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The Uniform Trust Code: An Analysis of Ohio's Version

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The Uniform Trust Code: An Analysis of Ohio's Version

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I. INTRODUCTION

Shortly after the National Conference of Commissioners on Uniform State Laws approved the Uniform Trust Code (the "UTC") in August of 2000, members of the Estate Planning, Trust, and Probate Law ("EPTPL") Section of the Ohio State Bar Association, and members of the Legal, Legislative, and Regulatory ("LLR") Committee of the Ohio Bankers League, began studying it.[1] In 2003, a joint committee of members of the EPTPL Section and the LLR Committee (the "Joint Committee") was formed to continue that study. Over the next three years, the Joint Committee worked on a modified version

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[1] *See* Susan S. Locke, et al., *Uniform Trust Code*, 11 PROB. L.J. OF OHIO 49, 49 (2001).

of the UTC that resulted in the enactment in 2006 of House Bill 416, which includes the new Ohio Trust Code (the "OTC," or the "Code").[2]

Prior to the OTC, trust law in Ohio included relatively few statutes and consisted primarily of case law that had developed in the usual common law fashion by which courts resolve disputes arising from the specific facts of the cases before them. The OTC addresses many issues that formerly were either not addressed by Ohio law or were addressed only in difficult to find case law. For the most part, the OTC codified existing law. In some respects, however, it has changed Ohio's trust law. The purpose of this Article is to analyze the new OTC and its impact in Ohio, with a particular focus on the ways it has changed Ohio law and ways it differs from the UTC.[3]

II. EFFECTIVE DATE AND APPLICABILITY TO EXISTING AND TESTAMENTARY TRUSTS

Generally, the OTC is effective January 1, 2007,[4] and applies to existing as well as newly created trusts.[5] If the OTC had applied only to newly created trusts, Ohio would have had two distinct bodies of trust law that trustees, beneficiaries, settlors, lawyers, and judges would have had to work with for the indefinite future.[6] Three of the Code's provisions, however, are expressly made applicable prospectively only. First, because of concerns that the OTC's allowing the settlor and all beneficiaries to modify or terminate an otherwise irrevocable trust might result in adverse federal estate tax consequences,[7] its provision on that subject applies only to irrevocable trusts created on or after the effective

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[2] H.B. 416, 126th Gen. Assem., Reg. Sess. (Ohio 2006).

[3] For an earlier analysis of the impact the enactment of the UTC would have on trust law in Ohio, written by the Reporter of the Uniform Trust Code, see David M. English, *The Uniform Trust Code (2000) and Its Application to Ohio*, 30 CAP. U. L. REV. 1 (2002) [hereinafter English, *UTC Application to Ohio*]. Professor English's article was written before the UTC was amended in 2001, 2003, 2004, and 2005, and examined the impact the original UTC, without modification, would have had on Ohio law. As discussed in this Article, the OTC diverges from the UTC in many significant respects.

[4] Ohio H.B. 416 § 3.

[5] OHIO REV. CODE ANN. §§ 5811.03(A)(1), (A)(4) (West 2007). It also applies to judicial proceedings concerning trusts that were commenced before its enactment, "unless the court finds that application of a particular provision . . . would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties." *Id.* § 5811.03(A)(3).

[6] The retroactive effect of the OTC, however, is subject to several limitations. According to the comment to the comparable provision of the UTC:

> 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 Codes enactment.

UNIF. TRUST CODE § 1106 cmt. (2005). For an analysis of constitutional issues with respect to the application of Nebraska's version of the UTC to preexisting trusts, see John M. Gradwohl and William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts, 82 Neb. L. Rev. 312 (2003).* Note that at least one jurisdiction that has enacted a modified version of the UTC has made it apply only to newly created trusts. *See* WYO. STAT. ANN. § 4-10-1103 (2006) (providing that the provisions of the Wyoming Trust Code apply only to trusts created after July 1, 2003, unless otherwise consented to by the beneficiaries).

[7] *See* UNIF. TRUST CODE § 411 cmt. (2005).

date of the Code.[8] Second, because some settlors may have relied on the common law rule that trusts are irrevocable unless expressly made revocable, the OTC provision reversing that rule does not apply retroactively.[9] Third, trustees of existing trusts are not required to give formal notice to beneficiaries of the existence of the trust, the identity of the settlor, or the trustee's name, address, and telephone number. The OTC provisions requiring such notice within sixty days of the trustee's acceptance or within sixty days of the creation of an irrevocable trust or a revocable trust becoming irrevocable, do not apply to trustee acceptances or to trusts that became irrevocable, before January 1, 2007.[10]

The UTC makes no distinction between testamentary and inter vivos trusts and clearly was designed to apply equally to both.[11] If the OTC had taken that approach, Ohio trust law, with respect to testamentary and inter vivos trusts, would be uniform.[12] Such an approach, however, would have made fundamental changes with respect to the traditional role of the court in supervising the administration of testamentary trusts,[13] would have required substantial changes to chapter 21 of the Revised Code, and would have necessitated addressing and resolving issues of retroactivity as to existing testamentary trusts. Conversely, if the OTC had been 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 have varied substantially depending on whether the trust involved was testamentary or inter vivos.[14]

In two steps, Ohio House Bill 416 takes a third approach. First, the OTC includes a provision under which it applies "to testamentary trusts to the extent provided by section 2109.69 of the Revised Code."[15] Second, new section 2109.69 provides that the OTC applies:

> [T]o testamentary trusts except to the extent that any provision of [the OTC] conflicts with any provision of Chapter 2109 of the Revised Code, or with any other provision of the Revised Code, that applies specifically

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[8] OHIO REV. CODE ANN. § 5804.11(A) (West 2007).

[9] *Id.* § 5806.02(A).

[10] *Id.* § 5808.13(F).

[11] Without distinguishing between testamentary and inter vivos trusts, the UTC "applies to express trusts, charitable and noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires that trust to be administered in the manner of an express trust." UNIF. TRUST CODE § 102 (2005).

[12] Note that whether a trust is an inter vivos trust or a testamentary trust under Ohio law is not entirely clear. In a 1976 Ohio Supreme Court case, the court held that a will that simply devised the residue of the testator's estate to the trustee of an inter vivos trust purported to have been created the same day incorporated by reference the trust instrument into the will. Hageman v. Cleveland Trust Co., 343 N.E.2d 121, 124 (Ohio 1976). In *Hageman v. Cleveland Trust Co*, however, the trust was not funded. *Id.* at 123. On that basis, a court of appeals, in an unpublished decision, distinguished *Hageman* and found that if an inter vivos trust contained assets at the death of the settlor, the existence of a pour over provision in the settlor/testator's will would not convert the inter vivos trust to a testamentary trust. Hodde v. Hodde, No. 12-89-4, 1991 WL 11232, at *3 (Ohio Ct. App. Jan. 18, 1991).

[13] *See, e.g.*, OHIO REV. CODE ANN. § 2109.303 (West 2007) (requiring trustees of testamentary trusts to file with the court accounts at least once every two years).

[14] For a discussion of an example of when that will be the case following enactment of the OTC, *see infra* notes 142-49 and accompanying text (addressing the different rules for the early termination of uneconomic testamentary and inter vivos trusts).

[15] OHIO REV. CODE ANN. § 5801.02 (West 2007).

> to testamentary trusts and except to the extent that any provision of [the Code] is clearly inapplicable to testamentary trusts.[16]

This approach leaves undisturbed procedures in title 21 like those providing for the appointment of testamentary trustees,[17] their bonds,[18] and their inventories.[19] In most respects, however, the OTC will be equally applicable to testamentary and inter vivos trusts.

III. CODIFICATION OF THE COMMON LAW OF TRUSTS AND THE COURT'S CONTINUING ROLE

The most obvious, and perhaps most significant, consequence of the enactment of the OTC is that a significant body of trust law in Ohio is now codified. By addressing such subjects as the rights of creditors of trust beneficiaries to reach their interests and the creation, modification, and termination of trusts, the OTC provides rules on subjects that previously were governed primarily by judge-made law. Further, an objective of the OTC is "to keep administration of trusts outside of the courts."[20] One way in which that objective is accomplished is by allowing the trustee to take many actions simply by notifying beneficiaries or obtaining their consent.[21] The adoption of the OTC, however, clearly will not eliminate either the court's role, or that of the common law, in the administration of Ohio trusts and the continuing development of Ohio trust law.

With respect to the ongoing role of the court, the OTC expressly empowers it to "intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law."[22] Moreover, a mandatory rule of the OTC that the settlor may not override in the terms of the trust acknowledges "[t]he power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice."[23] Consistent with that broad, traditional power of the court, the OTC provides that "[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."[24]

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[16] *Id.* § 2109.69.

[17] *See id.* § 2109.02.

[18] *See id.* § 2109.04.

[19] *See id.* § 2109.58.

[20] *See* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 158 (2002) [hereinafter English, *Significant Provisions*].

[21] *See id*.

[22] OHIO REV. CODE ANN. § 5802.01(A) (West 2007). Note that "interested person" is not defined in the OTC or the UTC.

[23] *See* OHIO REV. CODE ANN. § 5801.04(B)(13) (West 2007). Similarly, other mandatory rules under section 5801.04(B) further illustrate the role the courts will continue to play in developing and applying trust law in Ohio by prohibiting the settlor from interfering with the power of the court, (1) to terminate or modify trusts, *see id*. § 5801.04(B)(4); (2) to require, dispense with, or modify or terminate a bond, *see id*. § 5801.04(B)(6); or (3) to adjust the trustee's compensation (if it is set unreasonably high or low in the instrument), without regard to the terms of the trust, *see id*. § 5801.04(B)(7). Further, the settlor may not deprive the court of subject-matter jurisdiction. *See id.* § 5801.04(B)(14).

[24] *See* OHIO REV. CODE ANN. § 5802.01(C).

Although the UTC broadly covers a variety of questions that arise more frequently than in the past due to the increasingly common use of trusts,[25] it is not expected or intended to be the sole source of trust law in enacting jurisdictions. In that regard, the OTC expressly acknowledges the ongoing role of the common law: "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 statute of the Revised Code."[26] According to the comment to the comparable provision of the UTC, the first source of the common law of trusts, including principles of equity, which will be of particular use in deciding questions not resolved by the UTC, will be prior case law in the enacting jurisdiction.[27] Other more general sources noted by the comment are "the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution."[28]

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, an uninsured spendthrift trust beneficiary who was driving under the influence of alcohol caused an accident that resulted in serious injuries to the plaintiffs.[29] In allowing the plaintiffs to reach the tortfeasor's interests in two spendthrift trusts, the Mississippi Supreme Court, on policy grounds, created a tort claimant exception to spendthrift protection.[30]

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[25] Indeed, "[t]he primary stimulus to the Commissioners' drafting of the Uniform Trust Code is the greater use of trusts in recent years." UNIF. TRUST CODE prefatory note (2005).

[26] *See* OHIO REV. CODE ANN. § 5801.05 (West 2007). It is likely that an important question courts will be called upon to decide in the wake of the enactment of the OTC is whether and to what extent a particular common law doctrine or principle of equity has been modified by the OTC.

[27] UNIF. TRUST CODE § 106 cmt. (2005).

[28] *Id*. 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." *Id.* 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. Am. Ins. Co. v. Cuyahoga Cmty. Coll. Dist., 774 N.E.2d 802, 805, 119 Ohio Misc. 2d 118, 122 (2002). Accordingly, the usefulness of the UTC comments to interpret the OTC is limited, at least in circumstances in which a provision of the UTC that is included in the OTC is found to be inconsistent with the applicable UTC comment.

[29] Sligh v. First Nat'l Bank of Holmes County, 704 So. 2d 1020, 1022-23 (Miss. 1997), *superseded by statute*, MISS. CODE ANN. § 91-9-503 (2003), *as recognized in* Duvall v. McGee, 826 A.2d 416, 429 (Md. 2003).

[30] The court's decision in *Sligh v. First National Bank of Holmes County* went well beyond holding that the spendthrift provisions in the trust instruments did not prevent the plaintiffs from reaching the tortfeasor's beneficial interests in the trusts. The trust instruments did not provide for mandatory distributions of income or principal to the tortfeasor/beneficiary, but instead gave the trustee the discretion to make distributions of income and principal in his best interest. *Sligh*, 704 So. 2d at 1029. Each trust instrument also named two remainder beneficiaries. *Id*. at 1023. Despite not only the spendthrift provisions, but also the discretionary nature of the trusts and the interests of the remainder beneficiaries, the court held that all of the trusts' assets were subject to the plaintiffs' claims. *Id*. at 1029. 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. MISS. CODE ANN. § 91-9-507 (Supp. 2000). The speed with which the Mississippi legislature acted to overturn *Sligh* has been characterized by Professor Halbach as "almost amusing." Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1894 (2000).

In the New Hampshire case, the beneficiary of a spendthrift trust was convicted and imprisoned for sexually assaulting a minor child.[31] The minor's mother obtained a default judgment against the beneficiary and tried to attach the beneficiary's interest in the spendthrift trust.[32] 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.[33] 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."[34] Finally, the court rejected the plaintiff's public policy argument (that was supported by the Restatement of Trusts[35]) 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.'"[36] As discussed below, the OTC also does not include a tort creditor exception to spendthrift protection.[37]

Similarly, under the Restatement 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.[38] Under the OTC, however, spendthrift provisions are enforceable "except as otherwise provided in this chapter and in section 5810.04 of the Revised Code,"[39] and no other provision of the OTC excepts claims for a set-off from the spendthrift bar. Further, the OTC provides that the list of spendthrift exceptions in the Code is exclusive.[40] The OTC's clear statement of the effectiveness of a spendthrift provision, together with its explicit list of exceptions and the statement that the list is exclusive, presumably would preclude a court from creating an additional exception under the common law or principles of equity for a set-off against the interest of a beneficiary/trustee who has breached a fiduciary duty.[41]

An example of a circumstance in which the common law or principles of equity could be applied to supplement the OTC is in determining who is the "settlor" of a trust. Under the OTC, creditors of the settlor of a trust can reach the settlor's beneficial interest.[42] The term "settlor" is defined to mean "a person . . . who creates, or contributes

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[31] State v. Krueger, 776 A.2d 720, 720 (N.H. 2001).

[32] Scheffel v. Krueger, 782 A.2d 410, 411(N.H. 2001).

[33] *Id.* at 412.

[34] *Id.*

[35] *See* RESTATEMENT (THIRD) OF TRUSTS § 59 cmt. a (2003).

[36] *Scheffel*, 782 A.2d at 412.

[37] *See infra* notes 198-99 and accompanying text.

[38] *See* RESTATEMENT (THIRD) OF TRUSTS §§ 59 cmt. a(2), 59(b) (2003).

[39] OHIO REV. CODE ANN. § 5805.01(C) (West 2007).

[40] *Id.* § 5805.02(E).

[41] 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 Am. Ins. Co. v. Thompson Trust, No. C-040127 (Ohio Ct. App. Jan. 27, 2006). *See generally* Alan Newman, *Powers of Withdrawal, Claims for Set-Off, and Spendthrift Protection*, 16 PROB. L.J. OF OHIO 143 (2006).

[42] OHIO REV. CODE ANN. § 5805.06 (A) (West 2007).

property to, a trust."[43] Absent from the OTC are rules for situations in which a person may be a settlor of a trust in substance, but not in form.[44] Arguably, the OTC provision under which the common law and principles of equity continue to apply after enactment of the OTC, would allow a court to apply such rules, because they help identify persons who create or contribute property to a trust.

IV. DEFAULT AND MANDATORY RULES

Consistent with the fundamental principle that trust property should be administered in accordance with the settlor's intent,[45] the OTC is primarily a set of default rules. Thus, generally its provisions apply only to the extent that the settlor has not provided otherwise in the terms of the trust.[46] Like the UTC, however, the OTC includes a list of mandatory rules that the settlor may not override in the terms of the trust.[47] The OTC mandatory rules are:

> (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;
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> (3) The requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;

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[43] *Id.* § 5801.01(S).

[44] Although such rules also are absent from the UTC, its comments discuss circumstances in which a person who in substance, but not in form, is a settlor of a trust will be so treated. *See* UNIF. TRUST CODE §§ 103(15), 103 cmt. (2005).

[45] To ascertain the meaning of the terms of a trust instrument or other donative document, "[t]he controlling consideration . . . is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law." RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003). The settlor's intent is paramount because "[t]he organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please." *Id.* at cmt. a. For a discussion of the extent to which the settlor's intent is respected under the UTC, *see generally* Alan Newman, *The Intent of the Settlor Under the Uniform Trust Code: Whose Property is It, Anyway?*, 38 AKRON L. REV. 649 (2005).

[46] OHIO REV. CODE ANN. § 5801.04(A) (West 2007). Note that in two respects the "terms of the trust" are not limited to the terms of a trust instrument. First, oral trusts are permitted if their creation can be proven with clear and convincing evidence. *Id.* § 5804.07. (Under pre-OTC 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, 245 (Ohio 1953).) Second, the "terms of a trust" are defined by the OTC to mean "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." OHIO REV. CODE ANN. § 5801.01(V) (West 2007). The comment to the comparable UTC provision notes the kinds of other evidence that may bear on determining the terms of a trust: "[o]ral 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." UNIF. TRUST CODE § 103 cmt. (2005).

[47] OHIO REV. CODE ANN. § 5801.04(B) (West 2007). The concept that some trust rules are so fundamental that the settlor may not override them is not new with the UTC. However, as noted by Professor David English, the UTC Reporter, prior to the UTC neither the Restatements, treatise writers, nor state legislatures had attempted to describe them. English, *Significant Provisions*, *supra* note 20, at 155. *See generally* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004).

