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THE ESSENTIALS OF TRUST ADMINISTRATION:

**Trustee's Duties and Beneficiaries'
Rights Regarding Information
about the Trust: The Basics and
More**

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I. Introduction.

A. The essence of a trust is the fiduciary relationship between the trustee and beneficiary with respect to the trustee's management of the trust property for the beneficiary's benefit. At the heart of that fiduciary relationship is the ability of the beneficiary to hold the trustee accountable. For the beneficiary to be able to enforce the trust, it is essential that the beneficiary have adequate information about the trust.

1. In *Nordloh v. McGuire*, 2015 -Ohio- 4529, 2015 WL 6658445 (Ct. App. 12th Dist.), trust beneficiaries sued the trustee after the trustee refused to provide them with copies of the trust instruments and trustee reports. The litigation revealed that the trustee has misappropriated hundreds of thousands of dollars of trust assets.

B. For a variety of reasons, a settlor, however, may want to limit, or waive entirely, the duty the trustee otherwise would have to provide information about the trust to one or more of its beneficiaries.

1. In that regard, another fundamental principle of the law of trusts is that, generally, the intent of the settlor of the trust should govern the trust and its administration:

The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law.

¹ Professor Newman served as the Reporter for the Ohio Trust Code.

Restatement (Third) of Property: Wills and Other Donative Transfers, § 10.1 (2003).

- C. The tension between these competing policy considerations resulted in the provisions of the Uniform Trust Code (“UTC”) that require the trustee to inform and report to certain beneficiaries about the trust, regardless of the settlor having provided otherwise in the terms of the trust, generating more debate in enacting jurisdictions than any other UTC provisions. See UTC § 105 cmt.
- D. This outline summarizes the provisions of the Ohio Trust Code (“OTC”), which was derived from the UTC, setting forth the duties of the trustee to inform and report to beneficiaries when the trust instrument is silent on that subject (i.e., the OTC’s information and reporting “default rules”), and its provisions making certain of those duties mandatory and thus not subject to being overridden by the settlor in the terms of the trust. In addition, the outline discusses a number of Ohio cases in which the OTC’s information and reporting rules were at issue and addresses a variety of other issues related to the trustee’s fundamental duty to inform and report to beneficiaries.
- E. With respect to the scope of the OTC’s information and reporting provisions:
 - 1. Under R.C. § 2109.69, their rules apply to testamentary as well as inter vivos trusts.
 - 2. Generally, the OTC, including its provisions on the information and reporting duties of trustees, applies to trusts existing on its January 1, 2007 effective date, as well as to trusts created after that date. R.C. § 5811.03(A)(1). For two exceptions, see VIII. The OTC’s Default Rules for Irrevocable Trusts: Other Information and Reporting Duties of the Trustee, below.
 - 3. The OTC covers the information and reporting duties of trustees of revocable (as well as irrevocable) trusts, but as discussed below, those duties are owed exclusively to the settlor during his or her lifetime. See III. The OTC’s Default Rules: Revocable Trusts.

II. Classification of Beneficiaries.

- A. The rights of a beneficiary to receive information about the trust under the OTC depend on the nature of the beneficiary’s interest.
 - 1. Note, however, that the OTC explicitly provides that the trustee *may* furnish information and reports to beneficiaries to whom the

trustee does not have a duty to provide them. R.C. § 5808.13(E). In *Newcomer v. National City Bank*, 2014 -Ohio- 3619, 19 N.E.3d 492 (Ct. App. 6th Dist.), remainder beneficiaries argued that the trustee acted with reckless indifference to their interests when for many years it did not inform them of the existence of the trust or of their interests in it. In rejecting the beneficiaries' argument, the court noted that although the trustee was under no obligation to communicate with the remainder beneficiaries, each of them had met with a representative of the trustee over the years to discuss the trust.

- B. Under the OTC, beneficiaries are classified as (i) "current beneficiaries," (ii) "qualified beneficiaries," or (iii) "beneficiaries," who are neither current beneficiaries nor qualified beneficiaries.
1. A "current beneficiary" is one to whom the trustee may, or is required to, make distributions at the time the determination is made. More specifically, a "current beneficiary" is "a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal." R.C. § 5801.01(F).
 2. A "qualified beneficiary" is a current beneficiary or a beneficiary who would be a current beneficiary at the time the determination is made if the interests of the current beneficiaries, or the trust itself, terminated on that date. More specifically, "qualified beneficiary" means:
 - a beneficiary to whom, on the date the beneficiary's qualification is determined, any of the following applies:
 - (i) The beneficiary is a distributee or permissible distributee of trust income or principal.
 - (ii) The beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the [current beneficiaries] terminated on that date, but the termination of those interests would not cause the trust to terminate.
 - (iii) The beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.R.C. § 5801.01(Q).
 3. A "beneficiary" is "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.” R.C. § 5801.01(C).

- a. Under this broad definition of “beneficiary,” a person (including one who is unborn or unascertained) who has a remote, contingent interest in a trust may be a “beneficiary” without being either a current or qualified beneficiary.
 - b. Note that a 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, is not included in the definition of “beneficiary.” R.C. § 5801.01(C).
 - c. The treatment of a holder of a non-fiduciary power of appointment over trust property as a beneficiary is a change from the common law. See UTC § 103 cmt.
4. Example. Assume that (i) D provides for the creation of an irrevocable trust at D’s death for D’s spouse, S, for life, remainder to D’s descendants, by representation, provided that if at S’s death, no descendants of D’s are then living, the trust assets are to be distributed to Charity; (ii) D has one child, C, and one grandchild, GC (who is a child of C’s); and (iii) D dies, survived by S, C, and GC.
- a. While S, C, and GC are living, S is a current beneficiary, C is a qualified beneficiary, and GC and Charity are beneficiaries.
 - b. If C dies during S’s lifetime, GC becomes a qualified beneficiary, while Charity remains a beneficiary. If C and GC die during S’s lifetime, Charity becomes a qualified beneficiary.
5. Consistent with the default rule that any beneficiary may request information about the trust, R.C. § 5808.13(A), and the default rule that any beneficiary may request annual trustee reports, R.C. § 5808.13(C), discussed below, beneficiaries who are not current or qualified beneficiaries, but who send the trustee a request for notice, are thereafter entitled to receive notices the trustee is required to give to current or qualified beneficiaries. R.C. § 5801.09(A).
6. In *Thallman v. Thallman*, 2016 -Ohio- 992, 2016 WL 953150 (Ct. App. 3rd Dist.), the settlor’s husband was the beneficiary of her

