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Ohio Trust Code Update: Recent Developments

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Since its enactment in 2006, effective January 1, 2007, the Ohio Trust Code ("OTC") has been amended, a number of cases have been decided under it, and a variety of issues related to or raised by it have been identified. This article will review those developments.

I. Amendment

The OTC's first amendments were made by House Bill 499, which was enacted in June of 2008 and took effect September 12, 2008. While most of them are technical or clarifying in nature, several are substantive. The following brief discussion of some of the more important amendments is presented in the order of the sections of the OTC that they affect.[1]

Governing law.[2] The original OTC's governing law provision, R.C. §5801.06, addressed what law applies to determine "the meaning and effect of the terms" of the trust. It did not, however, expressly address what law governs the administration of the trust. As a result of HB 499, R.C. §5801.06 now includes new language addressing what law governs trust administration. Under it, if the terms of the trust designate the law to govern trust administration, that law will apply. If not, the law of the trust's principal place of administration (which is not defined in the OTC or in the Uniform Trust Code ("UTC"), on which the OTC is based) will govern. Further, if the terms of the trust do not specify the law to govern trust administration and the trust's principal place of administration is moved, the law of the new principal place of administration will govern the administration of the trust from the time of the transfer.

Guardian of person or estate. A number of provisions of the OTC reference a guardian of the person or estate. For example, under R.C. §5803.03(A) and (B), a guardian of the person or estate may represent and bind the ward or the estate the guardian is responsible for (as long as there is not a conflict of interest between the representative and the person being represented). The OTC, as originally enacted, did not provide that a guardian must act in accordance with Chapter 2111 of the Revised Code, if

the guardian was appointed by an Ohio court, or by other applicable law, if the guardian was appointed elsewhere. Under HB 499, the OTC now does so in new R.C. §5801.11.

Modification and termination of trusts. R.C. §5804.11(A) provides for the modification or termination of a noncharitable irrevocable trust by the settlor and all of the trust's beneficiaries. As originally enacted, it directed the court to approve a modification or termination if the court found that the settlor and all of the beneficiaries consented to it. Under amended R.C. §5804.11(A), the court must also find "that all consents, including any given by representatives under Chapter 5803. of the Revised Code, are valid, and that all parties giving consent are competent to do so." Further, as originally enacted, R.C. §5804.11(A) applied only to irrevocable trusts created after 2006, or to revocable trusts that became irrevocable after 2006. HB 499 eliminated that restriction, thus making R.C. §5804.11(A), like most of the rest of the OTC, also applicable to pre-OTC trusts.

Generally, R.C. §5804.13, as originally enacted, provided that if a particular charitable purpose of a trust fails, the court may apply cy pres to modify the trust's terms, or terminate the trust, in a manner consistent with the settlor's charitable purposes. The only exception was that if a trust term addressed that contingency and provided for distribution to a noncharitable beneficiary, it would prevail over the court's power to apply cy pres. Under HB 499, the court also is barred from exercising its cy pres authority if the terms of the trust provide for alternative charitable purposes or beneficiaries if a particular charitable purpose fails.

The OTC, as originally enacted, included in R.C. §5804.17 the UTC's statute on the combination or division of trusts. Former R.C. §1339.67, which had addressed that subject somewhat differently, was repealed. Because the standard for combining or dividing trusts under the UTC's statute is more restrictive than under former R.C. §1339.67, HB 499 amended R.C. §5804.17 to restore the standard from former R.C. §1339.67.

Revocable trusts. Under R.C. §5806.03(A), the trustee's duties are owed exclusively to the settlor of a revocable trust while the settlor is living, regardless of whether the settlor is incapacitated. Generally, R.C. §5808.13 provides that the trustee must provide information about the trust to current beneficiaries and other beneficiaries who request it. The OTC, as originally enacted, did not expressly address whether the trustee's information and reporting duties under R.C. §5808.13 are owed to beneficiaries of a revocable trust other than the settlor during the settlor's lifetime. HB 499 resolved that uncertainty by inserting language in R.C. §5806.03(A), and adding new division (G) to R.C. §5808.13, each of which expressly states that during the lifetime of the settlor of a revocable trust, regardless of whether the settlor has capacity, the trustee's duties to inform and report under R.C. §5808.13 are owed exclusively to the settlor.

As originally enacted, R.C. §5806.04 (consistent with prior R.C. §2305.121) provided for a two-year contest period (from the settlor's death) for revocable trusts. The period for contesting a will under R.C. §2107.76 is three months from the filing of the

certificate with respect to notice having been given for the probate of the will. Because revocable trusts are used primarily as will substitutes, HB 499 changed the limitations period for contesting a trust to make it more comparable to, but still not the same as, that for contesting a will. Under amended R.C. §5806.04, the contest period ends on the first to occur of two years from the settlor's death or six months from the date on which the trustee sends a potential contestant a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for bringing the contest.

Right of beneficiary to copy of trust instrument. The default rule under R.C. §5808.13(B)(1), as originally enacted, was that the trustee was required to provide a copy of the trust instrument to a beneficiary who requested it. HB 499 revised that rule to allow the trustee to furnish a beneficiary who requests a copy of the trust instrument with a redacted copy that includes only the provisions that the trustee determines are relevant to the beneficiary's interest in the trust. Amended R.C. §5808.13(B)(1) further provides, however, that if the beneficiary then requests a copy of the entire trust instrument, the trustee must provide it.

Liability of trustee. R.C. §5810.05 is the OTC's two year statute of limitations for actions against a trustee. As originally enacted, it did not address equitable principles that may affect the limitations period. HB 499 amended the statute of limitations to explicitly state that an action against a trustee also might be barred by such equitable principles as laches, unclean hands, estoppel, and waiver.

