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Report on HB 416: The Ohio Trust Code

As Enacted

Prepared for the Joint Committee on the Ohio Trust Code of the Legal, Legislative, and Regulatory Committee of the Ohio Bankers League and the Estate Planning, Trust, and Probate Law Section of the Ohio State Bar Association

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Background and Introduction

Members of the Estate Planning, Trust, and Probate Law (EPTPL) section of the Ohio State Bar Association and of the Legal, Legislative, and Regulatory (LLR) Committee of the Ohio Bankers League began studying the Uniform Trust Code (UTC) shortly after its approval by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000. A joint committee consisting of members of the EPTPL section and the LLR committee produced its first draft of the Ohio Uniform Trust Code in January 2004. As the Reporter for the Joint Committee, I prepared a report to accompany the first draft of the Ohio Uniform Trust Code. In August 2004 and February 2005, the Joint Committee produced second and third drafts of the Ohio Uniform Trust Code, each of which was accompanied by a revised report. The second and third drafts were based on comments and suggestions the Joint Committee received from its statewide dissemination of the first and second drafts and the reports that accompanied them, amendments made by NCCUSL to the UTC, and the Joint Committee's continued study of the UTC and its possible adoption in Ohio.

Based on the Joint Committee's third draft of the Ohio Uniform Trust Code, along with additional revisions to it requested by the Joint Committee, the Ohio Legislative Service Commission (LSC) prepared a bill (HB 416) that was introduced into the Ohio General Assembly in late 2005 for its consideration and possible enactment. (For the

testimony of a principal sponsor of HB 416 to the House committee that considered the bill, see *Testimony of Rep. Mark Wagoner to House Civil and Commercial Law Committee*, 16 PROBATE LAW JOURNAL OF OHIO 65 (January/February 2006).) HB 416, which had at least 42 sponsors, changed the name of the proposed trust code from the "Ohio Uniform Trust Code" to the "Ohio Trust Code" (OTC), because of changes made to the UTC in preparing the OTC. While HB 416 was being considered by the House Civil and Commercial Law Committee, and later by the Senate Judiciary Committee on Civil Justice, several amendments were made to it. The bill was passed by the House in February 2006, and by the Senate (and again by the House, because of amendments to it made in the Senate) in May 2006. This Report is prepared on the assumption that the bill will be signed by the Governor and become law in its current form. Under Section 3 of the bill, it will have a January 1, 2007 effective date.

This Report begins with a discussion of policy considerations related to enactment of the OTC. Next, it discusses how the OTC will be incorporated into the Revised Code. The Report then discusses many of the OTC's provisions, in the same order as those provisions are included in the OTC. The focus of the discussion of OTC provisions is on those that will change existing Ohio law, or that are changes from the UTC itself. Thus, this Report does not provide a general explanation of the UTC. For such an explanation, see the article by the UTC Reporter, David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MISSOURI LAW REVIEW 143 (2002). The UTC itself, with comments, is available at:

http://utcproject.org/utc/DesktopDefault.aspx

A significant focus of this Report is on how enactment of the OTC will change existing Ohio law. It is likely, however, that it does not include every change adopting the OTC will make to Ohio law. Many of the changes it discusses were identified in Robert Brucken's outline, *Changes in Ohio Law by Adoption of Uniform Trust Code*, for the December 2002 OSBA CLE program on the UTC, and in articles written by the UTC Reporter, David English: *The Uniform Trust Code (2000) and its Application to Ohio*, 30 CAPITAL UNIVERSITY LAW REVIEW 1 (2002) and The *Uniform Trust Code (2000) and Its Application to Ohio*, 12 PROBATE LAW JOURNAL OF OHIO 1 (Sept./Oct. 2001). The OTC, however, is a broad codification of the law of trusts consisting of more than 100 separate statutes. While I have identified some changes the OTC will make in Ohio law that were not included in Mr. Brucken's outline or Professor English's articles, because of the great amount of time it would require to do so, I have not made a thorough, systematic analysis of each provision of the OTC in the context of existing Ohio statutory and case law to determine if each such provision is consistent with, different from, or simply not covered by, existing Ohio law. Examples of OTC provisions with respect to which I have not researched Ohio law to determine if enactment of the provision will change Ohio law include: (i) § 5808.02(C), which provides that a sale or other transaction between a trustee and a number of specifically described persons related to the trustee is presumed to be affected by a conflict of interest; (ii) § 5810.04, which provides that in judicial proceedings involving trusts, the court may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or the trust, as justice

and equity may require; (iii) §§ 5807.02 and 5801.04(B)(6), which provide that the court may require a bond if it finds a bond necessary to protect the interests of the beneficiaries and that the settlor may not waive the court's power to do so; (iv) §§ 5807.08 and 5801.04(B)(7), which provide that the court may increase or decrease the compensation of the trustee, as set forth in the trust instrument, if it determines that it is unreasonably high or low, and that the settlor may not waive the court's power to do so; and (v) § 5803.05(C), which provides that in making decisions, a court appointed representative of minor, incapacitated, or unborn individuals, or of a person whose identity or location is unknown, may consider general benefit accruing to the living members of the individual's family (rather than being limited, for example, to considering only the economic effects of the decision on the person being represented).

1. Policy considerations.

A. Codification of the common law of trusts. Much of the OTC is a codification of the existing common law of trusts, the adoption of which will not change Ohio law. Pre-OTC Ohio trust law, however, is relatively sparse and is found in scattered statutes and sometimes difficult to locate case law. Further, on some issues of trust law there is not well defined and accepted common law. In addition, as discussed throughout this Report, when the OTC becomes effective, it will make a number of changes in Ohio law. Perhaps equally important, with respect to issues addressed by the OTC but as to which there was no law in Ohio, adoption of the OTC provides law in circumstances where none previously existed. As a result of such factors, the adoption of the OTC should provide settlors, trustees, beneficiaries, lawyers, judges, and the general public with greater certainty and access to Ohio's trust law, and it should result in fewer situations in which courts are called upon to make trust law.

Adoption of the OTC, however, clearly will not eliminate the courts' role, or that of the common law and principles of equity, in the continuing development of the Ohio law of trusts. Of course, if and to the extent a statute in the OTC applies to an issue in a particular case, presumably the court would apply the statute. For issues not addressed by the OTC, § 5801.05 provides: "The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by [the OTC] or another section of the Revised Code." Thus, an issue not covered by the OTC will be resolved in the traditional common law manner. According to the comment to the comparable provision of the UTC (§ 106), the sources of the common law of trusts, including principles of equity, that will be of particular use in deciding questions not resolved by the UTC will be case law in the particular jurisdiction, the Restatement of Trusts, the Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution.

The comment to UTC § 106 also provides: "The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation." According to a recent Ohio Court of Claims case dealing with the Uniform Commercial Code, however, if a statute

from a uniform act is not ambiguous, the court may not refer to the comments to interpret it differently, as the comments have not been enacted into law. *American Insurance Company v. Cuyahoga Community College District*, 774 N.E.2d 802 (Ohio Ct. Cl. 2002). Accordingly, the usefulness of the UTC's comments to interpret the OTC may be limited, at least in circumstances in which a provision of the UTC that has been enacted in Ohio arguably is inconsistent with the applicable UTC comment.

Recent cases from Mississippi and New Hampshire illustrate how codifying the law of trusts affects the role of the court in making trust law. In the Mississippi case (*Sligh v. First National Bank of Holmes County*, 704 So. 2d 1020 (Miss. 1997)), an uninsured spendthrift trust beneficiary who was driving under the influence of alcohol caused an accident that resulted in serious injuries to the plaintiffs, who obtained a judgment against the beneficiary and attempted to reach his interest in the spendthrift trust. In allowing them to do so, the Mississippi Supreme Court, on policy grounds, created a tort claimant exception to spendthrift protection. (Shortly after the decision in *Sligh*, the Mississippi legislature effectively overruled it by enacting new spendthrift legislation that did not include a tort claimant exception.)

In the New Hampshire case (*Scheffel v. Krueger*, 782 A.2d 410 (N.H. 2001)), the beneficiary of a spendthrift trust was charged with, and apparently convicted and imprisoned for, sexually assaulting a minor child. The minor's mother obtained a default judgment against the beneficiary and tried to attach the beneficiary's interest in the spendthrift trust. In affirming the lower court's dismissal of the action, the New Hampshire Supreme Court noted that by statute in New Hampshire, spendthrift provisions preclude attachment of beneficiaries' interests by their creditors except in two specified circumstances, neither of which was applicable to the plaintiff's claim. In response to the plaintiff's argument that the legislature did not intend the statute to protect spendthrift trust beneficiaries from their tort creditors, the court noted that "[w]here the legislature has made specific exemptions, we must presume no others were intended." Finally, the court also rejected the plaintiff's public policy argument (that was supported by the Restatement of Trusts) that it should create a tort creditor exception to the statute: "In this State, the legislature has enacted a statute repudiating the public policy exception sought by the plaintiff. . . . This statutory enactment cannot be overruled, because '[I]t is axiomatic that courts do not question the wisdom or expediency of a statute.'" (As is the case under the UTC and the law in most states, the OTC does not include a tort creditor exception to spendthrift protection.)

Similarly, under the Restatement (Third) of Trusts, § 59 cmt. a, and § 59(b), a spendthrift provision will not prevent a set-off against a beneficiary's interest of amounts due to a trust from a beneficiary who served as trustee and breached a fiduciary duty. Under § 5805.01(C) of the OTC, however, spendthrift provisions are enforceable "except as otherwise provided in this chapter and in section 5810.04 of the Revised Code," and no other provision of the OTC excepts claims for a set-off from the spendthrift bar. Further, OTC § 5805.02(E) provides that the list of spendthrift exceptions in the OTC is exclusive. The OTC's clear statement of the effectiveness of a spendthrift provision, together with its explicit list of exceptions, arguably will preclude a court from creating

an additional exception from the common law or principles of equity for a set-off against the interest of a beneficiary/trustee who has breached a fiduciary duty. (For a recent Ohio court of appeals case discussing a probate court's order that apparently permitted a set-off against the interest of a beneficiary who, while executor of the settlor's estate, had improperly disposed of trust assets, see *Great American Insurance Co. v. Thompson Trust*, 2006-Ohio-304. The case is discussed in Alan Newman, *Powers of Withdrawal, Claims for Set-Off, and Spendthrift Protection,* 16 PROBATE LAW JOURNAL OF OHIO 143 (May/June 2006))

An example of a circumstance in which the common law or principles of equity arguably would be applied under § 5801.05 to supplement the OTC is determining who is the "settlor" of a trust. Under OTC § 5805.06, creditors of the settlor of a trust can reach the settlor's beneficial interest in the trust. OTC § 5801.01(S) provides that "'settlor' means a person . . . who creates, or contributes property to, a trust. . . ." Absent from the OTC are rules for situations in which a person may be a settlor of a trust in substance, if not in form. Arguably, consistent with a comment to the comparable provision of the UTC (§ 103), § 5801.05 would allow a court to apply such rules.

Finally, the mandatory rules provisions of OTC § 5801.04(B) also acknowledge the role the courts will continue to play in developing and applying trust law in Ohio after enactment of the OTC. Under those rules, in several contexts the court's role with respect to the administration of trusts may not be eliminated or reduced by the settlor. For example, in a variety of circumstances the court may terminate or modify a trust regardless of provisions in the instrument to the contrary. Similarly, the court may require, dispense with, or modify or terminate a bond, or adjust the trustee's compensation (if it is set unreasonably high or low in the instrument), without regard to the terms of the trust. Further, the settlor may not deprive the court of subject-matter jurisdiction. More generally, OTC § 5801.04(B)(13) provides that the terms of the trust may not affect "the power of the court to take any action and exercise any jurisdiction that may be necessary in the interests of justice." (See also OTC § 5802.01(C), under which the court's power extends to "any matter involving the trust's administration, including a request for instructions and an action to declare rights.")

B. Other policy considerations. Policy considerations underlie substantially all provisions of the OTC and the UTC. A discussion of policy issues raised and addressed by the UTC, as well as an explanation of many of its provisions, can be found in its official comments, which can be obtained from the website of the Uniform Law Commissioners at www.nccusl.org. In addition, the UTC Reporter, Professor David English of the University of Missouri-Columbia School of Law, has written extensively on the UTC and its policy issues. An outline Professor English prepared for state committees studying the UTC for possible adoption, entitled "Uniform Trust Code (2000): Overview and Key Provisions," includes a discussion of UTC policy issues with respect to: (i) default and mandatory rules; (ii) procedural rules; (iii) principal place of administration; (iv) representation and nonjudicial settlements; (v) trust modification and termination; (vi) charitable trusts; (vii) spendthrift provisions and rights of beneficiaries' creditors; (viii) revocable trusts; (ix) trustee removal; (x) trustee compensation; (xi)

mutual fund investment; (xii) the duty to keep beneficiaries informed; (xiii) remedies for breach of trust; and (xiv) retroactivity. (For a more comprehensive discussion of the UTC's policy issues by Professor English, see *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MISSOURI LAW REVIEW 143 (2002).) Because most, if not all, members of the Joint Committee already have reviewed Professor English's outline in some detail, and because even a summary of the basic policy issues of the most significant provisions of the UTC would add considerable length to this Report, it does not include specific discussions of the UTC's policy issues.

Rather, the primary focuses of this Report are on the changes the Joint Committee made to the UTC for the OTC, and on changes enactment of the OTC will make to existing Ohio law. In addition, to a limited extent policy considerations with respect to those changes are discussed in connection with the discussion of the changes themselves.

2. Structure.

Under HB 416, the OTC is incorporated into the Revised Code in accordance with a plan designed by Robert Brucken and Cal Kirchick under which new title 58 of the Revised Code is devoted to the OTC and other trust related statutes. Title 58 is structured as follows:

A. Chapters 5801 – 5811: the OTC (with the Uniform Prudent Investor Act of RC §§ 1339.52 – 1339.61 included as Chapter 5809).

