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Bill Analysis
Legislative Service Commission

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(As Introduced)

Reps. Oelslager, J. McGregor, Hughes, Combs, Barrett

BILL SUMMARY

- Provides that the administration of a trust is governed by the law designated in the terms of the trust to govern trust administration and, in the absence of such designation, the law of the trust's principal place of administration.
- Provides that the invalidity of any provision of a private settlement agreement does not affect the validity of other provisions of the agreement and adds creditors who are parties to the agreement and their heirs, successors, and assigns to the persons on whom the agreement is final and binding.
- Specifically requires a guardian of the estate or person, in acting under the Ohio Trust Code (OTC), to comply with the guardian's duties under the Guardianship Law.
- Provides that if upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust *and that all consents, including any given by representatives, are valid*, the court must order the modification or termination.
- Provides that a provision in the terms of a charitable trust for an alternative charitable purpose prevails over the court's power to apply cy pres to modify or terminate the trust.
- Modifies the authority of a trustee to combine or divide a trust by providing that such authority may be exercised if the result does not substantially impair the rights of any beneficiary or have a materially adverse effect on the achievement of the trust purposes.

- Modifies the period of limitations for certain actions pertaining to a revocable trust made irrevocable by the death of the settlor to the earlier of the date that is two years after the death or that is six months from the date on which the trustee sends the person bringing the action a copy of the trust instrument and notice specifying certain information.
- Generally permits a trustee to furnish a beneficiary a copy of a redacted trust instrument that includes only those provisions determined by the trustee to be relevant to the beneficiary's interest in the trust.
- Adds the following powers of a trustee: (1) mortgage, pledge, or grant a security interest in the property of a revocable trust to secure payment of loans made by others to the settlor and, if the settlor so directs, loans made by others to a third party, and (2) employ agents, attorneys, accountants, investment advisors, and other professionals.
- Removes certain information from the contents of a certification of trust and provides that the OTC provisions on certification of trust do not affect the use or validity of a memorandum of trust under continuing law.
- Provides that the OTC liability limitations pertaining to a breach of trust apply to trustees as partners notwithstanding the broader personal liabilities otherwise imposed by any partnership law and that the liability limitations in the OTC certification of trust provisions apply to fiduciaries as partners notwithstanding the broader personal liabilities otherwise imposed by any partnership law.
- Makes various clarifying and technical changes in the OTC.
- Outright repeals existing law that limits the liability of any excluded fiduciary when certain powers, including the authority to direct the acquisition, disposition, or retention of any investment, are granted to other persons.

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CONTENT AND OPERATION

The bill makes several substantive, clarifying, and technical changes in the Ohio Trust Code (OTC).

Definitions; wholly discretionary trust

Under current law, with respect to a trust established for the benefit of an individual who is blind or disabled as defined in 42 U.S.C. 1382c(a)(2) or (3), as amended, a wholly discretionary trust may include either or both of the following: (1) precatory language regarding its intended purpose of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs, or (2) a prohibition against providing food, *clothing*, and shelter to the beneficiary. Under the bill, with respect to a trust described in the preceding sentence, a wholly discretionary trust may include either or both (1), as described above, or (2) a prohibition against providing food and shelter to the beneficiary (the bill deletes *clothing*). (R.C. 5801.01(Y)(5).)

Scope of OTC

Current law provides that the OTC applies to testamentary trusts to the extent provided by R.C. 2109.69 (see **COMMENT 1**). The bill provides that the OTC applies to *charitable and noncharitable* (added by the bill) testamentary trusts to the extent provided by R.C. 2109.69. (R.C. 5801.02.)

Governing law

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

The bill adds the provision that the administration of a trust is governed by the law designated in the terms of the trust to govern trust administration. If the terms of the trust do not designate the governing law, both of the following apply: (1) the law of the trust's principal place of administration governs the administration of the trust, and (2) if the trust's principal place of administration is transferred to another jurisdiction under R.C. 5801.07, the law of the new principal place of administration of the trust governs the administration of the trust from the time of the transfer. (R.C. 5801.06(B).)

Private settlement agreements

Existing law

Current law provides that certain specified persons may by written instrument enter into an agreement with respect to any matter concerning the construction of, administration of, or distributions under the *trust instrument*, the investment of income or principal held by the trustee, or other matters. The agreement *is valid only to the extent that it does not effect a termination of the trust before the date specified for the trust's termination in the trust instrument, does not change the interests of the beneficiaries in the trust except as necessary to effect a modification under specified provisions of the law, and includes terms and conditions that could be properly approved by the court under the OTC or other applicable law.* Current law lists the types of matters that may be resolved by a private settlement agreement.

