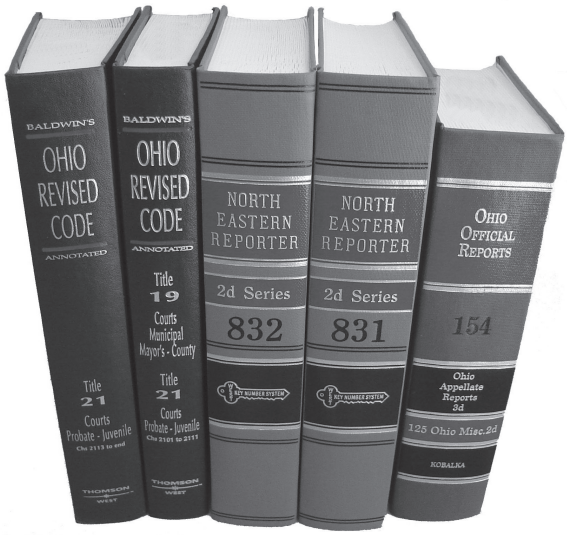

Probate Law Journal of Ohio

Robert M. Brucken, Esq. | Editor-in-Chief

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IN THIS ISSUE

121 **Ohio Trust Code Annual Reports**
by The Joint Committee on the Ohio Trust Code of the OSBA and OBL

123 **Private Settlement Agreement Forms**
By Robert M. Brucken, Esq.

124 **Modification and Termination of Trusts Under the Ohio Trust Code: A Drafter's Guide**
By Patricia D. Laub, Esq.

130 **More Isn't Always Merrier—The Effective Use of Cotrustees, Advisors, Trust Protectors and Committees**
by Michael J. Thacker, Esq., CPA

134 **S.B. 134: The Memorandum Of Trust Has Become More Useful**
By Mark E. Vannatta, Esq.

134 **Editor's Message**

135 **Coming to Ohio?**
Linda S. Whitton, Esq. and Richard E. Davis II, Esq.

145 **Opting-Out From the Rule Against Perpetuities in Ohio: Nine Years Later**
M. Patricia Culler, Esq. and Craig F. Frederickson, Esq.

149 **Comparing Safe Harbor Trusts & Wholly Discretionary Trusts**
by Craig M. Vandervoort, Esq.

150 **Common Real Estate Issues for Estate Planners**
By David W. Woodburn, Esq.

159 **The Probate Exception and International Wills: An Invitation for Comment**
By Daniel J. Hoffheimer, Esq.

161 **Summaries of Recent Cases**

162 **Legislative Scorecard**

Ohio Trust Code Annual Reports*

by The Joint Committee on the Ohio Trust Code of the OSBA and OBL

The Joint Committee on the Ohio Trust Code of the OSBA and OBL offers the following notice and guidance for Ohio Trust Code annual reports.

Annual reports will soon be due. They are required by Ohio Trust Code (OTC) section 5808.13(C) unless validly waived by the settler in the terms of the trust (see sections 5801.04(B)(8) and (9)). The first trust reports under OTC are due for calendar year 2007, when OTC became effective. They are due after the end of 2007, that is, in the spring of 2008. This timing is the intent of the statute, and the technical amendment bill now under consideration will confirm it.

Not all beneficiaries receive annual reports. The report must be given to each "current" beneficiary. Under section 5801.01(F), a current beneficiary is a person who is then "a distributee or permissible distributee of trust income or principal" as opposed to remainder beneficiaries who will or may be distributees only in the future. Section 5808.13(C) also requires the trustee to give reports to other beneficiaries who request them, and the trustee may but need not also give copies to other beneficiaries even if they do not request them, section

5808.13(E). A beneficiary may waive reports, section 5808.13(D).

Not all trustees need to do annual reports. Reports for a revocable trust are given only to the settlor, section 5806.03, and if the settler is the trustee he need not give reports to himself. A widow as trustee and sole current beneficiary of QTIPable A and B trusts created by her late husband need not give reports to herself; and if she later becomes senile and one or more of her children become successor trustees or even become additional current beneficiaries, they probably will not give reports to her either. The child responsible for the trusts may want to give reports to his siblings, however, whether or not they are current beneficiaries, and if someone else is serving as an agent for the widow under a durable power of attorney, or is appointed guardian for the widow, the successor trustee should furnish reports to the agent or guardian.

The annual report is to be "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," section 5808.13(C). It need not, however, be a formal accounting. Here is what the National Conference of Commissioners on Uniform State Laws says about the reports in its official Comment to section 813 of the Uniform Trust Code, on which OTC is based:

> The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high decree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.

The trustee who complies with this reporting requirement receives the benefit of section 5810.05(A), releasing the trustee from liability to the beneficiary for matters disclosed in the report two years after sending the report to him. That will be the case if the report "adequately discloses the existence of a potential claim for breach of trust and informs the [recipient] of the time allowed for commencing a proceeding against a trustee," section 5810.05(A).

The following is an example of a notice and annual report prepared by Bob Brucken that he believes would comply with the requirement and start the running of the time bar if the material attached to it contains the necessary information on the trust property, liabilities, receipts, disbursements and trustee fees (for example, bank or broker statements may not identify all assets, the checking account entries may not identify all fees or other transactions and neither may identify liabilities, which may be addressed in the text of the form or in another attachment to it). It is offered as an example for trustees that have not already prepared their own forms.

Annual Report of Sam Settlor Trust

To [current beneficiary]:

Sam Settlor, who created a revocable trust under trust agreement with [himself as initial trustee] dated [date], died on [date]. The trust then became irrevocable and I became trustee. You are a beneficiary of the trust. This is your 2007 annual report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, listing of the trust assets and their respective market values. The report is in the form of the attached copies of the twelve 2007 monthly statements of the bank [broker] that is custodian for the trust assets, of the 2007 checkbook entries for the bank account maintained for the trust and of the schedule K-1 tax information for your personal federal income tax return. Also attached is a separate list of any trust property, liabilities, receipts, disbursements and trustee fees not identified in the other attachments.

Please examine this report carefully, and direct any questions or concerns to me. Under Ohio law you have two years after my sending of this report to commence any proceeding on it against me.

Date_____

Tom Trustee

1234 Main Street

Anytown, Ohio 44444

Phone 216-123-4567

ENDNOTE

*

Private Settlement Agreement Forms*

By Robert M. Brucken, Esq.
Retired Partner, Baker & Hostetler LLP
Cleveland, Ohio
Editor-in-Chief, Probate Law Journal of Ohio
Co-Chairman, Joint Committee on Ohio Trust Code

Private Settlement Agreements (PSAs) are authorized and encouraged by the new Ohio Trust Code. RC 5801.10. As one of the authors of the Ohio Trust Code handbook, OSBA-CLE Institute Reference Manual 06-157, I prepared forms for PSAs and published them in that handbook as Forms 3.01 through 3.03 (at pages 4.16 *et seq*.). I even retained the copyright to these forms personally with the announced intent of permitting and encouraging all freely to copy and use them.

Experience with use of the forms by me and by others has suggested addition of two specific improvements to them. This note is to identify and explain the two additions.

PSAs in Court

A PSA will sometimes be filed with a court, possibly to challenge it (for example, by a beneficiary who was omitted from it, or claims he was fraudulently induced to join it) but more likely to obtain a court order "blessing" it. In the blessing situation, one or more parties may file in court because the trustee insists on the assurance of a court order, there may be doubt whether the result of the PSA can be validly effected without a court order or for other reasons peculiar to the facts. For example, RC 5801.10(C) appears to invalidate a PSA that terminates a trust prematurely, or changes the interests of the beneficiaries, but a court order can do either under RC 5804.11, even a court order simply approving a PSA and ordering it into effect.

In many cases there will be practical and psychological reasons for first negotiating a PSA before going to court. It is often easier to settle before litigation has hardened the positions, and even to negotiate settlement before a matter is ripe for litigation when there are no evident winners or losers. With the signed PSA in hand, any of the parties may then file it in court for a quick, simple and hopefully inexpensive court approval. The PSA may (and should) provide that as to all parties it is a waiver of service of summons, entry of appearance and answer to any complaint filed with any court, and that all parties agree to urge the court to approve the PSA and order it into effect.

The following additional paragraph may be used with each of my PSA forms in the handbook (or in any other PSA) to accomplish this:

> If this agreement is filed in any court, each of the parties to this agreement (individually or by representation, virtual or otherwise) hereby waives service of summons, enters his or her appearance in the proceeding and for his or her answer to the complaint or other pleading therein approves this agreement and joins in request that the court approve it and order it into effect. This agreement shall itself serve as such waiver of service, entry of appearance and answer, without the necessity of filing any other pleading therein.

A short form of complaint may be filed in court, with the PSA attached, identifying the PSA, alleging that all required parties are parties to the PSA (individually or by representation, virtual or otherwise), noting that they have all waived service, entered appearance and answered in the PSA and requesting the court to approve the PSA and order it into effect. A responsive judgment entry may be filed with the complaint. That's it! The court will of course satisfy itself that all required parties are indeed parties to the PSA and that the court has authority to approve the terms of the PSA, and with those determinations may promptly sign and file the tendered judgment entry.

PSAs as Enforceable Contracts

There may be expected or unintended issues of whether a PSA is valid as a PSA. For example, beneficiaries may be intentionally or inadvertently omitted, or some or even all of the issues determined by the PSA may arguably be ones not permitted to PSAs (as noted above, a PSA cannot terminate a trust or change its beneficial interests). It may be difficult to determine whether there is a conflict of interest that would preclude one beneficiary from representing the interests of another, or it may be difficult to distinguish between changing beneficial interests and only construing them.

If for any reason the agreement is not valid as a PSA, there is no reason why it should not be valid as a contract, enforceable by and against those who are parties to it, individually or by representation, virtual or otherwise (RC chapter 5803, providing for virtual representation,

is not limited to PSAs). The following additional paragraph may be used with each of my PSA forms in the handbook (or in any other PSA) to confirm this:

> If this agreement is ineffective as a statutory private settlement agreement as to any person not properly a party to it or as to any issue otherwise determined by it, it shall nevertheless be fully enforceable by and against all those who are parties to it (individually or by representation, virtual or otherwise) and with respect to all issues those parties have agreed to determine by it. Pursuant to section 5810.09 of the Ohio Trust Code, section 1009 of the Uniform Trust Code or other applicable law, we each hereby ratify the acts of the trustee performed as directed by this agreement and release the trustee from any liability to us for administering the trust as provided in this agreement.

The author suggests including these two paragraphs in all PSAs, to facilitate their utility both in and out of court. He has retained the copyright to them personally with the intent of permitting and encouraging all freely to copy and use them.

ENDNOTES

* Copyright 2007, Robert M. Brucken. All rights reserved by the author. For additional suggestions on court action on trusts, see the following article by Patricia Laub on modification and termination of trusts.

Modification and Termination of Trusts Under the Ohio Trust Code: A Drafter's Guide*

By Patricia D. Laub, Esq.
Frost Brown Todd LLC
Cincinnati, Ohio

Chapter 4 of Ohio Trust Code, and specifically, Ohio Revised Code Sections 5804.10 through 5804.17 provide a series of interrelated rules governing when a trust may be terminated or modified other than by its express terms.[1] In most cases these terminations or modifications must be made by a court, but in two instances, a trustee may have that authority.[2] Some of these rules represent a departure from prior Ohio law, and the provisions relating to the modification and termination of trusts are some of the more controversial provisions of the Ohio Trust Code. Although the comments to the Uniform Trust Code state that the overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount, some may argue that the ability to carry out the settlor's intent is jeopardized by these provisions. Just as the probate and trust law practitioner needs to be familiar with the flexibility that some of these statutes provide for revising trust arrangements once thought to be truly irrevocable, the estate plan drafter needs to be aware of how these provisions operate so as to draft for, or around, these provisions. This article will address both sides of that "drafting coin".

Modification or Termination of Non-Charitable Irrevocable Trusts By Consent of the Settlor and the Beneficiaries

Ohio Revised Code § 5804.11 provides that if the settlor and all the beneficiaries consent, the court must enter an order approving modification or termination of the trust, even if the modification or termination is inconsistent with a material purpose of the trust. The court must distribute the trust property as agreed by the beneficiaries. The Code addresses how a settlor's consent can be obtained if he is incapacitated. An agent under a power of attorney may exercise the settlor's power to consent to a trust's modification or termination, but only to the extent expressly authorized by both the power of attorney and the terms of the trust.[3]

> **Drafting point:** Consider whether to include such authorization in the power of attorney and the trust.

The provisions relating to the termination or modification of a trust by the settlor's and the beneficiaries' consent apply only to:

- Irrevocable trusts created on or after January 1, 2007;
- Revocable trusts that become irrevocable on or after January 1, 2007; and

- Do not apply to non-charitable irrevocable trusts described in 42 USC 1396p(d)(4) [Medicaid Pay Back Trusts; Federal Special Needs Trusts].

Modification or Termination of Non-Charitable Irrevocable Trust Upon Consent of the Beneficiaries

If the settlor is not involved in an action to modify or terminate a trust due to death or incapacity, or if the settlor does not consent, Ohio Revised Code § 5804.11 still allows a trust to be modified or terminated under certain circumstances. Specifically, a trust can be terminated if all the beneficiaries consent and the court concludes that the continuance of the trust is not necessary to achieve any material purpose of the trust.[4] Upon ordering such a termination, the court must distribute the property as agreed by the beneficiaries.[5] Further, the court may modify an irrevocable trust without settlor involvement if all the beneficiaries consent and the court finds that modification is not inconsistent with a material purpose of the trust. Note, however, that trusts cannot be modified to remove or replace the trustee through the consent of all the beneficiaries. Also note that the statute specifically states that a spendthrift provision may, but is not presumed to, constitute a material purpose of the trust.[6]

> **Drafting point:** Ohio Revised Code § 5801.04, the provision of the Ohio Trust Code that sets forth the mandatory rules which cannot be waived in the trust instrument, provides that the terms of the trust cannot override the power of the court to modify or terminate the trust under Sections 5804.10 through 5804.16 of the Ohio Revised Code. Therefore, estate planners need to consider drafting to protect a trust from a modification or premature termination that would not conform to the settlor's intent. For instance, the trust instrument should make clear the material purposes of the trust. Such a recitation of the material purposes may make it more difficult for beneficiaries to obtain court approval of a trust modification or termination. If creditor protection is one of the objectives of the trust, the drafter will want to include a spendthrift provision (being careful to follow the requirements of Ohio Revised Code § 5805.01 governing spendthrift provisions) and specifically state in the trust instrument that the spendthrift provision is a "material purpose" of the trust so that the trust cannot be terminated if the beneficiary has creditor problems.

Finally, from a drafting standpoint, consider the Ohio Trust Code's treatment of uneconomic trusts. Ohio Revised Code § 5804.14 provides two ways to modify or terminate an uneconomic trust: by trustee action or court action. A trustee of a trust with a corpus having a total value of less than $100,000 may terminate the trust after notice to qualified beneficiaries if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. Further, if a trust consists of trust property having a total value of less than $100,000, the court may modify or terminate the trust, or remove the trustee and appoint a different trustee, if it determines that the value of the trust property is insufficient to justify the cost of administration.

> **Drafting point:** The power of a trustee (but not the court) to terminate an uneconomic trust can be waived or modified. Generally, this power should not be waived in the trust instrument unless the trust is established for a beneficiary with special needs or creditor issues. The statute specifically states that a spendthrift clause does not preclude the termination of an uneconomic trust.

In practice, an action to terminate or modify an irrevocable trust where the settlor has died often will be brought by the trustee. In such cases, all the current and potential trust beneficiaries would be named defendants. The provisions of Article 3 of the Ohio Trust Code on representation, virtual representation, and the appointment and approval of representatives appointed by the court are used to determine whether all beneficiaries have consented to the action.[7] Although these actions for trust modification or termination often are brought by the trustee, note that a trust may be modified or terminated over a trustee's objection. Ohio Revised Code § 5804.10 provides the trustee standing to object to a proposed termination or modification. Although a private settlement agreement may be used to modify a trust, Ohio Revised Code § 5801.10(C) specifically states that a private settlement agreement may not be used if it effects "a termination of the trust before the date specified for the trust's termination in the trust instrument." Therefore, to effect an "early termination" of a trust, Ohio Revised Code § 5804.11 must be used. The following is a sample complaint drawn under that section for the termination of a trust where all the beneficiaries consent and it is asserted that continuance of the trust is not necessary to achieve any material purpose of the trust. Also included are sample consents to be executed by the adult current and remainder beneficiaries. As in many cases involving early termination of a trust, virtual representation is not available for the representation of

minor and unborn beneficiaries due to an inherit conflict between those beneficiaries' interests and the interests of the adult remainder beneficiaries. Therefore, a sample application for the appointment of a guardian ad litem and trustee for unborn is included.

ENDNOTES:

* For additional suggestions on court action on trusts, see the preceding article by Robert M. Brucken on filing PSAs in court.

1. English, David, General Comment – Article 4, Comments on the Uniform Trust Code as included in OSBA CLE Reference Manual Ohio Trust Code, NCCUSL Comments, p. 3.27.
2. Upon appropriate findings, a court may:
   - modify or terminate a noncharitable irrevocable trust if certain parties have consented (R.C. § 5804.11);
   - modify the administrative or dispositive terms of a trust or terminate a trust because of unanticipated circumstances, impracticality or impairment (R.C. § 5804.12);
   - modify or terminate a charitable trust using cy pres (R.C. § 5804.13);
   - reform the terms of a trust to conform to the settlor's intention if the settlor's intent and the terms of the trust were affected by a mistake of fact or law (R.C. § 5804.15);
   - modify the terms of a trust to achieve the settlor's tax objectives (R.C. § 5804.16);

   With respect to "uneconomic trusts," as defined in R.C. § 5804.14, a court has the power to modify or terminate a trust or change trustees of trusts having a value of less than $100,000. In addition, after notice to qualified beneficiaries, a trustee may terminate a trust having assets of less than $100,000 if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. See R.C. § 5804.14. Finally, after notice to qualified beneficiaries, a trustee may combine two or more trusts or divide a trust into separate trusts. See R.C. § 5804.17.
3. R.C. § 5804.11(A)
4. R.C. § 5804.11(B)
5. R.C. § 5804.11(C)
6. R.C. § 5804.11(B)
7. See R.C. § 5803.01-.05

APPENDIX A

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
[_____] COUNTY, OHIO

GEORGE WHITE, TRUSTEE
OF THE ELIZABETH BLACK TRUST
AGREEMENT dated December 22, 1986
Case No.: _____
Plaintiff,
v.
RICHARD A. BLACK
COMPLAINT FOR
TERMINATION OF TRUST
and
SALLY BLACK SMITH
and
DANIEL C. SMITH
and
MICHAEL F. SMITH
and
GARETH L. BLACK
and
DEBORAH S. BLACK
and
DAVID J. BLACK
and
ALLISON E. SMITH
and
BENJAMIN C. SMITH
and
MARY K. BLACK
and
LINDA R. BLACK
and
EMMA S. BLACK
and
SAMUEL W. BLACK
and
Jane Does and John Does
unborn issue of Sally Black Smith and
unborn issue of Richard A. Black,
Defendants.

