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Bill Analysis
Legislative Service Commission

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(As Reported by S. Judiciary – Civil Justice)

Reps. Wagoner, Gilb, Coley, Seitz, Reidelbach, Ujvagi, Webster, Latta, Reinhard, Brown, Mason, Book, Core, Barrett, Blessing, Bubp, Carano, Cassell, Combs, DeBose, DeGeeter, Dolan, Domenick, C. Evans, Flowers, Harwood, Healy, Hughes, Key, Law, Martin, R. McGregor, Oelslager, Otterman, T. Patton, Perry, Sayre, Schaffer, Schlichter, Schneider, Willamowski, Yuko

BILL SUMMARY

- Adopts the Ohio Trust Code and the Ohio Uniform Prudent Investor Act, regulating the creation, administration, modification, and termination of trusts and the powers and duties of settlors, trustees, beneficiaries, and the courts.
- Provides for private settlement agreements among beneficiaries and trustees.
- Moves existing Revised Code sections dealing with the Uniform Principal and Income Act, the Institutional Trust Funds Act, the Ohio Transfers to Minors Act, issuers of securities and holders of record, fiduciary bank accounts, powers of appointment, amortization of premiums, inter vivos or testamentary trusts, and consignment of art works to dealers to new Revised Code Chapters 5812., 5813., 5814., and 5815.

** This analysis was prepared before the report of the Senate Judiciary – Civil Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

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CONTENT AND OPERATION

The Ohio Trust Code: adoption; application; jurisdiction

Adoption

The bill adopts an Ohio Trust Code. The bill states that Chapters 5801. to 5811. of the Revised Code may be cited as the Ohio Trust Code (R.C. 5801.011). These chapters of the bill contain amended and renumbered sections of existing law as well as sections enacted by the bill. When used in this analysis, the "Ohio Trust Code" or "Code" refers to all of the sections in Chapters 5801. to 5811. of the bill, whether enacted, amended, or renumbered. In applying and construing the Ohio Trust Code, a court may consider the need to promote uniformity of the law with respect to the subject matter of that Code among states that enact the National Conference of Commissioners on Uniform State Laws' "Uniform Trust Code," upon which the Ohio Trust Code is based (R.C. 5811.01).

Application

Except as otherwise provided in any provision of the Ohio Trust Code, the bill applies the Ohio Trust Code to charitable and noncharitable inter vivos express trusts and to trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. The bill also applies the Ohio Trust Code to testamentary trusts except to the extent that the Ohio Trust Code conflicts with any provision of R.C. Chapter 2109. or any other provision of the Revised Code that applies specifically to testamentary trusts and except to the extent that any provision of the Ohio Trust Code is clearly inapplicable to testamentary trusts.¹ R.C. Chapter 2109. contains fiduciary provisions of Ohio's Probate Law. Notwithstanding the bill's general exceptions to the Ohio Trust Code's application to testamentary trusts, the bill specifies that R.C. 5808.13 applies to testamentary trusts whether or not that section conflicts with any provisions of R.C. Chapter 2109. or any other provision of the Revised Code that

¹ *"Inter vivos" trusts operate during the settlor's lifetime. "Testamentary" trusts become operative upon the settlor's death.*

applies to testamentary trusts. R.C. 5808.13 pertains to a trustee's duty to provide notice and information to beneficiaries of the trust (*see* "**Administration of a trust: duties of the trustee**," below). (R.C. 2109.69 and 5801.02.)

Except as modified by the Ohio Trust Code or another section of the Revised Code, the common law of trusts and principles of equity continue to apply in Ohio (R.C. 5801.05).

The Ohio Trust Code governs the powers and duties of a trustee, relations among trustees, and the rights and interests of a beneficiary, except as otherwise provided by the terms of a trust.² However, under the bill, a trust remains subject to the following provisions of the Ohio Trust Code *notwithstanding* the terms of the trust (R.C. 5801.04(A) and (B)):

- (1) The requirements for creating a trust;
- (2) The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (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 R.C. 5804.10 through 5804.16 (*see* "**Modification, termination, or revocation of a trust**," below);
- (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in R.C. Chapter 5805. (*see* "**Spendthrift provision and creditors**," below);

² *The Ohio Trust Code defines "terms of a trust" as the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding. The "trust instrument" is an instrument executed by the settlor that contains the terms of the trust and any amendments to that instrument. (R.C. 5801.01(V) and (W).)*

The Ohio Trust Code defines a "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 a trustee, holds a power of appointment over trust property, or a charitable organization that is expressly designated in the terms of the trust to receive distributions. "Beneficiary" does not include any charitable organization that is not expressly designated in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions. (R.C. 5801.01(C).)

(6) The power of the court under R.C. 5807.02 to require, dispense with, or modify or terminate a bond (*see* "**Trustee: bond**," below);

(7) The power of the court under R.C. 5807.08(B) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high (*see* "**Trustee: acceptance and compensation**," below);

(8) Subject to waiver or modification by the settlor, the duty under R.C. 5808.13(B)(2) and (3) to notify current 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 the beneficiary's right to request trustee's reports (*see* "**Administration of a trust: duties of the trustee**," below);

(9) Subject to waiver or modification by the settlor, the duty under R.C. 5808.13(A) to respond to the request of a current beneficiary³ of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust (*see* "**Administration of a trust: duties of the trustee**," below);

(10) The effect of an exculpatory term under R.C. 5810.08 (*see* "**Breach of trust and liabilities: liability of trustee**," below);

(11) The rights under R.C. 5810.10 to 5810.13 of a person other than a trustee or beneficiary (*see* "**Breach of trust and liabilities: liability of trustee**" and "**Third-party liability**," below);

(12) Periods of limitation for commencing a judicial proceeding;

(13) The power of the court to take any action and exercise any jurisdiction that may be necessary in the interests of justice;

(14) The subject-matter jurisdiction of the court for commencing a proceeding as provided in R.C. 5802.03 (*see* "**The Ohio Trust Code: jurisdiction**," below).

The bill permits a settlor to waive or modify a trustee's duties as set forth in (8) or (9), above, but only if the settlor designates one or more beneficiary surrogates in the trust instrument to receive any notices, information, or reports the trustee otherwise must provide to the current beneficiaries pursuant to those

³ *The Ohio Trust Code defines a "current beneficiary" as a beneficiary that, on the date that the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal (R.C. 5801.01(F)).*

provisions.⁴ If a settlor waives or modifies a trustee's duties, the trustee must provide the notices, information, and reports to the beneficiary surrogate or surrogates in lieu of the current beneficiaries. The designated beneficiary surrogate or surrogates must act in good faith to protect the interests of the current beneficiaries. The settlor's waiver or modification is effective for so long as the beneficiary surrogate or surrogates, or their successor or successors designated in accordance with the terms of the trust instrument, act in that capacity. (R.C. 5801.04(C).)

Unless otherwise provided, the bill applies the Ohio Trust Code to: (1) all trusts created before, on, or after the Code's effective date (January 1, 2007⁵), (2) all judicial proceedings concerning trusts commenced on or after the Code's effective date, and (3) all judicial proceedings concerning trusts commenced before the Code's effective date unless the court finds that the application of the Code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the superseded law applies. Any rule of construction or presumption in the Ohio Trust Code applies to trust instruments executed before the Code's effective date unless there is a clear indication of contrary intent in the terms of the trust. The Ohio Trust Code does not affect an act done before the Code takes effect. A right acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under another statute prior to the Ohio Trust Code taking effect will continue to apply even if the statute has been repealed or superseded. (R.C. 5811.03.)

The bill authorizes a court, in applying and construing the Ohio Trust Code, to consider the need to promote the uniformity of trust laws among the states that enact the Uniform Trust Code (R.C. 5811.01). The bill declares that the provisions in the Ohio Trust Code governing the legal effect, validity, or enforceability of electronic records or electronic signatures and of contracts formed or performed with the use of electronic records or electronic signatures conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7002, 114 Stat. 467, and supersede, modify, and limit the requirements of the federal act (R.C. 5811.02).

⁴ *The Ohio Trust Code defines a "beneficiary surrogate" as a person, other than a trustee, designated by the settlor in the trust instrument to receive notices, information, and reports otherwise required to be provided to current 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 (R.C. 5801.01(D)).*

⁵ *Section 3 of the bill.*

Jurisdiction

Under the Ohio Trust Code, the law of the jurisdiction designated in the terms of a trust determines the meaning and effect of those terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue determines the meaning and effect of the terms. (R.C. 5801.06.)

If the terms of a trust designate the principal place of administration of the trust, the designation is valid and controlling if either: (1) a trustee's principal place of business is located in, or the trustee is a resident of, the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. The Ohio Trust Code does not preclude other means from being used to establish a sufficient connection with the designated jurisdiction. (R.C. 5801.07(A).)

The Ohio Trust Code places a trustee under a continuing duty to administer a trust at a place appropriate to the trust's purposes, its administration, and the interests of its beneficiaries. A court with jurisdiction may intercede in the trustee's administration of the trust (*see* "**Administration of a trust: court intervention**," below). Without precluding the right of a court to order, approve, or disapprove a transfer, the Ohio Trust Code authorizes a trustee, in furtherance of the trustee's continuing duties, to transfer the trust's principal place of administration to another state⁶ or to a jurisdiction outside of the United States. Not less than 60 days prior to initiating the transfer, the trustee must notify the trust's current beneficiaries of the proposed transfer. The notice must include: (1) the name of the jurisdiction to which the principal place of administration is to be transferred, (2) the address and telephone number of the new location at which the trustee can be contacted, (3) an explanation of the reasons for the proposed transfer, and (4) the date on which the trustee expects the proposed transfer to occur. (*See* "**Administration of a trust: notice**," below, regarding the *manner* of notice.) The trustee may transfer some or all of the trust property to a successor trustee (*see* "**Trustee: vacancies**," below) in connection with the transfer of the trust's principal place of administration. (R.C. 5801.07(B), (C), (D), and (E).)

⁶ *The Ohio Trust Code defines a "state" as a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, or an Indian tribe or band recognized by federal law or formally acknowledged by a state (R.C. 5801.01(U)).*

Creation of a trust; specified purposes

Creation of a trust

The Ohio Trust Code authorizes trusts to be created by any of the following methods (R.C. 5804.01):

(1) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death ("person" includes an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, and any other legal or commercial entity (R.C. 5801.01(N));

(2) Declaration by the owner of property that the owner holds identifiable property as trustee;

(3) Exercise of a power of appointment in favor of a trustee;

(4) A court order.

A trust is created under the Ohio Trust Code only if all of the following apply (R.C. 5804.02(A)):

(1) The settlor of the trust, other than the settlor of a trust created by court order, has capacity to create a trust.

(2) The settlor of the trust, other than the settlor of a trust created by court order, indicates an intention to create the trust.

