

amount and distribute it to the beneficiary surviving spouse.

A proposed amendment to § 505 of the U.P.A.I.A. is intended to address potential problems generated when certain pass-through entities do not distribute all of their net income. The general rule is that taxes stemming from income items should be paid from income, and taxes from principal items, such as capital gains, should be paid from principal.<sup>10</sup> The proposed amendment permits taxes to be paid from principal to the extent that the taxes exceed total receipts from the entity. The amendment also permits a subsequent adjustment to be made in order to take into account the income distribution deduction. The examples to the proposed amendment demonstrate how convoluted and unwieldy its operation would be.

## OTHER ISSUES

Other aspects of the Columbus presentation included a focus on the notion that a trust is not a legal entity, but rather the trustee is the legal entity. Also, both the Uniform Prudent Investor Act and the Uniform Principal and Income Act are default rules; they may be altered by the express provisions of a document.<sup>11</sup> Because you may have inadvertently waived these statutes, it is very important that you review the boilerplate contained in your trust agreements. A waiver of a duty of loyalty is not the same thing as a waiver of the duty to diversify.

The segment concluded with a review of many discussion questions. The last one to be addressed was: “Is it legal in the State of Ohio for a man to marry his widow’s sister?” The answer, of course, is that it is not legal. If the man has a widow, then he is a corpse.

## ENDNOTES:

<sup>1</sup>R.C. 5810.01.

<sup>2</sup>R.C. 5810.03.

<sup>3</sup>R.C. 5810.04.

<sup>4</sup>*Thompson v. Butler*, 2013-Ohio-1075, 2013 WL 1189421 (Ohio Ct. App. 2d Dist. Montgomery County 2013).

<sup>5</sup>R.C. 5810.05(C).

<sup>6</sup>R.C. 5810.05(A).

<sup>7</sup> R.C. 2101.24(A)(1)(e), 2101(B)(1)(b), 5802.03.

<sup>8</sup>R.C. 5808.13.

<sup>9</sup>R.C. 5812.03.

<sup>10</sup>R.C. 5812.46.

<sup>11</sup>See, for example, R.C. 5809.01(c) and 5812.02(A)(1).

## “SHOW ME THE MONEY!”— TERMINATING IRREVOCABLE TRUSTS IN OHIO

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“Show me the money!” - Cuba Gooding, Jr. as Rod Tidwell in *Jerry Maguire*;

“Show me the money!” - Lots of trust beneficiaries.

In the early 2000s, the estate-planning world changed significantly. As recently as 2001, the federal estate-tax exemption was only \$675,000 with a top rate of 55%. Factor in an Ohio estate tax that had a very low threshold, and many people faced an estate-tax problem at death.

For decades, A/B trust plans had been the answer for couples trying to manage the impact of the federal estate tax. Those with

greater wealth employed strategies like irrevocable life-insurance trusts (ILITs) to shield additional value from the federal estate tax and provide liquidity that was so often needed to pay the tax man.

In 2006, the federal estate-tax exemption hit \$2 million, nearly a threefold increase from 2001. Estate-planning practitioners still employed the same solutions, but the number of people with estate-tax exposure began to decline.

By 2009, the federal estate-tax exemption reached \$3.5 million, more than five times the exemption in 2001. Further, the financial crisis of 2007-2008 meant that, while the estate-tax exemption climbed, the nation's overall economic output and household income had decreased significantly and would continue to decline.

When the dust of uncertainty had settled in 2011, the federal estate tax had been transformed from a tax on the middle class to a tax on the truly wealthy. Relatively few people needed estate-tax planning going forward. But there was lurking a new problem: needless irrevocable trusts.

Those credit-shelter trusts and ILITs that taxpayers embraced for years no longer had a purpose for an increasing number of taxpayers. With sky-high estate-tax exemptions, the need for estate-tax savings and liquidity to pay the tax bill had passed. What remains are irrevocable trusts that satisfy those former objectives. Their existence is costly.

There are many reasons why those irrevocable trusts are costly. Besides administrative fees, assets tied up in irrevocable trusts cannot benefit from the potential step-up in basis at death applicable if the assets were owned outright. Trustees now find themselves bound by restrictive tax-driven distribution standards that no longer serve a practical purpose (like Ohio's many QTIPable credit-shelter trusts or

trust designed to shelter the former Ohio credit). These and other costs have beneficiaries screaming, "Show me the money!"

For some of those costly trusts, termination is an option. This article will examine several methods for terminating trusts in Ohio, including court-ordered termination, termination by private settlement agreement, and termination by discretionary distribution. The article will then address important issues to consider when exploring trust termination. Finally, the appendix provides example forms for termination.

## I. COURT-ORDERED TERMINATIONS

The Ohio Trust Code became effective on January 1, 2007 and, with it, the provisions for court-ordered termination in Chapter 5804. Pursuant to R.C. 5801.04(B)(4), the terms of a trust will not prevent a court, under R.C. 5804.10 through 5804.16, from terminating or modifying it. Courts, depending on the circumstances, may use a number of the sections in Chapter 5804 to terminate an irrevocable trust.