trust following her death, with their children named as the remainder beneficiaries. The trial court incorrectly determined that the children were not beneficiaries of the trust until their father's death and thus were not entitled to receive information about the trust prior to his death. In addressing that issue, the Court of Appeals stated: "[T]here appears to be a legitimate question as to just what status the appellants had prior to [the husband's] death. However, we do not need to reach a decision on this matter as even if we assumed that appellants met the statutory definition for "other beneficiaries" ..., the trial court's decision denying appellants' motion to compel was supported on other grounds [i.e., that sufficient information had already been provided to the appellants] as previously stated."

7. With respect to a trust for the care of an animal or another noncharitable purpose (see R.C. §§ 5804.08 and 5804.09), a person appointed to enforce the trust has the rights of a current beneficiary. R.C. § 5801.09(B).
- C. The OTC does not address the question of whether a beneficiary who has received a distribution of all the beneficiary was entitled to receive under the terms of the trust loses his or her status as a beneficiary as a result of receiving the distribution.
1. In *Stavick v. Coyne*, 2003 WL 22997262 (Ct. App. Ohio), decided before enactment of the OTC, a beneficiary filed an action for an accounting and to obtain a complete copy of the trust instrument. While the action was pending the trustees distributed \$300,000 to the beneficiary, which the trustees alleged was the entire amount to which she was entitled. The court held the beneficiary's receipt of the distribution did not make the action moot.
 2. While law on this subject is sparse, for cases on the issue from other jurisdictions, see *Tobias v. Korman*, 141 S.W.3d 468 (Mo.App. 2004) ("[a]s long as each plaintiff received his or her specific amount, an accounting by [the trustee] would be unnecessary") and *Taylor v. Nationsbank Corp.*, 481 S.E.2d 358 (N.C.App. 1997) ("plaintiffs' mere receipt of cash bequests from a trustee does not terminate their status as beneficiaries where, as here, the plaintiffs were named as beneficiaries in the trust documents and they ask to view the trust documents because they question the terms of the trust from which their bequest came"). See also Kan. Stat. Ann. § 58a-813(b)(5), (e); Or. Rev. Stat. § 130.710(10).

III. The OTC's Default Rules: Revocable Trusts.

- A. During the lifetime of the settlor of a revocable trust, regardless of whether the settlor has capacity to revoke the trust, the trustee's duties, including the duty to inform and report about the trust to beneficiaries, are owed exclusively to the settlor. R.C. §§ 5806.03(A) and 5808.13(G).
1. If a third party serves as trustee of a revocable trust during the settlor's lifetime and breaches its fiduciary duties in doing so (without the settlor having provided a consent, ratification, or release), an interesting question may arise: after the settlor's death, may non-settlor beneficiaries pursue a claim against the trustee for the breach, or may such a claim be brought only by the personal representative of the settlor's estate? For a discussion, see Alan Newman, *Revocable Trusts: Holding a Non-Settlor Trustee Accountable for Administration during the Settlor's Lifetime*, 23 PROBATE LAW JOURNAL OF OHIO, Issue 6 (July/Aug. 2013).
- B. An important rationale for the rule that trustee's duties are owed exclusively to the settlor of a revocable trust during his or her lifetime is that revocable trusts typically are used as will substitutes to avoid probate administration. Thus, just as devisees under the will of a living testator do not have enforceable rights with respect to the testator's property, neither should beneficiaries of a living settlor of a revocable trust.
1. That rationale is weakened considerably, however, if the terms of the trust provide that if the settlor becomes incapacitated, the trustee shall or may make distributions to beneficiaries other than the settlor during the settlor's incapacity.
 2. In such a circumstance, if the trustee's duties are owed exclusively to the settlor, the non-settlor current beneficiaries of the revocable trust apparently would be unable to enforce the trust and protect the interests in it the settlor intended them to have during the settlor's incapacity.
 3. Arguably, however, the rule that the trustee of a revocable trust owes its duties exclusively to the settlor during the settlor's lifetime, even if the settlor is incapacitated, should not apply if the settlor has provided for other persons to receive benefits from the trust if the settlor becomes incapacitated. That rule, set forth in R.C. §§ 5806.03(A) and 5808.13(G), is not a mandatory one under R.C. § 5801.04(B), and the settlor's providing for others to be beneficiaries of the trust during the settlor's incapacity arguably expresses the settlor's intent to override the default rule of R.C. §§ 5806.03(A) and 5808.13(G). For a discussion of this issue, see

Joanne E. Hindel, Kerin Lyn Kaminski, and Franklin C. Malemud,
*Differing Answers to Questions on Beneficiary Rights and Trustee
Reporting: Summary of a Panel Discussion*, 24 PROBATE LAW
JOURNAL OF OHIO, Issue 2 (Nov./Dec. 2013).

IV. The OTC's Default Rules for Irrevocable Trusts: The Trustee's Duty to Keep Current Beneficiaries Reasonably Informed.