B. Chapter 5812: the Uniform Principal and Income Act (RC §§ 1340.40 – 1340.91).

C. Chapter 5813: the Institutional Trust Funds Act (RC §§ 1340.31 – 1340.37).

D. Chapter 5814: the Uniform Transfers to Minors Act (RC §§ 1339.31 – 1339.39).

E. As discussed in the remainder of this Report, some of the other provisions of Chapters 1339 and 1340 will be repealed in connection with the adoption of the OTC. The remaining provisions of Chapters 1339 and 1340 will be moved to Chapter 5815. All existing statutes in Chapters 1339 and 1340 will be repealed.

Consistent with this plan, the OTC sections discussed in this Report are numbered as they will appear in new title 58. In most cases, the OTC section numbers correspond to the numbering of the comparable provisions of the UTC. Thus, for example, UTC § 806 appears in the OTC, and is discussed in this Report, as § 5808.06.

3. Definitions (§ 5801.01).

A. Definition of beneficiary and current beneficiary. "Beneficiary" is defined in § 5801.01(C) to include not only a person with a present or future, contingent or vested, beneficial interest in a trust, but also a person who, "in a capacity other than that of trustee, holds a power of appointment over trust property." The rationale for including holders of powers of appointment in the definition of beneficiary, as stated in the comment to the comparable provision of the UTC (§ 103), is "the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries." An example of rights power holders will have as beneficiaries is the right to information about the trust. As discussed in section 37, below, § 5808.13 obligates the trustee to provide information to trust beneficiaries. While most of the trustee's duties under that section are owed only to "current" beneficiaries of the trust, some are owed to all beneficiaries. Further, under § 5801.09, if notice is required to be given to current or qualified beneficiaries, the trustee also must give notice to any other beneficiary who has sent the trustee a request for notice. Because in most cases persons who hold non-fiduciary powers of appointment over trust assets also hold beneficial interests in the trust, the OTC's treatment of holders of non-fiduciary powers as beneficiaries likely will have limited significance.

For other changes to the definitions of "beneficiary" and "current beneficiary" made while HB 416 was being considered by the House Civil and Commercial Law Committee, see section 7, below.

B. Definitions of conservator and guardian (§§ 5801.01(H) and (I)). The UTC uses "conservator" to refer to a fiduciary who manages the property of an incapacitated person, and "guardian" to refer to a fiduciary whose authority is with respect to personal care decisions for an incapacitated person. Because the Revised Code uses "guardian" in both of those contexts, OTC §§ 5801.01(H) and (I) use the terms "guardian of the estate" and "guardian of the person" instead of the UTC's "conservator" and "guardian."

"Guardian of the estate" and "guardian of the person" also are defined in the OTC to include a conservator appointed for the property or the person of a competent adult under RC § 2111.021. Thus, all references in the OTC to "guardian of the estate" or "guardian of the person" will apply to a conservator of property or of the person, if one has been appointed.

The provisions of the OTC that refer to a guardian of the estate or the person are: § 5803.03 (representation); § 5804.11(A) (modification or termination of noncharitable irrevocable trust by consent); § 5806.02(F) (revocation or amendment of, or distribution from, a revocable trust); § 5807.04(A)(6) (vacancy in trusteeship); § 5808.02(G)(2)(c) (transactions not precluded by trustee's duty of loyalty); § 5808.13(C) (duty to inform and report); and § 5808.16(U)(1) and (3) (distributions to or for the benefit of an incapacitated beneficiary). Note that under § 5807.04(A)(6), if an individual trustee has a conservator of his or her property or person appointed, a vacancy in the trusteeship will

result even though a conservator can only be appointed under RC § 2111.021 for a competent adult.

C. Other new defined terms. The OTC includes four other defined terms that are not included in the UTC: "beneficiary surrogate," "current beneficiary," "mandatory distribution," and "wholly discretionary trust." Each of these is discussed below in the section of the Report that discusses the subject to which it relates.

4. Application to testamentary trusts (§ 5801.02).

The UTC makes no distinction between testamentary and inter vivos trusts and clearly was designed to apply equally to both. If the Joint Committee had taken that approach for the OTC, Ohio trust law would be uniform and the OTC would apply in the same way to all Ohio trusts. That approach, however, would have made fundamental changes with respect to the role of the court in supervising testamentary trusts, required substantial changes to Chapter 21 of the Revised Code, and necessitated addressing and resolving issues of retroactivity as to existing testamentary trusts. Conversely, if the OTC were made applicable only to inter vivos trusts, there would be two bodies of trust law in Ohio, and the rights and duties of trust settlors, beneficiaries, and trustees would vary substantially depending on the kind of trust involved.

The Joint Committee decided to take a third approach. Section 5801.02 of the OTC provides, in part, that the OTC applies "to testamentary trusts to the extent provided by section 2109.69 of the Revised Code." Under new § 2109.69:

> (A) Subject to division (B) of this section, the provisions of Chapters 5801. to 5811. of the Revised Code apply to testamentary trusts except to the extent that any provision of those chapters conflicts with any provision of Chapter 2109. of the Revised Code, or with any other provision of the Revised Code, that applies specifically to testamentary trusts and except to the extent that any provision of Chapters 5801. to 5811. of the Revised Code is clearly inapplicable to testamentary trusts.
>
> (B) Section 5808.13 of the Revised Code applies to testamentary trusts whether or not that section conflicts with any provision of Chapter 2109. of the Revised Code or any other provision of the Revised Code that applies specifically to testamentary trusts.

This approach leaves undisturbed such procedures in Chapter 2109 as those providing for the appointment of testamentary trustees, their bonds, and their inventories. In other respects, the OTC's provisions will be applicable to testamentary as well as inter vivos trusts.

5. Default and mandatory rules (§ 5801.04).

A. In general. The OTC is primarily a default statute. Under § 5801.04(A), its provisions apply only to the extent the settlor has not provided otherwise in the terms of the trust. Section 5801.04(B) lists the exceptions that the settlor may not override in the terms of the trust. Three of the UTC's mandatory rules have been modified in the OTC and are discussed in sections 5.B and 5.C, below. The other mandatory rules (that are included in both the UTC and the OTC) are:

(1) the requirements for creating a trust;

(2) the duty of the trustee to act in good faith and in accordance with the terms of the trust;

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

(4) the power of the court to modify or terminate a trust under the provisions of Chapter 5804;

(5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust;

(6) the power of the court to require, dispense with, modify, or terminate a bond;

(7) the power of the court to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) the effect of an exculpatory term under § 5810.08;

(9) the rights of third persons who deal with the trustee;

(10) periods of limitation for commencing a judicial proceeding;

(11) the power of the court to take any action and exercise any jurisdiction that is necessary in the interests of justice; and

(12) the subject-matter jurisdiction of the court for commencing a proceeding.

B. Requirement that a trust and its terms be for the benefit of its beneficiaries (§§ 5801.04(B) and 5804.04). Section 404 of the UTC provides, in part, that: "A trust and its terms must be for the benefit of its beneficiaries." Under UTC § 105(b) this requirement is mandatory and may not be overridden by the settlor. Because of concerns that these provisions of §§ 404 and 105(b) might undermine the trust being

administered in accordance with the settlor's intent, the Joint Committee decided to delete the requirement that a trust and its terms be for the benefit of the beneficiaries from the mandatory rules of OTC § 5801.04(B) and to modify the corresponding language of OTC § 5804.04 to provide: "A trust exists, and its assets shall be held, for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust."

According to the comment to UTC § 404, and provisions of the Restatement (Third) of Trusts cited in that comment, the requirement that a trust and its terms be for the benefit of its beneficiaries is designed to preclude the settlor from including in the terms of the trust administrative or other nondispositive terms that do not reasonably relate to the trust's fundamental purpose of benefiting the beneficiaries in accordance with their interests as defined in the trust's terms. The Restatement cites two cases on this issue: *Colonial Trust Co. v. Brown*, 135 A. 555 (Conn. 1926), in which the settlor specified that improvements on trust property could not be more than three stories high or leased for more than a year, and *Matter of Pulitzer*, 249 N.Y.S. 87 (Surr. Ct. 1931), in which the settlor prohibited the trustee from selling closely held stock.

Professor John Langbein, a Uniform Law Commissioner and a member of the drafting committee for the UTC, has recently written an essay on the UTC's mandatory rules (*Mandatory Rules in the Law of Trusts*, 98 NORTHWESTERN LAW REVIEW 1105 (2004)). Professor Langbein's explanation for the mandatory benefit-of-the-beneficiaries rule of the UTC is as follows:

> The dominant substantive principle of the law of gratuitous transfers is to carry out the donor's intent. (Footnote omitted.) This deference to the wishes of the settlor presupposes that the settlor propounded the trust and its terms for the purpose of benefiting the beneficiaries. That presupposition is almost always justified, since the settlor has shown that he or she cared enough about the beneficiaries to give them the beneficial interest in the trust property. When, however, a settlor imposes manifestly value-impairing restrictions on the use or disposition of the trust property, the requirement that the trust terms be for the benefit of the beneficiaries places an outside limit upon the normal rule of deference to the settlor's intent.

The Joint Committee's decision to delete the requirement that a trust and its terms be for the benefit of its beneficiaries from the mandatory rules of OTC § 5801.04(B) does not necessarily mean that what might be characterized as frivolous or capricious administrative or other nondispositive terms of the trust must be followed under all circumstances, however. Under OTC § 5804.12(B), the court is authorized to "modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or impair the trust's administration." (In that regard, however, the comment to the comparable provision of the UTC (§ 412) notes that it is a specific application of § 404's requirement that a trust and its terms be for the benefit of the beneficiaries, thus acknowledging the possibility that § 404 could be applied in circumstances not covered by § 412(b).)

C. Duty to inform and report (§§ 5801.04(B)(8) and (9)). The UTC provisions addressing the duties of the trustee to inform and report to the beneficiaries are set forth in § 813. Several changes have been made to those provisions in the OTC, as discussed in section 37, below.

Under UTC §§ 105(b)(8) and (9), two of the UTC's reporting requirements may not be overridden by the settlor:

> (8) the duty under Section 813(b)(2) and (3) to notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;
>
> (9) the duty under Section 813(a) to respond to the request of a beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;

The OTC makes two changes to each of these two provisions. First, the beneficiaries to whom the information must be provided under the OTC are the "current beneficiaries," rather than all "qualified beneficiaries" or all "beneficiaries." "Current beneficiaries" is defined in new OTC § 5801.01(F) to mean, generally, beneficiaries who are current distributees or current permissible distributees of trust income or principal. Under OTC § 5801.01(Q) (and UTC § 103(12)), the term "qualified beneficiaries" is defined, generally, to include current beneficiaries and certain remainder beneficiaries whose interests are not remote.

Second, under OTC § 5801.04(C), the settlor may override the requirement that the current beneficiaries receive the information they otherwise would be entitled to receive under subdivisions (B)(8) and (9) by designating a "beneficiary surrogate" (which is a new defined term under OTC § 5801.01(D)) to receive information that otherwise would be provided to the beneficiary. The beneficiary surrogate is required to "act in good faith to protect the interests of the current beneficiaries for whom" the information is received. (Under § 5810.05, the two year statute of limitations on a beneficiary pursuing a claim against the trustee will run from the date the trustee sent a report to the beneficiary surrogate.)

The Joint Committee decided on the beneficiary surrogate procedure as an alternative to mandating that notices, reports, and other information be sent to current beneficiaries to allow settlors to restrict information beneficiaries receive about trusts in which they have interests. The beneficiary surrogate provisions of new OTC §§ 5801.04(B)(8) and (9) and 5801.04(C) are patterned after a similar approach taken by the District of Columbia in its recently enacted version of the UTC. The approach, being novel, is untested and, when used, likely will raise questions that are not addressed by the OTC. For example, what duties, powers, and potential liabilities would the surrogate (presumably a fiduciary) have? If a court proceeding involving the trust were commenced, would the beneficiary be a party with access to the court record? (A March

2004 Trusts & Estates article on "quiet trusts," and the District of Columbia's endorsement of them in its version of the UTC, suggests that a guardian ad litem could act for the beneficiary to make any necessary decisions and that the court record could be sealed.)

Note that the beneficiary may be entitled to some information with respect to the trust without regard to the OTC's beneficiary surrogate procedure. For example, if distributions are made to or for the benefit of the beneficiary, federal law would require the trustee to furnish the beneficiary with a Schedule K-1 for the beneficiary's use in preparing his or her income tax return. (RC §§ 1111.13(J) and (H), addressing the investment of trust funds in the trustee's affiliated investment funds, may not require disclosure to a beneficiary for whom a beneficiary surrogate is serving, as disclosure under those sections is to be made "to all persons entitled to receive statements of account activity," which presumably would be the beneficiary surrogate.)

6. Transfer of principal place of administration (§ 5801.07).

Two changes have been made to the UTC's provisions for the transfer of the trust's principal place of administration. First, under UTC § 108, if the trustee proposes to transfer the trust's principal place of administration, it must notify the trust's qualified beneficiaries; OTC § 5801.07 only requires that the trust's current beneficiaries be notified. Second, the provision in UTC § 108(e) under which a qualified beneficiary can stop such a transfer by notifying the trustee of his or her objection has been deleted from the OTC (as has the corresponding requirement that the trustee's notice of the transfer inform the beneficiaries of the date by which such an objection would have to be filed).

For a more thorough discussion of trust situs under the OTC, see Joanne E. Hindel, *Setting Your Sights on Trust Situs*, 16 PROBATE LAW JOURNAL OF OHIO 135 (May/June 2006).

7. Others treated as current or qualified beneficiaries (§ 5801.09).

Under UTC § 110(b), a charitable organization expressly designated to receive distributions under the terms of a charitable trust (other than such an organization that holds only a remote remainder interest) has the rights of a qualified beneficiary under the UTC (for example, to receive notices and to participate in such actions as filling a vacancy in the trusteeship). As noted by the comment to UTC § 103, the rationale for this approach – instead of simply treating such a charitable organization as a qualified beneficiary of the trust – is that "[c]haritable trusts … do not have beneficiaries in the usual sense." UTC § 110(b) has been omitted from OTC § 5801.09.