### A. 5804.10: Termination of Trust by Revocation or by Terms

Under R.C. 5804.10(A), a trust may be terminated to the extent that a court finds that:

1. It is revoked or expired pursuant to its terms;
2. There is no remaining purpose of the trust to be achieved; or
3. That the purpose of the trust has become unlawful or impossible.<sup>1</sup>Note that neither the settlor's nor the beneficiaries' consent is required for a court to terminate a trust pursuant to this section. R.C. 5804.10(B) sets forth who has standing to request that a court terminate a trust. A trustee or beneficiary has standing to commence a proceeding for termi-

nation of a trust under R.C. 5804.10 through 5804.16. A settlor of a trust, by contrast, may only commence a judicial proceeding to terminate the trust under R.C. 5804.11.<sup>2</sup>

#### B. 5804.11: Termination or Modification of Noncharitable Irrevocable Trust

R.C. 5804.11 authorizes the termination of an irrevocable trust by an agreement, authorized by the court, with the consent of the settlor and all of the beneficiaries. The trustee's consent, however, is not necessary for terminating a trust pursuant to this section. This prerequisite of court approval was originally put into place to alleviate concerns that this rule might cause federal estate tax consequences.<sup>3</sup> While the court's approval is required, if all of the consents are valid and all of the parties giving such consent are competent, then the court must issue an order to terminate the trust. This is true even if such termination is inconsistent with the trust's material purpose.<sup>4</sup>

A settlor's agent may authorize the termination of a trust under this section through a power of attorney, but only if it is expressly authorized by both the power of attorney and the terms of the trust. If the agent is not expressly authorized to consent to a termination, then the guardian of the settlor's estate may consent with the approval of the court supervising the guardianship.<sup>5</sup> If the agent is not authorized and there is no guardian of the estate, then the guardian of the settlor's person may consent with approval of the supervising court. This section, however, may not be used to terminate a self-settled special needs trust.<sup>6</sup>

Obtaining the consent of all beneficiaries is difficult for multi-generational trusts, so R.C. 5804.11 allows representatives, acting under R.C. Chapter 5803, to consent for beneficiaries that are unborn or not competent. If there is no conflict of interest, the following representa-

tives can consent on a beneficiary's behalf pursuant to R.C. 5803.03:

1. A holder of a general testamentary power of appointment when the interests are subject to that power;<sup>7</sup>
2. The guardian of the person and/or estate;<sup>8</sup>
3. An agent having authority to act with regard to a particular question or dispute;
4. The trustee of a trust;
5. The personal representative of a decedent's estate;
6. Parents of minor and unborn children,<sup>9</sup> and
7. Unless otherwise represented a minor, an incapacitated person, an unborn person, or a person whose identity or location is unknown and cannot reasonably be obtained may be represented by someone with a substantially identical interest.<sup>10</sup>

In cases where the settlor either cannot or will not give consent, the court may still allow termination of the trust with the consent of all of the beneficiaries under R.C. 5804.11(B), but only if it determines the trust's continuance is not necessary to achieve a material purpose. Determining what constitutes a material purpose is subjective, and there is little case law on this point.<sup>11</sup> In a case of first impression, an appeals court in *Vaughn v. Huntington Bank*, 209 Ohio 598, in deciding whether to terminate a trust under 5804.11(B), looked to the Uniform Trust Code comments which state that no material purpose does not mean that trust, has no remaining function.<sup>12</sup> The *Vaughn* court, in determining that, to be material, the remaining purpose must be significant, quoted the official comment to UTC § 411, which states:

"Material purposes are not readily to be inferred. A finding of such purpose generally

requires some showing of a particular concern or objective on the part of the settlor, such as a concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose."<sup>13</sup>

If a material purpose is not clear from the trust agreement<sup>14</sup> or the circumstances<sup>15</sup> surrounding its drafting, Ohio case law provides a default rule. If the trust property is to be held for "successive beneficiaries" and there is no evidence of any further purposes, the trust's purpose is "to give the beneficial interest in the trust property to one beneficiary for a designated period and to preserve the principal for the other beneficiary."<sup>16</sup>

R.C. 5804.11(D) provides an exception to the general rule that all of the beneficiaries must consent to the termination. A court may still order the termination of the trust if the court determines that:

1. The trust could be terminated under the statute if it had the consent of all of the beneficiaries; and
2. That the interests of all of the beneficiaries that did not consent will be adequately protected.<sup>17</sup>

This gives courts some level of discretion when all of the beneficiaries do not agree to terminate the trust. This is a subjective standard and the threshold of what is considered adequate protection will likely vary between courts. Upon the court authorizing the termination of an irrevocable trust, R.C. 5804.11 (c) requires that the trustee distribute the property as agreed upon by the beneficiaries.

### C. 5804.12: Judicial Action Due to Change of Circumstances

Pursuant to R.C. 5804.12(A), the court may terminate a trust due to a change in circumstances that has occurred since its creation. The court may terminate a trust if the change is due to circumstances not anticipated by the settlor, and such a termination would actually further the purposes of the trust.<sup>18</sup> An action to terminate the trust under this section may only be brought by a trustee or beneficiary. In terminating, the court must act in accordance with the probable intent of the settlor, but only to the extent that doing so is practicable.<sup>19</sup> After the trust has been terminated, the trustee shall distribute the property in a manner consistent with the trust's purpose.<sup>20</sup>

## II. STATUTORY PRIVATE SETTLEMENT AGREEMENTS

When the Ohio Trust Code became effective, practitioners received statutory authority to modify irrevocable trusts without judicial intervention. Now, interested parties can enter into a binding agreement regarding "construction of, administration of, or distributions under the terms of the trust, the investment of income or principal held by the trustee, or other matters." R.C. 5801.10(c). It is an excellent solution. Unfortunately, it is not a solution for every problem.