> (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. [sic] 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;
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> (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.[48]

Most of the OTC mandatory rules are identical to those of the UTC. In two respects, however, they differ. First, and most important, the OTC includes significant changes to the UTC mandatory rules on the trustee's duties to provide information to beneficiaries.[49]

Second, section 404 of the UTC provides, in part, that: "A trust and its terms must be for the benefit of its beneficiaries."[50] Under UTC section 105(b)(3), this rule is a mandatory requirement of all trusts that may not be changed by the settlor.[51] These

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[48] OHIO REV. CODE ANN. § 5801.04(B) (West 2007).
[49] *See infra* notes 335-51 and accompanying text.
[50] UNIF. TRUST CODE § 404 (2005).
[51] *Id.* § 105(b)(3).

provisions raised concerns that they might undermine trusts being administered in accordance with the settlors' intent. In response, the Joint Committee decided to delete the requirement from the mandatory rules of the OTC that a trust and its terms be for the benefit of the beneficiaries[52] and instead modified the corresponding language of section 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."[53]

According to the comment to section 404 of the UTC, and to the 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 administrative or other nondispositive terms in the trust 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.[54] Professor Langbein, a Uniform Law Commissioner and a member of the UTC drafting committee, provides the following explanation for the mandatory benefit-of-the-beneficiaries rule:

> The dominant substantive principle of the law of gratuitous transfers is to carry out the donor's intent. 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.[55]

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 the OTC may limit the ability of beneficiaries of an Ohio trust to avoid application of frivolous or capricious value-impairing administrative or other non-dispositive terms of a trust. For several reasons, however, that may not prove to be the case. First, in a mandatory rule that the settlor may not override, the OTC authorizes the court 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."[56] Second, if the application of the value-impairing

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[52] *Compare* UNIF. TRUST CODE § 105(b)(3) (2005), *with* OHIO REV. CODE ANN. § 5801.04(B)(3) (West 2007).

[53] OHIO REV. CODE ANN. § 5804.04 (West 2007). Note that "interests of the beneficiaries" is a defined term under the OTC: "'Interests of the beneficiaries' means the beneficial interests provided in the terms of the trust." *Id.* § 5801.01(K).

[54] *See* UNIF. TRUST CODE § 404 cmt. (2005); RESTATEMENT (THIRD) OF TRUSTS § 27(2) cmt. b (2003). The Restatement cites two cases in which settlor imposed terms of a trust were not enforced on this ground: *Colonial Trust Co. v. Brown*, 135 A. 555 (Conn. 1926) (involving a trust term under which improvements on trust property could not be more than three stories high or leased for more than a year), and *In re Estate of Pulitzer*, 249 N.Y.S. 87 (Surr. Ct. 1931) (involving a trust term prohibiting the trustee from selling closely held stock).

[55] Langbein, *supra* note 47 at 1109 (footnote omitted).

[56] OHIO REV. CODE ANN. § 5804.12(B) (West 2007). In that regard, however, note that the comment to the comparable provision of the UTC provides that this provision is a specific application of

restriction would occur in the context of circumstances not anticipated by the settlor, the OTC authorizes the court to modify or terminate the trust if doing so would further the purposes of the trust.[57] Third, the trustee and all of the beneficiaries may be able to enter into a binding private settlement agreement under which the problematic administrative or other non-dispositive terms will not be applied.[58]

V. CLASSES OF BENEFICIARIES

Under the OTC, in a variety of circumstances the rights of a person interested in a trust, and the corresponding duties of the trustee, depend on whether the person is a "beneficiary" of the trust, and, if so, whether the person is a "current beneficiary," a "qualified beneficiary," or a beneficiary who is neither a current nor a qualified beneficiary.[59] A "beneficiary" includes anyone with a beneficial interest in the trust.[60] A "current beneficiary" is a distributee or permissible distributee of trust income or principal on the date the beneficiary's status is determined.[61] "Qualified beneficiaries" include current beneficiaries and beneficiaries who would become current beneficiaries if the interests of the current beneficiaries, or the trust itself, terminated on the date the determination is being made.[62] Beneficiaries who are neither current nor qualified

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section 404's requirement that a trust and its terms be for the benefit of the beneficiaries, thus acknowledging the possibility that section 404 could be applied in circumstances not covered by section 412(b). *See* UNIF. TRUST CODE § 412 cmt. (2005).

[57] *See* OHIO REV. CODE ANN. § 5804.12(A) (West 2007).

[58] *See id.* § 5801.10(C). Note, however, that a private settlement agreement "is valid only to the extent that it . . . includes terms and conditions that could be properly approved by the court under [the OTC] or other applicable law." *Id.*

[59] For example, most of the trustee's reporting obligations are owed only to current beneficiaries. *See id.* § 5808.13. In the event of a vacancy in a trusteeship, if the trust's terms do not name a successor or designate someone to name a successor, the qualified beneficiaries may do so. *Id.* § 5807.04(C)(3). A private settlement agreement is binding only if, among other requirements, all beneficiaries are parties to it. OHIO REV. CODE ANN. § 5801.10(B)(2) (West 2007). Although many notice provisions of the OTC expressly apply only to current or qualified beneficiaries, other beneficiaries may obtain the right to receive the notices that the trustee is only required to furnish to current or qualified beneficiaries simply by sending the trustee a request for notice. *Id.* § 5801.09(A). Trusts without ascertainable beneficiaries for the care of an animal or for other noncharitable purposes are valid under the OTC and may be enforced by a person appointed by the terms of the trust or by the court. *See infra* notes 98-100 and accompanying text. Such a person, while not a beneficiary, has the rights of a current beneficiary. OHIO REV. CODE ANN. § 5801.09(B) (West 2007).

[60] *Id.* § 5801.01(C). The beneficial interest may be a present or future, vested or contingent interest. *Id.* As noted by the comment to the comparable provision of the UTC, "[i]n addition to living and ascertained individuals, beneficiaries may be unborn or unascertained." UNIF. TRUST CODE § 103 cmt. (2005). The UTC comment also provides that a person whose interest in a trust is not created by its terms nevertheless may be a beneficiary. *Id.* Examples include persons who receive their interest "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." *Id.*

[61] OHIO REV. CODE ANN. § 5801.01(F) (West 2007).

[62] More precisely, a qualified beneficiary under the OTC is:

> 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.

beneficiaries include persons with more remote beneficial interests in the trust. To illustrate, assume that D created a trust for Spouse for life, remainder to Child, if Child survives Spouse, but if Child does not survive Spouse, remainder to D's more remote descendants. During Spouse's life, Spouse would be the only current beneficiary. During the lifetimes of Spouse and Child, they would be the only qualified beneficiaries, and D's more remote descendants would be beneficiaries who were neither current nor qualified beneficiaries.

Also treated as beneficiaries under the OTC are persons who, in a capacity other than as a trustee, hold a power of appointment over trust property.[63] The rationale for doing so, as stated in the comment to the comparable provision of the UTC, is "the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries."[64] Although treating the holder of a power of appointment over trust property as a beneficiary is a change of the common law,[65] in most cases persons who hold non-fiduciary powers of appointment over trust assets also hold beneficial interests in the trust. As a result, the OTC treatment of holders of non-fiduciary powers as beneficiaries likely will have limited significance.

Under the UTC, 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.[66] As noted by the comment to the UTC definitions provision, the rationale for this approach—instead of simply treating such a charitable organization as a qualified beneficiary of the trust—is that "a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large."[67] The OTC takes a different approach. Its definition of "beneficiary" includes "a charitable organization that is expressly designated in the terms of the trust to receive distributions."[68] Specifically excluded from being a "beneficiary" of a trust are 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.[69]

> (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.

Id. § 5801.01(Q).

[63] *Id.* § 5801.01(C).

[64] UNIF. TRUST CODE § 103 cmt. (2005).

[65] *Id.*

[66] *Id.* § 110(b).

[67] *Id.* § 103 cmt.

[68] OHIO REV. CODE ANN. § 5801.01(C) (West 2007). Whether such a specifically designated 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. *Id.*

[69] *Id.* Also omitted from the OTC is section 110(d) of the UTC, which grants the attorney general the rights of a qualified beneficiary with respect to a charitable trust. The Revised Code's provisions addressing the role of the attorney general with respect to charitable trusts, and the duties of the trustee of such trusts to the attorney general, were not repealed with the enactment of the OTC and continue to apply. *See id.* §§ 109.23-.33.

VI. REPRESENTATION

The OTC objective for trusts to be administered outside of the courts[70] is accomplished, in part, by allowing the trustee to perform routine actions simply by giving notice to some or all beneficiaries,[71] and by providing for other actions to be taken by some or all beneficiaries.[72] Beneficiaries, however, may be minors, incapacitated, unborn, or unable to be located. To facilitate giving notice to,[73] or gaining consents from,[74] such beneficiaries, the OTC includes representation provisions under which such a beneficiary may be represented by another, as long as there is not a conflict of interest between the representative and the beneficiary being represented.[75]

More specifically, absent a conflict of interest, the representation provisions allow fiduciaries to act on behalf of persons they represent,[76] parents to act on behalf of their minor and unborn children,[77] persons with substantially identical interests to act on behalf of each other,[78] and the holder of a general testamentary power of appointment to act on behalf of both permissible appointees and takers in default.[79] If under these provisions the court determines that a trust interest is not represented, or that the representation might be inadequate, the court may appoint a representative.[80] In making decisions on behalf of a represented person, such a court-appointed representative is not limited to considering only the economic interests of the person represented. Rather, the representative also "may consider general benefit accruing to the living members of the individual's family."[81]

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[70] *See supra* note 20 and accompanying text.

[71] *See, e.g.*, OHIO REV. CODE ANN. § 5804.17 (West 2007) (providing that a trustee is authorized to combine separate trusts into one, or divide a single trust into two or more separate trusts, upon notifying the qualified beneficiaries).

[72] *See, e.g., id.* § 5807.04(C)(3) (providing that a successor trustee may be selected by the qualified beneficiaries).

[73] *Id.* § 5803.01(A).

[74] *Id.* § 5803.01(B). If the person represented objects to the representation before it would otherwise have become effective, the representative's consent will not be binding. *Id.*

[75] OHIO REV. CODE ANN. §§ 5803.01-.05 (West 2007). *See generally*, Joanne E. Hindel, *Private Settlement Agreements and Representation of Others: Ohioans Will Soon Have Greater Flexibility in the Administration of Trusts*, 15 PROB. L.J. OF OHIO 8 (2004).

[76] OHIO REV. CODE ANN. § 5803.03 (West 2007).

[77] *Id.* § 5803.03(F).

[78] *Id.* § 5803.04. Virtual representation in judicial proceedings was allowed under pre-OTC Ohio law. *See* Benner & Co. v. Atlas Remainder, Inc., 407 F.2d 219, 221 (6th Cir. 1969). The OTC expands the doctrine's use to, for example, the receipt of notices and the giving of consents. *See* OHIO REV. CODE ANN. § 5803.05(B) (West 2007). The representative is referred to as such, instead of as a "guardian ad litem," to signal that the representative's role is not limited to judicial proceedings. *See* UNIF. TRUST CODE § 305 cmt. (2005).

[79] OHIO REV. CODE ANN. § 5803.02 (West 2007).

[80] *Id.* § 5803.05(A).

[81] *Id.* § 5803.05(C). As noted by commentators on Virginia's recently enacted version of the UTC:

> This is a significant feature of the legislation, because it permits a court-appointed representative to consent to an action that disadvantages the represented person, but indirectly benefits the person by directly benefiting a member of the person's family. For example, the representative of a remainder beneficiary might consent to an action that

In response to concerns that the UTC provision allowing the settlor and all beneficiaries to terminate or modify a trust at will[82] could cause the assets of irrevocable trusts to be included in the taxable estates of settlors under Internal Revenue Code sections 2036 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 UTC was amended in 2004 to include a provision that prohibits the settlor from representing and binding a beneficiary with respect to such a termination or modification.[83] This provision also is included in the OTC.[84]

VII. PRIVATE SETTLEMENT AGREEMENTS

The OTC also facilitates the administration of trusts outside of the courts by authorizing private settlement agreements ("PSAs").[85] A PSA may be used "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,"[86] subject to several limitations. First, a PSA may not be used to effect an early termination of a trust.[87] Second, PSAs may not be used to change the interests of the beneficiaries in the trust.[88] Because "interests of the beneficiaries" is a defined term that means "the beneficial interests provided in the terms of the trust,"[89] a PSA cannot be used to change the beneficial interests of the trust's beneficiaries. This limitation likely will bar using a PSA to change the dispositive terms of a trust, because doing so presumably would be a change in the beneficiaries' beneficial interests in the trust.[90] Third, PSAs are

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> enlarges the interest of the income beneficiary, who is also the remainder beneficiary's parent.

John E. Donaldson & Robert T. Danforth, *The Virginia Uniform Trust Code*, 40 U. RICH. L. REV. 325, 348 n.140 (2005).

[82] UNIF. TRUST CODE § 411(a) (2005).

[83] *Id.* §§ 301(d), 411(a) cmt.

[84] OHIO REV. CODE ANN. § 5803.01(D) (West 2007).

[85] *Id.* § 5801.10. The OTC PSA statute is in lieu of the UTC nonjudicial settlement agreement statute. *See* UNIF. TRUST CODE § 111 (2005). There are significant differences between the two. The OTC statute is based on a proposed stand-alone statute a committee of the Ohio Bankers League prepared before the UTC was under serious consideration in Ohio. The Ohio Bankers League's proposed statute was, in turn, based on the State of Washington's Non-Judicial Dispute Resolution Act that has been in force for many years, although there are significant differences between the OTC private settlement agreement statute and the Washington Act. *See generally* Hindel, *supra* note 75, at 12.

[86] OHIO REV. CODE ANN. § 5801.10(C) (West 2007).

[87] *Id.* Note, however, that 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. *Id.* § 5801.10(I). *See infra* notes 108-58 and accompanying text.

[88] OHIO REV. CODE ANN. § 5801.10(C) (West 2007).

[89] *Id.* § 5801.01(K).

[90] Excepted from this limitation are PSAs entered into in connection with modifying trust terms to qualify a gift to charity for the charitable deduction, or to qualify a gift for a noncitizen spouse for the marital deduction. *Id.* § 5801.10(C)(5)-(C)(6). Note that PSAs may be used to construe a trust instrument. *Id.* § 5801.10(C)(2). Allowing PSAs with respect to the construction of the trust instrument, but prohibiting PSAs that change the beneficiaries' interests in the trust, could result in disputes over whether a PSA to construe the 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 that the better characterization of the PSA would be that it was determining

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.[91]

Another limitation on the use of PSAs was included in the OTC at the recommendation of the Ohio Attorney General's Office. Because the Attorney General is charged with enforcing charitable trusts,[92] the OTC provides that PSAs are not applicable to charitable trusts.[93] To prevent this limitation from barring PSAs for any trust that might ever make a charitable distribution, a "charitable trust" for which a PSA may not be used is defined to exclude trusts in which the charitable interests are contingent and remote.[94]

The necessary parties to a PSA are, (1) the settlor, unless adverse income or transfer tax results would arise from the settlor's participation; (2) all beneficiaries, personally or by representation; (3) all currently serving trustees; and (4) creditors, if their interests would be affected by the PSA.[95] The OTC requirement that settlors be parties to PSAs is a recognition of the importance of settlor intent in the administration of trusts, but likely will result in many cases in which the settlor will be a party to a PSA, but would not have been a party had the matter been the subject of a judicial proceeding.[96]

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the beneficiaries' interests, not changing them. If the beneficiaries' interests under the terms of the trust are clear, however, a PSA attempting to change them by "construction" presumably would be ineffective. In that regard, note that PSAs are "valid only to the extent that" they comply with the statute's limitations, *id.* § 5801.10(C), which also is a condition on them being final and binding on everyone interested in the trust, *see* OHIO REV. CODE ANN. § 5801.10(E) (West 2007). 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 the age of thirty and the parties entered into a PSA to change the distribution age to twenty-five, 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 thirty). By contrast, a PSA that addressed the propriety of the trustee's reasonable exercise of its discretion to make a distribution would be valid.

[91] *Id.* § 5801.10(C).

[92] *Id.* § 109.24.

[93] *Id.* § 5801.10(M). The prohibition on using PSA's for charitable trusts in division (M) is inconsistent with division (C)(5), which purports to allow a PSA to modify a trust instrument so that the trust will qualify for the federal gift or estate tax charitable deduction. This inconsistency should be addressed by amendment.

[94] *Id.*

[95] OHIO REV. CODE ANN. § 5801.10(B) (West 2007). The UTC does not attempt to define the necessary parties to a nonjudicial settlement agreement "[b]ecause of the great variety of matters to which a nonjudicial settlement may be applied." UNIF. TRUST CODE § 111 cmt. (2005). Rather, it requires all "interested persons" to be parties, *id.* § 111(b), and defines them to be "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court," *id.* § 111(a).

[96] 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. *See generally*, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT, AMY MORRIS HESS & RONALD CHESTER, THE LAW OF TRUSTS AND TRUSTEES § 42 (2d ed. 1992). Note in that regard, that under the OTC, a proceeding to approve or disapprove a modification or termination under Ohio Revised Code section 5804.12 [unanticipated circumstances or inability to administer a trust effectively], section 5804.14 [uneconomic trust], section 5804.15 [reformation to correct mistakes], or section 5804.16 [modification to achieve the settlor's tax objectives] may be brought by the trustee or a beneficiary, but not by the settlor. OHIO REV. CODE ANN. § 5804.10(B) (West 2007).

VIII. TRUST CREATION

The OTC provisions on the creation of trusts are located in sections 5804.01 through 5804.09. For the most part they codify common law, but in several respects they change it. For example, at common law a trust for a pet was not enforceable, but if the "trustee" was willing to act as such, the trust was allowed as an "honorary trust."[97] Under the OTC, a trust for a pet is enforceable for the lifetime of the pet.[98] Similarly, the OTC allows other noncharitable trusts without ascertainable beneficiaries, limiting their terms to twenty-one years.[99] Another example of a trust that is valid under the OTC, but that would not be valid at common law, is one as to which the trustee is empowered to select a beneficiary from an indefinite class.[100]

A method specified by the OTC for creating a trust is a "[d]eclaration by the owner of property that the owner holds identifiable property as trustee."[101] The comment to the analogous provision of the UTC expressly notes that reregistration of assets to be held in trust by the settlor as trustee is preferable, but that such reregistration is not necessary for the creation of the trust.[102] Thus, if a settlor declares in a trust instrument that the settlor holds assets listed on a schedule attached to the instrument as trustee under the terms of the instrument, the assets so listed will be trust assets regardless of whether formal transfers of title to the settlor as trustee are made.[103]

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[97] *See, e.g.*, *In re* Searight's Estate, 95 N.E.2d 779 (Ohio Ct. App. 1950).