II. Ohio Trust Code Cases[3]

Sowers v. Luginbill.[4] Rights of creditors of settlor of revocable trust after settlor's death.

Sowers may be the most important of the recent OTC developments as it calls into question whether assets in a deceased settlor's revocable trust will be protected from claims of the settlor's creditors. The settlor of a revocable trust caused a car accident in which the plaintiff was injured. The plaintiff sued the settlor, who died while the action was pending. The UTC includes a provision (§505(a)(3)) under which, after the death of the settlor of a revocable trust, the assets of the trust are subject to the claims of the settlor's creditors (if the settlor's probate estate is insufficient to pay them). At least in part because that result is contrary to the holding of *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119 (Ohio 1939), the OTC does not include a similar provision. Nevertheless, because in *Sowers* the plaintiff sued the settlor before his death, the court distinguished *Schofield* and held that the assets in the trust were subject to the plaintiff's claim. According to the court, that result was consistent with the "plain language and legislative purpose" of another OTC statute, R.C. §5805.06, under which (i) the assets of a revocable trust are subject to the claims of the settlor's creditors during the settlor's lifetime and (ii) the assets of an irrevocable trust in which the settlor retained an interest are subject to the claims of the settlor's creditors.

Vaughn v. Huntington National Bank.[5] The material purpose limitation on the ability of beneficiaries of an irrevocable trust to terminate it early.[6]

Grandmother's 1971 will provided for two $50,000 trusts, one for each of two granddaughters. The terms of the trusts, which were established when grandmother died a year later (when the grandchildren were 21 and 19 years of age), provided for each granddaughter to receive $250 per month for life. At a granddaughter's death, the $250 monthly payments were to continue for her issue. The will did not include any provisions for the termination of the trusts. In 2003, after having received the $250 monthly distributions for more than 30 years, the granddaughters filed motions for the trusts to be terminated and the trusts' assets (then approximately $50,000 in each trust) to be distributed to them. The magistrate's decision to deny their petitions – because under R.C. §5804.11(B) the continuance of each trust was necessary to achieve a material purpose of the trust – was approved by the trial court, and its decision was affirmed by the court of appeals. Quoting from the comment to the analogous provision of the UTC (§411(b)), which in turn quoted from the Restatement (Third) of Trusts, §65 cmt. d, the court noted that the not-necessary-to-achieve-any-material-purpose requirement for termination under R.C. §5804.11(B) "does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance: Material purposes are not readily to be inferred…[but] sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose." The court of appeals found that "the design of these trusts illustrates the material purpose of the trusts, that [the grandchildren] and their issue…receive a secure monthly income as long as the corpus of the trust remains." (The opinion does not address the possibility of the court terminating the testamentary trusts under the uneconomic trust termination provisions of R.C. §2109.62, presumably because that statute provides for a proceeding for such a termination to be initiated by a motion filed by the trustee, and the trustee in this case opposed the early terminations.)

In re Trust of Lowry.[7] Modification of terms of charitable trust under cy pres doctrine.

The decedent's will created a charitable testamentary trust for the beautification and upkeep of three cemeteries located in Damascus Township, Henry County, Ohio. In 2005, the trust corpus was approximately $75,000. The trustees, who also served as the trustees of the township, sought a distribution of the trust corpus in excess of $25,000, on the ground that $25,000 was sufficient to provide for the maintenance of the cemeteries. Through exercise of its cy pres power under R.C. §5804.13, the probate court ordered the distribution and that it be used for capital improvements for the cemeteries *or for other capital improvements in the township*. In response to the Attorney General's appeal, the appellate court reversed. In doing so it questioned the probate court's determination that the administration of the trust had become impracticable, and held that even if that were the case, R.C. §5804.13 requires that the court's cy pres authority be exercised in a

manner consistent with the settlor's charitable purposes. Here, the probate court's order permitting the trust funds to be used for capital improvements in the township was too dissimilar to the decedent's intent of benefitting the cemeteries.

In re Trust FBO Frank.[8] Private settlement agreement to dispense with the requirement that the trustee of a testamentary trust give a bond.

The decedent's will created a testamentary trust and did not dispense with the requirement that the trustee post a bond. After the OTC became effective, the trustee and his brother, a beneficiary of the trust, entered into a private settlement agreement (PSA) under R.C. §5801.10 to modify the will to dispense with the posting of a bond. The probate court denied approval of the PSA, holding that such an agreement could not operate to deprive it of jurisdiction to enforce a statutory requirement of Chapter 2109 governing the administration of trusts. The court of appeals reversed, finding (i) that while the proposed modification of the will would dispense with the bond requirement, it would do so subject to R.C. §2109.04(A)(2), under which the court nevertheless could order a bond if "the court is of the opinion that the interest of the trust demands it," and (ii) the modification would not deprive the probate court of jurisdiction to enforce the requirements of Chapter 2109.

Interestingly, the PSA, which was entered into by the trustee and his beneficiary brother, apparently purported to be between the trustee and the sole beneficiary of the trust. However, in a footnote, the court of appeals stated: "The will designates [the brother], his wife and children as trust beneficiaries. [For a PSA,] R.C. §5801.10(B)(2) requires agreement by all beneficiaries." After reversing the probate court's denial of the motion to approve the PSA, the court of appeals' opinion further stated: "We offer no opinion concerning whether the settlement agreement satisfies R.C. §5801.10 or whether, if the court approves the agreement, it should or should not order a bond in some amount."

