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REVITALIZING THE OHIO INCOME TAX RESIDENCY "BRIGHT LINE STATUTE" IN THE WAKE OF *CUNNINGHAM V. TESTA*

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INTRODUCTION

Before adopting Ohio Revised Code ("R.C.") section 5747.24, the "Bright Line Statute," Ohio nonresident taxpayers were in the same position as taxpayers in many other states, with controversies over whether one should be treated as a resident or nonresident for income tax purposes requiring a complex and fact-intensive analysis of one's domicile under common law standards. The Bright Line Statute was adopted in 1993 in hopes of streamlining that analysis by offering an irrebuttable presumption of non-Ohio domicile if an individual met certain requirements. However the Bright Line Statute was amended in 2006, and that amendment fundamentally changed its operation by requiring an annual filing, and allowing the Tax Commissioner to reverse the presumption by challenging the veracity of the filing. Before the recent Ohio Supreme Court decision in *Cunningham v. Testa*,[1] many practitioners believed the Tax Commissioner could only challenge the filing on the basis of three facts required by the statute. Because the Supreme Court's ruling in *Cunningham* allows the Tax Commissioner to challenge the truthfulness of any fact in the filing, and because the *Cunningham* decision did not place limitations on the Tax Commissioner's power to add requirements to the filing, the usefulness of the Bright Line Statute in providing efficiency to the tax system and certainty to taxpayers has been seriously compromised.

Legislation is necessary to return the Bright Line Statute to the understanding many practitioners held before this decision. The

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later than one month after the approval of that inventory. Failure of the surviving spouse to file such application as to the personal property or a petition as to the real property within such time nullifies the surviving spouse's rights thereunder. This is another example of the exception in R.C. 2106.25 as to the five-month limitation, i.e., "unless otherwise provided."

Under R.C. 2106.18, the interest of the deceased spouse in up to two automobiles may be selected by the surviving spouse, so long as the titles thereto have not been otherwise transferred as provided in Subdivision (A). There is no statutory time limit therein except when under Subdivision (B)(1), the surviving spouse purchases an automobile under R.C. 2106.16.

R.C. 2106.20 provides that a surviving spouse is entitled to a reimbursement from the decedent's estate for funeral and burial expenses, so long as the rights of other creditors of the estate will not be prejudiced by such reimbursement. This statute states that the spouse is "entitled" and not has a "right" to be reimbursed therefor - does this mean that the surviving spouse does not have to request or exercise the right to be reimbursed for such expenses within the five-month limitation period in R.C. 2106.25?

Under R.C. 2106.22, an action to set aside an antenuptial or separation agreement to which a decedent was a party must be commenced within four months after the appointment of the executor or administrator of the decedent's estate, or unless within such four-month period, the validity thereof is otherwise attacked. This is another example of the exception to the five-month limitation period in R.C. 2106.25.

Lastly, it appears that R.C. 2106.24, a "catch all" provision, provides for rights of a surviving spouse of a decedent who died testate or intestate as prescribed in other R.C. Chapters including, but not limited to, dower rights in R.C. Chapters 2103 and 5305.

INTERACTING WITH CO-TRUSTEES AND OTHER THIRD PARTY DECISION MAKERS: PLANNING AND ADMINISTRATION PERSPECTIVES

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While the use of co-trustees in trust creation and administration is not new, the emergence of other third party decision makers is a relatively new phenomenon.

Settlors are increasingly more sophisticated and wish to use multiple individuals in the management of their trusts. In addition, state laws have been enacted which allow for the bifurcation of trustee duties among multiple individuals.

However, the duties of third party decision makers are often not clear. Trust terms may not clearly identify duties between co-fiduciaries even when all serve as trustees. Further, even when trust terms are clear, the practice among the parties may not follow trust terms and obscure the roles and responsibilities of all decision makers.

In September 2015, a trust officers' conference was held in Louisville, Kentucky attended by all Fifth Third Bank trust officers and portfolio managers. A number of law firms, including Dinsmore & Shohl LLP, made presentations to the attendees. In one of those presentations a panel of practicing attorneys from Dinsmore (licensed in Ohio and Kentucky) and trust representatives from Fifth Third Bank discussed some scenarios highlighting the interaction of co-trustees and other third party decision makers and the complications that may arise.

