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The Modification and Termination of Irrevocable Trusts under the Ohio Uniform Trust Code

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I. Introduction

The adoption of the Ohio Uniform Trust Code (the “OUTC” or “the Code”)¹ will constitute a comprehensive codification of trust law in Ohio. Among the many subjects it covers are the modification and termination of trusts. As noted in a comment to the national Uniform Trust Code (the “UTC”),² “the overall objective of these [modification and termination] sections is to enhance flexibility consistent with the principle that preserving the settlor’s intent is paramount.”³ Given such factors as the increased use of trusts in recent years (including trusts created by non-lawyers and lawyers who do not specialize in estate planning); the ability to create trusts that can last, at least theoretically, forever due to the ability of trust settlors to opt out of the Rule Against Perpetuities;⁴ the uncertain future of wealth transfer taxes; and the inevitable reality that circumstances will change during the administration of a trust in ways the settlor did not anticipate, the increased flexibility afforded by the OUTC’s modification and termination provisions may result in these provisions being among the Code’s most useful to beneficiaries, settlors, trustees, and the lawyers who represent them.⁵ Further, Ohio’s current rules on the modification and termination of trusts are not easily located as they are found, for

the most part, in case law.⁶ Thus, an additional benefit of the OUTC with respect to this subject will be making the governing rules on modifying and terminating trusts more accessible and clear.

This article has two primary objectives. First, it reviews the OUTC's provisions that address the modification and termination of trusts. Second, it discusses how those provisions will affect existing Ohio law. For the most part, the OUTC's modification and termination provisions are found in Chapter 5804, and they are the focus of this article. Sections of other chapters of the Code will also affect its modification and termination provisions, however, and they too are discussed. Finally, this article covers only the OUTC's provisions dealing with the modification and termination of irrevocable trusts.⁷

II. The Mandatory Nature of the Court's Power to Modify or Terminate a Trust under the OUTC

In general, the OUTC is a compilation of default rules that apply only if and to the extent that the terms of the trust do not provide otherwise.⁸ Like the UTC, however, the OUTC includes a list of fundamental, mandatory rules that are not subject to the settlor's control.⁹ One of the mandatory rules, OUTC section 5801.04(B)(4), prevents the settlor from overriding "the power of the court to modify or terminate a trust under sections 5804.10 to 5804.16 of the Revised Code." Note that this rule only precludes the settlor from affecting the power *of the court* to modify or terminate a trust. As discussed below, the OUTC also includes provisions that, in specified circumstances, allow trusts to be modified or terminated without court involvement. The mandatory rule of OUTC section 5801.04(B)(4) will not affect the settlor's ability to limit or prohibit such modifications or terminations.

The OUTC's mandatory rule prohibiting a settlor from barring a court from exercising its power to modify or terminate a trust may effect a change in Ohio law, at least in one context. Under section 5804.11(B) of the Code, "[a] noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." Because such a termination cannot occur

unless the court so concludes, presumably the mandatory rule of section 5801.04(B)(4) would prevent the settlor from barring such a termination.

By contrast at least three Ohio cases have stated that for the beneficiaries to terminate a trust early when its material purposes have been accomplished, the settlor must not have prohibited its early termination in the instrument.¹⁰ However, none of those cases involved a trust in which the court found that all of the material purposes of the trust had been accomplished. Thus, if in the terms of the trust the settlor prohibited its early termination by the beneficiaries, despite its material purposes having been accomplished, Ohio case law would appear to bar the early termination. That case law, however, is dicta. Perhaps more importantly, as a practical matter a provision prohibiting early termination of a trust might be construed as evidencing a material purpose of the trust, in which case the trust could not be terminated early under OUTC section 5804.11(B) because continuance of the trust would be necessary to achieve a material purpose of the settlor. Accordingly, the mandatory rule of OUTC §5801.04(B)(4), in the context of beneficiary terminations when the trust's material purposes have been accomplished, may not be the departure from existing Ohio case law that it appears to be.

III. Section 5804.10: Termination under the Instrument or Related to the Trust's Purposes; Standing

OUTC section 5804.10(A) is the first of the Code's specific rules on termination. Under it, a trust terminates "to the extent the trust is revoked or expires pursuant to its terms, a court determines that no purpose of the trust remains to be achieved, or a court determines that the purposes of the trust have become unlawful or impossible to achieve."

