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Ohio Trust Code: The Joint Committee's Proposal for its First Amendment

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The Ohio Trust Code: The Joint Committee's Proposal for Its First Amendment

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The new Ohio Trust Code (“OTC” or the “Code”), which was enacted in mid-2006, took effect on January 1, 2007. It was the product of several years of study and work by a joint committee of representatives of the OSBA’s Estate Planning, Trust, and Probate Law Section and the Ohio Bankers League Legal, Regulatory and Legislative Committee (the “Joint Committee”). Since the OTC’s enactment, the Joint Committee’s co-chairs, Bob Brucken and Joanne Hindel, and I have received many proposals for its amendment. Some of the proposals were technical in nature while others were substantive.

In the spring of 2007, I prepared a report listing the proposals, with a short discussion of each of them, which was circulated among the Joint Committee and the Executive Committee of the Ohio Probate Judges Association. In May, Mr. Brucken, Ms. Hindel, and I met to review the report. As co-chairs of the Joint Committee, Mr. Brucken and Ms. Hindel made recommendations with respect to each proposal. The report was then revised to include the recommendations, posted on the OSBA’s website, and circulated to the Joint Committee, the Executive Committee of the Ohio Probate Judges Association, and those who had submitted the amendment proposals. A conference call among members of those three groups who chose to participate was held in June to discuss the report and recommendations. The participants in that call agreed with many of the recommendations, but decided to change others.

After the June conference call, I revised the report to reflect the decisions made by the participants in the call. The revised report also was posted on the OSBA’s website and circulated among the same three groups. The next step was to draft language to make

the agreed upon amendments. That process has been completed and, as of this writing, statutory text to effect the amendment has been delivered to the OSBA's and OBL's lobbyists for them to begin the process of having a bill to enact the amendment introduced in the General Assembly. This article summarizes the proposals that are included in the amendment and briefly discusses two that are being handled separately by committees of the Estate Planning, Trust, and Probate Law Section.

Information and Reporting Provisions.

Several of the amendment proposals related to the OTC's provisions requiring trustees to inform and report to beneficiaries. New §5808.13 of the Revised Code sets forth those duties, while §§5801.04(B)(8) and (9) make certain of them mandatory and thus not waivable by the settlor in the terms of the trust. The Code's information and reporting provisions (as well as most of its other provisions) are applicable to existing as well as newly created trusts.

As discussed below (see paragraphs 20, 23, and 24), several proposals for amending the OTC's information and reporting provisions are included in the proposed amendment. Two other proposals will be taken up by a new committee of the OSBA's Estate Planning, Trust, and Probate Law Section. First, it was proposed that the OTC's information and reporting provisions apply only to trusts created after the amendment's effective date. Under this proposal, the trustee's duty to inform and report to beneficiaries of trusts created earlier would continue to be governed by pre-OTC law. Second, it was proposed that the settlor be allowed to waive all duties of the trustee to inform and report to beneficiaries. Because of the controversial nature of these proposals, the participants in the June conference call decided that they should be considered separately from the more straightforward proposals that will be included in the proposed amendment.

Ability of an Agent under a Power of Attorney to Create a Trust.

The OTC's provision describing the methods for creating a trust (§5804.01) does not provide that an authorized agent of the settlor acting under a power of attorney may create a trust for the settlor. In addition, §5804.02, which sets forth the requirements for the creation of a trust, requires that the settlor have capacity. Further, the OTC's

provision addressing the ability of a duly authorized agent for the settlor of a revocable trust to exercise the settlor's powers refers to the settlor's powers "with respect to revocation, amendment, or distribution of trust property," but it does not address the creation of a revocable trust by an agent. While these provisions raise doubts as to whether an authorized agent can create a trust for a principal, the statutory form of power of attorney in §1337.18(A) states that "Unless expressly authorized in the power of attorney, a power of attorney does not grant authority to an agent to...create...a trust," thus implying that if expressly authorized to do so, an agent can create a trust for the settlor. The participants in the June conference call discussed this subject at length; noted that the ability to create a trust includes the ability to direct the disposition of trust property and raises potential conflict of interest issues (as, however, does the ability to amend a revocable trust, which, as stated, is allowed by the Code); also noted that a committee of the OSBA's Estate Planning, Trust, and Probate Law Section is studying Ohio's power of attorney statute; and concluded that this subject would be best addressed by that committee separately from the proposed amendment.

