IS IT TIME FOR OHIO TO CONSIDER A MOVE TOWARD STRONGER SILENT TRUST LEGISLATION?

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It is not unusual for a client to fret the effects of passing on wealth to their children and grandchildren. A common consequence to recipients of easy money, or the awareness of guaranteed fortune, is a decrease in motivation for personal success. One may ask, "Isn't there a way to provide for my children and grandchildren without them knowing any or all of the details?"

The simple answer is yes. One emerging approach other states are utilizing is the "silent trust," sometimes also referred to as "secret trust." Simply, a silent trust balances a settlor's desire to withhold information from a beneficiary, due to a settlor's belief that such knowledge will be a detriment to a beneficiary, with giving a beneficiary the tools necessary to protect such beneficiary's interest in the trust. The silent trust is not a new vehicle. In fact, Bob Brucken wrote two companion articles worth reading on this very topic in 2015. For details, see Brucken, *Do We Shoot the Trustee? Omitting Notices and Information Required by RC 5805.13,* PLJO 225 25 No. 5 Ohio Prob. L.J. NL 8 (May/June 2015), and Brucken, *Can Trusts Really Be Secret?* PLJO 22, 26 No. 1 Ohio Prob. L.J. NL 7 (September/October 2015).

The purpose of this article is to reintroduce the concept of a silent trust and begin a discussion among Ohio practitioners on whether the state should adopt legislation permitting the use of silent trusts by settlors in Ohio. The prospect of modifying the requirements to provide certain information to a beneficiary as set forth in the Ohio Trust Code ("OTC") will be analyzed by the OSBA Estate Planning, Trust, and Probate Law Section Silent Trust Committee ("Silent Trust Committee"). The Silent Trust Committee is a collaboration of estate planning attorneys who will be discussing whether change to the OTC is appropriate, and, if so, how to accomplish such change. In order to determine if change should occur, and how that change might come about, understanding the benefits and drawbacks of silent trusts and their application and enforcement in other states, as well as Ohio's current trust laws, is the essential first step.

WHAT IS A SILENT TRUST?

A silent trust is a trust in which the settlor in the governing trust instrument has waived or modified certain notice and information requirements of a trustee so as to prevent a trustee from informing a beneficiary of the trust's creation or certain details of the trust. A silent trust is used in circumstances where a settlor wishes to delay or prevent the trustee from informing a beneficiary of the existence of the trust or the assets held in the trust. This is often the case when assets are being transferred during the settlor's lifetime for tax plan-

ning or when there are concerns with the effect the knowledge of the existence of the trust or the value of the assets held in the trust will have on the beneficiary.

As discussed in more detail below, the modification and/or omission of trustee duties regarding information notices vary by state, which makes it difficult to pin down an exact definition of silent trusts. However, the one characteristic that each silent trust seems to have in common is a specific waiver in the trust instrument of a trustee's duty to inform the beneficiaries of the existence of the trust for a specified period of time.

UTC AND OTHER STATES' LAWS ABOUT A SILENT TRUST

While a settlor has considerable control over the obligations of the trustee, it is heavily disputed among jurisdictions if a settlor can waive two specific types of duties laid out in the Uniform Trust Code ("UTC"). The first, found in Section 105(8), is the duty "to notify qualified beneficiaries of an irrevocable trust who have attained twenty-five years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports."[1] The second, found in Section 105(9), is the duty "to respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust."[2]

These two provisions were placed in brackets in 2004, indicating their optional status,[3] and UTC-enacting states have promulgated conflicting legislation ever since. While the Drafting Committee believed the provisions should be used as presented, most enacting jurisdictions have amended or deleted them. For example, 17 states have omitted both provisions entirely,[4] and another 18 states have modified the provisions.[5] Most states believe placing Sections 105(8) and 105(9) in brackets is essentially a concession that at least some silent trust provisions are compatible with the UTC's overall structure.

OHIO'S CURRENT LAW REGARDING A SILENT TRUST

The OTC found in Ohio Revised Code ("R.C.") Chapters 5801 through 5811 is Ohio's version of the UTC. Ohio, like the above mentioned 18 other states, has enacted but modified the bracketed sections 105(b)(8) and 105(b)(9) of the UTC.