With respect to terminations when no trust purposes remain to be achieved, as mentioned above and discussed further in Part IV.B. below, OUTC section 5804.11(B) allows all of the beneficiaries, by consent, to terminate a trust early if the court determines "that continuance of the trust is not necessary to achieve a material purpose of the trust." Termination under section 5804.10(A) when no purposes remain to be achieved is similar, but differs from a section 5804.11(B) termination in two respects. First, required under section 5804.10(A) is that "*no purpose* of the trust remains to be achieved." By contrast, terminations under section 5804.11(B)

require only that there are *no material purposes* of the trust that necessitate its continuance. Second, a termination under section 5804.10(A) is not conditioned upon the consent of the beneficiaries. Such consents are required under section 5804.11(B), unless the court finds that termination under that division could have occurred had all beneficiaries consented and that the interests of nonconsenting beneficiaries will be adequately protected.¹¹

Also noteworthy about section 5804.10(A) is that its “to the extent” language permits partial terminations. While the OUTC will not have official comments, the comment to the comparable provision of the UTC, section 410, expressly provides that trusts may be partially terminated under it. Similarly, the new Restatement (Third) of Trusts provides that “a trust in which no time of termination or distribution is provided will terminate, in whole or in part, upon the fulfillment of the purpose(s) of the trust or of a separate and independent portion thereof.”¹²

Under section 5804.10(B), a judicial proceeding to approve or disapprove a modification or termination of a trust (including one to combine trusts or to divide a trust), may be commenced by a trustee or a beneficiary. In two circumstances a settlor also may initiate a proceeding to approve or disapprove a modification or termination of a trust. First, a settlor may commence such a proceeding with respect to a modification or termination by consent of the settlor and beneficiaries under section 5804.11(A) or by consent of the beneficiaries under section 5804.11(B). Second, the settlor of a charitable trust may commence a proceeding for a court to modify a trust by exercise of its *cy pres* authority under section 5804.13.

IV. Section 5804.11: Modification or Termination by Consent

A. Section 5804.11(A).

Consistent with the Restatements,¹³ OUTC section 5804.11(A) allows the settlor and all beneficiaries to modify or terminate an otherwise irrevocable noncharitable trust, even if doing so is inconsistent with a material purpose of the trust. While such a modification or termination requires court approval, the statute directs the court to grant its approval if it “finds that the settlor and all beneficiaries consent to the modification or termination.” Thus, the role of the court with respect to such a modification or termination is limited to ascertaining that the requisite consents have been given.

With respect to consent by the settlor, section 5804.11(A) provides that it may be given by an agent under a power of attorney, but only if the agent is so authorized by both the power of attorney and the terms of the trust. If an agent is not so authorized, a guardian of the settlor's estate may consent on behalf of the settlor, but only with the approval of the court supervising the guardianship. In the absence of both an authorized agent and an appointed guardian of the settlor's estate, the guardian of the settlor's person may give the consent, but again, only with the approval of the court supervising the guardianship.

The OUTC relaxes the traditional requirement for modifications or terminations by the settlor and the beneficiaries – that *all* beneficiaries consent – in two ways, both of which are discussed in C. of this Part IV, below. First, Chapter 5803 provides rules by which a representative of a beneficiary may consent on his or her behalf. Second, in specified circumstances, division (D) of section 5804.11 provides an exception under which it is not necessary that all of the beneficiaries consent to the modification or termination. Because the representation provisions and the division (D) exception are equally applicable to modifications and terminations by the beneficiaries, without the settlor's consent, under section 5804.11(B), they are addressed after the discussion of section 5804.11(B), below.

As stated, section 5804.11(A) allows the settlor and all beneficiaries to modify or terminate a noncharitable irrevocable trust even if doing so would be inconsistent with a material purpose of the trust. The consent of the trustee is not required.¹⁴ In *Jordan v. Price*, however, an Ohio Court of Appeals stated that “[t]he general rule appears to be that the settlor, trustee and beneficiary of a trust may...mutually terminate such trust.”¹⁵ In *Jordan*, however, a consenting beneficiary also was the sole trustee. Thus, the court was not faced with a situation in which the settlor and all beneficiaries consented to a modification or termination, but the trustee objected. Had that been the case, it is not likely that the trustee's objection would have prevented the modification or termination.¹⁶ As noted in an earlier Ohio case in a different context: “It is fundamental that a trust will be terminated where there is no object to be obtained by prolonging it, and the only one objecting to the termination is the trustee. A trust is never continued for the benefit of a trustee.”¹⁷ Accordingly, the OUTC's allowing the settlor and all beneficiaries of a trust to modify or terminate it, without regard to whether the trustee consents or objects, may not change existing Ohio law.

The facts in *Jordan* also differ from the facts with respect to which section § 5804.11(A) may apply in that in *Jordan*, the court found that the purpose of the trust had been accomplished. By contrast, section 5804.11(A) allows the settlor and the beneficiaries to terminate a trust early without regard to the accomplishment of its purposes. *Jordan*, however, does not state that accomplishment of the purposes of the trust is required for a termination by consent. Rather, in *Jordan*, the trust's purpose having been accomplished was an independent reason for it having terminated. Thus, while section 5804.11(A) may add to or clarify the law in Ohio on its subject, it does not appear to change it.

B. Section 5804.11(B).

Under division (B) of section 5804.11, the settlor's consent is not required for a termination or modification by the beneficiaries if: (i) with respect to a termination, "the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust," or (ii) with respect to a modification, "the court concludes that modification is not inconsistent with a material purpose of the trust."

