power to "order any other appropriate relief" (§5810.01); (ii) damages for breach, including contribution among cotrustees (§5810.02); (iii) the court's power to award attorney's fees and costs to any party, to be paid by another party or from the trust (§5810.04); (iv) the statute of limitation for actions against the trustee (§5810.05); (v) the unenforceability of an exculpation clause that relieves a trustee from liability for a breach committed in bad faith or with reckless indifference, or that was inserted into the instrument as the result of an abuse by the trustee of a confidential or fiduciary relationship with the settlor (§5810.08); and (vi) the protection a trustee receives from a claim by a beneficiary for a breach if the beneficiary gave a consent, release, or ratification with respect to the breach (§5810.09).

Retroactivity

If the OUTC were applicable only to trusts created after its effective date, there would be two bodies of trust law governing Ohio trusts for the indefinite future. In part to avoid that result, the OUTC provides for it to apply, generally, to existing as well as newly created trusts. OUTC §5811.06. Because settlors of existing trusts may have relied on the rule that trusts are irrevocable unless expressly made revocable, however, OUTC §5806.02(a), which reverses that rule, would have prospective effect only.

Conclusion

While the OUTC would, for the most part, codify existing common law in Ohio, it also would make a number of changes to Ohio law, many of which are discussed in this article. Adoption of the OUTC also would provide law in Ohio in many circumstances

where none now exists. Of at least equal importance, however, enactment of the OUTC would provide Ohio settlors, trustees, beneficiaries, judges, and lawyers with an organized, comprehensive codification of trust law. The result should be greater certainty for settlors with respect to the trusts they create; for trustees with respect to their duties and responsibilities in administering trusts; for beneficiaries with respect to their rights and how to enforce them; for lawyers with respect to advising settlors, trustees, and beneficiaries; and for judges with respect to resolving trust disputes and overseeing the administration of trusts that require it.