Ohio Legislative Service Commission

Bill Analysis

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Reps. C. Hagan and Blessing, Batchelder, Gardner, Grossman, Stebelton, Sears, Boose, Damschroder, Schuring, Wachtmann, Johnson, Beck, Gonzales, Terhar, Amstutz

BILL SUMMARY

Ohio Legacy Trust Act

- Enacts the Ohio Legacy Trust Act.
- Defines "legacy trust" as a trust evidenced by a written trust instrument that essentially satisfies the following criteria: it has a "qualified trustee" in connection with property that is the subject of a "qualified disposition"; it incorporates Ohio laws to govern its validity, construction, and administration; it expressly states that it is irrevocable; and it has a spendthrift provision applicable to a beneficiary's interests, including a transferor's interests, in the trust property.
- Generally requires that the spendthrift provisions of a legacy trust restrain both voluntary and involuntary transfer of a transferor's interest in that trust, and provides that a spendthrift provision is enforceable under any applicable nonbankruptcy law.
- Permits a transferor's interest in property that is the subject of a qualified disposition to be attached or involuntarily alienated in connection with any debt owed by the transferor under an agreement or court order for spousal or child support or the division of property in favor of the transferor's spouse or former spouse.
- Provides that a transferor's interest in property transferred pursuant to a qualified disposition and the transferor's beneficial interest in a legacy trust is not subject to any claim for forced heirship or a distributive or similar award to any person other than the transferor's spouse or former spouse.

- Provides that a legacy trust may allow or provide for any or all of specifically listed rights, powers, or interests of a transferor, or provisions, none of which grants or is considered to be a right or power to revoke a trust or to voluntarily or involuntarily transfer an interest in that trust.

- Renders void any written, verbal, tacit, express, or implied agreement or understanding or other agreement or understanding purporting to grant, permit, or recognize any greater rights, powers, or interests than are provided in the bill or the governing legacy trust instrument.

- Requires a transferor to sign a notarized "qualified affidavit" before or contemporaneously with making a qualified disposition, specifies the contents of the qualified affidavit, specifies the circumstances in which a qualified affidavit is not considered defective, and provides that a qualified affidavit is not required from a transferor who is not a beneficiary of the legacy trust that receives the disposition.

- Generally prohibits a creditor from bringing any action against any person who made or received a qualified disposition, against or involving any property that is the subject of a qualified disposition or is otherwise held by or for any trustee as part of a legacy trust, or against any trustee of a legacy trust.

- Allows a creditor to bring an action to avoid any qualified disposition of an asset on the ground that a transferor made the qualified disposition with the specific intent to defraud the specific creditor bringing the action.

- Provides that the claim for relief in the preceding dot point is extinguished if not brought within a specified period of time that relates to whether the creditor became a creditor before or after the qualified disposition.

- Provides that if more than one qualified disposition is made in connection with the same legacy trust, each qualified disposition will be separately evaluated to determine whether a creditor's claim regarding that particular qualified disposition is extinguished.

- Specifies rules in determining the order in which property is paid, applied, or distributed from a legacy trust.

- Provides that a specific qualified disposition is avoided only to the extent necessary to satisfy a transferor's debt to the creditor who brought the action to avoid the qualified disposition and that all other qualified dispositions to any trustee of the legacy trust remain valid and effective.

- Specifies the rights of a trustee with respect to property that is the subject of an avoided qualified disposition and the rights of a beneficiary to a distribution if a court is satisfied that the trustee or beneficiary has not acted in bad faith, and places on the creditor the burden of proving such bad faith by clear and convincing evidence.

- Requires a court to award reasonable attorney's fees and costs to the prevailing party in an action to avoid a qualified disposition.

- Prescribes the manner in which a successor or replacement trustee is determined or selected in cases in which a qualified trustee who is a party to an action involving a legacy trust or trustee ceases to be a trustee upon the court's action declining to apply Ohio law in determining any of the specified matters pertaining to the trust.

- Requires that in all cases other than the situation described in the preceding dot point, a vacancy in the qualified trusteeship or trusteeship of a legacy trust must be filled in the same manner as provided in the Ohio Trust Code.

- Provides that a disposition by a nonqualified trustee to a qualified trustee is not treated as other than a qualified disposition solely because the nonqualified trustee is a trustee of a nonlegacy trust and a disposition to a nonqualified trustee of a legacy trust is treated as a qualified disposition if certain conditions exist at the time of the disposition.

- Generally provides that a disposition by a trustee of a nonlegacy trust to a trustee of a legacy trust is considered a qualified disposition for the benefit of all of the persons who are the beneficiaries of both the nonlegacy trust and the legacy trust.

- Specifies that any valid lien attaching to property before a disposition of that property to a trustee of a legacy trust survives the disposition and the trustee takes title to the property subject to the valid lien and to any agreements that created or perfected the valid lien.

- Subject to the Ohio and United States Constitutions, precludes Ohio courts from dismissing or declining to adjudicate any case brought before them pertaining to any legacy trust or qualified disposition on the ground that a court of another jurisdiction has acquired or may acquire proper jurisdiction or venue over the case or the parties.

- Permits any person to serve as an advisor of a legacy trust except that a transferor may act as an advisor only in connection with investment decisions and generally considers an advisor as a fiduciary.

- Generally grants to each trustee and advisor of a legacy trust the greatest discretion permitted by law in connection with all matters of trust administration, all trust distributions, and all other trustee or advisor decisions.

- Applies the Ohio Legacy Trust Act to all qualified dispositions made on or after the bill's effective date.

Ohio Trust Code changes; disclaimer; temporary conveyance of trust property to beneficiary; distribution of trust income or principal to trustee of second trust

- Provides that the right of a creditor or assignee to reach a settlor's interest in an irrevocable trust is subject to the Ohio Legacy Trust Act to the extent that that Act applies to that trust.

- Specifies the trust property that could be but has not yet been distributed to or for the benefit of the settlor under specified circumstances and that would not be considered an amount that can be distributed to or for the benefit of the settlor for purposes of the maximum amount that a creditor or assignee of a settlor of an irrevocable trust may reach.

- Permits a trustee to pay any expense incurred by a beneficiary to the extent the payment is permitted by the trust instrument, permits the trustee to make those payments even if they exhaust the trust's income and principal, and provides that the trustee is not liable to a beneficiary's creditor for paying those expenses.

- Specifies the types of administrative duties and responsibilities that may be included in an instrument or agreement that describes, appoints, or directs a fiduciary to handle only the administrative duties and responsibilities of a trust.

- Generally precludes an administrative fiduciary from having any duties, responsibilities, or liabilities to the trust beneficiaries or other persons interested in a trust except for the administrative duties and responsibilities specifically described in the instrument or agreement.

- Provides that a disclaimer of testamentary or intestate succession to property is not considered a transfer or conveyance by the disclaimant and precludes a creditor of a disclaimant from avoiding a disclaimer.

- Prescribes the requirements if any interest in real property held by a trustee of an express trust wholly or partially governed by an Ohio law or in real property located in Ohio and held by the trustee of a trust wholly governed by the law of another

jurisdiction is temporarily conveyed to any beneficiary of that trust and reconveyed back to any trustee of the trust.

- Requires, among others, that a temporary conveyance of an interest in real property as described in the preceding dot point be for the principal purpose of enabling some or all of that interest to be used as collateral in a loan transaction.

- Specifies the rights, duties, and obligations of a lender and a debtor that survive unimpaired after the interest in the real property that is temporarily conveyed to a beneficiary is reconveyed back to the trustee.

- Modifies the statute pertaining to the distribution of trust income or principal to the trustee of a second trust to conform the references in that statute to the Revised Code sections dealing with the rule against perpetuities and certain trusts exempt from that rule as modified by the bill.

Exempt rights and interests in property

- Increases the current maximum limit of $20,200 to $500,000 as the exempted interest in one parcel of property that a person or person's dependent uses as a residence and applies that exemption for any real and personal property that the person has devoted to agricultural use.

- Expands the current exemption for certain payments under any individual retirement account, individual retirement annuity, "Roth IRA," or education individual retirement account to include an exemption for certain payments or benefits under a "529 plan."

- Exempts a person's rights or interests in assets held in, or to receive any payment or benefit under, any individual retirement account, individual retirement annuity, "Roth IRA," "529 plan," or education individual retirement account that a decedent, upon or by reason of the decedent's death, directly or indirectly left to or for the benefit of the person outright or in trust or otherwise.

Rule against perpetuities

- For purposes of the rule against perpetuities, specifies the time of the creation of an interest in property resulting from the exercise of a general power of appointment exercisable in a nonfiduciary capacity by deed or resulting from the termination, without exercise, of a general power of appointment exercisable in a nonfiduciary capacity by deed.

- Provides that existing law's requirements for exempting certain trusts from the rule against perpetuities generally are effective with respect to an interest in property in trust created by the exercise of a nongeneral power of appointment over any portion of a trust that meets those requirements but only if the date of creation of that power of appointment is on or after the bill's effective date.

