



JONES DAY  
**COMMENTARY**

## WEALTH MANAGEMENT

# IMPORTANT CHANGES TO OHIO AND FLORIDA TRUST LAWS

Ohio and Florida have made significant changes to their respective trust laws by enacting the Ohio Trust Code (“OTC”) and Florida Trust Code (“FTC”). Importantly, both statutes include new concepts, obligations, and rights that may affect you in your capacity as a trustee, a beneficiary, or both. And unlike most laws, the OTC and FTC generally apply retroactively—meaning most of the new provisions apply to Ohio trusts and Florida trusts, respectively, regardless of when the trusts originally were formed.

The enormous breadth and scope of the new laws preclude a comprehensive overview of their provisions. Nonetheless, this *Commentary* summarizes some key considerations that may be of particular interest to our readers.

### OHIO TRUST CODE

**Flow of Trust Information to Beneficiaries and Third Parties.** Several provisions of the OTC concern the

beneficiaries’ access to information regarding trust administration. This works two ways—by requiring trustees to provide certain information to beneficiaries, and by authorizing beneficiaries to request information from the trustees. For example, trustees generally must provide annual reports to current beneficiaries and otherwise keep current beneficiaries “reasonably informed” as to material facts necessary for the beneficiaries to protect their interests. For their part, beneficiaries are given broad rights to obtain information related to trust administration upon request and may, for example, obtain copies of the trust instrument. Thus, under the OTC, more trust information potentially is available to trust beneficiaries. (The creator of the trust may, in the trust agreement, name a surrogate to receive notices on behalf of certain beneficiaries and may waive or modify many of these information/notice requirements.)

The OTC also addresses the flow of trust information to third parties. Third parties often request copies of trust instruments to verify that the trustee is

authorized (by the terms of the trust) to enter into a particular transaction. Trustees often resist such requests because the trust instrument may contain highly private provisions that are irrelevant to the trustee's authority. The OTC permits the trustee to provide a "certification of trust"—an abbreviated summary of the trustee powers and other nondispositive trust provisions—that may better preserve family privacy.

**Trustee Reports May Cut Off Claims.** Properly crafted trustee reports can help protect a trustee against breach-of-trust claims. Under the OTC, a "beneficiary may not commence a proceeding against a trustee for breach of trust more than two years after the date the beneficiary [or his or her representative] is sent a report that adequately discloses the existence of a potential claim for breach of trust." (The report must also note the two-year deadline for bringing a claim.) Such a report is adequate "if it provides sufficient information so that the beneficiary [or his or her representative] knows of the potential claim or should know of the existence of the potential claim." While trustees should be aware of the power behind this provision, beneficiaries should be sensitive to the deadline that results upon receipt of a trustee report.

**Addressing Trust Issues Without Involving the Court.** The OTC is designed to help beneficiaries and trustees avoid court proceedings by providing a streamlined, nonjudicial settlement alternative known as a Private Settlement Agreement ("PSA"). The trustees, beneficiaries, settlor (if living and if no adverse tax results would arise from his or her participation), and interested creditors of a trust may enter into a PSA to resolve a multitude of trust matters. For example, the parties may (a) agree on the precise meaning of an ambiguous trust provision, (b) provide the trustee with certain additional powers and authority, and (c) modify the trust instrument (so long as the modification is not inconsistent with a dominant purpose or objective of the trust and does not change the disposition of the trust property). To encourage the broad use of PSAs, moreover, the OTC provides that PSAs are final and binding on the parties and their heirs, successors, and assigns and, in addition, allows minors and unborn children to be represented and bound by their parents or by persons who have substantially identical interests. Further, the statute underscores that PSAs are to be liberally construed for validity and enforceability. PSAs can thus be an exceedingly useful tool to accomplish agreed-upon family objectives without the time and expense of a formal court action.

Similarly, trustees unilaterally may combine trusts or divide a trust "if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust." The trustees need only notify certain beneficiaries prior to acting. However, the trustees or a beneficiary may nonetheless petition the court for direction as to the legitimacy of such a division or combination of trusts.