While R.C. 5801.10 allows interested parties to modify irrevocable trusts, 5801.10(c) specifically prohibits the use of statutory private settlement agreements to "effect" early terminations of irrevocable trusts. The same statute, however, does not limit trust terminations using R.C. Chapter 5804<sup>21</sup> or agreements governed by "the common law."<sup>22</sup>

## III. NON-STATUTORY PRIVATE SETTLEMENT AGREEMENTS

Trust termination by interested parties has existed in Ohio for years, but the constraints

of case law offer similar possibilities to those allowed by the Ohio Trust Code. A reading of early American trust jurisprudence will quicken a trust-terminator's heart. The dominant rule on trust termination in the early days of the United States favored "free alienability and control of property by the living."<sup>23</sup> That rule allowed beneficiaries, so long as they were competent and of legal age, to terminate a trust notwithstanding the settlor's intent or the trust's material purpose.<sup>24</sup> Courts changed direction<sup>25</sup> starting in 1889 with the *Clafin v. Clafin*<sup>26</sup> decision, which prohibited the trust's beneficiary from terminating the trust where doing so would frustrate the settlor's intent. That decision gave rise to a line of American jurisprudence that places great emphasis on the settlor's intent.

#### A. Termination without Settlor's Consent

Ohio's common law generally follows the American common law giving great weight to the settlor's intent. So long as an irrevocable trust no longer serves a material purpose, the trust can be terminated by the agreement of the all beneficiaries (even if the settlor is not a party to the agreement).<sup>27</sup> Traditionally, that meant following a four-item checklist:

- (1) the beneficiary class is closed; (2) all the beneficiaries have full legal capacity to and in fact do consent to termination; (3) the trust instrument does not prohibit its termination, either expressly or impliedly; and (4) all material purposes of the trust have been accomplished.<sup>28</sup>

The first two elements are practical obstacles to modern, long-term trusts. Since modern Ohio trusts can last forever,<sup>29</sup> it is possible that the beneficiary class will never be closed and that the beneficiaries will not all be of legal age (or even born!) when a given group of beneficiaries wants to terminate the trust. At common law, because the consent of all beneficiaries is necessary to terminate a trust, the beneficiary class must be closed and the beneficiaries must have reached legal age and

maintain capacity necessary to sign an agreement. Since the Ohio Trust Code became effective, however, representatives can consent on beneficiaries' behalf even if the class is not closed and if all beneficiaries do not have capacity.<sup>30</sup> Therefore, the *effect* of the first two elements can be satisfied by having beneficiaries with similar interests represent those that lack capacity or are unborn.<sup>31</sup>

The third element will ultimately depend on the facts and need not be analyzed here.

The fourth element concerning the trust's material purpose is discussed in detail in Section I(B) above. The Ohio default rule is worth restating here if only to include the method for overcoming such a purpose. When there is no evidence of a trust's purpose, Ohio courts will consider that the purpose of a trust held for "successive beneficiaries" is "to give the beneficial interest in the trust property to one beneficiary for a designated period and to preserve the principal for the other beneficiary, and if each of the beneficiaries is under no incapacity, and both of them consent to the termination of the trust, they can compel the termination of the trust."<sup>32</sup>

In light of the Ohio Trust Code, the new checklist for terminating an irrevocable trust with a non-statutory PSA is as follows: (1) the interests of all beneficiaries are represented whether by the beneficiary himself or herself, or by a representative under R.C. 5803.04; (2) all the beneficiaries and representatives actually consent to the termination; (3) the trust agreement does not prohibit the termination, either expressly or impliedly; and (4) all material purposes of the trust have been accomplished.

#### B. Termination with Settlor's Consent

Terminating irrevocable trusts is even easier when the settlor is living. Because the common-law jurisprudence gives great weight to the settlor's intent, the rule is that the set-

tlor and beneficiaries may terminate a trust regardless of whether the trust's material purpose has been accomplished.<sup>33</sup> Where the settlor consents to a trust's termination, the checklist for terminating an irrevocable trust is as follows: (1) the interests of all beneficiaries are represented whether by the beneficiary himself or herself, or by a representative under R.C. 5803.04; (2) the settlor and all the beneficiaries and representatives actually consent to the termination; and (3) the trust agreement does not prohibit the termination, either expressly or impliedly.

Beware of the possibility of adverse federal estate-tax consequences when terminating trusts. Revocable transfers are includible in a settlor's estate under I.R.C. § 2038. Even though I.R.C. § 2038 does not apply if "the decedent's power could be exercised only with the consent of all parties having an interest (vested or contingent) in the transferred property,"<sup>34</sup> R.C. 5804.11 requires court approval because of fears surrounding federal estate-tax consequences.<sup>35</sup>

### C. Advantages and Disadvantages of Non-Statutory Private Settlement Agreements.

Using a non-statutory PSA allows the non-judicial termination of irrevocable trusts in situations that would require court intervention under the Ohio Trust Code. The Ohio Trust Code does not allow termination by private settlement agreement. Termination is only authorized with court approval. Even with court approval, the Ohio Trust Code requires the court to find that termination is "not inconsistent with a material purpose of the trust."<sup>36</sup>

The advantages of non-statutory PSAs over judicial intervention are many. The most obvious benefit is avoiding the time and expense associated with judicial proceedings. An equally important benefit is the ability to maintain privacy. Filing a lawsuit for termination of the trust will make parts of the trust

part of the public record. Terminating a trust using a non-statutory PSA will allow beneficiaries (and the settlor) to protect their identities and save time and money.

The major disadvantage of a non-statutory PSA is securing the trustee's participation. While the trustee is not a necessary party to the non-statutory PSAs, the trustee's participation is a practical necessity. There is always a risk that a trustee may not believe that such an agreement is binding (it doesn't comply with the statute!) or may simply be uncomfortable with it since the court is not making the decision. Whether this disadvantage exists will depend on the facts.