[98] OHIO REV. CODE ANN. § 5804.08 (West 2007). The settlor may designate someone in the terms of the trust to enforce it; if the settlor does not do so, the court may appoint someone. *Id.*

[99] *Id.* § 5804.09. The comment to the analogous provision of the UTC notes that an example of a trust that would be valid under this provision is "a bequest of money to be distributed to such objects of benevolence as the trustee might select." UNIF. TRUST CODE § 409 cmt. (2005).

[100] OHIO REV. CODE ANN. § 5804.02(C) (West 2007). *See also* UNIF. TRUST CODE § 402 cmt. (2005).

[101] OHIO REV. CODE ANN. § 5804.01(B) (West 2007). Other methods for creating a trust under the OTC are by transfer of property to a trustee, by exercise of a power of appointment in favor of a trustee, or by court order. *Id.* § 5804.01. The analogous section of the UTC does not expressly provide for trusts to be created by court order, but its list of trust creation methods is not exclusive. *See* UNIF. TRUST CODE § 401 (2005). The OTC does not expressly address whether a duly authorized agent under a durable power of attorney may create a trust for the principal, *see* OHIO REV. CODE ANN. § 5804.01 (West 2007), and its requirements for the creation of a trust include that the settler has capacity and indicates an intention to create the trust. *Id.* §§ 5804.02(A)(1)-(A)(2). Under other Ohio law, however, a duly authorized agent under a durable power of attorney can create a trust for the principal. *See id.* § 1337.18(A). Further, the OTC expressly allows a duly authorized agent to amend a revocable trust of the principal. *Id.* § 5806.02(E). This uncertainty should be resolved by amendment.

[102] UNIF. TRUST CODE § 401 cmt. The OTC does not address the question whether a purported transfer to a named trust, rather than to a person as trustee, is effective to transfer the property to the trustee of the trust. In *Thompson v. McVey*, Nos. CA 2006-03-006, CA 2006-03-009, 2006 WL 3833975, (Ohio Ct. App. Dec. 28, 2006), an Ohio court of appeals held that a deed purporting to transfer real estate to the "George E. Roads and Mae Roads Trust," *id.* at *1, as grantee was invalid because "[a] trust is not an entity capable of taking title," *id.* at *2. In a footnote to that statement, the court noted that section 5804.01(A) of the OTC, which was not in effect when the case was decided, supported its holding by providing that a trust can be created by "[t]ransfer of property *to another person as trustee*." *Id.* at n.1.

[103] For a recent Ohio case decided before enactment of the OTC that so holds, see Stephenson v. Stephenson, 836 N.E.2d 628 (Ohio Ct. App. 2005). *See also* C. Terry Johnson, *A New Way to Establish and Fund a Living Trust: But How Do We Recognize the Trustee?*, 16 PROB. L.J OF OHIO 111 (2006).

Included among the Revised Code provisions that were repealed in connection with the enactment of the OTC was section 1335.01(A).[104] It provided, in part, that a conveyance of property "in trust for the exclusive use of the person making the . . . conveyance [is] void."[105] The effect, apparently, was to invalidate trusts of which the settlor was the sole beneficiary, regardless of whether the settlor had named a third party as trustee. At common law, a merger of title preventing the creation of a valid trust occurred only if the settlor was both the sole trustee and the sole beneficiary of all life interests and remainders.[106] The OTC codifies that rule, thus allowing a settlor to create a trust for the settlor's sole benefit, as long as the settlor is not also the sole trustee.[107]

IX. MODIFICATION AND TERMINATION

Some OTC modification and termination provisions allow a trust to be terminated, or its terms modified, only by the court,[108] while others permit a modification or termination without court involvement.[109] The settlor may override the latter, but not the former, in the terms of the trust.[110]

A primary objective of the UTC modification and termination provisions, which for the most part are unchanged in the OTC, "is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount."[111] Among the factors contributing to the need for greater flexibility in the modification and termination rules are the increased use of trusts in recent years (including trusts created by non-lawyers and lawyers who do not specialize in estate planning); the ability to create trusts that can last forever, at least theoretically, due to the ability of trust settlors to opt out of the Rule Against Perpetuities;[112] the uncertain future of wealth transfer taxes; and the inevitable

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[104] H.B. 416, 126th Gen. Assem., Reg. Sess. (Ohio 2006).

[105] OHIO REV. CODE ANN. § 1335.01(A) (repealed 2007).

[106] *See* RESTATEMENT (THIRD) OF TRUSTS § 69 (2005). Under an example given in a comment to the UTC provision setting forth the requirements for the creation of a trust, the settlor is the sole trustee and the sole beneficiary for life, with the trust assets to be distributed to the settlor's estate at the settlor's death. UNIF. TRUST CODE § 402 cmt. (2005).

[107] OHIO REV. CODE ANN. § 5804.02(A)(5) (West 2007).

[108] *See, e.g., id.* § 5804.12 (allowing the court to modify or terminate a trust because of unanticipated circumstances, impracticability, or impairment).

[109] *See, e.g., id.* § 5804.14(A) (allowing the trustee to terminate an uneconomic trust with assets of less than $100,000).

[110] *Id.* § 5801.04(B)(4). For a discussion of whether the OTC mandatory rule prohibiting a settlor from barring a court from exercising its power to modify or terminate a trust may effect a change in Ohio law in the context of a termination by consent of the beneficiaries when the material purposes of the trust have been accomplished, see Alan Newman & Jamie R. Minor, *The Modification and Termination of Irrevocable Trusts under the Ohio Uniform Trust Code*, 16 PROB.. L.J OF OHIO 2 (2005).

[111] UNIF. TRUST CODE art. 4, cmt. (2005). The risk that the UTC modification and termination provisions do not sufficiently protect the settlor's intent has been recognized by its reporter, Professor David English:

> The sections of the UTC on trust modification and termination are innovative and there was considerable debate on each of the changes. . . . The ultimate issue comes down to whether liberalizing the standards enables the settlor's purposes to be better fulfilled or instead presents too great a risk that the trust as modified or terminated will bear little resemblance to what the settlor would have preferred.

David M. English, *The Uniform Trust Code (2000)*, ALI-ABA COURSE OF STUDY (July 21-22, 2005).

[112] *See* OHIO REV. CODE ANN. § 2131.09 (West 2007).

reality that circumstances will change during the administration of a trust in ways the settlor did not anticipate. The tension between the two objectives of providing greater flexibility to terminate trusts or modify their terms on the one hand, and respecting the settlor's intent on the other, was resolved by retaining, but liberalizing in several specific respects, the traditional framework of the rules on modification and termination.

A. Unanticipated Circumstances

Prior to the OTC, unanticipated circumstances could be grounds for modifying the administrative terms of an Ohio trust, but not its dispositive terms.[113] By contrast, the OTC also permits the court to modify the dispositive terms of a trust when unanticipated circumstances occur.[114] Examples of unanticipated circumstances noted by the comment to the comparable provision of the UTC that might be sufficient to warrant modification of a trust's dispositive terms are economic changes and the incapacity of the beneficiary.[115] Also noteworthy about the OTC unanticipated circumstances doctrine is that it permits not only the modification of the terms of a trust, but also its termination.[116] Finally, note that the requisite finding for a court to exercise its modification or termination power for unanticipated circumstances under the OTC is that "because of circumstances not anticipated by the settlor[,] modification . . . will further the purposes of the trust."[117] By contrast, the Ohio Supreme Court recently applied the stricter, more traditional standard under which "owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust."[118]

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[113] *See, e.g*, Union Sav. Bank v. Alter, 132 N.E. 834, 838-39 (Ohio 1921); First Nat'l Bank v. Gaines, 237 N.E.2d 182 (Ohio Prob. Ct. 1967). While the doctrine of deviation, as applied in Ohio under pre-OTC law, permitted a modification when unanticipated circumstances arose (or when compliance with the terms of the trust was impossible or illegal), generally it was applied only with respect to the administration of the trust. *See* Daloia v. Franciscan Health Sys., 679 N.E.2d 1084, 1092 (Ohio 1997). Note, however, that in a recent unreported court of appeals decision, the court cited the new Restatement (Third) of Trusts for the proposition that dispositive, as well as administrative, provisions of a trust instrument may be modified when there are unanticipated circumstances. *See* Bank One Trust Co. v. Miami Valley Hosp., No. 19703, 2003 WL 22026337, at *2 (Ohio Ct. App. 2003). Note also that at least in the context of charitable trusts, the doctrine of deviation, while purportedly applicable only to the administration of the trust, has been liberally applied to permit distributions to a different charitable beneficiary than the one named in the instrument when the originally named charitable beneficiary ceases to exist. *See infra* notes 159-66 and accompanying text.

[114] OHIO REV. CODE ANN. § 5804.12(A) (West 2007).

[115] UNIF. TRUST CODE § 412 cmt. (2005). For a recent case in which the argument was made, unsuccessfully, that a change in the state's banking law was an unforeseen circumstance sufficient to warrant distributing greatly appreciated bank stock to all nine of the settlor's children, instead of the three named to receive it under the terms of the trust, see *In re* Nobbe, 831 N.E.2d 835, 841 (Ind. Ct. App. 2005).

[116] OHIO REV. CODE ANN. § 5804.12(A) (West 2007). For an Ohio case that, in dictum, quoted favorably the Restatement provision allowing such terminations, see Harter Holding Co. v. Perkins, 43 N.E.2d 365, 374 (Ohio Ct. App. 1942) (quoting RESTATEMENT (SECOND) OF TRUSTS § 336 (2005)).

[117] OHIO REV. CODE ANN. § 5804.12(A) (West 2007).

[118] *Daloia*, 679 N.E.2d at 1091-92 (quoting SCOTT, LAW OF TRUSTS § 381, at 323. Note, however, that the "defeat or substantially impair" traditional standard has, in the context of charitable trusts, been loosely applied to allow the trustees of charitable trusts to deviate from the terms of the trust in furtherance of what the court determined to be the settlor's broader charitable purposes. *See, e.g*., Cleveland Museum of Art v. O'Neill, 129 N.E.2d 669 (Ohio Ct. C.P. Cuyahoga County 1955).

If continuation of a trust under its terms "would be impracticable or impair the trust's administration," the OTC permits the court to modify the administrative terms without regard to whether there are unanticipated circumstances.[119] As noted by the comment to the comparable provision of the UTC, this provision is similar to applying cy pres to a charitable trust, broadens the court's ability to modify a trust's administrative terms, and does not have "a direct precedent in the common law."[120] Rather, it is an application of the requirement "that a trust and its terms must be for the benefit of its beneficiaries."[121]

B. Reformation for Mistake

Section 5804.15 of the OTC authorizes the court to reform the terms of a trust when there is clear and convincing evidence of a mistake of fact or law with respect to both the settlor's intent and the terms of the trust.[122] Although this provision does not explicitly apply to testamentary, as well as inter vivos trusts, it should be equally applicable to both.[123] Significantly, section 5804.15 expressly provides that trust terms

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[119] OHIO REV. CODE ANN. § 5804.12(B) (West 2007). The analogous UTC provision also allows modification if continuation of a trust on its existing terms would be "wasteful." UNIF. TRUST CODE § 412(b) (2005).

[120] *Id.* § 412 cmt.

[121] *Id.* The comment further explains the rationale for the provision:

> Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust has 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 § 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. *See* RESTATEMENT (THIRD) OF TRUSTS § 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). *Id.*

[122] OHIO REV. CODE ANN. § 5804.15 (West 2007). The difference between "reformation" and "modification" is explained by the new Restatement:

> As used in this Restatement, "reformation" involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain—and properly restate—the true, legally effective intent of settlors with respect to the original terms of trusts they have created; by way of contrast, "modification" involves a change in—a departure from—the true, original terms of the trust . . . . Thus, a trust that needs no reformation—i.e., the trust instrument says what it was supposed to say—may later be modified to improve or otherwise change the trust when grounds or a power to do so exists.

RESTATEMENT (THIRD) OF TRUSTS § 62 rptr. notes (2003). Note also that if a trust is established as a result of a material mistake, rescission may be available. *See* Generaux v. Dobyns, 134 P.3d 983 (Or. Ct. App. 2006); RESTATEMENT (THIRD) OF TRUSTS § 62 cmt. a (2003)..

[123] OHIO REV. CODE ANN. § 2109.69 (West 2007). *See supra* notes 16-19 and accompanying text. The comparable provision of the UTC, which does not distinguish between testamentary and inter vivos trusts, also does not explicitly refer to testamentary trusts. UNIF. TRUST CODE § 415 (2005). Its comment, however, notes that under the new Restatement of Property, the longstanding remedy of reformation of inter vivos instruments also applies to wills. *Id.* § 415 cmt. (citing RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 12.1 (2003)).

may be reformed even if they are unambiguous,[124] and regardless of whether the mistake was in expression or inducement.[125]

C. Modification or Termination by Consent

The OTC codifies the common law rule[126] that the settlor and all beneficiaries of a noncharitable trust may modify or terminate the trust regardless of whether doing so would be inconsistent with a material purpose of the trust.[127] Because of concerns that this rule might cause adverse federal estate tax consequences,[128] the OTC imposes the additional requirement that the court approve modification or termination, although the court is required to do so if it finds that the settlor and all beneficiaries have consented.[129] An agent of the settlor may consent on the settlor's behalf if the settlor has authorized the agent to do so in both the power of attorney and the terms of the trust.[130]

The requirements to qualify for supplemental security income ("SSI") under federal law prohibit beneficiaries of self-settled special needs trusts from having the ability to terminate the trust.[131] To address the possibility that the Social Security Administration might use the OTC's authorizing the settlor and beneficiaries to terminate a trust as the basis for denying SSI benefits to beneficiaries of self-settled supplemental needs trusts, the OTC includes a provision in section 5804.11(A), that is not included in

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[124] The applicable UTC comment explicitly notes that the proof required to support a reformation may be made by extrinsic evidence. *Id.*

[125] According to the UTC comment:

> 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.

Id.

[126] *See* RESTATEMENT (THIRD) OF TRUSTS § 65(2) (2003). Note that the new Restatement also allows the beneficiaries to modify or terminate a trust after the settlor's death if the court "determines that the reason(s) for termination or modification outweigh the material purpose." *Id.* That basis for modification or termination is not included in the OTC (or the UTC) and would constitute a significant change in the common law. For a discussion, see Newman, *supra* note 45, at 649, 661.

[127] OHIO REV. CODE ANN. § 5804.11(A) (West 2007). For a discussion of an Ohio case allowing termination of a trust upon the consent of the settlor and the beneficiary-trustee, when the trust's material purpose had been accomplished, see Jordan v. Price, 49 N.E.2d 769, 771 (Ohio 1942). *See also* Newman & Minor, *supra* note 110, at 2.

[128] UNIF. TRUST CODE § 411 cmt. (2005).

[129] OHIO REV. CODE ANN. § 5804.11(A) (West 2007). Also because of estate tax concerns over this provision, the OTC representation provisions do not allow a settlor to represent and bind a beneficiary with respect to a section 5804.11(A) modification or termination. *Id*. § 5803.01(D).

[130] *Id*. The UTC does not require the settlor's authorization to be in both the power of attorney and the terms of the trust, but allows it to be in either. UNIF. TRUST CODE § 411(a) (2005). The OTC also provides that if the settlor has not so authorized an agent, a guardian of the settlor's estate (or, if none, of the settlor's person) may consent on the settlor's behalf, but only with the approval of the court supervising the guardianship. OHIO REV. CODE ANN. § 5804.11(A) (West 2007).

[131] *See* Richard E. Davis & Stanley C. Kent, *The Impact of the Uniform Trust Code on Special Needs Trusts*, 1 NAT'L ACAD. OF ELDER LAW ATTY'S. J. 235, 262 (2005).

the comparable UTC provision, making it inapplicable to self-settled supplemental needs trusts.[132]

The OTC also allows modification or termination by the beneficiaries, without the consent of the settlor, but only if: (1) with respect to a termination, "the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust,"[133] or (2) with respect to a modification, "the court concludes that modification is not inconsistent with a material purpose of the trust."[134] With respect to what constitutes a material purpose of a trust, the OTC provides only that the inclusion of a spendthrift provision in the terms of the trust may, but is not presumed, to constitute a material purpose.[135] Ohio case law on what constitutes a material purpose,[136] however, should continue to apply.[137]

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[132] OHIO REV. CODE ANN. § 5804.11(A) (West 2007); UNIF. TRUST CODE § 411(a) (2005). Similarly, the OTC provides that supplemental needs trusts 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. OHIO REV. CODE ANN. § 5804.18 (West 2007). This provision is intended to preclude arguments by the Social Security Administration that such trusts are revocable and thus disqualify their beneficiaries from receiving SSI. *See* Davis & Kent, *supra* note 131, at 235, 262-63.

[133] By contrast, if "no purpose of the trust remains to be achieved," it may be terminated without the consent of the beneficiaries. OHIO REV. CODE ANN. § 5804.10(A) (West 2007). Under the OTC, the no-purpose determination is to be made by the court. *Id.* The comparable provision of the UTC does not directly address how the determination is to be made. *See* UNIF. TRUST CODE § 410(a) (2005). However, section 410(b) addresses standing to seek court approval of a termination or modification under sections 411 through 416, or a combination or division under section 417, thus suggesting that court approval is not necessary for a termination or modification under section 410.

[134] OHIO REV. CODE ANN. § 5804.11(B) (West 2007). The beneficiaries may not, however, use section 5804.11(B) to remove or replace the trustee. *Id.* Removal of the trustee is addressed by section 5807.06. *See infra* notes 293-97 and accompanying text.

[135] OHIO REV. CODE ANN. § 5804.11(B) (West 2007). According to the comment to the comparable provision of the UTC:

> 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, § 65 cmt. d (Tentative Draft No. 3, approved 2001).