However, as amended during its consideration by the House Civil and Commercial Law Committee, the OTC's definition of "beneficiary" in § 5801.01(C) includes "a charitable organization that is expressly designated in the terms of the trust to

receive distributions." (Whether such a charitable organization will be a current, qualified, or more remote beneficiary will be determined in the same way as for other beneficiaries and will thus depend on its interest in the trust.) The definition excludes charitable organizations that are not expressly designated in the terms of the trust to receive distributions, but to whom the trustee, in its discretion, may choose to make distributions. (Formerly, the OTC's definition of "current beneficiary" under § 5801.01(F) included distributees and permissible distributees of trust income or principal, "other than a charitable organization not expressly designated in the trust instrument to receive distributions." In connection with the above described amendment of § 5801.01(C), the definition of "current beneficiary" was also amended to delete its now unnecessary charitable organization exclusion.)

Also omitted from the OTC is § 110(c) of the UTC, which grants the attorney general the rights of a qualified beneficiary with respect to a charitable trust.

8. Private settlement agreements (§ 5801.10).

A. Introduction. UTC § 111 includes provisions for nonjudicial settlement agreements (NJSAs). In lieu of those provisions, OTC § 5801.10 includes a private settlement agreement (PSA) statute based on a statute drafted by a committee of the Ohio Bankers League (OBL). The OTC PSA statute differs in many material respects from UTC § 111. While the OTC statute is based, in part, on statutes from Washington state (§§ 11.96A.210 – 250), it also includes many provisions that are not in the Washington statutes. The following is a discussion of differences between the OTC PSA statute and UTC § 111. See also, Joanne E. Hindel, *Private Settlement Agreements and Representation of Others: Ohioans Will Soon Have Greater Flexibility in the Administration of Trusts*, 15 PROBATE LAW JOURNAL OF OHIO 8 (September/October 2004).

B. Parties, in general. UTC § 111 provides for "interested persons" to be parties to a NJSA, and defines "interested persons" as "persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court." The comment to UTC § 111 provides: "Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define 'interested persons' whose consent is required to obtain a binding settlement . . ." The OTC statute specifies the parties who may enter into a PSA as (i) the settlor (if living and if no adverse income or transfer tax results would arise), (ii) all beneficiaries, (iii) all currently serving trustees, and (iv) creditors, if their interest would be affected by the agreement.

(1) Settlor a party. As mentioned, the OTC statute generally provides for the settlor to be a party to a PSA. At common law, the settlor of an irrevocable trust, who is not also a beneficiary of the trust, does not have an interest in the trust and would not be a party to an action with respect to the trust's administration. (Note, in that regard, that under UTC § 410(b), a proceeding to approve or disapprove a modification or termination under § 412 [because of unanticipated circumstances or inability to

administer a trust effectively], § 414 [uneconomic trust], § 415 [reformation to correct mistakes], or § 416 [modification to achieve the settlor's tax objectives] may be brought by the trustee or a beneficiary, but not by the settlor.) Thus, requiring the settlor to be a party to a PSA imposes that requirement in circumstances in which the settlor would not be a party if the settlement were reached in a judicial proceeding. (In Washington, unlike under the UTC, it appears that the settlor also is a necessary party to a judicial proceeding involving a trust. Wash. Stat. § 11.96A.030(4) and (5).)

(2) Creditors as parties. The OTC statute requires creditors to be parties to PSAs, "if their interest is to be affected by the agreement." UTC § 111 does not directly address whether, and if so under what circumstances, creditors could be "interested persons" with respect to a NJSA who would be necessary parties to it.

C. Matters that may be covered. Under UTC § 111, a NJSA may be entered into with respect to any matter involving a trust, but "only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this [Code] or other applicable law." By contrast, OTC § 5801.10(C) allows PSAs, "with respect to any matter concerning the construction of, administration of, or distributions under the trust instrument, the investment of income or principal held by the trustee or other matters," subject to the following three limitations.

(1) Early terminations prohibited. First, a PSA may not be used to effect an early termination of a trust. (Note that under § 5801.10(I), this prohibition will not affect the ability to terminate or modify a trust under the statutes in Chapter 5804 that allow modification and termination in a variety of specific circumstances.)

(2) Changes in beneficial interests prohibited. Second, PSAs may not be used to change the "interests of the beneficiaries" in the trust. Under OTC § 5801.01(K), "interests of the beneficiaries" is a defined term that means "the beneficial interests provided in the terms of the trust." Thus, a PSA can not be used to change the beneficial interests of the beneficiaries in the trust. Because a change to the dispositive terms of a trust presumably would be a change in the beneficiaries' beneficial interests in the trust, this limitation likely means that PSAs can not be used to change the dispositive terms of a trust. Excepted from this limitation are PSAs entered into in connection with modifying a trust to qualify a gift to charity for the charitable deduction, or modifying a trust to qualify a gift for a noncitizen spouse for the marital deduction.

(3) Changes a court could not properly approve prohibited. The third limitation on PSAs is that they are only valid to the extent that they include terms and conditions that could be properly approved by the court under the OTC or other applicable law.

In addition, at the recommendation of the Ohio Attorney General's Office, HB 416 was amended while under consideration by the House Civil and Commercial Law

Committee to add new division (M) to § 5801.10. Generally, new division (M) provides that PSAs are not applicable to charitable trusts (unless the charitable interest is remote).

D. Potential issues. As mentioned, except as limited in the three ways described above, the OTC statute permits PSAs "concerning the construction of, administration of, or distributions under the trust instrument . . ." Allowing PSAs with respect to the construction of a trust instrument, but prohibiting PSAs that change the beneficiaries' interests in the trust, could result in disputes over whether a PSA in connection with construing a trust instrument was in substance, if not in form, an invalid attempt to change the beneficiaries' interests in the trust. Assuming the construction issue addressed in the PSA was a bona fide one, however, it would seem the better characterization of the PSA would be that it was determining the beneficiaries' interests, not changing them. If the beneficiaries' interests under the trust instrument are clear, however, a PSA attempting to change them by "construction" presumably would be ineffective. (In that regard, note that under § 5801.10(E), PSAs are only final and binding on the parties if they comply with the limitations described above.)

A PSA addressing distributions under the trust instrument might also raise questions of its validity, given the prohibition on PSAs that change the beneficiaries' interests in the trust. For example, if a trust instrument provided for half of the principal to be distributed to a beneficiary when he or she reached age 30 and the parties entered into a PSA to change the distribution age to 25, arguably the PSA would be invalid as having changed the beneficiary's interest in the trust (particularly if the instrument calls for the beneficiary's share to go to another if the beneficiary died before age 30). By contrast, a PSA that addressed the propriety of the trustee's exercise of its discretion to make a distribution presumably would be valid.

9. Applying wills rules of construction to trusts (UTC § 112).

The OTC omits UTC § 112, which provides: "The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." Part of the rationale for this section is that revocable trusts are increasingly being used as will substitutes, and thus the rules of construction applicable to wills should be applied to revocable trusts. (UTC § 112, however, applies not just to revocable trusts, but also to testamentary and irrevocable inter vivos trusts.)

Among the rules of construction applicable to wills that might be applicable to trusts if UTC § 112 were enacted are those applicable to lapse, ademption, abatement, the 120-hour survivorship requirement, the construction of class gifts, survivorship with respect to future interests, and the meaning of specific words, including "descendants," "by representation," and "heirs." Under § 112, it is unclear whether the wills construction rules applicable to such matters would be applied to a trust in a given case, as by its terms § 112 applies only "as appropriate." Professor English's Capital Law Review article on the possible adoption of the UTC in Ohio notes the significance of the "as appropriate"

language: "This phrase masks some very difficult questions. Not all will construction rules should necessarily be applied to trusts. Also, even those that should apply may require modification due to the legal distinctions between wills and trusts. There is a need for a consensus on which rules should apply, and once that issue has been determined, what they should say."

Section 112 is bracketed in the UTC, meaning that it is presented as optional. The comment to § 112 states that instead of enacting § 112, a jurisdiction might want to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. Because of the uncertainties § 112 would introduce into Ohio law (and because of RC § 2107.01, which expressly defines "will" to exclude inter vivos trusts to overturn the applicability of the lapse rules to revocable trusts under *Dollar Savings and Trust Co. v. Turner*, 39 Ohio St. 3d 182 (1988)), § 112 was deleted from the OTC.

10. Judicial supervision of trusts (§ 5802.01(B)).

Because the Joint Committee decided that testamentary trusts should continue to be subject to continuing judicial supervision, the statement in UTC § 201(b) that trusts are not subject to such supervision unless ordered by the court has been modified in OTC § 5802.01(B) to apply only to inter vivos trusts. Unlike the UTC, OTC § 5802.01(B) also includes a provision making it clear that judicial supervision of trusts created under circumstances requiring such supervision is not affected by the OTC: "Trusts created pursuant to a statute of the Revised Code, judgment, or decree are subject to continuing judicial supervision to the extent provided by such statute, judgment, or decree, or by court order."

11. Subject-matter jurisdiction (§ 5802.03) and venue (UTC § 204).

The UTC's subject-matter jurisdiction provisions of § 203 were replaced with the language of RC § 2101.24(B)(1)(b), which states that the probate division of the court of common pleas has concurrent jurisdiction with the court's general division with respect to actions involving inter vivos trusts. UTC § 204, dealing with venue, was omitted from the OTC, as venue for trust matters is covered by Civil Rule 3.

12. Representation (Chapter 5803).

While Ohio law recognizes virtual representation in judicial proceedings (see, e.g., *Benner & Co. v. Atlas Remainder, Inc.*, 407 F.2d 219 (6th Cir. 1969)), Chapter 5803 of the OTC makes the doctrine available in other circumstances (including the receipt of required notices and the provision of consents), and specifies persons who may represent others. Generally, in the absence of a conflict of interest, (i) the holder of a general testamentary power of appointment may represent the interests of permissible appointees

and takers in default, (ii) fiduciaries may represent those to whom they owe fiduciary duties (provided that a trustee may not represent a beneficiary in connection with a private settlement agreement), (iii) parents may represent minor or unborn children, and (iv) a person with a substantially identical interest may represent a minor, incapacitated, or unborn individual, or a person who cannot be located. For further discussion, see Joanne E. Hindel, *Private Settlement Agreements and Representation of Others: Ohioans Will Soon Have Greater Flexibility in the Administration of Trusts*, 15 PROBATE LAW JOURNAL OF OHIO 8 (September/October 2004).

In response to concerns that UTC § 411(a) could cause the assets of irrevocable trusts to be included in the taxable estates of settlors under Internal Revenue Code sections 2036 and/or 2038, and in accordance with a recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel, the 2004 UTC amendments include a provision that prohibits the settlor from representing and binding a beneficiary with respect to the termination or modification of a trust under UTC § 411(a). That provision is included in the OTC as § 5803.01(D).

13. Trust creation (§§ 5804.01 and 5804.02).

UTC § 401 sets forth three methods for creating a trust: by transfer of property to a third person trustee, by declaration of the owner of property that the owner holds it as trustee, or by exercise of a power of appointment in favor of a trustee. In § 5804.01(D), the OTC adds "by court order" as a fourth method. For further discussion, see C. Terry Johnson, *A New Way to Establish and Fund a Living Trust: But How Do We Recognize the Trustee?*, 16 PROBATE LAW JOURNAL OF OHIO 111 (March/April 2006).

Under UTC § 402(a), two of the requirements for the creation of a trust are that the settlor have capacity and that the settlor indicates an intention to create the trust. To accommodate such trusts as special needs trusts created for incapacitated persons, § 5804.02(A) excepts from those requirements trusts that are created by court order.

14. Certain issues with respect to the validity of trusts (§ 5804.02).

RC § 1335.01(A), which will be repealed in connection with enactment of the OTC, apparently invalidates trusts that were established for the exclusive use of their settlors. Under OTC § 5804.02(A)(5), a trust created by a settlor for the settlor's sole benefit is not invalid unless the settlor/sole beneficiary also is the sole trustee. Thus, it appears that the repeal of RC § 1335.01(A) will change Ohio law to allow a settlor to create a trust of which the settlor is the sole beneficiary, as long as the settlor is not also the sole trustee.

The provisions of RC §§ 1335.01(B) and (C), under which trusts are valid even if they have no corpus or if the sole current beneficiary also is the sole trustee, have been added to OTC § 5804.02 as divisions (D) and (E).

15. Grounds for challenging the validity of a trust (§§ 5804.06 and 5806.01).

The OTC, like the UTC, provides that the capacity required to create, amend, revoke, or add property to a revocable trust is the same as that required to make a will. (Similarly, at least one Ohio court has applied the test of testamentary capacity to a revocable trust: *Lah v. Rogers*, 707 N.E.2d 1208, 1214 n. 7 (Ohio Ct. App. 1998.)) A sentence that is not included in the comparable provision of the UTC (§ 406) has been added to OTC § 5804.06, which provides that a trust is void to the extent its creation was induced by fraud, duress, or undue influence. The added sentence provides that those terms have the same meaning for trust validity purposes as they have for purposes of determining the validity of a will.

16. Oral trusts (§ 5804.07).

Under prior Ohio law, to establish an oral trust, the evidence had to be "clear, certain and conclusive and must establish the existence of the trust beyond a reasonable doubt." *Hill v. Irons*, 113 N.E.2d 243 (Ohio 1953). Under OTC § 5804.07, the evidentiary standard an oral trust must meet to be valid is clear and convincing evidence.

17. Trusts for pets and other noncharitable trusts without ascertainable beneficiaries (§§ 5804.08 and 5804.09).

Under prior Ohio law, a "trust" for the care of a specific animal (and noncharitable trusts without ascertainable beneficiaries for other purposes that are not capricious) was not void only if the person designated to provide the care (or perform the other noncharitable purpose) was willing to do so and the trust did not violate the Rule Against Perpetuities. *In re Searight's Estate*, 95 N.E.2d 779 (Ohio App. 1950). Under OTC § 5804.08, a trust for the care of a specific animal is valid and enforceable (but only for animals alive during the settlor's lifetime, and for no longer than the lives of such animals). Similarly, under OTC § 5804.09, other noncharitable trusts without ascertainable beneficiaries to enforce them also are enforceable, but for only 21 years. Enforcement of such trusts is by a person appointed in the terms of the trust, or if the settlor did not appoint one, by a person appointed by the court. (Unaffected by OTC § 5804.09 will be the ability of cemetery companies to hold property in trust for such purposes as the maintenance of gravesites, without the 21 year limitation. RC § 1721.12.)