## IV. DISCRETIONARY TRUSTS

Another way to terminate an irrevocable trust is by discretionary distribution of the trust assets to the beneficiaries. How effective this method will be depends on the terms of the trust itself. The first consideration is the standard for distribution; is there an ascertainable standard, or does the trustee have complete discretion?<sup>37</sup> A trustee is given great flexibility with discretionary trusts. The greater the amount of the discretion granted to the trustee, then the broader the range of conduct that will be considered permissible when the trustee exercises it.<sup>38</sup> In accordance with the R.C. 5808.01, a reasonableness standard is not applied to distribution of assets under a wholly discretionary trust.<sup>39</sup> Depending on the level of discretion a trustee may be able to fully distribute the trust assets.

Not all trustees enjoy unlimited authority. Unless the terms of the trust expressly indicate otherwise, a trustee that is also a beneficiary may only make distributions in accordance with an ascertainable standard. Further, a trustee cannot make discretionary distributions to fulfill a legal obligation of support that the trustee owes another person.<sup>40</sup> Neither of these limitations apply to an irrevocable trust

where the settlor's spouse, who is the trustee of the trust, holds a power for which a marital deduction was previously allowed for a life estate for the surviving spouse with a power of appointment as defined in I.R.C. §§ 2056(b)(5) or 2523(e).<sup>41</sup> Finally, the trustee may not simply ignore the terms of the trust. Oftentimes discretionary distributions begin upon the occurrence of certain events or require that other assets of the beneficiary be taken into account before the trustee makes any such distributions. The trustee is not permitted to simply ignore these provisions.<sup>42</sup>

## V. FEDERAL TAX CONCERNS

There are some federal tax concerns which practitioners should be aware of prior to terminating a trust. Trustees using discretionary distributions of a specific/pecuniary amount must in requests and correspondence be very careful not to trigger Treasury Regulation § 1.661(a)-2(f). This can result in the realization of capital gains on the transfer. Also, practitioners must be aware of 26 U.S. Code § 1014 which sets forth the basis of the property acquired from a decedent. Under section (e) of the Code § 1014, if the beneficiary/spouse of a Trust dies within one year of the trust's creation, and pursuant to that spouse's estate plan such assets pass to or in trust for the surviving spouse, the basis of such assets will not be stepped-up to fair market value.<sup>43</sup> Finally, for a trust that is GST tax exempt by its terms or due to allocation of GST tax exemption, early termination should not affect the trust's GST tax status. However, in the case where a trust is GST tax exempt due to being a "grandfathered trust," then it is uncertain whether an early termination would constitute a modification of the trust's governing instrument, placing the trust's grandfathered status in jeopardy.<sup>44</sup> Practitioners must be careful because if the trust is not fully GST exempt, a termination could constitute a taxable termination and GST tax would be owed.

Gift taxes are not an issue when terminating of an irrevocable trust if the beneficiaries agree to distribute the trust asset in the manner consistent with their proportionate interests in the trust.<sup>45</sup> In light of R.C. 5804.11(c), which requires a trustee to distribute the property as agreed upon by the beneficiaries, practitioners must be careful. If the beneficiaries want one or more of the beneficiaries to receive a greater portion of trust assets (ex: parents wanting additional assets to be received by their children) an attorney must be sure to advise their clients that gift taxes may be assessed.

Currently, we are in a period of stability with regard to the federal estate tax. The U.S. Congress has moved onto other political issues, and practitioners can make long term plans for their clients without having to guess what the future tax laws will hold. In 2015, an individual may leave at death or give during lifetime \$5,430,000 without owing estate or gift tax.<sup>46</sup> Further, portability allows married couples to combine their exemption allowing couples to transfer almost \$11,000,000 estate tax free. This means that about 99.5% of estates will not owe any estate tax.<sup>47</sup> It is still worth noting that, as with any law, it is only permanent until Congress decides to change it. In the future, Congress could pass new estate and gift tax laws to change the amount of the exemption amounts and/or tax rates, but this would require a proactive Congress.

## VI. TRUST DOMICILE CHANGES

Many people will move to another state at some point in their lives. Those moves often involve being closer to family, getting more sunshine, or enjoying tax advantages. Sunshine has not yet proven to make trust termination any easier, but moving a trust to a new jurisdiction might.

With 29 states and the District of Columbia having enacted the Uniform Trust Code,<sup>48</sup>a

majority of the nation has trust law that is similar to Ohio's. Still, with each state putting its own modifications<sup>49</sup> on its version of the trust code, the laws are not entirely uniform. It is easier to terminate trusts in some states than it is in Ohio. Because many Ohio estate planning practitioners are also licensed to practice law in Florida, we will examine how changing an Ohio trust's situs to Florida might facilitate the trust's termination.

Trust terminations are easier to accomplish under the Florida Statutes. Where settlement agreements under R.C. 5801.10 allow interested parties to modify a trust in certain circumstances, the law expressly prohibits using such an agreement to terminate a trust. Florida's nonjudicial trust modification statute, Fl. Stat. § 736.0412, by contrast, authorizes the interested parties to terminate an irrevocable trust.

Terminating a trust under Fl. Stat. § 736.0412 is simple as long as all the conditions are met. First, the settlor must be deceased,<sup>50</sup> so trusts with living (healthy?) settlors might try another state. Second, the statute only applies to relatively new trusts, those that were created or became irrevocable<sup>51</sup> on or after January 1, 2001.<sup>52</sup> Third, the trust must not have been allowed a charitable deduction or, if it has, all of the charitable interests must have already terminated.<sup>53</sup> Fourth, the trust must be subject to Florida's "new"<sup>54</sup> rule against perpetuities or the trust agreement must expressly authorize nonjudicial modification.<sup>55</sup> So long as all of those conditions are satisfied, the trustee and all qualified<sup>56</sup> beneficiaries may agree to terminate the trust.<sup>57</sup>

Fl. Stat. § 736.0412 does not expressly state that a trust can be terminated. Instead, it authorizes modification "at any time as provided in [Fl. Stat. § ] 736.04113(2)," the judicial modification statute. The judicial modification statute specifically authorizes the termination

of a trust in whole or in part.<sup>58</sup> Like Ohio, the Florida statute clarifies that the statutory nonjudicial termination of trusts is "in addition to" termination "rights under the common law."<sup>59</sup> Therefore, the trustee and beneficiaries could also use a common-law agreement to terminate a trust.