Cundall v. U.S. Bank.[9] Jurisdiction of Ohio court over out-of-state beneficiaries of Ohio trust; releases. (This discussion focuses on the portions of the court of appeals opinion in *Cundall* dealing with the OTC. The Supreme Court, which subsequently held that the plaintiffs' claims were barred by the statute of limitations, did not address the OTC subjects.)

Beneficiaries of a trust administered in Ohio filed an action against the estate of a deceased trustee and another trustee for breach of duty. Out-of-state beneficiaries who were named as parties argued that the court lacked jurisdiction over them. The OTC includes a provision (R.C. §5802.02(B)) under which beneficiaries of a trust that has its principal place of administration in Ohio are subject to the jurisdiction of Ohio courts regarding any matter involving the trust. The court of appeals held that that provision, which as a part of the OTC was effective January 1, 2007, could be applied retroactively

(and that jurisdiction was proper under Ohio's long-arm statute (R.C. §2307.382) and civil rule (Civil Rule 4.3) even without R.C. §5802.02(B)).

Cundall also involved the effect of releases given by the plaintiff beneficiaries with respect to the transaction as to which they alleged that the trustees had breached their duties. In rejecting the trustees' argument that the case should have been dismissed because of the releases, the court of appeals noted that the OTC provision on the subject (R.C. §5810.09) was not applicable, as the transaction in question occurred well before the OTC's effective date, but that if it had applied, dismissal would not have been warranted because R.C. §5810.09 does not protect trustees who obtain releases by improper conduct, as the plaintiffs alleged.

III. Issues under or Related to the OTC

A. Private Settlement Agreements[10]

The OTC's private settlement agreement (PSA) statute, R.C. §5801.10, is intended to facilitate the resolution of disputes and uncertainties outside of the courts. Under division (B), the required parties to a PSA are the trustees, all beneficiaries, creditors whose interests would be affected by the PSA, and the settlor (if living and if no adverse income or transfer tax results would arise from the settlor's participation).[11] Division (E) provides that PSAs that comply with the statute's requirements are final and binding.

Under division (C), PSAs may be used "with respect to any matter concerning the construction of, administration of, or distributions under the terms of the trust, the investment of income or principal held by the trustee, or other matters." That broad authorization, however, is followed by significant limitations:

> The agreement may not effect a termination of the trust before the date specified for the trust's termination in the terms of the trust, change the interests of the beneficiaries in the trust [with exceptions for certain tax motivated modifications], or include terms and conditions that could not be properly approved by the court under [the OTC] or other applicable law. The invalidity of any provision of the agreement does not affect the validity of other provisions of the agreement.[12]

Generally, under the Restatement, Second, of Trusts, §§342 and 216, an agreement between a trustee and beneficiaries to terminate a trust early, or to change the beneficiaries' interests in the trust, is valid and the trustee will not be liable to consenting beneficiaries (assuming their consents were valid[13]) regardless of whether its conduct in terminating the trust early or changing beneficiaries' interests in the trust otherwise would have constituted a breach of the terms of the trust. Those results were not certain at common law, however,[14] and whether they are available in Ohio after enactment of the OTC also is unclear.[15]

As quoted above, under division (C) of the PSA statute, a PSA may not be used to terminate a trust early (or change beneficial interests in the trust). A question raised is whether a trustee who had the consent of the beneficiaries could be liable for terminating a trust early (or changing the beneficial interests in the trust), despite the prohibition on using a PSA to do so.[16] In that regard, R.C. §5810.09 provides:

> A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee or, at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

Note that there is no exception for a breach that terminates a trust early, or changes its beneficial interests. Thus, if a court imposed liability on a trustee for such conduct, it would be doing so against the plain language of R.C. §5810.09 and, arguably, the common law.[17]

If, because of R.C. §5810.09, a trustee would not be liable to consenting beneficiaries for terminating a trust early, or changing beneficial interests, what, if any, practical effect does the prohibition on using PSAs to do so have? Under division (G) of the PSA statute (R.C. §5801.10), any party to a PSA may request that the court approve it, including making a finding that the representation of any party under Chapter 5803 was adequate[18] and that the PSA contains terms and conditions the court could have properly approved. Because an agreement to terminate a trust early or change its beneficial interests cannot be a PSA, the parties to such an agreement would not have the option of having the court determine its validity. More important, under division (E) of the PSA statute, a valid PSA "shall be final and binding on the trustee, the settlor if living, all beneficiaries, and their heirs, successors, and assigns." By contrast, division (C) refers to "the invalidity of any provision" of a PSA immediately following the prohibitions on using a PSA to terminate a trust early or change beneficial interests, thus suggesting that the terms of an agreement between the trustee and beneficiaries to do so would be "invalid." Would an "invalid" agreement to terminate a trust early or change its beneficial interests not be final and binding on the parties to it? For example, would a consenting beneficiary later be able to, in some form or fashion, "undo" the early termination or change in beneficial interests? Would such equitable doctrines as estoppel, waiver, or laches preclude the beneficiary from doing so?

Another aspect of this subject is that "[t]he 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."[19] As noted above, generally, at common law, an agreement between the trustee and beneficiaries to terminate a trust early (or change beneficial interests) is valid and the trustee is not liable for complying with the agreement.[20] The yet-to-be-answered question raised is whether, after enactment of the OTC, a trustee and beneficiaries could by a simple agreement, that was not intended to

comply with the PSA requirements and limitations or to obtain its benefits, safely terminate a trust early or change its beneficial interests, or whether any ability they may have had to do so at common law is foreclosed because the common law rules allowing such have been preempted by having been modified by the OTC's PSA statute and its rather detailed and specific rules in Chapter 5804 on when trusts can be terminated or modified.[21]

B. Creation of Trust by Agent under a Durable Power of Attorney

The OTC does not explicitly address whether an authorized agent under a durable power of attorney may create a trust for a principal.[22] R.C. §5804.01 lists four ways that a trust may be created: (i) by lifetime or death transfer of property to another as trustee; (ii) by declaration of the owner of property that the owner holds it as trustee; (iii) by exercise of a power of appointment in favor of a trustee; and (iv) by court order. There is no mention of a trust being created by an agent who is authorized to do so under a durable power of attorney. Further, R.C. §5804.02 sets forth the requirements for the creation of a trust. Under division (A)(1), the settlor must have capacity, and under division (A)(2), the settlor must indicate an intention to create a trust. There is no mention of an exception for an incapacitated settlor who, prior to becoming incapacitated, had authorized an agent to create a trust on the principal's behalf.