This article is a summary of that panel presentation.

WORKING WITH CO-TRUSTEES

Both Ohio and Kentucky have adopted versions of the Uniform Trust Code (Ohio in 2007 and Kentucky in 2014). Each state has a specific statute addressing the interaction among co-trustees. Kentucky's statute (KRS 386B.7-030) is identical to the UTC and provides the following general rules:

1. A majority of co-trustees may act rejecting the common law requirement of unanimity among multiple trustees
2. Generally all trustees must participate in trustee functions, however
3. If one is unable to act, the others can still act without participation from the absent co-trustee
4. Co-trustees cannot delegate functions to each other that the settlor may have expected them to perform together
5. Each co-trustee is expected to prevent any other from committing a serious breach of trust and to compel any one that has committed a breach of trust to redress the breach
6. Dissenting co-trustees will not be held liable for the actions of the others unless those actions constitute a serious breach of trust

Ohio (O.R.C. 5807.03) chose to alter the UTC provisions in two significant ways:

1. Co-trustees may delegate functions to each other as long as the delegation is prudent and follows the general delegation rules found in R.C. 5808.07 (pertaining to delegation to agents)
2. Co-trustees will not be held liable for the actions of others if that co-trustee is excluded from the action by application of R.C. 5815.25 or if the other co-trustees act by majority vote.

While the statutes set forth the general guidelines pertaining to interaction among co-trustees, in practice, the division of responsibility regarding trustee duties may be unclear and the accountability of each co-trustee may be uncertain. Further, obtaining consent may be difficult or time-consuming and deadlocks can occur in decision making which can adversely impact trust administration.

The following scenario demonstrates some of these problems.

"FINGER LICKIN GOOD"

Lowell Armstrong established "Mom's Soul Food" a fast food chain of southern fried food. The company expanded considerably while Lowell ran the business and eventually, he transferred majority ownership in the company to his son, Sam. As a part of his estate planning, Lowell executed an irrevocable life insurance trust which held insurance on his life. When he died, the trust received the insurance proceeds and they were held for the benefit of Sam and his two minor children.

Lowell had decided to name his son, Sam and a corporate fiduciary as co-trustees. The trust terms provided for discretionary distributions of income and principal "to or for the benefit of the primary beneficiary (Sam) and his descendants as the trustees deem appropriate, taking into consideration the potential needs, best interests and welfare of the beneficiaries."

After Lowell died, Sam continued to run the company and owned 75% of the business. The company was facing the payment of a sizeable loan and Sam approached the corporate co-trustee of the irrevocable trust established by his father for the funds. He explained that he needed all the funds held in the trust to cover the company debt and reasoned that payment of the debt would be in the best interests and welfare of his family. His rationale was that the unpaid debt might force the company into bankruptcy which would impact his ability to provide for his family.

The panelists discussed the following issues:

From the planning perspective:

How common is it that settlors want to designate two or more co-trustees where one co-trustee is an individual and another is a corporate entity?

Wayne Wilson:

In the planning stages, it is very common to discuss the utilization of co-trustees. More often than not, if a settlor is considering co-trustees, one of them will be a corporate trustee because corporate trustees can offer a unique platform not available to an individual trustee (fiduciary accounting software, investment expertise, etc.). On the other hand, a settlor may want someone with knowledge of the family to be involved with the trust as well. Utilizing individual and corporate co-trustees can provide a comforting balance to a settlor. Unfortunately, as the example above demonstrates, nominating co-trustees has risks that trust settlors often don't foresee. One solution to solve possible conflicts between co-trustees is to insert a provision that gives one of the co-trustees, often the individual co-trustee, the authority to direct the other co-trustee in the event of a disagreement between the two of them. It is common for trust documents to absolve the dissenting co-trustee of any liability after a disagreement has been resolved in this fashion. Once a trust is funded, the best way to prevent future finger pointing between the co-trustees is to establish a clear delineation of duties. It may develop that 90% of the administrative burden will fall on the corporate co-trustee. It is also possible that an individual nominated as a co-trustee may decline to serve once he or she gains a full appreciation for the burdens of the position. In any event, once the administrative responsibilities have been agreed upon by the co-trustees, they should be reduced to writing for future reference.