The modified UTC provisions can be found in R.C. 5801.04. According to R.C. 5801.04, a settlor cannot waive the following duties of a trustee:

1. The duty to notify current beneficiaries of an irrevocable trust who have attained age 25 of the "existence of the trust, the identity of the trustee, and the right to request trustee reports" under R.C. 5808.13(B)(2) and (3);[6] and

2. The duty to "respond to the request of a current beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust" under 5808.13(A).[7]

However, both provisions are subject to R.C. 5801.04(c). Division C of R.C. 5801.04 states that, a settlor, in the trust instrument, may waive or modify the above mentioned duties "only by the settlor designating in the trust instrument one or more beneficiary surrogates to receive any no-

tices, information, or reports otherwise required under those divisions to be provided to the current beneficiaries."[8] This is a clear modification of UTC 105(b)(8)-(9), allowing a settlor to waive one or both of the provisions, but only if surrogate beneficiary is informed on the behalf of the beneficiary.

BENEFITS OF A SILENT TRUST

The benefits of a silent trust are straightforward. Knowledge of an awaiting future inheritance can create adverse effects on the life of a beneficiary as well as that of the settlor. For the settlor, the use of a silent trust may protect the confidentially of the settlor's financial success. As for the beneficiary, benefits include:

- Maintaining motivation to finish school and seek meaningful employment.
- Encouraging independent financial responsibility.
- Discouraging substance abuse.

POSSIBLE DRAWBACKS OF A SILENT TRUST

While the use of a silent trust may sound purely beneficial at first glance, there is at least one significant drawback. The OTC favors notice to a beneficiary so that each beneficiary is able to monitor the trustee's activities and ensure that the trustee is acting in the best interests of the beneficiary. One major question when using silent trusts is how a beneficiary can protect an interest unbeknownst to them.

Arguably, the risk of a trustee's breach of fiduciary duty going undetected is mitigated in states such as Ohio that require a surrogate beneficiary. However, while the OTC imposes fiduciary duties on a surrogate beneficiary,[9] the OTC does not specifically provide that the surrogate can act on the beneficiary's behalf. Without the ability of a surrogate beneficiary to take the same action that a current beneficiary could take in the absence of a designation of a surrogate beneficiary, the existence of a surrogate beneficiary may provide less protection to the beneficiary's interest.

WHAT COULD CHANGE IN OHIO LAW?

If it is determined that Ohio should allow a settlor the freedom to create a silent trust, what could Ohio do to best balance the settlor's reasonable desire for a beneficiary to not be made aware of the existence of the trust or certain information about the trust while adequately protecting a beneficiary's interest in the trust?

Do Nothing

Ohio law currently allows a limited version of a silent trust by permitting a waiver of notice of the existence of the trust, the identity of the trustee, and the right to request trustee reports for beneficiaries over age 25, but only if a surrogate is designated to receive such notice on behalf of the beneficiary. In addition, a settlor may waive the trustee's duty to respond to the request of a current beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust, so long as the trustee provides "the notices, information, and reports to the beneficiary surrogate or surrogates in lieu of providing them to the current beneficiaries."[10]

Eliminate Notice Requirements

Ohio could follow the 17 other states that

enacted the UTC but omitted the default requirements of notice under Sections 105(b)(8)—(9). This change would require Ohio to remove R.C. 5801.04(B)(8)-(9) and (C), eliminating the role of a surrogate beneficiary. As discussed above, this may leave a trustee completely unmonitored. Also, with a complete elimination of any notice requirements, there is a risk that if the settlor overreaches in not providing any mechanism for the beneficiary's interest to be protected from a breach of fiduciary duty by the trustee, the court may override the settlor's intentions and require the beneficiary be given information necessary to protect the beneficiary's interest.[11]

Create a More Robust Surrogate Beneficiary by Granting Rights and Imposing Responsibilities

Ohio could modify its current laws by more clearly defining the role of a surrogate beneficiary and specifically granting a surrogate beneficiary the same rights as a current beneficiary as well as imposing the responsibility to act in case of a breach of fiduciary duty of the trustee. Of course, the competency of the surrogate beneficiary will have a direct impact on the level of protection that will be provided to a beneficiary's interest.