- A. Under R.C. § 5808.13(A), the trustee is required to “keep the current beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.”
1. Note that this duty is owed only to current beneficiaries. (By contrast, under the UTC it is owed to qualified beneficiaries. UTC § 813(a)).
 2. In a significant change from pre-OTC Ohio law (see former R.C. § 1339.69, which was repealed, effective January 1, 2007, in connection with the enactment of the OTC), this duty is an affirmative obligation of the trustee that is not dependent on a current beneficiary making a request for information about the trust.
- B. According to the comment to the analogous provision of the UTC (§ 813), this duty “would ordinarily be satisfied by providing the beneficiary with a copy of the annual report mandated by subsection (c) [see R.C. § 5808.13(C), discussed below]. Otherwise, the trustee is not ordinarily under a duty to furnish information to a beneficiary in the absence of a specific request for the information.”
- C. However, the comment to UTC § 813 goes on to state that “special circumstances may require that the trustee take affirmative steps to provide ... information” in addition to the required annual reports. Two examples are given.
1. First, “if the trustee is dealing with the beneficiary on the trustee’s own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know.” UTC § 813 cmt. Here are summaries of several illustrative cases from other jurisdictions:
 - a. *In re Estate of Halas*, 568 N.E.2d 170 (Ill. App. 1991), involved a reorganization of the corporation that owned the Chicago Bears football team (the “Company”). George Halas, Sr., the team’s founder, president, board director,

and largest shareholder, served as executor of the estate of his son and testamentary trustee of two trusts for his son's children. The estate assets included stock in the Company. In affirming the lower court, the appellate court held that in reorganizing the Company without giving notice of the reorganization to the children's guardian ad litem, Mr. Halas, Sr. breached his fiduciary duty of full disclosure to the beneficiaries. (The lower court's award of only \$1 of nominal damages for the breach, however, also was affirmed.)

- b. In *Britton v. Winger*, 442 N.E.2d 264 (Ill. App. 1982), the trustee, who also was a beneficiary, breached his duty of loyalty and full disclosure by mortgaging trust farm land to finance his purchase of the interest in the trust of another beneficiary without full disclosure to other beneficiaries.
- c. In *Willers v. Wettstad*, 510 N.W.2d 676 (S.D. 1994), plaintiff and defendant entered into a Stock Sale Agreement under which defendant agreed to hold as trustee plaintiff's 50% interest in stock they purchased in a franchisee corporation of which defendant served as president. A dispute between the franchisee and franchisor ultimately led to the stock they purchased becoming worthless. Defendant, as trustee, was found to have breached his duty of loyalty to plaintiff, as beneficiary, by, among other things, failing to disclose to plaintiff that the franchise was in financial trouble, that the franchisor had threatened to take the franchise from defendant, and that, as a result, the stock they had purchased could become worthless.

2. Second, "to enable the beneficiaries to take action to protect their interests, the trustee may be required to provide advance notice of transactions involving real estate, closely-held business interests, and other assets that are difficult to value or replace." However, "[t]he trustee is justified in not providing such advance disclosure if disclosure is forbidden by other law, as under federal securities laws, or if disclosure would be seriously detrimental to the interests of the beneficiaries, for example, when disclosure would cause the loss of the only serious buyer." UTC § 813 cmt. Here are summaries of several cases from other jurisdictions on this issue:

- a. In *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983), (one of two nonroutine transaction cases cited in the comment to UTC section 813 and referred to in the Reporter's Notes to § 82 of the Restatement (Third) of

Trusts as “[t]he leading case on a trustee's duty to disclose contemplated transactions involving significant asset holdings”), the sole asset of the trust was improved real estate in downtown Seattle. The trust instrument authorized the trustee to manage, lease, sell or mortgage the real estate, which was subject to a 99-year lease and a right of first refusal held by the lessee. After the lessee assigned its leasehold interest to a third party, the trustee sold the property to the third party. The beneficiaries’ resulting claim of breach of duty by the trustee was upheld. Although the trustee had broad powers with respect to the real property, including the power to sell it, and had no duty to obtain the consent of trust beneficiaries before making such a sale, the court held that in such a circumstance, the trustee “must inform beneficiaries ... of all material facts in connection with a nonroutine transaction which significantly affects the trust estate and the interest of the beneficiaries prior to the transaction taking place.” While the beneficiaries could not have prevented the trustee from selling the property, they could have outbid the lessee's assignee for the property and they should have been given the opportunity to do so.

- b. Similar to *Allard*, and citing it approvingly, in *In re Green Charitable Trust*, 431 N.W. 2d 492 (Mich. Ct. App. 1988), (the second of the two nonroutine transaction cases cited in the comment to UTC section 813), the trustee was held to have breached its duty to fully inform beneficiaries, in advance, of a nonroutine transaction involving the sale of a trust’s single most valuable asset.
- c. Beneficiaries’ claims of breach based on the rule in *Allard* failed in *Conran v. Seafirst Bank*, 89 Wash. App. 1005 (Wash. App. 1998) and *Matter of Harold S. Ansell Family Trust*, 569 N.W.2d 914 (Mich. App. 1997).
 - i. In *Conran*, the trustee sold all of the stock of a publicly traded company, which initially comprised more than 97% of the trust’s assets, in nine separate transactions over a 10-year period. The court rejected the beneficiary’s argument that the nine transactions should have been viewed in the aggregate as the nonroutine sale of the trust’s principal, if not sole, asset.

- ii. In *Ansell*, the *Allard* argument failed because the court found that the trustee had kept the beneficiaries informed of the sale of trust property in a nonroutine transaction.

V. The OTC's Default Rules for Irrevocable Trusts: The Trustee's Duty to Respond to Beneficiaries' Requests for Information.