While an argument can thus be made that an authorized agent may not create a trust for a principal under the OTC, the Code does not state that an agent may not do so and R.C. §5804.01 does not state that the methods it lists for creating a trust are the only ways a trust can be created. (In fact, the comment to the analogous provision of the UTC, §401, explicitly states that "[t]he methods specified in this section are not exclusive.") Further, the statutory form of power of attorney in R.C. §1337.18(A) states: "Unless expressly authorized in the power of attorney, a power of attorney does not grant authority to an agent to…create…a trust," thus clearly implying that if expressly authorized to do so, an agent can create a trust for the principal. Note also that it would be inconsistent to allow an authorized agent to amend the terms of a revocable trust, as clearly can be done under R.C. §5806.02(E), and to otherwise control the disposition of the principal's property during the principal's life or at his or her death by making gifts, creating or changing rights of survivorship, or designating or changing the designation of a beneficiary of an insurance policy or retirement plan interest, all of which are implicitly authorized by R.C. §1337.18(A), but not to allow an authorized agent to create a trust. Further, there is substantial authority in addition to R.C. §1337.18 that an authorized agent may create a trust for a principal.[23] Thus, while it is not entirely clear under the OTC that an authorized agent may create a trust for the principal, the stronger argument is that such an agent may do so.

A committee of the OSBA's Estate Planning, Trust and Probate Law section, chaired by Rick Davis, of Canton, is working on a modified version of the Uniform Power of Attorney Act (UPOAA), which allows authorized agents to create trusts for principals,[24] and is considering this issue. The committee expects to present a proposal to

adopt the UPOAA, with modifications, and to amend the OTC to expressly allow an authorized agent to create a trust for the principal, to the section's Council at its meeting scheduled for September 11 and 12, 2009 in Columbus.

C. Consequences of Settlor Being a Permissible Appointee of a Power of Appointment

Consider an irrevocable inter vivos trust under which the settlor is not a beneficiary and which gives the settlor's spouse (or child) a broad non-general lifetime and testamentary power to appoint the trust assets to anyone other than the power holder, the power holder's estate or the creditors of either. With such a power, the power holder could appoint the trust assets to the settlor. R.C. §5805.06(A)(2) provides that creditors of a settlor of an irrevocable trust "may reach the maximum amount that can be distributed to or for the settlor's benefit." In the example above, are assets that could be appointed to the settlor by the holder of the non-general power amounts "that can be distributed to or for the settlor's benefit" within the meaning of R.C. §5805.06(A)(2)? If so, because the settlor's creditors could reach the trust assets, would they be includible in the settlor's gross estate for estate tax purposes?[25]

While an argument to that effect can be made, it does not appear that that should be the case. R.C. §5805.06(A)(2), which is identical to UTC §505(a)(2), codifies "traditional doctrine in providing that a settlor ***who is also a beneficiary*** may not use the trust as a shield against the settlor's creditors (emphasis added)."[26] A settlor whose only "interest" in an irrevocable trust is as a permissible appointee of an unexercised, non-fiduciary power of appointment held by another is owed no fiduciary duties with respect to the trust, its assets, or the power of appointment, and should not be treated as a "beneficiary" of the trust.[27] Further, R.C. §5805.06(A)(2) speaks in terms of amounts "that can be ***distributed*** to or for the settlor's benefit (emphasis added)." Arguably, amounts the settlor might receive through the exercise of a non-fiduciary power of appointment should not constitute amounts that can be "distributed" from the trust to or for the settlor's benefit, as "distributions" from a trust are generally understood to mean amounts paid, or other assets conveyed, from the trustee to the beneficiaries under the terms of the trust.

This issue is being considered by the newly formed Technical Tax Issues under the Ohio Trust Code Committee of the EPTPL section, which is chaired by Roy Krall, of Akron.

D. Non-Trustee with Power over Discretionary Distributions

If a beneficiary of a trust (who is not a settlor of the trust) also is a trustee with the discretionary power to make distributions to him or herself, the general rule under R.C. §5808.14(B)(1) is that the trustee-beneficiary may exercise the power only in accordance with an ascertainable standard relating to health, education, maintenance, or support.[28] The purpose of the provision is to protect against the inadvertent creation of a general power of appointment in the trustee-beneficiary that would cause the trust assets to be

includible in the beneficiary's gross estate. Another issue the committee on Technical Tax Issues under the Ohio Trust Code is considering is whether the statute should be amended to also apply to situations in which a non-trustee holds a power to make, or cause to be made, discretionary distributions to him or herself.

E. Trust Decanting

"Trust decanting" refers to the distribution by a trustee who has discretion to distribute principal of a trust (the "first trust") in further trust (the "second trust") for the benefit of one or more beneficiaries of the first trust. While a trustee may have the power to decant under common law, that is not clear in many jurisdictions, including Ohio. Statutes providing such authority have been enacted in New York, Tennessee, Delaware, Alaska, South Dakota, Florida and New Hampshire, and Missouri is presently working on such a statute. A committee of the EPTPL section chaired by Patty Culler, of Cleveland, is working on a decanting statute for Ohio. The committee presented a draft statute to the EPTPL section Council at its May 2009 meeting in Cleveland. The Council approved the statute in principle, but with modifications that the committee will incorporate into the proposed statute.