This is an action pursuant to Ohio Revised Code § 5804.11(B) for the termination of the trust held under Article V of the Elizabeth Black Trust Agreement dated December 22, 1986 (the "Trust"). A true copy of the Elizabeth Black Trust Agreement is attached hereto as Exhibit A.

1. Elizabeth Black created the Elizabeth Black

Trust Agreement (the "Trust Agreement"), as Grantor, on December 22, 1986, and named George White Trustee of the Trust Agreement. George White has served as Trustee of the Trust Agreement since the creation of the Trust Agreement on December 22, 1986.

2. Elizabeth Black died on February 6, 1990 and upon her death, the Elizabeth Black Trust Agreement became irrevocable.

3. Plaintiff, George White, brings this action at the request of Elizabeth Black's children and grandchildren.

4. Defendants Sally Black Smith and Richard A. Black are the only children of Elizabeth Black and her husband, Harvey Black, and both are adults.

5. Harvey Black died on November 6, 2005.

6. Defendants Daniel C. Smith and Michael F. Smith are the only living children of Sally Black Smith and are adults.

7. Gareth L. Black, Deborah S. Black, and David J. Black are the only children of Richard A. Black, and are all adults.

8. The Trust Agreement requires that upon the death of Elizabeth Black (the "Grantor"), the trust assets be held as one trust for the benefit of the Grantor's husband and the Grantor's children under Article V of the Trust Agreement. Specifically, the Trust Agreement provides:

[Insert pertinent portion of Trust Agreement]

9. The Trust Agreement contains inconsistent provisions, such that a dispute has arisen as to the intended disposition of the trust assets at the death of the Grantor's husband. Defendants Richard A. Black and his children contend that the Trust must be maintained as one trust for the benefit of the Grantor's two children, until the death of the later to die of the Grantor's two children, at which time the trust assets are to be distributed to the Grantor's then living lineal descendants, per stirpes. Such an interpretation would require an equal division among the five grandchildren of the Grantor, with the issue of a deceased grandchild succeeding to such grandchild's share on a per stirpital basis. Defendants Sally Black Smith and her two children contend that upon the death of Harvey Black, the Trust was intended to be split into equal separate shares for the Grantor's children, which shares were to be held for each child's benefit during his or her lifetime. Upon a child's death, the assets held in the separate share trust would pass to such child's issue, per stirpes. As shown herein, all the adult potential beneficiaries of the Trust agree with the resolution of this inconsistency by the termination of the Trust and distribution of the Trust assets according to the percentages set forth herein.

10. Defendants are all the living persons who are or may be beneficiaries of the Trust and the unborn issue of Elizabeth Black.

11. Currently there are six (6) great grandchildren of Elizabeth Black, all of whom are minors. All living great grandchildren will be represented in this action by a Guardian ad Litem, to be appointed by this Court. All unborn issue of Elizabeth Black who may become beneficiaries of the Trust will be represented in this action by a Trustee for Unborn, to be appointed by this Court.

12. Thus, all possible beneficiaries of the Trust are or will be before this Court.

13. As evidenced by the Waivers of Service of Process and Consents filed herewith, all the adult potential beneficiaries of the Trust have consented to the termination of the Trust and the distribution of its assets among the living grandchildren of Elizabeth Black in the following manner:

Daniel C. Smith	20%
Michael F. Smith	20%
Gareth L. Black	20%
Deborah S. Black	20%
David J. Black	20%
	100%

14. Under the terms of the Trust, the material purposes of the Trust were to provide for the support, maintenance, education and medical care of the Grantor's husband, Harvey Black, and the Grantor's children, Sally Black Smith and Richard A. Black, or the survivor(s) of them for their lifetimes. Further, the Trust specifically provides that the

Trustee was to treat the needs of Harvey Black as paramount in exercising the discretion granted in Article V. In addition, the Trust provides:

> Any income not so distributed may be added to principal from time to time. Distributions of benefits hereunder may be to or for the benefit of one or more of said beneficiaries [Harvey Black, Sally Black Smith and Richard A. Black] to the exclusion of any other or others, and there is no requirement that such distributions be made equally to such beneficiaries, but the Trustee may vary distributions to or for the benefit of such beneficiaries as their needs may respectively appear, taking into consideration any other source of income and means available therefore, known to the Trustee, that any said beneficiary may have. …

Now that Harvey Black, the primary beneficiary of the Trust, has died, the other two lifetime beneficiaries, Defendants Sally Black Smith and Richard A. Black, state that their sources of income and financial resources available to them are such that they would not need, and therefore, would not be eligible for, distributions from the Trust for their support, maintenance, education or medical care.

15. The Trust contains a spendthrift provision in Article VI, but spendthrift protection is not a material purpose of the Trust.

16. As a result, the continuance of the Trust is not necessary to achieve any material purpose of the Trust.

17. Accordingly, the Court is authorized by O.R.C. § 5804.11(B) to terminate the Trust.

WHEREFORE, Plaintiff respectfully petitions the Court for an order that the Trust be terminated and that, after payment of proper expenses, the Trust assets be distributed among the living grandchildren of Elizabeth Black in the following manner:

Daniel C. Smith	20%
Michael F. Smith	20%
Gareth L. Black	20%
Deborah S. Black	20%
David J. Black	20%
	100%

Respectfully submitted,

_____

Attorney for Plaintiff

APPENDIX B

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
[ ] COUNTY, OHIO

GEORGE WHITE, TRUSTEE OF THE
ELIZABETH BLACK TRUST AGREEMENT
dated December 22, 1986,
Plaintiff,
Case No.: _____
v.
RICHARD A. BLACK, ET AL.,
WAIVER OF SERVICE OF
Defendants.
PROCESS OF COMPLAINT
FOR TERMINATION OF
TRUST AND CONSENT TO
TERMINATION OF TRUST

I, Deborah S. Black, do hereby waive service of process in the above-captioned matter and direct that all further process be served upon my counsel, Robert Martin, Attorney at Law, [Law Firm Name].

Further, as a daughter of Richard A. Black and a granddaughter of Elizabeth Black, I am a potential remainder beneficiary of the assets currently held in trust under Article V of the Elizabeth Black Trust Agreement dated December 22, 1986. I hereby consent to the termination of the Trust and, after payment of proper expenses, distribution of the Trust assets in the following manner:

Daniel C. Smith	20%
Michael F. Smith	20%
Gareth L. Black	20%
Deborah S. Black	20%
David J. Black	20%
	100%

_____

Deborah S. Black

APPENDIX C

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
[ ] COUNTY, OHIO

GEORGE WHITE, TRUSTEE OF THE
ELIZABETH BLACK TRUST AGREEMENT
dated December 22, 1986,
Plaintiff,
Case No.:
v.
RICHARD A. BLACK, ET AL.,
WAIVER OF SERVICE OF
Defendants.
PROCESS OF COMPLAINT
FOR TERMINATION OF
TRUST AND CONSENT TO
TERMINATION OF TRUST

I, Sally Black Smith, do hereby waive service of process in the above-captioned matter and direct that all further process be served upon my counsel, Katherine Brown, Attorney at Law, [Law Firm Name].

Further, as a current beneficiary of the Trust held under Article V of the Elizabeth Black Trust Agreement, I hereby consent to the termination of the Trust and, after payment of proper expenses, distribution of the Trust assets to the grandchildren of Elizabeth Black in the following manner:

Daniel C. Smith	20%
Michael F. Smith	20%
Gareth L. Black	20%
Deborah S. Black	20%
David J. Black	20%
	100%

_____
Sally Black Smith

APPENDIX D

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
[ ] COUNTY, OHIO

GEORGE WHITE, TRUSTEE
OF THE ELIZABETH BLACK TRUST
AGREEMENT dated December 22, 1986,
Plaintiff,
Case No.: _____
v.
RICHARD A. BLACK, ET AL.,
Defendants.
APPLICATION FOR
APPOINTMENT OF GUARDIAN
AD LITEM
TRUSTEE FOR UNBORN

Applicant is Plaintiff in the above-referenced action brought under Ohio Revised Code § 5804.11(B) for the termination of the Trust held under Article V of the Elizabeth Black Trust Agreement dated December 22, 1986. Ohio Revised Code § 5804.11(B) provides that a noncharitable irrevocable trust may be terminated upon consent of all the beneficiaries if the Court concludes that continuance of the Trust is not necessary to achieve any material purpose of the Trust. In this case, the current Trust beneficiaries are Elizabeth Black's children, Sally Black Smith and Richard A. Black. The remainder beneficiaries are the grandchildren of Elizabeth Black, who are Defendants herein. However, should a grandchild die before the Trust is terminated, his or her share will be distributed to his or her issue, per stirpes. Currently, there are six (6) great grandchildren of Elizabeth Black in being, all of whom are minors. The great grandchildren of Elizabeth Black who are in being, as well as any unborn issue of Elizabeth Black have interests which are adverse to those of Elizabeth Black's children and grandchildren. As such, the class of potential remainder beneficiaries consisting of the great grandchildren in being and future lineal descendants of Elizabeth Black cannot be represented in this action by either of the current beneficiaries or by the adult remainder beneficiaries of the Trust under the doctrine of virtual representation.

THEREFORE, Plaintiff respectfully requests this Court for an order appointing the same individual Guardian ad Litem to represent the interests of the living great grandchildren of Elizabeth Black and Trustee for Unborn to represent the interests of the unborn future lineal descendants of Elizabeth Black, all of whom are potential remainder beneficiaries under the Trust.

_____
Plaintiff's Attorney

More Isn't Always Merrier—The Effective Use of Cotrustees, Advisors, Trust Protectors and Committees

by Michael J. Thacker, Esq., CPA[1]
Senior Vice President and Managing Counsel
KeyBank National Association
Cleveland, Ohio

Estate planning attorneys strive to give their clients the best representation possible. That representation entails addressing the numerous options available in trust planning, including those that go beyond the traditional plan that uses a sole trustee with full authority. In many cases, the addition of a cotrustee, advisor, trust protector, or even a committee may substantially improve the overall plan. However, before such parties are added to the mix, it is wise to carefully consider their purpose, their authority, and their impact upon the legal recourse that may be available to the beneficiaries.

Selection of the Trustee

The starting point in trust planning is the selection of the trustee. Whether the potential trustee is a corporation (i.e., bank or trust company) or an individual, the trustee must have expertise in all of the areas necessary to effectuate the proper administration of the trust(s). Trustees have many duties with respect to the trust property and the beneficiaries. In the context of a sole trustee with full investment authority, those duties would include taking custody of the trust property, investing the assets appropriately, handling income payments and discretionary distributions of principal, communicating with the beneficiaries, allocating receipts and disbursements as to income or principal, and handling tax reporting and payment. Given the breadth of duties, an Ohio trustee needs to have a solid understanding of several areas of statutory and common law. The statutory obligations are primarily contained in the Ohio Trust Code ("OTC")[2] which encompasses, among its many provisions, both the Uniform Prudent Investor Act, and the Uniform Principal and Income Act.[3] Those two Uniform Acts were already a part of Ohio law when the OTC became effective January 1, 2007.

Numerous factors need to be considered in the selection of a trustee. It is important to focus on the advantages and disadvantages of selecting either an individual or corporate trustee. A particular individual might be selected to serve, one who possesses personal knowledge of the client's affairs, or who has a close relationship with the client. An individual trustee, particularly a surviving spouse or other family member, may charge lower fees than a corporate trustee. An individual trustee is more likely to keep the family attorney involved during the administration of the trust.

There are also disadvantages to selecting individual trustees. A family-member trustee, without substantial outside guidance, is unlikely to fully appreciate all of the duties involved. For example, that trustee is unlikely to know exactly how to comply with the Prudent Investor Act or the Principal and Income Act. That trustee is also unlikely to fully appreciate the beneficiary notification requirements of the OTC, or how to provide periodic statements. Individual trustees age, become infirm, and die. When individual trustees are part of the plan, it becomes especially important that a good scheme for appointment of successors is put in place.

Another possible disadvantage is that the individual does not want to be saddled with the obligations of serving. In many cases, a client who names a child as a trustee of a trust for the benefit of the child's siblings is doing that child no favor. Disagreements over financial matters can give rise to and exacerbate personality conflicts.

Having a long succession of individual trustees becomes unwieldy in dynasty trust planning. Also, drafting attorneys need to be cognizant of and address possible adverse tax consequences in using individual trustees. Finally, if administration is done properly, being a trustee is hard work.

There are advantages in using a corporate trustee. One of them is unlimited life. Even in an era of corporate mergers, the law upholds the continuing validity of the fiduciary appointments of those entities that have been merged.[4]

Corporate trustees are impartial. They come to the appointment with no bias and, in most cases, have had no involvement in prior family disagreements.

Banks and trust companies typically have deep pockets. The client and the drafting attorney can take some comfort in the knowledge that, if beneficiaries at some point have valid and enforceable claims against the trustee, there will be an available source of funds for the damages involved. That is frequently not the case when individual trustees are used. Corporate trustees are most likely to fully appreciate the extent of their obligations, and to bring all of their expertise to the implementation of their duties. For example, corporate trustees typically have the staffing and technological resources available to interpret instruments, manage investments, exercise appropriate discretion, issue statements, notices, and other communications, and otherwise execute their duties.

There are disadvantages to using corporate trustees as well. In some situations, fees may be higher. Corporate trustees frequently do not share the historical and personal relationship that many individual trustees have. A corporate trustee may also have a high rate of employee turnover.

Other Parties

There are many situations in which a client may want to have additional parties involved. For example, when the client has operated a family business, the client may want to appoint an advisor to counsel or direct the trustee with respect to that business. Likewise, an advisor might be named to select and monitor policies held in a Crummey life insurance trust. In many cases, a client and his or her spouse may derive comfort from knowing that, after the first death, the survivor will serve as cotrustee with either another individual or a corporation. The client may want to create a perpetual charitable foundation, and have family members serve on an advisory committee. A client who is concerned that a trustee might be unresponsive, or might not properly implement the plan, may want to have a trust protector who can override or veto the decisions of the trustee. These are but a few examples.

Allocation of Liability

When a sole trustee with full authority is serving, it's pretty clear where liability exposure lies in the event of a breach: the beneficiaries need look no further than the trustee. However, the involvement of other parties entails a shifting of responsibilities and a consequential allocation of potential liability exposure. Ohio has a statutory framework with default rules. The drafting attorney can tailor the document to change the default rules. In the absence of contrary language in the document, Ohio law limits the liability of a fiduciary, when certain powers are granted to others.[5] It is simple in its approach: if the responsibility is assigned away from the fiduciary, so too is the potential liability. The fiduciary must comply with direction authority contained in the instrument and need not second-guess the directions. The Ohio statute offers greater protection than the rule applicable at common law, or under the Uniform Trust Code ("UTC") outside Ohio, both of which contain a "Catch-22."[6] Under the common law rule, a trustee is under a duty to comply with a directive, unless compliance would violate the terms of the trust or is a violation of a fiduciary duty. Under the UTC rule, the fiduciary is to follow the direction, unless the exercise of power of direction is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty. Both the common law approach and the UTC approach effectively provide beneficiaries with an opportunity to try to impose liability on a trustee who has acted at the direction of others. The comment to the UTC provision indicates that the trustee acting on direction would have only "minimal oversight responsibility." The provision appears to have been designed to limit the oversight responsibility found at common law and to thus placate directed trustees. Ohio has rejected the approaches found at common law and under the UTC. The OTC offers strong statutory protection to the directed trustee.

Fiduciary vs. Not

Under the OTC, a person other than a beneficiary who holds a power to direct is presumed to be a fiduciary.[7] So, whether that person is called a cotrustee, an advisor, a trust protector, or a committee member, that person is still exercising fiduciary duties. The scope of those duties may be very limited. While it is clear that a trustee or cotrustee has broad duties with respect to the custody and control of the entire trust, an advisor's or trust protector's role may be very limited. For instance, a trust may be drafted so that the advisor's only role is to, if necessary, remove and replace the trustee. On the other hand, the advisor's role might be very broad, such as in the case where an advisor has the ability to direct the trustee as to investments and distributions.

Is there a difference between an advisor and a trust protector? As a practical matter, there is not. Some planners tend to view a trust protector as a sort of super fiduciary, one that can be utilized to do those things that an ordinary fiduciary could not or would not do, such as amend the trust to add or delete beneficiaries. Indeed, at least one state does not view a trust protector to be a fiduciary at all, but rather views the role as a type of substitute for the settlor.[8] However, Ohio's position that

the various parties are fiduciaries is prevalent throughout most of the United States.

The default Ohio rule, then, is quite logical:

1. A party who is subject to the direction of another is not liable for the action taken.
2. If the directing party is not a beneficiary, that party is a fiduciary.
3. A party who directs is liable for the action taken.

Drafting Issues—Where Does The Liability Go?

A drafting attorney could always provide that, for example, an advisor is not acting in a fiduciary capacity. Likewise, a drafting attorney could completely waive the application of the Uniform Prudent Investor Act. In each case, the attorney would be wise to contemplate the effects of such drafting. If an advisor or trust protector is not a fiduciary, does a beneficiary have any recourse, when there is an arguably inappropriate exercise of the authority? Probably not. If the Prudent Investor Rule is waived, what is put in its place? It is important to keep in mind that, if default rules are eliminated by drafting, new rules need to be added to fill the void. While it may be possible to authorize a fiduciary to do any action undertaken in good faith, what about a non-fiduciary? Does a non-fiduciary have to act in good faith? These are open issues.

Succession Issues

It is difficult to anticipate what the near future will bring, much less the distant future. Technical challenges are posed by the client who demands a long succession of individual trustees and advisors. Where possible, a drafting attorney will do well to build flexibility into the plan. One way to add flexibility is to give the beneficiaries the authority to remove and replace trustees and advisors. A succession problem arises when individual fiduciaries resign, become disabled, or die. If the successor is not named or available, and there is no clear mechanism to appoint a successor, the trust instrument must be construed, in order to determine whether the grantor would have intended that the non-trustee fiduciary office must always remain filled. This problem has historically been addressed through declaratory judgment actions. Since the adoption of the OTC, this issue can likely be addressed now through private settlement agreements.[9] However, good drafting will always provide either a mechanism to fill a vacancy, or a statement that the vacancy need not be filled.

If the client has chosen a corporate trustee, and if the duration of the trust is likely to extend into the distant future, you should strongly consider letting an office lapse after the named individuals become unavailable to serve.

Direction/Approval/Delegation

As indicated above, Ohio law is clear on the allocation of liability among fiduciaries with direction authority. With the power to direct comes both the responsibility and liability. But what about the allocation of liability when an advisor has approved the actions of the trustee? An advisor/beneficiary with approval authority will most likely be estopped from complaining about actions for which approval was granted. If the advisor is not a beneficiary, that advisor will be presumed to be a fiduciary. Acceptance by the second fiduciary provides evidence of the propriety of the action taken. Indeed, under R.C. §5815.25(B), an argument can be made that approval by an advisor relieves the trustee from the liability for the action. However, an alternative interpretation of the provision would be that the trustee who initiates or proposes an action is not an "excluded fiduciary" under the statute, and that the trustee and the advisor would jointly bear responsibility for the actions taken.