If the trust does not satisfy all of the requirements for nonjudicial termination, the interested parties could use Florida's judicial termination provisions. Florida's judicial termination statute is somewhat less restrictive than Ohio's statutes.<sup>60</sup>

Judicial termination under Florida law has only few requirements. First, the trust must be irrevocable.<sup>61</sup> Second, the trust's purposes must have been fulfilled or cannot be fulfilled, changed circumstances make the trust's material purpose very difficult to fulfill, or "a material purpose of the trust no longer exists."<sup>62</sup> If both requirements are met, the trustee or any qualified beneficiary can petition the court to terminate a trust.<sup>63</sup> The parties could also pursue a common-law judicial trust termination because statutory judicial termination of trusts is "in addition to" termination "rights under the common law."<sup>64</sup>

The Florida statute has two main advantages over Ohio's statutes. First, R.C. 5804.11 is drafted such that it appears to require the consent of all beneficiaries to terminate a noncharitable irrevocable trust. That a court may terminate such a trust without the consent of all of the beneficiaries is only apparent at the very end of the section where the court is simply required to ensure that the nonconsenting beneficiaries are protected. Florida's statute does not impose the same babysitting requirement on its courts and does not require that all beneficiaries consent. In theory, the Ohio statute only requires that all beneficiaries are represented by counsel. One can, however, envision a family situation where such a requirement could present an obstacle to trust termination.



The second advantage of the Florida statute is the lack of a statutory preference for modification over termination when there has been a change in circumstances. The Ohio statute governing change of circumstances,<sup>65</sup> requires that the court modify a trust “in accordance with the settlor’s probable intention.”<sup>66</sup> Only if doing so is not “practicable,” should the court terminate a trust.<sup>67</sup> The Florida statute does not contain a similar preference.

## VII. CONCLUSION

*“I wanna make sure you’re ready, brother. Here it is: Show me the money. Oh-ho-ho! SHOW! ME! THE! MONEY! A-ha-ha! Jerry, doesn’t it make you feel good just to say that! Say it with me one time, Jerry.” - Rod Tidwell*

There are many ways to terminate those needless, costly irrevocable trusts. With the Ohio Trust Code, the common law, and even the law of other states, Ohio practitioners have many options. So, the next time your client shows up at your door with a needless, costly irrevocable trust, you will know how to say it: “Show me the money!”

## AGREEMENT FOR TERMINATION OF TRUST

This is a private settlement agreement, pursuant to common law, entered into the day of, 2014, to distribute all remaining assets of The Robert Jones Irrevocable Trust dated 1-30-1993 (the “Trust”) and to then terminate the Trust.;

WHEREAS, Robert Jones (“Mr. Jones”), Creator of the Trust died on March 3, 2012;

WHEREAS, the trustee of the Trust is National Bank (the “Trustee”);

WHEREAS, Jamie Jones (“Mrs. Jones”), the surviving spouse of Mr. Jones, is the current beneficiary of the Trust;

WHEREAS, Douglas Jones, Christopher

Jones and Michael Jones, the only children of Mr. Jones and Mrs. Jones, are the remainder beneficiaries (“Remainder Beneficiaries”);

WHEREAS, there are no other lineal descendants of Mr. Jones;

WHEREAS, Mrs. Jones and the Remainder Beneficiaries constitute the beneficiaries as defined in O.R.C. § 5801.01 (collectively the “Beneficiaries”);

WHEREAS, the Trust was created for the benefit of the Beneficiaries;

WHEREAS, Trustee is unaware of any action or inaction on its part in the administration of the Trust that could be considered a breach of its fiduciary duty to the Beneficiaries;

WHEREAS, the costs of administering the Trust for the Beneficiaries are burdensome, and continuation of the Trust is not necessary to achieve any material purpose;

WHEREAS, the parties hereto find it necessary to enter into this Agreement to facilitate the termination of the Trust and the distribution of the assets to Mrs. Jones.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises, covenants and provisions set forth herein, the Parties agree as follows:

1. The parties agree that the Trustee shall terminate the Trust immediately and all remaining Trust assets shall be distributed outright in kind to Mrs. Jones.
2. The parties agree that Trustee will forego a formal accounting with regard to its administration of the Trust.
3. The Beneficiaries agree to release, indemnify and hold harmless forever the Trustee and its successors in interest, from any and all claims, demands or actions of any kind, including those arising

out of or in any way related to the termination of the Trust and/or the distribution of the Trust assets to Mrs. Jones, or that may hereafter or at any time be made or brought against the Trustee and/or its successors in interest.

4. This Agreement, its terms, covenants and conditions shall extend to and shall be binding upon the respective successors, assigns, personal representatives, administrators, executors, issue and heirs of the parties hereto to the extent permissible by law.

5. This Agreement shall be construed and enforced in accordance with the laws of the State of Ohio.

6. This Agreement may be amended; however, any such amendment shall be valid only if in writing and signed by all parties hereto or by their successors in interest.

7. In the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or otherwise invalidated.

8. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior or contemporaneous agreement or understanding with respect thereto.

9. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective on the date first above written.