(3) The trust has a definite beneficiary⁷ or is (a) a charitable trust, (b) a trust for the care of an animal (below), or (c) a trust for noncharitable purposes (below).

(4) The trustee has duties to perform.

(5) The same person is not the sole trustee and the sole beneficiary.

The Ohio Trust Code prohibits the creation of a trust unless the trust's purposes are lawful, not contrary to public policy, and possible to achieve. A trust exists and the trust's assets must be held "for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust." (R.C. 5804.04.) A

⁷ For this purpose, a beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities (R.C. 5804.02(B)).

trust is void to the extent that the trust's creation is induced by "fraud," "duress," or "undue influence"; these terms are defined by the Code as having the same meanings as when used in connection with determining the validity of a will (R.C. 5804.06).

Under the Ohio Trust Code, a trust may exist without a trust instrument, unless an instrument is required by provisions of the Revised Code outside of the Ohio Trust Code. The creation of an oral trust and its terms, however, may be established only by clear and convincing evidence. (R.C. 5804.07.)

A trust, whether executed prior to, on, or after the bill's effective date, is valid regardless of the existence, size, or character of the corpus of the trust. A trust is not invalid because a person, including, but not limited to, the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial enjoyment of the corpus of the trust, provided that one or more other persons hold a vested, contingent, or expectant interest relative to the enjoyment of the corpus of the trust upon the cessation of the present beneficial enjoyment. Further, the bill provides that a merger of the legal and equitable titles to the corpus of the trust does not occur in the trust's creator, and, notwithstanding any contrary provision of R.C. Chapter 2107., which regulates wills, the trust is not a testamentary trust and its corpus may be legally distributed to other beneficiaries in accordance with the provisions of the trust upon the cessation of the present beneficial enjoyment, whether the trust was executed prior to, on, or after October 10, 1991. (R.C. 5804.02(D) and (E); these divisions restate R.C. 1335.01(B) and (C), a section repealed by the bill.)

The terms of a trust may authorize a trustee to select a beneficiary from an indefinite class; however, if the trustee does not exercise this power within a reasonable time, the power fails, and the property subject to the power passes under the Ohio Trust Code to the persons who would have taken the property had the power not been conferred to the trustee. (R.C. 5804.02(C).)

A trust not created by a will is validly created, under the Ohio Trust Code, if its creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of the creation, any of the following applies (R.C. 5804.03):

- (1) The settlor was domiciled in, has a place of abode in, or was a national of the jurisdiction.
- (2) A trustee was domiciled or had a place of business in the jurisdiction.
- (3) Any trust property was located in the jurisdiction.



Specified purposes

A *charitable* trust may be created under the Ohio Trust Code for the relief of poverty, the advancement of education or religion, the promotion of health, governmental, or municipal purposes, or other purposes the achievement of which is beneficial to the community. If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries that are consistent with the settlor's intention to the extent that it can be determined. The settlor of a charitable trust and other interested parties may maintain a proceeding to enforce the trust. (R.C. 5804.05.)

A trust may be created under the Ohio Trust Code to provide for the care of an animal alive during the settlor's lifetime. A trust of this nature terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal. A person appointed in the terms of a trust of this nature may enforce the trust, or, if no person is appointed in the terms of the trust, the court may appoint a person to enforce the trust. A person having an interest in the welfare of the animal or animals may request the court to appoint a person to enforce the trust or to remove an appointed person. The Code restricts the use of the trust property to its intended use, the care of the animal or animals, except to the extent that the court determines that the value of the trust property exceeds the amount required for that use. The Code requires the distribution of the property that is not required for that use to the settlor, if then living, or to the settlor's successors in interest, except as otherwise provided in the terms of the trust. (R.C. 5804.08.)

A trust also may be created for a *noncharitable* purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The Ohio Trust Code limits the enforcement of a trust created for a noncharitable purpose to no longer than 21 years. A person appointed in the terms of the trust may enforce a trust of this nature or, if no person is appointed in the terms of the trust, the court may appoint a person to enforce the trust. The Code limits the use of the trust property to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for that use. The Code requires the distribution of the property that is not required for that use to the settlor, if then living, or to the settlor's successors in interest, except as otherwise provided in the terms of the trust. (R.C. 5804.09.)

Under the Ohio Trust Code, persons appointed to enforce a trust created for the care of an animal or another noncharitable purpose have the rights of current beneficiaries (R.C. 5801.09(B)).

Modification, termination, or revocation of a trust: noncharitable irrevocable trust; charitable trust; inter vivos trust; revocable trust; combining and dividing trusts

Modification, termination, or revocation of a trust

In addition to termination under methods specified elsewhere in the Ohio Trust Code, a trust terminates under the Ohio Trust Code to the extent that the trust is revoked or expires pursuant to its terms, a court determines that no purpose of the trust remains to be achieved, or a court determines that the purposes of the trust have become unlawful or impossible to achieve. As described below, a *trustee or beneficiary* may commence a proceeding to approve or disapprove a proposed modification or termination of a trust, or to approve or disapprove a trust combination or division (see "**Administration of a trust: powers of the trustee**," below, regarding the role of the trustee following a modification or termination). As described below, a *settlor* may commence a proceeding to approve or disapprove a proposed modification or termination of a trust, and the *settlor of a charitable trust* may maintain a proceeding to modify the trust. (R.C. 5804.10.) The court may "reform" the terms of a trust, even if the terms are unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement (R.C. 5804.15). The court may modify the terms of a trust to achieve a settlor's tax objectives in a manner that is not contrary to the settlor's probable intention and may provide that the tax modification has retroactive effect (R.C. 5804.16).

The Ohio Trust Code also permits the court to modify the administrative or dispositive terms of a trust or terminate a trust if, because of circumstances not anticipated by the settlor, the modification or termination will further the purposes of the trust. The court must make the modification, to the extent practicable, in accordance with the settlor's probable intention. The court also may modify the administrative terms of a trust if continuation of the trust on its existing terms is impracticable or impairs the trust's administration. Upon the termination of the trust under these circumstances, the trustee must distribute the trust property in a manner consistent with the purposes of the trust. (R.C. 5804.12.)

Noncharitable irrevocable trust

Under the Ohio Trust Code, if a court finds upon petition that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court must enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.

An agent under a power of attorney may exercise a settlor's power to consent to a trust's modification or termination only to the extent expressly authorized by both the power of attorney and the terms of the trust. The settlor's guardian of the estate⁸ may exercise the settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized. The guardian of the settlor's person⁹ may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized and a guardian of the estate has not been appointed. This paragraph and the preceding paragraph, however, apply only to irrevocable trusts created on or after the effective date of the Ohio Trust Code and to revocable trusts that become irrevocable on or after the effective date of the Ohio Trust Code. The paragraphs do not apply to a noncharitable irrevocable trust described in section 42 U.S.C. 1396p(d)(4) of the federal Social Security Act. (R.C. 5804.11(A).)

A court also may *terminate* a noncharitable irrevocable trust with the consent of all of the beneficiaries of the trust, if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A court also may *modify* a noncharitable irrevocable trust, except for the removal or replacement of a trustee, with the consent of all of the beneficiaries of the trust, if the court concludes that the modification is not inconsistent with a material purpose of the trust. Under the Ohio Trust Code, a spendthrift provision in the terms of a trust may, but is not presumed to, constitute a material purpose of the trust.¹⁰ The court's authority to terminate or modify an irrevocable trust under this paragraph is not limited by the effective date of the Ohio Trust Code, or by the Social Security Act, as applicable in the preceding paragraphs. (R.C. 5804.11(B).)

⁸ *The Ohio Trust Code defines a "guardian of the estate" as a guardian appointed by a court to administer the estate of any individual or to serve as conservator of the property of an individual 18 years of age or older under R.C. 2111.021 of the Probate Law (R.C. 5801.01(H)). Existing R.C. 2111.021 of the Probate Law provides means to establish conservatorships for competent, physically infirm adults.*

⁹ *The Ohio Trust Code defines a "guardian of the person" as a guardian appointed by a court to make decision regarding the support, care, education, health, and welfare of any individual or to serve as conservator of the person of an individual 18 years of age or older under section 2111.021 of the Probate Law. "Guardian of the person" does not include a guardian ad litem. (R.C. 5801.01(I).)*

¹⁰ *The Ohio Trust Code defines a "spendthrift provision" as a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest (R.C. 5801.01(T)).*

Upon the termination of a trust with the consent of all of the trust's beneficiaries and, if necessary, a trust's settlor, the trustee must distribute the trust's property as agreed by the beneficiaries (R.C. 5804.11(C)).

A court also may approve a proposed modification or termination of a noncharitable irrevocable trust *without* the consent of all of the beneficiaries of the trust, if the court is satisfied of both of the following (R.C. 5804.11(D)):

(1) That if all of the beneficiaries had consented, the conditions would have allowed the court to modify or terminate the trust;

(2) The interests of a beneficiary who does not consent will be adequately protected.

The Ohio Trust Code provides that a trust described in 42 U.S.C. 1396p(d)(4) of the Social Security Act is irrevocable if the terms of the trust prohibit the settlor from revoking the trust, whether or not the settlor's estate or the settlor's heirs are named as the remainder beneficiary or beneficiaries of the trust upon the settlor's death (R.C. 5804.18).

Charitable trust

All of the following apply under the Ohio Trust Code if a particular charitable purpose of a charitable trust becomes unlawful, impracticable, or impossible to achieve (R.C. 5804.13(A)):

(1) The trust does not fail in whole or in part.

(2) The trust property does not revert to the settlor or the settlor's successors in interest.

(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes. The Attorney General is a necessary party to the judicial proceeding.

A provision in the terms of a charitable trust for the distribution of trust property to a noncharitable beneficiary prevails over the court's authority above to apply cy pres or to modify or terminate the trust (R.C. 5804.13(B)).

Inter vivos trust

Under the Ohio Trust Code, except with respect to certain charitable trusts as described below, after the trustee of an inter vivos trust consisting of trust property having a total value of less than \$100,000 gives notice to the qualified

beneficiaries of the inter vivos trust, the *trustee* may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration of the trust. Upon the termination of the trust in this manner, the trustee must distribute the trust estate in accordance with any provision specified in the trust instrument for the premature termination of the trust. If the trust instrument does not contain a provision of that nature, the trustee must distribute the trust estate among the beneficiaries of the trust in accordance with the beneficiaries' respective beneficial interests and in a manner that the trustee determines is equitable. The authority of a trustee to terminate an inter vivos trust of insufficient value as described above does *not* apply to: (1) a charitable trust that has one or more charitable organizations as qualified beneficiaries, or (2) a charitable trust the terms of which authorize or direct the trustee to distribute trust income or principal to one or more charitable organizations to be selected by the trustee, or for one or more charitable purposes for the creation of a charitable trust under the Ohio Trust Code *if* any of the following apply: (a) the distributions may be made on the date that the trust would be terminated by the trustee as described above, (b) the distributions could be made on the date that the trust would be terminated by the trustee as described above if the interests of the current beneficiaries of the trust terminated on that date, but the termination of those interests would not cause the trust to terminate, or (c) the distributions could be made on the date that the trust would be terminated by the trustee as described above, if the trust terminated on that date but was not terminated by the trustee as described above. (R.C. 5804.14(A) and (C).)

