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Bill Analysis

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Primary Sponsors: Reps. A. Mathews and Stewart

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SUMMARY

Ohio Trust Protector and Directed Trust Act

- Enacts the Ohio Trust Protector and Directed Trust Act (OTPDTA).
- Establishes eligibility requirements to serve as a protector, and establishes the powers, authority, and duties attributable to protectors.
- Prohibits concurrent service as trustee and protector of the same trust.
- Establishes procedures for the designation, compensation, resignation, removal, and vacancies of protectors.
- Requires beneficiaries of a trust to be notified in advance of any change in the method or rate of the trust protector's compensation.
- Replaces current law related to powers of direction with provisions governing directed trusts and powers of direction.
- Establishes procedures by which a trust officeholder can seek clarification, instructions, or written confirmation of trust directives.
- Establishes procedures under which trust directives must be delivered.
- Enumerates the duties related to communication that trustees and protectors owe to one another.
- Identifies the communication duties that trustees and protectors do not owe to one another.
- Differentiates between protectors acting in fiduciary and nonfiduciary capacities in terms of liability.

- Lists certain acts or omissions for which a protector may be liable, and describes the extent of the liability.
- Permits certain claims to be brought against protectors for breach of trust.
- Establishes certain defenses for protectors, including those based on exemptions from the bill.
- Lists certain prohibitions for trustees and protectors, particularly regarding power of direction and relief from liability.
- Identifies exceptions to the provisions of the bill.

Drafting attorneys

Trust protector eligibility

- Limits who may serve or be compensated as a protector by excluding both of the following:
 - The attorney that prepared, or supervised the execution of, the trust instrument that appointed the attorney, or a relative of the attorney, as a protector (“drafting attorney”¹);
 - Any relative of the drafting attorney.
- Provides exceptions for persons related to the settlor or if certain disclosures are made by the drafting attorney as required by the bill.
- Provides guidance on who is considered the drafting attorney or relative.
- Provides circumstances under which the drafting attorney or relative is deemed to have been appointed protector.

Required disclosures

- Requires a drafting attorney to make certain disclosures to the trust’s settlor before the trust instrument is executed.
- Requires a settlor to execute a written statement, using a form substantially similar to the form provided in the bill, acknowledging that the disclosures required by the bill were made prior to executing the trust instrument.
- Provides that both of the following apply to the written statement:
 - The written statement must be separate from the trust instrument (but may be annexed to it);

¹ Although this analysis utilizes the term “drafting attorney” for brevity, that term is not used within the text of the bill.

- The written statement may be executed before or after the trust instrument is executed.
- Specifies that failure to obtain the written statement does not affect the validity of the trust instrument.

Trustee removal

- Permits a drafting attorney that is serving as protector of a trust to file a petition in a court of competent jurisdiction to seek removal of a trustee.
- Provides that the attorney may remove the trustee only if the court issues a finding of good cause for the removal.

Applicability

- Specifies that nothing in the bill's provisions related to required disclosures shall be construed to limit any rights or remedies by an interested party, except for the limitations on trust protector eligibility.

Estate administrators

- Repeals the requirement that an administrator, special administrator, administrator de bonis non, or administrator with the will annexed ("administrator") be removed based solely on not being a resident of Ohio, and instead does all of the following:
 - Permits the appointment of a nonresident administrator related by consanguinity or affinity to the decedent;
 - Prohibits the refusal to appoint, and the removal of, a nonresident administrator;
 - Permits the court to impose requirements on a nonresident administrator regarding the retention of decedent assets in the county until distribution or permission is granted for the assets to be removed.

Ohio Trust Code

- Makes changes to the Ohio Trust Code to align its provisions with the OTPDTA.
- States the intent of the state when it comes to interpreting trust documents.
- Establishes duties, discretion, and powers of a trustee with respect to income tax liability for a person treated as an owner of a trust.
- Permits a protector to perform the duties of the trustee with respect to income tax liability for a trust so long as the protector is subject to the same limitations as the trustee.
- Repeals provisions related to excluded fiduciaries that overlapped with the OTPDTA related to directed trusts.
- Aligns the Legacy Trust Act with the provisions of the OTPDTA related to protectors.

Fraudulent transfers

- Exempts transfers made or obligations incurred by a debtor as a result of the debtor’s death from certain actions against the debtor for fraudulent transfers.
- Requires any claim for relief based on a transfer made or obligation incurred as a result of a debtor’s death to be brought within six months of that debtor’s death.

Power of attorney

- Establishes that certain fiduciary duties of an agent acting under a power of attorney are mandatory and cannot be waived.
- Aligns certain powers of agents with respect to revocable trusts with the Ohio Trust Code and the OTPDTA.
- Limits certain rights of an agent with respect to a revocable trust when the principal is also the settlor.
- Permits the awarding of costs and expenses, including reasonable attorney’s fees, in proceedings involving the administration of a power of attorney.

Probate claims

- Requires an executor or administrator to present any claim they have against an estate within the same six-month period following the decedent’s death during which creditors are required to bring claims.