- Provides that interests created pursuant to the exercise of a nongeneral power of appointment that has a date of creation on or after the bill's effective date is required to vest not later than 1,000 years after the date of creation of that power.

- States that the provisions modifying existing law pertaining to the exemption of certain trusts from the rule against perpetuities are intended to clarify the originally enacted provisions and apply to trust instruments that are in existence prior to, on, or after the bill's effective date.

Transfer made or obligation incurred fraudulent as to creditor

- Modifies the Ohio Uniform Fraudulent Transfer Act by providing that a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the claim arose before, or *within a reasonable time not to exceed four years* after, the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation in either of certain ways under existing law.

Records

- Requires the county recorder to keep a separate set of records containing transfers, conveyances, or assignments of tangible or intangible personal property or rights or interests in that property if any person wishes to record that personal property transaction and requires these records to be maintained in or as part of the "official records."

- Sets the fees for recording and indexing the records described in the preceding dot point to be deposited into the county treasury to the credit of the special fund designated as "General fund moneys to supplement the equipment needs of the county recorder."

- Establishes a procedure for the county recorder to submit a proposal to the board of county commissioners to reserve funds for the office's future equipment needs and requesting that the amount of the above fees collected be placed in the county treasury and designated as "General fund moneys to supplement the equipment needs of the county recorder."

- Specifies that the recording with a county recorder of any document under current law and the bill or the filing or recording with the Secretary of State of any document under the Secured Transactions Law is constructive notice to the world of the documents' existence and contents as a public record and of any transaction referred to in that record.

Applicability of amendments to certain Revised Code sections; statement of common law

- Provides that the bill's amendments to specified Revised Code sections apply to the transfers, claims, conveyances, or other acts relevant to those amendments that are made on or after the bill's effective date.

- Provides that the bill's amendments to specified Revised Code sections are intended to be a statement of the common law of Ohio.

TABLE OF CONTENTS

Ohio Legacy Trust Act 8
Spendthrift provision 8
Transferor's interest in property transferred in a qualified disposition 8
Retained rights and powers of transferor 9
Limits on transferor's rights 11
Qualified affidavit 11
Restrictions on actions by creditors with respect to qualified dispositions 13
Restrictions on other actions, remedies, or claims 14
Avoidance of qualified disposition 16
Successor trustees; filling of vacancies 17
Effect of dispositions 18
Jurisdiction of Ohio courts 19
Trust advisors; trustee and advisor discretion 20
Miscellaneous rules; applicability 20
Definitions 21
Ohio Trust Code changes 24
Rights of settlor's creditors 24
Power of modification 25
Limitations on trustee's liability 25
Administrative fiduciary 25
Disclaiming testamentary and nontestamentary succession property 26
Temporary conveyance of trust property to beneficiary and reconveyance back to trustee 27
Requirements and rules of construction 27
Date to which reconveyance relates back; survival of rights, duties, and obligations 28
Distribution of trust income or principal to trustee of second trust 29
Exempt interests and rights in property 30
Property used as residence 30
Pension, annuity, retirement, or similar plan 31
Adjustments of dollar amounts of exemptions 33
Rule against perpetuities 33

Exemption of certain trusts 34
Definitions 36
Transfer made or obligation incurred fraudulent as to creditor 37
Records 37
Recording fees; funds for recorder's future equipment needs 38
Public records under Uniform Commercial Code 39
Applicability of amendments to certain Revised Code sections 40
Statement of common law 40

CONTENT AND OPERATION

Ohio Legacy Trust Act

The bill enacts new R.C. Chapter 5816. and states that the chapter may be cited as the Ohio Legacy Trust Act.[1] The definitions of the terms that are in parentheses the first time the term is used in this analysis are found under "**Definitions**," below.

Spendthrift provision

The bill provides that in addition to any other method allowed by law, the "spendthrift provision" of a "legacy trust" may be stated as a term of a trust providing that the interest of a beneficiary is held subject to a spendthrift trust, or words of similar import, that is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest. Generally, the spendthrift provisions of a legacy trust must restrain both voluntary and involuntary transfer of a "transferor's" interest in that trust. A legacy trust and its spendthrift provisions additionally may provide for any other restraints on alienation that are permitted by any Ohio law. Any spendthrift provision in a legacy trust is enforceable under any applicable nonbankruptcy law within the meaning of section 541(c)(2) of the "Bankruptcy Code" regardless of whether or not the relevant legacy trust instrument makes any reference to that enforceability.[2]

Transferor's interest in property transferred in a qualified disposition

The bill provides that notwithstanding the above described provisions or the terms of any spendthrift provision, but subject to the following provisions, a transferor's interest in property that is the subject of a "qualified disposition" may be attached or otherwise involuntarily alienated in connection with any "debt" that the transferor owes pursuant to an agreement or court order for either: (1) the payment of child or spousal support or alimony to or for the transferor's "spouse," "former spouse," child, or children, or to any governmental agency designated by statute, rule, or regulation to be

[1] R.C. 5816.01.

[2] R.C. 5816.03(A) and (B) and R.C. 5805.01(B), not in the bill.

the payee of that child or spousal support or alimony; or (2) the division or distribution of property in favor of the transferor's spouse or former spouse.[3]

A transferor's interest in property transferred pursuant to a qualified disposition and the transferor's beneficial interest in a legacy trust is not subject to: (1) any claim for forced heirship or legitime, or (2) a distributive award under R.C. 3105.171 (equitable division of marital and separate property; distributive award) or any similar award under the law of another jurisdiction to any person other than the transferor's spouse or former spouse. The bill requires a court to liberally construe and apply (2), above, in finding that such similarity exists.[4]

The bill provides that nothing in the above provisions deprives any "beneficiary" of exemption rights that the beneficiary may have under any applicable law after the trust property is received by that beneficiary.[5]

Retained rights and powers of transferor

The bill provides that to the extent conferred by the governing legacy trust instrument, a transferor to a legacy trust may have any or all of the rights, powers, and interests described below.[6] A legacy trust may allow or provide for any or all of the following rights, powers, interests, or provisions, none of which grants, or is considered to be, either alone or in any combination, a right or power to revoke a trust or to voluntarily or involuntarily transfer an interest in that trust:[7]

(1) A provision that, upon the happening of a defined event, results in the termination of a transferor's right to mandatory income or principal;

(2) A transferor's power to veto a distribution from the trust;

(3) A power of appointment, other than a power to appoint to a transferor, a "creditor" of the transferor, the transferor's estate, or a creditor of the transferor's estate, that is exercisable by will or other written instrument of a transferor effective upon the death or during the lifetime of the transferor;

(4) A transferor's right to receive trust income as set forth in the trust instrument;

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[3] R.C. 5816.03(C).

[4] R.C. 5816.03(D) and (E).

[5] R.C. 5816.03(F).

[6] R.C. 5816.04.

[7] R.C. 5816.05.

(5) Both of the following: (a) a transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as defined in section 664 of the "Internal Revenue Code" (IRC), and (b) the transferor's right, at any time and from time to time by written instrument delivered to the trustee, to release the transferor's retained interest in that unitrust or annuity trust, in whole or in part, in favor of one or more charitable organizations that have a succeeding beneficial interest in that unitrust or annuity trust;

(6) A transferor's power to consume, invade, or appropriate property of the trust, but only if limited in each calendar year to 5% of the value of the trust principal at the time of the exercise of the power;

(7) A transferor's potential or actual receipt or use of principal or income of the trust if that receipt or use is or would be the result of any of the following that applies with respect to one or more of the "qualified trustees":

(a) A qualified trustee's acting in the trustee's discretion. For purposes of this provision, a qualified trustee has discretion with respect to the distribution or use of principal or income unless the discretion is expressly denied to the trustee by the terms of the trust instrument;

(b) A qualified trustee's acting pursuant to a standard in the trust instrument that governs the distribution or use of principal or income;

(c) A qualified trustee's acting at the direction of an "advisor" who is acting in the advisor's discretion or pursuant to a standard in the trust instrument that governs the distribution or use of principal or income. If an advisor is authorized to direct that distribution or use, the advisor's authority is discretionary unless otherwise expressly stated in the trust instrument.

(8) A transferor's right to remove any advisor and appoint a new advisor who satisfies the eligibility criteria described below in "**Trust advisors; trustee and advisor discretion**."