YOUR INPUT CAN MAKE A DIFFERENCE

The availability of the perfect estate planning vehicle that harmonizes our clients' competing interests of providing for the next generation, saving estate taxes, developing the next generation to be productive citizens and protecting our clients' confidential financial matters is of great interest to our clients. For some, a silent trust, may be that vehicle. Therefore, it is time to carefully analyze if Ohio law should be changed in order to allow settlors greater freedom to determine the best use of a trust for their families, while providing the necessary protection to a beneficiary's interest from a trustee's breach of fiduciary duties.

Your input (whether you are in favor of change or not) is not only encouraged, but critical to determining whether Ohio law should be changed, and if so, how. If you have comments or questions, please contact Susan L. Racey, chair of the Silent Trust Committee, at sracey@tuckerellis.com or (216) 969-3651.

ENDNOTES:

[1]UNIF. TRUST CODE § 105(b)(8) (UNIF. LAW COMM'N 2010).

[2]UNIF. TR. CODE § 105(b)(9).

[3]"Placing these sections in brackets signals that uniformity is not expected. States may elect to enact these provisions without change, delete these provisions, or enact them with modifications." UNIF. TR. CODE § 105 cmt. para. 16.

[4]Arkansas, Kansas, Massachusetts, Minnesota, Montana, New Hampshire, North Carolina, North Dakota, South Caroline, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming have omitted both provisions. *See* Kent D. Schenkel, *Silent Trusts are Trending: Will They Hold Trustees to Account?,* 47 ACTEC L.J. 107, 117 (2021).

[5]Alabama, Arizona, Colorado, Connecticut, Florida, Hawaii, Illinois, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, and the District of Columbia have modified sections 105(8) or 105(9). *See id.*

[6]R.C. 5801.04(B)(8).

[7]R.C. 5801.04(B)(9). While there are other notice and information requirements of the trustee under the R.C., this article focuses on the UTC's bracket provisions,

found in the R.C. 5801.04(C). For a more general discussion of trustee notice obligations, see Brucken *Do We Shoot the Trustee? Omitting Notices and Information Required by RC 5805.13*, PLJO 225 (May/June 2015).

[8]R.C. 5801.04(c).

[9]R.C. 5801.04(c) states "surrogates shall act in good faith to protect the interests of the current beneficiaries for whom the notices, information, or reports are received."

[10]R.C. 5801.04(c).

[11]*See e.g.*, *Wilson v. Wilson*, 203 N.C. App. 45, 690 S.E.2d 710 (2010). Upon review, the appellate court held the good faith requirement of trustees, in addition to the courts power to act in the interest of justice meant the beneficiaries are always entitled to information "reasonably necessary to enable them to enforce their rights under the trust," and that such information "could not legally be withheld" despite the fact that the trust instrument relieved the trustee of any obligation to "prepare or file for approval any inventory, appraisal or regular or periodic accounts or reports with any court or beneficiary." *Wilson v. Wilson*, 203 N.C. App. 45, 47, 53, 55, 690 S.E.2d 710, 711, 715, 716 (2010).

THE PANDORA PAPERS: THE END OF ASSET PROTECTION PLANNING?

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Many estate planning practitioners may have overlooked the international news item in April of 2016 describing some leaked legal documents later labeled as the "Panama Papers" by a curious media.[1] At the time, few of us could appreciate the broader questions that the transactions described in these filings, or those that followed, might raise in the field of asset protection planning. Often, the extreme actions of a small group raise calls for additional regulatory scrutiny for a broader population. Or, as the old saying reminds us, "pigs get fed; hogs get slaughtered."

Before practitioners surrender to the temptation to dismiss stories like these with thoughts like "none of my clients have Panamanian companies, so this shouldn't affect me" it may be prudent to consider the local after-effects of these actions in other parts of the world. In fact, we should all be aware of the potential consequences to the "everyday" strategies that practitioners deploy on behalf of their clients, especially as the broader population begins to ask questions about international asset protection planning.

HOW IT ALL STARTED

In April of 2016 an unknown source leaked over 11,000,000 confidential client documents to a German reporter originating from the Panamanian law firm of Mossack Fonseca. These documents provided previously undisclosed details regarding thousands of shell companies that were established by various individuals across the globe. The paperwork revealed that the firm often worked with local bank trust departments to establish various structures in favorable jurisdictions that were then subsequently used to purchase and hold property.

Over 100 journalists combed through the volumes of paperwork and began reporting stories on the ways in which some of the over 200,000 shell companies had occasionally been used since the 1970s to promulgate illegal activity. Several prosecutions across the globe followed including those of