- A. Also under R.C. § 5808.13(A), "unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust." Note that this duty is not limited to current beneficiaries, but is owed to all beneficiaries.
- B. With respect to when a beneficiary's request for information about the trust might be unreasonable, see:
 1. Restatement (Third) of Trusts § 82 cmt. e ("On petition by the trustee or a beneficiary...a court may limit the frequency or extent of ... inquiries [for information] by one or more of the beneficiaries, weighing the remoteness or substantiality of their interests in the trust against the burdens, intrusiveness, and privacy considerations that may be involved.").
 2. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 201 (2002) ("A request may be unreasonable in terms of the volume of information requested, the speed with which the beneficiary expects a response, and the relevance to the beneficiary's particular beneficial interest.") (Professor English was the UTC Reporter.)
 3. *Salem v. Lane Processing Trust*, 37 S.W.3d 664 (Ark. App. 2001) (a trust beneficiary's request for access to basically all documents related to the trust throughout its existence was denied; the appellate court apparently agreed with the lower court that the beneficiary was "not particularly interested in vindicating his own rights under the trust," but was only interested in continuing a pattern of "vexatious lawsuits" derived from "second-guessing everything that these people [the trustees] have done.").
 4. *Andrews v. Trustco Bank*, 735 N.Y.S.2d 640 (App. Div. 2001) (remainder beneficiaries were not entitled to review all trust-related advertising, promotional materials, and brochures after a specified date or all memoranda, work papers, and correspondence related to trust administration since the trust's inception; the requests for documents were overbroad, sought non-relevant information, and imposed an undue burden on the trustee).

5. *State v. Taylor*, 362 P.2d 247 (Wash. 1961) (requests from the Attorney General to the trustees of a charitable trust seeking “records of all principal income and disbursements; records of all property and transactions relating thereto; records of substantial changes in administration, and records of legal actions” were not reasonable: “[t]he duty to furnish information certainly included a reasonable opportunity to examine the books and records (and, under some circumstances, a requirement to furnish a limited amount of information in written form), but not an unreasonably extensive duplication of all the books and records.”).

C. If a beneficiary requests communications between the trustee and the trustee’s attorney, the basic issue raised is whether the communications are protected by the attorney-client privilege or are discoverable as “information related to the administration of the trust” under R.C. § 5808.13(A).

1. The OTC and the UTC do not address the issue. Rather, a UTC comment states:

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee’s attorney. The courts are split because of the important values that are in tension on this question. “The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383 (1981). On the other hand, [this Code] requires that a trustee keep the qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, which could include facts that the trustee has revealed only to the trustee’s attorney.

UTC § 813 cmt.

2. Under R.C. § 5815.16, generally a trustee’s attorney has no duty to beneficiaries to whom the trustee owes fiduciary obligations. Assuming that means the beneficiaries could not be deemed to be clients of the attorney, as would appear to be the case, they presumably could not demand access to communications between the trustee and its counsel on the basis of their being clients of the attorney. That is not the end of the inquiry, however.

- a. An additional issue is whether, because of the trustee's duty under R.C. § 5808.13(A) to respond to beneficiaries' requests for information related to the administration of the trust (and its duty to keep current beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests), the trustee has a duty to waive the attorney-client privilege and furnish the communications to beneficiaries who request them.
 - b. For a more thorough discussion of this subject, see Michael G. Schwartz and Dorothea K. Langsam, *Attorney-Client Privilege: Representing Trustees in Ohio*, 19 PROBATE L. J. OF OHIO 239 (July/Aug. 2009). See also Julia B. Meister, *The Fiduciary Exception: What the United States Supreme Court is Saying About the Attorney-Client Privilege Between Trustees and Their Counsel and What it Means in Ohio*, 22 PROBATE LAW JOURNAL OF OHIO, Issue 1 (Sept./Oct. 2011).
 - c. Finally, for a recent case holding that the trustee's duty to keep beneficiaries informed so that they may protect their interests overrides the attorney-client privilege with respect to communications between the trustee and its counsel, see *Dueck v. Clifton Club Company*, 2017 -Ohio- 7161, --- N.E.3d ---, 2017 WL 3432638 (Ct. App. 8th Dist.). The opinion in *Dueck* does not discuss R.C. § 5815.16, under which an attorney for a trustee does not owe duties to trust beneficiaries, and found that "[t]he 'real client' in securing the information [from the attorney] was the Beneficiaries."
- D. A number of New York cases have addressed the issue of a beneficiary's right to information about an entity in which a fiduciary owns an interest. When the fiduciary controls the entity, by virtue of the fiduciary estate's interest, beneficiaries have been held to be entitled to information about the entity. See, e.g., *Matter of Witkind's Estate*, 4 N.Y.S.2d 933 (N.Y. Sur. 1938); *Matter of Hubbell's Will*, 97 N.E.2d 888 (N.Y. 1951); *In re Voice's Will*, 35 227 N.Y.S.2d 991 (Sur. Ct. 1962); *Matter of Murray's Will*, 88 N.Y.S.2d 579 (Sur. Ct. 1949). This rule also has been applied when the trustee controlled the entity individually, with the trust owning a minority interest, see *In re Luce's Estate*, 230 N.Y.S.2d 45 (N.Y.A.D. 1962), and when the trust owns a minority interest, a cotrustee is an officer and director, and the beneficiary alleges that funds that should have been distributed to shareholders as dividends instead were distributed as excessive bonuses to officers and other key personnel. *In re Schlegel's Trust*, 227 N.Y.S.2d 203 (N.Y.A.D. 1962).