(9) A transferor's right to remove any trustee and appoint a new trustee;

(10) A transferor's potential or actual use of real property or tangible personal property, including property held under a qualified personal residence trust as described in section 2702(c) of the IRC and regulations promulgated under that section, or a transferor's possession and enjoyment of a qualified interest as defined in section 2702(b) of the IRC;

(11) Any provision requiring or permitting the potential or actual use of trust income or principal to pay, in whole or in part, income taxes due on the income of the trust, including any provision permitting that use in the discretion of any one or more of the qualified trustees acting in the qualified trustee's discretion or at the direction of an advisor who is acting in the advisor's discretion;

(12) The ability of a qualified trustee, whether pursuant to the qualified trustee's discretion or the terms of the legacy trust instrument or at the direction of an advisor, to pay after the death of a transferor all or part of the debts of the transferor outstanding on or before the transferor's death, the expenses of administering the transferor's estate, or any estate, gift, generation skipping transfer, or inheritance tax;

(13) Any provision that pours back after the death of a transferor all or part of the trust property to the transferor's estate or any trust;

(14) Any other rights, powers, interests, or provisions permitted or allowed by any other section of the Ohio Legacy Trust Act.

Limits on transferor's rights

The bill states that a transferor has no rights, powers, or interests in, over, to, or regarding the corpus or income of a legacy trust unless those rights, powers, or interests are granted, permitted, or recognized by both the above described provisions and the governing legacy trust instrument. Any written, verbal, tacit, express, or implied agreement or understanding or any other agreement or understanding purporting to grant, permit, or recognize any greater rights, powers, or interests than are provided in the bill or the governing legacy trust instrument is void. Any portion of a legacy trust instrument that is not voided under this provision remains valid and effective.[8]

Qualified affidavit

The bill requires a transferor to sign a "qualified affidavit" before or substantially contemporaneously with making a qualified disposition.[9] A qualified affidavit must be notarized and contain all of the following statements under oath:[10]

(1) The property being transferred to the trust was not derived from unlawful activities.

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[8] R.C. 5816.04.

[9] R.C. 5816.06(A).

[10] R.C. 5816.06(B).

(2) The transferor has full right, title, and authority to transfer the property to the legacy trust.

(3) The transferor will not be rendered insolvent immediately after the transfer of the property to the legacy trust.

(4) The transferor does not intend to defraud any creditor by transferring the property to the legacy trust.

(5) There are no pending or threatened court actions against the transferor, except for any court action identified by the affidavit or an attachment to the affidavit.

(6) The transferor is not involved in any administrative proceeding, except for any proceeding identified by the affidavit or an attachment to the affidavit.

(7) The transferor does not contemplate at the time of the transfer the filing for relief under the Bankruptcy Code.

Under the bill, a qualified affidavit is considered defective if it materially fails to meet the above requirements, but a qualified affidavit is not considered defective due to any one or more of the following: (1) any nonsubstantive variances from the language set forth in the above requirements, (2) any statements or representations in addition to those requirements if the statements or representations do not materially contradict the required statements or representations, or (3) any technical errors in the form, substance, or method of administering an oath if those errors were not the fault of the affiant, and the affiant reasonably relied upon another person to prepare or administer the oath.[11]

The bill provides that a qualified affidavit is not required from a transferor who is not a beneficiary of the legacy trust that receives the disposition. A subsequent qualified affidavit is not required in connection with any qualified disposition made after the execution of an earlier qualified affidavit if that disposition is a part of, is required by, or is the direct result of, a prior qualified disposition that was made in connection with that earlier qualified affidavit.[12]

If a qualified affidavit is required and a transferor fails to timely sign a qualified affidavit or signs a defective qualified affidavit, subject to the normal rules of evidence, that failure or defect may be considered as evidence in any proceeding commenced pursuant to the proceedings described below under "**Restrictions on actions by**

[11] R.C. 5816.06(C).

[12] R.C. 5816.06(D).

creditors with respect to qualified dispositions," but the legacy trust or the validity of any attempted qualified disposition is not affected in any other way due to that failure or defect.[13]

Restrictions on actions by creditors with respect to qualified dispositions

The bill, notwithstanding any provision of law to the contrary but subject to the provision described in the last paragraph under "**Effect of dispositions**," below, prohibits a creditor from bringing any action, including an action to enforce a judgment entered by a court or other body having adjudicative authority, an action at law or in equity, or an action for an attachment or other final or provisional remedy: (1) against any person who made or received a qualified disposition, (2) against or involving any property that is the subject of a qualified disposition or is otherwise held by or for any trustee as part of a legacy trust, or (3) against any trustee of a legacy trust. However, a creditor generally may bring an action to avoid any qualified disposition of an "asset" on the ground that a transferor made the qualified disposition with the specific intent to defraud the specific creditor bringing the action.[14]

The above described creditor's cause of action or claim for relief to avoid any qualified disposition of an asset is extinguished unless that action is brought by a creditor of a transferor who meets one of the following requirements:[15]

(1) The creditor is a creditor of the transferor before the relevant qualified disposition, and the action is brought within the later of the following periods: (a) 18 months after the qualified disposition, or (b) six months after the qualified disposition is or reasonably could have been discovered by the creditor if the creditor files a suit against the transferor, other than the above described action to avoid the qualified disposition, or makes a written demand for payment on the transferor that in either case asserts a claim based on an act or omission of the transferor that occurred before the qualified disposition, and that suit is filed, or the written demand is delivered to the transferor, within three years after the qualified disposition.

(2) The creditor becomes a creditor after the qualified disposition, and the action to avoid the qualified disposition is brought within 18 months after the qualified disposition.

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[13] R.C. 5816.06(E).

[14] R.C. 5816.07(A).

[15] R.C. 5816.07(B).

The bill provides that in any action to avoid the qualified disposition, the burden is upon the creditor to prove the matter by a preponderance of the evidence. It states that this provision is construed as providing a substantive rather than a procedural rule or right under the law of Ohio.[16]

Restrictions on other actions, remedies, or claims

Under the bill, notwithstanding any provision of law to the contrary but subject to the provision described in the last paragraph under "**Effect of dispositions**," below, a creditor or any other person has only the rights and remedies with respect to a qualified disposition that are provided in the bill, and the creditor or other person has no claim or cause of action against any trustee or advisor of a legacy trust or against any person involved in the counseling in connection with, or the drafting, preparation, execution, administration, or funding of, a legacy trust.[17]

Notwithstanding any provision of law to the contrary but subject to the provision described in the last paragraph under "**Effect of dispositions**," below, and in addition to any other limitations, restrictions, or bars imposed by the bill, the bill prohibits any action, including an action to enforce a judgment of a court or other body having adjudicative authority, from being brought at law or in equity against a trustee or an advisor of a legacy trust or against any person involved in the counseling in connection with, or the drafting, preparation, execution, administration, or funding of, a legacy trust if and to the extent that, in connection with the qualified disposition that forms the basis of that action, the time in which a creditor could sue to avoid that qualified disposition would have expired as described above.[18]

All of the following apply under the bill if more than one qualified disposition is made in connection with the same legacy trust:

(1) Each qualified disposition will be separately evaluated, without regard to any subsequent qualified disposition, to determine whether a creditor's claim regarding that particular qualified disposition is extinguished as described above in "**Restrictions on actions by creditors with respect to qualified dispositions**."[19]

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[16] R.C. 5816.07(C).

[17] R.C. 5816.07(D).

[18] R .C. 5816.07(E).

[19] R.C. 5816.07(F)(1).

(2) The following apply when determining the order in which property is paid, applied, or distributed from a legacy trust, and they are to be construed as providing a substantive rather than a procedural rule or right under the law of Ohio:[20]

(a) Any payment, application, or distribution of money is considered to have been made from or with the money most recently received or acquired by any trustee of a legacy trust except to the extent that it is proven otherwise beyond a reasonable doubt. For purposes of this provision, "money" means cash or cash equivalents; "cash" means the coins or currency of the United States or any other nation; and "cash equivalent" includes certified or uncertified checks, money orders, bank drafts, any electronic transfer of funds, negotiable instruments, instruments indorsed in blank or in bearer form, securities issued or guaranteed by the United States, any state of the United States, or any state or federal agency, funds on deposit in any savings or checking account or any similar account, funds on deposit in any money market account or similar account, any demand deposit account, time deposit account, or savings deposit account at any bank, savings and loan association, brokerage house, or similar institution, or any other monetary instrument or device that is commonly or routinely accepted as a cash equivalent. The definition of "cash equivalent" is to be liberally construed and applied.

(b) Any payment, application, or distribution of fungible assets other than money is considered to have been made from or with the fungible assets most recently received or acquired by any trustee of a legacy trust except to the extent that it is proven otherwise by clear and convincing evidence. For purposes of this provision, any asset that can be classified as either money or a fungible asset is classified as money; and "fungible assets" means any assets, other than money, that are interchangeable for commercial purposes and the properties of which are essentially identical. The definition of "fungible assets" is to be liberally construed and applied.

Under the bill, the counseling in connection with, or the drafting, preparation, execution, administration, or funding of, a legacy trust includes such activities with respect to any limited partnership, limited liability company, corporation, or similar or comparable entity if the limited partnership interests, limited liability company interests, stock, or other similar or comparable ownership interests in the relevant entity are subsequently transferred to any trustee of any trust that is, was, or becomes a legacy trust.[21]

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[20] R.C. 5816.07(F)(2)(a), (b), and (c).