18. Termination of trusts, in general (§ 5804.10(A)).

UTC § 410 provides that a trust terminates if none of its purposes remain to be achieved or if its purposes have become unlawful, contrary to public policy, or impossible to achieve. Two changes have been made to that section in OTC §

5804.10(A). First, the "contrary to public policy" language has been deleted, as the Joint Committee decided that if a trust (such as a special needs trust) was valid when created, it should not become invalid if a court at a future date determines that its purposes have become contrary to public policy. (The omission of the "contrary to public policy" language from § 5804.10(A) may not, however, preclude a court from terminating an existing trust if it finds its purposes have become contrary to public policy.) Second, UTC § 410(a) does not address how or by whom a determination that the purposes of a trust have become unlawful or impossible to achieve is to be made. Under the OTC, a trust will terminate upon a court making such a determination.

19. Modification of irrevocable noncharitable trust by consent (§ 5804.11).

A. Tax concern; court proceeding. Under UTC § 411(a) (and OTC § 5804.11(A)), a noncharitable irrevocable trust may be modified or terminated upon the consent of the settlor and all beneficiaries. In response to concerns that such a provision might result in the inclusion of irrevocable trust assets in the settlor's estate for federal estate tax purposes under Internal Revenue Code sections 2036 and/or 2038, and at the recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel, under 2004 amendments to the UTC, an option for court action for a modification or termination under UTC § 411(a) has been included in the UTC. That provision has been included in OTC § 5804.11(A).

B. Authority of agent of settlor. The UTC provides that the settlor's power to consent to a § 411(a) termination or modification may be exercised by an agent under a power of attorney if either the power of attorney or the terms of the trust authorize the agent to do so. OTC § 5804.11(A) prohibits the agent from doing so unless both the terms of the trust and the power of attorney authorize it.

C. Special needs trusts. Federal supplemental security income (SSI) requirements prohibit beneficiaries of self-settled special needs trusts (SNTs) from having the ability to terminate the trust. To address the possibility that the Social Security Administration might use § 5804.11(A) as a basis to deny SSI benefits to SNT beneficiaries, a sentence has been added to § 5804.11(A) that is not included in the UTC making it inapplicable to self-settled SNTs.

D. Modification or termination by beneficiaries. Under UTC § 411(b), a noncharitable irrevocable trust may be modified (or terminated) with the consent of all beneficiaries if the court concludes that modification (or termination) is not inconsistent with a material purpose of the trust. OTC § 5804.11(B) changes the UTC statute in two respects. First, it is clear from the comment to UTC § 411, but not from the statute itself, that this power to modify may not be used to remove and replace the trustee; rather, the grounds for removing the trustee are set forth in UTC § 706. A provision has been added to OTC § 5804.11(B) explicitly stating that the power to modify under that section may not be exercised to remove and replace the trustee. Second, UTC § 411(c) provides that a spendthrift provision is not presumed to constitute a material purpose of the trust. The Joint Committee modified that provision in the OTC to state that a spendthrift provision

may, but shall not be presumed to, constitute a material purpose of the trust, and moved it into § 5804.11(B).

20. If administration of a trust, or if a charitable purpose of a trust, becomes wasteful (§§ 5804.12(B) and 5804.13(A)).

UTC § 412(b) provides that if the continuation of a trust on its existing terms would be impracticable or wasteful or impair the trust's administration, the court may modify its existing terms. Similarly, UTC § 413(a) provides that if a particular charitable purpose of a trust becomes unlawful, impracticable, impossible to achieve, or wasteful, the court may apply cy pres to modify or terminate the trust. The corresponding provisions of the OTC have been changed to eliminate "wasteful" as a ground for such a modification or termination.

21. Charitable trusts (§§ 5804.05(C) and 5804.13).

The OTC will change Ohio law governing charitable trusts in at least two respects. First, under OTC § 5804.05(C), the settlor of a charitable trust has standing to enforce the trust. By contrast, under *Three Bills, Inc., v. Parma*, 676 N.E.2d 1273, 1276 (Ohio Ct. App. 1996), the settlor does not have standing to do so.

Second, under existing Ohio law if the charitable purpose of a trust fails (and the instrument does not address that contingency), cy pres may be applied to reform the trust to accomplish the settlor's charitable intent only if the court determines that the settlor had a general charitable intent in addition to the specific charitable intent that failed. If not, the trust assets revert to the settlor, if living, or the settlor's successors. *See Craft v. Schroyer,* 74 N.E.2d 589 (Ohio App. 1947). Under OTC § 5804.13(A), a general charitable intent is presumed, as the court cannot order a reversion or gift over unless the instrument expressly provides for one.

In many jurisdictions, the UTC would change existing law in that it provides that cy pres may be applied not just if the charitable purpose becomes impossible or unlawful, but also if it becomes impracticable. In Ohio, that expansion of the court's cy pres power may not effect a change in the law. According to the UTC Reporter, Professor David English, "Ohio applies cy pres only if the original charitable means have failed. However, there are numerous Ohio cases where inefficient charitable dispositions have been modified on account of unanticipated circumstances. Given this, there may be little or no difference between the U.T.C. and current Ohio law in practical effect." David M. English, *The Uniform Trust Code (2000) and its Application to Ohio*, 30 CAPITAL UNIVERSITY LAW REVIEW 1 (2002).

Because of administrative difficulties and concerns with respect to the clogging of title, UTC § 413(b) provides that if a trust's charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful and the instrument provides for a gift

over to a noncharitable beneficiary, the gift over will be valid only if the distribution is to be made to the settlor, while living, or to someone else within 21 years of the trust's creation. OTC § 5804.13 omits both of those limitations.

Finally, a provision has been added to OTC § 5804.13(A)(3) noting that, in accordance with RC § 109.25, the attorney general is a necessary party to cy pres judicial proceedings.

For further discussion of the OTC's charitable trust provisions, see Susan S. Locke, *The Ohio Trust Code and Charitable Interests,* 16 PROBATE LAW JOURNAL OF OHIO 72 (January/February 2006).

22. Termination of uneconomic inter vivos trusts (§ 5804.14).

HB 416, which repeals RC § 1339.66, addresses the termination of uneconomic inter vivos trusts in OTC § 5804.14.

A. Differences between RC § 1339.66 and OTC § 5804.14. There are many:

(1) Court involvement. RC § 1339.66 allows the court to terminate a trust of less than $100,000 of assets; OTC § 5804.14(A) allows the trustee to do so without court involvement. (At the recommendation of the Ohio Attorney General's Office, while HB 416 was being considered by the House Civil and Commercial Law Committee, § 5804.14 was amended to include new division (A)(2). Under it, the trustee may not terminate an uneconomic charitable trust without court involvement, unless the charitable interest is remote.)

(2) Modification or removal and replacement of trustee. For trusts with less than $100,000 of assets, OTC § 5804.14(B) authorizes the court to modify the trust, or remove and replace the trustee, as well as terminate the trust. RC § 1339.66 has no similar provision.

(3) Standard. The standard for terminating, modifying, or removing and replacing the trustee of a trust under OTC § 5804.14 is similar to, but somewhat different from, the standard for terminating an uneconomic trust under RC § 1339.66. Under OTC § 5804.14, the trustee (for a termination by the trustee) or court (for a termination, modification, or removal of the trustee by the court) must only conclude "that the value of the trust property is insufficient to justify the cost of administration." By contrast, RC § 1339.66 requires a determination that: (a) it is no longer economically feasible to continue the trust, (b) the termination of the trust is for the benefit of the beneficiaries, and (c) the termination of the trust is equitable and practical.

(4) Notice. RC § 1339.66 requires notice to "all beneficiaries who are known and in being and who have vested or contingent interests in the trust." OTC §

5804.14(A) provides that for a termination by the trustee, notice must be given only to qualified beneficiaries (which, generally, do not include remote remainder beneficiaries).

(5) Distribution of assets of terminated trust. As recently amended, RC § 1339.66 provides guidance for the distribution, by order of the probate court, of the assets of a trust terminated under its provisions. The new language from the amendment has not been inserted directly into OTC § 5804.14(C) because, as discussed above, the OTC allows the trustee to terminate an uneconomic trust with assets of less than $100,000 without court involvement. Therefore, the amendment language has been changed to allow the trustee, rather than the probate court, to determine how the assets of such a trust should be distributed. For trusts that are terminated by the court under § 5804.14(B), rather than the trustee, the amendment language on how to distribute the trust assets has been included in § 5804.14(D).

(6) Representation. The new amendment to RC § 1339.66 also includes a provision allowing virtual representation of minors, incapacitated or unborn persons, or persons whose identity or location is unknown or not reasonably ascertainable. That provision has been omitted from OTC § 5804.14 because virtual representation already is available under Chapter 5803 of the OTC.

(7) Easements for conservation or preservation. OTC § 5804.14(F) excludes easements for conservation or preservation from the trusts that may be terminated for being uneconomic. RC § 1339.66 does not address such easements. The UTC comment to § 414 explains the rationale for the corresponding provision of the UTC, as follows:

> "Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. . ."

B. Differences between OTC § 5804.14 and UTC § 414. Five changes have been made in OTC § 5804.14 to the UTC's provisions for the modification or termination of an uneconomic trust. First, OTC § 5804.14 is expressly made applicable only to inter vivos trusts. The termination of uneconomic testamentary trusts will continue to be governed by RC § 2109.62. Second, in accordance with the dollar amounts of RC §§ 1339.66 and 2109.62, UTC § 414's $50,000 suggested cap for the termination of an uneconomic trust by the trustee has been changed to $100,000 in OTC § 5804.14(A).

Third, UTC § 414(b) allows the court to modify or terminate a trust, or remove and replace the trustee, if it determines the value of the trust property is insufficient to justify the cost of administration. This power of the court is not limited to trusts with assets of less than a stated amount. OTC § 5804.14(B) limits these powers of the court to trusts with assets of less than $100,000. Fourth, because of the recent amendments to RC §§ 1339.66 and 2109.62, the provision in UTC § 414(c) that the trustee shall distribute the assets of a terminated uneconomic trust "in a manner consistent with the purposes of the trust" has been omitted and, generally, replaced by the new amendment's provisions on that subject. Fifth, the provision of RC § 1339.66 that the existence of a spendthrift provision in a trust instrument does not preclude termination of an uneconomic trust has been included in OTC § 5804.14 as division (E).

23. Consolidation or division of trusts (§ 5804.17).

The OTC provides for the repeal of RC § 1339.67, and uses the UTC provision (§417) to address the consolidation or division of trusts in OTC § 5804.17. The principal differences between the two statutes are:

A. While both statutes allow the trustee, without involvement of the court, to consolidate or divide trusts, under OTC § 5804.17, notice must be given to qualified beneficiaries. By contrast, under RC § 1339.67, notice need not be given to beneficiaries unless court approval is sought.

B. With respect to the standard for consolidation or division, OTC § 5804.17 allows consolidation or division "if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust." Under RC § 1339.67, consolidation or division is allowed if: (i) it is in the best interests of the beneficiaries, (ii) it is equitable and practicable, and (iii) it will not defeat or substantially impair the accomplishment of the purpose of the trust or trusts or the interests of the beneficiaries under the trust or trusts."

C. RC § 1339.67 includes a provision stating that trusts also may be consolidated or divided in accordance with the terms of "the governing instrument, under any other section of the Revised Code, at common law, or in equity." There is no similar provision in OTC § 5804.17.

24. Other OTC provisions on modification and termination of trusts (Chapter 5804).

The OTC's provisions on dividing or consolidating trusts, on terminating an uneconomic trust, on the modification and termination of an irrevocable noncharitable trust by consent, and on the termination of a trust when none of its purposes remain to be achieved or if its purposes have become unlawful, contrary to public policy, or impossible to achieve, are discussed above. The OTC includes a number of additional

provisions with respect to the modification or termination of a trust. In § 5804.18, for example, the OTC provides that supplemental needs trusts described in 42 U.S.C. § 1396p(d)(4) are irrevocable (as long as the settlor is not authorized to revoke them), regardless of whether the settlor's estate or heirs are named the trust's remainder beneficiaries. This provision, which is intended to preclude arguments by the Social Security Administration that such trusts are revocable and thus disqualify their beneficiaries from receiving Supplemental Security Income, is discussed in Richard E. Davis, *Treatment of Supplemental Needs Trusts Under the OUTC*, 16 PROBATE LAW JOURNAL OF OHIO 1 (September/October 2005) and Richard E. Davis and Stanley C. Kent, *The Impact of the Uniform Trust Code on Special Needs Trusts*, 1 NATIONAL ACADEMY OF ELDER LAW ATTORNEYS JOURNAL 235 (2005).

For a more detailed discussion of the OTC's various provisions on the modification and termination of irrevocable trusts, see Alan Newman and Jamie R. Minor, *The Modification and Termination of Irrevocable Trusts under the Ohio Uniform Trust Code*, 16 PROBATE LAW JOURNAL OF OHIO 2 (September/October 2005). The article's conclusion summarizes the OTC's modification and termination provisions as follows:

> The [OTC's] modification and termination provisions will provide settlors, beneficiaries, and trustees with increased flexibility for dealing with problematic irrevocable trusts. Trust terms, even if unambiguous, may be reformed to correct mistakes, or modified to achieve the settlor's tax objectives. To further the settlor's trust purposes, dispositive as well as administrative provisions may be modified under the unanticipated circumstances doctrine. Further, the standard for application of the unanticipated circumstances doctrine has been reformulated to allow modifications to further the purposes of the trust without a showing that compliance with the terms of the trust will defeat or substantially impair the accomplishment of its purposes. The cy pres doctrine will be available to save charitable trusts without a finding that the settlor had a general charitable intent or resort to the deviation doctrine. The court will be able to modify the terms of an uneconomic trust of less than $100,000 of assets, or change its trustee, when terminating the trust is not appropriate. A termination or modification by consent of the settlor and beneficiaries, or by the beneficiaries if the material purpose requirement is satisfied, may be accomplished through use of the Code's representation provisions if a trust has minor, unborn, incapacitated, or unable to be located beneficiaries. Further, beneficiaries whose interests will be protected in connection with such a modification or termination may not prevent other beneficiaries from accomplishing it. In short, the [OTC's] modification and termination provisions may prove to be among its most useful.