Trust conveyance validity

- Corrects an erroneous use of the term “memorandum of understanding” with “memorandum of trust” in the conveyances and encumbrances law.

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DETAILED ANALYSIS

Ohio Trust Protector and Directed Trust Act

The bill enacts new provisions related to trust protectors and directed trusts and names the new provisions the Ohio Trust Protector and Directed Trust Act (OTPDTA).²

Applicability

Under the bill, the OTPDTA governs the rights, powers, discretion, duties, and liabilities of a protector in connection with the protector's exercise or nonexercise of a power of direction. The OTPDTA applies, to the maximum extent allowed by the U.S. and Ohio constitutions, to any trust, regardless of the date of creation, that is wholly or partially administered in Ohio or governed by Ohio law, except as otherwise provided by the terms of a trust or in case of conflict with the Ohio Legacy Trust Act (see "**Protectors**," below). Furthermore, the bill permits a trust to identify whether certain rights, powers, discretion, duties, or liabilities of a protector are governed by one or more jurisdictions other than Ohio. However, the bill grants Ohio courts personal jurisdiction over a person who accepts an appointment to serve as protector of a trust subject to the OTPDTA.³

Rules of construction

The bill sets forth the following rules of construction in connection with all protectors, directed trusts, and trust directives:

- Courts must give effect to Ohio's policy of maximizing a settlor's freedom of disposition set forth in Ohio law;
- Courts must liberally interpret, construe, and apply the OTPDTA in ways which recognize and allow directed trusts, uphold the rights, powers, discretion, and authority of a protector, and uphold the validity and enforceability of trust directives.
- The rule that statutes in derogation of common law must be strictly construed does not apply to the OTPDTA. In other words, if the OTPDTA conflicts with existing common law, courts are not required to strictly construe the OTPDTA to minimize alterations to the common law.

Additionally, the term "power of direction" must be liberally and broadly interpreted, construed, and applied with respect to the bill's provisions.⁴

OTPDTA definitions

The OTPDTA defines the following terms:

² R.C. 5818.011.

³ R.C. 5818.02 and 5818.24.

⁴ R.C. 5818.17.

- **“Protector”** means a trust officeholder, other than a trustee, that holds a power of direction pursuant to the terms of a trust, regardless of whether the terms of a trust refer to the person holding that power as a “protector,” “adviser,” “director,” or some other name or title.
- **“Breach of trust”** means a breach of a fiduciary duty imposed on a protector by the OTPDTA, any other applicable Ohio law, or the terms of a trust. This includes only acts or omissions undertaken by a protector while acting in a fiduciary capacity, and not those taken while acting in a nonfiduciary capacity. “Breach of trust” does not include acts or omissions which are allowed by the terms of a trust, except where expressly prohibited by law, or the OTPDTA, except where expressly prohibited by the terms of a trust.
- **“Directed trust”** means a trust that includes terms granting a power of direction to a protector.
- **“Legacy trust”** means a trust that is:
 - Evidenced by a written trust instrument to which all of the following apply:
 - ❖ The trust has, names, or appoints at least one qualified trustee for or in connection with the property that is the subject of a qualified disposition.
 - ❖ The trust expressly incorporates the laws of this state to wholly or partially govern its validity, construction, and administration.
 - ❖ The trust expressly states that it is irrevocable.
 - ❖ The trust has a spendthrift provision applicable to the interests of any beneficiary in the trust property, including any interests of a transferor in the trust property.
 - A trust that satisfies all of the above is a legacy trust even if the trust instrument also allows for one or more nonqualified trustees and regardless of the language used to satisfy those criteria.
- **“Person”** means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.
- **“Power of direction”** means a power vested in a protector by the terms of a trust that allows a protector to do any of the following:
 - Issue binding trust directives to another trust officeholder that direct, order, mandate, require, veto, bar, prohibit, or prevent any actual or proposed decisions or actions by a trust officeholder regarding the trust or trust estate, including decisions or actions regarding trust investments, trust administration, or distributions to or for trust beneficiaries;
 - Remove another trust officeholder from a trust office, or appoint another person to a trust office, subject to the bill’s trustee removal provisions;
 - Modify or amend the trust instrument, including amendments related to favorable tax treatment, responding to changes in any tax laws that affect the trust, settlor,