F. Anti-Lapse

Generally, if a devisee under a will predeceases the testator, the gift to the devisee under the will lapses so that the devise does not pass through the predeceased devisee's estate to his or her own intestate heirs or will devisees. If, however, (i) the predeceased devisee was a relative of the testator, (ii) one or more descendants of the predeceased devisee survived the testator, and (iii) the testator's will did not express an intent to the contrary, the devise will be saved for the predeceased devisee's descendants by Ohio's wills anti-lapse statute (R.C. §2107.52).

In *First National Bank of Cincinnati v. Tenney*,[29] a settlor created a revocable trust the terms of which provided for the distribution of the trust assets to the settlor's sister upon the settlor's death. The instrument did not require the sister to survive the settlor in order to take, nor did it otherwise provide for the contingency of the sister predeceasing the settlor, which occurred. Consistent with the common law of future interests, the Supreme Court held that the sister's interest was not contingent on surviving the settlor. Rather, her remainder was vested, subject to defeasance if the settlor had exercised her power to revoke the trust, and passed through the sister's estate to her residuary devisee. Because when the settlor later died she had not revoked (or amended) the trust, the sister's residuary devisee took at the settlor's death.

By contrast, in *Dollar Savings & Trust Company of Youngstown v. Byrne*,[30] when a remainder beneficiary of a revocable trust predeceased the settlor, the Supreme Court did not hold that the predeceased beneficiary's interest passed through the predeceased beneficiary's estate. Instead, the Court applied the wills anti-lapse statute to the gift so that the predeceased beneficiary's descendants took upon the settlor's later death. *Dollar Savings*, however, effectively was overruled prospectively by amendments to R.C. §§

2107.01 and 2107.52, under which it is clear that the wills anti-lapse statute does not apply to trusts.

A committee of the EPTPL section, chaired by John Clark, of Canton, is studying the Uniform Probate Code's trust anti-lapse statute (UPC §2-707) for possible adoption, with modifications, in Ohio.[31] The committee expects to propose a new trust anti-lapse statute which would, unless the instrument expressed a contrary intention (i) make a remainder beneficiary's interest contingent on surviving the date on which the interest was to take effect in possession or enjoyment (the "distribution date," which in the context of an outright gift on the death of a settlor of a revocable trust would be the date of the settlor's death) and (ii) provide a substitute anti-lapse gift to the remainder beneficiary's descendants, if the remainder beneficiary did not survive the distribution date and was a grandparent, descendant of a grandparent, or stepchild of the settlor. The statute, which would apply to irrevocable as well as revocable trusts, would thus change the result in cases like *Tenney* and reach the same result in cases like *Dollar Savings*. In addition, because the new statute would differ significantly from the present wills anti-lapse statute (R.C. §2107.52),[32] the committee expects to propose that the wills anti-lapse statute be amended to be consistent with the new trust anti-lapse statute. Finally, the committee also plans to propose an amendment to the OTC's distributions statute, R.C. §5808.17, under which a trustee would be authorized to make distributions directly to the heirs or devisees of a predeceased beneficiary to whom distributions were owed and for whom an estate administration proceeding is not pending, rather than requiring an estate administration proceeding to be opened or reopened.

G. Trustee's Duties to Inform and Report to Beneficiaries[33]

R.C. §5808.13 includes a number of default rules under which a trustee must provide information to beneficiaries about the trust. These rules depart significantly from pre-OTC Ohio law.[34] Among the more significant of these duties are the following:

1. The trustee must keep current beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, regardless of whether they have requested information about the trust. (The trustee also must promptly respond to any beneficiary's request for information related to the administration of the trust, unless the request is unreasonable under the circumstances.)[35]

2. If any beneficiary requests a copy of the trust instrument, the trustee must promptly furnish it. (The trustee may redact the copy to show only the provisions that relate to the beneficiary's interest in the trust, but if the beneficiary requests a copy of the entire instrument, the trustee must furnish it.)[36]

3. Within sixty days of the trustee learning of the creation of an irrevocable trust or of a revocable trust becoming irrevocable, the trustee must inform the trust's current beneficiaries of (i) the trust's existence; (ii) the identity

of the settlor, (iii) the right to request a copy of the trust instrument, and (iv) the right to a trustee's report.[37]

4. At least annually, the trustee must send current beneficiaries, and other beneficiaries who request it, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values.[38]

R.C. §5801.04(B) sets forth mandatory rules that the settlor may not override in the terms of the trust. Two of them are with respect to the trustee's reporting obligations:

1. Unless the settlor, in the trust instrument, designates a "surrogate" to receive the information on behalf of a beneficiary,[39] the trustee's duty to inform a current beneficiary who has reached age twenty-five of (i) the existence of the trust, (ii) the identity of the trustee, and (iii) their right to request trustee's reports, may not be waived.[40]

2. Unless the settlor, in the trust instrument, designates a "surrogate" to receive the information on behalf of a beneficiary, the trustee's duty to respond to the request of a current beneficiary for trustee's reports and other information reasonably related to the administration of a trust may not be waived.[41]

These provisions of the Trust Code, which apply to pre-OTC as well as post-OTC irrevocable trusts, have been the subject of considerable debate and disagreement. The EPTPL Council established a committee, chaired by Bob Barnett, of Columbus, to consider changing the OTC's information and reporting rules. At its January 2009 meeting, the Council considered a proposal from the committee. The key points of the proposal were (i) to allow the settlor to waive the trustee's duty to inform current beneficiaries of the existence of the trust and (ii) to eliminate the default rules that require the trustee to provide information about the trust to current beneficiaries who have not requested it. Rather, under the proposal, the trustee would have been required to provide information about the trust to beneficiaries only in response to their requests. The proposal was defeated by a vote of 25 to 17 and the committee was disbanded.