Even where a trust instrument does not name a separate individual to perform fiduciary duties, the OTC recognizes that trustees may delegate certain functions. Assuming that a trustee exercises due care in the selection and monitoring of the agent, the OTC makes it clear that it is the agent, and not the trustee, who incurs liability for the specific actions.[10] There are two OTC statutes regarding delegation; one is of general application, and the other applies specifically to investments. Since the potential liability of the agent is triggered by having the delegation classified as one that is done pursuant to the statutory authorization, it is wise for trustees to have written agreements with their agents, and the agreements should reference the intent to establish a delegation under the OTC.

Who Gets Sued?

The answer to that question, of course, is "everyone." In recent years, there have been many suits brought by beneficiary plaintiffs against trustees relative to the management of trust investments.[11] Ohio's Uniform Prudent Investor Act, originally enacted in 1999, provides a default rule with respect to investments by trustees. It provides that trustees shall "invest and manage trust assets as a prudent person would, by considering the purposes, terms, distribution requirements and other

circumstances of the trust."[12] Under Prudent Investor, diversification is required, unless the trustee *reasonably* determines that, because of special circumstances, the purposes of the trust are served better without diversifying.[13] Note that the "reasonable" standard is an objective one. The Act specifically states that actions are not to be viewed with hindsight, but should rather be viewed objectively in light of the circumstances when the decision was made.[14]

An extensive analysis of the Prudent Investor Rule is beyond the scope of this article. However, drafting attorneys should focus on these issues: (1) actual investment performance may be relevant as to potential damages, but it provides no guide as to whether a particular action was reasonable; (2) when an objective standard is used, using a reasonable process is more important than the actual results obtained; (3) any litigation will involve all parties, including cotrustees, advisors, trust protectors, etc.; and, (4) a plan that has a clear allocation of authority and consequent liability is likely to be enforced. This is true whether the situation involves direction, approval, or delegation.

Considerations/Recommendations

1. A power vested in the beneficiaries to remove and replace the trustee goes a long way toward making the trustee responsive.
2. Consider letting the first generation serve along with an independent trustee, then letting the independent trustee serve alone.
3. Consider a default rule, allowing the trustee to reconstitute any open or inactive offices.
4. Consider waiving the Prudent Investor Rule with respect to irrevocable life insurance trusts, during the life of the grantor. This is likely to be the intention of the parties in any event. A "good faith" standard should be adequate during the grantor's life.
5. Review your boilerplate language with respect to retention of assets, and the obligation to diversify.
6. In order to ensure that beneficiaries can enforce their rights, it is a good idea to ensure that all parties (except family members) act as fiduciaries.
7. Simplicity is good. When a good trustee is selected, the single trustee/sole authority approach works well.
8. Approval arrangements can slow administration dramatically.
9. Estate planning counsel and their clients need to know both the benefits and the problems with bringing additional parties into the mix.
10. Be wary of any client's request to name a non-family member to an office in a non-fiduciary capacity.

Conclusion

Great care should be taken in optimizing a client's estate plan. Many situations will call for additional parties beyond the single trustee. Detailed drafting and a good understanding of Ohio law will help estate planners implement solid and workable plans. Such plans will have clearly defined allocations of rights and obligations.

ENDNOTES

1. Mr. Thacker specializes in the fields of trust law, estate planning and taxation. He is a frequent speaker on fiduciary matters, and he has previously written for this publication on four occasions. This article is based on a presentation on the topic by Herbert L. Braverman and Mr. Thacker at the Cleveland Bar Association's Estate Planning Institute in October, 2007. Mr. Thacker gratefully acknowledges Mr. Braverman's opinions and insights in the development of the presentation and this article.
2. Ohio Rev. Code Title 58.
3. Ohio Rev. Code Chapters 5809 and 5812.
4. See, for example, 12 USCS §215a(e), which is applicable to national banks. The merged entity is deemed to be the same corporation as each bank or banking association participating in the merger. See also R.C. §2109.28.
5. R.C. §5808.
6. Restatement of Trusts 2d §185; UTC §808(b).
7. R.C. §5808.08(D).
8. Alaska Stat. §13.36.370(d).
9. See R.C. §5801.10.
10. R.C. §§5808.07, 5809.06.
11. See, for example, *Wood v. U.S. Bank*, 160 Ohio App.3d 831, 828 N.E.2d 1072, 2005-Ohio-2341 (Ohio App. 1 Dist., 2005), and *Americans for the Arts v. Ruth Lilly Charitable Remainder Annuity Trust No. 1 U/A January 18, 2002*, 855 N.E.2d 592 (Ind. App. 2006). See also Galloway, *The First Case to Interpret Ohio's UPIA Clarifies Trustees' Duty to Diversify*, 16 PLJO 51 (Nov./Dec. 2005); Galloway, *A Second Ohio Case Interprets UPIA's Duty to Diversify*, 16 PLJO 117 (Mar./Apr. 2006), and *Summary of Fifth Third Bank v. First Star Bank*, 17 PLJO 84 (Nov./Dec. 2006).
12. R.C. §5809.02(A).
13. R.C. §5809.03(B).
14. R.C. §5809.05.

S.B. 134: The Memorandum Of Trust Has Become More Useful

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R.C. §5301.255 authorizes the recording of a memorandum of trust to provide notice of the existence of a trust. One of the purposes in initially enacting this statute was to provide privacy to settlors of trusts by eliminating the need to record an entire trust agreement if real estate was to be owned through the trust.

Two of the requirements of R.C. §5301.255 are that the memorandum of trust must be executed by both the settlor and trustee and that the memorandum of trust must state the names and addresses of both the settlor and trustee. These two requirements, however, have caused the statute to be seldom used for two primary reasons. First, settlors often times create trusts for the primary purpose of not disclosing their ownership interest in real estate in the public records. This objective is defeated if the name and address of the settlor is disclosed in the memorandum of trust. Second, once the settlor died, it became impossible to comply with the statute if the memorandum of trust was not prepared and executed prior to the settlor's death.

In order to address these problems and make the statute more useful, the Ohio State Bar Association Real Property Section prepared and sponsored S.B. 134, which was also supported by the Estate Planning, Trust and Probate Law Section. The Ohio General Assembly recently passed S.B. 134, and Governor Strickland signed S.B. 134 on October 18, 2007, making it effective on January 17, 2008.

S.B. 134 revises R.C. §5301.255 and removes the requirements that the memorandum of trust must be signed by the settlor and that the name and address of the settlor must be disclosed in the memorandum of trust. S.B. 134 also makes a conforming change to R.C. §5301.01 and removes the requirement that the settlor sign and acknowledge a memorandum of trust.

The changes made by S.B. 134 should now make the memorandum of trust more useful. Title to real estate owned through a trust should be actually titled in the name of the trustee, and now that trustee can execute and acknowledge the memorandum of trust without the signature of the settlor and without disclosing the name and address of the settlor. In addition, since the memorandum of trust is often not needed until the real estate owned through the trust is sold, it is beneficial to owners of real estate to delay the payment of legal fees and recording costs associated with a memorandum of trust until the real estate is to be sold.

Prior to the passage of S.B. 134, real estate lawyers and title examiners used an affidavit on facts relating to title under R.C. §5301.252 to reflect the existence of the trust and the power of the trustee to sell the real estate owned through the trust. In addition, real estate lawyers and title examiners used an affidavit to remove trustee from title to realty under R.C. §5302.171 to reflect the appointment of a successor trustee or co-trustee of a trust. Now, with the changes made by S.B. 134, the memorandum of trust, rather than either affidavit, should become more useful and be the document of choice for real estate lawyers and title examiners in all transactions involving real estate owned through a trust.

Editor's Message

The problem of shifting control of an LLC on the death of a member has been corrected by HB 134, effective October 18, 2007. The original statute, R.C. 1705.21(A), was assumed and intended to permit the operating agreement to determine rights at the death of a member. However, in *Holdeman v. Epperson*, 111 Ohio St. 3d 551, 857 N.E.2d 583, 2006-Ohio-6209 (Ohio 2006), the court held that the statute was not effective to permit variance by the operating agreement. See Galloway, *Holdeman v. Epperson: Rights of an Executrix to Control Limited Liability Company*, 17 PLJO 164 (May/June 2007). A dissenting opinion called on the General Assembly to clarify this, and it did on the recommendation of the OSBA Corporation Law Committee and with the support of the OSBA EPTPL Section.

Coming to Ohio?

The Uniform Power of Attorney Act[1]

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I. Introduction

The Uniform Power of Attorney Act (the "Act") was approved by the Uniform Law Commission in 2006. It was enacted in New Mexico, introduced in Maine, Maryland, Michigan, and Minnesota, and is currently under study for adoption in a number of other states, including Ohio. This article summarizes key features of the Act and explores some of the issues currently under discussion in Ohio.

The Act's drafting committee studied existing state legislative trends, input from a national survey,[4] as well as comments from many professional organizations to identify the key issues for legislative reform.[5] Two predominant issues emerged in this process—first, the concern that powers of attorney are useless if third persons refuse to accept them; and second, the concern that statutory safeguards are needed to prevent, detect, and redress abuse if the fiduciary relationship goes awry.

Where there exists controversy, it stems not from anything radical about the Act's provisions, but from differences of opinion about where the balance should be struck between inherently competing objectives—promoting the principal's self-determination interests on the one hand, and minimizing the risk of financial exploitation by an untrustworthy agent on the other. Surrogate property management by any means—guardianship, trust, or power of attorney—must balance the autonomy-versus-protection tension, but the tension is particularly keen in the context of a power of attorney because of the very informal and flexible nature of this private fiduciary arrangement. Striking this balance is further complicated by the need to guide and protect trustworthy agents who may be reluctant to serve under powers of attorney because of the fear of liability emanating from contentious family situations.

The following section provides an overview of the basic structure of the Act and describes how key features of the Act balance the often competing interests among the principal, the agent, and the third persons who are asked to accept a power of attorney.

II. Basic Structure and Key Features of the Act

The Act, which supersedes the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code,[6] consists of four articles. The first contains all of the general provisions that pertain to creation and use of a power of attorney. While most of these provisions are default rules that can be altered by the power of attorney, certain mandatory provisions in Article 1 serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent's authority. Article 2 provides default definitions for the various areas of authority that can be granted to an agent. The genesis for most of these definitions is the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Article 2 also identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal's property or alter the principal's estate plan.[7] Article 3 contains an optional statutory form power of attorney[8] that is designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Article 3 also includes a sample agent certification form.[9] Article 4 contains miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.

The Act attempts to balance protections for the principal, the agent, and third persons who are asked to accept an agent's authority under a power of attorney. Protecting the principal's interests includes the need to safeguard the principal's surrogate decision-making plan and choice of agent, as well as the need to prevent, detect, and redress fiduciary abuse. Protecting the agent requires that the agent have clear guidelines for conduct under the power of attorney as well as an objective method for determining when an agency relationship commences and terminates. Protecting third persons requires safe harbors for good faith acceptance of a power of attorney as well as good faith refusal. The following outlines the key features of the Act that address these objectives.

A. Protection of the Principal

A plan for surrogate decision making via a power of attorney cannot be effective unless the power of attorney is accepted, the scope of authority and principal's expectations respected, and the choice of agent undisturbed barring agent misconduct. Given that durable powers are often exercised after the principal has lost the ability to monitor the agent's conduct, a statute should also provide means for preventing, detecting, and redressing abuse.

1. Encouraging Acceptance of Powers of Attorney

The Act encourages acceptance of powers of attorney by providing portability for powers created under other law, protection for good faith acceptances (discussed in Section C.), and by creating liability for arbitrary refusals. With respect to portability, the Act recognizes powers of attorney validly created in other jurisdictions or under pre-existing law.[10] Given the mobility of clients and the frequency with which they own property in more than one jurisdiction, a power of attorney will be of limited value unless it is honored across state lines. The Act's broad portability provision obviates the necessity of executing multiple powers of attorney or of obtaining limited guardianship to deal with property in other jurisdictions.

The Act also provides protection against arbitrary refusal of a power of attorney. Unless a refusal meets one of the statutory safe harbors in the Act, a person that refuses an acknowledged power of attorney is subject to: "(1) a court order mandating acceptance of the power of attorney; and (2) liability for reasonable attorney's fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney."[11] As an alternative to this liability provision, states may choose to adopt instead a provision that limits liability to arbitrary refusal of an acknowledged *statutory form* power of attorney.[12]

While the Act does not provide a damages provision for arbitrary refusals, it also does not preclude recovery of actual damages.[13] The drafting committee chose to focus on recoupment of fees and costs in response to overwhelming feedback from practitioners who indicated that a guardianship proceeding was generally more cost effective than a suit to mandate acceptance of the power of attorney. Awarding costs and fees removes the economic disincentive of an action for injunctive relief.

Currently eleven states recognize some level of liability for arbitrary refusal of a power of attorney, including New Mexico which has adopted the Act's liability provision for arbitrary refusal of an acknowledged statutory form power of attorney.[14] Of those states, six provide recovery of attorney's fees[15] and four provide for recovery of costs.[16]

2. Respecting the Scope of Authority and the Principal's Expectations

While portability of a power of attorney is desirable, confusion can arise with respect to what law governs interpretation of a power of attorney drafted in another jurisdiction.[17] Default rules on matters of authority vary from state to state.[18] The Act provides that the meaning and effect of a power of attorney is determined by the law of the jurisdiction under which it was created.[19] Thus, an agent's authority will neither be enlarged nor narrowed by virtue of using the power of attorney in a different jurisdiction.

Three mandatory agent duties under the Act also operate to reinforce the principal's intended scope of delegated authority as well as the expectations for exercise of that authority. The Act provides that the agent must act in good faith, within the scope of authority granted, and according to the principal's reasonable expectations, if known, and otherwise in the principal's best interest.[20] By establishing the principal's expectations as the paramount guideline for agent conduct, the Act permits a principal to empower agent transactions that effectuate objectives which might not meet an objective "best interest" standard. For example, a principal may prefer housing or care options that are more or less expensive than what a reasonably prudent person would select in the same or similar circumstances. Likewise, the principal may instruct the agent to carry out donative activities that do not result in any tax benefit or other outcome which objectively satisfies the best interest standard. Such expectations might even include transactions that benefit the agent, with or without an accompanying benefit to the principal.

In addition to the foregoing mandatory duties, the Act contains default duties that protect the principal and the principal's objectives. Unless otherwise provided in the power of attorney, an agent must:

- act loyally for the principal's benefit;[21]
- avoid creating a conflict of interest that impairs the ability to act impartially in the principal's best interest;[22]
- act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;[23]

- keep records;[24]
- cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations if known, and if unknown, to act in the principal's best interest;[25]
- attempt to preserve the principal's estate plan to the extent the plan is known to the agent and preservation is consistent with the principal's best interest;[26] and
- account only if requested by the principal, a fiduciary appointed for the principal, a governmental agency having authority to protect the principal's welfare, or the personal representative or successor in interest of the principal's estate, or if ordered by a court.[27]

In light of these default duties, if a principal expects an agent to act in a manner that might not meet an objective best interest standard or that may conflict with statutory default duties, then the principal should consider altering the relevant default duties in the power of attorney and making known to the agent those expectations in some admissible form.[28]

3. Protecting the Principal's Choice of Agent

Under the Act, an agent's authority continues notwithstanding the later appointment of a conservator or guardian unless the court limits, suspends, or terminates the agent's authority.[29] This is a departure from the Uniform Durable Power of Attorney Act which vested in a later-appointed fiduciary the same authority that a principal would have to revoke a power of attorney.[30] When the Uniform Durable Power of Attorney Act was drafted, it was not contemplated that the power of revocation, if vested in the hands of feuding family members, could be used to undermine the principal's surrogate decision-making plan and gain control of the principal's assets.

Reserving to the court, rather than to a later-appointed fiduciary, the authority to modify or terminate an agent's authority is consistent with more recent state legislative trends.[31] This legislative approach not only discourages the use of guardianship as a weapon in control battles, it promotes judicial economy. As the Comments to the Act note, "If . . . a fiduciary appointment is required because of the agent's inadequate performance or breach of fiduciary duties, the court, having considered the evidence during the appointment proceedings, may limit or terminate the agent's authority contemporaneously with appointment of the fiduciary."[32]

4. Preventing, Detecting, and Redressing Fiduciary Abuse

The Act takes a multi-faceted approach to the problem of financial abuse perpetrated with a power of attorney. Given that financial abuse of all types is currently the focus of significant national attention, adequate safeguards in a power of attorney statute are important for the principal's protection as well as for garnering political support for legislative reform. The following highlights how provisions in the Act aid in the prevention, detection, and redress of power of attorney abuse.

Prevention

Addressing financial abuse perpetrated with a power of attorney is much like the proverbial problem of the horse that has already escaped the barn—shutting the door is of little effect. By the time financial abuse is detected, and liability assessed, the chances of recovering the value of the principal's property are slim. Thus, the Act embodies a number of preventative measures that make financial abuse more difficult to perpetrate. The following outlines those provisions:

- An agent may not do the following unless authority is granted with express language in the power of attorney:
  - (a) create, amend, revoke, or terminate an inter vivos trust;
  - (b) make a gift;
  - (c) create or change rights of survivorship;
  - (d) create or change a beneficiary designation;
  - (e) authorize another person to exercise authority granted to the agent;
  - (f) waive the principal's right to be a beneficiary of a joint and survivor annuity;
  - (g) exercise fiduciary powers that the principal has authority to delegate; and
  - (h) disclaim or refuse an interest in property, including a power of appointment.[33]
- A spouse-agent's authority terminates upon the filing of an action for marital dissolution, annulment, or legal separation unless the power of attorney provides otherwise.[34]

- An agent who is not the principal's ancestor, spouse, or descendant is prohibited from exercising authority to create in the agent (or in an individual to whom the agent owes an obligation of support) an interest in the principal's property unless the power of attorney provides otherwise.[35]

- An agent who has actual knowledge of a breach or imminent breach of duty by another agent must notify the principal, and if the principal is incapacitated, must take reasonably appropriate action to safeguard the principal's best interest.[36]

- A person may refuse to accept an otherwise valid power of attorney if the person makes, or knows that another person has made, a report to adult protective services (or the equivalent agency) stating a good faith belief that the principal may be subject to abuse by the agent or someone acting in concert with the agent.[37]

Detection

One of the benefits of a power of attorney over a trust or guardianship is the greater degree of privacy that can be maintained with respect to the principal's property and the management of that property. The privacy advantage has, however, a corresponding disadvantage which is the difficulty of detecting financial abuse if the fiduciary relationship goes awry. The Act addresses this difficulty on two fronts. First, an agent must disclose information about transactions conducted on behalf of the principal if ordered by a court, or requested by the principal, a fiduciary acting for the principal, a governmental agency with authority to protect the welfare of the principal, or by the personal representative of the principal's estate.[38] Second, any person that demonstrates sufficient interest in the principal's welfare may petition the court to construe a power of attorney or review the agent's conduct.[39]

Narrowly defining who may require the agent to directly account for transactions conducted on the principal's behalf is consistent with the goal of protecting the principal's privacy. Limiting this duty to requests by the principal, a fiduciary acting for the principal, or, if the principal is deceased, the personal representative, is a common statutory approach.[40] Heightened awareness of the financial abuse problem has prompted a number of states to add to this limited list a governmental agency that has authority to protect the principal's welfare.[41] The Act embodies this legislative trend.