[21] R.C. 5816.07(G).

Avoidance of qualified disposition

The bill provides that all of the following apply in connection with any action brought pursuant to these provisions or an action to avoid a qualified disposition as described above:[22]

(1) If a qualified disposition is wholly or partially avoided, all of the following apply:[23]

(a) That specific qualified disposition is avoided only to the extent necessary to satisfy a transferor's debt to the creditor who brought the action to avoid the qualified disposition, and any part of the qualified disposition that is not used to satisfy that debt remains subject to the legacy trust in question.

(b) All other qualified dispositions to any trustee of the legacy trust, including any qualified disposition of a partial, co-ownership, or undivided interest in property by a transferor other than the transferor whose qualified disposition is avoided, together with the legacy trust itself, remain valid and effective.

(c) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the avoided qualified disposition, all of the following apply:

(i) The trustee has a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney's fees, properly incurred by the trustee in the defense of the action or proceedings to avoid the qualified disposition.

(ii) The qualified disposition is avoided subject to the proper fees, costs, and pre-existing rights, claims, and interests of the trustee and of any predecessor trustee that has not acted in bad faith.

(iii) For purposes of the above provisions, no trustee is considered to have acted in bad faith merely because the trustee accepted the property that is the subject of the qualified disposition.

(d) If the court is satisfied that a beneficiary of a legacy trust has not acted in bad faith in receiving a distribution from that trust, the avoidance of the qualified disposition is subject to the right of the beneficiary to retain that distribution if the

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[22] R.C. 5816.08

[23] R.C. 5816.08(A).

distribution was made upon the exercise of a trust power or discretion vested in a trustee or advisor and that power or discretion was exercised prior to the creditor's commencement of the action to avoid the qualified disposition. For purposes of this provision, no beneficiary, including a beneficiary who is also a transferor of the trust, is considered to have acted in bad faith merely because the beneficiary accepted a distribution made in accordance with the terms of the trust instrument.

(e) A creditor has the burden of proving by clear and convincing evidence that a trustee or a beneficiary acted in bad faith under (1)(c) or (d) above. This provision is construed as providing a substantive rather than a procedural rule or right under the law of Ohio.

(2) The court must award reasonable attorney's fees and costs to any prevailing party in any final judgment rendered in any action wholly or partially brought under these provisions or an action to avoid a qualified disposition.[24]

Successor trustees; filling of vacancies

The bill requires that any successor or replacement trustees of a legacy trust be determined or selected in the following manners:[25]

(1) Paragraph (2), below, applies if in any action involving a legacy trust or any trustee of the legacy trust a court takes an action in which the "court" (including a judicial tribunal, an administrative tribunal, or other adjudicative body or panel) declines to apply the law of Ohio in determining any of the following matters: (a) the validity, construction, or administration of the trust, (b) the effect of any term or condition of the trust, including a spendthrift provision, or (c) the rights and remedies of any creditor or other suitor in connection with a qualified disposition.[26]

(2) Immediately upon the court's action under (1), above, and without the need for any order of any court, any "qualified trustee" who is a party to that action ceases in all respects to be a trustee of the legacy trust, and the position of trustee must be occupied in accordance with the terms of the trust instrument that governed the legacy trust immediately before that cessation, or, if the terms of the trust instrument do not provide for another trustee and the trust would otherwise be without a trustee, any Ohio court, upon the application of any beneficiary of the legacy trust, must appoint a successor qualified trustee upon the terms and conditions that it determines to be

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[24] R.C. 5816.08(B).

[25] R.C. 5816.09.

[26] R.C. 5816.09(A)(1) and (3).

consistent with the purposes of the trust and the bill. Upon a qualified trustee ceasing to be such pursuant the above provision, that qualified trustee has no power or authority other than to convey trust property to any other trustee that is appointed, installed, or serving in accordance with this provision.[27]

In all cases other than the situation described above, both of the following apply:[28]

(1) If a legacy trust ceases to have at least one qualified trustee, the vacancy in the qualified trusteeship must be filled in the following order of priority, except to the extent that the legacy trust expressly provides otherwise: (a) by a person designated in the terms of the trust to act as successor trustee, (b) by a person appointed by someone designated in the terms of the trust to appoint a successor trustee, (c) by a person appointed by unanimous agreement of the qualified beneficiaries in the case of a noncharitable trust or by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust in the case of a charitable trust, and (d) by a person appointed by the court.[29]

(2) If a legacy trust ceases to have at least one trustee, the vacancy in the trusteeship must be filled as described in (1), above, and the successor trustee must be a qualified trustee unless the legacy trust instrument expressly provides otherwise.[30]

Effect of dispositions

Under the bill, a "disposition" by a "nonqualified trustee" to a qualified trustee is not treated as other than a qualified disposition solely because the nonqualified trustee is a trustee of a "nonlegacy trust."[31] A disposition to any nonqualified trustee of a legacy trust is treated as a qualified disposition if at the time of the disposition any of the following applies:[32]

(1) There is at least one qualified trustee serving pursuant to the terms of that legacy trust.

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[27] R.C. 5816.09(A)(2).

[28] R.C. 5816.09(B).

[29] By reference to R.C. 5807.04, not in the bill.

[30] By reference to R.C. 5807.04, not in the bill.

[31] R.C. 5816.10(C).

[32] R.C. 5816.10(D).

(2) There is no qualified trustee serving but the circumstances require the appointment or installation of a qualified trustee pursuant to the first paragraph (2) under "**Successor trustees; filling of vacancies**," above.

(3) There is no qualified trustee serving but within 180 days after the date of disposition a qualified trustee fills the vacancy in the qualified trusteeship or an application to appoint a qualified trustee is filed pursuant to the last paragraphs (1) and (2) in "**Successor trustees; filling of vacancies**," above.

If a disposition is made by a trustee of a nonlegacy trust to a trustee of a legacy trust, both of the following apply:[33]

(1) Except to the extent expressly stated otherwise by the terms of that disposition, the disposition is considered a qualified disposition for the benefit of all of the persons who are the beneficiaries of both the nonlegacy trust and the legacy trust.

(2) The date of the disposition to the legacy trust is considered to be the date on which the property that was part of the nonlegacy trust was first continuously subject to any law of a jurisdiction other than Ohio that is similar to the Ohio Legacy Trust Act. A court must liberally construe and apply this provision in finding that such continuity and similarity exist.

Any "valid lien" attaching to property before a disposition of that property to a trustee of a legacy trust survives the disposition, and the trustee takes title to the property subject to the valid lien and to any agreements that created or perfected the valid lien. Nothing in the bill is to be construed to authorize any disposition that is prohibited by the terms of any agreements, notes, guaranties, mortgages, indentures, instruments, undertakings, or other documents. In the event of any conflict between this provision and any other provision of R.C. Chapter 5816., this provision controls.[34]

Jurisdiction of Ohio courts

The bill provides that to the maximum extent permitted by the Ohio Constitution and the United States Constitution, the courts of Ohio must exercise jurisdiction over any legacy trust or any qualified disposition and adjudicate any case or controversy brought before them regarding, arising out of, or related to, any legacy trust or any qualified disposition if that case or controversy is otherwise within the subject matter jurisdiction of the court. Subject to the Ohio Constitution and the United States Constitution, no court of Ohio may dismiss or otherwise decline to adjudicate any such

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[33] R.C. 5816.10(E).

[34] R.C. 5816.10(G).

case or controversy on the ground that a court of another jurisdiction has acquired or may acquire proper jurisdiction over, or may provide proper venue for, that case or controversy or the parties to the case or controversy. Nothing in this provision is construed to prohibit a transfer or other reassignment of any case or controversy from one Ohio court to another Ohio court, or to expand or limit the subject matter jurisdiction of any court of Ohio.[35]

Trust advisors; trustee and advisor discretion

The bill permits any person to serve as an advisor of a legacy trust except that a transferor may act as an advisor only in connection with "investment decisions." An advisor is considered a fiduciary unless the terms of a legacy trust instrument expressly provide otherwise.[36]

Except to the extent expressly provided otherwise by the terms of a legacy trust instrument, each trustee and each advisor of a legacy trust have the greatest discretion permitted by law in connection with all matters of trust administration, all trust distributions, and all other trustee or advisor decisions.[37]

Under the bill, no beneficiary or other person is considered to have a property interest in any property of a legacy trust to the extent that the distribution of that property is subject to the discretion of one or more qualified trustees or advisors, either acting alone or in conjunction with any other person, including any person authorized to veto any distributions from the legacy trust.[38]

Miscellaneous rules; applicability

The bill provides that the provisions of the Ohio Legacy Trust Act control and prevail in the event of any conflict between any provision of that Act and any provision of R.C. Chapter 1336. (Ohio Uniform Fraudulent Transfer Act) or any other provision of law similar to any provision of R.C. Chapter 1336. A statement in a trust instrument stating that it "shall be governed by the laws of Ohio" or other statement to similar effect or of similar import is considered to expressly incorporate the laws of Ohio to govern the validity, construction, and administration of that trust instrument and to satisfy the

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[35] R.C. 5816.10(H).