The remainder of this article discusses the changes included in the proposed amendment. Generally, the Joint Committee decided to include in the amendment straightforward changes as to which there was a broad consensus. The discussion below addresses the proposals included in the amendment in the order of the sections of the Revised Code that are affected.

1. §§2109.022 and 5815.25 (power to direct).

Prior to enactment of the OTC, the Revised Code addressed the subject of a fiduciary not being liable when others had a power to direct in two statutes, §§2109.022 and 1339.43. The two statutes were identical, except that §2109.022 defined fiduciary, in part, to mean "a trustee under any testamentary or other trust," while §1339.43 defined the term, in part, to mean, "a trustee under any testamentary, inter vivos, or other trust." With the enactment of the OTC, §1339.43 was moved and renumbered to §5815.25, while §2109.022 was not changed. Because §2109.022 is duplicative of §5815.25, the proposed amendment repeals it.

2. §5801.01(Y) (definition of “wholly discretionary trust”).

Section 5801.01(Y) includes a lengthy definition of a “wholly discretionary trust.” Under division (Y)(5), the terms of a WDT that is a supplemental needs trust may include “a prohibition against providing food, clothing, and shelter to the beneficiary.” Rick Davis, a member of the Joint Committee, reported that from the perspective of supplemental needs trust (“SNT”) planning, “clothing” need not be included in such a prohibition to avoid adverse SNT consequences. As a result, the proposed amendment deletes “clothing” from §5801.01(Y)(5).

3. §5801.02 (scope of OTC).

Generally, §5801.02 provides, in part, that the OTC applies to inter vivos express trusts and to testamentary trusts to the extent provided by §2109.69.¹ In describing the inter vivos express trusts to which the OTC applies, §5801.02 provides that both “charitable and noncharitable” inter vivos express trusts are subject to the OTC. In describing the testamentary trusts to which the OTC applies, however, language specifically referencing both charitable and noncharitable trusts is not included. To make the statute internally consistent and avoid any question as to whether both charitable and noncharitable testamentary trusts are subject to the OTC, the proposed amendment inserts “charitable and noncharitable” in the provision of §5801.02 stating that the OTC applies to testamentary trusts.

4. §5801.06 (governing law).

The OTC’s governing law provision, §5801.06, addresses what law applies to determine “the meaning and effect of the terms” of the trust. It does not, however, expressly address what law governs the administration of the trust. Under the proposed amendment, §5801.06 will consist of two divisions. Division (A) will include the section’s current language addressing the law that will govern the meaning and effect of the trust’s terms. Division (B) will address what law governs trust administration:

(B) The administration of a trust is governed by the law designated in the terms of the trust to govern trust administration. In the absence of a designation in the terms of the trust (i) the law of the trust's principal place of administration

governs the administration of the trust and (ii) if the trust's principal place of administration is transferred to another jurisdiction under section 5801.07 of the Revised Code, the law of the new principal place of administration of the trust thereafter governs administration of the trust.²

5. §§5801.10, 5804.14, 5805.01(C), and 5805.03 (replacing “trust instrument” with “terms of the trust”).

The OTC generally uses "terms of the trust" to describe the provisions that govern the trust. "Terms of the trust" is a defined term that is not limited to the trust instrument, but also includes manifestations of the settlor's intent "as may be established by other evidence that would be admissible in a judicial proceeding."³ In some of the OTC's provisions that depart from the UTC's, the OTC uses the more limited "trust instrument" language. While in some instances that is appropriate,⁴ the OTC uses "trust instrument" a number of times in (i) the private settlement agreement statute (§5801.10), (ii) the small trust termination statute (§5804.14), (iii) the spendthrift provision statute (§5805.01(C)), and (iv) the wholly discretionary trust statute (§5805.03), when “terms of the trust” is more appropriate. The proposed amendment changes those references to the “trust instrument” to the “terms of the trust.”

6. §5801.10 (effect of a term or condition in a PSA that a court could not properly approve).