In distributing the trust estate upon termination of the trust as described in the preceding paragraph, the trustee must consider all of the following (R.C. 5804.14(C)):

- (1) The existence of any agreement among the beneficiaries with respect to their beneficial interests;
- (2) The actuarial values of the separate beneficial interests of the beneficiaries;
- (3) Any expression of preference of the beneficiaries that is contained in the trust instrument.

Under the Ohio Trust Code, a probate *court* may modify or terminate an inter vivos trust consisting of trust property having a total value of less than \$100,000 or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration. Upon the termination of the trust in this manner, the court must order the distribution of the trust estate in accordance with any provision specified

in the trust instrument for the premature termination of the trust. If the trust instrument does not contain a provision of that nature, the court must order the distribution of the trust estate among the beneficiaries of the trust in accordance with the beneficiaries' respective beneficial interests and in a manner that the court determines is equitable. In distributing the trust estate, the court must consider the same factors as a trustee distributing the trust estate, as described above.

The existence of a spendthrift or similar provision in a trust instrument or will does not preclude a trustee or court from choosing to terminate an inter vivos trust of insufficient value. The Ohio Trust Code's provisions relating to the termination of an inter vivos trust of insufficient value do not apply to an easement for conservation or preservation. (R.C. 5804.14(B), (D), (E), and (F).)

The bill repeals existing section 1339.66 of the Ohio Uniform Prudent Investor Act, which governs the termination of both inter vivos and testamentary trusts with a total value of less than \$100,000. The existing law differs from R.C. 5804.14 in not providing for the termination of the trust by the trustee. A trustee must, upon providing notice to the beneficiaries of a trust, file a motion with the court asking the court to terminate the trust. The court may terminate the trust after a hearing, if the court finds all of the following: (1) the continuation of the trust is not economically feasible, (2) the termination of the trust would benefit the beneficiaries, (3) the termination is equitable and practicable, and (4) the current value of the trust is less than \$100,000. The existing law does not provide for the termination of the trust in this manner by the trustee.

Revocable trust

Under the Ohio Trust Code, unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend a trust created under an instrument executed on or after the effective date of the bill. An agent under a power of attorney may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only to the extent expressly authorized by both the terms of the trust and the power. The capacity to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required for a will.

The Ohio Trust Code defines "revocable," as applied to a trust, as revocable at the time of determination by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest; 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. (R.C. 5801.01(R), 5806.01, and 5806.02(A) and (E).)

If a revocable trust is created or funded by more than one settlor, all of the following apply (R.C. 5806.02(B)):

(1) To the extent the trust consists of community property, either spouse acting alone may revoke the trust, but the trust may be amended only by joint action of both spouses.

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.

(3) Upon the revocation or amendment of the trust by less than all of the settlors, the trustee must promptly notify the other settlors of the revocation or amendment.

A settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust or, if the terms of the trust do not provide a method, by any other method manifesting clear and convincing evidence of the settlor's intent, provided that a revocable trust may not be revoked or amended by a will or codicil, regardless of whether the will or codicil refers to the trust or specifically devises property that otherwise would have passed according to the terms of the trust unless the terms of the trust expressly allow the trust to be revoked or amended by a will or codicil (R.C. 5806.02(C)).

Upon the revocation of a revocable trust, the trustee must deliver the trust property as the settlor directs. A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

A guardian of the estate of the settlor or, if no guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property with the approval of the court supervising the guardianship. (R.C. 5806.02(D), (F), and (G).)

During the lifetime of the settlor of a revocable trust, whether or not the settlor has the capacity to revoke the trust, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.¹¹ If the trustee breaches that duty during the lifetime of the settlor, any recovery obtained from the trustee after the settlor becomes incapacitated or dies

¹¹ *The Ohio Trust Code even authorizes a trustee while a trust is revocable to follow a direction of the settlor that is contrary to the terms of the trust (R.C. 5808.08(A)).*

must be apportioned by the court. If the settlor is living when the recovery is obtained, the court must apportion the recovery between the settlor and the trust, or allocate the entire recovery to the settlor or the trust, as it determines to be equitable under the circumstances. If the settlor is not living when the recovery is obtained, the court must apportion the recovery between the settlor's estate and the trust, or allocate the entire recovery to the settlor's estate or the trust, as it determines to be equitable under the circumstances. The holder of a power of withdrawal has the rights of a settlor of a revocable trust to the extent of the property subject to that power during the period that the power may be exercised. (R.C. 5806.03.) The Ohio Trust Code defines a "power of withdrawal" as a presently exercisable general power of appointment other than a power exercisable by a trustee that is limited by an ascertainable standard or that is exercisable by another person only upon consent of the trustee or a person holding an adverse interest (R.C. 5801.01(O)).

Combining and dividing trusts

The Ohio Trust Code provides, that after notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust (R.C. 5804.17).

Existing section 1339.67 of the Ohio Uniform Prudent Investor Act, repealed by the bill, allows a trustee to consolidate two or more trusts, or to divide a single trust, when the consolidation or division is "in the best interests of the beneficiaries of the trust or trusts, 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." Existing law requires a trustee or beneficiary to file a motion or complaint with the court for approval of a consolidation or division of a trust or trusts. Existing law does not affect other rights or procedures under the Revised Code, the terms of a trust, at common law, or in equity, to consolidate, divide, or terminate trusts. (Existing R.C. 1339.67--repealed.)

Spendthrift provision and creditors; mandatory distributions

The Ohio Trust Code provides that a spendthrift provision (*see* footnote 10, above) is valid only if the provision restrains both voluntary and involuntary transfer of a beneficiary's interest or if it restrains involuntary transfer of a beneficiary's interest and permits voluntary transfer of a beneficiary's interest only with the consent of a trustee who is not the beneficiary. A term of a trust that provides the trust is held subject to a "spendthrift trust," or words of similar

import, is sufficient to restrain both voluntary and involuntary transfer of a beneficiary's interest. (R.C. 5805.01(A) and (B).)

Beneficiaries may not transfer an interest in a trust in violation of a valid spendthrift provision, and, except as otherwise provided, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. Real property or tangible personal property that is owned by the trust but that is made available for a beneficiary's use or occupancy in accordance with the trustee's authority under the trust instrument is not considered to have been distributed by the trustee or received by the beneficiary for purposes of allowing a creditor or assignee of the beneficiary to reach the property. (R.C. 5805.01(C).)

A spendthrift provision is unenforceable against either of the following (R.C. 5805.02(B)):

(1) A beneficiary's child¹² or current spouse (the provision *is* enforceable against a beneficiary's *former* spouse), if the child or spouse has a judgment or court order against the beneficiary for support, but 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;

(2) A claim of Ohio or the United States to the extent provided by the Revised Code or federal law.

However, a claimant described in either (1) or (2) may obtain an order from the court attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to the relief that is appropriate under the circumstances, considering among any other factors that the court determines to be appropriate, 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. (R.C. 5805.02(D).)

Notwithstanding the provisions of (1) or (2), above, a creditor or assignee of a beneficiary of a wholly discretionary trust may reach the beneficiary's interest in the trust, or a distribution by the trustee before its receipt by the beneficiary, whether by attachment of present or future distributions to or for the benefit of the beneficiary, by judicial sale, by obtaining an order compelling the trustee to make

¹² For this purpose, a "child" includes any person for whom an order or judgment for child support has been entered in Ohio or another state (R.C. 5805.02(A)).

distributions from the trust, or by any other means, regardless of whether the trust instrument includes a spendthrift provision (R.C. 5805.03).

For purposes of the Ohio Trust Code, a "wholly discretionary trust" is a trust to which all of the following apply (R.C. 5801.01(Y)(1)):

- (1) The trust is irrevocable.
- (2) Distributions of income or principal from the trust may or must be made to or for the benefit of the beneficiary only at the trustee's discretion.
- (3) The beneficiary does not have a power of withdrawal from the trust.
- (4) The terms of the trust use "sole," "absolute," "uncontrolled," or similar language to describe the trustee's discretion to make distributions to or for the benefit of the beneficiary.
- (5) The terms of the trust do not provide any standards to guide the trustee in exercising the trustee's discretion to make distributions to or for the benefit of the beneficiary.
- (6) The beneficiary is not the settlor, the trustee, or a cotrustee.
- (7) The beneficiary does not have the power to become the trustee or cotrustee.

A trust may be wholly discretionary, notwithstanding conditions (6) and (7), above, 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. If a trust is for an individual who is blind or disabled, as defined by the Social Security Act, a wholly discretionary trust may include either or both: (1) precatory language regarding the trust's 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, and (2) a prohibition against providing food, clothing, and shelter for the beneficiary.

Under the Ohio Trust Code, a trust may be a wholly discretionary trust with respect to one or more but less than all beneficiaries. If a beneficiary has the power of withdrawal, the trust may be wholly discretionary with respect to that beneficiary during any period in which the beneficiary may not exercise the power of withdrawal. During a period in which the beneficiary may exercise the power of withdrawal, both of the following apply: (1) the portion of the trust that the beneficiary may withdraw may not be a wholly discretionary trust with respect to

the beneficiary, and (2) the portion of the trust that the beneficiary may not withdraw may be a wholly discretionary trust with respect to that beneficiary.

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 the power of withdrawal, then upon the lapse, release, or waiver of the power, the beneficiary must be treated as having made contributions to the trust only to the extent that the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts: (1) the amount specified in section 2041(b)(2) (estate tax) or 2514(e) (gift tax) of the Internal Revenue Code for a lapse, (2) 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 (amount excluded from gift tax), or (3) 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. (R.C. 5801.01(Y)(2), (3), (4), and (5).)

Under the Ohio Trust Code, a creditor of a beneficiary may not compel a distribution from a trust, whether or not the trust contains a spendthrift provision, if the distribution is subject to the trustee's discretion even if the discretion is expressed in the form of a standard distribution or the trustee has abused the discretion (R.C. 5805.04(B)). There are two exceptions to this provision (R.C. 5805.04(C) and (D)):

(1) The restriction does not apply to Ohio for any claim for support of a beneficiary in a state institution if the terms of the trust do not include a spendthrift provision and do not include a standard for distributions to or from the beneficiary under which the trustee may make distributions for the beneficiary's support.