How often is the individual co-trustee also a trust beneficiary?

Wayne Wilson:

It is very common for the individual co-trustee to also be a beneficiary of the trust. In blended families where trusts are utilized to ensure that the settlor's assets will be inherited by the settlor's children, sometimes a settlor will name a surviving spouse as a co-trustee (especially if there is no prenuptial agreement) so he or she can feel involved in the management of the trust assets. If a trust is going to hold an interest in a closely held business, in addition to a portfolio of listed securities, a settlor may name a beneficiary who is also running the business as a co-trustee. Finally, a settlor may feel that naming the beneficiary as a co-trustee with a corporate trustee will prevent resentment by the beneficiary for the establishment of the trust in the first place. Unfortunately, all three of these examples also illustrate that the best intentions of the settlor, who will not be around to keep the peace, can yield a combustible situation that will ignite the moment the beneficiaries feel the individual co-trustee is not acting impartially toward them.

How do Ohio and Kentucky law differ regarding the ability of one co-trustee to direct another co-trustee in certain trustee actions?

Jill Scherff:

In Ohio, a trustee may delegate duties and powers that a prudent trustee having comparable skills could properly delegate under the circumstances.[1] *In a case involving an individual trustee with little or no investment experience and a corporate trustee serving as co-trustees, the individual trustee may delegate the investment of the trust assets to the corporate trustee. If three co-trustees are serving and one co-trustee does not agree to a proposed action, the dissenting co-trustee has no liability for the decision of the other two co-trustees and may have no duty to prevent the other co-trustees from committing a breach of trust if specifically excluded from participating in the decision by the trust terms.*[2]

In Kentucky, co-trustees may not delegate functions that the settlor may have expected them to perform together.[3] *In the case of an individual and a corporate trustee serving as co-trustees, without some direction on the part of the settlor it is not clear that the individual trustee could delegate the investment of the trust assets to the corporate trustee. As in Ohio, the general rule in Kentucky is that if three co-trustees are serving and one co-trustee does not agree to a proposed action, that dissenting trustee has no liability for the decision made by the other co-trustees. However, if the dissenting trustee believes that the action of the majority of the co-trustees will constitute a serious breach of trust, the trustee must exercise reasonable care to prevent the co-trustees from committing a breach of trust and compel the co-trustees to redress a breach of trust even when trust terms specifically exclude that co-trustee from participation.*[4]

From the administration perspective:

Should or can the corporate co-trustee exclude the individual co-trustee from making the decision regarding the loan since the individual co-trustee will benefit from distribution of the trust funds?

Katerina Mills:

Here, Lowell named his son Sam and a corporate fiduciary as co-trustees of his Irrevocable Life Insur-

ance Trust ("ILIT"). Accordingly it is Lowell's intent to have both an individual trustee and corporate trustee make all decisions with regards to the administration of the ILIT. Under the ILIT terms, Sam as the primary beneficiary is entitled to discretionary distributions of income and principal, as the trustees deem appropriate, for his "potential needs, best interest and welfare." The terms of this dispositive provision provide broad discretion to the trustees with respect to income and principal distributions. Lowell has provided the trustees with broad language thereby permitting the trustees to use their discretion to care for Sam's "best interest," typically treated as a subjective standard. Sam's position is that as a beneficiary he is entitled to distributions for his best interest and for the best interest of his children, and therefore paying off the company loan is in their collective best interests.