The OUTC addresses the question of what constitutes a material purpose of a trust only in the context of spendthrift trusts: "A spendthrift provision in the terms of the trust may, but shall not be presumed to, constitute a material purpose of the trust."¹⁸ However, there also is case law in Ohio on the question¹⁹ that should continue to apply.²⁰

Also noteworthy about section 5804.11(B) is that it provides that the terms of a trust may not be modified under it to remove or replace a trustee. Rather, those subjects are addressed by sections 5807.04 and 5807.06.

Finally, as discussed in Part II, above, section 5804.11(B) may effect a change in existing Ohio law in that it allows, at least theoretically, the beneficiaries to terminate or modify a trust if doing so would not violate the material purpose limitations of the provision, even if the settlor has expressly provided otherwise in the instrument. Also as discussed in Part II, however, such a term of the trust might be construed as reflecting a material purpose of the trust that would thus bar its modification or early termination in any event.

C. Requirement that the Beneficiaries Consent to a Section 5804.11(A) or (B) Modification or Termination.

The general rule of divisions (A) and (B) of section 5804.11 is that all beneficiaries must consent to a modification or termination under the section. Division (D), however, provides an exception to that rule if two requirements are met. First, there must be a finding by the court that the trust could have been modified or terminated under the section if all of the beneficiaries had consented. Second, the court must also find that the interests of nonconsenting beneficiaries will be adequately protected. Note that there are no quantitative requirements with respect to consenting and nonconsenting beneficiaries for the division (D) exception to apply. Thus, while not likely to occur often, a court could allow a trust to be modified or terminated under section 5804.11 by consent of less than a majority of the beneficiaries, if the two division (D) requirements are met.

While section 5804.11 generally requires the consent of all beneficiaries to a modification or termination under its provisions, Chapter 5803 of the Code includes representation provisions under which, in specified circumstances, another person may represent a beneficiary for such purposes as receiving notices or giving consents.²¹ Under those provisions, generally, in the absence of a conflict of interest, (i) the holder of a general testamentary power of appointment may represent the interests of permissible appointees and takers in default,²² (ii) fiduciaries may represent those to whom they owe fiduciary duties,²³ (iii) parents may represent minor or unborn children,²⁴ and (iv) a person with a substantially identical interest may represent a minor, incapacitated, or unborn individual, or a person who cannot be located.²⁵

V. Section 5804.12: Modification or Termination for Unanticipated Circumstances; Modification of the Administrative Terms of a Trust

OUTC section 5804.12 applies to charitable as well as noncharitable trusts. It includes two separate rules under which the terms of a trust may be modified, the first of which also allows a trust to be terminated:

(A) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent

practicable, the modification must be made in accordance with the settlor's probable intention.

(B) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or impair the trust's administration.

Of particular significance with respect to sections 5804.12(A) and (B) are the following. First, under division (A) the dispositive, as well as the administrative, terms of a trust may be modified (or terminated) to further the trust's purposes when unanticipated circumstances arise.²⁶ By contrast, Ohio courts have been unsympathetic to claims by beneficiaries that unanticipated circumstances warranted modifications to the dispositive terms of a trust.²⁷ While the doctrine of deviation, as applied in Ohio under current law, permits a modification when unanticipated circumstances arise (or when compliance with the terms of the trust is impossible or illegal), generally, it has been applied only with respect to the administration of the trust.²⁸ Examples of situations in which modifications of the dispositive terms of a trust might be permissible under section 5804.12(A) are the settlor's "failure to anticipate economic change or the incapacity of a beneficiary."²⁹

Second, section 5804.12(A) allows a trust to be terminated, as well as its terms modified, for unanticipated circumstances. We have not found an Ohio case in which a trust was terminated due to unanticipated circumstances, although dictum in *Harter Holding Co. v. Perkins*³⁰ quoted favorably section 336 of the Restatement of Trusts, under which such terminations are allowed.

Third, also under section 5804.12(A), the unanticipated circumstances requirement for a modification or termination is a finding by the court that "because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust." By contrast, the Ohio Supreme Court recently applied the traditional stricter standard:

Under the doctrine of deviation, a court can 'direct or permit a deviation from the terms of the trust where compliance is impossible or illegal, or where owing to circumstances not known to the settlor and not anticipated by him compliance

would defeat or substantially impair the accomplishment of the purposes of the trust.’ Scott, Law of Trusts, at 323, Section 381.³¹

Fourth, under division (B) of section 5804.12, the administrative terms of a trust may be modified if complying with the trust’s existing terms “would be impracticable or impair the trust’s administration.” Note that such a modification is not dependent on there being unanticipated circumstances, and that there is no express requirement that such a modification be made consistently with the settlor’s intent or probable intent.

VI. Section 5804.13: Cy Pres

If a charitable trust’s specific charitable purpose becomes unlawful, impracticable, or impossible to achieve, OUTC section 5804.13 will apply. Under division (B) of that section, if the settlor has addressed that possibility and directed distribution of the trust assets to a noncharitable beneficiary, the terms of the trust will govern and the alternative distribution will be made.