25. Rights of creditors of beneficiaries (Chapter 5805).

Many changes have been made in Chapter 5805, dealing with the rights of creditors of trust beneficiaries, from the corresponding article of the UTC. As discussed

in Richard E. Davis and Alan Newman, *Codify – Not Modify: Creditor Remedies and the Ohio Uniform Trust Code*, 15 PROBATE LAW JOURNAL OF OHIO 17 (November/December 2004), in many cases the changes have been made to conform the OTC to existing Ohio law. (For additional discussions of issues affected by Chapter 5805, see (i) Stanley C. Kent and Richard E. Davis, *The Uniform Trust Code and Supplemental Needs Trusts*, 15 PROBATE LAW JOURNAL OF OHIO 53 (January/February 2005); Daniel J. Hoffheimer and Natasha M. Cavanaugh, *The Uniform Trust Code and Asset Protection: The Discretionary/Support Distinction and Spendthrift Provisions*, 15 PROBATE LAW JOURNAL OF OHIO 17 (November/December 2004); and Richard E. Davis, *Treatment of Supplemental Needs Trusts Under the OUTC*, 16 PROBATE LAW JOURNAL OF OHIO 1 (September/October 2005).)

A. Spendthrift trusts. Generally, spendthrift provisions that restrain both voluntary and involuntary transfers of a beneficiary's interest are enforceable under existing Ohio law, the OTC, and the UTC. (In a departure from the UTC, which does not address the issue, § 5805.01(A) provides that spendthrift protection is available if the beneficiary may voluntarily transfer the beneficiary's interest, but only with the consent of a trustee who is not the beneficiary.) Thus, most creditors of a beneficiary of a spendthrift trust may not reach assets of the trust unless and until they are received by the beneficiary in a distribution from the trustee. (In another departure from the UTC, which does not address the issue, § 5805.01(C) provides that real property, or tangible personal property, that is owned by the trust, but properly made available for a beneficiary's use or occupancy under the terms of the trust, is not considered to have been distributed to the beneficiary for creditors' rights purposes.)

(1) Spendthrift exceptions. Consistent with existing Ohio law (see, e.g., *Albertson v. Ryder*, 621 N.E.2d 480 (Ohio App. 1993)), OTC § 5805.02 (like UTC § 503) excepts support claims of a current spouse or child from the spendthrift bar. (Section 5805.02(B)(1), after an amendment in the Senate that resulted from discussions between members of the Joint Committee and the OSBA's Family Law section, limits the exception, however, by making such support claims spendthrift exceptions "only if distributions can be made for the beneficiary's support or the beneficiary is entitled to receive mandatory distributions under the terms of the trust.") As is the case under the UTC, an additional spendthrift exception under the OTC is for claims of the State or the United States, to the extent the Revised Code or federal law so provides.

Two additional spendthrift exceptions under the UTC have been omitted from OTC § 5805.02: an alimony claim of a former spouse and the claim of a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust. Not including alimony claims as a spendthrift exception is consistent with Ohio law. (See *Martin v. Martin*, 374 N.E.2d 1384, 1390 (Ohio 1978), which involved a discretionary support trust, but which relied on a Minnesota case that explicitly rejected an alimony exception to spendthrift protection for a beneficiary's mandatory income interest.) Probably the most common creditor of a beneficiary who will have provided services for the protection of the beneficiary's interest in the trust will be an attorney. While the claim of such an attorney has been deleted from the list of spendthrift

exceptions in OTC § 5805.02, the OTC has been modified from the UTC to make it clear that the discretion of the court to order the payment of attorney's fees in proceedings involving the administration of a trust applies to spendthrift trusts. OTC § 5810.04. (For a recent Ohio court of appeals case discussing a probate court's order that apparently permitted a set-off against the interest of a beneficiary who, while executor of the settlor's estate, had improperly disposed of trust assets, see *Great American Insurance Co. v. Thompson Trust*, 2006-Ohio-304. No such set-off would be permitted under the OTC. See section 1.A., above. For further discussion, see Alan Newman, *Powers of Withdrawal, Claims for Set-Off, and Spendthrift Protection,* 16 PROBATE LAW JOURNAL OF OHIO 143 (May/June 2006)).

Although UTC § 502(c) provides that creditors of a beneficiary of a spendthrift trust may not reach the beneficiary's interest or a distribution by the trustee before its receipt by the beneficiary except as set forth in article 5 of the UTC, it does not explicitly state that its list of spendthrift exceptions is exclusive. New division (E) to OTC § 5805.02 includes such a statement.

Like UTC § 503, as amended in 2005, the OTC provides that a spendthrift trust exception creditor may attach present or future distributions to or for the benefit of the beneficiary. Also like the UTC, OTC § 5805.02(D) provides that an exception creditor's award against a beneficiary's interest in a spendthrift trust may be limited by the court "to such relief as is appropriate under the circumstances." OTC § 5805.02(D), however, goes on to provide that in deciding whether to so limit a creditor's award, the court may consider, "among any other factors determined appropriate by the court the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support."

(2) Mandatory distributions from spendthrift trusts. Generally, the effect of a spendthrift provision is to preclude a beneficiary's creditor from reaching trust assets prior to their receipt by the beneficiary. To address the possibility of a trustee not making mandatory distributions to a beneficiary that his or her creditor could then reach, OTC § 5805.05(B), like UTC § 506, allows the creditor to reach a "mandatory distribution" if the trustee has not made it "within a reasonable time after the designated distribution date." Under § 5801.01(M), " 'mandatory distribution' means a distribution of income or principal, including a distribution upon termination of the trust, that the trustee is required to make to a beneficiary under the terms of the trust. Mandatory distributions do not include distributions that a trustee is directed or authorized to make pursuant to a support or other standard, regardless of whether the terms of the trust provide that the trustee 'may' or 'shall' make the distributions pursuant to a support or other standard." (This definition differs, although not substantively, from the definition of "mandatory distribution" added to the UTC in § 506(a) in a 2005 amendment.)

In *Domo v. McCarthy*, 612 N.E.2d 706 (Ohio 1993), the trust instrument provided for a terminating distribution to the beneficiary when he reached age 35. The trust also

included a spendthrift clause which provided that title to principal was not to vest in any beneficiary until actual payment to the beneficiary, and that no beneficiary could alienate his interest prior to the actual receipt of property from the trust. The trial court held that when the beneficiary reached age 35, the trustee was required to satisfy the creditor's judgment from the trust property distributable to the beneficiary. On appeal, the trial court's judgment was reversed. According to the Supreme Court, the trust's spendthrift provision prevented the creditor from reaching the beneficiary's interest until the principal was actually transferred to the beneficiary. Because the beneficiary had not yet reached age 35, however, the issue of the trustee unreasonably delaying the distribution was not presented or addressed.

B. In the absence of spendthrift protection.

(1) UTC rules. If a trust does not include a spendthrift provision, UTC § 501 provides that the court may authorize the creditor to reach the beneficiary's interest by attachment of present or future distributions or by other means. UTC § 501 applies to both mandatory distributions and discretionary distributions (whether or not standards such as support are provided for such discretionary distributions). Thus, for example, in the absence of spendthrift protection, the court may allow a beneficiary's creditor to collect from the trust both distributions the trustee is required to make to the beneficiary, and distributions the trustee chooses to make in the exercise of its discretion. In exercising its authority, however, the court is authorized by UTC § 501 to "limit the [creditor's] award to such relief as is appropriate under the circumstances."

UTC § 504 addresses discretionary trusts. Regardless of whether a discretionary trust includes a spendthrift clause, and regardless of whether it includes one or more standards (for example, support, health, or education) for distributions, the general rule of UTC § 504(b) is that creditors of the beneficiary may not compel the trustee to exercise its discretion to make a distribution the creditor can reach. (That is the case even if the trustee has abused its discretion or failed to comply with a standard in not making a distribution.) Again, however, under UTC § 501, if the trustee exercises its discretion to make a distribution (and spendthrift protection is not available), the court may order the trustee to make all or part of the discretionary distribution to the creditor.

Many changes have been made to these UTC provisions in the OTC. Under the OTC, in the absence of spendthrift protection, different rules are provided for wholly discretionary trusts, mandatory distribution trusts, and discretionary trusts that are not wholly discretionary trusts.

(2) Wholly discretionary trusts. Under Ohio law, a creditor of a beneficiary of a purely discretionary trust may not reach the trust. *Domo v. McCarthy*, 612 N.E.2d 706, 710 (Ohio 1993); *Scott v. Bank One*, 577 N.E.2d 1077, 1081 (Ohio 1991). (In *Matthews v. Matthews*, 450 N.E.2d 278 (Ohio App. 1981), the court allowed a child support claim against the interest of a beneficiary of a discretionary support trust. In explicitly noting that the trust was not a purely discretionary trust, the court arguably

indicated that had it been a purely discretionary trust, even a child support claimant would not have been able to reach the beneficiary's interest in the trust.)

OTC § 5805.03 provides that no creditor of a beneficiary of a "wholly discretionary trust" (the definition of which is attached as Appendix A) "may reach the beneficiary's interest in the trust, or a distribution by the trustee before its receipt by the beneficiary, whether by attachment of present or future distributions to or for the benefit of the beneficiary, by judicial sale, by obtaining an order compelling the trustee to make distributions from the trust, or by any other means, regardless of whether the trust instrument includes a spendthrift provision." Thus, under the OTC, no creditor, regardless of the nature of its claim or whether the instrument includes a spendthrift clause, may reach the interest of a beneficiary of a wholly discretionary trust. (Federal law, however, preempts state law. Under federal law, a claim by the United States for unpaid income taxes reaches distributions the trustee of a discretionary trust chooses to make to or for the benefit of a beneficiary/delinquent taxpayer. *United States v. Cohn*, 855 F. Supp. 572 (D. Conn. 1994).)

(3) Mandatory distribution trusts. At the other end of the spectrum from wholly discretionary trusts are trusts in which the trustee is directed to make mandatory distributions to the beneficiary. As described above, "mandatory distributions" are those the trustee is required to make, and do not include distributions subject to the exercise of the trustee's discretion (without regard to whether standards for distributions are included in the instrument or whether the instrument provides that the trustee "may" or "shall" make such distributions). Thus, for example, if the beneficiary is entitled to receive periodic distributions of the trust income or a unitrust amount, or the beneficiary is entitled to receive part or all of the principal upon reaching a specified age, those amounts so distributable to the beneficiary would be mandatory distributions.

Under OTC § 5805.05(A): "To the extent that a trust which gives a beneficiary the right to receive one or more mandatory distributions does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary's interest by other means." However, the court also is authorized to "limit an award under this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children, or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support."

Because the beneficiary's interest may be remote or contingent (for example, the trust principal is to be distributed to a child upon the parent's death, unless the child predeceases the parent, in which case the distribution is to be made to the child's children), § 5805.05(A), consistent with Restatement (Second) of Trusts, § 162, provides: "If in exercising its power under this section the court decides to order either a sale of a beneficiary's interest or that a lien be placed on the interest, in deciding between the two

types of action, the court shall consider among any other factors it considers relevant the amount of the claim of the creditor or assignee and the proceeds a sale would produce relative to the potential value of the interest to the beneficiary."

(4) Discretionary trusts that are not wholly discretionary trusts. In *Bureau of Support v. Kreitzer*, 243 N.E.2d 83 (Ohio 1968), a parent created a trust for a child and gave the cotrustees the sole and absolute discretion to make distributions the trustee determined were necessary for the beneficiary's care, comfort, maintenance, and general well-being. The beneficiary was an institutionalized mentally incompetent patient whose support was being paid for by the state, which sued to compel the cotrustees to reimburse it for the cost of the beneficiary's care. In holding for the state, the Supreme Court determined that the destitute beneficiary could have compelled the cotrustees to provide for her support and that the state was subrogated to her right to do so. Several subsequent court of appeals cases have followed *Kreitzer*.

Ten years later, in *Martin v. Martin*, 374 N.E.2d 1384 (Ohio 1978), the Supreme Court decided a case in which a former spouse attempted to reach a beneficiary's interest in a discretionary support trust. The terms of the trust gave the trustees the sole and absolute discretion to distribute income and principal for the beneficiary's "comfort, care, support and education." In the event of an attempted alienation or attachment of the beneficiary's interest, the trustees were given the absolute and uncontrolled discretion to distribute income and principal for the "education, care, comfort, or support" of the beneficiary, the beneficiary's spouse, and the beneficiary's issue. In rejecting the trustees' argument that the discretionary nature of the trust precluded the beneficiary's creditors from reaching the trust property, the Supreme Court stated:

> Application of the rationale of the *Kreitzer* case here leads to the conclusion that the trustees can be required, after attempted alienation or attachment, to distribute income or principal for purposes of 'education, care, comfort or support of such beneficiary or such beneficiary's spouse and/or issue,' and that debts incurred for the enumerated purposes are obligations which the trustees are required to discharge.

Because the former spouse's alimony claim was not a part of the support the trustees could be required to furnish the beneficiary, the Supreme Court denied her claim to reach the beneficiary's interest in the trust prior to its termination. (Because the beneficiary was entitled to receive the trust principal and accumulated income upon termination of the trust, the Court, however, affirmed the lower court's placing a lien on the beneficiary's interest in the trust.)

Subsequent to *Martin*, several court of appeals decisions have cited *Kreitzer*, *Martin*, or both for the proposition that creditors other than the state can assert *Kreitzer* type claims against discretionary trust interests of beneficiaries when their claims are for items covered by standards in the terms of the trust for distributions to or for the beneficiary. See, e.g., *Schierer v. Ostafin*, 1999 WL 493940 (Ohio App.); *Samson v. Bertok*, 1986 WL 14819 (Ohio App.); and *Buoscio v. Estate of Buoscio*, 2001 WL

1123960 (Ohio App.). None of these cases involved claims by creditors that were for items the trustee could have provided under standards in the terms of the trusts, and the *Kreitzer* rationale therefore was not applicable. See also *Bank One, Dayton, NA v. Ohio Dept. of Mental Retardation and Developmental Disabilites*, 1990 WL 27520 (Ohio App.).