Any such agreement entered into that complies with the law's requirements is final and binding on the trustee, the settlor if living, all beneficiaries, and their heirs, successors, and assigns. (R.C. 5801.10(C) and (E).)

Operation of the bill

The bill provides that certain specified persons may by written instrument enter into an agreement with respect to any matter concerning the construction of, administration of, or distributions under the *terms of the trust* (instead of *trust*

instrument), the investment of income or principal held by the trustee, or other matters. The agreement *may not* (instead of *is valid only to the extent that it does not*) effect a termination of the trust before the date specified for the trust's termination in the *terms of the trust*, change the interests of the beneficiaries in the trust except as necessary to effect a modification under specified provisions of the law, *or include* terms and conditions that could *not* be properly approved by the court under the OTC or other applicable law. *The invalidity of any provision of the agreement does not affect the validity of other provisions of the agreement* (added by the bill).

Any such agreement entered into that complies with the law's requirements is final and binding on the trustee, the settlor if living, all beneficiaries, *creditors who are parties to the agreement* (added by the bill), and their heirs, successors, and assigns. (R.C. 5801.10(C) and (E).)

In the provisions in current law listing the types of matters that may be resolved by a private settlement agreement and the trustee's representation of interests in negotiating or entering into a private settlement agreement, the bill replaces *trust instrument* with *terms of the trust*. (R.C. 5801.10(C)(2) to (6) and (F).)

Guardian's duties

The bill adds a new section in the OTC that provides that a guardian of the estate or person, in acting under the OTC, must comply with the guardian's duties under R.C. Chapter 2111. (Guardianship Law) or other applicable law (R.C. 5801.11).

Representation by holder of testamentary power

Under continuing law, to the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. The bill adds the provision that the rights of the holder of a presently exercisable general power of appointment are governed by R.C. 5806.03 (see **COMMENT 2**). (R.C. 5803.02.)

Representation by parent

Under continuing law, to the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute, a parent may represent and bind the parent's minor or unborn child if neither a guardian for the child's estate or a

guardian of the person has been appointed. The bill adds the provision that if a minor or unborn child is not represented by a parent under this provision, another person may represent and bind the minor or unborn child under R.C. 5803.04 (see **COMMENT 3**) if the requirements of that section are met. (R.C. 5803.03(F).)

Trustee's power to select beneficiary from indefinite class; validity of trust

Under current law, a power in a trustee to select a beneficiary from an indefinite class is valid. The bill provides that a power in a trustee *or other person* (added by the bill) to select a beneficiary from an indefinite class is valid. (R.C. 5804.02(C).)

Under current law, the provision that a trust is valid regardless of the existence, size, or character of the corpus of the trust applies to any trust that was executed prior to, or is executed on or after the effective date of the OTC. The bill applies that provision to any trust *instrument* that was executed prior to, or is executed on or after January 1, 2007. (R.C. 5804.02(D).)

Modification or termination of noncharitable irrevocable trust by consent

Current law provides that if upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court must enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. An agent under a power of attorney may exercise a settlor's power to consent to a trust's modification or termination only to the extent expressly authorized by both the power of attorney and the terms of the trust. The settlor's guardian of the estate may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized. The guardian of the settlor's person may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized and a guardian of the estate has not been appointed. *This provision applies only to irrevocable trusts created on or after the effective date of the OTC and to revocable trusts that become irrevocable on or after the effective date of the OTC.*

The bill modifies the first sentence in the preceding paragraph by providing that if upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust *and that all consents, including any given by representatives under R.C. Chapter 5803. (Representation), are valid* (added by the bill), the court must enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. The bill deletes the italicized

last sentence in the preceding paragraph regarding the applicability of current law's provision described in that paragraph. (R.C. 5804.11(A).)

Charitable trusts; cy pres

Under current law, except as otherwise described in the following sentence, if a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve, all of the following apply: (1) the trust does not fail in whole or in part, (2) the trust property does not revert to the settlor or the settlor's successors in interest, and (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes. A provision in the terms of a charitable trust for the distribution of the trust property to a noncharitable beneficiary prevails over the power of the court to apply cy pres to modify or terminate the trust.

The bill modifies the exception described in the preceding sentence by providing that a provision in the terms of a charitable trust for *an alternative charitable purpose* (added by the bill) or for the distribution of the trust property to a noncharitable beneficiary prevails over the power of the court to apply cy pres to modify or terminate the trust. (R.C. 5804.13.)

Modification or termination of uneconomic trust

Under current law, upon the termination by the court of an inter vivos trust consisting of trust property with a total value of less than \$100,000, the *probate court* must order the distribution of the trust estate in accordance with any provision specified in the *trust instrument* for the premature termination of the trust. If there is no provision of that nature in the *trust instrument*, the *probate court* must order the distribution of the trust estate among the beneficiaries of the trust in accordance with their respective beneficial interests and in a manner that the court determines to be equitable. (R.C. 5804.14(D).)