The Act also follows the majority trend in states that have standing provisions for judicial review of the agent's conduct. Of the eleven states with such provisions, five permit any person interested in the welfare of the principal to petition,[42] and four permit "an interested person" to file, but do not define interested person.[43] Only Pennsylvania and Vermont limit standing to the principal and a governmental agency or official.[44] Because victimized principals are often socially or physically isolated, a broad standing provision to initiate judicial review of an agent's conduct may be the only effective means of detecting and stopping surreptitious abuse. Furthermore, this check-and-balance on abuse is far less onerous to the principal's privacy interests than state reforms that permit any interested person to directly request an accounting from an agent,[45] or that require agent registration with the court and the filing of inventories and accountings.[46]

Remedies

If an agent is found liable for violating the Act, the Act provides that the agent must

> "(1) restore the value of the principal's property to what it would have been had the violation not occurred; and (2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf."[47] This provision recognizes that the costs of an agent's representation may have been advanced from the principal's property, and that if the agent is found to have violated the Act, the principal's estate should be reimbursed. Moreover, the remedies under the Act are not exclusive.[48] An agent may be subject to additional civil or criminal liability if the jurisdiction has other statutes that govern financial abuse.[49]

B. Protection of the Agent

In light of the increase in family litigation over elders and their assets and the advent of state civil and criminal penalties for financial abuse, both the principal and the agent are best served by clearly articulated parameters for agent conduct. Notwithstanding the Act's explicit mandatory and default agent duties,[50] the Act recognizes that loyalty to the principal does not necessarily preclude conduct that also benefits the agent. The Act provides that "[a]n agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act

or has an individual or conflicting interest in relation to the property or affairs of the principal."[51] This provision addresses the fact that many agents are family members who have inherent conflicts of interest.

The principal is also permitted to exonerate the agent in the power of attorney provided that the exoneration provision is not inserted as the result of abuse of the fiduciary relationship and does not reduce the agent's standard of conduct below a good faith standard.[52] In highly contentious family situations, a prudent prospective agent may be unwilling to serve without such protection. Likewise, agents should have the ability to terminate the agency relationship in a manner that is reasonably protective of the principal's future needs while clearly demarcating the end of the agent's responsibilities and potential liability. The Act provides alternative means by which an agent can give appropriate notice of resignation without the necessity of invoking a court proceeding.[53]

C. Protection of Third Persons

Creating a mechanism to assure acceptance of powers of attorney was the drafting committee's most time-consuming task. A necessary counterpart to liability for an arbitrary refusal of a power of attorney is that third parties must have adequate protection for a good faith acceptance or a good faith refusal. The committee worked closely with a representative from the American Bankers Association, an informal work group of bankers assembled by the American Bankers Association, and the National Conference of Lawyers and Corporate Fiduciaries to gather input and critique interim drafts. The provisions in the final Act that pertain to third persons are an amalgamation of those efforts. These provisions explicitly protect good faith acceptance and refusal of powers of attorney, and recognize liability only for refusals that fall outside the broad safe harbors outlined in the Act.

1. Protection for Good Faith Acceptance of a Power of Attorney

The Act provides that a third person who in good faith accepts a purportedly acknowledged power of attorney may rely on the validity of the power of attorney, the validity of the agent's authority, and the propriety of the exercise of that authority unless there is actual knowledge to the contrary.[54] By protecting acceptance of a purportedly acknowledged power of attorney, the Act places upon the principal, rather than the person accepting the power of attorney, the risk that the power of attorney is forged or otherwise invalid.[55] Furthermore, if the person accepting a power of attorney conducts activities through employees, that person is not held to have actual knowledge of a fact if the employee conducting the transaction with the power of attorney is without actual knowledge of the fact.[56] Thus, a bank with multiple offices will not be held to have actual knowledge of a fact that was communicated to one office if the employee conducting the transaction with the power of attorney in another office is unaware of the fact.

The Act also permits a third person to request and rely upon an agent's certification as to any factual matter, an opinion of counsel as to any legal matter, and an English translation if any part of the power of attorney is in a language other than English.[57] The decision to request any of these items is at the discretion of the third person and is not a condition to protection of good faith acceptance.

2. Protection for Good Faith Refusal of a Power of Attorney

While it is an objective of the Act to encourage and protect good faith acceptance of a power of attorney, it is also in the best interest of the principal to protect a good faith refusal. The Act provides the following safe harbors for legitimate refusals of a power of attorney:

> "(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;
>
> (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;
>
> (3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;
>
> (4) a request for a certification, a translation, or an opinion of counsel under Section 119(d) is refused;
>
> (5) the person in good faith believes that the power is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation, or an opinion of counsel under Section 119(d) has been requested or provided; or
>
> (6) the person makes, or has actual knowledge that another person has made, a report to the [local adult protective service office] stating

> a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent."[58]

While the Act does not require third persons to serve as watchdogs for abuse, the Act permits a third person to do so when there is good faith belief that the principal may be subject to some type of abuse by the agent or someone acting in concert with the agent. If the third person has such a belief and is willing to make a report to the local adult protective services office, or knows that someone else has made such a report, then an otherwise valid power of attorney may be refused.[59]

III. Review of the Act in Ohio

The OSBA Estate Planning, Probate, and Trust Law Council has formed a committee to study the Act and to recommend whether or not the Council should seek its enactment in Ohio. That committee has not completed its work, however it is clearly apparent that the committee is supportive of the Act. A discussion of a few of the areas under review may be informative. Many of the matters discussed in this section III are included primarily to list those matters that are actively being studied by the Ohio committee as well as concerns expressed by individual members of the committee. The committee recently held a teleconference with author Whitton to discuss these issues, all of which were addressed during the drafting process. The committee realizes that the usefulness of a uniform act is seriously diminished the more that an enacting state deviates from it. These issues will be presented to the OSBA Estate Planning, Trust & Probate Law Council at its January meeting.

A. Voids in Current Ohio Law

The statutory form contained in R. C. § 1337.18 lacks a statutory framework and contains statements that may not be supported by Ohio's common law. Division (A) of that section begins, "The following form may be used to create a power of attorney:" The form itself states, "Unless authorized in the power of attorney, a power of attorney does not grant authority to an agent to do any of the following:", followed by a listing of the hot powers of the type listed in Sec. 201(a) of the Act. Clearly, an agent under the statutory forms lacks the proscribed powers, but are agents under non-statutory forms also statutorily deprived of these powers? Statutory forms work best when the substance of the form tracks statutory law, as is the case both with respect to the statutory powers of an agent enumerated in R. C. §1337.20 and the statutory power of attorney form contained in Article 3 of the Act.

B. Third Party Acceptance

The EPPTL Council's Uniform Power of Attorney Act Committee is not aware of any opposition in Ohio to § 120 of the Act, which imposes liability for refusal to accept acknowledged powers of attorney. A debate within the committee has arisen. Powers of attorney are useless if they are not honored by third parties. If third party financial institutions are to be forced to accept acknowledged powers of attorney, it only seems fair that they be protected for accepting them provided that they act in good faith. That protection, contained in § 119, however, necessarily shifts the risk of loss from the third party to the principal, and this shift has generated strong opinions on both sides within the committee. It is important to understand what this shift in liability entails. A couple of examples will illustrate:

> *Example 1.* Mary, who is now incompetent, had appointed her son, Tom, as her agent. Tom attempted, without success, to change Mary's $100,000 brokerage account from her sole name to her name TOD to her husband (and Tom's father), Roy. (Mary's will leaves her entire estate to her husband, Tom.) Mary died a month after her brokerage firm refused to honor the power of attorney. Mary's only probate asset was the brokerage account, and cost to probate her estate was $4000.

> *Example 2.* Mary inadvertently left her purse at the restaurant where she had lunch. Upon realizing this, she returned, however it could not be located. Jane, a felon who had served a prison sentence for fraud, now had Mary's purse. Jane forged Mary's signature on a copy of the Act's statutory power of attorney form which appointed herself as Mary's agent. Posing as Mary and using the I. D.'s contained in the purse, Jane was able to find a notary who acknowledged the forged signature. Jane took the form to Mary's brokerage firm, where she liquidated and withdrew Mary's $2,000,000 account. Jane also forged Mary's signature on a check payable to herself in the amount of $5,000 drawn on Mary's account with Bank A. When the fraud was discovered, Mary was able to recover the $5,000 but not the $2,000,000.

The scenario in example 1 is extremely common and

illustrates the need for legislative encouragement for the acceptance of acknowledged powers of attorney. Had this example taken place in a jurisdiction that had enacted the Act, the brokerage firm would have made the requested change and Mary's family would have saved $4,000.

Example 2 is more troubling. If we assume that these facts occurred in a jurisdiction that had enacted the Act, Mary would be out $2,000,000 and her only recourse would be to track down Jane. Bank A, however, must return $5,000 to Mary for having honored a forged check. Had Mary's $2,000,000 been withdrawn by use of a forged check, the bank, not Mary, would have suffered the loss. It has been pointed out, however, that when a bank opens an account, it obtains necessary identification from the customer when the account card is signed. When a third party presents a power of attorney, however, a third party financial institution is not a party to that agreement, and the agreement was not signed in the presence of the financial institution.

While the result in example 2 may be troubling, that is the "cost" of imposing liability upon third party financial institutions for refusing to accept acknowledged powers of attorney. The question can be asked whether the Act goes too far in encouraging third parties to accept powers of attorney. Is it a good policy decision to give fraud victims such as Mary legal recourse only against the criminal? Is there sufficient reason to hold financial institutions liable on account of forged checks, but not forged powers of attorney? While it is little consolation to Mary, the refusal of financial institutions to accept powers of attorney is far more common than occurrences of forged powers of attorney. The answer may have been given by Star Trek's Lt. Commander Spock. As he was dying from radiation poisoning after having restored the Enterprise's warp drive, allowing it to speed away and escape the Genesis explosion, his last words were, "Do not grieve, Admiral - it is logical: the needs of the many outweigh – the needs of the few... Or the one."[60]

Regarding this issue, states such as California, Illinois, Indiana, and North Carolina, which recognize liability for failing to accept powers of attorney, long ago decided to apportion the risk to the account owner. In these states, this shift has not resulted in a problem with forged powers of attorney. One committee member has handled a very high volume of litigation involving the misuse of powers of attorney, but none of those cases has involved a forged document. The resolution of this issue necessarily comes down to a policy decision. The NCCUSL national survey identified the reluctance or refusal of third parties to accept powers of attorney to be a significant problem. The fact that this problem exists and that it is a significant problem has been verified by a number of members of the Ohio committee. The use of forged powers of attorney does not appear to be a problem either in Ohio or nationally. The policy issue which must be addressed is whether the law should place more importance on encouraging third parties to accept powers of attorney or to sacrifice that goal in favor of protecting depositors against the risk of loss through the use of forged powers of attorney.

C. Power to Create a Trust

It is not clear whether or not the recently enacted Ohio Trust Code permits an agent of an incompetent principal to create a trust. R. C. § 5804.02 requires that the settlor of a trust be competent and express an intention to create a trust. While not directly on point, R. C. § 5806.02(E), which deals with existing revocable trusts, states that an agent under a power of attorney may only amend or revoke a trust if specific authority to do so is contained both in the trust agreement and in the power of attorney. By analogy, it can be argued that if the Ohio Trust Code contemplated that a trust could be created by an agent, language would have been included permitting an agent to perform that act if specific authority to do so is included in the power of attorney. This exact point was made by the U. S. 10th Circuit Court of Appeals in *Stafford v. Crane*[61], which dealt with the creation of a trust by an agent under a power of attorney.

The current Ohio statutory power of attorney form contained in R. C. § 1337.18, and § 201 of the Act, both state that an agent cannot create a trust unless specific authority to do so is granted to the agent.

The Uniform Law Commission and the OSBA Estate Planning, Probate, and Trust Law Council are both studying this issue to determine whether or not an actual conflict exists and to take any necessary remedial action.

D. Section 201 "Hot" Powers in the Statutory Form

Fiduciaries ordinarily do not have powers of the type listed in § 201, yet an agent under a power of attorney is the fiduciary subject to the least amount of oversight. Because of that, should consideration be given to making the exoneration provisions of § 115 inapplicable to the exercise of the hot powers, especially where those powers are exercised for the benefit of the agent?

§ 114 of the Act imposes upon the agent the duty to act in accordance with the principal's reasonable intention, to the extent actually known. If a principal is able to form and express that intention, would not the principal also be able to perform actions such as making gifts, signing beneficiary designations, amending or creating trusts? If so, why would an agent need the power to perform those actions? If the law is to allow an agent to act on the basis of the principal's expectations, what level of proof should be required of the agent in establishing those expectations, and should that level of proof be set forth in the statute? Regardless of what that level of proof may be, should that level be higher for the exercise of the hot powers? Should it be higher still where a hot power is exercised by the agent for the benefit of the agent, as where the agent exercises the power to name herself as the beneficiary of the principal's IRA?

The exercise of a hot power by the agent for the agent's benefit is an extreme act of self-dealing. Should the agent's naked assertion that the action was consistent with the principal's intention be sufficient?

> The relationship of an attorney-in-fact to his [or her] principal is that of agent and principal . . . and, thus, the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing . . . Consistent with this duty, an agent may not make a gift to himself [or herself] or a third party of the money or property which is the subject of the agency relationship" (*Semmler v. Naples*, 166 AD2d 751, 752 [1990] [citations and internal quotation marks omitted]). " 'Such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make the gift' " (*Semmler v Naples, supra* at 752, quoting *Matter of De Belardino*, 77 Misc 2d 253, 256 [1974], *affd* 47 AD2d 589 [1975]; *see Matter of Naumoff*, 301 AD2d 802 [2003]; *Mantella v Mantella*, 268 AD2d 852 [2000]).[62]

Accordingly, should § 201 be amended to raise the bar on the relaxed agent duties set forth in § 114 with respect to the exercise of the hot powers?

§ 114(b)(6) requires that an agent "attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based upon all relevant factors", including 4 enumerated items. Should an agent who is not aware of the principal's estate plan and to whom the principal has not expressed his or her intention be permitted to complete beneficiary designations, create rights of survivorship, or create trusts? If the agent is only permitted to complete beneficiary designations in a manner consistent with the principal's estate plan, how can an agent ever be certain that the will he or she has seen is the principal's current estate plan? There are serious problems both with imposing this requirement and in not imposing it.

The act of funding a trust may appear to be, and in most cases actually would be, innocuous, however if the trust being funded has different beneficiaries that other parts of the principal's estate plan, then the power to fund a trust become dangerous indeed. Should the funding of trusts be added to Sec. 201(a)(1)?

Of the eight enumerated hot powers in Sec. 201(a), only the gifting power is further limited by Sec. 217. Is that power really more subject to abuse or more dangerous than the power to amend a trust? Should not similar additional limitations be placed on some of the other hot powers?

The OSBA Uniform Power of Attorney Committee is concerned that the Act's statutory form found in Article 3 contains a section whereby a principal can easily grant any or all of the eight hot powers. While it is true that this section includes a warning, a number of members feel that the granting of these powers should be entirely omitted from the form on the basis that the power of an agent to perform estate planning for a principal should be granted rarely, and that the risk of lay persons completing the form and initialing all grants of power with little thought substantially outweighs the benefit of providing an easy method of granting the hot powers. The Act's drafting committee, on the other hand, felt that it was important that all options offered by the Act be readily available through the use of the form.

E. Substituted Judgment Standard of Section 114

In re Estate of Ferrara[63], was decided upon New York's "best interest" standard. It is very possible that the opposite result would have been reached had the substituted judgment standard of § 114 of the Act been applied by the Court. You decide!

In June of 1999, George J. Ferrara, unmarried and with no descendants, executed a will which left his entire estate to The Salvation Army. A mere five months later, as his health deteriorated, George called on his brother, John, and John's son, Dominick, for assistance.

Dominick obtained and completed a New York statutory power of attorney from George to John and Dominick, which contained an additional, typewritten provision that permitted the agents to "make gifts without limitation in amount to John Ferrara and/or Dominick Ferrara."

In the three week interval between the document's execution and George's death, Dominick transferred about $820,000 of his uncle's assets to himself. At trial, Dominick asserted that the transfers were made pursuant to George's expectations, which assertion the trial Court accepted.

> Dominick Ferrara insists that this provision authorizing him to make unlimited gifts to himself was added "[i]n furtherance of [decedent's] wishes," because decedent repeatedly told him in December 1999 and January 2000 that he "wanted [Dominick Ferrara] to have all of [decedent's] assets to do with as [he] pleased." When asked if he and decedent had discussed making gifts to other family members—including his father, John, the other attorney-in-fact—Dominick Ferrara replied that they had not, again because "[m]y Uncle George gave me his money to do as I wished." Dominick Ferrara acknowledges that decedent made no memorandum or note to this effect, and only once expressed these donative intentions in the presence of anyone else—Dominick's wife, Elizabeth.[64]

The notary who acknowledged George's signature testified that George read the entire document, and that while Dominick explained the form's provisions to his uncle, the notary could "not recall the word 'gift' having been mentioned."[65]

By pure happenstance, The Salvation Army learned of George's death, that it had been named as the residuary beneficiary of George's estate, and the fact that his monies had been disbursed. It commenced a special Surrogate's Court proceeding against Dominick and other surviving relatives, seeking a "turnover" of George's assets. The Salvation Army's case was dismissed on the basis that George was competent when he executed the power of attorney and that there was no wrongful conduct. On appeal, the Appellate Division affirmed the decision.[66]

When the case reached the state's highest court, the New York State Court of Appeals disagreed with both the Surrogate's Court and the Appellate Division. The Court held that under New York law, all gifts made pursuant to a power of attorney must be made in the "best interest" of the principal. The gifting authority contained in New York's power of attorney statute limits gifts to $10,000 per year, permits them only to be made to "spouse, children and more remote descendants, and parents," and limits them "*only for purposes which the agent reasonably deems to be in the best interest of the principal."* (General Obligations Law § 5-1502M [1] [emphasis added]). In *Ferrara*, the typewritten addition removed the $10,000 limitation and expanded the permitted class of donees to include John and Dominick, however the Court held that the additional language did not remove the italicized best interest requirement quoted above. The Court noted, "Section 5-1502M, the constructional section governing gift giving, explains at subdivision (1) that authority to make gifts in the best interest of the principal includes 'minimization of income, estate, inheritance, generation-skipping transfer or gift taxes.' "[67]

How would *Ferrara* have been decided under the Act? Under § 201, an agent has no authority to make gifts unless the document expressly grants that authority. Even when that authority is granted § 217 limits gifts to the annual exclusion amount, unless the document otherwise provides, and further provides that "an agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors," including 5 enumerated items. The power of attorney executed by George Ferrara granted specific gifting authority and removed the amount limitation. Dominick had testified that he had not seen his uncle's will. Dominick's claim that the $820,000 gift he made to himself was consistent with his uncle's objectives was accepted by the trial court[68], thereby apparently falling squarely within the requirement of § 217(c) of the Act. Accordingly to Dominick and the Surrogate Court which believed him, Dominick was acting in accordance with the expectations of George, as required by § 114 of the Act. If George truly had wanted to leave his entire estate to Dominick just months after having executed a will that gave his entire estate to The Salvation Army, would he not have thought that he had better execute a new will?