- E. A beneficiary's request for information about the trust, even though related to the administration of the trust, might properly be denied, at least temporarily, in various circumstances. See, e.g., *Shiple v. Crouse*, 370 A.2d 97 (Md. 1977) (when trustees with broad discretionary powers were engaged in delicate negotiations to sell property, the court indicated that beneficiaries were not entitled to anything more than a disclosure of the end product); *Copley v. Copley*, 126 Cal. App.3d 248, 178 Cal. Rptr. 842 (Cal. App. 1981) (trustee's refusal to furnish information about trust asset unless ordered by the court was reasonable where estate tax valuation had not been finally determined); *Matter of Butterfield*, 310 N.W.2d 381 (Mich. App. 1981) (because of competitive considerations, trustees were not required to provide on the public record detailed accountings of two operating companies).
- F. The Restatement (Third) of Trusts, § 78 cmt. i, addresses the issue of a conflict arising between a beneficiary's request for information and the trustee's duty of confidentiality to another beneficiary with respect to the information requested: "the extent of the trustee's duties may require a balancing of competing interests...[with respect to] the confidentiality or privacy concerns of some and the interest-protection needs of others."

VI. The OTC's Default Rules for Irrevocable Trusts: The Trustee's Duty to Furnish a Copy of the Trust Instrument to a Beneficiary who Requests It.

- A. R.C. § 5808.13(B)(1) addresses the right of beneficiaries to obtain a copy of the trust instrument.
- B. Noteworthy are the following:
 1. The trustee is required to furnish a copy of the trust instrument only to beneficiaries who request it.
 2. Qualified and other beneficiaries, as well as current beneficiaries, are entitled to request a copy of the trust instrument.
 3. Unless a beneficiary expressly requests a copy of the entire trust instrument, the trustee may furnish the requesting beneficiary a redacted copy of the instrument that includes only the provisions the trustee determines are relevant to the beneficiary's interest in the trust. If, however, the beneficiary then requests a copy of the entire trust instrument, the trustee is required to furnish it.
 4. If a deceased settlor of a revocable trust had completely restated its terms, the trust instrument a requesting beneficiary is entitled to receive is the restated instrument, including amendments to it. The

statute acknowledges that a beneficiary may be able to obtain a copy of earlier trust instruments, and their amendments, in a judicial proceeding with respect to the trust.

VII. The OTC's Default Rules for Irrevocable Trusts: The Trustee's Duty to Furnish Trustee Reports.

- A. Under R.C. § 5808.13(C), the trustee is required to furnish to current beneficiaries, and other beneficiaries who request them, at least annually and at the termination of the trust, reports “of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values.”
1. Note that the trustee's duty to furnish reports to current beneficiaries is an affirmative one that does not depend on current beneficiaries' requesting them.
 2. Trustee reports need not be presented in any particular format. Rather, “[t]he reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. The key factor is not the format chosen but whether the report provides the beneficiaries with the information necessary to protect their interests.” UTC § 813 cmt.
 - a. In *Gorby v. Aberth*, 2017 -Ohio- 274, 81 N.E.3d 910 (Ct. App. 9th Dist.), a revocable trust became irrevocable upon the settlor's death. The trustee did not provide the beneficiaries the first annual report required by R.C. § 5808.13(C) until 18 months after the settlor's death. Within a year of the settlor's death, however, the trustee had provided them with brokerage statements for the trust that satisfied his reporting obligations.
 - b. In *Cartwright v. Batner*, 2014 -Ohio- 2995, 15 N.E.3d 401 (Ct. App. 2nd Dist.), Son served as trustee of a trust his mother had created. He and his sister were the trust's beneficiaries. In determining the adequacy of an accounting by Son, the court noted the requirements of R.C. § 5808.13(C) [that the trustee provide “a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values], but also considered the

requirements of R.C. § 2109.303, which governs accountings for testamentary trusts. Because Son had failed to provide itemized disbursements that were verified by receipts or proof, the court found that he had not timely accounted. However, he had admitted that he had improperly expended trust funds in an amount reasonably consistent with the amounts determined to have been misappropriated by a witness for his sister. As a result, the appellate court upheld the trial court's determination that the trustee/son's untimely accounting was adequate.

c. In *In re: Marjorie A. Fearn Trust*, 2012-Ohio-1029, 2012 WL 850735 (Ct. App. 5th Dist.), the court stated that non-professional trustees may not necessarily be held to the same standards as professional trustees, but held that a handwritten ledger that included neither an inventory nor a running account of disbursements and receipts fell beneath the standard of care required of trustees to provide reports to beneficiaries.

B. If a trustee resigns or is removed, the former trustee is required to furnish a report for the period during which the former trustee served to the current beneficiaries unless a cotrustee remains in office. If a trustee becomes incapacitated or dies, the trustee's guardian, or the personal representative of the trustee's estate, may, but is not required by the statute to, furnish a report to the current beneficiaries. R.C. § 5808.13(C). As noted by the comment to UTC § 707, "to limit the former trustee's liability, the personal representative...or guardian may submit a trustee's report on the former trustee's behalf...Otherwise, the former trustee remains liable for actions taken during the trustee's term of office until liability is otherwise barred."

VIII. The OTC's Default Rules for Irrevocable Trusts: Other Information and Reporting Duties of the Trustee.

A. Within sixty days after accepting a trusteeship, the trustee (whether the initial trustee or a successor) is required to notify the current beneficiaries of the acceptance and of the trustee's name, address, and telephone number. R.C. § 5808.13(B)(2).

B. Within sixty days after the trustee learns of the creation of an irrevocable trust, or that a formerly revocable trust has become irrevocable, the trustee is required to notify the current beneficiaries (i) of the trust's existence, (ii) of the identity of the settlor or settlors, (iii) of the right to request a copy of the trust instrument, and (iv) of the right to a trustee's report. R.C. § 5808.13(B)(3).