UNIF. TRUST CODE § 411 cmt (2005).

[136] *See, e.g.*, Brown v. Moss, No. 19422, 1999 WL 1037758 (Ohio Ct. App. Nov. 10, 1999) (providing an emergency financial safety net for beneficiaries was a material purpose); *In re* Estate of Grant, No. CA-6122, 1983 WL 7050 (Ohio Ct. App. Sept. 26, 1983) (continuing testator's business for fifteen years after his death was a material purpose).

[137] *See supra* notes 26-28 and accompanying text (discussing Ohio Revised Code section 5801.05).

The requirement that *all* beneficiaries consent to a modification or termination under section 5804.11(A) or (B) has been eased by the OTC in two respects. First, if less than all of the beneficiaries consent, the court nevertheless may approve the modification or termination if it determines that the interests of a nonconsenting beneficiary will be adequately protected.[138] Second, should a beneficiary's consent be unattainable because the beneficiary is incompetent, a minor, or unable to be located, a representative may be able to consent on his or her behalf.[139]

D. Uneconomic Trusts

Prior to the enactment of the OTC, section 1339.66 of the Revised Code included a procedure for the termination of an uneconomic inter vivos trust.[140] Ohio House Bill 416 repealed section 1339.66 and replaced it with section 5804.14 of the OTC, which is a modified version of the UTC small trust termination statute.[141] Enactment of section 5804.14 has changed Ohio law on the termination of uneconomic trusts in several respects.[142] First, under the OTC the trustee may terminate a non-charitable trust[143] with assets of less than $100,000 in value, after notifying the trust's qualified beneficiaries but without court involvement, if it "concludes that the value of the trust property is insufficient to justify the cost of administration."[144] While prior Ohio law permitted such a termination only by the court, it stated the standard for terminating such a trust somewhat differently, and required notice to a potentially larger number of beneficiaries.[145] Second, if the trust has assets of less than $100,000 and the court makes the uneconomic trust finding, it may modify, as well as terminate, the trust, or remove

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[138] OHIO REV. CODE ANN. § 5804.11(D) (West 2007). (Also required is a determination that the modification or termination could have been approved had all beneficiaries consented. *Id.*) This provision will prevent one or more beneficiaries from being able to veto a modification or termination requested by other beneficiaries. Note that there is no requirement that a majority of the beneficiaries consent to the requested modification or termination. *Id.*

[139] *Id.* § 5803. For a discussion of the OTC representation provisions, see *supra* notes 70-84 and accompanying text.

[140] OHIO REV. CODE ANN. § 1339.66 (repealed 2007).

[141] *See* UNIF. TRUST CODE § 414 (2005). One of the modifications to the UTC provision in section 5804.14 is to substitute for the UTC's direction that, upon termination of an uneconomic trust the trust assets be distributed "in a manner consistent with the purposes of the trust," *id.* § 414(c), the more detailed provisions on that subject from section 1339.66. *See* OHIO REV. CODE ANN. § 5804.14 (West 2007).

[142] Unlike section 1339.66, new section 5804.14 does not include representation provisions under which a minor, an incapacitated or unborn person, or a person whose identity or location is unknown and is not reasonably ascertainable may be represented by another person who has a substantially identical interest in the trust. *Compare id.* § 1339.66(D) (repealed 2007), *with id.* § 5804.14 (West 2007). The OTC, however, includes broader representation provisions in chapter 5803. *See supra* notes 70-84 and accompanying text. Thus, representation remains available under the OTC for use in uneconomic trust terminations.

[143] Because the Attorney General protects the public's interest in charitable trusts, they may not be terminated by the trustee, without court involvement, regardless of their size. OHIO REV. CODE ANN. § 5804.14(A)(2) (West 2007). If a trust's charitable interests are sufficiently remote, it is not treated as a charitable trust for this purpose. *See id.*

[144] *Id.* § 5804.14(A).

[145] *See id*. § 1339.66(A)(1) (repealed 2007).

and replace the trustee.[146] Pre-OTC law did not provide the court with such flexibility.[147] Finally, note that Ohio's separate statute for terminating uneconomic testamentary trusts, which is identical to section 1339.66, was not affected by the enactment of the OTC.[148] Thus, different rules now apply to the termination of uneconomic inter vivos and testamentary trusts.[149]

E. Combination and Division of Trusts

The OTC replaces the Revised Code's former provision[150] addressing the combination or division of trusts with the UTC provision on that subject.[149] Under both provisions, the trustee is authorized to combine or divide trusts without court involvement, but the standards for combinations or divisions under the two provisions differ.[150] Under the OTC, a combination or division may be made "if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust."[151] By contrast, prior law barred a combination or division if it would "*substantially* impair . . . the accomplishment of the purpose of the trust or the interests of the beneficiaries under the trust."[152] Another principal difference between the two provisions is that under the OTC, the trustee must give notice to the qualified beneficiaries, while under former law, notice was not required to be given unless court approval was sought.[153]

A question not addressed by the OTC is whether the trustee of an inter vivos trust with assets valued at more than $100,000 could divide it into separate trusts, each with assets of less than $100,000, and then terminate the separate trusts under the OTC uneconomic trust provision.[154] If the division were made as a part of a plan for the early termination of a trust of over $100,000, arguably it would be impermissible, because a trust can be divided only if the division would not "adversely affect achievement of the purposes of the trust."[155] Alternatively, such terminations by the trustee under the uneconomic trust provision might be challenged as being, in substance if not in form, an impermissible termination of a trust with assets of more than $100,000.[156]

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[146] *Id.* § 5804.14(B). Under the UTC, the court's power to modify or terminate an uneconomic small trust, or remove and replace its trustee, is not limited to trusts with assets of less than $100,000 in value. UNIF. TRUST CODE § 414(b) (2005).

[147] *See* OHIO REV. CODE ANN. § 1339.66 (repealed 2007).

[148] *See id.* § 2109.62.

[149] *See infra* notes 11-14 and accompanying text.

[150] OHIO REV. CODE ANN. § 1339.67 (repealed 2007).

[149] *See id.* § 5804.17; UNIF. TRUST CODE § 417 (2005).

[150] OHIO REV. CODE ANN. §§ 1339.67 (repealed 2007), 5804.17 (West 2007).

[151] *Id.* § 5804.17.

[152] OHIO REV. CODE ANN. § 1339.67 (repealed 2007) (emphasis added).

[153] *Id.*

[154] OHIO REV. CODE ANN. § 5804.14. *See supra* notes 141-46 and accompanying text.

[155] *Id.* § 5804.17 (West 2007). *See* UNIF. TRUST CODE § 414 cmt. (2005) (suggesting that such a division might constitute a breach of duty).

[156] Note also that an agreement among the trustee and beneficiaries (and settlor, if living) to accomplish such terminations—if not permissible under section 5804.14—would not be valid as a private settlement agreement under section 5801.10, because of its prohibition of using private settlement agreements to terminate trusts early. OHIO REV. CODE.§ 5801.10(C) (West 2007). In that regard, an agreement that does not comply with the limitations on private settlement agreements is not valid or final

X. CHARITABLE TRUSTS

The OTC has changed Ohio law governing charitable trusts. First, unlike prior law,[157] the settlor of a charitable trust now has standing to enforce the trust under the OTC.[158] Second, prior to enactment of the OTC, if the charitable purpose of a trust failed and the trust terms did not address that contingency, cy pres could be applied to reform the trust in order to accomplish the settlor's charitable intent only if the court determined that the settlor had a general charitable intent in addition to the specific charitable intent that failed.[159] If these elements were not met, the trust assets reverted to the settlor, if living, or the settlor's successors.[160] Under the OTC, if a charitable trust fails the court is authorized to exercise its cy pres authority to modify or terminate the trust in a manner consistent with the settlor's charitable purposes without the need for a finding that the settlor had a general charitable intent.[161]

The OTC does not include two UTC charitable trust provisions that change the common law of trusts in enacting jurisdictions. First, the UTC expands the cy pres doctrine by allowing the court to apply it not only if a trust's charitable purpose becomes unlawful, impracticable, or impossible to achieve, but also if it becomes "wasteful."[162] That is not the case under the OTC.[163] Second, because of administrative difficulties and concerns with respect to the clogging of title, the UTC 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 twenty-one years of the trust's creation.[164] By contrast, under the OTC, a direction by the settlor that trust assets be distributed to noncharitable beneficiaries, if a

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and binding on persons interested in the trust. *See id.* §§ 5801.10(C), (E). Note, however, that the OTC protects a trustee who has breached the trust from liability to a beneficiary who gave the trustee a consent, release, or ratification with respect to the conduct that constituted the breach (as long as the consent, release, or ratification was not induced by improper conduct of the trustee and the beneficiary knew of the beneficiary's rights and the material facts when the beneficiary gave the consent, release, or ratification). *See id.* § 5810.09.

[157] *See, e.g.*, Three Bills, Inc., v. Parma, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996).

[158] OHIO REV. CODE ANN. § 5804.05(C) (West 2007). Consistent with giving the settlor standing to enforce a charitable trust, the OTC also permits the settlor to maintain a proceeding for the court to exercise its cy pres authority. *Id.* § 5804.10(B).

[159] *See, e.g.*, Craft v. Schroyer, 74 N.E.2d 589, 591 (Ohio App. 1947).

[160] *See id.*

[161] OHIO REV. CODE ANN. § 5804.13(A)(3) (West 2007). This change in Ohio law, however, may be more apparent than real. Under prior law, courts used the deviation doctrine to save a charitable gift without having to find that the settlor had a general charitable intent, as would have been necessary for it to exercise its cy pres authority. *See* Cheney v. State Council of Ohio Jr. Order United Am. Mechs., 162 N.E.2d 242, 245 (Ohio 1959). Note, however, that in *Cheney v. State Council of Ohio Junior Order United American Mechanics* the court refused to apply the deviation doctrine expansively, stating that it "has been limited to those cases in which its application will carry out the general purpose of the gift. Moreover, it cannot be invoked when its application would enlarge or change the class of beneficiaries who are the object of the donor's bounty." *Id.* at 245.

[162] UNIF. TRUST CODE § 413(a) (2005). For a discussion, see Newman, *supra* note 45, at 671.

[163] OHIO REV. CODE ANN. § 5804.13(A) (West 2007).

[164] UNIF. TRUST CODE § 413(b) (2005).

trust's charitable purpose fails, will be respected without regard to when or to whom the distribution is to be made.

XI. THE RIGHTS OF CREDITORS OF TRUST BENEFICIARIES

The UTC provisions on the rights of creditors of trust beneficiaries have been among its most controversial.[165] Many material changes have been made to the UTC in the OTC creditor's rights provisions. Generally, the changes were made to conform the OTC to existing Ohio law.[166]

A. Spendthrift Trusts

Spendthrift provisions in trust instruments were enforceable in Ohio before enactment of the OTC,[167] and they remain so after its enactment.[168] For a spendthrift provision to be valid under the UTC, it must restrain both voluntary and involuntary transfer of a beneficiary's interest.[169] While such a provision also is valid under the OTC,[170] the OTC addresses an issue that is not addressed by the UTC. Under the OTC, a spendthrift provision is valid if it "permits voluntary transfer of a beneficiary's interest only with the consent of a trustee who is not the beneficiary."[171]

Valid spendthrift provisions provide substantial protection against the claims of most creditors of a beneficiary of a third party created trust.[172] As a general rule,

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[165] *See generally* Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551 (2006); Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 567 (2005).

[166] *See generally* Richard E. Davis & Alan Newman, *Codify—Not Modify: Creditor Remedies and the Ohio Uniform Trust Code*, 15 OHIO PROB. L.J. 24 (2004).

[167] *See* Scott v. Bank One, 577 N.E.2d 1077, 1081 (Ohio 1991). In *Scott v. Bank One*, the trust terms included a classic spendthrift provision prohibiting the voluntary and involuntary alienation of the beneficiary's interest, *id*. at 1081 n.3, but also provided that the trust would convert from one requiring that its assets be distributed immediately after the settlor's death to the beneficiary to a purely discretionary trust for the beneficiary if he was insolvent, filed a petition in bankruptcy, or would not personally enjoy the property, *id*. When none of those conditions existed, the trust would convert back to one requiring the outright distribution of the assets to the beneficiary. *Id.* If the trustee were allowed to administer the trust in accordance with its terms, the beneficiary would have been able to enjoy the trust assets free of his creditors' claims. *Id*. at 1081-82. As a result, the supreme court treated the trust as a spendthrift trust. *Scott*, 577 N.E.2d.at 1082. In a recent court of appeals decision, the terms of a trust authorized the trustee "to expend [from the trust assets] such sums as he, within his sole discretion, deems proper, for [the beneficiary's] education, health, happiness, and medical treatment, for his life." Styer v. Styer, No. 6-05-06, 2006 WL 319248, at *1 (Ohio Ct. App. Feb. 13, 2006). Apparently the trust terms did not expressly restrain the voluntary and involuntary alienation of the beneficiary's interest. *Id* at *3. Relying on *Scott*, the court nevertheless characterized the trust as a spendthrift trust. *Id.*

[168] OHIO REV. CODE ANN. § 5805.01(C) (West 2007).

[169] UNIF. TRUST CODE § 502(a) (2005).

[170] OHIO REV. CODE ANN. § 5805.01(A) (West 2007). Thus, to achieve spendthrift protection, it is not necessary that the terms of the trust provide for a beneficiary's interest to be converted to a discretionary interest if a creditor attempts to reach the interest.

[171] *Id.*

[172] The OTC does not provide protection against the claims of a creditor of a settlor/beneficiary of a trust, regardless of whether its terms include a spendthrift provision. *See* OHIO REV. CODE ANN. § 5805.06(A) (West 2007); *infra* notes 260-62 and accompanying text.

creditors "may not reach the [debtor/beneficiary's] interest or a distribution by the trustee before its receipt by the beneficiary."[173] Assets distributed to a beneficiary, however, are no longer protected by a spendthrift provision and may be reached by the beneficiary's creditors. An issue thus raised is whether creditors of a beneficiary of a spendthrift trust may reach property owned by the trustee, but being used by the beneficiary, on the theory that such property effectively has been distributed to the beneficiary. Although the UTC does not address this issue, the OTC does. Under the OTC, real or tangible personal property owned by the trustee that is properly made available for use by the beneficiary under the terms of the trust is not treated as having been distributed to the beneficiary.[174]

Neither the OTC nor the UTC directly addresses the question of whether a trustee of a spendthrift trust may make distributions to third parties for the beneficiary's benefit, rather than directly to the beneficiary, that creditors of the beneficiary may not reach. If the terms of the trust authorize the trustee to make such distributions, presumably the beneficiary's creditors would not be able to reach them.[175] If the terms of the trust do not expressly authorize the trustee to make distributions to third parties for the benefit of the beneficiary, they likely nevertheless can be made free of claims of the beneficiary's creditors. In such a case, presumably the beneficiary would have acquiesced in the indirect distributions[176] and most creditors of a beneficiary of a spendthrift trust have no claim against the trustee, the trust assets, or the beneficiary's interest in the trust.[177] Note, however, that the OTC's explicit authorization of a trustee to make distributions for the benefit of a beneficiary, instead of directly to the beneficiary, applies only "to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated."[178]

Although spendthrift protection under the OTC is very broad, it is not absolute. For example, the OTC, like the UTC, addresses the question of what rights creditors of a beneficiary of a spendthrift trust have if the terms of the trust provide for the trustee to make mandatory distributions to the beneficiary.[179] If the creditor were able to attach required distributions when they became due, a spendthrift provision "would become largely a nullity,"[180] at least with respect to mandatory distributions. On the other hand, if the beneficiary is entitled to receive mandatory distributions, but the trustee simply

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[173] *Id.* § 5805.01(C).

[174] *See id.*

[175] Note, however, that certain creditors' claims are not barred by a spendthrift provision. *See infra* notes 188-99 and accompanying text. The OTC expressly allows those creditors to attach "present or future distributions to or for the benefit of the beneficiary." OHIO REV. CODE ANN. § 5805.02(D) (West 2007).

[176] Generally, a beneficiary's consent, release, or ratification of trustee conduct that otherwise would constitute a breach protects the trustee from liability to the beneficiary. OHIO REV. CODE ANN § 5810.09 (West 2005).

[177] The Restatement (Third) of Trusts acknowledges that distributions to third parties on behalf of a beneficiary may be made by the trustee, although not in the context of creditor avoidance. *See* RESTATEMENT (THIRD) OF TRUSTS § 49 cmt. c (2003) ("[a] trustee who improperly applies or distributes income in good faith for the support, care, or other needs of the beneficiary [whether or not under a legal disability] is entitled to credit in the trust accounts to the extent the beneficiary would otherwise be unjustly enriched").

[178] OHIO REV. CODE ANN. § 5808.16(U) (West 2007).

[179] *See id.* § 5805.05(B); UNIF. TRUST CODE § 506 (2005).

[180] UNIF. TRUST CODE § 506 cmt. (2005).

fails to make them, the required payments "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."[181] The OTC, like the UTC, resolves these competing considerations by allowing the trustee of a spendthrift trust to make mandatory distributions the beneficiary's creditors can not reach (until received by the beneficiary), as long as such distributions are made within a reasonable time after they become due.[182] If the trustee fails to make a mandatory distribution within a reasonable time after its due date, however, the beneficiary's creditors may reach it.[183]

Two problems raised by this approach are what constitutes a "mandatory distribution" that is subject to the rule, and what constitutes a reasonable time during which the mandatory distribution cannot be reached while being held by the trustee. Neither the OTC, nor the UTC, attempt to define a "reasonable time" for that purpose.[184] A "mandatory distribution" is defined in the OTC as:

> [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.[185]

Thus, a beneficiary's entitlement to receive current distributions of trust income, a unitrust or annuity amount, or part or the entire trust principal upon reaching a specified age would constitute the right to receive mandatory distributions that the beneficiary's creditor could reach if the trustee did not make them within a reasonable time of their due dates. But if the terms of the trust authorized the trustee to make distributions of income or principal for the beneficiary's health, education, maintenance, or support, amounts so distributable would not be mandatory distributions, even if the trust terms directed the trustee to make them.