If the terms of the trust do not address the possibility of the trust’s specific charitable purpose failing, the Code will change current law. Under existing Ohio law, in such a case the court may apply the cy pres doctrine to, in effect, reform the trust’s terms to provide for an alternative charitable purpose, but only if it first determines that the settlor had a general charitable intent, in addition to the specific charitable purpose that failed.³² In the absence of such a finding (and if the terms of the trust do not address how the trust assets should be distributed in such a case), the trust corpus will revert to the settlor or the settlor’s estate.³³ The OUTC will change that result. Under section 5804.13(A)(3), in such a circumstance the court is authorized to apply cy pres “to modify or terminate the trust by directing that the trust property be applied, or distributed, in whole or in part, in a manner consistent with the settlor’s charitable purposes,” without the necessity of finding that the settlor had a general charitable intent.

As a practical matter, however, to some extent this change in Ohio law may be more apparent than real. As noted in a 1959 Ohio probate court case, some Ohio decisions circumvent the general charitable intent requirement for applying the cy pres doctrine through use of the

doctrine of deviation.³⁴ Indeed, several Ohio cases have applied the deviation doctrine to direct that trust assets be distributed to a different charity when a specifically designated charitable beneficiary ceased to exist (or never existed) and the court found that the settlors' charitable purposes were to further the work of the specifically named charities.³⁵ Under the Code, it appears that in such cases, the result of saving the charitable gift may occur under either the unanticipated circumstances doctrine of section 5804.12(A) or the cy pres doctrine of section 5804.13. Because the cy pres doctrine is applicable under the Code without regard to the settlor having had a general charitable intent, it no longer will be necessary for courts to resort to the deviation doctrine to avoid a failure of a charitable trust when it can not be established that the settlor had a more general charitable intent.

VII. Section 5804.14: Uneconomic Inter Vivos Trusts

Section 5804.14 of the Code permits modification and termination of inter vivos trusts with less than \$100,000 of assets. Under division (A), the trustee, without court involvement, may terminate (but not modify) such a trust upon giving notice to the trust's "qualified beneficiaries,"³⁶ if the trustee "concludes that the trust property is insufficient to justify the cost of administration."

Section 5804.14(B) provides the court with more flexibility to deal with such trusts. If it determines that the costs of administering an inter vivos trust with less than \$100,000 of assets are not warranted by the trust property, it is not limited to terminating the trust. Rather, the court may modify its terms or remove and replace its trustee.

Existing Ohio law addresses uneconomic trusts in sections 1339.66 (inter vivos trusts) and 2109.62 (testamentary trusts) of the Revised Code. Adoption of the OUTC will change Ohio law with respect to uneconomic trusts in a number of ways. First, as mentioned, OUTC section 5808.14(A) allows the trustee, without court involvement, to terminate an uneconomic inter vivos trust of less than \$100,000 of assets. Under R.C. section 1339.66, while the court may do so, the trustee may not. Second, OUTC section 5804.14(B) authorizes the court to modify the terms of, or remove and replace the trustee of, such an uneconomic trust, as well as terminate it. R.C. section 1339.66 does not. Third, under both divisions (A) (trustee termination) and (B)

(court termination, modification, or removal and replacement of the trustee), the standard for such an action to be taken is “that the value of the trust property is insufficient to justify the cost of administration.” By contrast, the standard under R.C. section 1339.66 is that: (a) it is no longer economically feasible to continue the trust, (b) the termination of the trust is for the benefit of the beneficiaries, and (c) the termination of the trust is equitable and practical. Fourth, OUTC section 5804.14(A) allows the trustee to terminate an uneconomic trust upon giving notice to the trust’s qualified beneficiaries. R.C. section 1339.66 requires notice to what may be a significantly broader class: “all beneficiaries who are known and in being and who have vested or contingent interests in the trust.”

Finally, note that OUTC section 5804.14 applies only to inter vivos trusts. While the joint committee’s plan is for section 1339.66 of the Revised Code to be repealed in connection with the enactment of the OUTC, section 2109.62 of the Revised Code, which includes the same provisions for testamentary trusts as are included in section 1339.66 for inter vivos trusts, will not. Thus, after enactment of the OUTC, different rules will apply to the termination of uneconomic inter vivos and testamentary trusts.

VIII. Section 5804.15: Reformation

OUTC section 5804.15 permits the reformation³⁷ of trusts to correct mistakes. Under this provision, a court may reform the terms of a trust to conform to the settlor’s intent if it can be proven by clear and convincing evidence that both the settlor’s intent and the terms of the trust were affected by a mistake of law or fact, either in expression or in inducement.³⁸ Significantly, section 5804.15 expressly provides that trust terms may be reformed even if they are unambiguous.³⁹ Further, because the OUTC generally will apply to testamentary as well as inter vivos trusts,⁴⁰ the court’s reformation power under section 5804.15 will apply to trusts created by will as well as inter vivos trusts.

IX. Section 5804.16: Modifications to Achieve the Settlor’s Tax Objectives

Section 5804.16 of the Code provides for the modification of the terms of a trust to achieve the settlor's tax objectives. While such a modification might alter the dispositive terms of the trust,⁴¹ the statute requires that it be made "in a manner that is not contrary to the settlor's probable intention."