This case may not illustrate a potential problem with the Act as much as it points out poor advocacy and/or judicial review at the Surrogate Court level. It does, however, focus attention on the substituted judgment standard of § 114 of the Act and the possible need to require a high level of proof of the principal's objectives.

IV. Conclusion

Many innovations in the Uniform Power of Attorney Act enhance the use of a power of attorney as an inexpensive and flexible tool for surrogate property management. Inherent in the use of powers of attorney is a tension between facilitating the principal's self-determination interests and protecting the principal's financial interests once the principal has lost capacity. Furthermore, a power of attorney is useless for surrogate property management if third persons refuse to accept it. Successful reform of power of attorney legislation thus requires a careful balancing of these interests. The provisions of the Uniform Power of Attorney Act strike this balance while preserving the usefulness of powers of attorney as a low-cost, flexible means of surrogate property management.

ENDNOTES

1. Sections I and II are based upon presentations by author Whitton at the 41st Annual Heckerling Institute on Estate Planning titled, "The New Uniform Power of Attorney Act: Balancing Protection of the Principal, the Agent, and Third Persons," the 2007 ACTEC annual meeting titled, "Hot Buttons on the New Uniforms: the Controversial Provisions of the UTC, UPOAA and UPMIFA—Balancing the Buttons on the Uniform Power of Attorney Act," and the 2007 ABA Section of Real Property, Trust & Estate Law Spring Symposia titled, "Advancing the Law—What's Behind Those New Uniforms: The Uniform Power of Attorney Act Top Ten List." Section III is based upon ruminations of the OSBA Estate Planning, Probate & Trust Law Council's Uniform Power of Attorney committee and does not reflect the views of author Whitton.
2. Linda S. Whitton is Professor of Law at Valparaiso University School of Law and the Reporter for the Uniform Power of Attorney Act. She is a Commissioner of the ABA Commission on Law and Aging and also a Council Member of the ABA Section of Real Property, Trust & Estate Law where she supervises its Elder Law, Disability Planning and Bioethics Group. Professor Whitton is a past Chair of the Association of American Law Schools Section on Aging and the Law and teaches courses in Elder Law and Property.
3. Richard E. Davis is a member of the *Probate Law Journal*'s Editorial Board of Advisors. He chairs the EPPTL Council's Uniform Power of Attorney Act committee.
4. Linda S. Whitton, *National Durable Power of Attorney Survey Results and Analysis,* National Conference of Commissioners on Uniform State Laws (2002), *available at* http://www.law.upenn.edu/bll/ulc/dpoaa/surveyoct2002.htm .
5. *See* "All is Not Well with the 'Lowly' Power of Attorney—But help may be on the way", Richard Davis Nov/Dec 2003 PLJO, at 30.
6. Unif. Power of Att'y Act § 404 (2006).
7. Unif. Power of Att'y Act § 201(a).
8. Unif. Power of Att'y Act § 301.
9. Unif. Power of Att'y Act § 302.
10. Unif. Power of Att'y Act § 106.
11. Unif. Power of Att'y Act § 120(c), Alternative A.
12. Unif. Power of Att'y Act § 120, Alternative B.
13. *See* Unif. Power of Att'y Act § 123 (indicating that the remedies under the Act are not exclusive).
14. Alaska Stat. § 13.26.353(c) (2004); Cal. Prob. Code § 4306(a) (West Supp. 2006); Fla. Stat. Ann. § 709.08(11) (West 2000 & Supp. 2006); 755 Ill. Comp. Stat. Ann. 45/2-8 (West 1992); Ind. Code Ann. § 30-5-9-9 (West Supp. 2005); Minn. Stat. Ann. § 523.20 (West 2006); N.Y. Gen. Oblig. Law § 5-1504 (McKinney 2001); N.M. Stat. Ann. § 45-5A-120(D) (Lexis Adv. Legis. Code 2007); N.C. Gen. Stat. § 32A-41 (2005); 20 Pa. Cons. Stat. Ann. § 5608 (West 2005); S.C. Code Ann. § 62-5-501(F)(1) (Supp. 2005).
15. Alaska Stat. § 13.26.353(c); Cal. Prob. Code Ann. § 4306(a); Fla. Stat. Ann. § 709.08(11); Ind. Code Ann. § 30-5-9-9(a)(2); N.M. Stat. Ann. § 45-5A-120(D)(2); N.C. Gen. Stat. § 32A-41(a)(1).
16. Alaska Stat. § 13.26.353(c); Fla. Stat. Ann. § 709.08(11); N.M. Stat. Ann. § 45-5A-120(D)(2); N.C. Gen. Stat. § 32A-41(a)(1).
17. *See generally* Linda S. Whitton, *Crossing State Lines with Durable Powers*, Prob. & Prop., Sept./Oct. 2003, at 28 (discussing the challenges of drafting durable powers for mobile clients and suggesting guidelines).
18. *Id*.
19. Unif. Power of Att'y Act §107.
20. Unif. Power of Att'y Act § 114(a).
21. Unif. Power of Att'y Act § 114(b)(1).
22. Unif. Power of Att'y Act § 114(b)(2).
23. Unif. Power of Att'y Act § 114(b)(3).
24. Unif. Power of Att'y Act § 114(b)(4).
25. Unif. Power of Att'y Act § 114(b)(5).
26. Unif. Power of Att'y Act § 114(b)(6).
27. Unif. Power of Att'y Act § 114(h).
28. Unif. Power of Att'y Act § 114 cmt.
29. Unif. Power of Att'y Act § 108(b).
30. Unif. Durable Power of Att'y Act § 3 (1987).
31. *See, e.g.,* 755 Ill. Comp. Stat. Ann. 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-4 (West 1994); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.J. Stat. Ann. § 46:2B-8.4 (West 2003); N.M. Stat. Ann. § 45-5-503A (LexisNexis 2004); Utah Code Ann. § 75-5-501 (Supp. 2006); Vt. Stat. Ann. tit. 14, § 3509(a) (2002); Va. Code Ann. § 11-9.1B (2006).
32. Unif. Power of Att'y Act § 108 cmt.
33. Unif. Power of Att'y Act § 201(a).
34. Unif. Power of Att'y Act § 110(b)(3).
35. Unif. Power of Att'y Act § 201(b).
36. Unif. Power of Att'y Act § 111(d).
37. Unif. Power of Att'y Act §§ 120(b)(6), Alternative A;

120(c)(6), Alternative B.
38. Unif. Power of Att'y Act § 114(h).
39. Unif. Power of Att'y Act § 116(a)(8).
40. *See, e.g.*, Cal. Prob. Code § 4236(b) (West Supp. 2006); Ind. Code Ann. § 30-5-6-4 (West 1994 & Supp. 2005).
41. *See, e.g.,* 755 Ill. Comp. Stat. Ann. § 45/2-7.5 (West Supp. 2006 & 2006 Ill. Legis. Serv. 1754) (permitting a representative of a provider agency, of the Office of the State Long Term Care Ombudsman, or of the Office of Inspector General for the Department of Human Services to request an accounting); 20 Pa. Cons. Stat. Ann. § 5604(d) (West 2005) (permitting agency acting pursuant to Older Adults Protective Services Act to petition); Vt. Stat. Ann. tit 14 § 3510(b) (2002 & LexisNexis 2006-3 Vt. Adv. Legis. Serv. 228) (permitting the commissioner of disabilities, aging, and independent living to petition).
42. Cal. Prob. Code § 4540 (West Supp. 2006); Kan. Stat. Ann. § 58-662 (2005); Mo. Ann. Stat. § 404.727 (West 2001); N.H. Rev. Stat. Ann. § 506:7 (LexisNexis 1997 & Supp. 2005); Wash. Rev. Code Ann. § 11.94.100 (Supp. 2006).
43. Colo. Rev. Stat. § 15-14-609 (West 2005);755 Ill. Comp. Stat. Ann. § 45/2-10 (West 1992); Ind. Code Ann. § 30-5-3-5 (West 1994); Wis. Stat. Ann. § 243.07(6r) (West 2001).
44. 20 Pa. Cons. Stat. Ann. § 5604 (West 2005); Vt. Stat. Ann. tit 14 § 3510(b) (2002 & 2006-3 Vt. Adv. Legis. Serv. 228).
45. *See* Kan. Stat. Ann. § 58-662(a) (2005); Mo. Stat. Ann. § 404.727(1) (West 2001); Utah Code Ann. § 75-5-501(2) (Supp. 2006).
46. *See* N.C. Gen. Stat. §§ 32A-9(b), -11 (2005).
47. Unif. Power of Att'y Act § 117.
48. Unif. Power of Att'y Act § 123.
49. For a discussion of various state statutory responses to financial exploitation, see Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 McGeorge L. Rev. 267 (2003).
50. *See supra* nn. 20-28 and accompanying text.
51. Unif. Power of Att'y Act § 114(d).
52. Unif. Power of Att'y Act § 115.
53. Unif. Power of Att'y Act § 118.
54. Unif. Power of Att'y Act § 119(c).
55. Unif. Power of Att'y Act §§ 119 (a) & (b).
56. Unif. Power of Att'y Act § 119(f).
57. Unif. Power of Att'y Act § 119(d).
58. Unif. Power of Att'y Act §§ 120(b), Alternative A; Sec. 120(c), Alternative B).
59. Unif. Power of Att'y Act §§ 120(b)(6), Alternative A; Sec. 120(c)(6), Alternative B).
60. Jack B. Sowards, "Star Trek II, The Wrath of Khan" (1982).
61. Sep 3 2004 No. 03-3067.
62. *In re Ferrara*, 22 A.D.3d 578, 802 N.Y.S.2d 471 (N.Y. Sup Court, Appellate Div. 2005), rev'd on other grounds, *see* n. 63.
63. *In re Estate of Ferrara,* 852 N.E.2d 138, 7 N.Y.3d 244) (N.Y. Ct. App 2006)
64. *Id.* at 140.
65. *Id.*
66. *Supra,* n. 62.
67. *Supra,* n. 63, at 143.
68. *Supra,* n. 62, at 578: "Further, competent evidence was adduced at the hearing to support the respondents' contention that the decedent specifically authorized the distribution of his funds to the respondent Dominick Ferrara."

Opting-Out From the Rule Against Perpetuities in Ohio: Nine Years Later

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The rule against perpetuities ("RAP") that first year law students are taught in Property class is not one of the more exciting topics addressed in law school. Indeed, even senior attorneys, decades after learning about the RAP as a law student, groan at its very mention. Nevertheless, when it comes to creating trusts, the RAP is an important reality. The trust and estate attorney must be mindful that, due to the RAP, a trust cannot continue into perpetuity and that trust principal must eventually be distributed to trust beneficiaries. Under the traditional RAP, a trust must terminate (or interests in it vest) no later than twenty-one (21) years after the death of the last person who was alive when the trust was created.[1] Consequently, most trusts last no more than about 90 to 100 years after they are created.

When trust assets are distributed (because the RAP applies or otherwise by their terms), transfer taxes will eventually take their toll and any creditor protection that the trust provided will be lost. Those who wished to preserve their wealth for successive generations sought

to be able to create trusts that would last for many generations, particularly after the enactment of the current version of the federal generation-skipping transfer tax, which provided an added incentive to create mutigenerational trusts to make optimal use of the GST exemption. As a result, 24 states and the District of Columbia have enacted laws permitting trusts to last for many generations, thereby eliminating (or minimizing the effect of) the centuries old RAP law that prevented perpetual trusts. In some states, a trust may last in perpetuity because the RAP does not apply.[2] Some states have extended the time period for vesting under the RAP to durations ranging from 150 to 1,000 years.[3] These statutes have allowed grantors to create so-called "dynasty trusts" that provide for the trust property to continue to be held in trust for multiple generations, often free of wealth transfer taxes and outside the reach of the beneficiaries' creditors.

As of March 22, 1999, Ohio law has allowed a grantor to create a multi-generational, or even perpetual, trust by "opting out" from the RAP in the terms of the trust agreement.[4] Division (B)(1) of R.C. §2131.09 provides that the RAP will not apply to a trust governed by Ohio law if (a) either the trustee has an unlimited power to sell all trust assets or if one or more persons, one of whom may be the trustee, have the unlimited power to terminate the entire trust and (b) the *instrument creating the trust* specifically provides that the RAP or the provisions of R.C. §2131.08(B) (Ohio's RAP statute)[5] shall not apply to the trust.

Ohio law, allowing the settlor to opt-out of the RAP, may be invoked (among other methods or circumstances) simply by reciting in the instrument creating the trust that Ohio law applies.[6] The statute is effective with respect to interests in real or personal property in a trust created by (a) wills of decedents dying on or after March 22, 1999, (b) *inter vivos* trust instruments executed on or after March 22, 1999 or (c) the exercise of a general power of appointment on or after March 22, 1999.[7] The opt-out of the RAP is not applicable, however, "to the exercise of a power of appointment, other than a general power of appointment."[8]

It has been nearly nine years since the enactment of Ohio's RAP opt-out statute. During that time certain imperfections in the statute have come to light. An obvious one is that reference in R.C. §2131.09(B)(1) to division (B) of R.C. §2131.08 when it should have been a reference to division (A) of R.C. §2131.08. There are other aspects of the statute, however, that have raised concerns and are perhaps not so easily remedied.

A fundamental, and no doubt unintended, issue arises as a result of the requirement under R.C. §2131.09(B)(1) that the "instrument creating the trust" specifically state that the RAP or that the provisions of division (B) [sic] of R.C. §2131.08 shall not apply to the trust. Some practitioners have expressed concern that this precludes a settlor from opting out of the RAP in an amendment (even a restatement) of a revocable trust that was originally established before March 22, 1999, because the "instrument creating the trust," that is, the original trust agreement, did not specifically state that the RAP shall not apply. Although it is technically the case that a revocable trust is created by the original instrument, it was not the intent of the drafters of the statute to require the establishment of entirely new trusts after the effective date in order to take advantage of the provisions of the RAP opt-out statute. One approach to clarifying the statute would be similar to the provision in R.C. §2131.08(B) that clarified, for purposes of determining the time period within which interests must vest under the RAP, that interests created under a trust that is subject to the grantor's power to revoke are created when the power to revoke terminates (by death, release or otherwise). The suggestion is to add a definition section to R.C. 2131.09, as division (D), which would read:

> (D) For purposes of Division (B) of this section, the instrument creating a trust subject to a power reserved by the grantor to amend, revoke, or terminate the trust shall include the original instrument establishing the trust and all amendments to the instrument made prior to the time at which the reserved power expires by reason of the death of the grantor, by release of the power, or otherwise.

This would be a clarifying amendment that would be effective as of the original effective date, March 22, 1999, to remove all doubt that amendments, otherwise meeting the statutory requirements, executed by the settlor after March 22, 1999 to revocable trust agreements established before that date, are effective in eliminating the applicability of the RAP to interests created under the amended trust agreement.

In addition to the express language stating that the RAP will not apply, there is a threshold requirement for an effective opt-out of the RAP in Ohio that either (a) *one or more persons, one of whom may be the trustee*, has the unlimited power to terminate the trust or (b) *the trustee* has the unlimited power to sell *all trust assets*.[9] These provisions were included in the statute to avoid

running afoul of the rule against suspension of the power of alienation, which may be relevant to whether the provisions of the so-called Delaware Tax Trap (discussed below) of Internal Revenue Code §2041(a)(3) are applicable to a multi-generational or perpetual trust established under the law of a state that has abolished the RAP. It is current common practice in drafting trust instruments to seek to divide some of the duties of the trustee by naming "trust advisors" or other ancillary fiduciaries[10] who will have certain powers and authorities usually held by the trustee. A common example of such a power is a power in a "trust advisor" to direct the trustee regarding sales, exchanges and investments of trust assets and a corresponding limitation on the trustee's power to act in these matters without any direction by the trust advisor. This approach might be used, for example, where there is a corporate trustee or an unsophisticated family member serving as trustee and the trust will hold interests in a closely held business and there is a desire to give the power to make decisions about the disposition of the closely held business interests in a trusted advisor who is familiar with the business. If the terms of the trust agreement are such that no person or persons have sufficient discretion to terminate the trust (and thus do not meet the first prong of the threshold requirement described above), then the opt-out statute requires that the *trustee* have the unlimited power to sell all trust assets. The statute clearly differentiates in the two alternative threshold requirements between a power to be held by a trustee (power of sale) and a power that may be held by persons other than the trustee (power to terminate). The implication of that distinction is that, if there is any limitation on a *trustee's* power of sale, regardless of whether others, even others acting in a fiduciary capacity, have the full power of sale, the requirement is not met. Unless it is determined that only a power of sale held solely by the trustee is sufficient to negate any restraint on, or suspension of, the power of alienation, a suggested change to R.C. 2131.09(B) would read: "one or more persons, one of whom may be the trustee, either has the unlimited power to sell, or to direct the trustee to sell, all trust assets or has the unlimited power to terminate the entire trust."

In crafting Ohio's statute permitting a trust settlor to opt-out of the RAP, the drafters sought to avoid an inadvertent application of the so-called "Delaware Tax Trap" of Internal Revenue Code § 2041(a)(3). That section provides for inclusion in the gross estate

> to the extent of any property with respect to which the decedent . . . exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

Thus, even if the power of appointment is not exercisable in favor of the decedent, the decedent's estate, the decedent's creditors or the creditor's of the decedent's estate, and thus is not a general power of appointment under the Internal Revenue Code, there will be estate tax inclusion if, by reason of the exercise of the power (the "first power"), another power is created and that power (the "second power") can be validly exercised in a manner that will postpone vesting of any interest in the property or will suspend the power of alienation of such property for a period that is not ascertainable with reference to the date of the creation of the first power. An exercise of a power of appointment in further trust is arguably itself the "creation of another power" (in the trustee), even if the new trust does not grant powers of appointment to the beneficiaries. If a state has abolished the RAP and that state's law places no limitation on the exercises of powers of appointment, any exercise of a power of appointment in further trust is likely to create a second power that can be exercised so as to postpone the vesting of interests in the trust property for a period that is not determinable with reference to the date of the creation of the first power.[11] The obvious drawback to triggering the Delaware Tax Trap is that the trust will (a) be subject to estate tax and (b) lose its zero inclusion ratio for generation-skipping transfer tax purposes when a new person becomes the "transferor" for such purposes because the trust property has been included in that person's gross estate.