**Streamlined Judicial Modification of Irrevocable Trusts.** The OTC facilitates trust modifications even when court involvement is necessary (or preferred by one or more parties). For example, an "irrevocable trust may be modified, but not to remove or replace the trustee, upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust." Indeed, a court may approve such a modification *without* the consent of all beneficiaries if it determines that the trust otherwise could have been modified and the interests of the nonconsenting party will be "adequately protected." The representation of minors and unborn children (discussed above) likewise applies in this context. The OTC specifically notes, moreover, that representatives of minors and unborn children "may consider general benefit accruing to the living members of the individual's family"—which may enhance the likelihood of judicial approval in certain instances.

## FLORIDA TRUST CODE

**Expanded Notice Requirements.** Beginning January 1, 2008, a trustee will have expanded obligations to provide trust-related information (e.g., accountings, notices, copies of the trust agreement) to certain beneficiaries. Most of these duties will be owed to so-called *qualified beneficiaries* of the trust, including (i) beneficiaries currently entitled to receive trust income or principal, (ii) beneficiaries who would be entitled to receive trust income or principal if the rights of the current beneficiaries ceased, and (iii) beneficiaries who would be entitled to receive trust income or principal if the trust were to terminate immediately. (While a trust is revocable, however, these duties will be owed only to the settlor.)

**Wide Latitude to Modify Irrevocable Trusts Upon the Settlor's Death.** The FTC facilitates nonjudicial modifications in situations where the settlor has passed away. Previously, a trust could be modified after the settlor's death only with

the unanimous consent of all trustees and a broad class of so-called *potential beneficiaries*. Now, the FTC permits posthumous trust modifications (including those related to trust distributions and administration) as long as the trustees and all *qualified beneficiaries* (defined above) unanimously consent. (Such nonjudicial modifications are limited to noncharitable trusts formed after December 31, 2000, and must satisfy additional requirements related to arcane rule-against-perpetuities laws.) In order to protect the rights of all beneficiaries, however, the FTC provides that *any* beneficiary may commence a court proceeding to disapprove a proposed nonjudicial modification.

This provision is designed primarily to address long-term trusts, and it reflects a growing academic and judicial concern as to whether such “dynasty” trusts can comprehensively anticipate and accommodate all that the future might hold. Obviously, the notion that later generations may band together to materially modify trust terms will be applauded by some and condemned by others. Those who fall in the latter camp may be pleased to know that this result can be avoided. Doing so, however, may require some trade-offs with respect to the trust’s duration.

**Trustees May Be Removed Without Cause.** Under prior law, a trustee could be removed only for cause (e.g., breach of trust, unfitness, persistent failure to perform the trustee’s functions). The FTC, however, provides that a trustee may be removed without cause upon the unanimous request of all *qualified beneficiaries*, as long as a court determines that (i) the removal would best serve the interests of *all* beneficiaries (not just the *qualified beneficiaries*), (ii) the removal is not inconsistent with a material purpose of the trust, and (iii) a suitable successor trustee (or co-trustee if applicable) is available. This new law may be particularly useful in a situation where the trustee is fulfilling his duties as trustee but the relationship between the beneficiaries and the trustee have become strained.

**Statute of Limitations Cuts Off Claims as to a Trust’s Validity.** The FTC sets a tight limitations period for contesting the validity of a revocable trust once it becomes irrevocable due to the settlor’s death. Under the new law, such an action must be commenced within six months after the trustee sends the person a copy of the trust and a notice regarding the limitations period. Because the six-month limitations period runs

only against parties who have received the required information from the trustee, the trustee may decide to send the required information to as many potential claimants as possible. For their part, persons who receive these notices may want to take reasonable steps to protect their rights.

## MOVING FORWARD

A trust agreement may modify or override most (but not all) of the OTC and FTC provisions. We are therefore incorporating related changes into our new trust agreements, and we are updating existing revocable trust agreements when the need arises to modify or restate such agreements for other reasons. If you wish to incorporate such changes in an existing revocable trust on a more expedited basis, please contact us at your convenience.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General e-mail messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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