(2) Unless the settlor has explicitly provided in the trust that the beneficiary's child or spouse or both are excluded from benefiting from the trust, to the extent that a trustee of a trust that is not a wholly discretionary trust has not complied with a standard of distribution or has abused the discretion, both of the following apply:

(a) The court may order a distribution to satisfy a judgment or court order against the beneficiary for support of the beneficiary's child or spouse, provided that the court may order the distributions only if distributions can be made for the beneficiary's support under the terms of the trust and that the court may not order

any distributions under this provision to satisfy a judgment or court order against the beneficiary for support of the beneficiary's former spouse;

(b) The court must direct the trustee to pay to the child or spouse the amount that is equitable under the circumstances, but not more than the amount that the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused their discretion.

With or without a spendthrift provision, to the extent that a beneficiary's interest in a trust is subject to the exercise of a trustee's discretion, whether or not the discretion is subject to one or more standards of distribution, the interest may not be ordered sold to satisfy or partially satisfy a claim of the beneficiary's creditor or assignee. If a trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard,¹³ a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim if the beneficiary were not acting as trustee or cotrustee. (R.C. 5805.04(E) and (F).)

Regardless of whether or not the terms of a trust contain a spendthrift provision, all of the following apply (R.C. 5805.06(A)):

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) With respect to a trust described in 42 U.S.C. 1396p(d)(4)(A) or (C) of the Social Security Act, the court may limit the award of a settlor's creditor under (1) or (2), above, to the relief that is appropriate under the circumstances, considering among any other factors that the court determines to be appropriate, the supplemental needs of the beneficiary.

All of the following apply to paragraphs (1) to (3) above (R.C. 5805.06(B)):

¹³ *The Ohio Trust Code defines "ascertainable standard" as a standard relating to an individual's health, education, support, or maintenance within the meaning of estate and gift tax provisions of the Internal Revenue Code, §§ 26 U.S.C. 2041(b)(1)(a) and 26 U.S.C. 2514(c)(1) (R.C. 5801.01(B)).*

(1) The holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power during the period the power may be exercised.

(2) Upon the lapse, release, or waiver of the power of withdrawal, the holder is treated as the settlor of the trust only to the extent that 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 (estate and gift taxes);

(b) If the donor of the property subject to the holder'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 (gift tax);

(c) If the donor of the property subject to the holder'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.

In addition to the above, a spendthrift provision in a trust does not stop a creditor or assignee of a beneficiary from reaching a mandatory distribution under certain conditions (*see* "**Spendthrift provision and creditors; mandatory distributions**," below) or prevent a court from ordering costs, expenses, and fees to be paid from a trust as the result of judicial proceedings involving a trust's administration (*see* "**Breach of trust and liabilities: judicial proceedings**," below). (R.C. 5805.02(E).)

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt (R.C. 5805.07).

Mandatory distributions

The Ohio Trust Code permits a court, to the extent that a trust that gives a beneficiary the right to receive one or more mandatory distributions does not contain spendthrift provisions, to 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.¹⁴ The court

¹⁴ *The Ohio Trust Code defines a "mandatory distribution" as a distribution of income or principal, including a distribution upon termination of the trust, that the trustee is required to make to a beneficiary under the terms of the trust. "Mandatory distributions" do not include distributions that a trustee is directed or authorized to make pursuant to a support or other standard, regardless of whether the terms of the trust provide that the*

may limit the award to the relief that is appropriate under the circumstances, considering among any other factors that the court determines to be appropriate, 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. If in exercising its power, 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 those actions the court must consider, among any other factors the court considers relevant, the amount of the claim of the creditor or assignee and the proceeds that a sale would produce relative to the potential value of the interest to the beneficiary.

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution that the beneficiary is entitled to receive if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date. (R.C. 5805.05.)

Trustee: acceptance and compensation; bond; vacancies; resignation or removal; cotrustee

Acceptance and compensation

Under the Ohio Trust Code, a person designated as a trustee accepts the trusteeship by substantially complying with a method of acceptance provided in the terms of the trust or, if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship (R.C. 5807.01(A)).¹⁵ A trustee's powers and duties with regard to the administration of a trust are discussed below (*see "Administration of a trust,"* below). A designee may do either or both of the following without the actions constituting the designee's acceptance of the trusteeship (R.C. 5807.01(C)):

trustee "may" or "shall" make the distributions pursuant to a support or other standard. (R.C. 5801.01(M).)

¹⁵ *The Ohio Trust Code defines a "trustee" as an original, additional, or successor trustee or a cotrustee (R.C. 5801.01(X)).*

(1) Act to preserve the trust property if, within a reasonable period of time after acting, the person sends a rejection of the trusteeship to the settlor¹⁶ or, if the settlor is dead or lacks capacity, to a qualified beneficiary;¹⁷

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

Under the Ohio Trust Code, a person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable period of time after knowing of the designation is deemed to have rejected the trusteeship. (R.C. 5807.01(B).)

If the terms of a trust do not specify a trustee's compensation, the trustee is entitled to compensation that is reasonable under the circumstances. If the terms of a trust specify a trustee's compensation, the trustee is entitled to the compensation specified, but the court may allow more or less compensation if the duties of the trustee are substantially different from those contemplated when the trust was created or the compensation specified by the terms of the trust would be unreasonably low or high. The Ohio Trust Code entitles trustees to be reimbursed out of trust property, with interest as appropriate, for expenses properly incurred in the administration of the trust, and to the extent necessary to prevent the unjust enrichment of the trust, for expenses that were not properly incurred in the administration of the trust. Any advance of money by the trustee for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest. (R.C. 5807.08 and 5807.09.)

¹⁶ *The Ohio Trust Code defines a "settlor" as a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion. (R.C. 5801.01(S).) "Property" means anything or any interest in anything that may be the subject of ownership (R.C. 5801.01(P)).*

¹⁷ *The Ohio Trust Code defines a "qualified beneficiary" as a beneficiary to whom, on the date that the beneficiary's qualification is determined, any of the following applies: (1) the beneficiary is a distributee or permissible distributee of trust income or principal, (2) the beneficiary would be a distributee or permissible distributee of trust income or principal if the interest of the distributees in (1) terminated on that date but the termination of those interests would not cause the trust to terminate, or (3) the beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date (R.C. 5801.01(Q)).*

Bond

Under the Ohio Trust Code, a trustee is not normally required to post bond. However, the Code requires a trustee to post bond if the court determines that bond is needed to protect the interests of the trust's beneficiaries or, when the terms of a trust require a trustee to post bond and a court has not dispensed with the requirement. The court may specify the amount of a bond, the bond's liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time. A regulated financial-service institution qualified to do business in Ohio does not have to give bond even if required by the trust. (R.C. 5807.02.)

Vacancies

When a vacancy in a trusteeship occurs, the Code permits the vacancy to be left open if one or more trustees remain. If there are cotrustees, the remaining trustees may act for the trust (*see* "**Trustee: cotrustee**," below). The Code requires a vacancy to be filled only when a trust has no remaining trustee. (R.C. 5807.04(B) and 5807.03(B).) The Code provides that a vacancy in a trusteeship occurs under any of the following circumstances (R.C. 5807.04(A)):

- (1) A person designated as trustee rejects the trusteeship.
- (2) A person designated as trustee cannot be identified or does not exist.
- (3) A trustee resigns, is disqualified or removed, or dies (*see* "**Trustee: resignation or removal**," below).
- (4) A guardian of the estate or person is appointed for an individual serving as trustee.

When a vacancy in the trusteeship of a noncharitable trust must be filled, the Ohio Trust Code provides that the vacancy must be filled in the following order of priority (R.C. 5807.04(C)):

- (1) By a person designated in the terms of the trust to act as successor trustee;
- (2) By a person appointed by someone designated in the terms of the trust to appoint a successor trustee;
- (3) By a person appointed by unanimous agreement of the qualified beneficiaries;
- (4) By a person appointed by the court.

When a vacancy in the trusteeship of a charitable trust must be filled, the bill provides that the vacancy must be filled in the following order of priority (R.C. 5807.04(D)):

- (1) By a person designated in the terms of the trust to act as successor trustee;
- (2) By a person appointed by someone designated in the terms of the trust to appoint a successor trustee;
- (3) By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust;
- (4) By a person appointed by the court.

Under existing section 1339.14 of the Fiduciary Law, repealed by the bill, the terms of a trust may designate a person to act for a trustee during the trustee's *military service*. If the terms of a trust do not designate a successor, the trustee or court may designate a person to act during the trustee's absence. The current law applies only to vacancies open due to a trustee entering military service.¹⁸

¹⁸ Existing section 1339.14 of the Fiduciary Law, states that any person who is engaged or is about to engage in military service who is acting as a trustee or advisor under any trust instrument and who is not appointed by and accountable to the probate court may, unless otherwise expressly provided by the terms of the trust, appoint a competent person, who may be a cotrustee or coadvisor, to exercise all of the powers, duties, and privileges of the trustee or advisor. If the trust instrument names a successor, under the existing law, the person must be appointed by the trustee or advisor if the named successor is willing and able to act. Under the existing law, an appointment does not take effect until approved by the court of common pleas, upon petition of the trustee or advisor or of the nominated trustee or advisor, upon notice to those interested parties and in such manner as the court directs. If the trustee or advisor in military service has not exercised the power to appoint a person to exercise the trustee's powers and duties and has not filed a petition with the court for the approval of an appointment, any other person interested in the trust estate may file a petition with the court of common pleas asking for an order suspending the powers of the trustee or advisor in military service and appointing another person to exercise the trustee's powers. Notice of the filing must be given to the trustee or advisor in the manner directed by the court. Other persons interested in the trust may obtain relief from the court. Substitute trustees and advisors appointed under the existing law are accountable only for the assets of the trust estate that come into their possession, or as should be, with reasonable diligence, in their possession. A former trustee, upon leaving military service and petitioning the court, must be reappointed to their former trusteeship if suitable and competent.

Whether or not a vacancy in a trusteeship exists or must be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust (R.C. 5807.04(E)).

Resignation or removal

Under the Ohio Trust Code, a trustee may resign by giving at least 30 days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees, or with the approval of the court. In approving a resignation of a trustee, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property. Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation. (R.C. 5807.05.)

A settlor, a cotrustee, or a beneficiary of a trust may request the court to remove a trustee, or the court may remove a trustee on the court's own initiative (R.C. 5807.06(A)). The Code authorizes the court to remove a trustee for any of the following reasons (R.C. 5807.06(B)):

- (1) The trustee has committed a serious breach of trust.
- (2) Lack of cooperation among cotrustees substantially impairs the administration of the trust.
- (3) 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.

Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the Code permits the court to order any appropriate relief from among the remedies that the court may order for a breach of trust that is necessary to protect the trust property or the interests of the beneficiaries (*see* "**Breach of trust and liabilities**," below). Unless a cotrustee remains in office or the court orders otherwise, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property. A trustee who has resigned or been removed must proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to the property. (R.C. 5807.06(C) and 5807.07.)

Existing R.C. 2109.24 provides for the removal of a fiduciary or trustee by the probate court. The bill modifies R.C. 2109.24 to provide that its provisions apply only to the removal of testamentary trustees. As amended, R.C. 2109.24

provides that the court may remove any fiduciary, after giving the fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, or fraudulent conduct, because the interest of the *property, testamentary trust, or estate that the fiduciary is responsible for administering* demands it, or for any other cause authorized by law. The court may remove a *testamentary* trustee upon the written application of more than one-half of the persons having an interest in the estate controlled by the *testamentary* trustee, but the *testamentary* trustee is not to be considered as a person having an interest in the estate under the proceedings; except that no *testamentary* trustee appointed under a will can be removed upon such written application unless for a good cause.

Cotrustee

Multiple trustees may administer a trust. The Ohio Trust Code authorizes cotrustees to act by majority decision whenever three or more cotrustees serve a trust. In the event of a vacancy in a cotrusteeship, the remaining cotrustees may act for the trust.

The Code requires a cotrustee to participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or when the cotrustee has properly delegated the performance of the function to another trustee. If prompt action is necessary to achieve the purposes of the trust or to avoid injury to trust property, and a cotrustee is unavailable to perform their duties because of absence, illness, disqualification under another law, or other temporary incapacity, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust. (R.C. 5807.03(A), (B), (C), and (D).)

The Ohio Trust Code authorizes a trustee to delegate to a cotrustee "duties and powers" that a prudent trustee of comparable skills could properly delegate under the circumstances. The delegation is governed by R.C. 5808.07, which authorizes a trustee to delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances to an "agent," cotrustee, or other fiduciary (existing R.C. 1339.59, amended and renumbered as R.C. 5808.07). A trustee may revoke a delegation unless the delegation was irrevocable. (R.C. 5807.03(E).)

Trustees are required to exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress a serious breach of trust. However, a trustee is not required to exercise that reasonable care, and is not liable for resulting losses, when R.C. 5815.25 applies (existing R.C. 1339.43, renumbered by the bill; this section provides that a trustee without power to direct the acquisition, disposition, or retention of investments for a trust is not liable for losses due to other parties' related actions or inactions) or there is more

than one other trustee and the other trustees act by majority vote. A trustee who does not join in a cotrustee's action is not liable for the action, *unless* the trustee fails to exercise the reasonable care that a cotrustee is required to exercise, fails to exercise reasonable care, skill, and caution in delegating functions, or fails to participate in the performance of the trustee's function absent illness, disqualification, or other incapacity. If a dissenting trustee joins in an action at the direction of the majority of the trustees, and the dissenting trustee notified any cotrustee of the dissent at or before the time of the action, the trustee is not liable for the action. (R.C. 5807.03(F), (G), and (H).)

Representatives

The Ohio Trust Code provides that to the extent that there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to a particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power (R.C. 5803.02). To the extent that there is no conflict of interest between a representative and the person represented or among those represented with respect to a particular question of dispute, all of the following apply (R.C. 5803.03):

- (1) A guardian of an estate may represent and bind the estate that the guardian of the estate controls.
- (2) A guardian of the person may represent and bind the ward if a guardian of the estate has not been appointed.
- (3) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.
- (4) Except with regard to the trustee's role in private settlement agreements (*see* "**Private settlement agreements**," below), a trustee may represent and bind the beneficiaries of the trust.
- (5) A personal representative of a decedent's estate may represent and bind persons interested in the estate.
- (6) A parent may represent and bind the parent's minor or unborn child if neither a guardian for the child's estate or a guardian of the person has been appointed.

The Ohio Trust Code provides that the consent of a person who may represent and bind another person under R.C. Chapter 5803. is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective (R.C. 5803.01(B)).

Unless otherwise represented, the Ohio Trust Code permits a person having a substantially identical interest with respect to a particular question or dispute to represent a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown and not reasonably ascertainable, to the extent that there is no conflict of interest between the representative and the person represented. This language is similar to language in existing section 1339.66(D) of the Fiduciary Law, a division repealed by the bill. The bill repeals similar language on representation of minors, and incapacitated and unborn persons, in existing section 2109.62(D) of the Probate Law, pertaining to representation of these persons in the event of the termination of a trust. Both of the existing provisions require the representative to have a substantially identical interest "in the trust," rather than "with respect to a particular question or dispute." (R.C. 5803.04 and 2109.62(D).)

A court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown if the court determines that an interest is not represented under R.C. Chapter 5803. or that otherwise available representation might be inadequate. A representative may be appointed to represent several persons or interests. In making decisions, a representative may consider general benefit accruing to the living members of the individual's family. The representative may act on behalf of a person with respect to any matter arising under the Ohio Trust Code, whether or not a judicial proceeding concerning the trust is pending. (R.C. 5803.05.)

Under the Ohio Trust Code, notice to a person who may represent or bind another person has the same effect as if notice were given directly to the other person (R.C. 5803.01(A)).

A person who represents a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf except as provided in R.C. 5804.11 and 5806.02. A settlor may not represent and bind a beneficiary with respect to the termination or modification of a trust under R.C. 5804.11(A). (R.C. 5803.01(C) and (D); see "*Modification, termination, or revocation of a trust: noncharitable irrevocable trust*," above, regarding those sections.)

Administration of a trust: duties of the trustee; notice; powers of the trustee; court intervention; judicial review; conflicts of interest

Duties of the trustee

Upon a trustee's acceptance of a trusteeship, the Ohio Trust Code requires the trustee to administer a trust in good faith and in accordance with the trust's terms and purposes, the interests of its beneficiaries, and the Ohio Trust Code.

The bill states, "A trustee shall *administer the trust* solely in the interests of the beneficiaries." The bill repeals a similar provision in existing law (R.C. 1339.55, amended and renumbered by the bill as R.C. 5808.03) that states, "A trustee shall *invest and manage the trust assets* solely in the interests of the beneficiaries." (Regarding investments, see "**Ohio Uniform Prudent Investor Act**," below.) (R.C. 5808.01, 5808.02(A), and 5808.03(A).)

The Ohio Trust Code also requires a trustee to take reasonable steps to take control of and protect the trust property (R.C. 5808.09). A trustee must exercise reasonable care, skill, and caution in administering a trust as a prudent person would and must consider the purposes, terms, distribution requirements, and other circumstances of the trust in doing so (R.C. 5808.04). A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, must use those special skills or expertise (R.C. 5808.06).

The Ohio Trust Code states, "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries respective interests." This requirement is an amendment of current law, which states, "If a trust has two or more beneficiaries, the trust shall act impartially in investing *and managing the trust assets taking into account any differing interests of the beneficiaries*." (R.C. 1339.55 of the Ohio Uniform Prudent Investor Act, amended and renumbered by the bill as R.C. 5808.03.)

Under the Ohio Trust Code, a trustee must take reasonable steps to enforce claims of the trust, to defend claims against the trust, to collect trust property held by third persons, and keep adequate records of the administration of the trust. A trustee must keep trust property separate from the trustee's own property. A trustee may invest as a whole the property of two or more trusts if the trustee maintains records clearly indicating the respective interests of those trusts. If a trustee is not subject to federal or state banking regulation, except as otherwise provided by R.C. 2131.21 in relation to securities held by fiduciaries, the trustee must designate trust property so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary. (R.C. 5808.10, 5808.11, and 5808.12.)

Under the Ohio Trust Code, a successor trustee is, and acts as, a trustee for a trust (see "**Trustee: acceptance and compensation**," above, including footnote 15). However, R.C. 5808.12 also states, "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 [Ohio Trust Code]" (R.C. 5815.24 is existing R.C. 1339.42, renumbered by the bill). A fiduciary or transferee of real or personal property, under R.C. 5815.24(B), "is not required to inquire into any act, or audit

any account of the transferor fiduciary, unless the transferee is specifically directed to do so in the instrument governing the transferee or unless the transferee has actual knowledge of conduct of the transferee that would constitute a breach of the transferor's fiduciary responsibilities."

The Ohio Trust Code requires trustees to keep the current beneficiaries of the trust reasonably informed about the administration of the trust and the material facts necessary for the beneficiaries to protect the beneficiaries' interests. Unless unreasonable under the circumstances, a trustee must promptly respond to a beneficiary's request for information related to the administration of the trust. (R.C. 5808.13(A).) This section of the Code applies to testamentary trusts notwithstanding any conflicting provisions of Chapter 2109. of the Revised Code or any other provision of the Revised Code that applies specifically to testamentary trusts (R.C. 2109.69(B); see "*The Ohio Trust Code: application,*" above).

Trustees also are required to send to the current beneficiaries, and to other beneficiaries who request it, at least annually and at the termination of the trust, 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. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, the former trustee must send a report for the period during which the former trustee served to the current beneficiaries. A personal representative or guardian may send the current beneficiaries a report on behalf of a deceased or incapacitated trustee. A beneficiary may waive the right to a trustee's report or other information that a trustee otherwise must furnish to the beneficiary. The beneficiary may withdraw a waiver previously given with respect to future reports and information. A trustee may provide this information and reports to other beneficiaries who are not covered above. (R.C. 5808.13(C), (D), and (E).)

Existing section 1339.69 of the Fiduciary Law, repealed by the bill, requires a trustee of an inter vivos trust to furnish a report of the management of the trust upon receiving a written request of a qualified beneficiary or the beneficiary's legal representative, but not more than once every six months. The trustee must furnish a report within 30 days after receiving the request. A beneficiary or legal representative may file a court action to obtain a report, if necessary. The report must be current to within five months prior to the date of the request and must show an inventory of the trust property and receipt and expenditures for the two years prior to the preparation of the report. The report, and others furnished by trustees during the usual course of business, has binding legal effect on the beneficiaries and representatives who receive the report, their heirs and assignees, on the matters described or disclosed in the report, unless one

of the parties receiving the report files an action against the trustee on one of those matters within two years after receiving the report. (R.C. 1339.69--repealed.)

The Ohio Trust Code requires a trustee to do all of the following (R.C. 5808.13(B)):

(1) Upon the request of a beneficiary, promptly furnish to the beneficiary a copy of the trust instrument. If the settlor of a revocable trust that has become irrevocable has completely restated the terms of the trust, the trust instrument furnished by the trustee must be the restated trust instrument, including any amendments to the restated trust instrument. Beneficiaries also may obtain a copy of the original trust instrument, any other restatements of the original trust instrument, or amendments to the original trust instrument and any other restatements of the original trust instrument in a judicial proceeding with respect to the trust.