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[181] *Id.*

[182] OHIO REV. CODE ANN. § 5805.05(B) (West 2007).

[183] *Id.* In *Domo v. McCarthy*, the trust instrument provided for a terminating distribution to the beneficiary when he reached age thirty-five. Domo v. McCarthy, 612 N.E.2d 706, 715 (Ohio 1993). The trust terms 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. *Id.* at 709. The trial court held that when the beneficiary reached age thirty-five, the trustee was required to satisfy the creditor's judgment from the trust property that would then be distributable to the beneficiary. *Id.* at 708. On appeal, the trial court's judgment was reversed. *Id.* at 709. According to the supreme court, the trust instrument's spendthrift provision prevented the creditor from reaching the beneficiary's interest until the principal was actually transferred to the beneficiary. *Id.* Because the beneficiary had not yet reached age thirty-five, however, the issue of the trustee unreasonably delaying the distribution was not presented or addressed.

[184] *See* OHIO REV. CODE ANN. § 5805.05(B) (West 2007); UNIF. TRUST CODE § 506(b) (2005).

[185] OHIO REV. CODE ANN. § 5801.01(M) (West 2007). The UTC definition is similar, although not identical. *See* UNIF. TRUST CODE § 506(a) (2005).

Consistent with existing Ohio law,[186] a spendthrift exception under the OTC is for the claims of a "child or spouse who has a judgment or court order against the beneficiary for support."[187] The exception, however, applies "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."[188] Although a child or spouse whose claim is not barred by a spendthrift provision "may obtain from the court an order attaching present or future distributions to or for the benefit of the beneficiary,"[189] the beneficiary may also continue to benefit from the trust. In such a case, the OTC expressly authorizes the court to limit the award of the child or spouse:

> [T]o 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.[190]

Consistent with 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.[191] With respect to claims of the United States against a spendthrift trust beneficiary, this exception simply acknowledges that under standard preemption doctrine, federal law is determinative of the effect of a spendthrift provision on a claim of the United States.[192] Under the OTC spendthrift exception for claims of the State of Ohio, if another statute in the Revised Code allows the State to reach a debtor/beneficiary's interest in a spendthrift trust, that statute will not be negated by the OTC general provisions validating spendthrift clauses. Otherwise, claims of the State also are barred by a spendthrift provision.

Two additional spendthrift exceptions under the UTC have been omitted from the OTC: a claim for support 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.[193] Not including alimony claims as a spendthrift exception under the OTC is consistent with pre-

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[186] *See, e.g.*, Albertson v. Ryder, 621 N.E.2d 480 (Ohio Ct. App. 1993); Matthews v. Matthews, 450 N.E.2d 278 (Ohio Ct. App. 1982). *But see Styer*, 2006 WL 319248, for a recent holding to the contrary.

[187] OHIO REV. CODE ANN. § 5805.02(B)(1) (West 2007).

[188] *Id.* The UTC includes no such limitation on its comparable spendthrift exception, which applies not only to support claims of a child or spouse, but also of a former spouse. UNIF. TRUST CODE § 503(b)(1) (2005).

[189] OHIO REV. CODE ANN. § 5805.02(D) (West 2007).

[190] *Id.*

[191] OHIO REV. CODE ANN. § 5805.02(B)(2) (West 2007); UNIF. TRUST CODE § 503(b)(3) (2005).

[192] *See generally* Bank One Ohio Trust Co., N.A. v. U.S. 80 F.3d 173 (6th Cir. 1996). While this case has some negative history in *Craft v. U.S*, 233 F.3d 358 (6th Cir. 2000), *Craft* addresses a different issue.

[193] *Compare* OHIO REV. CODE ANN. §§ 5805.02(B)-(C) (West 2007), *with* UNIF. TRUST CODE § 503(b) (2005).

OTC Ohio law.[194] 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 OTC list of spendthrift exceptions, a separate provision of 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 a proceeding involving the administration of a trust applies to spendthrift trusts.[195]

Finally, the OTC explicitly states that there are no exceptions to spendthrift protection other than those it specifically identifies.[196] Thus, it is clear under the OTC that courts may not create new spendthrift exceptions, such as for tort claimants.[197]

B. In the Absence of Spendthrift Protection

If the terms of a third-party-created trust do not include a valid spendthrift provision, or if a claim of a beneficiary's creditor is excepted from its bar, the rights of the beneficiary's creditor will depend on whether the trust is a wholly discretionary trust ("WDT"), a mandatory distribution trust, or a discretionary trust that is not a WDT.

Consistent with pre-OTC Ohio law,[198] if a trust is a WDT, the OTC provides that no creditor of a beneficiary may reach the beneficiary's interest, or the assets of the trust,

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[194] In *Martin v. Martin*, 374 N.E.2d 1384, 1390 (Ohio 1978), the beneficiary's former spouse was not allowed to reach his interest in a discretionary support trust. In so holding, the Ohio Supreme Court relied on a Minnesota case that explicitly rejected an alimony exception to spendthrift protection for a beneficiary's mandatory income interest. *Id.* (citing Erickson v. Erickson, 266 N.W. 161 (Minn. 1936)). According to the supreme court in *Martin*, if alimony is to be an exception to spendthrift protection, it has to be as a result of language in the instrument to that effect. *Id.* In *Erickson v. Erickson*, the beneficiary's interest included the right to receive automatic distributions of income, rather than distributions at the trustee's discretion for the beneficiary's support. *Erickson*, 266 N.W. at 161-62. In enforcing the trust's spendthrift provision against a claim for alimony, the court in *Erickson* expressly noted and rejected the position of the Restatement (Second) of Trusts that alimony claims are exceptions to spendthrift protection. *Id.* at 164.

[195] OHIO REV. CODE ANN. § 5810.04 (West 2007).

[196] *Id.* § 5805.02(E). The exceptions are for mandatory distributions not made within a reasonable time of their due dates, *see supra* notes 181-85 and accompanying text; support claims of a beneficiary's child or spouse, *see supra* notes 188-91 and accompanying text; claims of the United States or the State of Ohio to the extent provided by federal law or the Revised Code, *see supra* notes 193-94 and accompanying text; claims of a creditor of a settlor/beneficiary, *see infra* notes 260-64 and accompanying text; and claims arising from a judicial proceeding involving the administration of the trust, *see supra* note 197 and accompanying text.

[197] Although the UTC does not include a similar explicit provision that its list of spendthrift exceptions is exclusive, it effectively does so by providing 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. *See* UNIF. TRUST CODE § 502(c) (2005). With respect to a possible spendthrift exception for claims of a victim of a beneficiary/tortfeasor, the applicable UTC comment notes that its "drafters also declined to create an exception for tort claimants." *Id.* § 503 cmt. For a discussion of recent cases from Mississippi and New Hampshire on whether there is a tort claimant exception to spendthrift protection, see *supra* notes 29-36 and accompanying text. *See also Duval*, 826 A.2d 416.

[198] *See, e.g.*, *Domo*, 612 N.E.2d at 710; *Scott*, 577 N.E.2d at 1081. In a 1981 case, an Ohio court of appeals allowed a child support claim to reach the interest of a debtor/beneficiary of a discretionary support trust. *See Matthews*, 450 N.E.2d at 281 (explicitly noting that the trust was not a purely discretionary trust, and thus arguably indicating that had the trust been purely discretionary, even a child support claimant would not have been able to reach the beneficiary's interest).

by any means.[199] Thus, unless a creditor's claim is asserted under federal law that preempts the OTC,[200] a beneficiary's interest in a WDT is protected under the OTC from all of his or her creditors, regardless of the nature of their claims. The definition of a WDT is lengthy,[201] but its most important requirements are that, (1) "[t]he 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,"[202] (2) the trustee's discretion to make distributions is described with language such as "sole," "absolute," or "uncontrolled,"[203] and (3) the beneficiary is not, and does not have the power to become, a trustee who can participate in discretionary distribution decisions.[204]

At the opposite end of the spectrum from WDTs are trusts the terms of which provide for one or more mandatory distributions to a beneficiary.[205] For mandatory distribution trusts whose terms do not include an effective 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."[206] The court also is authorized, however, to limit the creditor's award in the same way that it may limit the award of a spendthrift exception creditor.[207]

If, as is common, the terms of a third-party-created trust provide a standard, such as support, to guide the trustee in making distributions to or for the benefit of the beneficiary, the trust will be discretionary,[208] but it will not be a WDT. Even so, the

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[199] OHIO REV. CODE ANN. § 5805.03 (West 2007). The protection is broad:

> [N]o 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 trust instrument includes a spendthrift provision.

Id. The UTC does not include a counterpart to the OTC WDT provisions. Rather, under the UTC, creditors of beneficiaries may be able to reach their interest even if the trust would be a WDT under the OTC. For example, in the absence of spendthrift protection the UTC allows a beneficiary's creditor "to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means" regardless of the discretionary nature of the beneficiary's interest. UNIF. TRUST CODE § 501 (2005). Further, a beneficiary's child, spouse, or former spouse may be able to compel distributions from purely discretionary trusts under the UTC. *Id.* § 504(c).

[200] *See, e.g.*, United States v. Cohn, 855 F. Supp. 572 (D. Conn. 1994) (noting that 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).

[201] *See* OHIO REV. CODE ANN. § 5801.01(Y)(1) (West 2007).

[202] *Id.* § 5801.01(Y)(1)(e). If the trust is a supplemental needs trust, however, the terms of a WDT may include precatory language regarding its purpose of supplementing, rather than supplanting, public benefits and language prohibiting the trustee from providing for the beneficiary's food, clothing, and shelter. *See id.* § 5801.01(Y)(5).

[203] *Id.* § 5801.01(Y)(1)(d).

[204] *Id.* §§ 5801.01(Y)(1)(f), .01(Y)(5).

[205] For a discussion of what "mandatory distributions" are under the OTC, see *supra* note 187 and accompanying text.

[206] OHIO REV. CODE ANN. § 5805.05(A) (West 2007).

[207] *Id.* § 5805.05(A). *See supra* notes 191-92 and accompanying text.

[208] At common law, "support trusts" were distinguished from "discretionary trusts." *See* RESTATEMENT (SECOND) OF TRUSTS §§ 155(1) (addressing discretionary trusts), 154 (addressing support trusts) (2003). For creditors' rights purposes, the distinction is eliminated under the UTC. UNIF. TRUST

rights of creditors of a beneficiary of such a trust are few and far between. As a general rule, regardless of whether the trust terms include a spendthrift provision, such creditors may not compel discretionary distributions they can reach, regardless of whether the trustee's discretion is expressed in the form of a support or other standard of distribution, or whether the trustee has abused its discretion.[209] Similarly, even if the terms of such a trust do not include a spendthrift provision, a creditor may not force the sale of the beneficiary's interest.[210]

The OTC includes two exceptions to the general rule that creditors of a beneficiary of a third-party-created discretionary non-WDT may not compel discretionary distributions. First, a beneficiary's child or current spouse may do so, but only if four conditions are satisfied: (1) the child or current spouse has a judgment or court order against the beneficiary for support;[211] (2) under the terms of the trust, the trustee could have made distributions for the beneficiary's support;[212] (3) the trustee has abused its discretion or failed to comply with a standard for distributions;[213] and (4) the settlor did not specifically exclude the child or spouse from benefiting from the trust.[214] The distribution amount a child or current spouse who meets these requirements may receive cannot be more than what the trustee would have distributed if the trustee had not abused its discretion or failed to comply with the distribution standards. Further, this amount may be reduced to what the court deems equitable under the circumstances.[215]

Second, and consistent with the Ohio Supreme Court's decision in *Bureau of Support v. Kreitzer*,[216] the State of Ohio also may compel discretionary distributions to reimburse the State for care provided to the beneficiary, but only if the terms of the trust include a standard under which distributions could be made for the beneficiary's support.[217] Under the OTC, this exception is applicable only if the trust's terms do not include a spendthrift provision.[218]

CODE § 504 cmt. (2005) (citing RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. a rptr. note (2003) (describing the distinction as "arbitrary and artificial," and rejecting it in part because trust instruments commonly both give the trustee discretion and include support standards)). For a discussion, see Newman, *supra* note 167, at 592-93.

[209] OHIO REV. CODE ANN. § 5805.04(B) (West 2007).

[210] *Id*. § 5805.04(E).

[211] *Id*. § 5805.04(D)(1).

[212] *Id*.

[213] *Id*. § 5805.04(D).

[214] *Id*. For a pre-OTC case allowing a child support claimant to attach a beneficiary's interest in a discretionary support trust in part because its terms did not include an express exclusion of the children, see *Matthews*, 450 N.E.2d 278.

[215] *Id*. § 5805.04(D)(2).

[216] 243 N.E.2d 83 (Ohio 1968). Subsequent to *Bureau of Support v. Kreitzer*, several lower courts have applied it to allow claims of the state for reimbursement of the cost of care provided to beneficiaries of discretionary support trusts. *See* Bank One, Dayton, N.A. v. Ohio Dep't of Mental Retardation, No. 11773, 1990 WL 27520 (Ohio Ct. App. Mar. 13, 1990); *In re* Stum, No. 86 CA 28, 1987 WL 26246 (Ohio Ct. App. Dec. 2, 1987); *In re* Gantz, No. 86-CA-19, 1986 WL 12960 (Ohio Ct. App. Nov. 7, 1986). *See also In re* Kerney, No. 12-136, 1988 WL 59837 (Ohio Ct. App. June 3, 1988).

[217] OHIO REV. CODE ANN. § 5805.04(C) (West 2007). Note that a trust may be for the beneficiary's support even if its terms do not use the word "support" in its distribution language. For example, under the Restatement "[t]he terms 'support' and 'maintenance' are normally construed as synonyms." RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d (2003). Further, if the trust instrument does not expressly provide a support standard for distributions to the beneficiary, but provides for distributions

The OTC *Kreitzer* exception applies only to claims of Ohio for having supported a person who is a beneficiary of a support trust. Other creditors who have provided support to the beneficiary may not similarly compel discretionary distributions. That limitation of the *Kreitzer* rule arguably is inconsistent with pre-OTC Ohio law. In *Kreitzer*, 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.[219] The beneficiary was an otherwise destitute, institutionalized, and mentally incompetent patient whose support was being paid for by the state.[220] Its suit to compel the cotrustees to reimburse it for the cost of the beneficiary's care was successful, as the supreme court determined that the beneficiary could have compelled the cotrustees to provide for her support and that the state was subrogated to her right to do so.[221]

Ten years later, the supreme court revisited *Kreitzer* in a case involving the attempt of the former spouse of a beneficiary of a discretionary support trust to reach the beneficiary's interest for unpaid alimony.[222] 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."[223] 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.[224] 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.[225]

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for the beneficiary's "comfort," "benefit," "best interests," or "welfare," under the Restatement a support standard will be implied. *Id*.

[218] OHIO REV. CODE ANN. § 5805.04(C) (West 2007). The opinion in *Kreitzer* does not address whether the terms of the trust at issue in the case included a spendthrift provision. A subsequent, unreported lower court decision, however, stated that they did not, and limited the *Kreitzer* rule to trusts without spendthrift provisions. *See* Society Bank Nat'l Association v. Cayuga County Dep't of Soc. Services, No. 13624, 1993 WL 65747 at *2 (Ohio Ct. App. Mar. 10, 1993) (noting that the trust terms provided for the beneficiary's interest to become purely discretionary in the event of an attempted alienation or attachment).

[219] *Kreitzer*, 243 N.E.2d at 85 .

[220] *Id*.

[221] *Id.*

[222] *Martin*, 374 N.E.2d at 1388.

[223] *Id*. at 1386.

[224] *Id.* at 1387.

[225] *Id.* at 1389-90.

Because the former spouse's alimony claim was not part of the support the trustees could be required to furnish on behalf of the beneficiary, the Ohio Supreme Court denied her claim to reach the beneficiary's interest in the trust prior to its termination.[226]

After *Martin v. Martin*, three appellate decisions cite *Kreitzer*, *Martin*, or both, for the proposition that creditors other than the state can assert claims against the interests of beneficiaries of discretionary support trusts, when their claims represent support provided to or for the benefit of the beneficiary.[227] Those cases, however, did not involve claims by creditors for providing support to the beneficiary; therefore the *Kreitzer* rationale was inapplicable.[228] The dicta in those cases, and in *Martin*, indicate that the OTC's allowing only the State to compel distributions from discretionary support trusts to reimburse the State for support provided to the beneficiary may have affected a change in Ohio law. Whether that is the case, however, is unclear because the supreme court's holding in *Kreitzer* dealt only with reimbursement claims of the State,[229] apparently no Ohio cases allow a support creditor other than the State to compel distributions it can reach, and at least one court of appeals decision expressly declined to do so.[230]

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[226] *Id.* at 1389-90. Under the terms of the trust, the beneficiary was entitled to receive the trust principal and accumulated income upon termination of the trust. As a result, the Ohio Supreme Court affirmed the lower court's placing of a lien on the beneficiary's interest in the trust, and required the trustees to apply distributions due to the beneficiary at that time against the former spouse's judgment. *Martin*, 374 N.E.2d at 1391. In a subsequent court of appeals case that examined *Martin*, a child of a beneficiary of a discretionary support trust was allowed to reach the beneficiary's interest for unpaid child support in part because the beneficiary's "support" included support of the beneficiary's children. *Matthews*, 450 N.E.2d at 281.

[227] *See* Buoscio v. Estate of Buoscio, No. 00 CA 215, 2001 WL 1123960 at *4 (Ohio Ct. App. Sept. 14, 2001); Schrierer v. Ostafin, No. 19381, 1999 WL 493940 at **3-4 (Ohio Ct. App. July 4, 1999); and Samson v. Bertok, No. WD-86-3, 1986 WL 14819 at **3-4 (Ohio Ct. App. Dec. 19, 1986). Note also that in *Bank One, Dayton, N.A. v. Ohio Department of Mental Retardation*, the mother of the beneficiary of a discretionary support trust, relying on *Kreitzer*, sought reimbursement from the trust for amounts she had spent for his care. *Bank One*, 1990 WL 27520, at *2. The lower court dismissed her claims, without prejudice, noting that they raised the question of a parent's right of subrogation. *Id.* The appellate court held it error to have dismissed her claims. *Id.* at *4.