Sam argues that making the distribution to pay off the loan for Mom's Soul Food will prevent the company from having to file bankruptcy allowing him to provide for himself and his minor children. However, because Sam is both a beneficiary and co-trustee an inherent conflict exists between these two roles which can compromise his neutrality. The corporate trustee may therefore seek guidance under the Ohio Trust Code in deciding whether it should permit Sam to participate in the decision to make a large, trust terminating distribution to cover the debt owed by the company. Pursuant to Ohio law[5]*, since Sam is both a beneficiary and trustee (but not the settlor) when a discretionary distribution is being made for his personal benefit; he may participate in the exercise of his discretionary power, but only in accordance with an ascertainable standard. An example of the most universally used ascertainable standard is the "HEMS" standard which stands for health, education, maintenance and support*[6]*. By using an ascertainable standard the trustees are given parameters within which to guide their decision making. Accordingly if Sam is included in the decision of whether to make the distribution regarding the loan, the applicable standard for making the decision will be a substituted ascertainable standard like HEMS, and not the standard as written in the trust.*

Are the interests of the individual co-trustee as beneficiary of the trust synonymous with the interests of his two minor children?

Wayne Wilson:

Probably, Sam's interests are in conflict with his two minor children. The language of the trust appears to name Sam as the "primary beneficiary" which would seem to subordinate the interests of the minor children to Sam's interests. But that certainly doesn't diminish the co-trustee's fiduciary obligations to the minor children. Furthermore, the language of the trust also gives the co-trustees the discretion to distribute between Sam and the minor children after taking into consideration the potential needs, best interests and welfare of the beneficiaries. By referring to all three of them as a single class of "beneficiaries" relying on the language identifying Sam as the "primary" beneficiary becomes problematic.

One possible mitigating factor would be if the minor children, or a trust for their benefit, owned the other 25% of the distressed company. In that instance, bailing out the company could benefit both classes of beneficiaries.

Does it make a difference that the funds will be used to pay off a loan to the company not a personal loan incurred by the individual co-trustee/beneficiary?

Katerina Mills:

The short answer is yes it does make a difference. Pursuant to Ohio law[7]*, Sam and the corporate trustee are required to administer the trusts solely in the interests of the beneficiaries and because there are multiple beneficiaries, Sam and the corporate trustee shall act impartially in distributing trust property giving due regard to the interests of the respective beneficiaries. Here, Lowell, as settlor, named Sam as the primary beneficiary and Sam's children as secondary. Yet, both Sam and his children are current beneficiaries under Ohio law*[8]* since they are distributees or permissible distributees of trust income and principal. Under the facts, the request that Sam has made is not to pay off a personal loan, rather he is asking that the trustees use the ILIT's funds to pay off a loan owed by Mom's Soul Food. Importantly, Sam only owns 75% of Mom's Soul Food. In evaluating the request it would be significant to identify who the other 25% shareholders of Mom's Soul Food are. If they are Sam's children or trusts established for their benefit then that could provide additional credence when deciding whether the distribution is for the benefit of the beneficiaries. In addition, Sam is telling the corporate trustee that if this debt is not paid it could force the company into bankruptcy thereby affecting his ability to provide for his family. The trustee would nevertheless have to look at all of the facts and circumstances to decide whether the payment of Mom's Soul Food is an action in the best interest of the beneficiaries.*

What are the arguments for and against using all trust funds to cover the company debt?

Wayne Wilson:

As noted above, if the minor children had a direct or indirect interest in the 25% of the distressed company Sam does not own, their interests could align and an *argument could be made for depleting the trust assets to cover company debt. Another argument in favor of using trust funds to cover company debt is the fact that Sam's children are minors, and in theory they will benefit from any action which benefits Sam.*

Clearly, the strongest argument against using all trust funds to cover the company debt is that it may leave the trust beneficiaries without any means of support if the company cannot survive even after its current debts are retired.

THIRD PARTY DECISION MAKERS

Third party decision makers may be referred to in a variety of ways: trust advisor; investment advisor; distribution advisor or trust protector. The authority given to these third parties varies and may not always be clear.

The authority (powers) given to third parties falls into three general categories:

1. Powers that would otherwise be exercised by the trustee (inherent trustee powers).
2. Powers that a settlor, beneficiary or trustee would not normally have but which have been given to them in the trust terms with no adverse tax effect.
3. Powers that would normally be exercised by a court because of potential adverse tax effect if held by the settlor, beneficiary or trustee.

While all states have laws addressing the duties of trustees and co-trustees, the laws regarding the authority of other third party decision makers vary significantly.

Kentucky, which has adopted its version of the Uniform Trust Code, follows UTC Section 808.