[36] R.C. 5816.11.

[37] R.C. 5816.12.

[38] R.C. 5816.13.

specific requirement that the trust expressly incorporate the laws of Ohio to wholly or partially govern its validity, construction, and administration.[39]

A legacy trust may contain any terms or conditions that provide for changes in or to the place of administration, situs, governing law, trustees or advisors, or the terms or conditions of the legacy trust or for other changes permitted by law.[40]

The bill provides that the Ohio Legacy Trust Act applies to qualified dispositions made on or after the bill's effective date.[41]

Definitions

The bill defines the following terms:[42]

"Advisor" means a person to whom both of the following apply: (1) the person satisfies the eligibility criteria described in the first sentence under "**Trust advisors; trustee and advisor discretion**," above, and (2) the person is given the authority by the terms of a legacy trust to remove or appoint one or more trustees of the trust or to direct, consent to, or disapprove a trustee's actual or proposed investment, distribution, or other decisions. Any person to whom (1) and (2), above, apply is considered an advisor even if that person is denominated by another title, such as protector.

"Asset" means property of a transferor but does not include: (1) property to the extent it is encumbered by a valid lien, (2) property to the extent it is exempt at the time of a qualified disposition under any applicable nonbankruptcy law, including R.C. 2329.66 (exempt rights and interests), (3) property held in the form of a tenancy by the entireties to the extent that, under the law governing the entireties estate at the time of a qualified disposition, it is not subject to process by a creditor holding a claim against only one tenant, or (4) any property transferred from a nonlegacy trust to a legacy trust to the extent that the property would not be subject to attachment under the applicable nonbankruptcy law governing that nonlegacy trust.

"Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. Chapter 11, as amended.

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[39] R.C. 5816.10(A) and (B) and by reference to R.C. 5816.02(K)(1)(b).

[40] R.C. 5816.10(F).

[41] R.C. 5816.14.

[42] R.C. 5816.02.

"Beneficiary" means a person that has a present or future beneficial interest in a trust, whether vested or contingent, or that, in a capacity other than that of trustee, holds a power of appointment over trust property, or a charitable organization that is expressly designated in the terms of the trust to receive distributions. "Beneficiary" does not include any charitable organization that is not expressly designated in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions.[43]

"Claim" means a right to payment, whether or not the right is reduced to judgment or is liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

"Creditor" means a person who has a "claim" against a transferor and any transferee or assignee of, or successor to, that claim.

"Debt" means a liability on a claim.

"Disposition" means a transfer, conveyance, or assignment of property, including a partial, contingent, undivided, or co-ownership interest in property. "Disposition" includes the exercise of a general power so as to cause a transfer of property to a trustee or trustees but does not include: (1) the release or relinquishment of an interest in property that, until the release or relinquishment, was the subject of a qualified disposition, (2) the exercise of a limited power so as to cause a transfer of property to a trustee or trustees, or (3) a disclaimer of an interest in a trust, bequest, devise, or inheritance.

"Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1 et seq., as amended.

"Investment decision" means any participation in any decision regarding the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of or rights in investments.

"Legacy trust" means a trust evidenced by a written trust instrument to which all of the following apply: (1) the trust has, names, or appoints at least one qualified trustee for or in connection with the property that is the subject of a qualified disposition, (2) the trust expressly incorporates the laws of Ohio to wholly or partially govern its validity, construction, and administration, (3) the trust expressly states that it is irrevocable, and (4) the trust has a spendthrift provision applicable to the interests of any beneficiary in the trust property, including any interests of a transferor in the trust

[43] By reference to R.C. 5801.01(C) – not in the bill.

property. A trust that satisfies the above criteria is considered a legacy trust even if the trust instrument also allows for one or more nonqualified trustees and regardless of the language used to satisfy those criteria.

"Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common law lien, or a statutory lien.[44]

"Nonlegacy trust" means any trust other than a legacy trust.

"Nonqualified trustee" means any trustee other than a qualified trustee.

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.[45]

"Property" means anything or any interest in anything that may be the subject of ownership.[46]

"Qualified affidavit" means an affidavit that meets the requirements described above in "**Qualified affidavit**."

"Qualified disposition" means a disposition by or from a transferor to any trustee of a trust that is, was, or becomes a legacy trust.

"Qualified trustee" means a person who is not a transferor and to whom both of the following apply: (1) the person, if a natural person, is a resident of Ohio or the person, if not a natural person, is authorized by Ohio law or by a court of competent jurisdiction of Ohio to act as a trustee and whose activities are subject to supervision by the Ohio Superintendent of Banks, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision or a successor of any of them, and (2) the person maintains or arranges for custody in Ohio of some or all of the property that is the subject of the qualified disposition, maintains records for the legacy trust on an exclusive or nonexclusive basis, prepares or arranges for the preparation of required income tax returns for the legacy trust, or otherwise materially participates in the administration of the legacy trust.

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[44] By reference to R.C. 1336.01(H) – not in the bill.

[45] By reference to R.C. 5801.01(N) – not in the bill.

[46] By reference to R.C. 5801.01(P) – not in the bill.

"Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.[47]

"Spouse" and "former spouse" means only the person to whom a transferor was married on or before a qualified disposition is made.

"Transferor" means a person who directly or indirectly makes a disposition.

"Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.[48]

Ohio Trust Code changes

Rights of settlor's creditors

The bill modifies the Ohio Trust Code by providing that, whether or not the terms of a trust contain a spendthrift provision, *except to the extent that a trust is established pursuant to, or otherwise is wholly or partially governed by or subject to the Ohio Legacy Trust Act, as enacted by the bill*, with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If an *irrevocable* trust has more than one settlor, the amount *distributable to or for a settlor's benefit that* the creditor or assignee of a particular settlor may reach may not exceed *that* settlor's interest in the portion of the trust attributable to that settlor's contribution. *The right of a creditor or assignee to reach a settlor's interest in an irrevocable trust is subject to the Ohio Legacy Trust Act to the extent that that Act applies to that trust.*[49] (Added language is italicized.)

The bill provides that, for purposes of the above provision, none of the following is considered an amount that can be distributed to or for the benefit of the settlor:[50]

(1) Trust property that could be but has not yet been distributed to or for the benefit of the settlor only as a result of the exercise of a power of appointment held in a nonfiduciary capacity by any person other than the settlor;

(2) Trust property that could be but has not yet been distributed to or for the benefit of the settlor of a trust pursuant to the power of the trustee to make distributions or pursuant to the power of another in a fiduciary capacity to direct distributions, if and

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[47] By reference to R.C. 5801.01(T) – not in the bill.

[48] By reference to R.C. 1336.01(M) – not in the bill.

[49] R.C. 5805.06(A)(2).

[50] R.C. 5805.06(B)(3).

to the extent that the distributions could be made from trust property the value of which was included in the gross estate of the settlor's spouse for federal estate tax purposes under section 2041 or 2044 of the IRC or that was treated as a transfer by the settlor's spouse under section 2514 or 2519 of the IRC.

(3) Trust property that, pursuant to the exercise of a discretionary power by a person other than the settlor, could be paid to a taxing authority or to reimburse the settlor for any income tax on trust income or principal that is payable by the settlor under the law imposing the tax.

Power of modification

Current law permits the terms of a trust to confer upon a trustee or other person a power to direct the modification or termination of the trust.[51] The bill clarifies current law by providing that, *except to the extent otherwise provided by the terms of a trust*, a person other than a beneficiary who holds a power to direct, *including, but not limited to, a power to direct the modification or termination of a trust*, is presumptively a fiduciary who, as a fiduciary, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.[52] (Added language is italicized.)

Limitations on trustee's liability

The bill provides that regardless of whether a beneficiary is subject to the claims of any creditor, a trustee may pay any expense incurred by a beneficiary to the extent that payment is permitted by the instrument governing the trust, and the trustee may make those payments even if the payments exhaust the trust's income and principal. A trustee is not liable to any creditor of a beneficiary for paying the expenses of a beneficiary as allowed by this provision.[53]

Administrative fiduciary

The bill provides that if an instrument or other applicable written agreement describes, appoints, or directs a fiduciary to handle only the administrative duties and responsibilities of a trust, that administrative fiduciary does not have any duties, responsibilities, or liabilities to the trust beneficiaries or to other persons interested in a trust except for those administrative duties and responsibilities specifically described in the instrument or agreement. The administrative duties and responsibilities of a trust

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[51] R.C. 5808.08(C).

[52] R.C. 5808.08(D).