[228] The trusts in *Buoscio v. Estate of Buoscio*, 2001 WL 1123960 at *1, *Schrierer v. Ostafin*, 1999 WL 493940 at *4, and *Samson v. Bertok*, 1986 WL 14819 at *1, all were for the support of their beneficiaries. The creditors' claims in *Schierer* and *Samson*, however, were for the beneficiary having committed a tortious assault against the creditor, *Schierer*, 1999 WL 493940 at *1, and defects in construction work the beneficiary had performed, *Samson*, 1986 WL 14819 at *1. In *Buoscio*, the beneficiary unsuccessfully sued to compel a distribution from a discretionary support trust with assets of approximately $84,000 to pay a $25,000 retainer to a lawyer to pursue post voluntary manslaughter conviction relief that the court characterized as a "long shot." *Buoscio*, 2001 WL 1123960, at *5.

[229] *See Kreitzer*, 243 N.E.2d at 84.

> By discharging its qualified duty to advance support to a destitute patient in a mental institution under the jurisdiction of the Department of Mental Hygiene and Correction, the [S]tate of Ohio is entitled, under the equitable doctrine of subrogation, to seek reimbursement for the support advanced by pursuing whatever right of action might be available to the patient, including such rights as the patient may have as a destitute cestui que trust.

Id.

[230] In *Winter Haven Hospital, Inc. v. BancOhio National Bank*, a hospital, relying on *Kreitzer*, sought reimbursement from a discretionary support trust for amounts it was owed by the beneficiary of the trust. *Winter Haven Hosp., Inc. v. BancOhio Nat'l Bank*, No. 93APE08-1141, 1993 WL 524898, at *2 (Ohio Ct. App. Dec. 14, 1993). The trust assets had a value of approximately $97,000 and the hospital's claim was for nearly $59,000. In holding for the trustee, the court noted that "payment of the debt would so

Another issue with respect to discretionary trusts that are not WDTs is whether the rights of a beneficiary's creditor will be enhanced if the beneficiary serves as trustee. The rationale for such a result is that a trustee-beneficiary's "rights and authority represent a limited form of ownership equivalence analogous to certain general powers."[231] Like the UTC,[232] the OTC provides that creditors' rights are not increased in such a case if the trustee-beneficiary's discretion to make distributions for his or her own benefit is limited by an ascertainable standard related to the trustee-beneficiary's health, education, support, or maintenance.[233]

Finally, the OTC does not address the question whether, if the terms of a discretionary trust do not include a spendthrift provision, a beneficiary's creditor may attach discretionary distributions the trustee chooses to make. At least one Ohio court of appeals decision held that if the trust is for the beneficiary's support, and the creditor's claim is not for furnishing support to the beneficiary, the creditor may not attach future discretionary distributions the trustee chooses to make.[234] The UTC rule to the contrary[235] is supported by case law in a number of states.[236] However, there are also states in which the creditor may not attach future discretionary distributions,[237] and there are likely states in which this issue has not been addressed.

C. Creditors' Claims Against the Settlor

Consistent with the UTC and pre-OTC law in Ohio,[238] the OTC provides that, as a general rule, during the lifetime of the settlor of a revocable trust, the settlor's creditors may reach the trust's assets regardless of whether the trust instrument includes a spendthrift provision.[239] A limited exception is included for self-settled supplemental

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deplete trust assets as to jeopardize [the beneficiary's] daily maintenance, the very purpose for which the trust was established." *Id.* In rejecting a broad application of the supreme court's holding in *Kreitzer* and its dictum in *Martin*, the court stated: "To hold otherwise would in effect require the trustee to pay a bill whenever it fell within the arguable parameters for which the trust was established. Clearly, the intent of the trust instrument is not to require such payment, but to allow the trustee to pay in its discretion." *Id.*

[231] RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. g (2003). Thus, under the Restatement, "in such a case, . . . creditors [are] able to reach from time to time the maximum amount the trustee-beneficiary can properly take." *Id.*

[232] UNIF. TRUST CODE § 504(e) (2005).

[233] OHIO REV. CODE ANN. §§ 5801.01(B), 5805.04(F) (West 2007). Note, however, that an ascertainable standard limitation on a trustee-beneficiary's discretion to distribute to the trustee-beneficiary may not protect the trust assets in the event of the trustee-beneficiary's bankruptcy. *See In re* McCoy, No. 00 CA 215, 2002 WL 1611588 at *4 (N.D. Ill. 2002). *See generally*, Charles Harris & Tye J. Klooster, *Beneficiary-Controlled Trusts Can Lose Asset Protection*, TR. & EST. 37 (Dec. 2006).

[234] *Samson*, 1986 WL 14819, at*4-5.

[235] UNIF. TRUST CODE § 501 (2005).

[236] *See* RESTATEMENT (THIRD) OF TRUSTS § 60 cmts. b rptr. notes, c rptr. notes (2003). *See also* RESTATEMENT (SECOND) OF TRUSTS § 155(2) (1959) (stating that a trustee of a discretionary trust who has notice of a creditor's claim and who makes a discretionary distribution to the beneficiary is liable to the creditor for the amount of the distribution).

[237] *See, e.g.*, Shelley v. Shelley, 354 P.2d 282, 289 (Or. 1960).

[238] OHIO REV. CODE ANN. § 1335.01(A) (repealed 2007); UNIF. TRUST CODE § 501 (2005).

[239] OHIO REV. CODE ANN. § 5805.06(A)(1) (West 2007). While neither the OTC nor the UTC explicitly recognize homestead rights and other exemptions from creditors' claims under other state law as limitations on creditors' rights to reach revocable trust assets, the UTC cites a comment to the Third Restatement that does. *See* UNIF. TRUST CODE § 505 cmt. (2005) (citing RESTATEMENT (THIRD) OF TRUSTS

needs trusts. For such a trust, the right of a creditor of the settlor-beneficiary to reach the trust assets is subject to the court's ability to limit the creditor's award to what "is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the supplemental needs of the beneficiary."[240]

Similar to the UTC,[241] the OTC treats the holder of a power of withdrawal from a trust as the settlor of a revocable trust for creditors' rights purposes, but only to the extent of the property subject to the power of withdrawal, and only during the period the power may be exercised.[242] Thus, for example, if the settlor makes a $12,000 contribution to the trust and its terms provide the beneficiary with a thirty-day period to withdraw the $12,000 from the trust, for creditors' rights purposes the beneficiary will be treated as the settlor of a revocable trust of $12,000 for the thirty-day period. It is not clear what action a creditor of a beneficiary must take during the thirty-day period to preserve its ability to reach the assets the beneficiary may withdraw. The comment to the analogous provision of the UTC simply provides that the creditor would have "to take action prior to the expiration of the [withdrawal] period."[243]

If the holder of the power of withdrawal allows it to lapse, releases it, or waives it, the power holder will not, with respect to the amount subject to the power, thereafter be treated as the settlor of a revocable trust for creditors' rights purposes. However, this is only the case if the amount subject to withdrawal was limited to the greater of the federal gift tax annual exclusion amount[244] (doubled, if the donor was married at the time of the transfer to the trust) or the five or five amount[245] under the Internal Revenue Code.[246] With respect to any excess, such as would exist when a hanging power is used and is

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§ 25 cmt. e (2003) (stating that property held in a revocable trust is subject to claims of the settlor's creditors "if the same property belonging to the settler . . . would be subject to the claims of the creditors, taking account of homestead rights and other exemptions")). Further, the General Comment to UTC section 505 explicitly provides that article 5 does not supersede state exemption statutes (nor state fraudulent transfer acts). *See* UNIF. TRUST CODE art. 5, gen. cmt. (2005).

[240] OHIO REV. CODE ANN. § 5805.06(A)(3) (West 2007).

[241] UNIF. TRUST CODE § 505(b)(1) (2005).

[242] OHIO REV. CODE ANN. § 5805.06(B)(1) (West 2007). The OTC defines "power of withdrawal" to mean: "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." *Id.* § 5801.01(O).

[243] UNIF. TRUST CODE § 505 cmt. (2005).

[244] *See* I.R.C. § 2503(b) (2007).

[245] *See id.* §§ 2041(b)(2); 2514(e) (2007).

[246] OHIO REV. CODE ANN. § 5805.06(B)(2)(a) (West 2007). Note that under the UTC, the gift tax annual exclusion amount is not doubled if the donor was married at the time of the contribution. UNIF. TRUST CODE § 505(b)(2) (2005).

outstanding,[247] the power holder will be treated as the settlor of a revocable trust for creditors' rights purposes.[248]

The OTC rule allowing a creditor of the holder of a power of withdrawal to reach the assets subject to the power is consistent not only with the UTC, but also with recent Ohio case law.[249] The rationale for this rule, as noted by the comment to the comparable provision of the UTC, is that a power of withdrawal is functionally identical to a power of revocation.[250] Nevertheless, while this UTC rule is consistent with recent case law in Ohio, it is a change from the common law in many states.[251]

Under the UTC[252] and case law in most states that have addressed the issue,[253] after the death of the settlor of a revocable trust, his or her creditors may reach the trust assets to satisfy their claims.[254] Under *Schofield v. Cleveland Trust Co.*,[255] Ohio law is

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[247] Generally, a "hanging power" permits the beneficiary to withdraw the full gift tax annual exclusion amount, but to avoid adverse transfer tax consequences to the power holder from a lapse of the power in excess of the five or five amount, the amount that lapses in any given year is limited to the five or five amount, with any excess carrying over to a subsequent year when gifts are not made or the size of the trust has increased sufficiently. For a discussion, see Robert E. Burton, *Estate Planning with Life Insurance*, *in* 37TH ANNUAL ESTATE PLANNING INSTITUTE, TAX LAW AND ESTATE PLANNING SERIES COURSE HANDBOOK D-339, 733, 747 (Practising Law Institute 2006); Bradley E.S. Fogel, *Back to the Future Interest: The Origin and Questionable Legal Basis of the Use of Crummey Withdrawal Powers to Obtain the Federal Gift Tax Annual Exclusion*, 6 FLA. TAX REV. 189, 213 n.127 (2003).

[248] OHIO REV. CODE ANN. § 5805.06(B)(2) (West 2007).

[249] *See, e.g.*, Great Am. Ins. Co. v. Thompson Trust, No.C-040127, 2006 WL 199751 (Ohio Ct. App. Jan. 27, 2006); *Bank One*, 1990 WL 27520. *See also*, Newman, *supra* note 41 (citing cases regarding a creditor's rights against a holder of a power of withdrawal). Two old Ohio cases, however, are to the contrary; under them, creditors of the holder of a general power of appointment can not reach property subject to the power even if it has been exercised. Meehan v. Burr, 51 N.E. 1099, (Ohio 1898); Jones' Adm'r v. Shields, 14 Ohio 359 (1846).

[250] UNIF. TRUST CODE § 505 cmt. (2005). Similarly, an Ohio court has analogized a power of withdrawal to outright ownership of the assets subject to the power:

> [W]e are unable to make a meaningful distinction . . . between funds held by a bank in trust for a beneficiary that are subject to the beneficiary's demand in whole or in part, and funds held by a bank in an account, such as a savings account, that are subject to being demanded by the owner of the account at any time. In either case, the funds held by the bank are essentially under the dominion and control of the person who has the unrestricted power to demand those funds, and are obviously intended for his sole use and benefit.

Bank One, 1990 WL 27520, at *4.

[251] According to the Restatement (Second) of Property, allowing creditors of the holder of an unexercised, but presently exercisable general power of appointment, to reach assets subject to the power is inconsistent with the law of most states. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 13.2 rptr. note (1986). Non-UTC law is not uniform on this subject, however, as the Restatement (Third) of Trusts, federal bankruptcy law, and statutes in a number of states allow creditors to reach such assets. *See* RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. b (2003). *See also* 11 U.S.C.A. § 541(b) (West 1994); CAL. CIV. CODE § 1390.3 (West 1982); MICH. COMP. LAWS § 556.123 (1988); MINN. STAT. § 502.70 (1990); N.Y. EST. POWERS & TRUSTS LAW §§ 10-7.2, -7.4 (McKinney 1998); OKLA. STAT. tit. 60, § 299.9 (1994); WIS. STAT. § 702.17 (1981).

[252] UNIF. TRUST CODE § 505(a)(3) (West 2007).

[253] *See* RESTATEMENT (THIRD) OF TRUSTS § 25 rptr. notes (2003) and cases cited therein.

[254] Under the UTC, that is the case not only for debts of the settlor, but also for "costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is

to the contrary[258] and prior attempts by the Estate Planning, Trust and Probate Law section of the Ohio State Bar Association to legislatively change *Schofield* have failed.[256] As a result, although the Joint Committee initially decided that the OTC should follow the UTC and legislatively overrule *Schofield*, in subsequent deliberations it decided to omit the UTC provision from the OTC. Note, however, that the OTC also does not codify the rule in *Schofield*, but is simply silent on the issue. Accordingly, the rule in *Schofield* remains the law in Ohio unless and until it is overruled by judicial decision or subsequent legislation.

Finally, consistent with existing Ohio law[257] and the UTC,[258] the OTC provides that a creditor of a settlor of an irrevocable trust may reach the maximum amount that can properly be distributed to or for the benefit of the settlor regardless of whether the terms of the trust include a spendthrift provision.[259] In a departure from the UTC, however, the OTC rejection of self-settled spendthrift trusts includes a limited exception for supplemental needs trusts.[260] For them, "the court may limit the award of a settlor's creditor . . . 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."[261]

XII. REVOCABLE TRUSTS

Because of the increased use of revocable trusts in recent years, the OTC, following the UTC's lead, includes an entire chapter that addresses many common issues they raise. These provisions have changed Ohio law in several significant respects. Perhaps most fundamentally, in recognition of the fact that trusts are so commonly used as will substitutes and increasingly are being created without the aid of lawyers, the OTC reverses the common law rule,[262] and provides that a trust is revocable unless expressly made irrevocable.[263]

A revocable trust is typically funded during the settlor's lifetime and creates beneficial interests in others.[264] Consequently, an argument could be made that the capacity required to create one should be the same capacity required to make a lifetime

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inadequate to satisfy those claims, costs, expenses, and [allowances]." UNIF. TRUST CODE § 505(a)(3) (2005) (alteration in original).

[255] 21 N.E.2d 119 (Ohio 1939).

[258] *Id.* at 122.

[256] *See generally*, Daniel J. Hoffheimer & Joshua A. Shapiro, *Expanding the Rights of Creditors to Nonprobate Property: A Sensible Proposal to Close Ohio's Antiquated Loopholes*, 13 PROB. L.J. OF OHIO 23, 24 (2002).

[257] *See, e.g.*, Miller v. Ohio Dep't of Human Servs., 664 N.E.2d 619, 620-22 (Ohio Ct. App. 1995).

[258] UNIF. TRUST CODE § 505(a)(2) (2005).

[259] OHIO REV. CODE ANN. § 5805.06(A)(2) (West 2007).

[260] *Id.* § 5805.06(A)(3).

[261] *Id.*

[262] *See, e.g.*, Lourdes Coll. v. Bishop, 703 N.E.2d 362 (Ohio Ct. C.P. Lucas County 1997).

[263] OHIO REV. CODE ANN. § 5806.02(A) (West 2007). Because of the possibility that settlors may have created trusts they intended to be irrevocable in reliance on the prior rule, this provision of the OTC does not apply to trusts in existence before the OTC's January 1, 2007 effective date. *Id.* § 5806.02 *cmt.*

[264] *See* RESTATEMENT (THIRD) OF TRUSTS § 69, illus. 2 (2003). For a discussion of the OTC provision that during the lifetime of the settlor of a revocable trust, regardless of whether the settlor has capacity, the trustee's duties are owed only to the settlor, see *infra* notes 276-79 and accompanying text.

gift. Revocable trusts, however, are used primarily as will substitutes to dispose of the settlor's property at death without a probate proceeding. For this reason, the OTC provides that the capacity required to create, amend, revoke, or add property to a revocable trust is the same as is required to make a will.[265]

Revocable trusts, which are subject to amendment as well as revocation,[266] raise questions concerning how the settlor may exercise those retained powers. If the settlor specifies in the terms of the trust a method for doing so, the OTC requires that the settlor substantially comply with the specified method.[267] If the trust terms do not provide a method for revocation or amendment, the OTC general rule is that the settlor may revoke or amend by any method that manifests clear and convincing evidence of the settlor's intent.[268] An important exception to the general rule that has changed Ohio law,[269] however, is that a settlor may not revoke a trust, or amend its terms, by will or codicil unless the terms of the trust expressly allow the settlor to do so.[270]

The OTC also addresses the question of how a settlor's powers with respect to a revocable trust may be exercised if the settlor is incapacitated. If the settlor has appointed an agent under a power of attorney, the agent may exercise the settlor's revocation, amendment, and distribution powers only if the settlor expressly authorized the agent to do so under both the terms of the trust and the power of attorney.[271] If a guardian of the settlor's estate or person is serving, the guardian may exercise the

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[265] OHIO REV. CODE ANN. § 5806.01 (West 2007). At least one pre-OTC case has similarly applied the testamentary capacity standard to a revocable trust. Lah v. Rogers, 707 N.E.2d 1208, 1214 n.7 (Ohio Ct. App. 1998). Note also that the OTC, in addressing an issue not covered by the UTC, provides that "fraud," "duress," and "undue influence," as grounds for challenging the validity of a trust—whether revocable or irrevocable—have the same meanings as they do in will contests. OHIO REV. CODE ANN. § 5804.06 (West 2007)..

[266] As noted by a UTC comment, "[a] power of revocation includes the power to amend." UNIF. TRUST CODE § 602 cmt. (2005).

[267] OHIO REV. CODE ANN. § 5806.02(C) (West 2007).