1. In such circumstances as a revocable trust becoming irrevocable by the death of the settlor who was the trust's trustee, this duty and the duty described in the preceding paragraph may overlap, in which case the trustee is obligated to provide current beneficiaries with the information required by both duties.
- C. If the trustee plans to change the method or rate of the trustee's compensation, the trustee must notify the current beneficiaries in advance. R.C. § 5808.13(B)(4).

IX. The OTC's Default Rules for Irrevocable Trusts: Other Situations in Which the Trustee Must Provide Notice to Beneficiaries.

- A. Under R.C. § 5801.07(C), the trustee, in furtherance of its duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries, may transfer the trust's principal place of administration to another jurisdiction. At least 60 days before initiating the transfer, however, under R.C. § 5801.07(D) the trustee must notify the current beneficiaries of each of the following:
 1. The name of the jurisdiction to which the principal place of administration is to be transferred.
 2. The address and telephone number at the new location at which the trustee can be contacted.
 3. An explanation of the reasons for the proposed transfer.
 4. The date on which the trustee expects the proposed transfer to occur.
- B. If the value of a trust's property is less than \$100,000 and the trustee determines the trust's value is insufficient to justify the cost of its administration, the trustee may terminate the trust early, without court involvement. R.C. § 5804.14(A)(1).
 1. Before doing so, however, the trustee must provide notice to the trust's qualified beneficiaries.
 2. Because of the Attorney General's role with respect to charitable trusts, this power is not available to trustees of charitable trusts described in R.C. § 5804.14(A)(2).
- C. The trustee may combine two or more trusts into a single trust, or divide a trust into two or more separate trusts, if doing so does not substantially

impair the rights of any beneficiary or have a materially adverse effect on the achievement of the purposes of the trust. The combination or division may be accomplished without court involvement, but only after the trustee gives notice to the trust's qualified beneficiaries. R.C. § 5804.17. The statute does not address what information the required notice must include.

- D. A trustee may resign, without court approval, if the trustee provides at least 30 days notice to the settlor, if living; the trust's qualified beneficiaries; and all cotrustees. R.C. § 5807.05.
- E. If a revocable trust has more than one settlor, and the trust is revoked or its terms amended by less than all of the settlors, the trustee is required to promptly notify the other settlors of the revocation or amendment. R.C. § 5806.02(B)(3).
- F. For a discussion of (i) the need for a beneficiary to give an "informed consent" for his or her release to be valid, and (ii) what information should be provided to a beneficiary to satisfy that requirement, see Daniel E. Ramer, *"Exit in an Orderly Fashion": Departing an Ohio Irrevocable Trust in the UTC Age*, 27 PROBATE LAW JOURNAL OF OHIO Issue 6 (July/Aug. 2017).

X. The Settlor's Ability to Override the OTC's Default Rules Imposing Information and Reporting Duties on the Trustee.

- A. Consistent with the fundamental principle of trust law that the settlor's intention should govern the trust and its administration, as a general rule the terms of the trust prevail over the OTC. R.C. § 5801.04(B).
 - 1. Note that the "terms of the trust" include "manifestation[s] 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." R.C. § 5801.01(V).
 - 2. Thus, "[o]ral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning." UTC § 103 cmt.
- B. R.C. § 5801.04(B), however, includes 14 mandatory rules the settlor cannot override in the trust's terms. Two of them are with respect to the trustee's duties to inform and report to beneficiaries.

1. First, subject to the beneficiary surrogate provisions discussed below, the settlor in the terms of the trust may not alter the trustee's duty "to notify current beneficiaries of an irrevocable trust who have attained twenty-five years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports." R.C. § 5801.04(B)(8).
2. Second, again subject to the beneficiary surrogate provisions discussed below, the settlor in the terms of the trust may not alter the trustee's duty "to respond to the request of a current beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust." R.C. § 5801.04(B)(9).
3. Thus, the settlor may, in the terms of the trust, relieve the trustee of (i) the affirmative duty to keep the current beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, and (ii) the affirmative duty to furnish current beneficiaries with trustee reports at least annually and at the termination of the trust.
4. Subject to the beneficiary surrogate provisions discussed below, the settlor may not, however, waive the trustee's duty to respond to the request of a current beneficiary for trustee's reports and other information reasonably related to the administration of the trust.
 - a. In *McHenry v. McHenry*, 2017 -Ohio- 1534, --- N.E.3d ----, 2017 WL 476308, (Ct. App. 5th Dist.), the settlor's two children, a son and a daughter, were the beneficiaries of the trust following the settlor's death, with the son named as trustee. Although the trust terms apparently specifically provided that he was not required to provide an accounting, the court noted the mandatory rule of R.C. § 5801.04(B)(9), under which a trustee must "respond to the request of a current beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust," and held that the trial court did not err in finding that the trustee providing his sister with cancelled checks and receipts fell below his duty under § 5801.04(B)(9) to respond to her request for reports and other information reasonably related to the administration of the trust.
 - b. In *Zimmerman v. Zirpolo Trust*, 2012-Ohio-346, 2012 WL 346657 (Ct. App. 5th Dist.), three minor great-grandchildren of the settlor were beneficiaries of the trust,

with their shares to be distributed to them when they reached specified ages. The terms of the trust included the following provision: “the Trustee shall use their best efforts to provide no information about the trust proceeds to the beneficiaries. It is my intention that the beneficiaries have no information about the proceeds until they are entitled to receive the proceeds.” Because of that provision, the trustee refused to comply with a request of the children’s mother, acting as their representative, for a copy of the trust instrument and trustee reports. Relying on R.C. § 5808.13(A) (which includes the default rule that the trustee must “respond to a beneficiary’s request for information related to the administration of the trust”), but without citing R.C. § 5801.04(B) for the mandatory rule that the settlor may not override the trustee’s duty to comply with § 5808.13(A), the court required the trustee to provide both a copy of the entire trust instrument and trustee reports.

