

**STAYING CURRENT WITH THE OHIO TRUST CODE –
USEFUL NEW TOOLS AND PRACTICAL APPLICATION
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STAYING CURRENT WITH THE OHIO TRUST CODE – USEFUL NEW TOOLS AND PRACTICAL APPLICATION

I. Why Does It Matter?

1. Proliferation of use of Trusts
 - Some drafted well, some not
2. Anticipated Transfer of Wealth in Coming Years
 - 30 Trillion from Baby Boomers to children in next 3-4 decades¹
3. Trust Administration needed regardless of estate tax exemption amounts, estate tax reform, or estate tax repeal

II. Some New Tools – provided by S.B. 117 (3-22-12) amending the Trust Code

1. Agreement Among Interested Parties Regarding Trust Matters – f/k/a “Private Settlement Agreements”
 - Parties
 - Old – required all beneficiaries
 - New – only need two or more of:
 - * Settlor
 - * Beneficiaries
 - * Trustee
 - * Creditors

¹ Sullivan, Paul, “What to Tell Children About Their Inheritance and When.” *NY Times*, July 23, 2012, citing Accenture report.

- Practical Result - Not much has changed
 - * If fewer than all beneficiaries execute PSA, only the parties to agreement will be bound (5801.10(E))
 - * Wise drafters previously used, and will continue to use, provision to bind parties even if agreement not sanctioned by statute
 - * Example: “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) and with respect to all issues those parties have agreed to be determined by it.”

➤ Tax Clause Interpretation

- Old – Did not specifically provide whether PSA could address “transfer tax issues”
- New – Construing transfer tax terms to give effect to settlor’s intent is identified as permissible use of PSA
- Practical Result – Useful, particularly if Congress, as anticipated, does not provide clarity

➤ Common Law Agreements

- Old – Did not specifically address whether non-statutory agreements (common law) among beneficiaries/trustees were valid given statute’s restrictions on early termination and changing beneficial interests
- New – 5801.10(N) – specifically authorizes agreements not described in 5801.10 and ratification per 5810.09
- Practical Result – Not much has changed
 - * Ratification of actions were consistently used
 - * Most believed common law agreements remained valid
 - * Still subject to trustee’s willingness to accept risk

2. Decanting

- Background – Simply stated, distributing all assets to a new trust
 - Act performed by trustee
 - Consent of beneficiaries unnecessary
 - Court approval unnecessary
 - Will corporate trustees act?
 - Previously – Available under common law if trustee had unlimited power to distribute
 - 5808.18 – Codifies decanting power
- 5808.18(A) – If trustee of first trust has absolute power to distribute principal
 - Trustee may distribute assets to second trust for the benefit of one or more current beneficiaries of first trust
 - Absolute power – cannot be limited by ascertainable standard (5801.01(B)) or reasonably definite standard
 - * Best interests, welfare, comfort, happiness does not = limited by reasonably definite standard
 - * Remainder beneficiaries 5808.18(A)(3)(b)
- 5808.18(B) – If no absolute power, trustee can still decant, but second trust may not materially change interest of beneficiaries of first trust
- Limitations
 - Mandatory right to income, principal, unitrust amount, or withdraw cannot be changed
 - Marital deduction, charitable deduction, annual exclusion, GST exemption must be preserved
 - Trusts that are permitted S-Corp shareholders must be preserved
 - Distribution period per 401(a)(9) must be preserved
 - “Tax Benefits” must be preserved

- Cannot change compensation of trustee
- Cannot change trustee's standard of care
- How?
 - 30 days notice to current beneficiaries unless waived
 - Written instrument (akin to restatement) executed by trustee
 - Effective date
 - * Division (A) – Distributions “whenever made;” codifies common law
 - * Division (B) – Distributions made on or after effective date

3. “Substitute Takers” (5808.19 & 5808.17(D))²

- 5808.19 codifies anti-lapse application to trusts

If beneficiary does not survive 120 hours and beneficiary is grandparent, descendant of grandparent, or stepchild, substitute gift is created for deceased beneficiary's descendants, per stirpes

 - Practical Result – little
 - * Proper drafting eliminates issue
 - * Common law applies to trusts irrevocable before 3-22-12
- Additional Assistance for Distributions to Deceased Beneficiaries – 5808.17(D)
 - Why?
 - * New anti-lapse applies only to trusts irrevocable after 3-22-2012
 - * Distribution may be made to non-relatives

² Review 2107.52 for Ohio's new anti-lapse statute for Wills

- How?
- If beneficiary is deceased and death does not terminate right to distribution, trustee may
 - * Distribute to estate if one is open
 - * If estate not open
 - ◆ Per intestate distribution
 - ◆ Devisees under Will
 - ◆ If 6 months have passed since beneficiary's death, possibly to residuary trust under pour-over provision even if will was not admitted
 - * If 6 months have passed since beneficiary's death, trustee may distribute to intestate heirs per domicile of beneficiary at death after reasonable determinations are made
- Practical Result – can be very useful, particularly if distribution is not large

4. Other Changes

- ILIT (Duties of Trustee With Respect To Life Insurance) (5809.031)
 - Applies to trusts and policies established before, on, or after effective date
- Uniform Power of Attorney Act (1337.21 – 1337.64)
- Titling Assets in Trust
 - Real property (5301.071)
 - Personal property (5810.14)

III. Existing Tools Under OTC

1. Ratification of Trust Action (5810.09)

- Not liable for breach of trust if consent by beneficiary
- Disclose all material facts

2. Modification Tools (5804.11 – 5804.16)

- By Consent
 - Settlor and all beneficiaries
 - If only beneficiaries, material purpose must not be defeated
 - Upon termination, Trustee shall distribute as agreed by beneficiaries
- Due to Unanticipated Circumstances
 - Modify/terminate due to circumstances not anticipated if purposes of trust will be furthered
 - Modify administrative terms if existing terms impractical or would impair administration
 - Distribute, upon termination, in a manner consistent with purposes
 - Apply equitable deviation to modify or terminate; settlor's intent not disregarded, but modify inopportune details to effectuate broader intent
- Cy Pres
- Uneconomic Trust
- Reformation to Correct Mistake
 - Even if unambiguous
 - Settlor's intent proven by clear and convincing evidence
 - If terms affected by mistake of fact or law
- To achieve Settlor's Tax Objectives

3. Notice of Proposed Distribution (5808.17)

4. Combine/Divide Trusts (5804.17)

5. Ohio's Power to Adjust (5812.03)

6. Actions Challenging Validity (5806.04)
7. Statute of Limitations (5810.05)

IV. Should We Use Tools?

1. Who is looking out for Settlor?

- 5804.11(B) & (C)
 - Distribute as beneficiaries agree
 - Preserve material purpose
- Unanticipated Circumstances
 - Distribute/modify to effectuate broader purpose
- Decant
 - To whole new trust if absolute power
 - Otherwise, to second trust that does not materially change interest of beneficiaries

2. Protect Settlor

- Define material purpose?
- Restrict modification by precatory language, as courts' power to modify is nonwaivable
- Decant
 - Unless instrument expressly provides otherwise (5808.18(B))
 - Distribution power can be limited (5808.18(N)(1))
 - Notice requirements can be expanded (5808.18(N)(2))