[268] *Id.* Under the UTC, the settlor's ability to revoke or amend by a method not specified in the terms of the trust is not limited to trusts the terms of which do not provide a method of revocation or amendment. Rather, under the UTC if the settlor has reserved the ability to revoke or amend by a specified means, another means of doing so may be used if it manifests clear and convincing evidence of intent unless the trust's terms state that the specified method is the exclusive method for revocation or amendment. UNIF. TRUST CODE § 602(c)(2) (2005). To protect a trustee who does not have notice of a revocation or amendment, the UTC also includes a provision protecting the trustee from liability for actions taken on the assumption that the trust had not been revoked or its terms amended. *Id.* § 602(g). The rationale for these UTC rules is "to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability." *Id.* § 602 cmt.

[269] *See In re* Estate of Davis, 671 N.E.2d 1302, 1304 (Ohio Ct. App. 1996).

[270] OHIO REV. CODE ANN. § 5806.02(C) (West 2007). This OTC provision also departs from the UTC, which expressly allows a revocable trust to be revoked, or its terms amended, by "a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust." UNIF. TRUST CODE § 602(c)(2)(a). The OTC provisions requiring a settlor who has specified a means of revocation or amendment, but not made it exclusive, to substantially comply with it, and prohibiting revocation or amendment by will or codicil unless the trust's terms expressly so allow, provide greater certainty than do the UTC's, but likely will result in cases in which a settlor's intent will be defeated. *See In re* Estate of Davis, 671 N.E.2d 1302.

[271] OHIO REV. CODE ANN. § 5806.02(E) (West 2007). The UTC comparable provision requires that the authorization be in either the terms of the trust or the power, but it need not be in both. UNIF. TRUST CODE § 602(e) (2005). Again, the OTC's added requirement, while adding certainty, does so at the potential cost of frustrating the settlor's intent.

settlor's powers over the trust only with the approval of the court that is supervising the guardianship.[272]

Because revocable trusts are commonly used as will substitutes, the OTC provides that during the lifetime of the settlor "the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor," even if the settlor has become incapacitated.[273] Accordingly, while the settlor is living, the trustee should have no duty to provide notices, reports, or other information about the trust to other trust beneficiaries, even though the OTC principal reporting provision, section 5808.13, is not expressly limited to irrevocable trusts. Furthermore, this is arguably the case even if the settlor has lost capacity and other persons, such as the settlor's spouse or descendants, are current beneficiaries of the trust.[274] Moreover, because the trustee's duties are owed exclusively to the settlor, even if incapacitated, other current beneficiaries would arguably be unable to enforce the trust, even if the trust terms explicitly provide for distributions to them that the trustee does not make. Perhaps the other current beneficiaries in such a situation could successfully petition the court to remove the trustee,[275] but with no right to information about the trust, they may not know of the trust's terms the trustee is ignoring. In such a circumstance—a revocable trust the terms of which provide for current distributions to others if the settlor becomes incapacitated—the revocable trust is not simply acting as a will substitute. Therefore, the OTC should be amended to provide that if the settlor becomes incapacitated, the trustee's duties, including its duties to report, also are owed to other current beneficiaries.[276]

If the trustee of a revocable trust breaches a duty and the settlor is incapacitated or dies after the breach, but without having consented to or ratified the trustee's conduct, the question is raised whether a recovery from the trustee would belong to the trust or to the settlor, if living, or the settlor's estate, if the settlor is not living. The OTC leaves this decision to the court.[277]

Finally, the OTC does not include the UTC statute of limitations for contesting a revocable trust.[278] Rather, it includes Ohio's recently enacted two-year statute for doing

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[272] OHIO REV. CODE ANN. § 5806.02(F) (West 2007). If a guardian of both the settlor's estate and person is serving, the guardian of the estate, with the court's approval, may exercise the settlor's powers. *Id.*

[273] *Id.* § 5806.03(A). The UTC, as initially promulgated, provided that the trustee's duties were owed exclusively to the settlor only while the settlor had capacity to revoke the trust. UNIF. TRUST CODE § 603(a) (2000). By amendment in 2004, the requirement that the settlor have capacity for the trustee's duties to be owed exclusively to the settlor was bracketed in the UTC because of concerns related to how the settlor's capacity would be determined and the different treatment revocable trusts would be afforded compared to wills. *Id.* § 603 cmt.

[274] For two recent articles noting that the OTC is not clear on this issue, see Robert J. Gall, *Revocable Trusts Under the Ohio Trust Code*, 17 PROB. L.J. OF OHIO 101, 102-03, n.9 (2007); Susan S. Locke & Venna Khanna, *Beneficiary Information and Notices*, 17 PROB. L.J. OF OHIO 5, 6-7 (2006).

[275] *See* OHIO REV. CODE ANN. § 5807.06 (West 2007); *infra* notes 293-97 and accompanying text.

[276] *See* Alan Newman, *The Ohio Trust Code and Revocable Trusts: Duties of the Trustee While the Settlor Is Living*, 17 PROB. L.J.OF OHIO 103 (2007).

[277] OHIO REV. CODE ANN. § 5806.03(A) (West 2007).

[278] *Compare id.* § 5806.04, *with* UNIF. TRUST CODE § 604 (2005). The operation of the UTC statute of limitations depends on whether the trustee sent the contestant a proper notice. UNIF. TRUST CODE § 604(a) (2005). For a notice to start the limitation period, it must be accompanied by a copy of the trust instrument and inform the recipients "of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding." *Id.* § 604(a)(2). If such a notice was sent, the statute will run

so.[279] Note, however, that if the settlor's will devises probate assets to the trust, the trust's terms may be incorporated by reference into the will.[280] In that event, a potential contestant of the trust who cannot contest the will (if, for example, the three-month limitation period for doing so[281] has run) may not have standing to contest the trust.[282] Whether the enactment of the two-year statute of limitations for contesting a revocable trust will affect that result is not addressed by the OTC.

XIII. OFFICE OF TRUSTEE

Chapter 5807 includes provisions that address a variety of issues related to the office of trustee. For the most part, these provisions are default rules the settlor may override in the terms of the trust.[283] Exceptions include the fact that the settlor may not bar the court from requiring, dispensing with, modifying, or terminating a bond,[284] or adjusting the trustee's compensation if it is unreasonably low or high.[285]

If the terms of the trust specify the means of acceptance of the trusteeship, the trustee accepts by substantially complying.[286] If a method of acceptance is not specified, the trustee may accept by any means indicating its acceptance, including accepting delivery of the trust property, exercising powers of the trustee, or performing trustee duties.[287] Acting to preserve trust property, however, will not constitute acceptance if the person who does so sends a rejection of the trusteeship to the settlor, if living and competent, or to a qualified beneficiary.[288] Similarly, a person considering accepting a trusteeship may inspect or investigate trust property for such purposes as determining potential liability under environmental laws without accepting the trusteeship.[289]

Perhaps the most controversial provision in chapter 5807 is section 5807.06, which specifies the circumstances under which a trustee may be removed.[290] Following the UTC, the OTC includes several grounds that can be described as constituting cause sufficient to warrant removal.[291] Absent from the OTC is the UTC provision allowing the court to remove a trustee if:

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120 days after the trustee sent the notice. *Id.* If not, it will run three years from the date of the settlor's death. *Id.* § 604(a)(1).

[279] OHIO REV. CODE ANN. § 5806.04 (West 2007).

[280] *Hageman*, 343 N.E.2d at 124.

[281] *See* OHIO REV. CODE ANN. § 2107.76 (West 2007).

[282] *See Hageman*, 343 N.E. 2d 121.

[283] *See* OHIO REV. CODE ANN. § 5801.04 (West 2007).

[284] *Id.* § 5801.04(B)(6).

[285] *Id.* § 5801.04(B)(7).

[286] *Id.* § 5807.01(A).

[287] *Id.*

[288] OHIO REV. CODE ANN. § 5807.01(C)(1) (West 2007).

[289] *Id.* § 5807.01(C)(2).

[290] The Revised Code includes a separate provision on the removal of trustees of testamentary trusts. OHIO REV. CODE ANN. § 2109.24 (West 2007). As amended by Ohio House Bill 416, it is now clear that section 2109.24 is not applicable to inter vivos trusts. *Id.*

[291] They are: commission of a serious breach of trust; a failure of cotrustees to cooperate that adversely affects the trust's administration; and "unfitness, unwillingness, or persistent failure . . . to administer the trust effectively," such that it is in the best interests of the beneficiaries for the court to remove the trustee. *Id.* § 5807.06(B).

> 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.[292]

If this provision, which represents a departure from traditional common law rules that require cause to remove a trustee,[293] had been included in the OTC, it would have effected a substantial change in Ohio law. Further, it arguably would defeat the intent of a settlor who designated the trustee and did not give the beneficiaries the power to remove and replace it.[294]

The OTC also departs from the UTC in its delegation provisions. Delegation issues can arise in two contexts: a delegation by one cotrustee to another or a delegation by a trustee to a third party. With respect to delegations by trustees to third parties, a UTC comment explains that "many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform."[295] 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."[296] As a result, the UTC prohibits a trustee from delegating to another trustee "the performance of a function the settlor reasonably expected the trustees to perform jointly."[297] By contrast, under the UTC a trustee may delegate to a third party agent any "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances."[298] The OTC departs from the UTC by using the UTC standard applicable to third party delegations in both the cotrustee and third party contexts.[299]

When cotrustees are named, a majority may act.[300] If a cotrustee fails to serve or continue to serve and the terms of the trust do not provide otherwise, the vacancy need not be filled[301] and the remaining trustees may act on behalf of the trust.[302] If a vacancy

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[292] UNIF. TRUST CODE § 706(b)(4) (2005).

[293] *See* BOGERT & BOGERT, *supra* note 96, § 527. It is more difficult to remove a trustee appointed by the settlor than one appointed by the court, particularly if the settlor knew of the asserted ground for removal when the settlor designated the trustee. *See* RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. f (2003).

[294] *See* Joanne E. Hindel, *Trustee Removal: From the Common (Law) to the Controversial*, 16 PROB. L.J. OF OHIO 67 (2006).

[295] UNIF. TRUST CODE § 703 cmt. (2005).

[296] *Id.*

[297] *Id.* § 703(e). Professor English notes that this "standard is appropriate but may be difficult to apply in practice." English, *Significant Provisions*, *supra* note 20 at 197.

[298] UNIF. TRUST CODE § 807(a) (2005). This also is the standard under the new Restatement, RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 171 (1992), and under the Uniform Prudent Investor Act, UNIF. PRUDENT INVESTOR ACT § 9(a) (1994).

[299] OHIO REV. CODE ANN. §§ 5807.03(E), 5808.07(A) (West 2007).

[300] *Id.* § 5807.03(A). Under the UTC, "[c]otrustees who are unable to reach a unanimous decision may act by majority decision." UNIF. TRUST CODE § 703(a). Because that language arguably implies a duty to attempt to reach a unanimous decision, the comparable provision of the OTC has been changed to provide that "[i]f there are three or more cotrustees serving, the cotrustees may act by majority decision." OHIO REV. CODE ANN. § 5807.03(A).

[301] OHIO REV. CODE ANN. § 5807.04.

[302] *Id.* § 5807.03(B).

occurs that is required to be filled, a judicial proceeding often will not be necessary to fill the vacancy.[303] Furthermore, judicial involvement is generally not required for trustee resignation.[304]

The UTC 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 such a breach.[305] Consistent with pre-OTC Ohio law,[306] this UTC provision has been modified in the OTC to provide that 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.[307] Similarly, the OTC also negates that duty when other trustees act by majority vote.[308] Note, however, that there is a limitation on the OTC provision, which is section 5807.03(F), that protects a trustee who does not join in a breach committed by another trustee. It is subject to separate OTC provisions that obligate each trustee to participate in the performance of a trustee's function[309] and prohibit delegations except those that a prudent trustee of comparable skills could properly delegate under the circumstances.[310] Under those three provisions, if other trustees, by majority vote, commit a breach, a cotrustee who did not participate would generally not be liable for the other trustees' actions, but presumably could be liable if it impermissibly delegated its duty or neglected to participate in the performance of the trustee's duties.

XIV. THE TRUSTEE'S DUTY TO INFORM BENEFICIARIES AND THE RIGHTS OF BENEFICIARIES TO RECEIVE INFORMATION ABOUT THE TRUST

Among the most important and controversial provisions of the OTC are those addressing the duties of a trustee of an irrevocable trust to inform and report to beneficiaries about the trust.[311] The OTC has made significant changes in Ohio law regarding the trustee's duty to provide information to beneficiaries about the trust.[312] Prior Ohio law addressed the obligation of a trustee of an irrevocable,[313] inter vivos

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[303] If the terms of the trust do not provide for a successor, and do not designate someone who can appoint a successor, the qualified beneficiaries, by unanimous agreement, may do so. *Id.* § 5807.04(C).

[304] In lieu of court approval, a trustee may resign by giving at least thirty-days notice to the qualified beneficiaries, the settlor, if living, and all cotrustees. *Id.* § 5807.05(A).

[305] UNIF. TRUST CODE § 703(g).

[306] OHIO REV. CODE ANN. § 1339.43 (renumbered § 5815.25 in 2007).

[307] *Id.* § 5807.03(G).

[308] *Id.*

[309] *Id.* § 5807.03(C).

[310] *Id.* § 5807.03(E).

[311] For a discussion of the reporting duties of the trustee of a revocable trust, see *supra* notes 276-77 and accompanying text.

[312] *See generally* Michael A. Ogline, *Notice Provisions of the Ohio Uniform Trust Code*, 15 PROB. L.J. OF OHIO 119 (2005). Most of the OTC provisions addressing the duties of the trustee to provide information about the trust to beneficiaries are found in section 5808.13. Note, however, that in addition to section 5808.13, several other provisions of the OTC impose notice requirements on the trustee in specific circumstances. *See, e.g.*, OHIO REV. CODE ANN. §§ 5801.07 (addressing transfer of trust's principal place of administration), 5804.14(A)(1) (addressing termination of an uneconomic trust), 5804.17 (addressing combination or division of trusts), 5807.05(A) (addressing resignation of trustee) (West 2007).

[313] As discussed *infra* note 318 and accompanying text, reporting obligations under prior law were owed to "qualified beneficiaries." OHIO REV. CODE ANN. § 1339.69 (repealed 2007). If a trust was subject

trust[314] to inform beneficiaries in section 1339.69, which was repealed in connection with the enactment of the OTC. Under section 1339.69, a "qualified beneficiary"[315] who made a written request was entitled to receive from the trustee a report of the trustee's management of the trust.[316] Absent such a request, which could be made no more often than once every six months,[317] the trustee was not obligated to report to the beneficiary. By contrast, under the OTC, the trustee is obligated to keep current beneficiaries of the trust informed about the administration of the trust and the material facts necessary for them to protect their interests, without first having received a request (written or otherwise) for such information.[318] Further, the OTC 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.[319]

In addition to the general duty to keep current beneficiaries informed about the trust and the duty to respond to beneficiaries' requests for information about the trust, the OTC imposes several specific reporting obligations on the trustee: (1) a newly serving trustee must notify the current beneficiaries of its acceptance of the trust and its name, address, and telephone number, within sixty days of its acceptance;[320] (2) within sixty days of a trustee learning of a new irrevocable trust, or of a revocable trust that has become irrevocable, the trustee must inform the current 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;[321] (3) the trustee must "[n]otify the current beneficiaries in advance of any changes in the method or rate of the trustee's compensation;"[322] and (4) if there is a vacancy in a trusteeship (and no cotrustee remains in office), trust reports must be sent to the current beneficiaries by the former trustee. If a

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to amendment, appointment, or revocation by its settlor, the settlor was the only qualified beneficiary of the trust. *Id.* § 1339.69(A)(1).

[314] The reporting obligations of the trustee of a testamentary trust are included in the Revised Code's probate provisions in title 21. *See, e.g.*, *id.* § 2109.303. Although these provisions were not directly affected by House Bill 416's enactment of the OTC, the bill also enacted new section 2109.69(B). Under it the OTC's reporting provisions apply to testamentary as well as inter vivos trusts. OHIO REV. CODE ANN. § 2109.69.

[315] "Qualified beneficiary" was defined differently under section 1339.69(A)(1) (repealed 2007) than it is under the OTC. Under former law, it means "a beneficiary who is entitled or eligible to receive a distribution of income or principal whether presently or at some future time that is predicated upon the happening of an event that is certain." OHIO REV. CODE ANN. § 1339.69 (repealed 2007). Under the OTC, it essentially means a current beneficiary or a person who would be a current beneficiary if the interests of the current beneficiaries, or the trust, terminated on the date the determination is being made. *Id.* § 5801.01(Q), reproduced *supra* note 62.

[316] OHIO REV. CODE ANN. § 1339.69(B)(1) (repealed 2007). Within thirty days of receiving the qualified beneficiary's request, the inter vivos trustee was required to furnish the qualified beneficiary with "a report that is current to within five months prior to the date of the request and that shows an inventory of the trust property and the receipts credited and expenditures charged to income or principal with respect to the inter vivos trust for the two years prior to the preparation of the report." *Id.* § 1339.69(B)(2) (repealed 2007).

[317] *Id.* § 1339.69(B)(1) (repealed 2007).

[318] *Id.* § 5808.13(A).

[319] *Id.* § 5808.13(A). The trustee, however, is not under a duty to respond if doing so would be "unreasonable under the circumstances." OHIO REV. CODE ANN. § 5808.13(A) (West 2007).

[320] *Id.* § 5808.13(B)(2).

[321] *Id.* § 5808.13(B)(3).