(2) Within 60 days after accepting a trusteeship, notify the current beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) Within 60 days after the date the trustee acquires knowledge¹⁹ of the creation of an irrevocable trust, or the date that the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, notify the current beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report;

(4) Notify the current beneficiaries in advance of any change in the method or rate of the trustee's compensation.

¹⁹ Under the Ohio Trust Code, a person has "knowledge" of a fact if: (1) the person has actual knowledge of the fact, (2) the person has received notice or notification of the fact, or (3) from all facts and circumstances known to the person at the time in question, the person has reason to know the fact (R.C. 5801.03(A)). An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only: (1) from the time an employee having responsibility to act for the trust received the information, or (2) the information would have been brought to the employee's attention if the organization had exercised reasonable diligence by maintaining reasonable routines for communicating significant information to the employee responsible for the trust through designated employees and by other employees when an employee knows a matter involving the trust would be materially affected by the information (R.C. 5801.03(B)).

The notice requirements in paragraphs (2) and (3) above apply only to a trustee who accepts a trusteeship on or after the bill's effective date (January 1, 2007), to an irrevocable trust created after the bill's effective date, and to a revocable trust that becomes irrevocable after the bill's effective date (R.C. 5808.13(F)).

When the Ohio Trust Code requires a trustee to give notice to current or qualified beneficiaries of a trust, the trustee also must give notice to any other beneficiary who has sent the trustee a request for notice (R.C. 5801.09(A)).

Notice

Trustees and others must provide notice and send documents under the Ohio Trust Code in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods for providing notice and sending documents include: (1) first-class mail, (2) personal delivery, (3) delivery to the person's last known place of residence or place of business, or (4) a properly directed electronic message. However, if a recipient's identity or location is unknown and not reasonably ascertainable by a trustee, a trustee is not required to provide notice or send a document as otherwise required. A person entitled to receive notice or to be sent a document may waive that right. The above notice provisions are not applicable to the provision of notice in connection with a judicial proceeding, which notice is governed by applicable rules of civil procedure. (R.C. 5801.08.)

Powers of the trustee

The Ohio Trust Code permits a trustee, without authorization by the court, to exercise the powers conferred by the terms of the trust and, except as limited by the terms of the trust and the trustee's fiduciary duties under R.C. Chapter 5808., all of the following powers (R.C. 5808.15):

- (1) All powers over the trust property that an unmarried competent owner has over individually owned property;
- (2) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property;
- (3) Any other powers conferred by the Ohio Trust Code.

Without limiting the powers conferred upon a trustee above, a trustee may do all of the following (R.C. 5808.16):

- (1) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;

- (2) Acquire or sell property, for cash or on credit, at public or private sale;
- (3) Exchange, partition, or otherwise change the character of trust property;
- (4) Deposit trust money in an account in a regulated financial-service institution;
- (5) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;
- (7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to do any of the following:
 - (a) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
 - (b) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
 - (c) Pay calls, assessments, and other sums chargeable or accruing against the securities and sell or exercise stock subscription or conversion rights;
 - (d) Deposit the securities with a depository or other regulated financial-service institution.
- (8) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;
- (9) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;

(12) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) With respect to possible liability for violation of environmental law, do any of the following:

(a) Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(b) Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of government enforcement;

(c) Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(d) Compromise claims against the trust that may be asserted for an alleged violation of environmental law;

(e) Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law.

(14) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

(16) Exercise elections with respect to federal, state, and local taxes;

(17) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, exercise rights under



any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, including the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) 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;

(20) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by doing any of the following:

(a) Paying it to the beneficiary's guardian of the estate, or, if the beneficiary does not have a guardian of the estate, the beneficiary's guardian of the person;

(b) Paying it to the beneficiary's custodian under R.C. 5814.01 to 5814.09 of the Revised Code (existing R.C. 1339.31 to 1339.39, part of the Transfers to Minors Act, renumbered by the bill) and, for that purpose, creating a custodianship;

(c) If the trustee does not know of a guardian of the person or estate, or custodian, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;

(d) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

(22) On distribution of the trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;

(23) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) Sign and deliver contracts or other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to the property.

The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust. A person other than a beneficiary who holds a power to direct is presumptively a fiduciary who, as a fiduciary, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty. However, a trustee is not liable for losses resulting from certain actions or failures to act when other persons are granted certain powers with respect to the administration of a trust. (R.C. 5808.08(B), (C), and (D).)

Under the Ohio Trust Code, upon a termination or partial termination of a trust, a trustee may send the trust's beneficiaries a proposal for distribution. A beneficiary may object to the proposal, but the beneficiary's right to object terminates if the beneficiary does not notify the trustee of the beneficiary's objection within 30 days after the proposal is sent. The time limit does not apply unless the proposal informs the beneficiary of the beneficiary's right to object and of the time allowed for objections.

Upon the occurrence of an event terminating or partially terminating a trust, the trustee must proceed expeditiously to distribute the trust property to the persons entitled to the property, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes. A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent that it was induced by improper conduct of the trustee or that the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts related to the breach. (R.C. 5808.17.)

Court intervention

The Ohio Trust Code authorizes a court to intervene in the administration of a trust to the extent provided by law or when invoked by an interested person. A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights. Trusts created under the Revised Code or pursuant to a judgment or decree of a court are subject to continuing judicial supervision to the extent provided by the Revised Code or the court's judgment or decree. An inter vivos trust, however, is not subject to continuing judicial supervision unless ordered by the court. (R.C. 5802.01.)

Under the Code, a person who accepts a trusteeship submits personally to the jurisdiction of Ohio's courts regarding any matter involving a trust that has its principal place of administration in Ohio or that moves its principal place of administration to Ohio. The beneficiaries of a trust having its principal place of administration in Ohio are subject to the jurisdiction of Ohio's courts with respect to the beneficiaries' interests in the trust in regard to any matter involving the trust. By accepting a distribution from a trust, the recipient submits personally to the jurisdiction of Ohio's courts regarding matters involving the trust. These provisions do not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or recipient of trust property. (R.C. 5802.02.)

Under the Ohio Probate Code, the probate division of the Court of Common Pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the Court of Common Pleas to issue writs and orders and to hear and determine actions involving an inter vivos trust (R.C. 5802.03).

Judicial review

The Ohio Trust Code sets a judicial standard of review for a trustee's administration of discretionary trusts. A trustee must 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 cannot 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 the discretion. (R.C. 5808.14(A).)

Unless the terms of a trust indicate otherwise, both of the following conditions apply to powers conferred by a discretionary trust (*see* **COMMENT**) (R.C. 5808.14(B)):

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard;

(2) A trustee may not exercise a power to make a discretionary distribution to satisfy a legal obligation of support that the trustee personally owes another person.

However, these two conditions do not apply to any of the following: (1) a power held by the settlor's spouse who is the trustee of the trust for which a marital deduction, as defined in section 2056(b)(5) or 2523(e) of the Internal Revenue Code, was previously allowed, (2) any trust during any period that the trust may be revoked or amended by its settlor, and (3) a trust if contributions to the trust qualify for the annual exclusion under 2503(c) of the Internal Revenue Code (pertaining to gifts to minors). A power whose exercise is limited or prohibited by the above may be exercised by a majority of the remaining trustees whose exercise of the power is not otherwise limited or prohibited; if the power of all trustees is so limited or prohibited, a court may appoint a special fiduciary with authority to exercise the power. (R.C. 5808.14(C) and (D).)

Existing section 1340.22 of the Fiduciary Law, repealed by the bill, prohibits trustees and other fiduciaries from making any of the following discretionary distributions of either principal or income from a trust:

(1) Distributions to or for the benefit of the trustee in the trustee's individual capacity;

(2) Distributions to satisfy any of the trustee's legal obligations for support or other private purposes;

(3) Distributions to or for the benefit of one or more beneficiaries to the extent that the trustee would or could receive a similar distribution in the trustee's individual capacity under any governing instrument from the beneficiary or beneficiaries acting as a trustee;

(4) Distributions to or for the benefit of one or more beneficiaries who possess both the right to remove the trustee and the right to appoint a successor trustee.

Under the existing law, a trustee may make distributions under paragraphs (1), (3), and (4), above, to the extent permitted by the terms of a trust, provided that the distributions are limited to an ascertainable standard. A trustee's power to make discretionary distributions for a "beneficiary's health, education, support,

comfort, care, comfort and support, support in reasonable comfort, support in accustomed manner of living, maintenance, maintenance in health and reasonable comfort, or any combination of those factors," is measurable in terms of and limited by an ascertainable standard related to the health, education, support, and maintenance of the beneficiary. If a trustee's authority is limited or prohibited by the above, the courts may appoint a special fiduciary to exercise the powers delegated by the terms of a trust for a period of time set by the court. The existing law does not apply to any of the following: (1) powers under a wholly discretionary trust, (2) any power of appointment or withdrawal specifically granted to a beneficiary in the terms of a trust that is exercisable only in the person's individual capacity, (3) any trust during the time that the trust is amendable or revocable by its settlor, or (4) any power held by a decedent's or settlor's spouse who is the trustee under a decedent's trust for which a marital deduction for estate tax purposes has been allowed. Existing R.C. 1340.21 and 1340.23, containing related definitions and limits, also are repealed by the bill. (R.C. 1340.21, 1340.22, and 1340.23--repealed.)

Conflicts of interest

A beneficiary that is affected by a transaction may void a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by a trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, subject to the rights of third parties dealing with or assisting the trustee as provided in R.C. 5810.12 (see "**Breach of trust and liabilities: third-party liability**," below), unless one of the following applies (R.C. 5808.02(B)):

(1) The transaction was authorized by the terms of the trust or by other provisions of the Revised Code.

(2) The court approved the transaction.

(3) The beneficiary failed to commence a judicial proceeding within the time allowed by R.C. 5810.05 (see "**Breach of trust and liabilities: judicial proceedings**," below).

(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with R.C. 5810.09 (see "**Breach of trust and liabilities: liability of trustee**," below).

(5) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming a trustee.

Under the Ohio Trust Code, if a trustee engages in the trustee's individual capacity in a transaction not concerning the trust property, which transaction concerns an opportunity properly belonging to the trust, the transaction is *deemed* to involve a conflict between personal and fiduciary interest (R.C. 5808.02(D)). A sale, encumbrance, or other transaction involving the investment or management of trust property is *presumed* to be affected by a conflict between personal and fiduciary interests if the trustee enters into the transaction with one of the following (R.C. 5808.02(C)):

- (1) The trustee's spouse;
- (2) The trustee's descendant, sibling, or parent, or the spouse of a trustee's descendant, sibling, or parent;
- (3) An agent or attorney of the trustee;
- (4) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

A trustee's investment that is otherwise permitted under the Revised Code is *not presumed* to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the Ohio Uniform Prudent Investor Act (*see* "**Ohio Uniform Prudent Investor Act**," below). In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee must act in the best interests of the beneficiaries. If a trust is the sole owner of a corporation or other form of enterprise, the trustee must elect or appoint directors or other managers to manage the corporation or enterprise in the best interests of the beneficiaries. If a transaction proposed by a trustee might constitute a conflict between fiduciary and personal interests, the Code authorizes a court to appoint a special fiduciary to make a decision with respect to the proposed transaction. (R.C. 5808.02(E), (F), and (H).)