NATIONAL BANK, TRUSTEE OF THE

ROBERT JONES IRREVOCABLE TRUST  
DTD 1-30-1993

By: \_\_\_\_\_

Its:

JAMIE JONES

DOUGLAS JONES

CHRISTOPHER JONES

MICHAEL JONES

**APPENDIX A: COMPLAINT**

In The Court Of Common Pleas Of County,  
Ohio Probate Division

Nicholas Smith) CASE NO.: \_\_\_\_\_

324 Green Rd)

Canton, Ohio 44718) JUDGE \_\_\_\_\_

)

PLAINTIFF)

)

vs. ) **COMPLAINT FOR**

) **TERMINATION OF TRUST**

Nicholas Smith)

324 Green Rd)

Canton, Ohio 44718)

)

and)

)

National Bank, Trustee)

of the Paul Smith Trust FBO)

Nicholas Smith dated 12-22-1978)

657 W. Main St. )

Canton, Ohio 44718)

)

and)

)

Alan Smith, Individually)

8700 Frank)

Cleveland, Ohio 44718)

)

and)

)

Elizabeth Jones, Individually)

4478 Northbury Cir. )

Akron, Ohio 44322)

)

and)

)

Jennifer Jones, Individually)

511 Weber)

Columbus, Ohio)

)

DEFENDANTS)

This is an action for termination of a trust known as the Paul Smith Trust FBO Nicholas Smith dated December 22, 1978 (the "Trust"). A true and accurate copy of the Trust is attached hereto as Exhibit A.

1.This Court has jurisdiction over this matter pursuant to Ohio RC § 2101.24 and RC § 5804.11.

2. Paul Smith ("Grantor") created the Trust, on December 22, 1978, and named National Bank as Trustee.

3. Grantor died on May 24, 2000 and his wife, Olga Smith, died on February 22, 1999.

4. National Bank ("Trustee") is currently serving as Trustee of the Trust.

5. Plaintiff Nicholas Smith ("Mr. Smith") brings this action on behalf of himself and at the request of the qualified beneficiaries.

6. Mr. Smith is the only son of Grantor and the sole current beneficiary of the Trust.

7. Defendants Alan Smith and Elizabeth Jones are the children of Mr. Smith, and Jennifer Jones is the granddaughter of Mr. Smith. They are the only children and grandchild of Mr. Smith and the only residuary beneficiaries of the Trust ("Residuary Beneficiaries").

8. Mr. Smith and the Residuary Beneficiaries constitute the qualified beneficiaries as defined in O.R.C. § 5801.01 (collectively the "Qualified Beneficiaries").

9. The Trustee and the Qualified Beneficiaries have signed Answers consenting to termination of the Trust and the distribution of all Trust assets outright to Mr. Smith

10. The Trust was created for the benefit of Mr. Smith. Costs of administering the Trust for Mr. Smith are burdensome, and continuation of the Trust is not necessary to achieve any material purpose. In addition, the repeal of the Ohio Estate Tax plus increase in federal estate tax exemptions makes the Trust no longer necessary to achieve estate tax savings intended by Grantor.

Wherefore, Plaintiff hereby requests the Court terminate the Trust and direct the Trustee to distribute all remaining Trust assets outright to Nicholas Smith.

Respectfully submitted,

Attorney (Ohio Bar #)

Address

Telephone:

Fax:

ATTORNEY FOR PLAINTIFF

**CERTIFICATE OF SERVICE**

I hereby certify that all parties have waived notice of hearing and service of summons. Said waivers are attached hereto.

Attorney (Ohio Bar #)

**APPENDIX B: ANSWER AND REQUEST**

Probate Court Of County, Ohio

*IN THE MATTER OF: CASE NO.*

Termination of the Paul Smith

Trust FBO Nicholas Smith

dated 12-22-1978

ANSWER AND REQUEST FOR

**TERMINATION AND DISTRIBUTION OF TRUST**

The undersigned, the Trustee of the above-captioned Trust, hereby requests the County Probate Court to allow the termination of the Trust and distribution of all remaining trust assets to Nicholas Smith, as requested in the Complaint for Termination of Trust, a copy of which has been provided.

The undersigned hereby waives the right to notice of hearing and any service of summons.

National Bank

By:

Its:

PROBATE COURT OF COUNTY, OHIO

*IN THE MATTER OF: CASE NO.*

Termination of the Paul Smith

Trust FBO Nicholas Smith

dated 12-22-1978

ANSWER AND REQUEST FOR

**TERMINATION AND DISTRIBUTION OF TRUST**

The undersigned, current beneficiary under the above-captioned Trust, hereby requests the County Probate Court to allow for the termination of the Trust and distribution of all remaining trust assets to Nicholas Smith, as requested in the Complaint for Termination of Trust, a copy of which has been provided to me.

The undersigned hereby waives the right to notice of hearing and any service of summons.

**Nicholas Smith**

**APPENDIX C: JUDGMENT ENTRY**

IN THE COURT OF COMMON PLEAS

PROBATE DIVISION

COUNTY OHIO

**Nicholas Smith, Individually)CASE NO.**

Plaintiff)

)

)**JUDGE**

**—vs—)**

)

**National Bank)**

**Trustee of the Paul Smith)**

**FBO Nicholas Smith dated)**

**12-22-1978)**

)

Defendants)**JUDGMENT ENTRY**

This matter is before the Court pursuant to a Complaint for the termination of the Paul Smith Trust FBO Nicholas Smith dated December 22, 1978 (“Trust”) and requesting the distribution of all Trust assets to Nicholas Smith, son of Paul Smith. The Court finds as follows:

1. The parties are properly before the Court.
2. The qualified beneficiaries of the Trust have requested termination of the Trust and that all Trust assets be distributed to Nicholas Smith.
3. The Court finds that the material purpose of the Trust is to reduce federal and Ohio estate taxes, and the repeal of the Ohio Estate Tax plus increase in federal estate tax exemptions makes the Trust no longer necessary to achieve the estate tax savings intended by Paul Smith.
4. The Trustee has consented to the termination of the Trust and distribution of the Trust assets to Nicholas Smith.
5. All of the defendants (interested parties) have signed Answers and Requests for Termination and Distribution of Trust and filed them with the Court.

