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# SEARCHING FOR FINALITY: ALTERNATIVE ROUTES FOR CLOSURE IN AN IRREVOCABLE TRUST ADMINISTRATION

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The conclusion of a trustee's administration of a trust often represents the involved parties' final opportunity to address and bring to orderly closure issues that may have arisen in the course of that administration, as well as those that may arise after the trustee's involvement with the trust concludes. Naturally, the involved parties need to consider the proper notices required, necessary information and disclosures to be circulated, and any releases from liability. Often trustees are faced with a much longer period of administration, competing beneficial interests, and dramatically different economic and market conditions over the life of the trust.

The adoption of Ohio Revised Code sections 5801.20 through 5801.24, which became effective on April 23, 2023, provides trustees with the option of a new, alternative strategy using a statutory mechanism to conclude the administration of an irrevocable, inter vivos trust. The statutory framework is divided into five sections: R.C. 5801.20 provides definitions; R.C. 5801.21 outlines the general provisions; R.C. 5801.22 governs distributions upon trust termination; R.C. 5801.23 addresses trustee resignation or removal; and R.C. 5801.24 contains various miscellaneous provisions. Today's article attempts to provide an overview of the various challenges that a trustee may face in the conclusion of an irrevocable trust

administration (as opposed to an estate), along with an analysis of the utility of this new statutory alternative from a litigator's perspective. A deep dive into the optional statutory mechanism and its requirements, highlighting some of the statute's features in comparison to its Kentucky and Indiana counterparts, is covered in an article in this journal closer to the statute's enactment. *See* Ramer, *A New Statutory Solution for Concluding Administration of Ohio Irrevocable Trusts*, 33 No. 3 *Ohio Prob. L.J.* NL 4 (January/February 2023).

Prior to the existence of the new optional statutory mechanism, trustees generally had three alternative methods for concluding administration which offered varying levels of protection. These methods, ranked from least to most protective for the trustee, are as follows:

- **Distribute and Pray Alternative:** A trustee could simply distribute and terminate the administration with no further action.
- **The Documentary Alternative:** The involved parties could enter into an agreement for final distribution and termination.
- **The Judicial Alternative:** The parties could seek judicial relief through court proceedings in the respective probate court.

Even with the enactment of the new optional statutory mechanism, a trustee may still choose one of the above alternatives in concluding a trust administration, and the type of assets and parties involved may, to some extent, influence that choice from a cost perspective. For example, while the "Judicial Alternative" may be significantly more costly than the "Distribute and Pray Alternative," the reduced upfront cost of the latter must be balanced against the trustee's potential liability and risk exposure.

Choosing the best fit from the available op-

tions requires an individualized analysis for each trust administration. While there are many factors to consider, two main areas of analysis warrant particular attention: first, any risk flags identified during the course of the administration; and second, the trustee's statutory obligation to "proceed expeditiously" to deliver or distribute the trust assets upon resignation, removal, or trust-terminating distribution as required by R.C. 5807.07(B) and 5808.17(B). At the same time, counsel must evaluate the financial cost of the selected exit strategy and seek to balance that cost against the attendant risks—a challenge in and of itself.

The statutory mechanism establishes a process for providing notice to certain beneficiaries, offering them a period of time to object to the trustee's proposed action and to assert any other claims a beneficiary may have, as well as an opportunity to resolve claims and provide finality to the beneficiaries and the trustee involved. In general, the trustee must provide a 45-day notice to the necessary parties and provide them the last four years of statements for the trust. In the context of trust-terminating distributions, one should further consider the requirements as outlined in R.C. 5801.22(B). Likewise, in the context of resignation or removal, one should examine the requirements outlined in R.C. 5801.23(B).

This approach may prove to be a great alternative to the extent a trustee can satisfy the notice and procedural requirements applicable to the interested parties. In circumstances where that is not feasible or desirable, certain factors may weigh in favor of the "Judicial Alternative" as the best option for concluding the trust administration, or perhaps even as the best strategy from the outset.

Some factors that may still trigger the "Judicial Alternative," even with the advent of the new optional statutory mechanism, include claims that fall outside of the statute of limita-

tions, such as fraud or other bad acts not necessarily covered by claims for breach of trust. *See* R.C. 5810.05, enacted as part of the Ohio Trust Code, which establishes either a two year or four year limitations period for breach-of-trust claims. Another factor to consider includes whether or not it is possible to provide notice to all the necessary parties to cover all potential liabilities. At times, the trust may involve a large class of beneficiaries, shifting sets of beneficiaries, or complicated and evolving relationships amongst the beneficiaries. In this respect, a judicial proceeding may provide the most protection for a trustee because it provides formal notice and an opportunity for all parties involved to be heard, and the resulting judgment carries *res judicata* as to both issues actually litigated as well as those that could have been raised, but were not. The procedural safeguards inherent in litigation (including service of process and discovery proceedings) further support that finality. Although judicial proceedings are the least private alternative, they uniquely provide a public objection period, a final appealable order, and access to appellate review—protections the other alternatives outlined above cannot provide due to their private nature. The tradeoffs, of course are cost and reduced privacy.

Of course, the trustee's best defense against potential claims is capable, professional administration of the trust. But the reality is that even if all of the trustee's duties are discharged professionally and appropriately over the life of the trust, beneficiary grievances may exist that could ripen into claims—meritorious or not. All beneficiaries and trustees should bear in mind that the termination of a trustee's administration of a trust offers the last, best chance to address any lingering issues or concerns and to close the book on the administration, so that all of the parties—beneficiaries and trustee—can move on.