The bill replaces *probate court* with *court* in the above provision. The bill replaces *trust instrument* with *terms of the trust* in the above provisions and in the provisions in current law pertaining to the distribution of the trust estate upon termination by a trustee of an inter vivos trust consisting of trust property with a total value of less than \$100,000. It modifies current law by providing that the existence of a spendthrift or similar provision in the *terms of a trust* (instead of *trust instrument*) or will does not preclude termination of a trust pursuant to current law. (R.C. 5804.14(C), (D), and (E).)

Combination and division of trusts

Current law provides that after notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust. The bill provides that after notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not *substantially* (added by the bill) impair the rights of any beneficiary or *have a materially adverse effect* (instead of *adversely affect*) on the achievement of the purposes of the trust. (R.C. 5804.17.)

Spendthrift provisions

The bill replaces *trust instrument* with *terms of the trust* in the spendthrift provision preventing a beneficiary's creditor or assignee from reaching trust property made available for the beneficiary's use or occupancy and in the provision prohibiting a creditor or assignee of a beneficiary of a wholly discretionary trust from reaching the beneficiary's interest in the trust or a trustee's distribution before its receipt by the beneficiary. (R.C. 5805.01(C) and 5805.03.)

Revocable trusts

Current law provides that the capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. The bill clarifies that the capacity required under the preceding sentence is that of a settlor. (R.C. 5806.01.)

Current law provides that during the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. The bill specifies that the duties of the trustee that are owed exclusively to the settlor *include the duties to inform and report under R.C. 5808.13*. (R.C. 5806.03(A).)

Under existing law, any of the following actions pertaining to a revocable trust that are made irrevocable by the death of the settlor of the trust must be commenced within two years after the date of the death of the settlor of the trust: (1) an action to contest the validity of the trust, (2) an action to contest the validity of any amendment to the trust that was made during the lifetime of the settlor of the trust, (3) an action to contest the revocation of the trust during the lifetime of the settlor of the trust, and (4) an action to contest the validity of any transfer made to the trust during the lifetime of the settlor of the trust. The bill provides that

those actions must be commenced *by the earlier of the date that is two years after the date of the death of the settlor of the trust or that is six months from the date on which the trustee sends the person bringing the action a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed under this provision for commencing an action.* (R.C. 5806.04(A).)

Duty of trustee to inform and report

Current law requires a trustee, that upon the request of a beneficiary, to promptly furnish to the beneficiary a copy of the trust instrument. The bill permits a trustee, unless the beneficiary expressly requests a copy of the entire trust instrument, to furnish to the beneficiary a copy of a redacted trust instrument that includes only those provisions of the trust instrument that the trustee determines are relevant to the beneficiary's interest in the trust. If the beneficiary requests a copy of the entire trust instrument after receiving a copy of a redacted trust instrument, the trustee must furnish a copy of the entire trust instrument to the beneficiary. (R.C. 5808.13(B)(1).)

Current law requires a trustee to send to the current beneficiaries, and to other beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values. The bill modifies the above requirement to apply to a trustee of a trust that has a fiscal year ending on or after January 1, 2007. (R.C. 5808.13(C).)

The bill specifies that during the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the trustee's duties to inform and report under current law, as modified by the bill, are owed exclusively to the settlor (R.C. 5808.13(G)).

Trustee's discretionary powers

Current law provides that the judicial standard of review for discretionary trusts is that the trustee must exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that a reasonableness standard cannot be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The bill modifies the above exception by providing that *with respect to distribution decisions*, a reasonableness standard cannot be applied to the exercise of discretion by the trustee of a wholly discretionary trust. (R.C. 5808.14(A).)

Specific powers of trustee

Continuing law lists the specific powers of a trustee. One of these powers under current law is to pledge the property of a revocable trust to guarantee loans made by others to the settlor of the revocable trust, or, if the settlor so directs, to guarantee loans made by others to a third party. The bill modifies this power of a trustee by instead authorizing a trustee to guarantee loans made by others to the settlor of a revocable trust *and*, if the settlor so directs, guarantee loans made by others to a third party *and mortgage, pledge, or grant a security interest in the property of a revocable trust to secure the payment of loans made by others to the settlor of the revocable trust and, if the settlor so directs, loans made by others to a third party* (added by the bill). The bill further adds the power of a trustee to employ agents, attorneys, accountants, investment advisors, and other professionals. (R.C. 5808.16(S) and (AA).)