Section 5801.10(C) includes, in part, the following provision:

(C) ... [A private settlement] agreement is valid only to the extent that it does not effect a termination of the trust before the date specified for the trust's termination in the trust instrument, does not change the interests of the beneficiaries in the trust except as necessary to effect a modification described in division (C)(5) or (6) of this section, and includes terms and conditions that could be properly approved by the court under Chapters 5801. to 5811. of the Revised Code or other applicable law.

Because that language could result in an entire PSA being invalid if it includes one or more improper terms or conditions, the proposed amendment inserts the following language in §5801.10(C): “The invalidity of any provisions of an agreement under this division (C) does not affect the validity of other provisions of the agreement.”

7. §5801.10(E) (PSAs; binding effect).

Under §5801.10(B), creditors are necessary parties to a PSA (if their interests will be affected by the agreement). Such creditors are not referenced in §5801.10(E), however, which provides that PSAs (that comply with the limitations on their use) are “final and binding on the trustee, the settlor if living, all beneficiaries, and their heirs, successors, and assigns.” The proposed amendment adds to that list “creditors who are parties to the agreement.”

8. §5801.11 (guardian of person or estate).

A number of provisions of the OTC reference a guardian of the person or estate. For example, under §5803.03(A) and (B), a guardian of the person or estate may represent and bind the ward or the estate the guardian is responsible for. The OTC does not provide that such a guardian must act in accordance with Chapter 2111 of the Revised Code, if the guardian was appointed by an Ohio court, or by other applicable law, if the guardian was appointed elsewhere. The proposed bill does so by adding new §5801.11 to the Revised Code:

5801.11 Guardian of the Estate or Person.

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

9. §5803.02 (representation by holder of a presently exercisable general power of appointment).

Section 5803.02 provides that in the absence of a conflict of interest, the holder of a general testamentary power of appointment may represent and bind persons whose interests are subject to the power. Thus, notices that otherwise would have to be given to

a person whose interest is subject to the power may instead be given to the powerholder, and a consent needed from a person whose interest is subject to the power may instead be obtained from the powerholder. Section 5803.02 applies only to holders of general testamentary powers; it does not apply to the holder of a presently exercisable general power.

Under §5806.03(B), however, the holder of a power of withdrawal (which is defined in §5801.01(O) as a presently exercisable general power) is treated as the settlor of a revocable trust. Therefore, during the period a presently exercisable general power is exercisable, no one else would need to be given notices or would need to give their consent, because the holder of the presently exercisable general power would have complete control over the trust under §5806.03(A).

Because this likely is not well known or self evident, the proposed amendment will add the following sentence to §5803.02: "The rights of the holder of a presently exercisable general power of appointment are addressed in section 5806.03 of the Revised Code."

10. §5803.03(F) (representation of minors by ancestors other than parents).

Section 5803.03(F) allows a parent (but no other relative) to represent the parent's minor or unborn children, if neither a guardian for the child's estate or person has been appointed (and there is not a conflict of interest between the parent and the child). While the Joint Committee decided not to propose amending the OTC to allow a grandparent or other relative to represent a minor or unborn child under §5803.03(F), the proposed amendment includes a reference in §5803.03(F) that another relative may be able to represent a minor or unborn child under §5803.04. Under §5803.04, a beneficiary who is a minor, an incapacitated individual, an unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by another beneficiary who has a substantially identical interest in the trust (to the extent there is not a conflict of interest between the representative and the person represented).

11. §5804.02(C) (trust creation).

Section 5804.02(C) provides, in part, that “[a] power in a trustee to select a beneficiary from an indefinite class is valid.” To provide greater flexibility, the proposed amendment will allow such a power to be given to “a trustee or other person.”

12. §5804.02(D) (trust creation).

Section 5804.02(D) refers to the execution of a trust. The proposed amendment will change it to refer to the execution of a trust instrument.

13. §5804.02(E) (trust creation).

Section 5804.02(E) addresses a circumstance in which “one or more other persons hold” an interest in the trust. The proposed amendment changes that language to “one or more other persons hold or holds” the trust interest.

14. §5804.11(A) (modification or termination by settlor and all beneficiaries).

Section 5804.11(A) provides, in part: “If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court *shall* enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust” (emphasis added).