In *Winter Haven Hospital, Inc. v. BancOhio National Bank*, 1993 WL 524898 (Ohio App.), a private hospital relied on *Kreitzer* in asserting a $58,900 claim against the interest of a beneficiary of a $97,000 discretionary support trust. In rejecting the creditor's claim, the court of appeals stated that the trustee "reasonably could conclude that payment of the debt would so deplete trust assets as to jeopardize [the beneficiary's] daily maintenance, the very purpose for which the trust was established." By contrast, in *Matthews v. Matthews*, 450 N.E.2d 278 (Ohio App. 1982), the court relied on *Kreitzer* and *Martin* in allowing a child support claimant to reach assets in a discretionary support trust for the debtor/beneficiary.

UTC § 504(b) provides, generally, that creditors of beneficiaries may not compel distributions from discretionary trusts, including those for the support, health, or education of the beneficiary, regardless of whether the trustee has abused its discretion or failed to comply with a standard of distribution. While OTC § 5805.04(B) includes that general rule, an exception for *Kreitzer* type claims of the state, but not for claims of other creditors that are within the standards of the trust, is included in division (C). Consistent with *Society Bank National Association v. Cayuga County Department of Social Services*, 1993 WL 65747 (Ohio App.), the *Kreitzer* exception of 5805.04(C) applies only if the terms of the trust do not include a spendthrift provision.

The OTC also addresses two other issues with respect to discretionary trusts that are not wholly discretionary trusts. First, under § 5805.04(D), a child or current spouse of the beneficiary who has a judgment or court order for support may compel distributions the child or current spouse can reach, but only if the trustee has abused its discretion or failed to comply with a standard of distribution in not making the distribution, and only if distributions can be made for the beneficiary's support under the terms of the trust. (The corresponding provision of the UTC (§ 504(c)) also allows former spouses with alimony claims to compel discretionary distributions and does not limit the provision to trusts from which support distributions could be made for the beneficiary.) However, consistent with the opinion in *Matthews*, if the settlor has explicitly provided in the trust instrument that the beneficiary's spouse or children are excluded from benefiting from the trust, the spouse or child may not compel distributions they can reach. Second, OTC § 5805.04(E) includes a provision that is not included in the UTC that prohibits the judicial sale of a discretionary interest, regardless of whether it is subject to a spendthrift provision.

C. When the beneficiary is the trustee or a cotrustee. As originally drafted, the UTC arguably would have allowed a creditor of a beneficiary of a third-party created trust to reach the maximum amount the beneficiary/trustee could distribute for his or her own benefit. The OTC rejects that result if the beneficiary/trustee's power to make distributions for his or her own benefit is limited by an ascertainable standard relating to

health, education, maintenance, or support. Under 2004 amendments to the UTC, that also is now the rule under the UTC. (HB 416, as originally introduced, addressed this subject in § 5805.04(F), with the language of the 2004 UTC amendment, and in § 5805.06(B)(3), with different language. While HB 416 was being considered by the House Civil and Commercial Law Committee, it was amended to delete § 5805.06(B)(3).)

D. Creditor's claim against the settlor. The OTC, like the UTC, rejects self-settled spendthrift trusts and generally allows a creditor of the settlor to reach the settlor's beneficial interest in the trust. In a departure from the UTC, § 5805.06(A)(3) provides a limited exception for certain supplemental needs trusts:

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

Also like the UTC, OTC § 5805.06(B)(1) treats the holder of a power of withdrawal from a trust as the settlor of the trust for creditors' rights purposes, but only to the extent of the property subject to the power of withdrawal and only during the period it may be exercised. The UTC provides an exception for powers of withdrawal that lapse (for example, Crummey powers): the holder of such a power will continue to be treated as the settlor of a revocable trust only to the extent the property subject to the power exceeds the greater of the annual exclusion amount under IRC § 2503(b) (determined without regard to gift splitting) or the five or five amount under IRC §§ 2041(b)(2) or 2514(e). To accommodate gift splitting, the OTC substitutes twice the annual exclusion amount if the donor was married at the time of the transfer to the trust. (For a recent Ohio case granting a creditor of a trust beneficiary the right to reach amounts the beneficiary could withdraw from the trust, see *Great American Insurance Co. v. Thompson Trust*, 2006-Ohio-304, which is discussed in Alan Newman, *Powers of Withdrawal, Claims for Set-Off, and Spendthrift Protection,* 16 PROBATE LAW JOURNAL OF OHIO 143 (May/June 2006).)

26. Revocable trusts (Chapter 5806).

Numerous changes have been made to the UTC provisions on revocable trusts in the OTC. In at least two respects, the OTC will change Ohio law on revocable trusts.

A. Presumption of revocability of trust. Consistent with the UTC, under OTC § 5806.02(A), the settlor may revoke or amend a trust unless the instrument expressly provides that the trust is irrevocable. Existing law in Ohio, as in most states, is just the opposite: unless the settlor has retained the power to revoke or amend a trust, he or she may not do so. *Lourdes College of Sylvania, Ohio v. Bishop*, 703 N.E.2d 362

(Ohio Com. Pl. 1997). (This change will not apply retroactively, but will instead apply only to trusts created after the effective date of the OTC.)

B. Manner of revoking or amending a revocable trust. Under UTC § 602(c)(2)(A), if a revocable trust does not specify the means of revoking or amending the trust, or if the means specified are not expressly made exclusive, the settlor may revoke or amend the trust (i) by a later will or codicil that either expressly refers to the trust, or that specifically devises property that otherwise would have passed under the trust, or (ii) by any other method manifesting clear and convincing evidence of the settlor's intent. The OTC makes two changes to this provision. First, it rejects the use of a will or codicil as a general means of revoking or amending a revocable trust by expressly providing, in § 5806.02(C)(2), that a will or codicil cannot amend or revoke a revocable trust unless the terms of the trust allow such an amendment or revocation. This change to the UTC also will constitute a change in existing Ohio law. See *Estate of Davis*, 109 Ohio App.3d 181 (1996). Second, under OTC § 5806.02(C), if the settlor specifies a manner of revocation or amendment, it will be treated as the exclusive means of revoking or amending the trust even if the instrument does not expressly state that it is the exclusive means of doing so.

C. Authority of agent of settlor of revocable trust (§ 5806.02(E)). The UTC allows an agent of the settlor under a power of attorney to exercise the settlor's powers to revoke or amend the trust, or effect distributions of trust property, if the agent is so authorized by either the power of attorney or the terms of the trust. OTC § 5806.02(E) prohibits the agent from doing so unless both the trust terms and the power of attorney authorize it.

D. Duties of trustee of revocable trust if the settlor is incapacitated (§§ 5806.03(A) and 5808.13(E)). Under UTC § 603(a), while the settlor is competent, the trustee of a revocable trust owes duties only to the settlor, but upon the settlor's incapacity, the trustee also owes duties to the other beneficiaries of the trust (for example, remainder beneficiaries). OTC § 5806.03(A) provides that during the lifetime of the settlor of a revocable trust, the trustee's duties are owed only to the settlor, regardless of whether the settlor is competent.

Under the initial draft of HB 416, § 5801.01(R) defined "revocable," in the context of a trust, as one that is "revocable by the settlor at the time of determination without the consent of the trustee or a person holding an adverse interest." At the recommendation of the Joint Committee, the definition of "revocable" was amended while HB 416 was being considered by the House Civil and Commercial Law Committee in two ways. First, an additional sentence was added stating: "A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, is serving." Thus, during the lifetime of the settlor of a revocable trust, the trustee will have no obligation to provide notices and information about the trust to other trust beneficiaries, regardless of whether the settlor is competent. See Alan Newman, *Revocable Trusts and Notice Provisions of the Ohio Uniform Trust Code*, 16 PROBATE LAW JOURNAL OF OHIO 41 (November/December

2005). Second, the definition was amended to provide that a trust that may be revoked by the settlor with the consent of a person who does not hold an adverse interest will be treated as a revocable trust. Thus, for example, if a settlor creates a trust that the settlor may revoke with the consent of the trustee, the trust will be treated as a revocable trust if the trustee does not hold an adverse interest in the trust.

To address the possibility of a trustee of a revocable trust breaching its duty, and a recovery from the trustee being obtained after the settlor's death or incapacity, § 5806.03(A) also provides for the apportionment of the recovery between the trust and the settlor, if the settlor is living, or between the trust and the settlor's estate, if the settlor is deceased. (As originally introduced, HB 416 did not address how such an apportionment would be made. At the Joint Committee's recommendation, while HB 416 was being considered by the House Civil and Commercial Law Committee, § 5806.03(A) was amended to provide that such an apportionment would be made by the court as it determines to be equitable under the circumstances.)

E. Contesting a revocable trust (§ 5806.04). In OTC § 5806.04, the provisions in UTC § 604 for contesting a revocable trust have been replaced, in their entirety, by the provisions of RC § 2305.121. The most significant difference between the two is that the limitation period for a contest under RC § 2305.121 is two years from the settlor's death. By contrast, UTC § 604 bars contests on the earlier of (i) three years from the settlor's death or (ii) 120 days after the trustee sent notice to the potential contestant.

F. Validity of revocable trusts and rights of creditors of the settlor of a revocable trust during the settlor's lifetime. Generally, RC § 1335.01(A) provides that revocable trusts are valid, and that creditors of the settlor of such a trust may reach the settlor's interest in it (or compel the settlor to exercise the power of revocation). HB 416 provides for the repeal of RC § 1335.01(A), as it is clear under the OTC that revocable trusts are valid, and creditors of the settlor of a revocable trust are authorized to reach the trust assets during the settlor's lifetime by OTC § 5805.06(A)(1).

G. Rights of creditors of the settlor of a revocable trust after the settlor's death. Under *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328 (1939), a creditor of a settlor of a revocable trust may not reach the trust's assets after the settlor's death. Consistent with the law of most states that have addressed the issue, under UTC § 505(a)(3), if the settlor's probate estate is inadequate, creditors of the settlor may reach the trust's assets (as may persons with claims for costs of administration of the settlor's estate, funeral expenses, and the support allowance for a surviving spouse and minor children), provided that the settlor may direct the source from which such liabilities will be paid. The OTC omits UTC § 505(a)(3), and thus does not address the *Schofield* issue one way or the other.

H. **Creation of revocable trust by declaration.** See section 13.

27. Cotrustees may act by majority decision (§ 5807.03(A)).

Under UTC § 703(a), "cotrustees who are unable to reach a unanimous decision may act by majority decision." Because that language arguably implies a duty to attempt to reach a unanimous decision, OTC § 5807.03(A) has been changed to provide that "if there are three or more cotrustees serving, they may act by majority decision."

28. Delegation (§§ 5807.03(E), 5808.07, and 5809.06).

Delegation issues can arise in two contexts: a delegation by one cotrustee to another, and a delegation by a trustee to a third party. With respect to delegations by trustees to third parties, the comment to UTC § 703 explains that "many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform." By contrast, in the context of a delegation among cotrustees, the comment states that the UTC assumes that "the settlor selected cotrustees for a specific reason and . . . this reason ought to control the scope of a permitted delegation to a cotrustee."

As a result, UTC § 703(e) prohibits a trustee from delegating to another trustee "the performance of a function the settlor reasonably expected the trustees to perform jointly." (Professor English's outline and discussion of key provisions of the UTC notes that this "standard is appropriate but may be difficult to apply in practice.") By contrast, UTC § 807(a), consistent with the Restatement (Third) of Trusts and the Uniform Prudent Investor Act, allows a trustee to delegate to a third party agent any "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances."

The OTC uses the UTC § 807(a) standard – allowing delegations of "duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances" – in both the cotrustee and third party context. Thus, under the OTC, the standard for a permissible delegation is the same whether to a cotrustee or to a third party. Accordingly, OTC § 5808.07 has been revised to include cotrustees as well as agents in its provisions requiring, for example, that a delegating trustee exercise reasonable care, skill, and caution in selecting the delegatee, establishing the scope of the delegatee's duties, and monitoring the delegatee's actions.

29. Liability of trustee when there are cotrustees (§ 5807.03(F) and (G)).

UTC § 703(g) imposes on each trustee a duty to exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress one. Consistent with RC § 1339.43, a provision has been added to the comparable provision of the OTC (§ 5807.03(G)) under which a trustee will not have that duty, and will not be liable for resulting losses, when one or more cotrustees have and exercise a power to direct. Similarly, § 5807.03(G) also negates that duty when other trustees act by

majority vote. (Note, however, that the OTC provision under which a trustee who does not join in an action of another trustee is not liable for the action, § 5807.03(F), has been changed to refer to §§ 5807.03(C) and (E). The former generally obligates each trustee to participate in the performance of a trustee's function; the latter prohibits delegations except those that a prudent trustee of comparable skills could properly delegate under the circumstances. Under those sections, if other trustees, by majority vote, committed a breach, a cotrustee who did not participate would not be directly liable for the other trustees' action, but presumably could be liable if it impermissibly delegated its duty or neglected to participate in the performance of the trustee's functions.)

30. Vacancy in trusteeship; appointment of successor (§§ 5807.04(C) and (D)).

If a vacancy occurs in the trusteeship of a noncharitable trust, UTC § 704(c) provides for it to be filled first by a successor designated in the instrument, second by unanimous agreement of the qualified beneficiaries, and third by court order. OTC § 5807.04(C) provides that a person appointed by someone who is authorized by the instrument to designate a successor trustee will be second in priority to fill a vacancy in the trusteeship. The same change also has been made to OTC § 5807.04(D), which addresses filling a vacancy in the trusteeship of a charitable trust.