Section 5804.16 expressly allows modifications made under it to be given retroactive effect. However, as noted by the comment to the corresponding UTC provision, section 416: "Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law." Because a modification that occurs after the taxing event, such as the death of the settlor of a revocable trust (or of the testator of a testamentary trust), may be ineffective for federal tax purposes,⁴² if the facts support it, the preferable approach to a modification under section 5804.16 may be a construction action to determine the operative effect of the trust's terms,⁴³ or a reformation action to conform the terms of the trust to the settlor's original intent.

Section 5804.16 will change existing Ohio law. Under current law, trusts may be construed to achieve favorable tax results,⁴⁴ but cannot be modified to do so.⁴⁵ The OUTC eliminates this distinction by permitting such modifications.

X. Section 5804.17: Combination and Division of Trusts

The last of the Code's modification and termination provisions is section 5804.17, which addresses the combination and division of trusts. Under this section, a trustee is permitted to combine two or more trusts, or divide a trust into two or more separate trusts, without court involvement, "if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust." The only other requirement is that the trustee give notice of the combination or division to the trust's qualified beneficiaries.⁴⁶

Current Ohio law also allows the trustee, without court involvement, to consolidate or divide trusts. The standard for a consolidation or division under current section 1339.67 of the Revised Code is similar to, but somewhat different from, the OUTC's standard quoted in the preceding paragraph: consolidation or division is permitted by section 1339.67 if it "is in the best interests of the beneficiaries of the trust or trusts, is equitable and practicable, and will not defeat

or substantially impair the accomplishment of the purpose of the trust or trusts or the interests of the beneficiaries under the trust or trusts.”⁴⁷ The other change replacing section 1339.67 of the Revised Code with OUTC section 5804.17 will have on existing Ohio law is with regard to notice. As mentioned, the OUTC provision requires the trustee to notify the trust’s qualified beneficiaries. By contrast, section 1339.67(B) of the Revised Code does not include a notice requirement unless court approval is sought, in which case notice must be given to “all beneficiaries of the trust who are known, in being, and have a vested or contingent interest in the trust.”

XI. Section 5810.09: Protecting the Trustee with Respect to a Modification or Termination Not Provided for by the Terms of the Trust or Chapter 5804

Consistent with the Second Restatement,⁴⁸ OUTC section 5810.09 provides that if a beneficiary consents to conduct by the trustee that would or did⁴⁹ constitute a breach of trust, ratifies it, or releases the trustee from liability with respect to it, the trustee will not be liable to that beneficiary for the breach. There is no exception in section 5810.09 for conduct that violates a material purpose of the trust. Rather, section 5810.09’s only exceptions to the trustee’s avoidance of liability are if the beneficiary’s consent, release, or ratification was induced by improper conduct of the trustee, or if at the time of the consent, release, or ratification, the beneficiary did not know of his or her rights or of the material facts relating to the breach.⁵⁰

Although section 5810.09 cuts off trustee liability only with respect to beneficiaries who provide a consent, release, or ratification to the trustee’s conduct, if all beneficiaries do so (and neither of the exceptions described in the preceding paragraph apply), the trustee could modify the terms of, terminate, or administer the trust in accordance with the beneficiaries’ desires, rather than the settlor’s material purposes, without risk of liability. While many trusts will have minor, unborn, or unascertained beneficiaries, getting the consent, release, or ratification of all beneficiaries may be possible using the representation provisions of Chapter 5803.⁵¹ A limitation on the ability of a person to represent a beneficiary under Chapter 5803, however, is that the

representative must not have a conflict of interest with respect to the representation.⁵² Thus, if the trustee's conduct that otherwise would constitute an actionable breach might benefit consenting beneficiaries at the expense of beneficiaries for whom representation would be required, the consenting beneficiaries would be unable to also consent on behalf of those other beneficiaries. In such a case, section 5803.05 authorizes the court to appoint a representative of the minor, unborn, or unascertained beneficiaries with respect to whom the conflict exists.

In contrast with section 5810.09, section 5801.10 permits binding private settlement agreements with respect to most matters affecting the administration of a trust. Under division (B), the necessary parties to such an agreement include, among others, all beneficiaries and currently serving trustees of the trust. Under division (C), however, such an agreement may not be used to effect an early termination of the trust (that is not accomplished under Chapter 5804⁵³) or a modification of the terms of the trust that would change the beneficiaries' interests in the trust.⁵⁴ Section 5801.10(C) also requires that private settlement agreements include "terms and conditions that could be properly approved by the court." In some cases, however, these limitations on the use of private settlement agreements will be more illusory than real. If the trust's beneficiaries and trustee wish to enter into a binding private settlement agreement, but would be foreclosed from doing so by one or more of the division (C) limitations, it appears that they could effectively nevertheless do so by entering into an agreement with respect to which the trustee would be protected under section 5810.09. Note, however, that section 5810.09 is not a mandatory rule.⁵⁵ Accordingly, a settlor who is concerned about the possibility of the trustee and beneficiaries agreeing to terminate the trust early, modify its terms, or otherwise administer it in a way that would violate a material purpose of the settlor for the trust, could provide in the terms of the trust that a consent, release, or ratification by a beneficiary will not protect the trustee from liability for a material breach.