As originally promulgated, UTC §411(a) provided: “A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.” In 2004, at the recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel (“ACTEC”), UTC §411(a) was amended. The amendment was made in response to concerns that in its original form, §411(a) might cause assets in irrevocable trusts created in states which previously required that a court approve a settlor/beneficiary termination or modification to be included in settlors’ gross estates for estate tax purposes. Section 5804.11(A), quoted above, tracks the language of the UTC amendment.

In its current form, §5804.11(A) mandates that the court approve a modification or termination consented to by the settlor and all of the beneficiaries. If a petition were

presented to the court for such a modification or termination, the court's role would be to determine that the settlor and all beneficiaries had, in fact, consented. Thus, if any beneficiaries' consents were provided by representatives, the court would need to determine whether the representatives' consents were effective (for example, whether there was a conflict of interest between the representative and the person represented).

The proposed amendment inserts in §5804.11(A) a specific reference to the requirement that, before a court approve a modification or termination by the settlor and all beneficiaries, it first determine that any consents given on behalf of beneficiaries by their representatives are valid under the OTC's representation provisions.

In accordance with an alternative suggestion of the ACTEC Estate and Gift Tax Committee in response to the concern described above, §5804.11(A) also provides that it is applicable only to post-2006 trusts. However, because of the ability of the settlor and all beneficiaries to amend or modify trusts under pre-OTC Ohio law, and because §5804.11(A) allows such modifications or terminations only upon approval by the court, the Joint Committee concluded that it should not be necessary to limit the division's applicability to post OTC trusts. The proposed amendment therefore deletes that limitation.

15. §5804.13 (charitable trusts; cy pres).

Generally, §5804.13 provides that if a particular charitable purpose fails, the court may apply cy pres to modify or terminate the trust in a manner consistent with the settlor's charitable purposes, except that a trust term that addresses that contingency and provides for distribution to a noncharitable beneficiary prevails over the court's power to apply cy pres. Section 5804.13 does not expressly address trust instruments that provide for alternative charitable purposes or beneficiaries if a particular charitable purpose fails. The proposed amendment addresses that subject by adding the following emphasized language to §5804.13(B):

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

16. §5804.14(D) (replacing “probate court” with “court”).

Section 5804.14(D) addresses the distribution of assets from an uneconomic small trust that is terminated early by the court. Twice it refers to the “probate court” rather than simply to the “court.” Because the general division of the court of common pleas has concurrent jurisdiction with the probate court over inter vivos trusts, the proposed amendment deletes “probate” from §5804.14(D).

17. §5804.17 (combination and division of trusts).

The OTC includes in §5804.17 the UTC’s statute on the combination or division of trusts. Former §1339.67 on that subject was repealed.

Former §1339.67 allowed a combination or division of trusts “if the consolidation or division is in the best interests of the beneficiaries...is equitable and practicable, and will not defeat or substantially impair the accomplishment of the purpose of the trust or trusts or the interests of the beneficiaries under the trust or trusts.” By contrast, the standard under new §5804.17 is that the combination or division “does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.” Because the standard under §5804.17 is more restrictive than under former §1339.67, the proposed amendment changes §5804.17 to permit a combination or division that does not *substantially* impair the rights of any beneficiary or have a *material* adverse effect on the achievement of the purposes of the trust.

18. §5806.01 (capacity to create a revocable trust).

Section 5806.01 provides that the capacity to create a revocable trust (or amend, revoke, or add property to it) is the same as is required to make a will, but it does not specify that the required capacity must be that of the settlor. The proposed amendment will cause it to do so.

19. §5806.02(C) (revocation or amendment of revocable trust).

Section 5806.02(C) describes the means by which a settlor may revoke or amend a revocable trust. If the terms of the trust do not provide for an exclusive means of revocation or amendment, the analogous UTC provision (§602(c)) allows revocation or

amendment by will or codicil or by any *other* method manifesting clear and convincing evidence of the settlor's intent. The OTC provision (§5806.02(C)) is patterned after the UTC provision, but it expressly does not allow amendment or revocation by will or codicil (unless the terms of the trust expressly allow it). Nevertheless, it refers to "any *other* method manifesting clear and convincing evidence of the settlor's intent (emphasis added)." The proposed amendment will delete "other" from that provision.