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[*] Professor Newman served as Reporter for the Ohio Trust Code.

[1] For a more thorough discussion of the amendments, see Alan Newman, "*The Ohio Trust Code: The Joint Committee's Proposal for Its First Amendment*," 18 PROB. L. J. OF OHIO 69 (Nov./Dec. 2007).

[2] For more comprehensive discussions of choice of law and related issues under the OTC, see Thomas Pillari, *Trust Situs and Jurisdiction Choices--Practical Applications*, 20 PROB. L. J. OF OHIO 66 (Nov./Dec. 2008) and Joanne Hindel, *Setting Your Sights on Trust Situs*, 16 PROB. L. J. OF OHIO 135 (May/June. 2006).

[3] Twenty two other jurisdictions have now adopted versions of the UTC: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah,

Vermont, Virginia, and Wyoming. A number of trust cases have been decided in many of these jurisdictions since their UTC enactments. Some of the significant and interesting ones are discussed or cited in endnotes 6, 17, 20, 27, 32, and 38 of this article.

[4] 175 Ohio App.3d 745, 889 N.E.2d 172 (2008); appeal not allowed by *Sowers v. Luginbill*, 119 Ohio St.3d 1446, 893 N.E.2d 517, 2008-Ohio-4487 (Ohio Sep 10, 2008). For a more thorough discussion of *Sowers*, see Michael A. Ogline, "*Sowers v. Luginbill*: A Chink in the *Schofield* Armor," 19 PROB. L. J. OF OHIO 15 (Sept./Oct. 2008) and Michael A. Ogline, "Update on *Sowers v. Luginbill*" 19 PROB. L. J. OF OHIO 83 (Nov./Dec. 2008).

[5] 2009 WL 342697 (Ohio App. 5 Dist.) For a more thorough discussion of *Vaughn*, see Joanne E. Hindel, *"Did My Dad Say That? He Didn't Really Mean It": Ascertaining a Trust's Material Purpose*, 19 PROB. L. J. OF OHIO 205 (July/Aig. 2009).

[6] The statute relied on by the beneficiaries in *Vaughn* was R.C. §5804.11(B), under which trust beneficiaries may modify the terms of a trust (or terminate it early), if the court concludes that "modification is not inconsistent with a material purpose of the trust" (or that "continuance of the trust is not necessary to achieve any material purpose of the trust"). Beneficiaries' attempts to modify trust terms under the OTC may more frequently be brought under R.C. §5804.12, which allows dispositive as well as administrative terms of a trust to be modified "if because of circumstances not anticipated by the settlor modification…will further the purposes of the trust." For two interesting, recent cases from Kansas on the unanticipated circumstances modification rule, see In re Estate of Somers, 89 P.3d 898 (Kan. 2004) and In re Harris Testamentary Trust, 69 P.3d 1109 (Kan. 2003).

[7] 175 Ohio App.3d 107, 885 N.E.2d 296 (Ohio App. 3 Dist. 2008). A summary of *Lowry* appeared in the May/June 2008 issue of the Probate Law Journal of Ohio.

[8] 2009 WL 726027 (Ohio App. 2 Dist. 2009). It is expected that an article on *Frank* by David Cox, of Xenia, the trustee's lawyer, will be published in an upcoming issue of the Probate Law Journal of Ohio.

[9] 174 Ohio App.3d 421, 882 N.E.2d 481 (Ohio App. 1 Dist. 2007), affirmed in part and reversed in part, --- N.E.2d ----, 2009 WL 1563851 (Ohio 2009). A summary of *Cundall* appeared in the March/April 2008 issue of the Probate Law Journal of Ohio.

[10] Many of the issues addressed in this section have been raised by Alan Acker and are discussed in his article "*Fixing Broken Irrevocable Trusts (The Ohio Trust Code Has Made This Harder!)*." The article was published in three installments in the May/June, July/Aug., and Sept./Oct. 2009 issues of the Probate Law Journal of Ohio.

[11] Parties to a PSA may act through a representative under Chapter 5803 of the Revised Code. R.C. §5801.10(B).

[12] The prohibition of early terminations by PSAs in R.C. §5801.10(C) does not apply to terminations that are permitted by Chapter 5804. R.C. §5801.10(I)(2).

[13] For a beneficiary's consent to be valid, the Restatement provides that the beneficiary must have been competent, the beneficiary must have been knowledgeable of the beneficiary's rights and the facts, the consent must not have been induced by improper conduct of the trustee, and, if the trustee has an adverse interest in the transaction, the terms must have been fair and reasonable. Restatement, Second, Trusts §216. A rule similar to this is codified in R.C. §5810.09.

[14] Under the Third Restatement:

> If the trustee takes action, reasonably and in good faith, on the basis of the consent of the beneficiaries, but it turns out that the action was contrary to a material purpose of the trust or that consent was not properly obtained from or on behalf of all beneficiaries, the consenting beneficiaries may not hold the trustee liable for damages resulting from action taken by the trustee before becoming aware of the impropriety. When the trustee's action was not taken reasonably and in good faith, the court, in determining whether estoppel applies or the amount of damages recoverable, may consider the relative fault of the various parties and the nature of the trust purposes or other obstacle to the requested termination or modification.