XII. Conclusion

The OUTC's modification and termination provisions will provide settlors, beneficiaries, and trustees with increased flexibility for dealing with problematic irrevocable trusts. Trust terms, even if unambiguous, may be reformed to correct mistakes, or modified to achieve the

settlor's tax objectives. To further the settlor's trust purposes, dispositive, as well as administrative, provisions may be modified under the unanticipated circumstances doctrine. Further, the standard for application of the unanticipated circumstances doctrine has been reformulated to allow modifications to further the purposes of the trust, without a showing that compliance with the terms of the trust will defeat or substantially impair the accomplishment of its purposes. The cy pres doctrine will be available to save charitable trusts without a finding that the settlor had a general charitable intent or resort to the deviation doctrine. The court will be able to modify the terms of an uneconomic trust of less than \$100,000 of assets, or change its trustee, when terminating the trust is not appropriate. A termination or modification by consent of the settlor and beneficiaries, or by the beneficiaries if the material purpose requirement is satisfied, may be accomplished through use of the Code's representation provisions if a trust has minor, unborn, incapacitated, or unable to be located beneficiaries. Further, beneficiaries whose interests will be protected in connection with such a modification or termination may not prevent other beneficiaries from accomplishing it. In short, the OUTC's modification and termination provisions may prove to be among its most useful.

¹ Preliminary discussions with a representative of the Ohio Legislative Service Commission (LSC) indicate that, because of the changes made to the national Uniform Trust Code in the version being prepared for enactment in Ohio, the Ohio version may be named the "Ohio Trust Code" rather than the "Ohio Uniform Trust Code." The third draft of the Code was finalized in February 2005. It may be found at the website of the Ohio State Bar Association: <http://osba.ohiobar.org/docushare/dsweb/Get/Document-19247/OUTC+Feb05.doc>. Additional changes to the third draft have been made and forwarded to LSC by the joint committee of lawyers and bankers who have been working on the Code.

² The Uniform Trust Code, with comments, may be found at the website of the National Conference of Commissioners on Uniform State Laws: <http://www.nccusl.org/Update/>.

³ UNIF. TRUST CODE Art. 4, gen. cmt.

⁴ See OHIO REV. CODE ANN. § 2131.09 (West 2005).

⁵ For an excellent recent discussion of various ways to modify, reform, or terminate irrevocable trusts in Ohio, see Alan S. Acker, *Fixing Broken Trusts*, 15 PROB. L. J. OF OHIO 41 (Nov./Dec. 2004).

⁶ Exceptions are the rules governing the termination of uneconomic trusts (R.C. §§ 1339.66 and 2109.62), and the rules for the consolidation and division of trusts (R.C. § 1339.67).

⁷ The Code's provisions governing the revocation and amendment of revocable trusts are found in OUTC §§ 5806.01 and 5806.02.

⁸ OHIO UNIF. TRUST CODE § 5801.04. Note that the "terms of a trust" are not necessarily limited to the terms of the trust instrument. Rather, "'terms of a trust' means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." OHIO UNIF. TRUST CODE § 5801.02(V).

⁹ See OHIO UNIF. TRUST CODE § 5801.04(B).

¹⁰ *Carnahan v. Johnson*, 711 N.E.2d 1093, 1097 (Ohio Ct. App. 1998); *Brown v. Moss*, 1999 WL 1037758 (Ohio Ct. App.); *In the Matter of Grant*, 1983 WL 7050 (Ohio Ct. App.).

¹¹ See OHIO UNIF. TRUST CODE § 5804.11(D).

¹² RESTATEMENT (THIRD) OF TRUSTS § 61 cmt. c (2003).

¹³ See RESTATEMENT (THIRD) OF TRUSTS § 65(2) (2003); RESTATEMENT (SECOND) OF TRUSTS § 338 (1959).

¹⁴ The comment to the corresponding provision of the UTC explicitly notes that: “Under this section, a trust may be modified or terminated over a trustee’s objection. However, pursuant to § 410, the trustee has standing to object to a proposed modification or termination.” UNIF. TRUST CODE § 411 cmt. Thus, for example, if the trustee believed that consents had not been obtained from all beneficiaries, and that the exception to that requirement under § 5804.11(D) did not apply, the trustee could object to a § 5804.11 modification or termination.

¹⁵ 49 N.E.2d 769, 771 (Ohio Ct. App. 1942).

¹⁶ Under the Restatements, the settlor and all beneficiaries, without the trustee, may modify or terminate a trust. See RESTATEMENT (THIRD) OF TRUSTS § 65 (2003); RESTATEMENT (SECOND) OF TRUSTS § 338 (1959).

¹⁷ *Westhafer v. Reed*, 20 Ohio NP (NS) 555 (Ohio Prob. 1932). See also *Robbins v. Smith*, 73 N.E. 1051, 1055 (Ohio 1905).