20. §§5806.03(A) and 5808.13 (trustee duties to other beneficiaries during settlor's lifetime, including the duty to inform and report).

Under §5806.03(A), the trustee's duties are owed exclusively to the settlor of a revocable trust while the settlor is living, regardless of whether the settlor is incapacitated. Generally, §5808.13 provides that the trustee must provide information to current beneficiaries and other beneficiaries who request it. The OTC does not expressly address whether the trustee's information and reporting duties under §5808.13 are owed to beneficiaries of a revocable trust other than the settlor during the settlor's lifetime. The proposed amendment resolves that uncertainty by inserting language in §5806.03(A) and adding a new division (G) to §5808.13, each of which expressly states that during the lifetime of the settlor of a revocable trust, the trustee's duties to inform and report under §5808.13 are owed exclusively to the settlor.

21. §5806.04 (accelerating the time bar for trust contests).

Section 5806.04 provides for a two year contest period (from the settlor's death) for revocable trusts. The period for contesting a will under §2107.76 is three months from the filing of the certificate with respect to notice having been given for the probate of the will. Because revocable trusts are used primarily as will substitutes, the proposed amendment changes the limitations period for contesting a trust to make it more comparable to that for contesting a will. This is accomplished by adding new division (E) to §5806.04:

(E) If the trustee sends a person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address,

and that the person has the lesser of six months from the date the notice is sent or two years from the date of settlor's death in which to commence a proceeding described in division (A), that person's right to commence such a proceeding terminates at the earlier of six months after the notice is sent or two years from the settlor's death.⁵

(The proposed amendment will also make division (A) of §5806.04, which contains the general two-year limitations period for contesting a revocable trust, subject to the rule of new division (E).)

22. §5806.04(D) (reference to “grantor” in statute of limitations).

The OTC replaced the UTC provision on the limitations period for contesting a revocable trust with former §2305.121. It refers to the creator of the trust as the “grantor.” The OTC refers to the creator of the trust as the “settlor.” When former §2305.121 was moved to §5806.04, all of its references to “grantor” were changed to “settlor” except for one (in division (D)). The proposed amendment will also change that reference to “grantor” to “settlor.”

23. §§5808.13(B)(1) and 5801.04(B)(9) (redacting the trust instrument before providing a copy to a beneficiary).

Under the default rule in §5808.13(B)(1), the trustee must provide a copy of the trust instrument to a beneficiary who requests it. (While that provision does not expressly state that the beneficiary is entitled to receive a copy of the entire trust instrument, without redaction, that is the plain meaning of (B)(1) [and of the definition of “trust instrument” in §5801.01(W)] and appears to be its intent. In that regard, the comment to the analogous provision of the UTC (§813) expressly states that a requesting beneficiary is entitled to receive a copy of the entire trust instrument.) In addition, under the default rule of §5808.13(A), “unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.”

The proposed amendment revises §5808.13(B)(1) to allow the trustee to furnish a beneficiary who requests a copy of the trust instrument with a redacted copy that includes only the provisions that the trustee determines are relevant to the beneficiary's interest in the trust. The proposed amendment further provides, however, that if the beneficiary then requests a copy of the entire trust instrument, the trustee must provide it.

24. §5808.13(C) (when the duty to provide annual reports to beneficiaries is effective).

Under §5808.13(C), the trustee of an irrevocable trust is required to send an annual report with respect to its administration of the trust to each current beneficiary and to other beneficiaries who request it. While the OTC's effective date generally is January 1, 2007, it is not clear whether the trustee's duty to furnish annual reports to beneficiaries applies to trust fiscal years ending in 2006 or in 2007. Under the proposed amendment, the trustee must provide such annual reports for trusts' years ending in 2007.

25. §5808.14(A) (judicial review of exercise of discretionary powers).

Section 5808.14(A) defines the judicial standard of review for discretionary trusts. Generally, it requires that trustees exercise discretionary powers reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. An exception is provided for wholly discretionary trusts (WDTs). For WDTs, a reasonableness standard is not to be applied to a court's review of the exercise of discretion by the trustee. Section 5808.14(A) does not limit the WDT exception to discretionary distribution decisions. The proposed amendment will do so.