[53] R.C. 5815.24(D).

may include any of the following: (1) opening and maintaining bank, brokerage, financial, or other custodial accounts to receive trust income or contributions and from which trust expenditures, bills, and distributions may be disbursed, (2) maintaining and handling trust records, reports, correspondence, or communications, (3) maintaining an office for trust business, (4) filing any trust tax returns, (5) employing agents in connection with the fiduciary's administrative duties, (6) taking custody of or storing trust property, and (7) any other similar administrative duties for the trust.[54]

Any administrative fiduciary 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.[55]

The above provisions do not apply to the extent that the instrument under which an administrative fiduciary acts contains provisions that are inconsistent with those provisions.[56]

Disclaiming testamentary and nontestamentary succession property

Continuing law provides for the rights to disclaim and the procedures for disclaimer of testamentary or intestate succession to any real or personal property. These rights and procedures are in addition to, and do not exclude or abridge, any other rights or procedures that exist or formerly existed under any other Revised Code section or at common law to assign, convey, release, refuse to accept, renounce, waive, or disclaim property.[57]

Under the bill, a disclaimer is not considered a transfer or conveyance by the disclaimant, and no creditor of a disclaimant may avoid a disclaimer. The bill provides that the disclaimer section takes precedence over any other Revised Code section that conflicts with it.[58]

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[54] R.C. 5815.25(B).

[55] R.C. 5815.25(D).

[56] R.C. 5815.25(E).

[57] R.C. 5815.36(N)(1).

[58] R.C. 5815.36(N)(2) and (3).

Temporary conveyance of trust property to beneficiary and reconveyance back to trustee

Requirements and rules of construction

The bill provides that if any interest in real property held by any trustee of an express trust that is wholly or partially governed by a law of Ohio or any interest in real property located in Ohio that is held by the trustee of a trust wholly governed by the law of one or more jurisdictions other than Ohio is temporarily conveyed to any beneficiary of that trust and reconveyed back to any trustee of that trust, the interest in the real property is subject to the provisions described below in "**Date to which reconveyance relates back; survival of rights, duties, and obligations**" if all of the following apply and with the following rules of construction:[59]

(1) That temporary conveyance is for the principal purpose of enabling some or all of that interest in the real property to be used as collateral in a loan transaction. A court must liberally construe the temporary conveyance to a beneficiary of the trust in determining whether its principal purpose is to enable some or all of the interest to be used as such collateral. An interest in real property is considered to be used as collateral if, as part of a lending transaction, that interest is wholly or partially made subject to a mortgage, deed of trust, lien, encumbrance, or any other similar or comparable instrument or arrangement used to give the lender collateral rights in and to that interest.[60]

(2) The loan proceeds will be delivered to the trustee, or will otherwise be principally used for the benefit of one or more beneficiaries, of the trust. A court must liberally construe this provision in determining whether the loan proceeds will be principally used for the benefit of one or more beneficiaries.[61]

(3) The interest in the real property is reconveyed back to one or more trustees of the trust within a reasonable time after the reconveying beneficiary acquired actual notice that the lender has perfected the lender's collateral rights in and to that interest. For purposes of this provision, any reconveyance to a trustee is considered to have occurred within a reasonable time if it is made within 120 days of the date on which the reconveying beneficiary acquired actual notice that the lender has perfected the lender's collateral rights in and to the interest in the real property. In all other cases, a court must consider all relevant facts and circumstances in determining whether the

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[59] R.C. 5815.37(A).

[60] R.C. 5815.37(D).

[61] R.C. 5815.37(E).

reconveyance is within a reasonable time after the reconveying beneficiary acquired that actual notice.[62]

(4) The lender in question is any of the following:

(a) A bank, thrift, savings bank, savings and loan association, credit union, or any other similar financial institution if the activities of the other similar financial institution are subject to supervision by the Ohio Superintendent of Financial Institutions, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Office of Thrift Supervision, any other comparable state or federal regulatory agency or entity, or a successor of any of them;

(b) An insurance company subject to supervision by the Ohio Department of Insurance or any comparable agency established by the law of any other jurisdiction;

(c) Any other corporation, limited liability company, partnership, or other similar or comparable entity the routine and regular business activities of which commonly include the making of commercial or residential loans that are wholly or partially secured by real property.

A court must liberally construe (4), above, in determining whether a corporation, limited liability company, partnership, or other similar or comparable entity qualifies as a lender within the meaning of that provision. Subject to this rule of liberal interpretation, the Ohio Superintendent of Financial Institutions may from time to time issue regulations setting forth a nonexhaustive list of entities that qualify as such a lender and specific entities or classes of entities that do not qualify as a lender.[63]

The bill provides that an interest in real property may be subject to or involved in more than one loan transaction undertaken pursuant to its provisions.[64]

Date to which reconveyance relates back; survival of rights, duties, and obligations

The bill provides that if a temporary conveyance and reconveyance of an interest in real property is made for the principal purpose of allowing a lender to acquire, perfect, foreclose on, or exercise collateral rights in and to that interest, the temporary conveyance to a beneficiary is disregarded for all other purposes, and the reconveyance back to a trustee relates back to the date immediately preceding that reconveyance on

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[62] R.C. 5815.37(F).

[63] R.C. 5815.37(G).

[64] R.C. 5815.37(H).

which the interest in the real property was transferred to any trustee of the trust in a transaction other than a loan transaction described above.[65]

In connection with any temporary conveyance and reconveyance of an interest in real property, the following survive unimpaired after any reconveyance back to a trustee:[66]

(1) The rights, duties, and obligations of a lender under the documents governing the loan transaction, including any of the following to the extent they are provided for in those documents: (a) a lender's collateral rights in and to any interest in real property that is reconveyed to a trustee, (b) the lender's rights under any mortgage, deed of trust, lien, encumbrance, or any other similar or comparable instrument or arrangement used to give the lender collateral rights in and to the interest being reconveyed, including a lender's right to foreclose on that interest, and (c) the lender's obligations to make loans or advances or to provide any person with any notice called for by those documents;

(2) The rights, duties, and obligations of any debtor under any documents governing the loan transaction, including the following to the extent they are provided for in those documents: (a) the duty to repay the lender or any other person who is entitled to receive payments under those documents, (b) the duty to honor any agreements or covenants made by the debtor in the documents, and (c) the right to receive any advances, loans, notices, or other benefits called for by the documents.

Distribution of trust income or principal to trustee of second trust

The bill modifies existing law by providing that the power to distribute trust income or principal to the trustee of a second trust cannot be exercised in a manner contrary to any provision of R.C. 2131.08 (rule against perpetuities as modified by the bill) to the extent applicable to the first trust, and after applying the provisions R.C. 2131.09 (exemption of certain trusts from the rule against perpetuities) (the bill deletes the reference to "division (B)" of that section) to the extent applicable to the first trust. Solely for purposes of applying under this provision the provisions of R.C. 2131.08 and 2131.09 (the bill deletes "division (B)"), the exercise of the power to distribute trust income or principal to the trustee of a second trust is considered the exercise of a *nongeneral power of appointment as defined in R.C. 2131.09(F)* (instead of "a power of appointment other than a general power of appointment within the meaning of R.C.

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[65] R.C. 5815.37(B).

[66] R.C. 5815.37(C).

2131.09(B)(4)" in existing law).[67] See below under "**Rule against perpetuities**" and "**Exemption of certain trusts**" for the bill's changes to R.C. 2131.08 and 2131.09 referred to in this paragraph.

Exempt interests and rights in property

Every person who is domiciled in Ohio may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order under current provisions of law.[68]

Property used as residence

Existing law provides that in the case of a judgment or order regarding money owed for health care services rendered or health care supplies provided to the person or person's dependent, one parcel or item of real or personal property that the person or a dependent of the person uses as a residence is exempt. This provision does not preclude, affect, or invalidate the creation under R.C. Chapter 2329. (execution against property) of a judgment lien upon the exempted property but only delays the enforcement of the lien until the property is sold or otherwise transferred by the owner or in accordance with other applicable laws to a person or entity other than the surviving spouse or surviving minor children of the judgment debtor. Every person who is domiciled in Ohio may hold exempt from a judgment lien created pursuant to this provision the person's interest, not to exceed $20,200, in the exempted property. In the case of all other judgments and orders, the law exempts a person's interest, not to exceed $20,200, in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence.[69]

The bill increases the amount of the exemption of a person's interest in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence to "not to exceed $500,000" and applies the exemption to a person's interest in any real and personal property that the person has devoted to agricultural use. For purposes of this provision, "parcel" means a tract of real property as identified on the records of the auditor of the county in which the real property is located.[70]

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[67] R.C. 5808.18(E).

[68] R.C. 2329.66(A).

[69] R.C. 2329.66(A)(1).

[70] R.C. 2329.66(A)(1).