¹⁸ OHIO UNIF. TRUST CODE § 5804.11(B).

¹⁹ See, e.g., *Brown v. Moss*, 1999 WL 1037758 (Ohio Ct. App.) (providing an emergency financial safety net for beneficiaries was a material purpose); *In re Estate of Grant*, 1983 WL 7050 (Ohio Ct. App.) (continuing testator’s business for 15 years after his death was a material purpose).

²⁰ The Code provides that: “The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by Chapters 5801 through 5811 or another statute of the Revised Code.” OHIO UNIF. TRUST CODE § 5801.05.

²¹ In response to concerns that UTC section 411(a), upon which OUTC section 5804.11(A) was based, could cause the assets of irrevocable trusts to be included in the taxable estates of settlors under Internal Revenue Code sections 2036 and/or 2038, and in accordance with a recommendation of the Estate and Gift Tax Committee of the American College of Trust and Estate Counsel, the 2004 UTC amendments include one to section 301(d) that prohibits the settlor from representing and binding a beneficiary with respect to the termination or modification of a trust under UTC section 411(a). See UNIF. TRUST CODE § 411 cmt. That provision is included in the OUTC as section 5803.01(D).

²² See OHIO UNIF. TRUST CODE § 5803.02.

²³ See OHIO UNIF. TRUST CODE §§ 5803.03(A) through (E).

²⁴ See OHIO UNIF. TRUST CODE § 5803.03(F).

²⁵ See OHIO UNIF. TRUST CODE § 5803.04.

²⁶ With respect to what might constitute an “unanticipated circumstance” under § 5804.12(A), the comment to the comparable section of the UTC provides:

While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements Section 415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

UNIF. TRUST CODE § 412 cmt.

²⁷ See, e.g., *Union Sav. Bank v. Alter*, 132 N.E. 834, 838-39 (Ohio 1921); *First Nat’l Bank v. Gaines*, 237 N.E.2d 182 (Ohio Prob. Ct. 1967).

²⁸ See *Daloia v. Franciscan Health System*, 679 N.E.2d 1084, 1092 (Ohio 1997). Note, however, that in a recent unreported Court of Appeals decision, the court cited the new Restatement (Third) of Trusts for the proposition that dispositive, as well as administrative, provisions of a trust instrument may be modified when there are unanticipated circumstances. See *Bank One Trust Co. v. Miami Valley Hospital*, 2003 WL 22026337 (Ohio Ct. App.). Note also that at least in the context of charitable trusts, the doctrine of deviation, while purportedly applicable only to the administration of the trust, has been liberally applied to permit distributions to a different charitable beneficiary than the one named in the instrument when the originally named charitable beneficiary ceases to exist. See *infra* note 35 and accompanying text.

²⁹ UNIF. TRUST CODE § 412 cmt. Despite unanticipated circumstances, it may not be possible to modify the dispositive terms of a special or supplemental needs trust, even if the modification would further the purposes of the trust. If the modification would change the disposition of the trust assets at the beneficiary’s death, it likely would not be allowed because the Revised Code prohibits the guardian and the guardianship court from making a will for a ward, see OHIO REV. CODE ANN. § 2111.50(B) (West 2005), and a modification of such provisions of such a trust has been deemed to effectively make a will for the beneficiary. In *re Rosenbaum Trust*, 2003 WL 1849141 (Ohio Ct. App.). Presumably, the general authorization of the court to modify trusts for unanticipated circumstances under

OUTC § 5804.12(A) would not override the specific limitation on the power of a guardian and guardianship court under R.C. § 2111.50(B).

³⁰ 43 N.E.2d 365, 375-76 (Ohio Ct. App. 1942).

³¹ *Daloia v. Franciscan Health System*, 679 N.E.2d 1084, 1091-92 (Ohio 1997). Note, however, that the “defeat or substantially impair” traditional standard has, in the context of charitable trusts, been loosely applied to allow the trustees of charitable trusts to deviate from the terms of the trust in furtherance of what the court determined to be the settlor’s broader charitable purposes. *See, e.g., Cleveland Museum of Art v. O’Neill*, 129 N.E.2d 669 (Ohio Com. Pl. 1955).

³² *See Daloia v. Franciscan Health System*, 679 N.E.2d 1084, 1091 (Ohio 1997); *Craft v. Schroyer*, 74 N.E.2d 589, 592 (Ohio Ct. App. 1947); *Muir v. Youse*, 80 N.E.2d 788, 794 (Ohio Prob. Ct. 1946).

³³ *See Muir v. Youse*, 80 N.E.2d 788, 799 (Ohio Prob. Ct. 1946).

³⁴ *See Cheney v. State Council of Ohio Jr. Order United Am. Mechanics*, 162 N.E. 242, 245 (Ohio Ct. App. 1959).