5. Perhaps more importantly, again subject to the beneficiary surrogate provisions discussed below, the settlor cannot relieve the trustee of the duty to notify current beneficiaries who are at least 25 years of age of the existence of the trust, the identity of the trustee, and their right to request trustee’s reports.
 - a. Note that this does not necessarily mean information about the trust can be kept from a current beneficiary who is under 25 years of age. If the settlor waives the duty of the trustee to notify such a beneficiary that the trust exists, but the beneficiary otherwise learns of the trust and requests trustee reports or other information reasonably related to the administration of the trust, the trustee must respond, as its duty to do so cannot be overridden by the settlor in the trust’s terms. R.C. § 5801.04(B)(9); see UTC § 105 cmt.
 - b. Similarly, the trustee’s duty to provide a copy of the trust instrument to a beneficiary who requests it is not a mandatory rule and can thus be waived. Again, however, the settlor may not relieve the trustee of the duty to respond to the request of a current beneficiary for information reasonably related to the administration of the trust. Thus, if a current beneficiary requests a copy of the trust instrument, the trustee must provide it (regardless of the terms of the trust) unless for a current beneficiary, in a given situation, a copy of the entire trust instrument is not reasonably related to the administration of the trust.

- C. Under the OTC, a settlor who does not want the trustee to be required to provide any information to a current beneficiary may relieve the trustee of its otherwise applicable duties to do so by designating in the trust instrument one or more “beneficiary surrogates” to receive information the trustee otherwise would be required to furnish to the current beneficiary. R.C. § 5801.04(C).
1. A beneficiary surrogate may be anyone, including the settlor or the settlor’s spouse, other than a trustee. See R.C. § 5801.01(D).
 2. A beneficiary surrogate’s duty is to “act in good faith to protect the interests of the current beneficiaries for whom the notices, information, or reports are received.” R.C. § 5801.04(C).
 - a. The OTC does not otherwise address the duties and potential liabilities of a beneficiary surrogate, and the corresponding rights of a current beneficiary, with respect to the trustee reports, notices, and other information the beneficiary surrogate receives from the trustee.
 - b. Note that in addition to the many uncertainties raised by the beneficiary surrogate provisions, their ability to preclude a current beneficiary from receiving information about the trust is not absolute. For example, if distributions are made to or for the benefit of the beneficiary, federal law requires the trustee to furnish the beneficiary with a Schedule K-1 for the beneficiary’s use in preparing his or her income tax return. I.R.C. § 6034A (West 2007).
 3. Note also that the two-year statute of limitations under R.C. § 5810.05(A) on a beneficiary’s bringing an action against a trustee can be triggered not only by the trustee sending a report that adequately discloses the existence of the potential claim (and provides the required information on the time allowed for commencing a proceeding against a trustee) to the beneficiary, but also by such a report being sent to the beneficiary’s surrogate.
 4. For a discussion of many of the problems that might arise in administering a “secret trust” through reliance on the beneficiary surrogate provisions of R.C. § 5801.04(C), see Robert M. Brucken, *Can Trusts Really Be Secret*, 26 PROBATE LAW JOURNAL OF OHIO, Issue 1 (Sept./Oct. 2015).

XI. The Statute of Limitations for a Beneficiary's Claim against a Trustee.

- A. The OTC includes two statutes of limitations for actions by a beneficiary against a trustee for breach of duty.
- B. First, if the beneficiary (or the beneficiary's representative under Chapter 5803 or surrogate under R.C. § 5801.04(C)) is sent a report that adequately discloses the existence of a potential claim and informs the beneficiary, the beneficiary's representative, or the beneficiary's surrogate of the time allowed for commencing a proceeding against a trustee, the beneficiary has two years from the date the report was sent to bring an action. R.C. § 5810.05(A).
1. For this purpose, "[a] report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the representative of the beneficiary knows of the potential claim or should know of the existence of the potential claim." R.C. § 5810.05(B).
 2. Because the two year statute of limitations will not begin to run unless the beneficiary is informed of the time allowed for commencing a proceeding, as a matter of practice, trustees may want to include a statement to that effect with all reports sent to beneficiaries.
- C. Second, under R.C. § 5810.05(C), even if an adequate disclosure report is not sent to the beneficiary, an action by the beneficiary for breach must be commenced within four years of the first to occur of:
1. The removal, resignation, or death of the trustee.
 2. The termination of the beneficiary's interest in the trust.
 3. The termination of the trust.
 4. The time at which the beneficiary knew or should have known of the breach of trust.
- D. Note that under the four year statute of limitations:

It is possible under current Ohio law that the claim of a beneficiary could be barred before the beneficiary discovered the existence of that claim, or perhaps even that there was a trust of which he/she was a beneficiary. At least one lower court case, *Moulin et al v. Brown*, No. 209741, Stark Co. Prob. Ct (Feb. 22, 2011) (unreported), has confirmed this result.

Michael A. Ogline, *How Long Is Too Short? The Statute of Limitations For Breach of Trust*, 27 PROBATE LAW JOURNAL OF OHIO 161, 163 (Mar./Apr. 2017); see also Alan Newman, *You Don't Know What You've Got Till It's Gone: Time-Barred Claims under the Uniform Trust Code*, 48 REAL PROPERTY, TRUST, AND ESTATE LAW JOURNAL 459 (2014).