The provisions on conflicts of interest do not preclude either of the following (R.C. 5808.02(G)):

- (1) Any transaction authorized by another section of the Revised Code;
- (2) Unless the beneficiaries establish that a transaction is unfair, any of the following transactions:
 - (a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
 - (b) Payment of reasonable compensation to the trustee;

(c) A transaction between a trust and another trust, decedent's estate, or guardianship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(d) A deposit of trust money in a regulated financial-services institution that is an affiliate of the trustee;

(e) An advance by the trustee of money for the protection of the trust.

Private settlement agreements

The Ohio Trust Code permits specified persons to enter into a written private settlement agreement with respect to any matter concerning the construction of, administration of, or distributions under a trust instrument, the investment of income or principal held by the trustee, and other matters (R.C. 5801.10(C)). It provides that matters that may be resolved by a private settlement agreement include, but are not limited to, all of the following (R.C. 5801.10(C)):

(1) Determining classes of creditors, beneficiaries, heirs, next of kin, or other persons;

(2) Resolving disputes arising out of the administration or distribution under the trust instrument, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the trust instrument;

(3) Granting to the trustee necessary or desirable powers not granted in the trust instrument or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the trust instrument or, if the powers are inconsistent, are necessary for the due administration of the trust instrument;

(4) Modifying the trust instrument, if the modification is not inconsistent with any dominant purpose or objective of the trust;

(5) Modifying the trust instrument in the manner required to qualify the gift under the trust instrument for the charitable estate or gift tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by the Internal Revenue Code and regulations promulgated under the Internal Revenue Code in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(6) Modifying the trust instrument in the manner required to qualify any gift under the trust instrument for the estate tax marital deduction available to

noncitizen spouses, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code and regulations thereunder in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(7) Resolving any other matter that arises under the Ohio Trust Code.

Only the settlor and any trustee are required to be parties to an amendment of a revocable trust pursuant to private settlement agreement. All of the following persons or their representatives must be parties to any other private settlement agreement (R.C. 5801.10(B)):

(1) The settlor, if living and if no adverse income or transfer tax results would arise from the settlor's participation;

(2) All beneficiaries;

(3) All currently serving trustees;

(4) Creditors, if the creditor's interest will be affected by the agreement.

When entering into a private settlement agreement, a trustee represents only the trustee's own individual or corporate interests. The trustee cannot be regarded as a representative of any settlor, beneficiary, or the interests of any settlor or beneficiary in negotiating or entering into the agreement. A private settlement agreement affecting the rights of a creditor may not be entered into without the consent of the creditor. Private settlement agreements may not affect the collection rights of federal, state, or local taxing authorities. (R.C. 5801.10(D) and (F).)

The Ohio Trust Code defines a "creditor," for purposes of private settlement agreements, as any of the following: (1) a person holding a debt or security for a debt entered into by a trustee on behalf of the trust, (2) a person holding a debt secured by one or more assets of the trust, (3) a person having a claim against the trustee or the assets of the trust under R.C. 5805.06 (*see "Spendthrift provision and creditors,"* above), and (4) a person who has attached a beneficiary's interest in a trust through legal process. (R.C. 5801.10(A).)

Private settlement agreements are valid only to the extent that they do not effect a termination of the trust before the date specified in the trust instrument for the trust's termination, does not change the interests of the beneficiaries in the trust except as necessary to effect a modification permitted pursuant to (5) or (6) of the first paragraph of this heading, and includes terms and conditions that could be approved by the court under the Ohio Trust Code or other applicable law. Private

settlement agreements meeting the Code's requirements are final and binding on the trustee, the settlor if living, all beneficiaries, and their heirs, successors, and assigns. Any provisions requiring binding arbitration of disputes arising under a private settlement agreement are enforceable. (R.C. 5801.10(C), (E), and (H).)

Any party to the private settlement agreement may request a court to approve the agreement, to determine whether representation provided under Chapter 5803. of the Revised Code (*see* "**Representatives**," above) was adequate, and to determine whether the agreement contains terms and conditions that the court could have properly approved (R.C. 5801.10(G)).

The private settlement agreement provisions do not affect any of the following: the right of a beneficiary to disclaim property (existing section 1339.68 of the Fiduciary Law, renumbered by the bill as R.C. 5815.36); the modification or termination of a trust (*see* "**Modification, termination, or revocation of a trust**," above); or the ability of a trustee to divide or consolidate a trust under R.C. 5804.17 (*see* "**Modification, termination, or revocation of a trust: combining and dividing trusts**," above). The Code does not restrict or limit a court's jurisdiction to dispose of matters not covered by a private settlement agreement or to supervise the acts of trustees appointed by the court. (R.C. 5801.10(I) and (J).)

The Ohio Trust Code provides that the provisions pertaining to private settlement agreements are to be liberally construed to favor the validity and enforceability of agreements entered into under these provisions. Trustees serving under a trust instrument are not liable to any third person for any loss due to the trustee's actions or inactions taken or omitted in good faith reliance on the terms of a private settlement agreement entered into under these provisions. (R.C. 5801.10(K) and (L).)

The Ohio Trust Code provides that the provisions pertaining to private settlement agreements do *not* apply to: (1) a charitable trust that has one or more charitable organizations as qualified beneficiaries, or (2) a charitable trust the terms of which authorize or direct the trustee to distribute trust income or principal to one or more charitable organizations to be selected by the trustee, or for one or more charitable purposes for the creation of a charitable trust under the Ohio Trust Code *if* any of the following apply: (a) the distributions may be made on the date that a private settlement agreement would be entered into, (b) the distributions could be made on the date that a private settlement agreement would be entered into if the interests of the current beneficiaries of the trust terminated on that date, but the termination of those interests would not cause the trust to terminate, or (c) the distributions could be made on the date that a private settlement agreement would be entered into if the trust terminated on that date. (R.C. 5801.10(M).)

Ohio Uniform Prudent Investor Act

R.C. 1339.52 to 1339.61 currently comprise Ohio's Uniform Prudent Investor Act, designated as such by R.C. 1339.61. These existing sections are amended by the bill and renumbered as sections 5808.03, 5808.05, 5808.07, 5809.01 to 5809.05, 5809.07, and 5809.08 of the Ohio Trust Code. Most of the amendments are nonsubstantive, merely changing cross-references in the renumbered sections. These renumbered sections, and R.C. 5808.02(A) (existing R.C. 1339.55(A), renumbered), 5808.06 (see "**Administration of a trust: duties of the trustee**," above), and 5809.06 (see "**Trustee: cotrustee**," above) are designated as the Ohio Uniform Prudent Investor Act by R.C. 5809.01(A).²⁰

In addition to renumbering the Ohio Uniform Prudent Investor Act and moving the Act to the Ohio Trust Code, making internal changes to cross-references, changing references to R.C. 1339.52 to 1339.61 to references to the Ohio Uniform Prudent Investor Act, and making other nonsubstantive changes, the bill makes the following changes to those sections:

(1) Section 5808.06 of the Ohio Uniform Prudent Investor Act restates language currently found in R.C. 1339.53(C); the language is removed from that section, and the section is renumbered as R.C. 5809.02. The bill does not otherwise substantively amend the renumbered section.

(2) R.C. 5809.06 permits a trustee to "delegate investment and management functions of a trust [to an agent] that a prudent trustee having comparable skills could properly delegate under the circumstances." This language and the related language of R.C. 5809.06 currently is found in R.C. 1339.59. R.C. 1339.59 was amended to permit the delegation of "duties and powers" to "agents, cotrustees, and fiduciaries," and renumbered by the bill as R.C. 5808.07 (see "**Trustee: cotrustee**," above). All of the language in R.C. 5809.06 is identical to former R.C. 1339.59.

The bill amends a few sections solely to change cross-references to existing R.C. 1339.52 to 1339.61 to cross-references to the "Ohio Uniform Prudent Investor Act" (R.C. 1111.13(A)(1), 1111.15(A), and 2109.37(D)).

Breach of trust and liabilities: court remedy; liability of trustee; judicial proceedings; third-party liability

Under the Ohio Trust Code, a violation by a trustee of a duty that the trustee owes to a beneficiary is a breach of trust (R.C. 5810.01(A)).

²⁰ Only division (B) of the renumbered section 5808.07 is included in the Ohio Uniform Prudent Investor Act.

Court remedy

Pursuant to the Ohio Trust Code, a court may do any of the following to remedy a breach of trust that has occurred or may occur (R.C. 5810.01(B)):

- (1) Compel the trustee to perform the trustee's duties;
- (2) Enjoin the trustee from committing a breach of trust;
- (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) Order a trustee to account;
- (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) Suspend the trustee;
- (7) Remove the trustee (*see* "**Trustee: resignation or removal**," above);
- (8) Reduce or deny compensation to the trustee;
- (9) Subject to R.C. 5810.12, below, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds;
- (10) Order any other appropriate relief.

Liability of trustee

A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following (R.C. 5810.02(A)):

- (1) The amount required to restore the value of the trust property and trust distributions to what these would have been had the breach not occurred;
- (2) The profit of the trustee made by reason of the breach.

If more than one trustee is liable to the beneficiaries for a breach of trust, a trustee may be entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries. A trustee who receives a benefit from the breach of trust is not entitled to

contribution from another trustee to the extent of the benefit received. (R.C. 5810.02(B).)

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 and is not liable for a loss or depreciation in the value of trust property or for failing to make a profit (R.C. 5810.03).

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent that the breach resulted from the reliance. If an event, including marriage, divorce, performance of educational requirements, or death, affects a trustee's administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge. (R.C. 5810.06 and 5810.07.)

A trustee is not liable to a beneficiary for a 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 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. A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interest of the beneficiaries or is inserted as the result of an abuse by the trustee or fiduciary or confidential relationship to the settlor. (R.C. 5810.08 and 5810.09.)

For contracts entered into on or after March 22, 1984, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust, unless the terms of a contract provide otherwise, if the trustee discloses the trustee's fiduciary capacity. The use of the words "trustee," "as trustee," "fiduciary," or "as fiduciary," or other words that indicate the trustee's capacity, following the name or signature of a trustee, is sufficient for this purpose. (R.C. 5810.10(A).)