Restatement, Third, Trusts §65 cmt. a. It appears that most of the case law supports barring a consenting beneficiary's claim for breach even if a trust is terminated before its material purposes have been accomplished. See, e.g., Shelton v. King, 229 U.S. 90, 94 (1913) (dicta); Hagerty v. Clement, 196 So. 330 (La. 1940); Partridge v. Clary, 117 N.E. 332 (Mass. 1917); Lemon v. McComas, 63 Md. 153, 1885 WL 4426 (Md. 1885). But see Whitney v. Whitney, 57 N.E.2d 913 (Mass. 1944). If the trust is spendthrift, however, and the beneficiary's interest is thus inalienable, as is usually the case, there is authority allowing

claims for the trustee's breach. See, e.g., Appeal of Grothe, 19 A. 1058 (Pa. 1890); Matter of Wentworth, 129 N.E. 646 (N.Y. 1920). Contra, Restatement, Second, Trusts, §342 cmt. f; Reed Estate, 17 Pa. Fiduc. Rep. 222 (1967). See also, Scott & Ascher on Trusts, §34.6.1, 5th ed. 2008.

[15] Under R.C. §5804.11(B), the court may terminate a trust early based on consent of the beneficiaries (or a finding that nonconsenting beneficiaries' interests are protected), but only if it concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. The issue addressed here is what the result is if the trustee, with agreement of the beneficiaries, acts to terminate a trust early, without such a material purpose finding by the court.

[16] Prior to enactment of the OTC, the Ohio Supreme Court addressed the effect of a beneficiary's consent on the beneficiary's ability to pursue a claim against a trustee in the context of the allocation of stock dividends to principal or income: "It is a well established principle of law that a sui juris beneficiary or a cotrustee who consents to, confirms or acquiesces in a claimed breach of trust in making certain allocations to corpus rather than to income is estopped to claim a breach of trust growing out of the action of the trustee in that regard." Hopkins v. Cleveland Trust Co., 127 N.E.2d 385 (Ohio 1955).

[17] See note 14 and text accompanying notes 13 - 14.

[18] Representation under Chapter 5803 requires that there not be a conflict of interest between the representative and the person being represented. For two recent cases on that subject, see Brams Trust v. Hayden, 266 S.W.3d 300 (Mo. App. 2008) and Davis v. U.S. Bank Nat. Ass'n, 243 S.W.3d 425 (Mo. App. 2007).

[19] R.C. §5801.05

[20] See note 14 and text accompanying notes 13 - 14.

[21] See Garwood v. Garwood, 194 P.3d 319 (Wyo. 2008). In *Garwood*, settlors, husband and wife, used a living trust "kit" to create a revocable trust, the terms of which provided for the creation of a marital and a family trust on the first of their deaths. (Because of the size of their estates, the court stated they had "no earthly use" for the trust.) For more than a decade after the creation of the trust, the settlors ignored its terms. Upon wife's death, the settlors' adult children became trustees of the family trust. In need of funds, husband sued them for an order directing them to pay him what he needed to live on. The trustees counterclaimed for an order requiring their father to repay amounts to the marital and family trusts they alleged he had expended in violation of the trusts' terms. Essentially relying on its finding that the settlors intended the survivor to have the benefit of their estate until death, with what remained to go to the children, the trial court fashioned an equitable remedy that was not consistent with the trust's terms, without specifying the legal basis for its decision. While the appellate court affirmed, it issued three separate opinions.

The author of one of the concurring opinions disagreed with the majority opinion's statement that "a court may modify the terms of a trust pursuant to the court's statutory authority and its equitable or common law powers." The concurring opinion noted that the Wyoming UTC (WUTC) provides that "[t]he common law of trusts and principles of equity supplement this act, *except to the extent modified by this act or another statute of this state* (emphasis in original)." Because of the italicized language, the concurring opinion concluded "that the common law relating to the modification of trust agreements has been statutorily preempted." A separate concurring opinion acknowledged the issue of whether the common law and principles of equity with respect to the modification and termination of trusts were still available or had been preempted by the WUTC, but concluded that the question did not need to be addressed in the case because the same result could be reached under the WUTC's unanticipated circumstances modification statute.

[22] The UTC also does not expressly address the question, but its Reporter, Professor David English, has stated informally his view that under agency law, an authorized agent may do so, and that the UTC drafters did not think it necessary to include such a provision in the UTC.

[23] See, e.g., Estate of Kurrelmeyer, 895 A.2d 207 (Vt. 2006); Uniform Power of Attorney Act §201(a)(1) (2006); Restatement, Third, Trusts §11(5) (2003). Note also that authorized agents may give the principal's property away. See, in addition to R.C. §1337.18, Restatement, Third, Agency §2.02 cmt. h (2006). However, for a case indicating that, because authorized agents may not execute wills for principals and revocable trusts are in many respects will substitutes, they also may not create or amend a principal's revocable trust instrument, see Matter of Goetz, 793 N.Y.S.2d 318 (2005). Note that the holding in Goetz, however, was "most substantially" based on the fact that neither the power of attorney nor the trust instrument expressly authorized the agent to amend the terms of the trust. Id.

[24] The UPOAA's allowing agents to create trusts for principals is subject to substantial restrictions. For example, the power of attorney must include specific authorization to do so, UPOAA §201(a)(1); generally, the agent is under a duty to preserve the principal's estate plan, UPOAA §114(b)(6); and the agent must act in accordance with the principal's reasonable expectations, if known by the agent, or the principal's best interests, if not, UPOAA §114(a)(1).

[25] See Treasury Regulation §20.2036-1(b)(2); Estate of Paxton v. C.I.R., 86 T.C. 785 (1986).