- E. Other principles of law or equity, including the doctrines of laches, unclean hands, estoppel, and waiver, also can bar claims. R.C. § 5810.05(D).
- F. A comment to the statute of limitations under the UTC (§ 1005) provides: “This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.” Presumably, such a tolling of the statute of limitations would be allowed in Ohio. In that regard, see R.C. § 5801.05 (“The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by Chapters 5801. to 5811. or another section of the Revised Code.”)
- G. For a discussion of the two and four year limitations periods under R.C. § 5810.05, in the context of a hypothetical fact pattern, see Steven L. Dauterman and Joanne E. Hindel, *Current Issues Under the Ohio Trust Code § 5808 – Trust Administration*, 25 PROBATE LAW JOURNAL OF OHIO Issue 2 (Nov./Dec. 2014).

XII. Remedies if Trustee Breaches Its Information and Reporting Duties.

- A. Any violation by the trustee of a duty owed to beneficiaries is a breach of trust. R.C. § 5810.01(A).
- B. The court has broad discretion in remedying a breach of trust. Under R.C. § 5810.01(B), available remedies include, among others:
 - 1. Compelling the trustee to perform its duties.
 - 2. Enjoining the trustee from committing a breach.
 - 3. Compelling the trustee to redress a breach by paying money, restoring property, or other means.
 - 4. Ordering the trustee to account.
 - 5. Removing the trustee, as provided in R.C. § 5807.06. A comment to UTC § 706 provides:

A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

- a. In *Dueck v. Clifton Club Company*, 2017 -Ohio- 7161, --- N.E.3d ----, 2017 WL 3432638 (Ct. App. 8th Dist.), also discussed on page 12, the court held that the trustee's refusal to provide trust-related documents to certain beneficiaries breached their duty to inform, report, and promptly respond. It declined, however, to remove the trustee, instead holding that the appropriate remedy was for trustees to compensate the beneficiaries for the reasonable costs of their attorney fees, costs, and expenses.
6. Reducing or denying compensation to the trustee.
7. Ordering any other appropriate relief.
8. For an interesting discussion of the possibility that, in a particular situation, a trustee might knowingly choose not to provide information and reports that are required to be provided by the OTC, see Robert M. Brucken, *Do We Shoot the Trustee?: Omitting Notices and Information Required by R.C. 5808.13*, 25 PROBATE LAW JOURNAL OF OHIO, Issue 5 (May/June 2015). Here is its introduction:

The Ohio Trust Code, specifically R.C. 5808.13, requires a trustee to give several notices and to provide certain information to the beneficiaries. We know that many trustees often do not give some or all of the required notices and provide only some or even none of the required information. What are the consequences to the trustee? Is he outlawed and subject to deportation or decapitation? In more modern civilized style, has he personally assumed liabilities, should he do so and what are his chances in court?

XIII. Probate Law Journal of Ohio Articles. The OTC's provisions on the duties of a trustee to inform and report to beneficiaries, including those limiting the settlor's ability to override the OTC's default duties, have been among its most controversial and are the subject of many Probate Law Journal of Ohio articles:

- A. Michael A. Ogline, *How Long Is Too Short? The Statute of Limitations For Breach of Trust*, 27 PROBATE LAW JOURNAL OF OHIO, Issue 4 (Mar./Apr. 2017).
- B. Robert M. Brucken, *Can Trusts Really Be Secret*, 26 PROBATE LAW JOURNAL OF OHIO, Issue 1 (Sept./Oct. 2015).
- C. Robert M. Brucken, *Do We Shoot the Trustee?: Omitting Notices and Information Required by R.C. 5808.13*, 25 PROBATE LAW JOURNAL OF OHIO, Issue 5 (May/June 2015).
- D. Joanne E. Hindel, Kerin Lyn Kaminski, and Franklin C. Malemud, *Differing Answers to Questions on Beneficiary Rights and Trustee Reporting: Summary of a Panel Discussion*, 24 PROBATE LAW JOURNAL OF OHIO, Issue 2 (Nov./Dec. 2013).
- E. Steven L. Dauterman and Joanne E. Hindel, *Current Issues Under the Ohio Trust Code § 5808 – Trust Administration*, 25 PROBATE LAW JOURNAL OF OHIO, Issue 2 (Nov./Dec. 2014).
- F. Alan Newman, *Zimmerman v. Zirpolo Trust: The Beneficiary's Right to Information*, 22 PROBATE LAW JOURNAL OF OHIO, Issue 5 (May/June 2012).
- G. Alan Newman, *The Trustee's Duty to Keep Beneficiaries Reasonably Informed*, 21 PROBATE LAW JOURNAL OF OHIO 17 (Sept./Oct. 2010).
- H. Joanne E. Hindel and Bernard L. Karr, "You Can't Please All the People All the Time": *Three Perspectives on the Trustee's Duty to Inform and Report*, 18 PROBATE LAW JOURNAL OF OHIO 191 (July/Aug. 2008).
- I. Joanne E. Hindel, *Ask But Don't Tell? The Continuing Controversy Over an Ohio Trustee's Duty to Inform and Report*, 18 PROBATE LAW JOURNAL OF OHIO 2 (Sept./Oct. 2007).
- J. Susan S. Locke and Veena Khanna, *Beneficiary Information and Notices*, 17 PROBATE LAW JOURNAL OF OHIO 5 (Sept./Oct. 2006).
- K. Michael A. Ogline, *Notice Provisions of the Ohio Uniform Trust Code*, 15 PROBATE LAW JOURNAL OF OHIO 119 (May/June 2005).

For a PLJO article comparing the OTC and the Florida Trust Code, including their provisions on the trustee's duties to inform and report, see David J. Simmons and Sue A. Sokolowski, *A Brief Review of Significant Differences Between the Ohio Trust Code and the Florida Trust Code*, 17 PROBATE LAW JOURNAL OF OHIO 131 (Mar./Apr. 2007).