[322] *Id.* § 5808.13(B)(4).

trustee is deceased or incapacitated, the trustee's personal representative or guardian may send the report.[323] Notably, the trustee's duty is owed only to the trust's current beneficiaries in these four circumstances.[324] By contrast, under the UTC each of these duties is owed to the broader class of qualified beneficiaries.[325]

The OTC also specifically requires the trustee to provide reports[326] to the current beneficiaries, and any other beneficiaries who request them, at least annually and at the termination of the trust.[327] The required report must address "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."[328] Although the OTC requires the trustee to keep current beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, it does not require the trustee to provide any beneficiaries with a copy of the trust instrument unless they request one.[329] Upon receiving such a request from a beneficiary—whether current, qualified, or more remote—the trustee is required to furnish a copy of the entire trust instrument to the beneficiary who made the request.[330] Although not addressed by the UTC, the OTC provides that if the settlor had completely restated the terms of a revocable trust that has become irrevocable, a requesting beneficiary is entitled to receive a copy of the restated instrument and amendments to it.[331]

The most significant OTC provisions regarding the trustee's duties to inform and report are those making some of the duties mandatory and thus beyond the ability of the settlor to waive.[332] Unless, as discussed below,[333] the settlor provides for a "beneficiary

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[323] *Id*. § 5808.13(C).

[324] The OTC, however, also expressly permits the trustee to provide information about the trust to beneficiaries to whom the trustee is not required to report. OHIO REV. CODE ANN. § 5808.13(E) (West 2007).

[325] UNIF. TRUST CODE § 813(b). For a discussion of the UTC reporting provisions, which have been among its most controversial, see Kevin D. Millard, *The Trustee's Duty to Inform and Report Under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373 (2005).

[326] The OTC follows the UTC in using the term "report," rather than "accounting," to describe what the trustee must furnish a beneficiary with respect to its administration of the trust. As explained by the comment to the comparable provision of the UTC, the rationale for this terminology is:

> 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.

UNIF. TRUST CODE § 813 cmt. (2005).

[327] OHIO REV. CODE ANN. § 5808.13(C) (West 2007).

[328] *Id.*

[329] *Id.* § 5808.13(B)(1).

[330] As noted by the comment to the comparable provision of the UTC, this requirement precludes the trustee from furnishing to a beneficiary only those portions of the trust instrument the trustee determines are relevant to the beneficiary's interest. *See* UNIF. TRUST CODE § 813 cmt. (2005).

[331] OHIO REV. CODE ANN. § 5808.13(B)(1) (West 2007). The beneficiary may, however, be able to obtain copies of earlier trust instruments and amendments in judicial proceedings. *Id.*

[332] For a discussion of the UTC limitations on settlor control, including those effected by its mandatory reporting rules, see Newman, *supra* note 45.

[333] *See infra* notes 345-51 and accompanying text.

surrogate" to receive the required information on behalf of a current beneficiary, the settlor may not override the trustee's duties "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"[334] and "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."[335]

Significantly, limiting the first of the trustee's mandatory duties—to inform current beneficiaries of the trust's existence, the trustee's identity, and their right to request trustee's reports—to persons who are at least twenty-five years old is not a blanket authorization for the trustee to withhold information from younger current beneficiaries. If a current beneficiary who is younger than age twenty-five learns of the trust and requests information about it, the trustee's mandatory duty to respond to such requests applies without regard to the current beneficiary's age.[336]

Although the trustee's mandatory reporting duties include the obligation to inform current beneficiaries who are at least twenty-five years old "of their right to *request* trustee's reports,"[337] they do not expressly require the trustee to provide such reports. The comment to the comparable provision of the UTC notes that the duty of the trustee to provide annual reports to qualified beneficiaries may be waived.[338] Similarly, the UTC comment also states that the settlor may waive the trustee's duty to furnish a copy of the trust instrument to a beneficiary who requests it.[339] Such waivers, however, may not prevent a current beneficiary from being entitled to receive reports or a copy of the entire trust instrument.

As also noted by the UTC comment, "[t]he 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."[340] Presumably, trustee reports usually would satisfy the reasonably-related-to-the-trust's-administration test, in which case a settlor could not (without designating a beneficiary surrogate) effectively bar a requesting current beneficiary from being entitled to receive them. Whether a complete copy of the trust instrument, as opposed to a copy of only those provisions related to the requesting current beneficiary's interest in the trust, would satisfy the test is less clear.[341]

In a significant departure from the UTC, the OTC allows the settlor to override the trustee's mandatory reporting duties by designating a "beneficiary surrogate" to

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[334] OHIO REV. CODE ANN. § 5801.04(B)(8) (West 2007).

[335] *Id.* § 5801.04(B)(9). Note that the comparable mandatory duties under the UTC are owed to qualified beneficiaries, rather than to current beneficiaries. UNIF. TRUST CODE §§ 105(b)(8), (b)(9). The 2004 amendments to the UTC, however, bracketed sections 105(b)(8) and (b)(9) because they "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." *Id.* § 105 cmt. The brackets were inserted to signal "that uniformity is not expected." *Id.*

[336] *See* OHIO REV. CODE ANN. § 5801.04(B)(9) (West 2007). *See also* UNIF. TRUST CODE § 105 cmt. (2005).

[337] OHIO REV. CODE ANN. § 5801.04(B)(8) (West 2007) (emphasis added).

[338] *See* UNIF. TRUST CODE § 105 cmt. (2005).

[339] *Id.*

[340] *Id.*

[341] For a case raising the question, in dictum, of whether a settlor could bar a beneficiary from access to the trust instrument, see *Fletcher v. Fletcher*, 480 S.E.2d 488, 491-93 (Va. 1997).

receive information that otherwise would be provided to the beneficiary.[342] The only limitation that the OTC imposes on who the settlor may designate as a beneficiary surrogate is that the beneficiary surrogate may not be a trustee.[343] Thus, presumably the settlor, or the settlor's spouse, if not acting as trustee, could serve in that capacity. The only duty the OTC expressly imposes on the beneficiary surrogate is that the surrogate "act in good faith to protect the interests of the current beneficiaries for whom" the information is received.[344]

The OTC includes 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 even current beneficiaries (such as, for example, those with serious substance abuse problems) are entitled to receive about trusts in which they have interests. The OTC beneficiary surrogate provisions are patterned after a similar approach taken by the District of Columbia in its recently enacted version of the UTC.[345] However, their novel approach is untested and, when used, will likely raise questions that are not addressed by the OTC.

For example, such questions may include: what duties, powers, and potential liabilities would the surrogate, who presumably would be a fiduciary, have to the current beneficiary for whom it received information? If a current beneficiary can maintain an action against a beneficiary surrogate with respect to its fulfilling its duty to act in good faith to protect the beneficiary's interest, would the statute of limitation not run on such an action unless and until the surrogate provided sufficient information to the current beneficiary about the trust? What information would be sufficient to cause the limitations period to run, and would the limitations period be the same two-year period applicable to actions by a beneficiary against a trustee?[346] If a court proceeding involving the trust was commenced, would the beneficiary be a party with access to the court record?[347] Would a beneficiary surrogate have standing to commence an action against the trustee with respect to the trust?[348]

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[342] OHIO REV. CODE ANN. § 5801.04(C) (West 2007).

[343] *Id*. § 5801.01(D).

[344] *Id*. § 5801.04(C). Note that if a beneficiary surrogate is serving and the trustee thus provides reports to the surrogate on behalf of a current beneficiary, the two-year statute of limitations on the beneficiary pursuing a claim against the trustee will run from the date the trustee sent a report to the beneficiary surrogate. *Id*. § 5810.05(A).

[345] *See* D.C. CODE §§ 19-1301.05(b)-.05(c) (2004). This approach has been characterized as a "unique and highly unusual" one. *2004 Enactments: District of Columbia*, UTC NOTES (Summer 2004) at 3, *available at* http://www.nccusl.org/Update/newsletters/UTCNotes/UTCnotes_Jul04_print.pdf. Other jurisdictions that have enacted versions of the UTC also allow the settlor to designate someone to receive information from the trustee on behalf of a beneficiary. *See, e.g.* ME. REV. STAT. ANN. tit. 18-B, § 105(3)(B) (2004).

[346] *See* OHIO REV. CODE ANN. § 5810.05(A) (West 2007).

[347] For a suggestion that in such a case a guardian ad litem could act for the beneficiary to make any necessary decisions and that the court record could be sealed, see Donald D. Kozusko, *In Defense of Quiet Trusts*, TR. & EST. 20, 22 (Mar. 2004).

[348] During a meeting of the Joint Committee at which the beneficiary surrogate approach was discussed, a member of the committee commented, only partly in jest, that after enactment of the OTC it may become necessary to enact a beneficiary surrogate code. Note that in addition to the many questions the beneficiary surrogate provisions raise, their ability to preclude the beneficiary from receiving information about the trust is limited. 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

XV. OTHER DUTIES AND POWERS OF THE TRUSTEE

In addition to the trustee's duties to inform beneficiaries about the trust, chapter 5808 imposes a variety of other duties on the trustee. Most of these duties are straightforward and non controversial. For example, the trustee's duty to administer the trust requires that it act in good faith[349] and "exercise reasonable care, skill, and caution."[350] The trustee must take reasonable steps to control and protect the trust property[351] and enforce and defend claims,[352] keep its property separate from the trust's,[353] and maintain adequate records for the trust.[354]

The duty of loyalty, described in the UTC comments as "perhaps the most fundamental duty of the trustee,"[355] is codified in the OTC.[356] It includes several changes to the UTC duty of loyalty provisions. For example, under the UTC, a transaction between the trustee and a beneficiary that does not involve trust property may give rise to a presumption that the trustee has abused a confidential relationship with the beneficiary.[357] Because of concerns about the application of that provision in the context of bank trustees whose commercial departments engage in home or car loan transactions with a beneficiary, this provision of the UTC has been omitted from the OTC.

Further, the UTC provisions addressing compensation and disclosure when the trustee invests trust assets in an affiliated fund are not included in the OTC, because those subjects are addressed elsewhere in the Revised Code.[358] Finally, the OTC also includes a change to the UTC provision setting forth exceptions to the trustee's duty of loyalty "if fair to the beneficiaries."[359] The UTC does not explicitly state whether the listed transactions are allowed unless the beneficiaries prove they are unfair, or whether the

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beneficiary's use in preparing his or her income tax return. I.R.C. § 6034A (West 2007). *See* OHIO REV. CODE ANN. §§ 1111.13(H), .13(J) (West 2007) (addressing the investment of trust funds in the trustee's affiliated investment funds and requiring that disclosure be made "to all persons entitled to receive statements of account activity").

[349] *Id*. § 5808.01.

[350] *Id*. § 5808.04.

[351] *Id*. § 5808.09. The UTC requires the trustee "to redress a breach of trust known to the trustee to have been committed by a former trustee." UNIF. TRUST CODE § 812 (2005). The OTC omits that provision, instead cross-referencing the Revised Code's provision (section 5815.24) on that subject. *See* OHIO REV. CODE ANN. § 5808.12 (West 2007).

[352] *Id*. § 5808.11.

[353] *Id*. § 5808.10(B).

[354] *Id*. § 5808.10(A).

[355] *See* UNIF. TRUST CODE § 802 cmt. (2005). For a criticism of the UTC duty of loyalty provisions, arguing that they significantly undermine traditional protections the duty was designed to provide, see Melanie B. Leslie, *Business Imperatives and Fiduciary Duty*, 13 ALI-ABA ESTATE PLANNING COURSE MATERIALS JOURNAL 5, 11-16 (Feb. 2007).

[356] OHIO REV. CODE ANN. § 5808.02 (West 2007).

[357] *See* UNIF. TRUST CODE § 802(d) (2005).

[358] *See* OHIO REV. CODE ANN. §§ 1111.13, 5815.26 (West 2007).

[359] UNIF. TRUST CODE § 802(h) (2005). Agreements are allowed relating to the trustee's appointment and compensation; payments of reasonable compensation to the trustee; transactions with another trust, an estate, or a guardianship; deposits made in financial institutions operated by or affiliated with the trustee; and advances by the trustee to protect the trust. OHIO REV. CODE ANN. § 5808.02(G)(1)-(2)(e) (West 2007); UNIF. TRUST CODE §§ 802(h)(1)-(5) (2005).

transactions are not allowed unless the trustee proves they are fair. The OTC places the burden of proof on the beneficiaries.[360]

Consistent with article 9 of the UTC, which was reserved for an enacting jurisdiction's version of the Uniform Prudent Investor Act (UPIA), Ohio's enactment of the OTC included moving its version of the UPIA to chapter 5809 of the OTC. Several provisions of Ohio's UPIA, however, were also included in other sections of the OTC and were not duplicated in chapter 5809.[361]

Prior to the enactment of the OTC, Ohio was one of few states that did not have a statutory list of trustee's powers. The OTC includes lists of both general powers[362] and specific powers.[363] Of most substantive significance, the OTC provides that the trustee may, without court authorization, exercise all powers over trust property that an unmarried individual could over the individual's own property and all powers appropriate to the administration of the trust.[364] While that single broad grant arguably eliminates the need for other specific or general powers, they are included to facilitate trustee dealings with third parties.[365]

XVI. LIABILITY OF TRUSTEES

The OTC provisions regarding the liability of trustees are located in chapter 5810. This chapter includes a broad list of remedies that may be available when the trustee has breached the trust.[366] In addition to removing the trustee, ordering it to account, awarding damages, and reducing or denying compensation, the court may compel the performance of trustee duties, enjoin the trustee from committing a breach, appoint a special fiduciary, impose a lien or constructive trust, trace trust property wrongfully disposed of, and "[o]rder any other appropriate relief."[367] In several respects, the OTC trustee liability provisions differ from those in the UTC. For example, the OTC does not include the UTC provision under which a trustee is accountable to affected beneficiaries

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[360] OHIO REV. CODE ANN. § 5808.02(G) (West 2007).

[361] Divison (C) of section 1339.53, which addressed trustees who have special skill or expertise, was deleted from chapter 5809 because it is restated in Ohio Revised Code section 5808.06. *See* H.B. 416, 126th Gen. Assem., Reg. Sess., Legis. Bill Hist. (Ohio 2006). Section 1339.55, which dealt with duties of loyalty and impartiality, was deleted because those duties are addressed in Ohio Revised Code sections 5808.02(A) and 5808.03. *See id.* Section 1339.57 regarding investment costs was deleted because it is addressed in Ohio Revised Code section 5808.05. Section 1339.59(A) regarding delegation was deleted because it is included in Ohio Revised Code section 5808.07(B). *See id*, ("These existing sections are amended by the bill and renumbered. . . . Most of the amendments are nonsubstantive, merely changing cross-references.").

[362] *See* OHIO REV. CODE ANN. §§ 5808.15 (West 2007).

[363] *See id.* § 5808.16. Under the UTC, the trustee is expressly authorized to pledge trust property to guarantee third party loans to a beneficiary. *See* UNIF. TRUST CODE § 816(19) (2005). The OTC omits that power, but 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. *See* OHIO REV. CODE ANN. § 5808.16(S) (West 2007).

[364] *See id.* § 5808.15(A). This broad power of the trustee is subject only to limitations contained in the terms of the trust and its fiduciary duties. *Id.* § 5808.15(B).

[365] *See* UNIF. TRUST CODE § 816 cmt. (2005).

[366] OHIO REV. CODE ANN. § 5810.01(B) (West 2007).

[367] *Id.*

for any profit made from the administration of the trust, even in the absence of a breach of trust.[368]

The OTC treatment of exculpatory clauses also departs from the UTC. Both prohibit an exculpatory 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 instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.[369] The UTC goes further in providing that 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.[370] The OTC does not include such a provision.

There are several differences between the OTC provisions on the limitations period for a beneficiary (or representative of the beneficiary) to assert a claim against the trustee and the UTC. Most importantly, the UTC's shorter limitations period is one year from the date on which the beneficiary or representative is sent an adequate report, while the OTC's limitation period is two years.[371] Sending the beneficiary or representative a report will start the statute under the OTC 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."[372] The analogous provision of the UTC differs slightly.[373] Finally, the UTC provides that if an adequate report is not given to start the one-year limitations period, the beneficiary may commence a proceeding within five years of the first of three events to occur: "(1) the removal, resignation, or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust."[374] The OTC differs in two respects. First, the five-year period is changed to four years.[375] Second, added to the list of events that will trigger the

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[368] *Compare* OHIO REV. CODE ANN. § 5810.03(A) (West 2007), *with* UNIF. TRUST CODE § 1003(a) (2005). The UTC comment explains the rationale for its 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.

UNIF. TRUST CODE § 1003 cmt. (2005).

[369] OHIO REV. CODE ANN. § 5810.08 (West 2007); UNIF. TRUST CODE § 1008(a) (2005).

[370] *Id.* § 1008(b). *See* Paula A. Monopoli, *Fiduciary Duty: A New Ethical Paradigm for Lawyer/Fiduciaries*, 67 MO. L. REV. 309 (2002) (discussing ethical and other issues that arise when lawyers draft instruments for clients naming themselves as fiduciaries).

[371] OHIO REV. CODE ANN. § 5810.05(A) (West 2007); UNIF. TRUST CODE § 1005(a) (2005).

[372] OHIO REV. CODE ANN. § 5810.05(B) (West 2007).

[373] *See* UNIF. TRUST CODE § 1005(b) (2005) (providing that sending the report will start the statute if it "provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence").

[374] *Id.* § 1005(c).

[375] OHIO REV. CODE ANN. § 5810.05(C) (West 2007).

running of the longer limitations period is "[t]he time at which the beneficiary knew or should have known of the breach of trust."[376]

XVII. CONCLUSION

The OTC was intended to accomplish a variety of objectives, including codifying much of Ohio's existing trust law, making trust law in Ohio more accessible, providing law on questions as to which there was none in Ohio, making needed improvements to existing law, and making Ohio trust law more uniform with that of other UTC adopting jurisdictions. With gaps in Ohio's trust law having been filled and many uncertainties having been removed, parties to trusts will be able to plan for, administer, and benefit from trusts with greater confidence. Judicial proceedings involving trusts likely will be reduced, particularly with regard to more routine matters that can be handled under the OTC with notices or consents, issues that can be resolved by private settlement agreement, and matters that, because of the OTC's representation provisions, no longer will require the appointment of a guardian ad litem. In short, while it is expected that technical corrections and other amendments to the OTC will be needed, its enactment should be of substantial benefit to settlors, trustees, beneficiaries, and the lawyers who represent them.

[376] *Id*. § 5810.05(C)(4).