Under existing law, the above exemption of property used as a residence does not impair a lien for the payment of taxes due on real property.[71] The bill instead provides that the above exemption of property used as a residence does not impair a lien for the payment of any taxes, debts, or other obligations owed to this state or any agency or political subdivision of this state.[72]

Pension, annuity, retirement, or similar plan

With certain exceptions, current law exempts a person's "right" to a pension, benefit, annuity, retirement allowance, or accumulated contributions, a person's "right" to a participant account in any deferred compensation program offered by the Ohio Public Employees Deferred Compensation Board, a government unit, or a municipal corporation, or a person's other accrued or accruing "rights," as exempted by specified Revised Code sections, and a person's "right" to benefits from the Ohio Public Safety Officers Death Benefit Fund. The bill changes "right" above to "rights to or interests in."[73]

The bill modifies current law by providing that, subject to certain exceptions, a person's *rights* (instead of right) to receive *or interests in receiving* a payment or *other benefits* under any pension, annuity, or similar plan or contract, not including a payment *or benefit* from a stock bonus or profit-sharing plan or a payment included in specified provisions, on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the person and any of the person's dependents are exempt, except if all of certain conditions apply, including that the plan or contract was established by or under the auspices of an insider that employed the person at the time the person's rights *or interests* under the plan or contract arose (added language is italicized).[74]

The bill modifies current law by providing that except for any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as provided in specified Revised Code sections, a person's rights *or interests* in the assets held in, or to *directly or indirectly* receive any payment *or benefit* under, any individual retirement account, individual retirement annuity, "Roth IRA," *"529 plan,"* or education individual retirement account that provides *payments or* benefits by reason of illness, disability, death, *retirement,* or age *or provides payments or benefits for purposes of*

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[71] R.C. 2329.661(A)(3).

[72] R.C. 2329.661(A)(4).

[73] R.C. 2329.66(A)(10)(a).

[74] R.C. 2329.66(A)(10)(b).

education, are exempt to the extent that those assets, payments, or benefits are attributable to *or derived from* any of the following *or from earnings, dividends, interest, appreciation, or gains on any of the following* (added language is italicized):[75]

(1) Contributions of the person that were less than or equal to the applicable limits on deductible contributions to an individual retirement account or individual retirement annuity in the year that the contributions were made, whether or not the person was eligible to deduct the contributions on the person's federal tax return for the year in which the contributions were made;

(2) Contributions of the person that were less than or equal to the applicable limits on contributions to a Roth IRA or education individual retirement account in the year that the contributions were made;

(3) Contributions of the person that are within the applicable limits on rollover contributions under specified subsections of the IRC.

(4) Contributions by any person into any plan, fund, or account that is formed, created, or administered pursuant to, or is otherwise subject to, section 529 of the IRC.[76]

The bill further modifies current law by providing that except for any portion of the assets that were deposited for the purpose of evading the payment of any debt and except as provided in certain Revised Code sections, a person's rights *or interests* in the assets held in, or to receive any payment under, any Keogh or "H.R. 10" plan that provides benefits by reason of illness, disability, death, *retirement,* or age, are exempt to the extent reasonably necessary for the support of the person and any of the person's dependents (added language is italicized).[77]

The bill specifically exempts a person's rights to or interests in any assets held in, or to directly or indirectly receive any payment or benefit under, any individual retirement account, individual retirement annuity, "Roth IRA," "529 plan," or education individual retirement account that a decedent, upon or by reason of the decedent's death, directly or indirectly left to or for the benefit of the person, either outright or in trust or otherwise, including any of those rights or interests in assets or to receive payments or benefits that were transferred, conveyed, or otherwise transmitted by the decedent by means of a will, trust, exercise of a power of appointment, beneficiary

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[75] R.C. 2329.66(A)(10)(c).

[76] R.C. 2329.66(A)(10)(c)(iv).

[77] R.C. 2329.66(A)(10)(d).

designation, transfer or payment on death designation, or any other method or procedure.[78]

The bill provides that the above exemptions under current law, as modified by the bill, and the exemption described in the preceding paragraph also apply or otherwise are available to an alternate payee under a qualified domestic relations order (QDRO) or other similar court order. A person's interest in any plan, program, instrument, or device described in the above provisions are considered an exempt interest even if the plan, program, instrument, or device in question, due to an error made in good faith, failed to satisfy any criteria applicable to that plan, program, instrument, or device under the IRC.[79]

Adjustments of dollar amounts of exemptions

The bill modifies current law by providing that on April 1, 2010, and on the first day of April in each third calendar year after 2010, the Ohio Judicial Conference must adjust each dollar amount set forth in the exempt rights and interests law to reflect *any increase* (instead of "the change") in the consumer price index for all urban consumers, as published by the United States Department of Labor, or, if that index is no longer published, a generally available comparable index, for the three-year period ending on the 31st day of December of the preceding year. Any adjustments must be rounded to the nearest $25.[80]

Rule against perpetuities

Under current law, subject to R.C. 1746.14 (perpetual period of existence of certain business trusts), 1747.09 (perpetual period of existence of real estate investment authorized to transact real estate business in Ohio), and 2131.09 (exemption of certain trusts), no interest in real or personal property is good unless it must vest, if at all, not later than 21 years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in real property lying within Ohio must be and remain an absolute estate in fee simple to the issue of the first donee in tail. It is the intention by the adoption of this provision to make effective in Ohio what is generally known as the common law rule against perpetuities, with the exception set forth in the law.[81]

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[78] R.C. 2329.66(A)(10)(e).

[79] R.C. 2329.66(A)(10)(f) and (g).

[80] R.C. 2329.66(B).

[81] R.C. 2131.08(A).

The bill provides that for purposes of the law on the rule against perpetuities and subject to R.C. 1746.14, 1747.09, and 2131.09 (see above), the following apply:[82]

(1) The time of the creation of an interest in real or personal property resulting from the exercise of a "general power of appointment" "exercisable in a nonfiduciary capacity by deed," (see "**Definitions**," below) whether or not also exercisable by will, is the time at which that power of appointment is exercised.

(2) The time of the creation of an interest in real or personal property resulting from the termination, without exercise, of a general power of appointment exercisable in a nonfiduciary capacity by deed, whether or not also exercisable by will, is the time at which that power of appointment terminates by reason of the death of the power holder, by release of the power, or otherwise.

The bill states that the above provisions are intended to be a statement of the common law of Ohio and are effective with respect to interests in real or personal property whenever created.[83]

Exemption of certain trusts

The bill modifies existing law by providing that no rule of law against perpetuities or suspension of the power of alienation of the title to property, any other existing law against perpetuities, or any law restricting or limiting the duration of trusts applies with respect to any interest in real or personal property held in trust if *both of the following apply: (1)* the instrument creating the trust specifically states that the rule against perpetuities or the provisions of R.C. 2131.08*(A)* (see above) (instead of R.C. 2131.08(B)) (time of creation of an interest in property subject to a power of the grantor to revoke or terminate the interest) do not apply to the trust, and (2) *the trustee has unlimited power, or one or more persons have the unlimited power to direct the trustee or to approve the trustee's decision, either to sell all trust assets or to terminate the entire trust* (instead of "if either the trustee of the trust has unlimited power to sell all trust assets or if one or more persons, one of whom may be the trustee, has the unlimited power to terminate the entire trust" in current law).[84]

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[82] R.C. 2131.08(D).

[83] R.C. 2131.08(F).

[84] R.C. 2131.09(B)(1).

Under existing law, as modified by the bill in italics, the provisions described in the preceding paragraph and current law (hereafter, requirements for exempting certain trusts) are effective with respect to all of the following:[85]

(1) An interest in real or personal property in trust created *under the terms of a will of a decedent* (instead of "by wills of decedents") dying on or after March 22, 1999;

(2) An interest in real or personal property created *under the terms of* an inter vivos or testamentary trust instrument executed on or after March 22, 1999;

(3) An interest in real or personal property in trust created by the exercise of a general power of appointment on or after March 22, 1999;

(4) An interest in real or personal property in trust created by the exercise of a "nongeneral power of appointment" over any portion of a trust that meets the requirements described in those provisions (R.C. 2131.09(B)), but only if the "date of creation" of that nongeneral power of appointment is on or after the effective date of the bill (see "**Definitions**," below, for definitions of terms in quotation marks).

The bill deletes the provision in existing law that provides that the requirements for exempting certain trusts do not apply to the exercise of a power of appointment other than a general power of appointment.[86]

The bill provides that the requirements for exempting certain trusts are subject to the following provision. The exercise of a nongeneral power of appointment granted over any portion of a trust to which the rule against perpetuities does not apply because the terms of the trust meet the requirements for exempting the trust nevertheless is subject to R.C. 2131.08, except that interests created pursuant to the exercise of a nongeneral power of appointment that has a date of creation on or after the bill's effective date is required to vest not later than 1,000 years after the date of creation of that power.[87]

Under the bill, for purposes of the requirements for exempting certain trusts, the instrument creating a trust subject to a power reserved by the grantor to amend, revoke, or terminate the trust includes the original instrument establishing the trust and all

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[85] R.C. 2131.09(B)(3).

[86] R.C. 2131.09(B)(4).

[87] R.C. 2131.09(C).