Ohio's opt-out statute has addressed the potential inadvertent trigger of the Delaware Tax Trap, but has perhaps done so in a manner that is unduly restrictive. R.C. §2131.09(B)(4) provides that the opt-out from the RAP under § 2131.09(B) "shall not apply to the exercise of a power of appointment other than a general power of appointment."[12] Ostensibly this provision is included to make it clear that a non-general power of appointment granted in a trust that is subject to the RAP (whether because the trust was created prior to March 22, 1999 or because the trust instrument does not opt-out of the RAP) cannot be exercised to create a trust that opts out

of the RAP. But the language of the statute is broader than merely confirming that exercises of non-general powers cannot negate the application of the RAP. It states that the opt-out "does not apply" to non-general powers of appointment. The result of this language is that the same limitations on the exercises of non-general powers of appointment that apply to Ohio trusts that are subject to the RAP also apply to Ohio trusts to which the RAP does not apply under the express terms of the trust instrument. Specifically, no non-general power can be exercised to create interests that are not certain of vesting within the period of lives in being at the time of the creation of the trust plus twenty-one years (the "perpetuities period") and once the perpetuities period has elapsed, no non-general powers of appointment may be effectively exercised (because any interests created by the exercise would not have vested within the perpetuities period). This prevents any inadvertent trigger of the Delaware Tax Trap through the exercise of a non-general power of appointment in further trust, but it substantially limits the flexibility of any multi-generational or perpetual trust in Ohio.

Sound planning suggests that as much flexibility as possible should be incorporated into trust arrangements that are designed to last for multiple generations, flexibility that may be essential to take into account changed family circumstances and changes in the tax or other laws. It is absurd to think that a trust could be drafted that will anticipate circumstances as they may exist in even 100 years, let alone 360 years or 1000 years. Giving successive generations of beneficiaries limited testamentary powers of appointment is one way to insure that flexibility while preserving the tax and creditor protection benefits of a trust that is exempt from generation-skipping transfer tax. Ohio's statute in its present form does not allow for the flexibility afforded by granting powers of appointment to each successive generation of beneficiaries. On the other hand, the section as it is currently in effect prevents an undesired trigger of the Delaware Tax Trap. Consequently, great care must be taken in revising the section to allow for greater flexibility to be built in to trust arrangements.

Several states have recognized this issue and have addressed it by providing a specific term of years within which powers must be exercised and within which interests created by the exercise of powers must vest. Some states, such as Florida, that had enacted the Uniform Statutory Rule Against Perpetuities, which provides for the necessity of vesting no later than the later of 90 years or the common law period, have amended their statutes by simply changing the 90 year period to a much longer one, for example, 360 years in the case of Florida.[13] Other states, for example Alaska, have abolished the RAP, but have imposed a limitation on the period within which interests created by exercises of powers must vest, with a term that runs from the original creation of the power and runs, in the case of Alaska, for 1000 years.[14]

Currently, the Ohio State Bar Association's Estate Planning, Trust and Probate Section Council is considering a proposed amendment to R.C. 2131.09(B) that would adopt an approach similar to Alaska's extended term of years applicable to interests created by exercises of powers granted in Ohio trusts that have opted out of the RAP. However, some commentators have suggested that the IRS would take the position that the Delaware Tax Trap should apply to exercises of powers of appointment that create new powers if the state's law would create what the IRS would view as a "phony term of years period."[15] The suggestion is that the IRS would require that powers must be exercised using the same limitations found in the constructive addition rules under Internal Revenue Code § 2601 and Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) relating to when the exercise of a limited power of appointment will cause loss of exemption from the generation-skipping transfer tax under the effective date rules.

Such an application would read into Internal Revenue Code § 2041(a)(3) a limitation not found in the statutory wording and is arguably inconsistent with the Tax Court's holding in *Estate of Murphy v. Commissioner.*[16] In *Murphy*, the court's holding turned on the specific form of Wisconsin's RAP, which is stated in terms of limiting the suspension of the power of alienation. The court held that the taxpayer's exercise of a limited power of appointment did not trigger the Delaware Tax Trap because it did not violate Wisconsin's statute and, under Wisconsin's RAP, the period was measured from the date of the first creation of the power. Stephen Greer, who is one of the principal authors of Alaska's statute, has suggested that a rule based on limitations on the suspension of the power of alienation is more readily stated to eliminate concerns about the Delaware Tax Trap,[17] but adopting this approach would require a complete overhaul of Ohio's statute. For the time being, the most workable solution appears to use an approach similar to Alaska's approach,[18] limiting the period for vesting of interests created pursuant to the exercise of powers of appointment. However, due regard needs to be given to the concerns expressed by Worthington and others that the IRS will disregard any "unreasonably long" period of limitation imposed on exercises of powers of appointment.

Trust settlors in Ohio have increasingly taken advantage of Ohio's opt-out approach to the RAP since its enactment nearly nine years ago. Nonetheless, there are a few aspects of the statute that require clarification and the unduly restrictive approach taken regarding exercises of powers of appointment granted in trusts that are not subject to the RAP should be modified to allow more flexibility in such trusts. Care needs to be taken, however, not to create a problem with the Delaware Tax Trap that the statute was originally drafted to avoid.

ENDNOTES

1. See R.C. 2131.08.
2. Alaska (1,000 years in certain circumstances), Delaware, Idaho, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania (for interests created after 12/21/06), South Dakota, and Wisconsin have completely abolished the RAP. A few other jurisdictions such as Arizona, District of Columbia, Illinois, Maine, Maryland, Nebraska, Ohio and Virginia provide for "opting out" of the RAP rather than an outright repeal of the RAP.
3. Colorado is 1,000 years; Florida is 360 years; Nevada is 365 years; Utah is 1,000 years; Washington is 150 years; and Wyoming is 1,000 years.
4. R.C. §2131.09(B). *See* Frederickson, *The Dynasty Trust Is Here!* 9 PLJO 41 (Jan/Feb 1999).
5. The statutory reference to division (B) of R.C. §2131.08 is incorrect. It should refer to §2131.08(A), which states the RAP applicable in Ohio.
6. R.C. §2131.09(B)(2)(d).
7. R.C. §2131.09(B)(3).
8. R.C. §2131.09(B)(4). A general power of appointment is a power exercisable in favor of the power holder, the power holder's estate, the power holder's creditors or the creditors of the power holder's estate. R.C. §2131.09(C).
9. R.C. §2131.09(B)(1).
10. As Shakespeare wrote, "what's in a name? A rose by any other name would smell as sweet." A variety of terms are used by trust and estate lawyers to refer to persons who hold some power normally reserved to the trustee (or some power intended to put a limitation on the trustee's power). Among them are trust advisor, trust protector, investment advisor, business advisor and special trustee. As a rule these persons act in a fiduciary capacity, but may not hold the title "trustee." For purposes of this discussion, the term "trust advisor" is intended to include any of these other terms.
11. For a thorough discussion of the potential problem posed by the Delaware Tax Trap in states that have merely abolished the RAP without limiting exercises of powers of appointment, see, Greer, "The Delaware Tax Trap and Abolition of the Rule Against Perpetuities," *Estate Planning* (February 2001) at page 73.
12. The statute defines a general power of appointment in the same manner that it is defined under the Internal Revenue Code.
13. Fla. Stat. Ann. § 689.225(2)(f).
14. AS §§ 34.27.051, 34.27.075 and 34.27.100.
15. Worthington, "Perpetual Trust States – The Latest Rankings," *Trusts and Estates* (January 2007) at 59. Citing Nenno, "Relieving Your Situs Headache: Choosing and Rechoosing the Jurisdiction for a Trust," 2006 *Philip E. Heckerling Institute on Estate Planning*, at 3-1, 3-51.
16. 71 TC 671 (1/29/1979).
17. Greer, *supra* note 11.
18. The approach can only be similar, because Alaska is not an opt-out state, but has eliminated the RAP, except in relation to exercises of powers. Alaska also has a separate statute dealing with suspension of the power of alienation. AS § 34.27.100.

Comparing Safe Harbor Trusts & Wholly Discretionary Trusts

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Ohio attorneys who wish to improve their understanding of trust planning for persons with disabilities face a significant challenge. The use of descriptive trust names will seem inconsistent and references will be made simultaneously to the U.S.C.S and the Ohio Revised and Administrative Codes. Earlier this year I faced this challenge while studying the OSBA Special Needs Trusts Handbook. The handbook includes a trust comparison chart by the handbook's co-editor David Zwyer Esq. that provides a helpful starting point, however I found that it did not provide the kind of detail that I desired.

Following is a more detailed chart that compares safe harbor trusts and wholly discretionary trusts, and provides cross references to the Ohio Revised Code, Ohio Admin. Codes, and the U.S.C.S. If you wish to better understand the various trusts used to plan for persons with disabilities, I highly recommend the OSBA Special Needs Trusts Handbook. The chart provided below should help you tie it all together.

Comparing Safe Harbor Trusts & Wholly Discretionary Trusts					
	Ohio Safe Harbor Trust	Federal Safe Harbor Trusts			Wholly Discretionary Trust Ohio Trust Code
Common Names	Supplemental Services Trust	Medicaid Payback Trusts, Medicaid Qualifying Trusts, and Special Needs Trusts	Miller Trusts	"Pooled" Medicaid Payback Trusts	Discretionary Trust
Source of funds	Third Party (Anyone except beneficiary)	Generally with beneficiary's assets but also from others	Only Beneficiary's Income	Generally with beneficiary's assets but also from others	Third Party (Anyone except beneficiary)
Trust Agreement created by	Third Party (Anyone except beneficiary)	Parent Grandparent Legal Guardian Court	Anyone	Beneficiary Parent Grandparent Guardian or Court	Third Party (Anyone except beneficiary)
Age restrictions	None	Funded before age 65	None	None	None
Beneficiary Qualifications	Qualified for benefits By MRDD or Department of Mental Health for a physical or mental disability	Qualified for disability benefits	Does not require disability	Qualified for disability benefits	Does not require disability
Principal Limit when created	2007 limit = $224,000 (per parent) Increases +$2,000 each year	None	None	None	None
Balance of trust at death of Beneficiary	50% to the services fund for individuals MRDD and mental illnesses	The State will receive up to the amount of total medical assistance paid on behalf of the beneficiary			The trust can name anyone as the contingent beneficiary **(Nothing goes to the State)**
Source of Law	Ohio Revised Code 5815.28 formerly 1339.51	42 U.S.C.S. sec. 1396p			Ohio Trust Code 5801.01(Y) for definition
		(d)(4)(A)	(d)(4)(B)	(d)(4)(C)	
Cross Reference to Ohio Rev Code 5111.151	5111.151F(4)	5111.151 (F)(1)	5111.151 (F)(2)	5111.151 (F)(3)	5111.151(G)(1 through 5)
Cross Reference to Ohio Admin Code 5101:1-39-27.1	5101:1-39-27.1(C)(3)(d) aka Category Three (d)	(C)(3)(a) Category Three (a)	(C)(3)(b) Category Three (b)	(C)(3)(c) aka Category Three (c)	5101:1-39-27.1(C)(4) aka Category Four
Trust may pay for	Supplemental Services (or other items denied by Medicaid)	No statutory limit, BUT must restrict to Supplemental Services or will affect other benefits (i.e. SSI)		Supplemental Services	NOT FOR: medical care, care, comfort, maintenance, health, welfare, general well being

Common Real Estate Issues for Estate Planners

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This article is based on the author's presentation at the Cleveland Bar Association Annual Estate Planning Institute on October 15, 2007.

In today's world, in order to be considered a complete estate planner, one cannot be content to focus only on traditional issues related to wills and trusts. The reach of a well thought out estate plan touches on many other areas of law – income taxation, succession planning, and asset protection. One of the widest reaching realms faced by estate planners includes real estate law. Descending from centuries of common law, the law of real property requires careful attention to detail and expertise. This outline will address some of the more common issues and possible pitfalls of estate planning in relation to real property.

1. Transfer Tools To Avoid Probate

Over the years the mantra of "you must avoid probate" has taken over the minds of the general populous. Virtually all of our clients have become aware of the concept of probate avoidance and they often act in irrational or improper ways to pass property free from probate. Despite the relative simplicity associated with titling property to avoid probate, estate planners often fail to take into account the multiple considerations and options available to them when deciding how to assist their clients in titling real estate to avoid probate.

Perhaps the most commonly used probate avoidance technique is the use of survivorship tenancy. The concept of survivorship tenancy allows a decedent's interest to pass to the survivor by operation of law upon death.[1] The survivorship tenancy approach is beneficial mainly because its simplicity provides an easy avenue for titling property by deed in a manner to avoid probate and administration expenses. A survivor need only file an affidavit of surviving spouse and an original death certificate in order to confirm that fee simple title has vested in the survivor.

Similarly, from an estate tax standpoint, this ownership approach allows spouses to receive a step-up in basis for one-half of the value of the property.[2] Notwithstanding the foregoing, if a couple purchased a home prior to 1977 and the surviving spouse did not contribute to the purchase price, 100% of the value can be included in the decedent's estate, free of estate tax due to the unlimited marital deduction. As long as 100% of the asset is included, the surviving spouse receives a full 100% step-up in basis.[3]

While the survivorship tenancy approach to titling property is simplistic, it is not without its own problems. For example, real property cannot be conveyed free of its survivorship feature without the consent of all joint tenants. Accordingly, survivorship ownership places a significant restriction on transferability and creates problems when there are more than two joint owners. Families often run into this situation when a parent mistakenly titles property along with multiple children.

Additionally, individuals often overlook the gift tax consequences associated with titling assets in survivorship format. This often occurs when widows or widowers decide, upon their own, to title property with one child. The widow typically overlooks the fact that the property will vest in only one child, as opposed to all her children (as set forth in the testator's will).

Finally, survivorship tenancy creates a potential creditor problem. Similar to tenancy in common, jointly owned property is reachable by creditors of either survivorship tenant and poses significant risk of partition. A creditor may obtain a judgment against a joint owner and in turn force a partition action. This is a harsh result that few clients ever contemplate.

A less often used probate avoidance tool is the transfer on death deed. Properly executed and recorded before death, transfer on death deeds allow property to pass to named beneficiaries of the grantor's choice.[4] For estates in which the only asset of significant value is real property, transfer on death deeds allow a decedent to avoid probate without the expense or complexity of trusts. More so, the use of these deeds also allows the transferor to preserve a 100% step-up in basis for income tax purposes. In this sense, it is similar to survivorship tenancy and requires no more than a single deed to put into place.

That being said, the transfer on death deed has multiple benefits that differ from survivorship tenancy, namely, the transfer is revocable. Because the transferor retains the flexibility to change beneficiaries, there is not a completed gift at the time of recordation. Thus, there is no gift tax consequence, and a creditor of a transfer on death beneficiary cannot reach the beneficiary's interest in the property until after the transferor's death. The transferor can change his or her mind at any time and record a new transfer on death deed, effectively changing the desired beneficiary if there is a change in circumstances which warrants such change. Such changes can be effectuated simply by executing and recording a new deed. The Ohio Revised Code also provides flexibility in that the transferor may designate specific "contingent" beneficiaries who will inherit an interest in the property if a named beneficiary does not survive the transferor.

While the benefits to the transfer on death deed are numerous, there are potential pitfalls which must be considered by an estate planner. To begin with, property cannot pass "per stirpes" under a transfer on death deed. Rather, a beneficiary must be named and survive in order to inherit an interest. The requirement of having a named beneficiary prevents gifts to a class (i.e., "to my grandchildren"). Likewise, after-born descendants cannot take under these deeds. Thus, one must take care to be sure that transfer on death deeds are updated in the event that subsequent changes in the desired beneficiaries arise (i.e., a fifth grandchild is born ten months after the grantor records a deed leaving the property to her four living grandchildren).

One must also be careful to make sure that the transfer

on death deed is recorded as soon as possible following execution. At least one Ohio court of appeals has held that the transfer on death deed must be recorded prior to the transferor's death in order for the deed to be valid.[5] Recently, the Summit County Probate Court has agreed with this interpretation and the issue is now before the Ninth Circuit Court of Appeals.[6]

Finally, the third current alternative for avoiding probate is to title property in the trustee's name. Certainly, it is common in larger estates to have a trust involved in a distribution of property. When such a trust has been created, it is only logical to have real property conveyed to the trustee and held in trust. This provides flexibility as to the ultimate disposition of the property and provides a tremendous way to fund a credit shelter trust so as to maximize estate tax savings. The use of trust-owned property also provides benefits in that there is no need to transfer title specifically upon the death of a grantor. One need only file an affidavit of successor trustee and memorandum of trust in order to resolve any outstanding title issues.

That being said, care must be taken to properly title the property.[7] Significant mistakes and title problems can arise if property is titled directly into the trust or there is insufficient information of record relating to the identify of the trustee (see infra).

2. Precautions When Titling Property to a Trustee

As stated above, it is common practice to place real estate into a trust for purposes of avoiding probate or funding credit-shelter trusts. Unfortunately, when titling property into a trust, there are certain pitfalls and obstacles which must be addressed in order to avoid invalidating the transfer.

To begin with, the trustee, not the trust, must hold title to the property. The only exceptions to this rule are business trusts governed by Ohio Revised Code § 1746 and real estate investment trusts governed by Ohio Revised Code § 1747. If the trust does not qualify as one of these statutorily defined entities, the trust itself may not own property.

The general premise is that a deed conveying property to a trust, not a trustee, is void ab initio.[8] Where a transfer is incorrectly made to a trust, equity is designed to benefit the trustee and the beneficiaries. Accordingly, all hope is not lost. There are several options available to the involved parties in this situation.

The easiest option is to re-record the deed if the grantor is still living. Under the Ohio Title Standards, a change made to clarify or complete a document may be implemented by re-filing the deed as a "deed of correction." In order to accomplish this task, one must edit the original deed and submit it for recordation. For this reason, it is always advisable to keep the original deed on hand, much as you would original wills, powers of attorney, and other estate planning documents. Be careful in using this technique, because one may not change the nature of the document by simply re-filing the deed (i.e., convey a different parcel than that which was previously specified on the deed).[9]

In the unfortunate event that the transferor is deceased, the deed of correction may not be an available remedy. However, in that situation, title may be cleared by recording the trust or a memorandum of trust in conjunction with an affidavit of facts relating to title which identifies the successor trustee.[10] In that situation, third party purchasers are effectively placed on notice as to the proper owner of the property (i.e., the trustee of a particular trust).

Alternatively, one may file a quiet title action to establish the identity of the trustee as the rightful owner. This is obviously the least desirable course of action as it requires filing a civil action and naming all of the parties who may claim to have an interest in the property in the action. Not only is this option time consuming, but it also adds unnecessary cost to the equation.

Practitioners should take heart, as the Estate Planning, Trust, and Probate Law Section of the Ohio State Bar Association is presently reviewing options to statutorily clarify that a trust is not a legal entity able to take title to real estate and define curing affidavits which can create a safe harbor for estate planners.

When conveying the property into a trustee's name, the deed should include the word "trustee" after the grantee's name.[11] If the designation of "trustee" appears within the deed but the trust beneficiaries are not identified, one has created a "undisclosed trust."[12] In such an instance, no notice of the existence of the trust or any limitations on the trustee's authority are provided to persons dealing with real property.[13] While some attorneys advocate use of undisclosed trusts for privacy purposes, a bona fide purchaser will be held harmless from claims of the undisclosed trust beneficiaries if they take title to the property when the trustee allegedly had no authority to convey the property to them.[14] This unfortunate result is not the

case if the trust or beneficiaries are identified or a memorandum of trust is filed pursuant to Ohio Revised Code § 5301.255, thereby creating a "disclosed trust."[15] Ohio Standards of Title Examination Section 3.18 requires a title examiner to object to a disclosed trust without such a memorandum or affidavit, thereby creating a defect impairing marketability of title.