UTC § 704(d) provides that if there is a vacancy in a trusteeship of a charitable trust, one of the means of filling it is for the charitable organizations expressly designated to receive distributions under the terms of the trust to select a successor "if the attorney general concurs." The requirement that the attorney general concur is consistent with UTC § 110(c), which provides for the attorney general to have the rights of a qualified beneficiary with respect to charitable trusts. As discussed in section 7, above, however, UTC § 110(c) has been deleted from the OTC. Consistent with that deletion, the requirement that the attorney general concur with the designation of a successor trustee by the charitable organizations expressly designated to receive distributions under the terms of the trust also has been deleted from the OTC.

31. Removal of trustee (§ 5807.06(B)).

Following UTC § 706(b), OTC § 5807.06(B) provides that the court may remove the trustee if: "(a) the trustee has committed a serious breach of trust; (b) lack of cooperation among cotrustees substantially impairs the administration of the trust; or (c) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries."

UTC § 706(b)(4) also provides for removal of the trustee if "there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable

cotrustee or successor trustee is available." This UTC ground for removing a trustee, which is inconsistent with existing Ohio law, has been omitted from the OTC. For a discussion, see Joanne E. Hindel, *Trustee Removal: From the Common (Law) to the Controversial,* 16 PROBATE LAW JOURNAL OF OHIO 67 (January/February 2006), which analyzes Ohio case law and concludes that under it "removal of an inter vivos trustee requires a clear and convincing showing that removal is necessary to protect trust assets." Id. at 71.

The removal of trustees of testamentary trusts is addressed by existing Ohio law in RC § 2109.24. Under it, the grounds for removal are "habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the trust demands it, or for any other cause authorized by law." Under current § 2109.24, it is not clear whether it applies to trustees of inter vivos trusts. To avoid the possibility of a conflict between new § 5807.06 and § 2109.24, HB 416 was amended while being considered by the House Civil and Commercial Law Committee to add an amendment to § 2109.24 to clarify that it does not apply to the removal of trustees of inter vivos trusts.

32. Replacement of trustee in military service (§ 5807.04(C)).

The OTC provides for the repeal of RC § 1339.69. Under it, (i) a trustee in military service may be replaced, (ii) if the instrument provides for a successor, it controls, and (iii) if not, the trustee may designate a successor. OTC § 5807.04(C) addresses filling vacancies in a trusteeship more broadly; under it, if the instrument does not provide for a successor, the replaced trustee may not appoint one. Rather, the qualified beneficiaries, acting unanimously, may designate one, or the court may appoint one.

33. Duty of loyalty (§ 5808.02).

A. Voidable transactions (§ 5808.02(B)(1)). Generally, under UTC § 802(b), transactions involving trust property that a trustee enters into for its own account, or which are otherwise affected by a conflict of interest, are voidable by an affected beneficiary. Among the exceptions to that rule are transactions that were authorized by the terms of the trust. OTC § 5808.02(B)(1) makes that exception also applicable to transactions authorized by another provision of the Revised Code.

B. Transactions between a trustee and a beneficiary that do not concern trust property (UTC § 802(d)). UTC § 802(d) provides that: "A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary." Because of concerns about the application of this provision in the context of such situations as the commercial

side of a corporate trustee engaging in home or car loan transactions with a beneficiary, the OTC omits UTC § 802(d).

C. Affiliated funds (§ 5808.02(E)). Because the disclosure and compensation issues arising from trustees investing in affiliated funds are addressed by RC §§ 1111.13 and 1339.44, the provisions of UTC § 802(f) on those subjects have been omitted from OTC § 5808.02(E).

D. Permitted transactions (§ 5808.02(G)). UTC § 802(h) includes a list of transactions between a trustee and a beneficiary that are not precluded by the trustee's duty of loyalty, "if fair to the beneficiaries." The provision does not explicitly state whether the listed transactions are allowed unless the beneficiaries prove they are unfair, or whether the transactions are not allowed unless the trustee proves they are fair. OTC § 5808.02(G) places the burden of proof on beneficiaries: the listed transactions are permitted "unless the beneficiaries establish that they are unfair."

The fourth of those permitted transactions allows deposits of trust funds in a regulated financial-services institution. OTC § 5808.02(G)(4) modifies the language permitting such deposits so that it applies to deposits in a regulated financial-services institution that is an affiliate of the trustee, rather than such an institution that is operated by the trustee.

Finally, another change made to § 5808.02(G) from the corresponding UTC provision is that it provides that the trustee's duty of loyalty also does not preclude any transaction authorized by another section of the Revised Code.

34. Costs of administration (§ 5808.05).

The requirement of UTC § 805 that a trustee incur only reasonable costs has been qualified in OTC § 5808.05 by the addition of "except as otherwise permitted by law," because that language was included in current RC § 1339.57, apparently when Ohio adopted the Uniform Prudent Investor Act.

35. Liability of trustee when another has a power to direct (§ 5808.08).

The OTC does not include the provisions of UTC § 808(b) on the liability of a trustee who follows directions it receives from another who has the authority to direct under the terms of the trust. Rather, OTC § 5808.08(B) cross references the existing Ohio statute on that subject (former RC § 1339.43, which is moved to § 5815.25 with the enactment of HB 416). (The provisions of § 5815.25 are not inserted into OTC § 5808.08(B) because they apply to executors of estates as well as to trustees of trusts.)

A significant difference between UTC § 808(b) and § 5815.25 is that the UTC provision does not protect a trustee who follows directions if the act the trustee is directed

to perform "is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust." Section 5815.25, like RC § 1339.43, includes no such limitation on the protection afforded a trustee who follows directions from one with the authority to direct.

36. Collecting trust property (§ 5808.12).

UTC § 812 provides: "A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee, and to redress a breach of trust known to the trustee to have been committed by a former trustee." The Joint Committee decided that the OTC should not use UTC § 812 to address this subject, but should instead address it with the provisions of RC § 1339.42 (which will be moved to § 5815.24 with the enactment of HB 416). Because RC § 1339.42 applies not just to trusts, but also to estates, guardianships, conservatorships, and other fiduciary relationships, however, its provisions are not inserted into the OTC. Rather, § 5808.12 includes a cross reference to § 5815.24.

Both UTC § 812 and RC § 1339.42 generally relieve a successor trustee from the duty of pursuing breach of fiduciary duty claims against a predecessor trustee unless the successor knows (or, in the case of RC § 1339.42, has "actual knowledge") of the predecessor's breach. UTC § 812, however, also provides for the general duty of a trustee to take reasonable steps to collect trust property held by any third person. RC § 1339.42 does not provide for such a duty (except, as mentioned, when a successor trustee has actual knowledge of a breach by a prior trustee). As a result, rather than simply cross referencing to the new version of RC § 1339.42 (§ 5815.24), OTC § 5808.12 provides that: "A trustee shall take reasonable steps to collect trust property held by third persons. The responsibility of a successor trustee with respect to the administration of the trust by a prior trustee shall be governed by section 5815.24 of the Revised Code."

37. Duty of the trustee to inform and report (§ 5808.13).

A. Duty to inform qualified or current beneficiaries. The obligations of the trustee to inform the beneficiaries about the trust are set forth in UTC § 813 and OTC § 5808.13.

(1) Trustee's duties to inform "qualified beneficiaries" under the UTC. Under UTC § 103(12) "qualified beneficiaries" are defined, generally, to include current beneficiaries and certain remainder beneficiaries whose interests are not remote. UTC § 813 provides the trust's qualified beneficiaries with both general and specific rights to receive information from the trustee:

(a) § 813(a) imposes a general obligation on the trustee to keep the qualified beneficiaries reasonably informed with respect to the administration of the trust;

(b) § 813(b)(2) requires a newly serving trustee to notify the qualified beneficiaries of its acceptance of the trust and its name, address, and telephone number, within 60 days of its acceptance;

(c) § 813(b)(3) provides that within 60 days of a trustee learning of a new irrevocable trust, or of a revocable trust that has become irrevocable, the trustee must inform the qualified beneficiaries of the trust's existence, the settlor's identity, their rights to request a copy of the trust instrument, and their rights to receive trustee's reports;

(d) § 813(b)(4) requires the trustee to notify the qualified beneficiaries, in advance, of any changes in the method or rate of the trustee's compensation; and

(e) § 813(c) provides that if there is a vacancy in a trusteeship, trust reports must be sent to the qualified beneficiaries by the former trustee, and that a personal representative or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

(2) Trustee's duties to inform "current beneficiaries" under the OTC. OTC § 5801.01(F) generally defines "current beneficiaries" as those who are current distributees or permissible distributees of trust income or principal. Under OTC § 5808.13, the trustee's duty to inform in each of the five circumstances listed above is owed only to the trust's current beneficiaries. OTC § 5808.13, however, also includes in new division (E) a provision permitting the trustee to also provide information to other beneficiaries to whom the trustee is not required to report.

B. Obligations owed to all beneficiaries. Both the UTC and the OTC require the trustee to (i) promptly respond to any beneficiary's request for information related to the administration of the trust, (ii) furnish any beneficiary who requests it a copy of the trust instrument, and (iii) send current beneficiaries, and any other beneficiaries who request it, at least annually and at termination of the trust, reports of assets, liabilities, receipts and disbursements. With respect to (ii), the OTC includes a provision that is not a part of the UTC: if the settlor of a revocable trust has restated the terms of the trust, in the absence of litigation concerning the trust the trust instrument the trustee is required to furnish a copy of to a beneficiary who requests it is the restated instrument (and all amendments to it).

If there is a vacancy in a trusteeship (and there is not a cotrustee serving), the UTC provides that a report must be sent to qualified beneficiaries by the former trustee, but it does not specify the period the report must cover. Section 5808.13(C) provides that

such a report is required from the former trustee for the period during which the former trustee served.

C. Settlor's right to override the OTC's trustee reporting duties. See section 5.C., above.

D. Changes to existing Ohio law. Existing Ohio law addresses the obligation of a trustee of an inter vivos trust to inform beneficiaries in RC § 1339.69, which is repealed with enactment of HB 416. There are many differences between RC § 1339.69 and OTC § 5808.13. For example, under RC § 1339.69, certain trust beneficiaries are entitled to request, in writing, and receive information about the trust, but no more often than once every six months. Under OTC § 5808.13(A), the trustee is obligated to keep the current beneficiaries informed about the administration of the trust, without first having received a request (written or otherwise) from a current beneficiary for such information. Further, OTC § 5808.13(A) also obligates the trustee to respond to any beneficiary's request for information about the trust without a stated limitation on how often a beneficiary may make such requests. (The trustee's duty to respond under OTC § 5808.13(A), however, is qualified by requiring the trustee to respond "unless unreasonable under the circumstances.") In addition to these general duties, under OTC § 5808.13(B) the trustee also is obligated to meet the specific notice requirements described in sections 37.A. and B., above. Finally, there is no provision in existing Ohio law for information a beneficiary is entitled to receive instead being provided to a beneficiary surrogate. See section 5.C., above.

For further discussion of the OTC's provisions on the trustee's duty to inform and report to beneficiaries, see Michael A. Ogline, *Notice Provisions of the Ohio Uniform Trust Code*, 15 PROBATE LAW JOURNAL OF OHIO 119 (May/June 2005).

38. Discretionary powers of trustee (§ 5808.14(A)).

UTC § 814(a) provides: "Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

The OTC makes several changes to the UTC provision. Most notably, the OTC distinguishes between wholly discretionary trusts and other discretionary trusts. For the former, the trustee's exercise of its discretion is not subject to a reasonableness standard. For the latter, it is. Section 5808.14(A) provides:

> The judicial standard of review for discretionary trusts is that the trustee shall exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The greater the grant of discretion by

the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.

39. Tax sensitive discretionary powers of trustee (§§ 5808.14(B), (C), and (D)).

HB 416 provides for the repeal of RC §§ 1340.21 through 1340.23, and addresses tax sensitive discretionary powers of the trustee in OTC §§ 5808.14(B), (C), and (D). The objectives of the statutes are similar, but the provisions for accomplishing those objectives differ in many respects. The following summarizes the principal differences.

A. Basic rule: limitation of beneficiary-trustee's discretionary power. To avoid a deceased trustee-beneficiary from having a general power of appointment over assets in the trust, the basic rule of each statute is that unless the trust instrument expressly provides otherwise, the power of a trustee-beneficiary to make discretionary distributions to him or herself is automatically limited by an ascertainable standard. In that regard, Internal Revenue Code § 2041(b)(1)(A) provides that "a power to consume ... property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment." Consistent with that provision of the Internal Revenue Code, § 5808.14(B)(1) limits the trustee-beneficiary's discretion to an "ascertainable standard," and § 5801.01(B) defines an "ascertainable standard" as one relating to health, education, maintenance, or support (HEMS). By contrast, RC § 1340.22(B)(1) limits the trustee-beneficiary's discretion to an ascertainable standard, but does not define the standard as one related to HEMS. Subdivision (B)(2) of § 1340.22 defines certain commonly used terms as being related to HEMS, but if, for example, the trustee-beneficiary is simply given the discretionary power to make distributions to himself, without any standard, (B)(1) would only cause the discretion to be limited by an undefined ascertainable standard that arguably would not necessarily be one related to HEMS.

B. Trustee's discretion to distribute to satisfy trustee's legal obligations other than for support. Also to avoid a general power of appointment problem, both statutes provide that a trustee's discretion cannot be exercised so as to satisfy the trustee's legal obligation of support of another person. In that regard, RC § 1340.22(A)(2) is not limited to support (as is OTC § 5808.14(B)(2)), but also applies to the trustee's discretion to make distributions to satisfy the trustee's legal obligations for "other purposes."

C. Exception for purely discretionary trusts. RC § 1340.22 includes an exception to the basic rules of the section. Division (E)(1) of § 1340.22 provides that the section does not apply to:

> Any purely discretionary power to distribute either principal or income to or for the benefit of a beneficiary, other than a beneficiary who is also a fiduciary, that is exercisable in a fiduciary capacity in the sole and absolute discretion of the

> fiduciary and without any other direction or limitation as to its exercise or use set forth in the governing instrument.

OTC §§ 5808.14(B) – (D) do not include a similar exception.