Section KRS 386B.8-080 provides that a trustee "shall act in accordance with an exercise of a power granted to a third party by the trust terms *unless the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.*"

By contrast, Ohio's O.R.C. 5808.08 does not follow UTC Section 808 and provides: "As provided in section 5815.25 of the Revised Code, a trustee is not liable for losses resulting from certain actions or failures to act when other persons are granted certain powers with respect to administration of the trust."

The key distinction between these two statutes is the fact that Kentucky's statute (and that of the UTC) continues to impose an oversight obligation on the trustee to monitor the actions of the third party decision maker to ensure that exercise of a power will not constitute a breach of fiduciary duty by that third party.

Ohio does not impose any oversight obligation on the trustee—if the trust terms exclude the trustee from decision making with respect to some matter and confer that authority on another, the trustee is only responsible for following the directives of the third party and is not responsible for evaluating whether the actions being undertaken by the third party constitute a breach of fiduciary duty.

While UTC 808 (and the state statute versions of it) only addresses the ability of a third party to direct the trustee, trust provisions often confer additional types of authority on third parties.

Third parties might not hold the authority to direct but might have the ability to approve or deny trustee recommended actions. Third parties might also serve in a consultative capacity but hold no authority to impact trustee actions.

The trust terms are critical—

1. If the trustee's authority is supplanted by the third party, it is important to ensure that no lingering responsibility exists for the trustee to monitor or review the actions of the third party.
2. If the trustee's authority is supplemented, it is important to understand the obligations imposed upon the trustee to obtain third party consent.
3. In either case, it is important to understand trustee duties when the third party is unavailable or unresponsive.

Trust protectors are generally third parties that hold powers a trustee does not possess such as the ability to remove the trustee, amend trust terms or change beneficiaries. Trust protectors may also hold the power to terminate a trust.

The authority of third parties might be further complicated if someone holds multiple roles with respect to the administration of the trust. For instance, a beneficiary may also serve as a co-trustee and might also be an investment advisor with respect to a particular holding in the trust.

The trust terms are critical—trustees must have a clear understanding of the scope and authority of the third party decision maker and must be able to recognize when, if at all, trustee action is involved.

The following scenario demonstrates some of these problems.

"WILL JOHN HANDLE THE INVESTMENTS?"

Paul established a trust that continued for the lives of his three children after his death. In addition to being current beneficiaries of the trust, the three children are nominated as members of an Advisory Committee with the authority to direct the trustee with respect to investments of the trust.

The trust terms further provide that: "the written consent or ratification of the Advisory Committee shall have the same force and effect as a written direction. The trustee shall not be liable for any act done upon the direction or with the consent or ratification of the Advisory Committee."

In addition, the trust terms authorize the Advisory Committee to "delegate their powers of sale and investment of trust assets to any person selected by the Advisory Committee as Investment Advisor. Upon direction of the Advisory Committee the trustee shall enter into and execute agreements approved by the Advisory Committee for the employment of the Investment Advisor."

The Advisory Committee sends a letter to the trustee which states: "We hereby direct the trustee to enter into an agreement to employ John to provide investment services to the above trust."

The trustee receives the letter and wonders: Is he or isn't he the Investment Advisor for the trust?

From the planning perspective

Is it clear from the trust terms that the Advisory Committee serves to the exclusion of the trustee? If not, how could this be made clearer?

Lee Stautberg:

No. It is not clear that the Advisory Committee has the sole duty with respect to the investments of the trust. The trust terms provide that the Advisory Committee has the authority to direct the trustee with respect to investments of the trust, but it also provides that "written consent or ratification" has the same effect as a written direction. This is problematic for two reasons. First, the "written consent" language implies that the trustee has a duty to make a recommendation regarding the investment of assets that the Advisory Committee could then veto or approve. Second, the word "ratification" allows the trustee to take an action and after the fact, get the Advisory Committee's ratification of the action already taken. This language does not clearly state that the trustee is acting at the direction of the Advisory Committee. Instead, it appears that the trustee's authority is supplemented by the Advisory Committee and not truly supplanted, so the trustee retains liability for investment decisions.