Note, however, that in *Cheney*, the court refused to apply the deviation doctrine expansively, stating that it “has been limited to those cases in which its application will carry out the general purpose of the gift. Moreover, it cannot be invoked when its application would enlarge or change the class of beneficiaries who are the object of the donor’s bounty.” *Id.*

³⁵ *See, e.g., First Nat’l Bank v. Unknown Heirs of Donnelly*, 122 N.E.2d 672 (Ohio Ct. App. 1954); *Daloia v. Franciscan Health System*, 679 N.E.2d 1084 (Ohio 1997); *In re Farren*, 272 N.E.2d 162 (Ohio Ct. App. 1970); *Bank One Trust Co. v. Miami Valley Hospital*, 2003 WL 22026337 (Ohio Ct. App.).

³⁶ The required notice may be given to a representative for a minor, incapacitated, unborn, or unable to be located beneficiary. *See supra* notes 22 - 25 and accompanying text. The term “qualified beneficiary” is defined in § 5801.02(Q). Generally, the term includes current and so-called first line remainder beneficiaries, and excludes remote, contingent beneficiaries. More specifically:

(Q) “Qualified beneficiary” means a living beneficiary to whom, on the date the beneficiary’s qualification is determined, any of the following applies:

(1) The beneficiary is a distributee or permissible distributee of trust income or principal.

(2) The beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in division (Q)(1) of this section terminated on that date, but the termination of those interests would not cause the trust to terminate.

(3) The beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

³⁷ The difference between “reformation” and “modification” is explained by the new Restatement:

As used in this Restatement, “reformation” involves the use of interpretation (including evidence of mistake, etc.) in order to ascertain – and properly restate – the true, legally effective intent of settlors with respect to the original terms of trusts they have created; by way of contrast, “modification” involves a change in – a departure from – the true, original terms of the trust ... Thus, a trust that needs no reformation – i.e., the trust instrument says what it was supposed to say – may later be modified to improve or otherwise change the trust when grounds or a power to do so exists.)

RESTATEMENT (THIRD) OF TRUSTS reporter’s notes on § 62 (2003). Note also that if a trust is established as a result of a material mistake, rescission may be available. *See* RESTATEMENT (THIRD) OF TRUSTS § 62 cmt. a (2003).

³⁸ As described by the comment to the comparable provision of the UTC, § 415: “A mistake of expression occurs when the terms of the trust misstate the settlor’s intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law.”

³⁹ Again as noted by the comment to UTC § 415: “Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential.”

⁴⁰ The bill to enact the OUTC includes new section 2109.69, which provides:

The provisions of Chapters 5801. through 5811. of the Revised Code apply to testamentary trusts except to the extent that any provision of those chapters conflicts with any provision of Chapter 2109. or other part of the Revised Code that applies specifically to testamentary trusts and except to the extent that any provision of Chapters 5801. through 5811. of the Revised Code is clearly inapplicable to testamentary trusts. Section 5808.13 of the Revised Code, which provides for the duties of a trustee to inform and report to the trust’s beneficiaries, shall apply to testamentary trusts.

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- ⁴¹ See UNIF. TRUST CODE § 416 cmt.
- ⁴² *Id.* (citing Rev. Rul. 73-142, 1973-1 C.B. 405).
- ⁴³ See David R. Hodgman & David C. Blickenstaff, *Judicial Reformation of Trusts – The Drafting Tool of Last Resort*, 28 EST. PLAN. 287 (June 2001).
- ⁴⁴ See *Sawyer v. Sawyer*, 374 N.E.2d 166, 168-169 (Ohio Ct. App. 1977).
- ⁴⁵ See *Fifth Third Bank v. Simpson*, 730 N.E.2d 406, 407-409 (Ohio Ct. App. 1999).
- ⁴⁶ For the definition of “qualified beneficiaries,” see *supra* note 36.
- ⁴⁷ OHIO REV. CODE ANN. § 1339.67(A) (West 2005).
- ⁴⁸ See RESTATEMENT (SECOND) OF TRUSTS §§ 216-218 (1959).
- ⁴⁹ According to the comment to the comparable provision of the UTC, the beneficiary’s consent, release, or ratification may occur before or after the trustee’s conduct. See UNIF. TRUST CODE § 1009 cmt. (2005).
- ⁵⁰ The new Third Restatement includes another limitation on the effectiveness of beneficiaries’ consents to shield the trustee from liability for a breach. Under it, the trustee may not be protected from liability, even to a consenting beneficiary, if the trustee’s action was contrary to a material purpose of the trust and not taken reasonably and in good faith. RESTATEMENT (THIRD) OF TRUSTS § 65 (2003).
- ⁵¹ See *supra* notes 22 - 25 and accompanying text.
- ⁵² See OHIO UNIF. TRUST CODE §§ 5803.02 – 5803.04.
- ⁵³ See OHIO UNIF. TRUST CODE § 5801.10(I)(2).
- ⁵⁴ Modifications necessary to qualify gifts for the federal charitable gift or estate tax deduction, or for the marital deduction available for gifts to noncitizen spouses, however, may be accomplished by private settlement agreement. See OHIO UNIF. TRUST CODE §§ 5801.10(C).
- ⁵⁵ See OHIO UNIF. TRUST CODE § 5801.04(B).