In most cases, the use of a memorandum of trust is a valuable tool to avoid any discrepancies and title disputes involving the property. The powers of a trustee should be memorialized by an affidavit of facts or a memorandum of trust.[16] In order to comport with statutory formalities and title standards, the memorandum of trust must include: (1) names and addresses of the grantor and trustee; (2) date of execution of the trust; (3) the powers granted the trustee in relation to the acquisition, sale or encumbrance of real estate; and (4) a description of the real property held in the trust.

Unfortunately, many times the statutory memorandum of trust was not prepared while the settlor was alive. In the past, if the settlor were deceased and unable to sign the document, the memorandum of trust would be technically ineffective. In that instance, an affidavit of facts would have to be recorded describing the operative trust provisions. The affidavit would include the same information as would have been included in a memorandum had the settlor survived. Most title persons were willing to accept the affidavit and proceed to insure title in this instance. Fortunately, under Senate Bill 134 (effective January 17, 2008), a memorandum of trust will now only need to be signed by the trustee of the trust. Likewise, with the new law, the identity of the settlor is no longer required to be identified.

It should be noted that the Certification of Trust created pursuant to new Ohio Revised Code § 5810.13 does not officially replace the memorandum of trust discussed above. Additionally, Certifications of Trust presently require that the taxpayer identification number of the trust be included in the document, which in the case of a revocable inter vivos trust with a living grantor is the grantor's social security number. Care must be taken to ensure that no one records a document in the public records containing a social security number. Doing so could create potential liability and an unnecessary risk of identity theft. It should be noted that there is a technical amendment bill now in preparation which would eliminate the inclusion of the trust identification number in a trust certification. Look for this change to be passed in the near future.

3. When to Use Certain Deeds

When transferring property for estate planning purposes, it is absolutely essential that the type of deed be considered so as to avoid unwanted title defects. When transferring real property, the practitioner must pay careful attention to the appropriate type of deed to be used in a given situation.

For years, estate planners have typically defaulted to using quit-claim deeds when transferring property into trusts, into survivorship tenancy ownership, or into family limited partnerships for estate planning purposes. Unfortunately, quit-claim deeds are often the wrong types of deeds to use in these estate planning situations.

It is important to remember from our law school days that there are three primary types of deeds to use for estate planning purposes, namely: the general warranty deed, limited warranty deed, and the quit-claim deed.

The general warranty deed includes four covenants: (1) that the property is free from all encumbrances except those mentioned in the deed; (2) that the transferor is lawfully seized in fee simple of the property at the time of delivery of the deed; (3) that the transferor has the right to convey the property to the transferee and his or her heirs, successors, and assigns; and (4) the transferor will defend title against any lawful claims.[17]

Conversely, the limited warranty deed includes two covenants: namely (1) that the property is free from all encumbrances made by the grantor except those mentioned in the deed; and (2) the grantor will defend title vested in the grantee against all persons claiming by, through, or under the grantor, but against no others.[18]

Finally, the commonly used quit-claim deed makes no warranties or covenants whatsoever. The quit-claim deed simply represents to the world that the transferor is conveying the property "as is."[19]

All in all, the question remains: Why does it matter which type of deed we use for estate planning purposes? The answer is simple: title insurance. Although the concept of title insurance often conjures up painful memories of paying significant dollars at closing on the purchase of your home (and seeing little to no practical use therefore), title insurance is a necessary evil. Title insurance insures against losses caused by: (1) defects, liens or encumbrances on the property; (2) unmarketable title; (3) priority of a lien or encumbrance over the insured's mortgage; and (4) lack of right of access to the property.

In the estate planning context, title insurance protects the "named insured" or the named insured's successors and persons who inherit by operation of law (i.e., devise, bequest, survivorship tenancy, or intestate succession). Historically, title insurance remains in force as long as the named insured retains an interest in the property or as long as the insured remains liable by reasons of covenant of transfer. Accordingly, a general or limited warranty deed allows coverage to continue upon transfer since the covenants continue the grantor's liability.

Many title agents maintain the position that, where an individual transfers property to himself or herself as a trustee, in theory, the insured's identity has changed. Thus, the protection of title insurance disappears when a simple quit-claim deed is used. This could pose a potential problem if a defect in title is later discovered. If a warranty deed is instead used, the protection of the existing title insurance policy will continue. However, where a quit-claim deed is used, and the identity is changed, no coverage will continue.

To some extent, the title insurance concern has been addressed by recent changes to the 2006 American Land Title Association (ALTA) owner policy. This policy now includes within the definition of "insured," a trustee "if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the insured for estate planning purposes."[20] This means that the future use of a quit-claim deed in most estate planning scenarios will not likely create a significant title problem.

However, unless you have recently acquired the property and obtained a 2006 policy with this new definition, you are likely still to be faced with the prior problems involving the definition of insured and the question of whether the title insurance coverage continues. It should be noted that the 2006 ALTA standards do not become mandatory until 2008. The fact remains that many states are still issuing title insurance policies on the old 1992 form, which did not include trustee language and left open the issue of whether a transfer to a trustee caused the policy to lapse.[21] Consequently, it is necessary to pay careful attention to when the property was first acquired and the identities of both the insured and the grantee.

A chart summarizing deeds for particular estate planning situations follows:

Hypothetical Transfer	**Type of Deed to Use When 1992 ALTA Policy Standards Are Possibly In Effect (Prior to 2008)**	**Type of Deed to Use When 2006 Policy Standards Are In Effect (i.e, after 2008)**
TRUSTS—REVOCABLE OR IRREVOCABLE		
Single person to him/herself as trustee of his/her own trust	1. Quitclaim: may work because, arguably, the identity of the insured has not changed; 2. General warranty deed: this ensures that the title company would not be able to deny coverage based on a stricter interpretation of "insured."	Quit-claim deed will work.
Single person to a 3rd party as trustee of his/her trust	General warranty deed + endorsement Note: a quitclaim deed may be problematic, depending on how the insurance company views quitclaim deeds because it would be easier to argue that the insured is not the same person	Quit-claim deed should work; however, a warranty deed is the safest option.
H & W to joint trust, with H and W as trustees	1. Quitclaim: may work because, arguably, the identity of the insured has not changed; 2. General warranty deed + endorsement: this ensures that the title company would not be able to deny coverage based on a stricter interpretation of "insured."	Quit-claim deed will work.
H and W to a 3rd party as trustee of joint trust	General warranty deed + endorsement Note: a quitclaim may be problematic, depending on how the insurance company views quitclaim deeds because it would be easier to argue that the insured is not the same person	A quit-claim deed may work given the definition of insured; however, the use of a general warranty deed is the safest option.

H and W to W as trustee of W's trust (or to H as trustee of H's trust)	Here, a quitclaim may not work because the insured's identity has changed from H and W jointly to H or W alone. Safe route would be general warranty deed + endorsement	Here, a quit-claim deed may not work because the insured's identity is changed from H and W jointly to H or W alone. The safest route would be a general warranty deed.
H and W to 3rd party as trustee of W's trust (or as trustee of H's trust)	General warranty + endorsement Note: a quitclaim may be problematic, depending on how the insurance company views quitclaim deeds because it would be easier to argue that the insured is not the same person	Here, a quit-claim deed may not work because the insured's identity is changed from H and W jointly to H or W's trust alone. The safest route would be a general warranty deed.
H to W as trustee of W's trust (or W to H as trustee of H's trust)	General warranty + endorsement Note: a quitclaim may be problematic, depending on how the insurance company views quitclaim deeds because it would be easier to argue that the insured is not the same person	A general warranty deed is necessary as the identity of the insured has clearly changed.
H to 3rd party as trustee of W's trust (or W to 3rd party as trustee of H's trust)	General warranty + endorsement Note: a quitclaim may be problematic, depending on how the insurance company views quitclaim deeds because it would be easier to argue that the insured is not the same person	A general warranty deed is necessary as the identity of the insured has clearly changed.
H to 3rd party as trustee of H's trust (or, W to 3rd party as trustee of W's trust)	General warranty + endorsement Note: a quitclaim may be problematic, depending on how the insurance company views quitclaim deeds because it would be easier to argue that the insured is not the same person	A quit-claim deed may work because arguably, the identity of the insured has not changed; however, a general warranty deed would be the safest option.
OTHER TRANSFERS (NON-TRUST)		
H to family limited partnership, to LLC, or to limited partnership (or W to these entities, or a single person to any of these entities)	General warranty deed + Fairway endorsement[1]	General Warranty Deed.
H and W to family limited partnership, to LLC, or to limited partnership	General warranty deed + Fairway endorsement	General Warranty Deed.
H and W to H and W as survivorship tenants	Quit Claim deed; title insurance should continue because identity of insured has not changed	Quit Claim Deed; title insurance should continue because identity of insured is not changed.
H to H and W as survivorship tenants (or W to H and W as survivorship tenants)	General Warranty Deed; may want to get an endorsement or new policy since identity of insured may arguably have changed	General Warranty Deed is a preferred option as the identity of the insured has changed.
Single person to a survivorship tenants with another person (such as a sibling or parent)	General Warranty Deed; may want to get an endorsement or new policy since identity of insured may arguably have changed	General Warranty Deed.

It should be noted that the original policy only covers defects that existed prior to the issuance of the policy. Accordingly, when a great deal of time has passed since the original date of property acquisition, it is conceivable that problems have arisen and that the old policy will be ineffective. Likewise, unless the policy was designed to increase in coverage over time, the protection afforded by the policy at the time of purchase may be

significantly below the current fair market value for the property. Thus, an endorsement or new policy may be the better option.

4. Marketable Title

When a client acquires an interest in real property (either as trustee or as a fee owner), he or she must focus on obtaining marketable title. Failure to obtain marketable title results in adverse claims against the real estate and the potential to lose both value and ownership control over the property. Estate planners often fail to understand how marketable title is determined and impacts an interest which a client may have in certain property. In turn, this affects the value of the property for both the grantor and potential beneficiaries of an estate or trust.

Over the years, the definition of marketable title has been somewhat varied. Case law has defined marketable title to "import such ownership as to ensure the owner the peaceful enjoyment and control of the land, as against all others … free from the lien of all burdens, charges, or encumbrances which present doubtful questions of law or fact."[23]

The more common definition of marketable title is defined by the Ohio State Bar Association, Ohio Standards of Title Examination, Section 1.1 as "one which a purchaser would be compelled to accept in the suit for a specific performance." Objections to title should not be made by an attorney when the irregularities or defects do not impair the title or cannot reasonably expect it to expose the client to the hazard of adverse claims, litigation or expense in clearing title.

Finally, Ohio recognizes the Ohio Marketable Title Act under § 5301.47, et seq. This section states that "any person having the legal capacity to own land in a state, who has an unbroken chain of title of record to any interest in land for 40 years or more, has marketable record title to such interest."[24] As a result, the Marketable Title Act extinguishes most interests, defects, and exceptions created prior to the root of title. The most recent recorded instrument over 40 years prior constitutes the "root of title."[25]

ORC §§ 5301.49 and 5301.53 recognize that certain interests are not extinguished under the Marketable Title Act, including: (1) railroad and public utility easements; (2) mineral rights; (3) rights of government (federal and state); and (4) easements and other rights reserved in instruments of record as provided by statute.[26]

From the estate planning perspective, one must pay attention to marketability of title when advising clients on transfers into or from trusts and estates. Failure to obtain marketable title can easily result in loss of value to the property and corresponding claims for mismanagement on behalf of beneficiaries. To avoid this undesirable result, it is wise to have a title search prepared in accordance with Ohio State Bar Association Title Standards. Since some interests survive the 40-year period, it is not enough to simply stop at the root of title.[27]

One must also pay particular attention to the Schedule B exceptions which impact ownership interests. These are items that most often influence marketability of title and must be addressed prior to a sale or transfer of the property. It is not simply enough to state that easements or rights of way on a property are acceptable. Care should be taken to either have the items identified on a detailed ALTA survey or be removed. It is helpful to work with a skilled real estate practitioner to be sure that these items are addressed prior to closing or a transfer of the property. Failure to do so can result in several unnecessary and undesirable claims.

5. Dower

One of the most often misunderstood elements of real estate and estate planning law surrounds dower rights. While everyone is generally familiar with the concept of dower, few understand how dower rights work and when dower rights must be waived for estate planning transfer purposes.

Under Ohio law, unless an individual has relinquished the right of dower or been barred from it, a spouse possesses a life estate in one-third of the real property owned by their spouse during marriage.[28] The dower interest terminates upon the death of the spouse owning real estate unless: (1) the decedent's spouse sold the property and the surviving spouse had not relinquished his or her interest or been barred from dower;[29] or (2) the decedent's spouse encumbered the property by a mortgage, judgment, or non-tax lien or the property became alienated by involuntary sale. In this case, dower is computed based on the value of the encumbrance at the time of death or alienation, but cannot exceed the sale price of the property.[30]

It is important to recognize that there are certain bars to dower interests. Such bars include (1) reasonable antenuptial agreements;[31] (2) a conveyance of an estate in lieu of dower;[32] (3) adultery (unless condoned by the injured consort!);[33] and (4) waste on the part of the non-owner spouse.[34]

Because an unrelinquished dower interest constitutes a

defect impairing marketable title,[35] it is necessary to understand when a dower release is necessary. Generally speaking, upon the transfer of property from one spouse to the trustee of a trust during the term of marriage, it is necessary to waive the dower interest.[36] Likewise, upon the transfer of property held as tenants in common to the trustee of a trust, it is advisable to have dower waived as each spouse has a separate freehold estate and, therefore, a release of dower is necessary on the other's tenancy.[37]

That being said, a release is ***not*** necessary when transferring property held by both under a survivorship deed. Survivorship tenancy is not a separate freehold interest and both parties must sign the deed. In this situation, there is no need for a separate dower release.[38] Likewise, a release is not necessary if property is held by a spouse as trustee and the spouse does not have both a beneficial and an equitable interest in the property. This typically arises in situations where a disinterested third party is serving as trustee. In that instance because the beneficial and equitable interests do not merge, there is no need for the spouse of the trustee to sign a dower release.[39]

All in all, there is still much debate in Ohio among title experts and real estate practitioners on the necessity of a dower release when property has been held in trust. If there is any doubt as to whether a spouse holds both beneficial and equitable title, err on the side of caution and include a dower release in the deed. In such a circumstance, it cannot hurt to have the spouse sign the dower release.

6. Use of LLCs for Non-Residents Regarding Ohio Estate Tax

A recent estate tax issue has arisen concerning whether or not options are available for non-Ohio residents to reduce their potential Ohio estate tax burden with respect to Ohio situsedreal estate. As everyone is aware, under Ohio Revised Code § 5731.19(A), non-resident owners of Ohio real property are subject to Ohio estate tax based on the value of the property. One recent school of thought has non-residents placing non-commercial real property into an LLC in order to reduce their potential Ohio estate tax exposure. To date, there have been no cases testing this theory.

A literal reading of Ohio's estate tax statutes indicates that a non-resident's taxable estate "consists of real property situated in this state, tangible personal property having an actual situs in this state, and intangible personal property employed in carrying on a business within this state."[40] An LLC formed to passively hold residential real estate technically meets none of those criteria. Accordingly, one could conclude that there should be no separate Ohio estate tax on such real property.

That being said, the Ohio Department of Taxation likely will take the position that the membership interests of the LLC constitute "intangible personal property employed in carrying on a business within this state" and that such interest should be taxed for Ohio estate tax purposes.[41] Although this argument is understandable, a property which is not rented out seemingly falls outside this argument. To that end, the Ohio LLC statutes do not require that an LLC physically transact business. Rather, it requires that an LLC be formed "for any purpose or purposes for which individuals lawfully may associate themselves."[42] It is difficult to argue that an LLC formed simply to hold title to residential real estate, without any other business purpose, is "employed in carrying out an actual business."

As stated above, it is not clear whether or not this approach will work. However, the literal readings of the relevant statutes seem to indicate that it is a viable tax strategy.

7. Property Sales and Required Disclosure Statements

Often times, when individuals attempt to sell property from an estate or trust, they wrongfully complete the Ohio Residential Property Disclosure Form when they are not required to do so under the law. This can be problematic when buyers become dissatisfied with the property and file suit against the seller alleging fraudulent statements on the form.

Ohio initially adopted the Residential Property Disclosure Form in 1993. Under Ohio Revised Code § 5302.30, persons engaging in the sale of residential real estate transactions, are forced to prepare this disclosure form. This includes any type of residential real estate that has one to four dwelling units. Thus, commercial transactions and those involving apartment buildings exceeding four dwelling units are not subject to this requirement. However, any sale, land installment contract, lease with option to purchase, or lease for a term of 99 years does require that the transferor execute this new form.

A new Ohio Residential Property Disclosure Form went into effect on January 1, 2004, and covers all residential real estate transactions falling within the gamut of Ohio Revised Code § 5302.30.

That being said, Ohio Revised Code § 5302.30(B)(2) identifies certain transactions where the completion of such forms is not necessary. With respect to estate and

trust planning, these exceptions to the rule include (a) a transfer pursuant to a court order (e.g., transfer ordered by a probate court during administration of an estate); (b) a transfer by a fiduciary in the course of the administration of a decedent's estate, guardianship, a conservatorship, or a trust; (c) a transfer from one co-owner to another (e.g., for estate balancing purposes); (d) a transfer made to a spouse of the transferor or to one or more lineal descendants of the transferor; (e) a transfer from a transferor who both has not occupied the property as a personal residence within one year immediately prior to the transfer and has acquired the property through inheritance or devise.

Ohio case law states that a transferor will not be held liable in damages in a civil action for injury, death, or loss to a person or property as a result of any error in, inaccuracy of, or omission of any item of information required to be disclosed if the error, inaccuracy, or omission was not within their actual knowledge. Thus, by implication, the transferor is liable for errors, inaccuracies, or omissions knowingly made by the transferor. In other words, if the person specifically misrepresents or perpetrates a fraud, they will be held liable for the failure to disclose, even if those disclosures were readily observable defects.

In determining what constitutes fraud, Ohio case law supports a notion there must be a "positive" fraud. That is, a fraud of commission rather omission. A seller can be held liable to a buyer for an affirmative statement which is untrue. In order to find liability, the court must determine that the representation of fact was made with knowledge of its falsity or with utter disregard for the truth, that the representation must be material to the transaction, and that the representation was made with the intent of misleading the buyer to relying on it.

The buyer must also rely upon the representation, and the buyer must be injured. For example, knowingly misrepresenting the status of a pending sewer assessment would be deemed a fraud and in violation of the new disclosure form. Expressions of opinion, however, although ultimately proven false, are not a basis for the fraud.

A seller involved with a trust or estate should be careful to avoid making a fraudulent misrepresentation that results from implying that they have knowledge, when in fact they have no such knowledge. In a recent Ohio Supreme Court case, the court established the principle that a seller may be found liable for fraud even though seller does not know the representation is false. If persons make a representation knowing they do not have sufficient information to make that statement, they can be held liable. When coupled with the fact that most estate planning transfers do not require the completion of an Ohio Residential Property Disclosure Form under Ohio Revised Code § 5302.30(B), it makes no sense to complete such a form. Preparing such forms when not required to do so can result in unnecessary liability exposure to both the estate and trust. One must be careful to make sure that their clients and the realtors incorrectly advising them do not run afoul of this law and subject themselves to unnecessary liability exposure.