Instead, the trust terms would be clearer if the language stated that the "Advisory Committee will direct the trustee regarding all aspects of the investment of the trust assets. This shall include, but not be limited to, the management, sale, purchase, and retention of investments and the engagement or termination of investment advisors. Further, the trustee will have no duty regarding the investment of the trust assets or to monitor the Advisory Committee or any other party with respect to performance of the investments."

Is there any provision in the trust terms addressing inaction by the Committee members and duties of the trustee?

Lee Stautberg:

If the Advisory Committee's authority supplements the trustee's authority (as in the example above), the trustee is benefited by the trust document stating the length of time that the Advisory Committee should be given to approve or disapprove trustee recommendation, and setting forth the consequences of the Advisory Committee's inaction (such as allowing the trustee to proceed without the advice or consent of the Advisory Committee).

On the other hand, if the trustee's authority is supplanted by the Advisory Committee such that the Advisory Committee directs the trustee with respect to all aspects of the investment of trust assets (which is *not the example above), then under the Ohio Revised Code there is no apparent need to address the Advisory Committee's inaction because the trustee does not have a duty concerning the investment assets.*[9] *However, there will be some tension if the Advisory Committee's inaction is impairing or could potentially lead to the impairment of the trust's assets.*[10] *In those circumstances, the trustee may seek to address the Advisory Committee's inaction by amending the trust through a private settlement agreement or court modification so that the members who are not performing their duties could be removed or replaced. Another option would be for the trustee to petition the Probate Court to direct the trustee to act in preservation of the trust assets.*

Jill Scherff:

In Kentucky, the trustee retains the responsibility for making sure that the Advisory Committee's actions do not constitute a breach of fiduciary duty, so the trustee would be required to ensure that the Advisory Committee acts within a reasonable time frame to prevent a breach of trust.

How long must the trustee wait for a directive from the Advisory Committee?

Lee Stautberg:

In this case, the trustee's authority is merely supplemented by the authority of the Advisory Committee. The trust language indicates that the trustee will be expected to continue to make recommendations to the Advisory Committee for their consent. Accordingly, the trustee retains responsibility over the investment of the trust assets and should not wait for direction from the Advisory Committee.

If the trustee chooses to make an investment recommendation, how long must it wait until the Advisory Committee acts?

Lee Stautberg:

Under Ohio law, a trustee is required to take reasonable steps to take control of and protect the trust property.[11] *In this example, because the trustee's authority is supplemented (and not supplanted), the trustee would be required to take such actions as are necessary under the facts and circumstances to protect the trust property.*

Jill Scherff:

In addition, in Kentucky, if the trustee thinks that the recommended action must be taken to prevent a breach of its fiduciary duties, the trustee should take the necessary action to protect the trust property in a timely manner.

From the administration perspective:

The trustee has been given a letter from the Advisory Committee. Does the letter clearly provide that the Advisory Committee intends to delegate its authority over investments to John?

Katerina Mills:

No, it is not clear from the letter that the Advisory Committee intends to delegate any of its authority to John. The letter is vague and merely states that the Advisory Committee is directing the trustee to "enter into an agreement to employ John to provide investment services to the above trust." The letter provides no evidence of the Advisory Committee's intent to hand over all of the investment authority and responsibility to John. Further, the direction letter is purely asking the trustee to "enter into a contract with John," the terms, conditions and services to be provided by John are unknown. Although the trust terms provide that the Advisory Committee may delegate their power of investments of trust assets, it is unclear as to whether the Advisory Committee or the trustee is responsible for trust investments. The trustee needs to first determine whether the Advisory Committee supplants its investment authority or supplements it. Should the trustee take a conservative approach and treat the Advisory Committee's authority as supplemental, the trustee would therefore retain responsibility and liability for investment decisions and should thereby take an active role is reviewing all aspects of the engagement of John for investment services.

Does the letter clearly state that John will serve as Investment Advisor?