WHEREFORE, the Court hereby terminates the Paul Smith Trust FBO Nicholas Smith dated December 22, 1978, and directs that all remaining Trust assets shall be distributed to Nicholas Smith.

### IT IS SO ORDERED

### JUDGE

### ENDNOTES:

<sup>1</sup>R.C. 5804.10(A).

<sup>2</sup>R.C. 5804.10(B).

<sup>3</sup>Alan Newman *The Uniform Trust Code:*

*An Analysis of Ohio’s Version*, Ohio Northern University Law Review 2008 at 156.

<sup>4</sup>R.C. 5804.11(A).

<sup>5</sup>R.C. 5804.11(A).

<sup>6</sup>R.C. 5804.11(A).

<sup>7</sup>R.C. 5803.02.

<sup>8</sup>R.C. 5803.03(A)-(B).

<sup>9</sup>See R.C. 5803.03 (D)-(F).

<sup>10</sup>R.C. 5803.04.

<sup>11</sup>McGregor, *Is That Irrevocable Trust Now Irrelevant?*, 22 No. 2 Ohio Prob. L.J. NL 7 (Nov/Dec 2011).

<sup>12</sup>See also Alan Newman, *The Uniform Trust Code: An Analysis of Ohio’s Version*, Ohio Northern University Law Review 2008 at 156.

<sup>13</sup>*Vaughn v. Huntington Natl. Bank*, 2009-Ohio-598, 2009 WL 342697 (Ohio Ct. App. 5th Dist. Tuscarawas County 2009).

<sup>14</sup>R.C. 5804.11(B) indicates that a spendthrift provision “may, but is not presumed to, constitute a material purpose of a trust.”

<sup>15</sup>R.C. 5804.11(B) expressly authorizes, but does not require, a court to consider extrinsic evidence to determine the settlor’s intent.

<sup>16</sup>*Morgan v. First Natl. Bank of Cincinnati*, 84 Ohio App. 345, 352 (1948) (quoting the note to Section 337 of 2 Restatement of the Law of Trusts).

<sup>17</sup>R.C. 5804.11(D).

<sup>18</sup>R.C. 5804.12(A).

<sup>19</sup>R.C. 5804.12 (A).

<sup>20</sup>R.C. 5804.12 (C).

<sup>21</sup>R.C. 5801.10(I)(2).

<sup>22</sup>R.C. 5801.10(N).

<sup>23</sup>Gail Boreman Bird, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie*, 36 Hastings L.J. 563, 578 (1985) (citing R. Powell, *The Law of Real Property* § 567, at 428.49 (rev. ed. 1981)).

<sup>24</sup>Gail Boreman Bird, *Trust Termination: Unborn, Living, and Dead Hands—Too Many Fingers in the Trust Pie*, 36 Hastings L.J. 563, 578 (1985) (citing R. Powell, *The Law of Real Property* § 567, at 428.49 (rev. ed. 1981) at 577.

<sup>25</sup>Before *Claflin*, American courts usually followed the precedent established by English courts. See, e.g., Peter J. Wiedenbeck, *Missouri’s Repeal of the Claflin Doctrine—New View*

of the Policy against Perpetuities, 50 Mo. L. Rev. 805, 808 (1985).

<sup>26</sup>*Claflin v. Claflin* 149 Mass. 19, 20 N.E. 454 (1889).

<sup>27</sup>*Brown v. Moss*, 1999 WL 1037758, \*3-5 (Ohio Ct. App.); *Jordan v. Price*, 49 N.E.2d 769, 771 (Ohio Ct. App. 1942).

<sup>28</sup>*Brown v. Moss*, 1999 WL 1037758, \*3-4 (Ohio Ct. App.) (citing *Carnahan v. Johnson* (1998), 127 Ohio App. 3d 195, 200-01, 711 N.E.2d 1093). Note that the trustee does not appear to be a necessary party to the agreement to terminate the trust.

<sup>29</sup>R.C. 2131.09(B)(1).

<sup>30</sup>R.C. 5803.04.

<sup>31</sup>But only to the extent there is no conflict-of-interest. R.C. 5803.04.

<sup>32</sup>*Morgan v. First Natl. Bank of Cincinnati*, 84 Ohio App. 345, 352 (1948) (quoting the note to Section 337 of 2 Restatement of the Law of Trusts).

<sup>33</sup>*Jordan v. Price*, 49 N.E.2d 769, 771 (Ohio Ct. App. 1942); see also Restatement (Third) of Trusts § 65(2) (2003).

<sup>34</sup>Treas. Reg. Section 20.2038-1(a)(2).

<sup>35</sup>Alan Newman, *The Uniform Trust Code: An Analysis of Ohio's Version*, 34 Ohio N.U.L. Rev. 135, \*156 (2008).

<sup>36</sup>R.C. 5804.11(B).

<sup>37</sup>*McGregor, Is That Irrevocable Trust Now Irrelevant?*, 22 No. 2 Ohio Prob. L.J. NL 7, \*62 (Nov/Dec 2011).

<sup>38</sup>*McGregor, Is That Irrevocable Trust Now Irrelevant?*, 22 No. 2 Ohio Prob. L.J. NL 7, \*62 (Nov/Dec 2011).

<sup>39</sup>R.C. 5808.14(A).

<sup>40</sup>R.C. 5808.14(B)(2).

<sup>41</sup>R.C. 5808.14(D)(1).