8. Conclusion

Trustees must be concerned with far more than just the law governing fiduciaries. Real property law is nuanced, and often requires very specific forms and methods of execution. Due care must be taken to ensure that real property remains marketable, insured, and alienable. Each situation presents its own set of circumstances and potential pitfalls, so proper thought and time must be given to the proper method of transfer. Often real estate is the major asset in a client's estate or trust, so a mistake (no matter how small or inadvertent) can potentially thwart the objective of a carefully thought-out estate plan. It is wise to consult with an experienced real estate attorney when handling real estate deals for your clients.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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ENDNOTES

1. ORC § 5302.20(B).
2. Internal Revenue Code § 1014.
3. C*f Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992).

4. ORC § 5302.22.
5. See *In Re Estate of Scott* (2005), 164 Ohio App. 3d 464; see also ORC § 5302.22.
6. *Mattia v. Hall et al.,* 2007 CV1, Summit County, Ohio Probate Court (2007); *Hall v. Mattia*, 237785, Ninth Judicial District, Summit County, Ohio (2007).
7. Robert M. Curry, James Geoffrey Durham, OHIO REAL PROPERTY LAW & PRACTICE (5th ed. 1997), Title to Real Estate, § 6-15[1].
8. OHIO REAL PROPERTY LAW & PRACTICE, § 6-15[1].
9. Ohio State Bar Association, Ohio Standards of Title Examination § 3.18.
10. See ORC § 5301.252.
11. OHIO REAL PROPERTY LAW & PRACTICE, § 6-15[1].
12. Id.
13. ORC § 5301.03.
14. Id.
15. OHIO REAL PROPERTY LAW & PRACTICE, § 6-15[1].
16. Ohio State Bar Association, Ohio Standards of Title Examination § 3.18.
17. ORC § 5302.06.
18. ORC § 5302.08.
19. ORC § 5302.11.
20. ALTA Owners Policy (6-06).
21. See John C. Murray, Transfer to Trust: Does Title Insurance Continue? http://www.firstam.com/content.cfm?id=7368.
22. In Ohio, partnerships are viewed as the sum of their individual members. Cf. Ohio Rev. Code Ann. §1775.05 (Anderson 1999) ("A partnership is *an association of two or more persons* to carry on as co-owners a business for profit . . . .") (emphasis added). In states that view partnerships as aggregates and not as entities—like Ohio—partners own partnership property either as joint tenants or as tenants in partnership. See Joyce Dickey Palomar, *Limited Liability Companies, Corporations, General Partnerships, Limited Partnerships, Joint Ventures, Trusts—Who Does the Title Insurance Cover?*, 31 Real. Prop. Prob. & Tr. J. 605, 625-26 (1997); see also Ohio Rev. Code Ann. §1775.24(A) (Anderson 1999) ("A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership."). Typically, when a partner leaves the partnership, a new partnership has formed, and the new partnership is not covered as an insured under the title insurance policy. See Palomar, *supra*, at 626 (citing *Fairway Dev. Co. v. Title Ins. Co. of Minn*., 621 F. Supp. 120 (N.D. Ohio 1985)). A common endorsement known as a Fairway endorsement—named for the case—allows the new partnership to be substituted as an insured under the original policy, thus continuing title coverage. See id. at 628. The Fairway endorsement will not be necessary under 2006 ALTA Standards.
23. *McCarty v. Lingham*, 111 Ohio St. 551, 558, 146 N.E. 64 (1924).
24. ORC § 5301.48.
25. ORC § 5301.48.
26. Ohio Land Title Association, *Principles of Ohio Real Estate Titles* (1984, Pg. 169).
27. *Report of the Real Property Section* (Ohio State Bar Association Report, Vol. 59, No. 41, Oct. 27, 1986, Pg. 1668).
28. ORC § 2103.02.
29. ORC § 2103.02(A).
30. ORC § 2103.02(B).
31. *Murphy v. Murphy*, 12 Ohio St. 407 (1861).
32. ORC § 2103.03.
33. ORC § 2103.07.
34. ORC § 2103.07.
35. Kenton L. Kuehnle with Jack S. Levey, BALDWIN'S OHIO PRACTICE: OHIO REAL ESTATE LAW (3rd Ed. 2003), Marketability § 9:4.
36. ORC § 2103.02.
37. CJS, Dower, § 10.
38. Id.
39. OHIO REAL PROPERTY LAW & PRACTICE, Section 6-15[4].
40. Id.
41. Id.
42. ORC § 1705.02.

The Probate Exception and International Wills: An Invitation for Comment

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The victory a year ago in the U.S. Supreme Court by *Playboy* celebrity Anna Nicole Smith in *Marshall v. Marshall* has renewed interest in the "Probate Exception" to federal diversity jurisdiction.[1] That rule holds that federal courts will abstain from jurisdiction over

probate matters.[2] But often thy do not abstain, as with Anna Nicole Smith's case.

Similar to its "sister" Domestic Relations Exception, the Probate Exception emerged from the reluctance of federal courts to become involved in probate matters, which they have viewed as peculiarly subject to state law. Federal courts have analyzed this exception as derived from ancient English law and brought into U.S. law through the Judiciary Act of 1789. Despite skepticism by federal courts and legal scholars, the rule has survived into the *Marshall* case.

Under the U.S. Constitution, the President and Congress share the power to regulate the application of international law to matters applying to the states and people throughout the United States.[3] Thus, when applicable, international law is the law of the land — federal law — under the U.S. Constitution.

Ohio soon is likely to consider enactment of the Uniform International Wills Act (UIWA). This uniform law was proposed by the National Conference of Commissioners on Uniform state Laws (NCCUSL) and is a part of their Uniform Probate Code (UPC). NCCUSL urges the adoption of the UIWA even independent of the UPC, and the American College of Trust and Estate Counsel (ACTEC) and the American Bar Association (ABA) also support the UIWA. Fifteen states and the District of Columbia already have adopted the UIWA.[4]

At its most fundamental, the purpose of the UIWA is to authorize a uniform and universally accepted method of will execution in all U.S. states and foreign countries that adopt the UIWA to assure the mutual acceptance and enforceability of such wills. In the pages of this journal, Professor Richard Wellman has succinctly set forth the history of the UIWA and well-articulated the reasons Ohio should adopt it.[5] The context of the UIWA is complex and involves the interplay of international, federal, and state law-making.

The question posed by this brief article is so far unanswered, and the author presents it to solicit comments from lawyers across Ohio. Such comments would be helpful as the Ohio State Bar Association Estate Planning, Trust and Probate Law Section Council considers and drafts a proposed Ohio version of the UIWA. The question in essence is: will adoption by a state, such as Ohio, of the UIWA leave probate issues arising out of an international will with the state probate courts, or will the establishment of the international will under both international law and federal law put disputes over such international wills in federal court?

The author solicits advice from Ohio and any other lawyers upon consideration of the UIWA and the body of law that surrounds the Probate Exception. Tentatively, the author is inclined to the opinion that with adoption of the UIWA, especially following the Marshall decision, the Probate Exception will be dead as a coherent doctrine. Instead, because the UIWA is authorized and empowered by international treaty and federal law, this will put plenary power over international wills, at least in diversity cases and perhaps in other circumstances, in federal court. If federal courts, then, do not wish to take jurisdiction over such "international probate" issues, they will have to reformulate a new abstention doctrine that so far as been missing in American law. What advice do other lawyers have to offer?

The UIWA, in some form at least, seems like an excellent idea. It would create uniformity in will execution. By establishing a process among the states and foreign countries, the law guarantees that a citizen of a state, such as Ohio, will have his or her will accepted and enforced in a foreign country. With more international ownership of property in an increasingly globalized world, this seems wise. This policy already underlies other domestic law, such as Ohio's version of the Uniform Foreign Country Money-Judgments Recognition Act.[6]

The author is keenly interested in comments and suggestions before Ohio enacts the UIWA. In 2008, NCCUSL intends to undertake renewed activity to encourage more states to adopt the UIWA. Ohio is likely to move forward with the UIWA. The time for comment is now.

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ENDNOTES

1. *Marshall v. Marshall,* 547 U.S. 293 (2006). The Court ruled in favor of Smith, whose real name was Vickie Lynn Marshall, in her widely-publicized, multi-forum litigation over her late husband's estate. She won $88 million in federal bankruptcy court in California and lost her will contest in Texas state court. The Ninth Circuit reversed her bankruptcy court verdict, and the Supreme Court reversed and remanded. Justice Ginsberg called the Probate Exception one of "misty understandings." For an Ohio federal court's treatment of the Probate Exception, see *Bortz v. DeGolyer,* 904 F. Supp. 680 (S.D. Ohio 1995) (the author was losing counsel).
2. The Probate Exception has been thoroughly studied, ex-

plained and analyzed in Nicholas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction,* 74 S. Cal. L. Rev. 1479 (2001); Winkler, *The Probate Jurisdiction of the Federal Courts,* 14 Prob. L. J. 77 (1997); Fratcher, *The Uniform Probate Code and the International Will*, 66 Mich. L. Rev. 469 (1968). See also Luke & Hoffheimer, *Federal Probate Jurisdiction: Examining the Exception to the Rule*, 39 Fed. Bar News & J. 579 (1992) (cited by the U.S. Solicitor General's brief amicus curiae in *Marshall v. Marshall, supra.*)

3. H. Steiner & D. Vagts, *Transnational Legal Problems* 102, 107 (1976); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Pfund & Taft, *Congress' Role in the International Unification of Private Law*, 16 Ga. J. Int'l & Comp. L. 671 (1986).
4. As of this writing, these U.S. jurisdictions have adopted the UIWA: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, New Hampshire, Hawaii, Illinois, Michigan, Minnesota, Montana, New Mexico, North Dakota, Pennsylvania, and Virginia.
5. Wellman, *Uniform International Will Act for Ohio?*, 13 PLJO 64 (Jan.-Feb. 2003).
6. R.C. 2329.90-.94. See Hoffheimer, *Ohio's New Weapon for Doing Business Abroad: Recognition and Enforcement of Foreign Country Money-Judgments*, 58 Ohio St. Bar Ass'n. Report 1288 (1985).

Summaries of Recent Cases

In re Estate of Brunswick

Citation: 2007-Ohio-5396 (App. Warren Cty. 2007)

Summary: This case involved two men who cohabited for 17 years and then broke up, with one of them then dying before they completed dividing their combined assets (a situation that may become more common). The survivor had gone through bankruptcy, had sheltered real estate by titling it in his partner's name, and wanted it back now. The estate was insolvent and would sell the real estate and distribute the proceeds to the survivor's creditors who also had claims against the decedent and his estate. The probate court awarded the real estate to the estate, based on its record title and lack of any writing to create any interest in the survivor.

In re Scheeff

Citation: 2007-Ohio-6081 (App. Cuyahoga Cty. 2007)

Summary: The original will could not be found, and applicant offered a photocopy as authorized by RC 2107.26. The trial court denied probate for lack of evidence (in addition to the photocopy) that the original had been properly executed; the will was about 30 years old, the drafting attorney and two witnesses had since died and the third witness could not be located.. The appellate court affirmed, but its opinion appears to rely on the version of the statute in effect before 1999 that required proof that the decedent had not revoked the will and on cases decided under that old statute. In 1999 the statute was rewritten to authorize probate absent proof that the will had been revoked.

The statute was rewritten by 1999 HB 59, and that act contains no special rule for its effective date; for example, it does not specifically apply to all estates of persons dying after its effective date. The Scheeff will was signed before the effective date of the statute, and death was after that date. If the loss of the will could also be shown to have occurred before the effective date of the statute, would the old statute apply so the will would be presumed to have been revoked by the testator? The theory would be that once the will was revoked, it could not later be revived by the new statute.

What if the will had been signed only a year or two before death, and the drafting attorney and witnesses all testified to its due execution and properly identified the photocopy? Presumably the trial court would have admitted it to probate, based on that evidence. The 1999 statute would have been the version in effect when the will was signed, so the photocopy clearly would be admissible absent evidence of revocation.

Long v. Long

Citation: 2007-Ohio-5909 (App. Trumbull Cty. 2007)

Summary: Decedent left a parcel of real estate and a will benefiting his four children equally. After his death, one son died, survived by a minor child. That grandchild of the first decedent sued her aunts and uncles for a one-quarter interest in the real estate. By then the real estate had been sold in a tax sale, and the grandchild wanted a quarter of the value at death, not of the lesser sales proceeds.

Both the trial and appellate courts held that the grandchild was not a proper plaintiff. Although title to the real estate passed from the decedent to his four children, when his son later died title to the son's share vested in the son's estate, not its beneficiaries. It was not established whether the son died testate, so the grandchild might not

even be a beneficiary under the will, or whether his estate was solvent or would go instead to his creditors.

The reminds us that title to real estate may pass on death of its owner, but not necessarily also on the later death of the owner's devisee. Tricky.

In re Estate of Baker

Citation: 2007-Ohio-6549 (App. Lorain Cty. 2007)

Summary: Decedent's will left all to his wife, stating that all children including future children were disinherited in her favor. If she predeceased him, the will left all to his five children by name. Later he and his wife divorced, he remarried and he adopted a stepchild. When he died, the adopted stepchild claimed an intestate share under RC 2107.34 as a pretermitted child. The issue was how to apply the gift to named children and disinheritance of future children where his former wife did not die but was divorced. Both trial and appellate courts reached the sensible conclusion that the adopted stepchild shared with her siblings, that under RC 2107.33 the divorce was the legal equivalent of the death of the wife so the disinheritance of future children in her favor did not apply.

The will was signed in 1980 and the testator died in 2003. In the intervening 23 years, the testator was divorced twice and married twice, in addition to adopting the stepchild. Is it remarkable that he never updated the will? Would his family have been better served without the will?

Legislative Scorecard

Keep this Scorecard as a supplement to your 2006 Ohio Probate Code for up-to-date information on probate and trust legislation.

Recently Enacted

Revise domicile rules for income tax See Gross, Saccogna, Warshawsky, and West, *It's No Longer "Out of Sight, Out of Mind" in Ohio: House Bill 73, A First Step Toward Relaxing Ohio's Residency Requirements While Strengthening Ohio's Nonprofits and Bolstering Ohio's Coffers*, 15 PLJO 153 (July/Aug. 2005); Vannatta, *The Ohio Bright Line Residency Test: What it is and What it has Become*, 17 PLJO 90 (Jan./Feb. 2007)	H.B. 73	Eff. 4-4-07	Trakas (R-17)
Regulation of heir hunter contracts See Lenga, *Heir Hunter Legislation: Proposed RC 2109.361*, 14 PLJO 47 (Jan./Feb. 2004), Robertson, *H.B. 83: A New Procedural Safeguard for Estate Beneficiaries*, 17 PLJO 126 (Mar./Apr. 2007)	H.B. 83	Eff. 3-23-07	Hughes (R-22)
Permits operating agreement of LLC to determine membership rights after death See Galloway, *Holdeman v. Epperson: Rights of an Executrix to Control Limited Liability Company*, 17 PLJO 164 (May/June 2007), *Editor's Message*, 18 PLJO 134 (Jan./Feb. 2008)	H.B. 134	Eff. 10-18-07	Seitz (R-30)
Capital improvements bill See Robertson, *H.B. 699 Updates References to Federal Law*, 17 PLJO 89 (Jan./Feb. 2007)	H.B. 699	Eff. 12-28-06	Calvert (R-69)
Execution and acknowledgment of memoranda of trust See Vannatta, *S.B. 134: The Memorandum of Trust Has Become More Useful*, 18 PLJO 134 (Jan./Feb. 2008)	S.B. 134	Eff. 1-17-08	Faber (R-12)
Updates RC Reference to IRC	H.B. 157	Eff. 12-21-07	Hughes (R-22)
Waives probate court costs for military deaths in combat zone	H.B. 372	Eff. _____	R. McGregor (R-72)

Pending

Repeals Ohio estate tax, subject to local option to continue it	H.B. 3	Intro. 2-20-07	Latta (R-6)
Reduces Ohio estate tax and provides local option to repeal it	H.B. 4	Intro. 2-20-07	Wolpert (R-23)
Update disclaimer act See Cairns, *The Ohio Disclaimer Statute: Pending Overhaul*, 17 PLJO 165 (Mar./Apr. 2007).	H.B. 160	Intro. 4-17-07 Passed House 6-13-07	Bubp (R-88)
Use of County Auditor real estate value in inventory and other probate matters	H.B. 255	Intro. 6-5-07	Latta (R-6)
Permit nomination of guardian for adult incompetent child See Peppers, *Designation of a Guardian for an Incompetent Adult Child*, 16 PLJO 75 (Jan./Feb. 2006).	S.B. 157	Intro. 5-1-07 Passed Senate 6-19-07	Buehrer (R-1)
Regulation of life insurance viatical settlements	H.B. 404	Intro. 11-29-07	Hottinger (R-71) Barrett (D-58)

Proposed legislation sponsored by the Ohio State Bar Ass'n, Estate Planning, Trust and Probate Law Section

Repeal tax releases and other Ohio estate tax changes — 4-16-01 **

See Frederickson, *Miscellaneous Estate Tax Proposals in Need of a Legislative Sponsor*, 14 PLJO 39 (Nov./Dec. 2003).

Extension of estate tax pension exclusion to rollover IRAs — 4-7-03**

See McNeil, *Ohio Estate Tax: Retirement Plans Exclusion—Final Decision*, 12 PLJO 99 (July/Aug. 2002).

Strengthen estate tax apportionment act — 10-17-05**

See Harris, *Estate Planning Trust and Probate Law Section Committee Supports Change to Apportionment of Estate Tax*, 16 PLJO 50 (Nov./Dec. 2005).

Permit nomination of guardian for adult incompetent child (S.B. 157) — 10-17-05**

See Peppers, *Designation of a Guardian for an Incompetent Adult Child*, 16 PLJO 75 (Jan./Feb. 2006).

Update disclaimer act (H.B. 160) — 10-23-06**

See Cairns, *The Ohio Disclaimer Statute: Overhaul Pending*, 17 PLJO 165 (Mar./Apr. 2007).

Ohio estate tax exemption increase — 4-23-07**

See Brucken, *Reforming the Ohio Estate Tax*, 17 PLJO 161 (May/June 2007).

Simplification of will execution — 10-23-07**

See Weiler, "So How Contagious Is the Testator?" 18 PLJO 115 (Nov./Dec. 2007)

Uniform Prudent Management of Institutional Funds Act — 10-23-07**

See Robertson, *Some Thoughts About the Uniform Management of Institutional Funds Act*, 15 PLJO 77 (Jan./Feb. 2005).

** Full text and explanation in cited issue of Ohio State Bar Association Reports.

For the full text of pending bills and enacted laws, and for bill analyses and fiscal notes of the Legislative Service Commission, see the website of the General Assembly: http://www.legislature.state.oh.us/search.cfm. Information may also be obtained from the West *Ohio Legislative Service*, and from our Customer Service Department at 800-362-4500. Copies of legislation prior to publication in OLS are available from Customer Service at nominal cost.❖

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