Katerina Mills:

No, the letter is vague and does not clearly state whether John will serve as Investment Advisor. The letter directs the Trustee to employ John to provide investment services but it does not describe what those services would be. John's duties and responsibilities would instead be included in the investment services agreement entered into by John and the Trustee. The trust terms do give the Advisory Committee authority to employ an Investment Advisor, but what is unclear in the terms is who is ultimately responsible for the investments of the trust as stated above. It would therefore be prudent for the trustee to take a conservative approach and treat the Advisory Committee's authority as supplemental to its own and therefore actively participate in the employment of John. The trustee under Ohio law could delegate its investment authority to John, however under Ohio law the trustee would have to act reasonably in employing John by running diligence on John, establishing the scope and terms of the delegation as well as periodically review his performance and compliance with the terms of the delegation.[12]

Should the Advisory Committee disagree with this approach, then the trustee may want to consider seek-

ing court direction through a petition or declaratory judgment action clarifying the role, duties and responsibilities of the Advisory Committee, as well as who is ultimately responsible for the investment decisions. An alternative to going to court may be for the trustee to enter into a private settlement agreement with the beneficiaries of the trust. Under Ohio law, a trustee and the beneficiaries may enter into an agreement with respect to any matter concerning the construction of, administration of or distribution under the terms of the trust, the investment of income or principal held by the trustee or other matters.[13] *Here, the trustee will want to evaluate all the facts and circumstancse to determine if a private settlement agreement could be used.*

Does the letter address trustee duties in the event John does not act or does not act promptly?

Katerina Mills:

Again, because the letter is so vague, it does not address the trustee's duties in the event John does not act at all or act promptly. Likewise, the contract for investment services may not necessarily address that issue either. Communication is key in these types of situations. It would be imperative for the trustee and the Advisory Committee to be clear on who is responsible for what pursuant to the trust terms. The trustee may want to set up a meeting with the members of the Advisory Committee to discuss what their intent is with employing John for investment services, who would be responsible should John become unavailable to act promptly and who is ultimately liable for the investment decisions of the trust. In order to accomplish this the trustee should consider seeking court direction with respect to the Advisory Committee's role under the trust terms as well as clarify who is ultimately responsible for the investment decisions of the trust. In the alternative, the trustee could consider a private settlement agreement with the beneficiaries.

Does the letter indicate whether John can direct investments or approve recommendations made by the trustee?

Katerina Mills:

It is unclear from the letter what exactly John would be doing since "investment services" is so broad. Would he be acting as the Investment Advisor making all the investment decisions or would he be acting as more of a consultant advising the trustee? Here the question implies that the Advisory Committee is trying to delegate its authority under the trust to John, which they may do pursuant to the trust terms. But because the trust terms are vague as to whether the trustee's investment authority is merely supplemented or actually supplanted by the Advisory Committee, again it would be prudent for the trustee to either enter into a private settlement agreement with the beneficiaries to clarify the Advisory Committee's role or, alternatively the trustee may file a petition or declaratory judgment action with the court.

CONCLUSION

These two scenarios highlight the importance of clarifying the roles of multiple fiduciaries within the terms of the trust agreement. While state statutes may provide some guidance, identifying settlor intent and establishing clear delineation of fiduciary duties demonstrate best practices in drafting of trusts and ensure best practices in trust administration.

ENDNOTES:

[1]R.C. § 5807.03 (E)
[2]R.C. §§ 5807.03 (G); (H)
[3]KRS § 386B.7-030(5)
[4]KRS § 386B.7-030 (7): (8)
[5]R.C. § 5808.14(B)
[6]IRC § 2041(b)(1)(A)
[7]R.C. §§ 5808.02 and 5808.03
[8]R.C. § 5801.01(F)
[9]R.C. § 5815.25(C)
[10]R.C. § 5808.06
[11]R.C. § 5808.09
[12]R.C. § 5808.07(A)
[13]R.C. § 5801.10

PLANNING WITH BENEFICIARY DESIGNATIONS

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This article is adapted from material presented at the Cleveland Metropolitan Bar Association's Estate Planning Institute and is intended to provide practitioners with topics to remember when planning with beneficiary designations for the following assets: bank accounts, automobiles and watercraft, real estate, securities, life insurance and annuities, and retirement accounts.

I. THE IMPORTANCE OF "WILL SUBSTITUTES"

A will only controls your clients' probate property; therefore effectively utilizing "will substitutes" in a