[26] UTC §505, cmt (citing Restatement, Second, Trusts, §156 and comment e. to Restatement, Third, Trusts, §58(2)).

[27] The OTC defines "beneficiary" as "a person that has a present or future beneficial interest in a trust, whether vested or contingent, or that, in a capacity other than that of trustee, holds a power of appointment over trust property…" R.C. §5801.01(C).

[28] An interesting, recent case involving a similar tax savings statute in Minnesota is In re Margolis Revocable Trust, 765 N.W.2d 919 (Minn. App. 2009). Wife created a revocable trust under which, if she became incapacitated, the trustee was to provide for her health, support, and maintenance. Upon her becoming incapacitated, husband became successor trustee and used some $206,000 of trust assets for nursing home and medical expenses of his wife that he was legally obligated to pay. In a subsequent action by wife's child from a prior marriage, who was a remainder beneficiary of the trust, the court held that because of the Minnesota tax savings statute, husband had breached his duty in using trust funds to pay expenses of his wife that he was legally obligated to pay. Based in part on wife's clearly stated intent that the trust assets be available for her support if she became incapacitated, the court also held, however, that he was not liable for the $206,000:

> Because Minn.Stat. § 501B.14 is merely a tax-curative statute, respondent's violation of this section does not constitute prohibited trustee self-dealing. Consequently, the district court correctly enforced the trust's exculpatory clause after finding that respondent's violation did not amount to either fraud or willful misconduct.

[29] 138 N.E.2d 15 (Ohio 1956).

[30] 529 N.E.2d 1261 (Ohio 1988).

[31] For a more thorough discussion, see John D. Clark, *Anti-Lapse Statute for Trusts: Finding Grantor's Intent in Absence of Clear Trust Language*, 18 PROB. L. J. OF OHIO 196A (July/Aug. 2008).

[32] For example, the proposed trust anti-lapse statute likely will include a provision addressing the effect of survivorship language in the trust instrument on the application of the anti-lapse statute, and will adopt UPC §2-603's definition of what relationship is required between the settlor and the predeceased beneficiary for the anti-lapse statute to apply.

[33] The Kentucky Supreme Court recently decided an interesting case involving the duties of a trustee to keep beneficiaries of the trust informed. (While Kentucky has not adopted the UTC, it has a notice provision, similar to the UTC's, which requires the trustee to "keep the current beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.") In JP Morgan Chase Bank, N.A. v. Longmeyer, 275 S.W.3d 697 (Ky. 2009), charities were the remainder beneficiaries of a revocable trust. The settlor, who was ninety-three years old and in declining health, revoked the trust and executed a new trust instrument. The new terms increased a gift to her unrelated caretaker, who had initiated the new estate planning, from $20,000 to $500,000 and named the drafting attorney sole trustee (his annual trustee fee was estimated at $100,000). Settlor died shortly thereafter. Acting on the advice of counsel, the corporate trustee of the revoked trust notified the charities of the revocation and that the revocation may have been the product of undue influence. After the will contest the charities filed was settled for $1.875 million, the new trustee/drafting attorney sued the former trustee for breach of duty in disclosing what was alleged to be confidential information about the revoked trust to its remainder beneficiaries. The Kentucky Supreme Court, in reversing the Court of Appeals, held that the former trustee's duty to keep beneficiaries reasonably informed of the trust and its administration included the duty to notify the former beneficiaries of the trust's revocation. In doing so, it rejected the contention that no such duty existed because the trust was revocable.

[34] See Michael A. Ogline, *Notice Provisions of the Ohio Uniform Trust Code*, 15 PROB. L. J. OF OHIO 119 (May/June 2005).

[35] R.C. §5808.13(A).

[36] R.C. §5808.13(B)(1).

[37] R.C. §5808.13(B)(3).

[38] R.C. §5808.13(C).
[39] The duty of the surrogate, who presumably would be treated as a fiduciary, is to "act in good faith to protect the interests" of the beneficiary for whom the surrogate is entitled to receive information. The OTC also accommodates the use of other non-trustee fiduciaries, sometimes referred to as "trust protectors" or "trust advisors." See R.C. §5808.08. A recent case from Missouri addressed the potential liability of such non-trustees. In Robert T. McLean Irrevocable Trust v. Patrick Davis, P.C., 283 S.W.3d 786 (Mo. App. S.D. 2009), a special needs trust was created to receive the proceeds from the settlement of a claim arising from the beneficiary's injury in a car accident. The attorney who handled the claim was designated "trust protector" in the trust instrument. Under the terms of the trust, the trust protector had the authority to remove and replace the trustee, which authority was "conferred in a fiduciary capacity and shall be so exercised, but the trust protector shall not be liable for any action taken in good faith." After the original trustees resigned, the trust protector appointed successor trustees, including the lawyer who had referred the personal injury case that was the source of the settlement proceeds to the trust protector. It was alleged that the beneficiary informed the trust protector that the new trustees were inappropriately spending trust funds. Later, the new trustees and the trust protector resigned. Ultimately, the beneficiary's mother became trustee and sued the former trustees and the trust protector for breaches of duty. The lower court granted the trust protector's motion for summary judgment on the ground that the trust protector had no duty to supervise the trustees. The appellate court, with two concurring opinions, reversed. It found that there were issues of material fact with respect to the scope of the trust protector's duties of care and loyalty and whether there had been a breach of duty. Noting that there was no Missouri law dealing with trust protectors, the court quoted from the comment to UTC 808 dealing with powers to direct (for Ohio, see R.C. § 5808.08) that § 808 "ratif[ies] the use of trust protectors and advisers."
[40] R.C. §5801.04(B)(8).
[41] R.C. §5801.04(B)(9).