26. §5808.16(S) (power of trustee to pledge trust property).

Section 5808.16(S) gives the trustee the power to:

(S) Pledge the property of a revocable trust to guarantee loans made by others to the settlor of the revocable trust, or, if the settlor so directs, to guarantee loans made by others to a third party.

In part because of differences between a “pledge of property” and a “guarantee of a loan,” the proposed amendment revises §5808.16(S) to read:

(S) Guarantee loans made by others to the settlor of a revocable trust and, if the settlor so directs, guarantee loans made by others to a third party, and mortgage, pledge, or grant a security interest in the property of a revocable trust to secure the payment of loans made by others to the settlor of the revocable trust and, if the settlor so directs, loans made by others to a third party.

27. §5808.16 (specific powers of trustee).

Section 5808.16 grants trustees 26 specific powers. The power to hire agents is not one of them. Although the power to hire agents is covered by the trustee’s broad, general power under §5808.15, and arguably is given by one or more of the specific powers granted by §5808.16, the proposed amendment adds new division (AA) to specifically authorize the trustee to hire agents, attorneys, and other professionals.

28. §5810.05 (limitation of action against trustee).

Section 5810.05 is the OTC’s statute of limitation for actions against a trustee. It does not address equitable principles that may affect the limitations period. The proposed amendment does so by adding new division (D):

(D) Nothing in Chapters 5801. to 5811. of the Revised Code shall limit the operation of any principle of law or equity that can bar claims, including the doctrines of laches, unclean hands, estoppel, and waiver.

29. §5810.13(A) (certification of trust).

Section 5810.13 includes provisions for the trustee to furnish third parties with a certification of trust, instead of the entire trust instrument. Division (A) of §5810.13 lists items to be included in a certification. The list includes the trust’s taxpayer identification number and “the manner of taking title to trust property.” The amendment will delete those two items.⁶

30. §5810.13(I) (certification of trust).

To make it clear that a certification of trust under §5810.13 is separate and distinct from memoranda of trust under §5301.255 that are used for real estate purposes, the proposed amendment adds division (I) to §5810.13, which provides that trust certifications do not affect the validity or use of trust memoranda under §5301.255.

31. §5810.13(H) (certification of trust).

Section 5810.13(H) provides:

(H) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

The proposed amendment deletes division (H).

¹ Generally, §2109.69(A) provides that the OTC applies to testamentary trusts except to the extent that it is inconsistent with a provision in Chapter 2109 or another provision of the Revised Code, or is clearly inapplicable to testamentary trusts. Under §2109.69(B), the OTC information and reporting requirements found in §5808.13 are applicable to testamentary trusts regardless of whether they are inconsistent with a provision in Chapter 2109 or another provision of the Revised Code.

² Note that “principal place of administration” of a trust is not defined by the OTC (or by the Uniform Trust Code). According to the comment to the UTC’s provision on principal place of administration, §108:

Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust’s principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.

³ R.C. §§5801.01(V). According to the comment to UTC §103, the terms of a trust might be derived from, in addition to the trust instrument, “oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction.”

⁴ See, e.g., R.C. §§5801.01(D) (the definition of “beneficiary surrogate”) and 5801.04(C) (the provision for the settlor to waive notices to beneficiaries by appointing a beneficiary surrogate). Those provisions require that the designation of the beneficiary surrogate and the waiver be in the “trust instrument” rather than in the “terms of the trust.”

⁵ This language differs from, and is an improvement of, the language included in the material on the proposed amendment for delivery to the Legislative Service Commission. It will be provided to LSC when it prepares the amendment for introduction in the General Assembly.

⁶ The possibility of deleting these two items from §5810.13(A) was not raised until after the June conference call described near the beginning of this article and after the preparation of the material on the

proposed amendment for delivery to the Legislative Service Commission. On the assumption that neither of these items is necessary for a trust certification, that mandating the provision of the trust's taxpayer identification number to third parties in certifications is problematic, and that deleting these items from the list would not be objectionable, the Joint Committee's co-chairs intend to request the Legislative Service Commission to delete them when it prepares the bill for enactment of the amendment.