Limitation of action against trustee for breach of trust

Continuing law prescribes the periods of limitation for an action against a trustee for breach of trust (R.C. 5810.05(A), (B), and (C)).

The bill provides that the liability limitations in continuing law apply to trustees as partners notwithstanding the broader personal liabilities otherwise imposed by any partnership law. When a trust is identified as a partner, the reference is deemed to be to, and the partner is, the current trustee or trustees of the trust and their successors as trustees. (R.C. 5810.05(E) and (F).)

The bill further provides that nothing in the OTC limits the operation of any principle of law or equity, including the doctrines of laches, unclean hands, estoppel, and waiver, that can bar claims (R.C. 5810.05(D)).

Certification of trust

Under current law, instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing all of the following information: (1) a statement that the trust exists and the date the trust instrument was executed, (2) the identity of the settlor, (3) the identity and address of the currently acting trustee, (4) the powers of the trustee, (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust, (6) the authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee, (7) the trust's taxpayer identification number, and (8) the manner of taking title to trust property. The bill removes the information described above in (7) and (8) from the contents of a certification of trust. (R.C. 5810.13(A).)

Current law provides that a person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument. The bill removes this provision and instead provides that the certification of trust provisions (R.C. 5810.13) do not affect the use or validity of a memorandum of trust under R.C. 5301.255. (R.C. 5810.13(H).)

The bill further provides that the liability limitations in the certification of trust provisions, as modified by the bill, apply to fiduciaries as partners notwithstanding the broader personal liabilities otherwise imposed by any partnership law. When an estate or other fund held by a fiduciary is identified as a partner, the reference is deemed to be to, and the partner is, the current executor, administrator, or other fiduciary of the estate or other fund and their successors as executors, administrators, or other fiduciaries. (R.C. 5810.13(J) and (K).)

Limitation on liability of fiduciary when certain powers granted to other persons

Under current law, when an instrument under which a "fiduciary" (defined below) acts reserves to the grantor, or vests in an advisory or investment committee or in one or more other persons, including one or more fiduciaries, to the exclusion of the fiduciary or of one or more of several fiduciaries, any power, including, but not limited to, the authority to direct the acquisition, disposition, or retention of any investment or the power to authorize any act that an excluded fiduciary may propose, any excluded fiduciary is not liable, either individually or as a fiduciary, for either: (1) any loss that results from compliance with an authorized direction of the grantor, committee, person, or persons, or (2) any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the grantor, committee, person, or persons if that excluded fiduciary timely sought but failed to obtain that authorization. Any excluded fiduciary as described in the preceding sentence is relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the grantor, an advisory or investment committee, or one or more other persons have authority to direct the acquisition, disposition, or retention of any investment. The above provisions do not apply to the extent that the instrument under which an excluded fiduciary acts contains provisions that are inconsistent with those provisions.

As used in current law, above, "fiduciary" means a trustee under any testamentary or other trust, an executor or administrator, or any other person who is acting in a fiduciary capacity for any person, trust, or estate. (R.C. 2109.022.)

The bill outright repeals R.C. 2109.022 and removes a reference to that section in the exception to the definition of "fiduciary" for purposes of the Probate Code. (R.C. 2109.01.)

COMMENT

1. R.C. 2109.69, not in the bill, provides that subject to the following sentence, the provisions of the OTC apply to testamentary trusts except to the extent that any provision of the OTC conflicts with any provision of R.C. Chapter 2109. (Fiduciaries Law), or with any other provision of the Revised Code, that applies specifically to testamentary trusts and except to the extent that any provision of the OTC is clearly inapplicable to testamentary trusts. R.C. 5805.13 (Trustee's duty to inform and report) applies to testamentary trusts whether or not that section conflicts with any provision of R.C. Chapter 2109. or any other provision of the Revised Code that applies specifically to testamentary trusts.

2. Under R.C. 5806.03, as modified by the bill, during the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee, *including the duties to inform and report under R.C. 5808.13*, are owed exclusively to the settlor. If the trustee breaches its duty during the lifetime of the settlor, any recovery obtained from the trustee after the settlor becomes incapacitated or dies must be apportioned by the court. If the settlor is living when the recovery is obtained, the court must apportion the recovery between the settlor and the trust, or allocate the entire recovery to the settlor or the trust, as it determines to be equitable under the circumstances. If the settlor is not living when the recovery is obtained, the court must apportion the recovery between the settlor's estate and the trust, or allocate the entire recovery to the settlor's estate or the trust, as it determines to be equitable under the circumstances. During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this provision to the extent of the property subject to the power.

3. R.C. 5803.04, not in the bill, provides that unless otherwise represented, a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

HISTORY

ACTION	DATE
Introduced	03-06-08

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