<sup>42</sup>*McGregor, Is That Irrevocable Trust Now Irrelevant?*, 22 No. 2 Ohio Prob. L.J. NL 7, \*62 (Nov/Dec 2011).

<sup>43</sup>I.R.C. § 1014(e).

<sup>44</sup>*John H. Turner III, Practical Considerations in Terminating Trusts under the Virginia Uniform Trust Code*, Trusts & Estates Newsletter a section of the Virginia State Bar, Vol. 21, No.1, Winter 2007 at 5.

<sup>45</sup>NCCUSL, *Uniform Trust Code*, Last Revised 2010 § 411 comments.

<sup>46</sup> [www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Estate-Tax](http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Estate-Tax).

<sup>47</sup>Mary Randolph, *Federal Gift and Estate Law in 2014 and Beyond*, [www.nol.com](http://www.nol.com).

<sup>48</sup> <http://uniformlaws.org/Act.aspx?title=Trust%20Code>.

<sup>49</sup>See, e.g., [http://www.actec.org/public/Documents/Studies/Nelson\\_\\_UTC\\_\\_State\\_\\_Laws\\_\\_03\\_\\_21\\_\\_2013.pdf](http://www.actec.org/public/Documents/Studies/Nelson__UTC__State__Laws__03__21__2013.pdf).

<sup>50</sup>Fl. Stat. § 736.0412(1).

<sup>51</sup>Revocable trusts are considered to be created on the date that the revocation power terminates. Fl. Stat. § 736.0412(5). Therefore, many formerly revocable trusts will be “created” on the date the settlor dies.

<sup>52</sup>Fl. Stat. § 736.0412(4)(a).

<sup>53</sup>Fl. Stat. § 736.0412(4)(c).

<sup>54</sup>Florida’s rule against perpetuities (Fl. Stat. § 689.225(2)) generally requires that unvested interests must “vest or terminate no later than 21 years after the death of an individual then alive; or” vest or terminate “within 90 years after its creation.” Fl. Stat. § 689.225(2). For trusts created after December 31, 2000, 90 years changes to 360 years. Fl. Stat. § 689.225(2)(f). Florida’s trust-modification statute, Fl. Stat. § 736.0412, clearly indicates that it does not apply to trusts created after December 31, 2000 that are still governed by the former rule against perpetuities unless the terms of the trust expressly authorize nonjudicial modification.

<sup>55</sup>Fl. Stat. § 736.0412(4)(b).

<sup>56</sup>Qualified beneficiary is defined in Fl. Stat. § 736.0103(14) as “a living beneficiary who, on the date the beneficiary’s qualification is determined:

(a) Is a distributee or permissible distributee of trust income or principal;

(b) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in paragraph (a) terminated on that date without causing the trust to terminate; or

(c) Would be a distributee or permissible distributee of trust income or principal if the trust terminated in accordance with its terms on that date.

<sup>57</sup>Fl. Stat. § 736.0412(1).

<sup>58</sup>Fl. Stat. § 736.04113(2)(b).

<sup>59</sup>Fl. Stat. § 736.0412(6)

<sup>60</sup>Ohio's judicial-termination provisions, discussed in detail above, and are spread among several sections of R.C. Chapter 5804. The comparable Florida provisions, by contrast, are in a single, simplified statute.

<sup>61</sup>Fl. Stat. § 736.04113(1).

<sup>62</sup>Fl. Stat. § 736.04113(1).

<sup>63</sup>Fl. Stat. § 736.04113(1).

<sup>64</sup>Fl. Stat. § 736.04113(4).

<sup>65</sup>R.C. 5804.12.

<sup>66</sup>R.C. 5804.12(A).

<sup>67</sup>R.C. 5804.12(A).

## THE ROLES OF COMMERCIAL LENDERS IN ESTATE AND BUSINESS SUCCESSION PLANNING

*By James G. Dickinson, Esq.*

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In preparing an estate plan, the planner generally asks the client for copies of documents containing contractual obligations such as prenuptial agreements, separation agreements and loan guarantees in addition to financial and family information. For the owners of businesses, the planner also wants to review important documents such as articles of incorporation, codes of regulation, buy-sell agreements, partnership and operating agreements. One document that has generally been overlooked is the credit agreement between the business and a commercial lender.

In preparing an estate plan for a business owner, the estate planning attorney is often not aware of the business owner's commitments to his business' commercial lenders and the restrictions placed on his personal assets. The ability of the estate planning and business lawyer to recommend succession plans is often thwarted by the commercial loan documents. Commercial lenders are being asked by regulatory authorities to seek and to document more information about the busi-

ness succession plans of closely held businesses that are seeking loans as well as about the estate plans of the owners of family-dominated enterprises. Lenders often refer to the increased scrutiny as the KYC, i. e., "Know Your Customer" regulatory requirements. Several nationwide banks have experienced these additional regulatory requirements but it is expected that the requirements will soon filter down to regional and local commercial lenders as well.

Historically, lenders tread carefully for fear of being too intrusive of many business and personal aspects of a borrower for fear of tripping "lender liability." In cases where the ability of the borrower to repay the debt was in question, additional life insurance, security and guarantees were demanded. Closely held business owners begrudgingly anticipate that commercial lenders will demand personal financial statements and guarantees from them before making any loans to their businesses. Primary residences, vacation homes and life insurance policies are routinely used to secure business loans.

In my practice, I define business succession planning as the transfer of present ownership and management of the closely-held business to others. The ownership of the business and the control of the business should be considered separately.

A business succession plan has three sub-plans:

- Financial Succession Plan - the manner in which and when stock or other financial interests will be transferred inside or outside the family. When and how will the economic benefits of owning the interests be realized?
- Organizational Succession Plan - who will assume the role of CEO, of President, of Treasurer? Who among the key managers or family members will fill these offices?