A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim. A trustee is deemed personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property, including

liability for violation of environmental law, only if the trustee is personally at fault. (R.C. 5810.10(B) and (C).)

A trustee that holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed. A partnership certificate filed pursuant to Chapter 1777. of the Revised Code or another chapter of the Revised Code that indicates that a trustee holds a general partnership interest in a fiduciary capacity, by the use of the words "as trustee" or other words indicating the trustee's fiduciary capacity following the trustee's name or signature, constitutes sufficient disclosure for this purpose. (R.C. 5810.11(A)(1).)

If a partnership certificate is not required to be filed, a sufficient disclosure for this purpose can be made by the trustee if a certificate filed with the recorder of the county in which the partnership's principal office or place of business is situated and with the recorder of each county in which the partnership owns real estate satisfies all of the following requirements (R.C. 5810.11(A)(2)):

(1) The certificate states in full the names of all persons holding interests in the partnership and their places of residence.

(2) The certificate is signed by all persons who are general partners in the partnership and is acknowledged by a person authorized to take acknowledgment of deeds.

(3) The certificate uses the words "trustee under the (will or trust) of (name of decedent or settlor)," or other words that indicates the trustee's fiduciary capacity, following the trustee's name or signature.

A contract or other written instrument that is delivered to a party that contracts with the partnership in which a trustee holds a general partnership interest in a fiduciary capacity and that indicates that the trustee holds the interest constitutes a disclosure with respect to transactions between the party and the partnership. If a disclosure is made by certificate, proper disclosure is deemed to exist regardless of whether a contract or other instrument indicates that the trustee holds the general partnership interest in a fiduciary capacity. (R.C. 5810.11(A)(3).)

A trustee who holds an interest as a general partner in a general or limited partnership is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault. This immunity does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the

trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of these persons. (R.C. 5810.11(B) and (C).)

If the trustee of a revocable trust holds an interest as a general partner in a general or limited partnership, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were the general partner (R.C. 5810.11(D)). Existing section 1339.65(B) of the Fiduciary Law contains similar language on the settlor's liability in this situation, but the bill deletes that language from section 1339.65 of the Fiduciary Law when R.C. 1339.65 is renumbered as R.C. 5815.35. The current language makes the settlor liable in this situation for "any debt, obligation, or liability of the [trustee's] partnership." (Existing R.C. 1339.65(B)(2).)

Judicial proceedings

In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision (*see* "**Spendthrift provision and creditors**," above), the court, as justice and equity requires, may award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy or from a party's interest in the trust (R.C. 5810.04).

A beneficiary may not commence a proceeding against a trustee for breach of trust more than two years after the date the beneficiary, a representative of the beneficiary, or a beneficiary surrogate is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary, the representative, or the surrogate of the time allowed for commencing a proceeding against a trustee. A report adequately discloses the existence of a potential claim for breach of trust if the report provides sufficient information so that the beneficiary or the beneficiary's representative knows of the potential claim or should know of the existence of the potential claim. (R.C. 5810.05(A) and (B).)

If a beneficiary does not receive an adequate report, a beneficiary is required to commence a judicial proceeding against a trustee for breach of trust within four years after the first of the following to occur (R.C. 5810.05(C)):

- (1) The removal, resignation, or death of the trustee;
- (2) The termination of the beneficiary's interest in the trust;
- (3) The termination of the trust;
- (4) The time at which the beneficiary knew or should have known of the breach of trust.

Third-party liability

The Ohio Trust Code limits the liability of third parties assisting a trustee. Under the Ohio Trust Code, a person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power. A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated, is protected from liability as if the former trustee was still a trustee.

A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or of the propriety of the trustee's exercise of those powers. A person who in good faith delivers assets to a trustee is not required to ensure the proper application of those assets. Comparable protective provisions of other laws relating to commercial transactions or the transfer of securities by fiduciaries prevail over the Ohio Trust Code's third-party liability provisions. (R.C. 5810.12.)

Certification of trust

A trustee may furnish to a person other than a beneficiary, instead of a copy of the trust instrument, a certification of trust that contains all of the following information (R.C. 5810.13(A)):

- (1) A statement that the trust exists and the date the trust instrument was executed;
- (2) The identity of the settlor;
- (3) The identify and address of the currently acting trustee;
- (4) The powers of the trustee;
- (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise the powers of the trustee;
- (7) The trust's taxpayer identification number;
- (8) The manner of taking title to trust property.

Any trustee may sign or otherwise authenticate a certification of trust. A certification must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect. The certification is not required to contain the dispositive terms of a trust. (R.C. 5810.13(B), (C), and (D).)

A person who receives a certification of trust may require a trustee to furnish copies of excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in a pending transaction. If a person acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect, the person is not liable to any person for so acting, and the person may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying on the certification holds a copy of all or part of the trust instrument. A person who enters into a transaction in reliance upon a certification of trust in good faith may enforce the transaction against the trust property as if the representations contained in the certification were correct. (R.C. 5810.13(E), (F), and (G).)

A person may demand a trust instrument under the Code in addition to the certification of trust and excerpts, but the person is liable for damages if the court determines that the person did not act in good faith in making the demand. A person may obtain a copy of the trust instrument in any judicial proceeding concerning the trust. (R.C. 5810.13(H) and (I).)

Collective investment funds

Existing law permits a trust company to establish and maintain one or more collective investment funds for the collective investment of assets held by the trust company or any of its affiliates in any fiduciary capacity. The trust company may charge a fee for the management of a collective investment fund, provided that the fractional part of the fee proportionate to the interest of each participant does not, when added to any other compensation charged to the participant by the managing trust company or another trust company under common control of a bank holding company, exceed the total amount of compensation that would have been charged to the participant if no assets of the participant had been invested in participations in the fund. The bill modifies this provision by allowing the trust company to charge a *reasonable* fee for the management of a collective investment fund, provided that the amount of the fee does not exceed an amount commensurate with the value of legitimate services of tangible benefit to the participant that the participant would not have received if no assets of the participant had been invested in participations in the fund. Existing law also allows the trust company to reimburse itself out of a collective investment fund for reasonable expenses

incurred in the administration of the fund that would have been charged to the respective participating accounts if incurred in the separate administration of the participating accounts. The bill instead allows the trust company to charge a fee for reasonable expenses incurred in the administration of the fund and prohibits a trust company from charging a fee for expenses incurred in establishing or reorganizing the fund. (R.C. 1111.14(B)(1).)

Under existing law, if a collective investment fund that invests in an affiliated investment company invests in any mutual fund, the collective investment fund must disclose, in at least ten-point boldface type, by prospectus, account statement, or any other written means to all persons entitled to receive statements of account activity, that the mutual fund is not insured or guaranteed by the federal deposit insurance corporation (FDIC) or by any other government agency or government-sponsored agency of the federal government or of this state. The bill removes the reference to investing in any mutual fund and instead provides that if a collective investment company invests in an affiliated investment company, the collective investment company must disclose, in at least ten-point boldface type, by prospectus, *by annual* account statement, or by any other written means to all persons entitled to receive statements of account activity, that the *affiliated investment company* is not insured or guaranteed by the FDIC or by any other government agency or government-sponsored agency of the federal government or of this state. (R.C. 1111.14(B)(2).)

Investment of trust funds

Current law generally allows a trust company acting as fiduciary under any instrument and having funds of the trust that are to be invested, in addition to any other investments authorized to a trust company by law, to invest them in forms of investment enumerated or described in, or made eligible for investment by, R.C. 1339.44 (when a fiduciary may hold cash or make a temporary investment), 1339.52 to 1339.61 (Ohio Uniform Prudent Investor Act), 2109.37 (law regarding investment authority), 2109.371 (law regarding additional investment authority), and 2109.372 (when a fiduciary may hold cash or make a temporary investment), including, but not limited to, securities, stocks, bonds, or certificates of deposit issued by the trust company or any bank owned or controlled by the bank holding company that owns or controls the trust company. Investment authority granted under this provision is subject to the limitations on investments specified in R.C. 2109.371(B). The bill removes the provision regarding the limitation. (R.C. 1111.13(A)(1)(a).)

Technical changes

The bill amends many sections solely to change cross-references to sections amended, repealed, enacted, or otherwise affected by the substantive provisions of

the bill or to make technical language changes (R.C. 1319.12(A)(2)(a), 1775.03(C), 1775.14(A), 1775.15, 1775.17(A), 1775.33, 1782.24(A), 2101.24(B)(1)(b), 2107.33(H)(1), 2109.62(B), 2109.68, 2111.131(A)(3) and (6), 2113.861, 5111.151(F)(4), 5119.01(L) and (M), 5119.17, 5121.04(A)(10), 5121.10, 5121.30(B)(7), 5121.52, 5123.04(E), 5123.28, and 5123.40).

Moved Revised Code sections

The bill moves many sections that are apparently trust related in order to place most trust-related Revised Code provisions in R.C. Title 58. The following table specifies the existing R.C. section numbers and the new R.C. section numbers for those sections.

Existing Revised Code section number	Revised Code section number in the bill	Subject matter
1340.40 to 1340.91	5812.01 to 5812.52	Uniform Principal and Income Act
1340.31 to 1340.37	5813.01 to 5813.07	Institutional Trust Funds Act
1339.31 to 1339.39	5814.01 to 5814.09	Ohio Transfers to Minors Act
1339.01 and 1339.02	5815.02 and 5815.03	Issuers of securities and holders of record
1339.031	5815.01	Interpretation of terms
1339.03 to 1339.13	5815.04 to 5815.11	Fiduciary bank accounts
1339.151, 1339.16, and 1339.17	5815.13, 5815.14, and 5815.15	Powers of appointment
1339.18	5815.16	Amortization of premiums
1339.41 to 1339.51	5815.21 to 5815.28	Inter vivos or testamentary trusts
1339.62 to 1339.68	5815.31 to 5815.36	Miscellaneous provisions
1339.71 to 1339.78	5815.41 to 5815.48	Consignment of art works to dealers

COMMENT

The bill applies conditions and exceptions to its standard of review for discretionary trusts (see "Administration of a trust: judicial review," above). The

General Assembly declares its intent in Section 4 of the bill, in enacting these provisions, to "codify certain fiduciary and trust law principles, previously codified in R.C. 1340.21 to 1340.23, relating to a fiduciary's conflict of interests and, in general, to provide for the exercise of certain discretionary powers to distribute either principal or income to a beneficiary by a beneficially interested fiduciary for the beneficially interested fiduciary's own benefit to the extent of an ascertainable standard."

HISTORY

ACTION	DATE
Introduced	11-15-05
Reported, H. Civil & Commercial Law	02-01-06
Passed House (93-0)	02-22-06
Reported, S. Judiciary – Civil Justice	---

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