D. Reciprocal trust limitation. RC §§ 1340.22(A)(3) and (B)(1) apply the ascertainable standard limitation if the fiduciary is a beneficiary of a reciprocal trust over which the beneficiary of the first trust (as fiduciary of the second trust) can make similar discretionary distributions to the fiduciary of the first trust. Thus, if A is the fiduciary of Trust #1 with the discretionary power to make distributions for B, and B is the fiduciary of Trust #2 with the discretionary power to make distributions for A, the ascertainable standard limitation would apply to each of their discretionary powers. There is no similar provision in OTC §§ 5808.14(B) - (D).

E. Limitation if beneficiary can remove and replace the trustee. Under RC § 1340.22(A)(4), if the beneficiary can remove and replace the fiduciary with the beneficiary or with another person who is related or subordinate to the beneficiary, and if the beneficiary has exercised both of those rights, then the successor fiduciary's power to exercise its discretion is subject to the section's ascertainable standard limitation. There is no similar provision in OTC §§ 5808.14(B) - (D).

F. Power of appointment or withdrawal exercisable in a non-fiduciary capacity. Under RC § 1340.22(E)(2), the section's limitation is not applicable to a power of appointment or withdrawal held by a beneficiary that is exercisable in an individual, rather than a fiduciary, capacity. While OTC §§ 5808.14(B) – (D) do not include a similar exception, their provisions are applicable only to the power of a trustee to make discretionary distributions. Thus, the OTC provisions should not apply to non-fiduciary powers of appointment or withdrawal, in which case this difference between the statutes is not consequential.

G. Surviving spouse as trustee of a marital deduction trust. Both RC § 1340.22 and OTC § 5808.14 provide that their ascertainable standard limitation on a trustee-beneficiary's discretionary powers generally does not apply to marital deduction trusts (because the assets of such trusts will be includible in the surviving spouses' gross estates anyway). Each statute includes an exception to the exception, but the exceptions to the exception are not the same. Under RC § 1340.22(E)(4), the ascertainable standard limitation is applicable (i.e., the exception to the general rule is not applicable) to marital deduction trusts for which reverse QTIP elections have been made. By contrast, under OTC § 5808.14(D)(1), the ascertainable standard limitation is applicable to all QTIP trusts, not just those as to which reverse QTIP elections have been made. The rationale for the OTC rule, as explained in the comment to UTC § 814 is:

> QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not

> making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

H. Internal Revenue Code § 2503 minors trusts. OTC § 5808.14(D)(3) also includes an exception for IRC § 2503(c) trusts. There is no similar exception in RC § 1340.22. The UTC comment's explanation for the exception is:

> The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. See Rev. Rul. 69-345, 1969-1 C.B. 226.

Finally, to eliminate or minimize potential estate tax problems with existing trusts, HB 416 follows a similar approach to that taken when RC § 1340.22 was enacted: it includes in section 4 a statement of legislative intent, which will not be codified, that §§ 5808.14(B), (C), and (D) are a codification of fiduciary and trust law principles that previously were codified in RC § 1340.22.

40. Trustee's powers (§§ 5808.15 and 16).

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

41. Power of trustee to pledge trust property to guarantee loans (§ 5808.16(S)).

UTC § 816(19) authorizes the trustee to pledge trust property to guarantee third party loans to a beneficiary. OTC § 5808.16(S) omits that power, and substitutes for it the power to pledge property of a revocable trust to guarantee third party loans to the settlor or to others, as directed by the settlor.

42. Distributions to or for an incapacitated beneficiary (§ 5808.16(U)).

Because Ohio has not enacted the Uniform Custodial Trust Act, the UTC's authorization to distribute to the custodial trustee of an incapacitated beneficiary has been omitted from § 5808.16(U).

43. Non-pro-rata distributions (§ 5808.16(V)).

To provide needed flexibility and lessen the risk that a non-pro-rata distribution will be treated as a taxable sale, § 5808.16(V) authorizes the trustee, on the distribution of trust property or the division or termination of a trust, to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares.

44. Uniform Prudent Investor Act (Chapter 5809).

Article 9 of the UTC was reserved for an enacting jurisdiction's version of the Uniform Prudent Investor Act. HB 416 moves Ohio's version of the Act (RC §§ 1339.52 – 1339.61) to Chapter 5809 of the OTC. Several provisions of the Uniform Prudent Investor Act, however, already are included in other sections of the OTC. Those provisions are not duplicated in Chapter 5809. Thus, RC § 1339.53(C) (addressing trustees who have special skills or expertise) has been omitted from Chapter 5809 because it is OTC § 5808.06; RC § 1339.55 (on the duties of loyalty and impartiality) has been omitted because they are addressed in OTC §§ 5808.02(A) and 5808.03; RC § 1339.57 (on investment costs) has been omitted because it is OTC § 5808.05; and part of RC § 1339.59(A) (on delegation) has been omitted because it is included in OTC § 5808.07(B).

RC § 1339.61 includes application, construction, and effective date provisions of the Ohio Uniform Prudent Investor Act. Generally, those provisions have been moved to OTC § 5809.08. Because, as discussed above, several provisions of the existing Ohio Uniform Prudent Investor Act are found in other sections of the OTC and are not duplicated in Chapter 5809, the provisions of OTC § 5809.08 refer not to Chapter 5809, but to the "Ohio Uniform Prudent Investor Act," which is defined in OTC § 5809.01(A)(1) to include not only Chapter 5809, but also those other provisions of the OTC (§§ 5808.02(A), 5808.03, 5808.05, 5808.06 and 5808.07(B)).

45. Trustee's profit from administration in the absence of a breach (§ 5810.03).

Under UTC § 1003(a), a trustee is accountable to affected beneficiaries for any profit made from the administration of the trust, even in the absence of a breach of trust. OTC § 5810.03(A) reverses that rule: "Absent a breach of trust, a trustee is not accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust." (The comment to UTC § 1003(a) explains the provision as follows: "The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts Section 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus

from a third party for actions relating to the trust's administration. *See* Restatement (Second) of Trusts Section 203 cmt. a (1959).")

46. Attorney's fees and costs (§ 5810.04).

For a discussion of a change made to UTC § 1004 in OTC § 5810.04, see section 25.A.(1), above.

47. Limitation of action against trustee (§ 5810.05).

UTC § 1005(a) provides for a one year statute of limitation on a beneficiary's breach of fiduciary duty action against a trustee. OTC § 5810.05(A) changes the limitations period to two years. As discussed in section 5.C., above, if a beneficiary surrogate has been designated to receive notices and reports on behalf of a beneficiary, OTC § 5810.05(A) has been modified to provide that the statute of limitations will run from the date the beneficiary surrogate was sent the information.

UTC § 1005(b) provides, in part, that a trustee's report constitutes adequate notice to start the limitations period if it provides sufficient information so that the beneficiary or representative "knows of the potential claim or should have inquired into its existence." OTC § 5810.05(B) changes the quoted language to "knows of the potential claim or should know of the existence of the potential claim."

UTC § 1005(c) provides that if an adequate notice is not given to start the limitations period, the beneficiary may commence a proceeding within five years of the first of three events to occur: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust. The OTC makes two changes in § 5810.05(C). First, the five year period is changed to four. Second, added to the list of events that will trigger the running of the limitations period is "(iv) the time at which the beneficiary knew or should have known of the breach of trust."

48. Exculpation of trustee (§ 5810.08).

Both the UTC (§ 1008(a)) and the OTC (§ 5810.08) prohibit an exculpation clause from protecting a trustee from liability for a breach made in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries, or if the clause was inserted in the trust as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

Under UTC § 1008(b), if an exculpatory clause was drafted or caused to be drafted by the trustee, it is invalid unless the trustee proves that it is fair under the

circumstances and that its existence and contents were adequately communicated to the settlor. This provision is omitted from OTC § 5810.08.

49. Limitation on personal liability of trustee (§ 5810.10).

A. Changes in existing Ohio law.

(1) Contract liability. Both the UTC (§ 1010(a)) and the Revised Code (§ 1339.65(A)(2)) protect the trustee from personal liability for contracts properly entered into by the trustee that disclose the trustee's fiduciary capacity. As discussed in B., below, two minor changes have been made to OTC § 5810.10(A) from UTC § 1010(a) so that the OTC provision will conform to RC § 1339.65(A)(2); as modified, it will not change existing Ohio law.

(2) Tort liability. The OTC may change Ohio law with respect to the personal liability of a trustee for torts committed during the administration of the trust and obligations arising from the ownership or control of trust property. Under OTC § 5810.10(B), the trustee will have no personal liability for torts committed during the administration of the trust, or from obligations arising from the ownership or control of trust property, including violation of environmental law, unless the trustee "is personally at fault." Apparently, there is no similar statutory protection in Ohio.

(3) Trustee serving as general partner. The OTC also will change Ohio law with respect to the personal liability of a trustee if the trust holds a general partnership interest in a general or limited partnership. Generally, OTC § 5810.11 and RC § 1339.65(B) each protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. (The UTC comment, in fact, states that UTC § 1011 is modeled after RC § 1339.65.) Among the differences between the two statutes is that the protection is lost under RC § 1339.65(B)(2) if the trustee's spouse or any of his lineal descendants (as well as the trustee in a capacity other than trustee) holds any interest in the partnership. By contrast, OTC § 5810.11(C) also precludes protection if an interest in the partnership is held by one or more of the trustee's siblings or parents, or by a spouse of any of the trustee's descendants, siblings, or parents. Thus, enactment of the OTC will eliminate the protection of a trustee who serves as a general partner when one or more of these additional persons related to the trustee own an interest in the partnership.

Another difference is that RC § 1339.65(B) apparently does not provide protection to the trustee of an irrevocable inter vivos trust, as RC § 1339.65(B)(2) applies to "an executor, administrator, or trustee who acquires, in his fiduciary capacity, a general partnership interest upon the death of a general partner of a partnership, or a trustee of a revocable trust who, in his fiduciary capacity, is a general partner of a partnership . . ." OTC § 5810.11, which includes no similar limitation, will thus extend the protection afforded trustees who hold general partnership interests to irrevocable inter vivos trusts.

Because RC § 1339.65 applies to estates, guardianships, and other fiduciary relationships, HB 416 does not provide for its repeal. RC § 1339.65, however, also applies to both testamentary and inter vivos trusts. Since the contract and general partner liability issues with respect to trusts will be covered by OTC §§ 5810.10 and 5810.11, if the OTC is enacted RC § 1339.65 will be amended to exclude trusts from its coverage. Note that this approach will result in different statutory protections for trustees than for executors and other fiduciaries with respect to contracts entered into in a fiduciary capacity and partnerships of which the fiduciary is a general partner.

B. Changes to the UTC in the OTC. UTC § 1010(a) and RC § 1339.65(A)(2) protect the trustee from personal liability for contracts properly entered into by the trustee that disclose the trustee's fiduciary capacity. Consistent with RC § 1339.65(A)(2), OTC § 5810.10(A) makes two changes to the UTC provision. First, the trustee's protection under the statute is limited to contracts entered into on or after March 22, 1984. Second, the following sentence has been added to address what constitutes disclosure of the trustee's fiduciary capacity: "The words 'trustee,' 'as trustee,' 'fiduciary,' or 'as fiduciary,' or other words that indicate one's trustee capacity, following the name or signature of a trustee are sufficient disclosure for purposes of this division."

50. Liability of trustee holding a general partnership interest (§ 5810.11).

Generally, UTC § 1011(a) protects a trustee who holds a general partnership interest from personal liability on a contract entered into by the partnership if the trust's ownership of the general partnership interest in a fiduciary capacity is disclosed "in the contract or in a statement previously filed pursuant to the [Uniform Partnership Act or Uniform Limited Partnership Act]." OTC § 5810.11(A) omits the quoted language and substitutes for it the more detailed provisions on disclosure of the trustee's ownership of the general partnership interest in a fiduciary capacity from RC § 1339.65(B)(2).

51. Effect of other states' application and construction of the UTC (§ 5811.01).

UTC § 1101 provides that: "In applying and construing this Uniform Act, consideration ***must*** be given to the need to promote uniformity of the law with respect to its subject matter among States enacting it (emphasis added)." OTC § 5811.01 changes "must" to "may."

52. Repeals; amendment of RC § 2305.22.

HB 416 includes: (i) the sections of the Revised Code that will be repealed because their subjects are covered by provisions of the OTC (section 2 of HB 416) and (ii) the remaining sections of Chapters 1339 and 1340 that will be repealed and reenacted

without change in new title 58 (section 1 of HB 416). As a result, the repealer section of the UTC, § 1105, has been omitted from the OTC.

Finally, because the limitations period for actions against a trustee is covered by OTC § 5810.05, HB 416 provides for RC § 2305.22 to be amended, as follows: "Sections 2305.03 to 2305.21, 1302.98, and 1304.35 of the Revised Code, respecting lapse of time as a bar to suit, do not apply in the case of ~~a continuing and subsisting trust, nor to~~ an action by a vendee of real property, in possession thereof, to obtain a conveyance of ~~it~~ the real property."

Respectfully submitted,

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Appendix A
Definition of Wholly Discretionary Trust
OTC § 5801.01(Y)

A “wholly discretionary trust” is defined in § 5801.01(Y):

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

(a) The trust is irrevocable.

(b) Distributions of income or principal from the trust may or shall be made to or for the benefit of the beneficiary only at the trustee’s discretion.

(c) The beneficiary does not have a power of withdrawal from the trust.

(d) The terms of the trust use "sole," "absolute," "uncontrolled," or language of similar import to describe the trustee's discretion to make distributions to or for the benefit of the beneficiary.

(e) The terms of the trust do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.

(f) The beneficiary is not the settlor, the trustee, or a cotrustee.

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

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

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

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

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

(4) If the beneficiary and one or more others have made contributions to the trust, the portion of the trust attributable to the beneficiary’s contributions may not be a wholly discretionary trust with respect to that beneficiary, but the portion of the trust attributable to the contributions of others may be a wholly discretionary trust with respect to that

beneficiary. If a beneficiary has a power of withdrawal, then upon the lapse, release, or waiver of the power, the beneficiary is treated as having made contributions to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:

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

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

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

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

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

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