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.[88]

It states that the provisions modifying R.C. 2131.09 as described above are intended to clarify the provisions of that section as originally enacted and apply to trust instruments that are in existence prior to, on, or after the bill's effective date.[89]

Definitions

The bill modifies the definition of "general power of appointment" in R.C. 2131.09 and applies that same definition in R.C. 2131.08. The term means a power that is exercisable in favor of the individual possessing the power, the *individual's* (instead of person's) estate, the *individual's* creditors, or the creditors of the *individual's* estate *other than either of the following: (1) a power that is limited by an ascertainable standard as defined in R.C. 5801.01* (definitions of terms in the Ohio Trust Code), *or (2) a power of withdrawal held by an individual, but only to the extent that it does not exceed the amount specified in section 2041(b)(2) or 2514(e) of the IRC* (added or modified language is italicized).[90]

The bill adds the following definitions of the terms used in R.C. 2131.08 and 2131.09:[91]

"Nongeneral power of appointment" means any power of appointment that is not a general power of appointment.

The "date of creation" of a nongeneral power of appointment created by the exercise of one or more powers of appointment, except by the exercise of a general power of appointment exercisable by deed, is the date of creation of the first of those powers of appointment to be exercised.

"Exercisable by deed" in reference to a power of appointment means a power that can be exercised during the power holder's lifetime by an instrument that takes effect immediately.[92]

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[88] R.C. 2131.09(D).

[89] R.C. 2131.09(E).

[90] R.C. 2131.09(F)(1).

[91] R.C. 2131.09(F)(2), (3), and (4).

[92] By reference to R.C. 2131.08(G)(2).

Transfer made or obligation incurred fraudulent as to creditor

The bill modifies the Ohio Uniform Fraudulent Transfer Act by providing that a transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before, or *within a reasonable time not to exceed four years* after, the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of certain ways, including with actual intent to hinder, delay, or defraud any creditor of the debtor (added language is italicized).[93]

Records

The County Recorder Law generally requires the county recorder to keep six separate sets of records: a record of deeds; a record of mortgages; a record of powers of attorney including memoranda of trust; a record of plats; a record of leases; and a record of declarations executed pursuant to R.C. 2133.02 (living wills) and durable powers of attorney for health care. In lieu of keeping these six separate sets of records, the separate sets of records containing corrupt activity lien notices and Medicaid fraud lien notices filed with the recorder, a county recorder may record all the instruments required to be recorded in two separate sets of record books. One set called the "official records" must contain all of the above instruments except plats. The second set of records shall contain plats.[94]

The bill requires the county recorder to keep a separate set of records containing all transfers, conveyances, or assignments of any type of tangible or intangible personal property or any rights or interests in that property if and to the extent that any person wishes to record that personal property transaction and if the applicable instrument is notarized. If the transferor is a natural person, the notice of personal property transfer must be recorded in the county in Ohio in which the transferor maintains the transferor's principal residence. If the transferor is not a natural person, the notice of personal property transfer must be recorded in the county in Ohio in which the transferor maintains its principal place of business. If the transferor does not maintain a principal residence or a principal place of business in Ohio and the transfer is to a trustee of a legacy trust formed pursuant to R.C. Chapter 5816., the notice of personal property transfer must be recorded in the county in Ohio where that trustee maintains a principal residence or principal place of business. In all other instances, the notice of personal property transfer must be recorded in the county in Ohio where the property

[93] R.C. 1336.04(A)(1).

[94] R.C. 317.08(A), (C), and (D).

described in the notice is located. The records described in this paragraph must be maintained in or as part of the "official records" described above.[95]

Recording fees; funds for recorder's future equipment needs

The bill provides that for recording and indexing an instrument described in the preceding paragraph if the photocopy or any similar process is employed, the recorder must charge and collect a fee of $28 for the first two pages to be deposited into the county treasury to the credit of the special fund designated as "General fund moneys to supplement the equipment needs of the county recorder" under R.C. 317.321 (see below), and a fee of $8 to be deposited in the same manner for each subsequent page, size 8 1/2 inches by 14 inches, or fraction of a page, including the caption page, of that instrument.[96] These fees are different from existing law's base fees for the recorder's services and housing trust fund fees. Conforming changes are therefore made in the sections that refer to existing law's fees.[97]

Existing law provides a procedure for a county recorder to submit to the board of county commissioners a proposal for the acquisition or maintenance of micrographic or other equipment or for contract services. If the county recorder has no immediate plans for the acquisition of equipment or services, the proposal for the acquisition or maintenance of micrographic or other equipment or for contract services must explain the general needs of the office for equipment and state that the intent of the proposal is to reserve funds for the office's future equipment needs.[98]

The bill modifies existing law by providing that not later than the first day of October of any year, the county recorder may submit to the board of county commissioners a proposal to reserve funds for the office's future equipment needs (separate from existing law's proposal described above) if the county recorder has no immediate plans for the acquisition of equipment or services. The proposal must be in writing and include at least the following:[99]

(1) A request that the amount of the fees collected under "**Recording fees**" above be placed in the county treasury and designated as "General fund moneys to supplement the equipment needs of the county recorder;"

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[95] R.C. 317.08(C) and (E).

[96] R.C. 317.32(A)(2).

[97] R.C. 1701.73(D), 1702.38(H), and 1703.22.

[98] R.C. 317.321(A).

[99] R.C. 317.321(A).

(2) An estimate of the total amount of fees that will be generated for filing or recording a document for which a fee is charged as required above;

(3) An estimate of the total amount of fees for filing or recording a document for which a fee is charged as required above.

A proposal to reserve funds for the office's future equipment needs if the county recorder has no immediate plans for the acquisition of equipment or services must explain the general needs of the office for equipment.[100]

The board of county commissioners must receive the proposal and the clerk must enter it on the journal. At the same time, the board must establish a date, not sooner than 15 or later than 30 days after the board's receipt of the proposal, on which to meet with the recorder to review the proposal. Not later than December 15 of any year in which a proposal to reserve funds for the office's future equipment needs is submitted, the board of county commissioners must approve the proposal, notify the county recorder of its action on the proposal, and request the establishment of a special fund under R.C. 5705.12 for any fees designated as "General fund moneys to supplement the equipment needs of the county recorder."[101]

Public records under Uniform Commercial Code

The bill provides that the recording with any county recorder of any document described or referred to in the County Recorder Law, as modified by the bill, or the filing or recording with the Secretary of State of any document the filing or recording of which is required or allowed under any provision of R.C. Chapter 1309. (Uniform Commercial Code – Secured Transactions) is constructive notice to the whole world of the existence and contents of either document as a "public record" and of any transaction referred to in that public record, including any transfer, conveyance, or assignment reflected in that record. Any person contesting the validity or effectiveness of any transaction referred to in a public record is considered to have discovered that public record and any transaction referred to in the record as of the time that the record was first filed with the Secretary of State or tendered to a county recorder for recording. The bill defines "public record" as any document described above that is recorded with the county recorder or the Secretary of State, as applicable.[102]

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[100] R.C. 317.321(A), last paragraph.

[101] R.C. 317.321(B) and (C)(2).

[102] R.C. 1301.401.

Applicability of amendments to certain Revised Code sections

The bill provides that the amendments made to R.C. 1336.04 (fraudulent transfers) apply to transfers made on or after the bill's effective date. The amendments made to R.C. 2329.66 and 2329.661 (exempt interests in property used as residence and in pension, annuity, retirement, or similar plans) apply to claims accruing on or after the bill's effective date. The amendments to R.C. 5815.36 (disclaiming testamentary and nontestamentary succession property) apply to disclaimers made on or after the bill's effective date. R.C. 5815.37 (temporary conveyance of trust property to beneficiary and reconveyance back to trustee) as enacted by the bill applies to conveyances made on or after the bill's effective date. The application of the amendments made to R.C. 2131.08 (rule against perpetuities) is provided in division (F) of that section as amended by the bill. The application of the amendments made to R.C. 2131.09 (exemption of certain trusts from rule against perpetuities) is provided for in divisions (C) and (E) of that section as amended by the bill. The application of the sections of R.C. Chapter 5816. (Legacy Trust Act) as enacted by the bill is provided for in R.C. 5816.14 as enacted by the bill. The bill is not intended to impair any secured or unsecured creditors' claims that accrue prior to its effective date.[103]

Statement of common law

The bill provides that the amendments made by the bill to R.C. 5805.06, 5808.08, 5815.24, and 5815.25 (see above "**Rights of settlor's creditors**," "**Power of modification**," "**Limitations on trustee's liability**," and "**Administrative fiduciary**," respectively), other than references to R.C. Chapter 5815. (miscellaneous provisions) in R.C. 5805.06(A)(2) as amended by the bill, are intended to be a statement of the common law of Ohio.[104]

HISTORY

ACTION	DATE
Introduced	03-13-12
Reported, H. Judiciary and Ethics	05-23-12

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[103] Section 3.

[104] Section 4.