- beneficiaries, or trust administration, or responding to changes in the circumstances of any beneficiary;
- Increase or decrease the interests of any beneficiaries to the trust;
 - Modify the terms of any power of appointment granted by the trust, provided that a modification shall not allow appointments to any person or class of persons who are not beneficiaries of the trust, except to the extent the terms of a trust expressly allow otherwise;
 - Terminate a trust;
 - Change the situs or the governing law of a trust;
 - Make binding interpretations of the terms of a trust;
 - Require a trustee to consult with the protector regarding specified matters;
 - Add or remove persons as beneficiaries of a trust;
 - Add or remove powers and discretion granted under the terms of a trust;
 - Otherwise direct the administration of a trust or the conduct of a trust officeholder.
- **“Settlor”** means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person’s contribution except to the extent another person has the power to revoke or withdraw that portion.
 - **“Terms of a trust”** means the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.
 - **“Trust directive”** means a verbal, written, or other directive, order, or instruction issued by a protector to another trust officeholder whereby the protector, as part of the protector’s exercise or nonexercise of a power of direction, requires the trust officeholder to implement, comply with, or otherwise act in a manner consistent with the directive, order, or instruction.
 - **“Trust instrument”** means an instrument executed by the settlor that contains terms of the trust and any amendments to that instrument.
 - **“Trustee”** includes an original, additional, and successor trustee and a co-trustee.
 - **“Trust office”** means any office, position, or role created by the terms of a trust whereby the person holding or occupying such office is wholly or partially responsible for the management, administration, or supervision of the trust or trust estate, or the investment of trust property. “Trust office” includes the offices of trustee, protector, advisor, and investment advisor. “Trust office” does not include the role of settlor or beneficiary, and does not include the role of beneficiary surrogate unless the term’s instrument expressly provides otherwise. And any person who holds a trust office is a “trust officeholder.”

- **“Willful misconduct”** means intentional wrongdoing. “Willful misconduct” does not include negligence, gross negligence, or recklessness.
- **“Wrongdoing”** means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.⁵

Protectors

The bill enacts a framework of provisions recognizing trust protectors and governing their relationship, powers, and duties in relation to trusts and other trust officeholders. Under the bill, any person who is not a trustee may serve as a protector. And, if a trust instrument creates multiple trusts, a person may serve as protector of any such trust for which the person is not concurrently serving as trustee.⁶

Any person who is an advisor under the Ohio Legacy Trust Act is considered a protector in connection with a legacy trust for the purposes of the OTPDTA, which applies to a legacy trust if the legacy trust permits or includes an advisor. A transferor to a legacy trust may serve as an advisor, but only with respect to investment decisions while they are not serving as a trustee. In the event of a conflict between these two acts, the Ohio Legacy Trust Act will control.⁷

However, a trust is not required to have a protector, and references to a protector may be omitted from the terms of any trust.⁸

Powers and duties

The bill grants various powers to protectors, most prominently, the power of direction, as defined above. Protectors may also take additional, supplemental, or ancillary steps the protector reasonably deems to be necessary or appropriate to exercise or refrain from exercising a power of direction. The bill classifies a protector as a fiduciary unless the terms of the trust provider otherwise.⁹

The rights, powers, duties, discretion, and liabilities of a protector may be varied, allocated, and limited among one or more protectors. In doing so, the terms of the trust may provide that a protector is a fiduciary for some matters, but not others, or impose different duties and liabilities on a protector for different matters, or both. If a trust has more than one protector, the terms of the trust may allocate different rights, powers, duties, discretion, and authority to different protectors, provide different standards of liability for different protectors, or both. However, the bill provides that protectors with jointly held powers must act by a majority decision, unless the terms of the trust provide otherwise.¹⁰

⁵ R.C. 5818.01 and 5818.04; R.C. 5801.01 and 5816.02, not in the bill.

⁶ R.C. 5818.05(A) and (C).

⁷ R.C. 5818.03 and 5818.05(E).

⁸ R.C. 5818.26.

⁹ R.C. 5818.04 and 5818.08.

¹⁰ R.C. 5818.07.

In the event the protector's office is vacant or on the occurrence of a stated contingency, the terms of a trust may provide that the protector's rights, powers, or authority may vest in and be exercised by a trustee during the vacancy or contingency. However, the trustee must be treated as holding and exercising the rights, powers, or authorities in the trustee's capacity as a fiduciary.¹¹

Concurrent service as trustee and protector

The bill prohibits any person from concurrently serving as both trustee and protector of the same trust. In a situation where a person does attempt or purport to serve as both trustee and protector, that person will be treated as having acted as a trustee rather than a protector for that duration of time.

Attempted or purported concurrent service, however, does not automatically invalidate any trust directives issued during that period. The bill permits the terms of a trust to establish rules and procedures for the subsequent protector to wholly or partially affirm, ratify, reject, invalidate, or disavow those trust directives. A subsequent protector is presumed to have ratified and affirmed those directives, except to the extent otherwise provided by or decided under the terms of the trust.

Similarly, any actions taken, or treated as having been taken, by the person during the period of attempted concurrent service are treated as valid and effective to the same extent as any actions taken by a trustee during a period of vacancy in the office of protector.¹²

Designation, removal, and vacancy

Under the bill, a person may accept designation as a protector by doing any of the following:

- Complying with a method of acceptance described by the terms of the trust;
- Exercising powers or performing duties of the protector;
- Otherwise indicating acceptance of the office and responsibilities of the protector.

Except to the extent the terms of the trust provide otherwise, a protector must give bond to secure performance of the protector's duties, but only if a court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust (and the court has not dispensed with the trust requirement). The court may specify the amount of the bond, its liabilities, and whether sureties are necessary. The court also may modify or terminate the bond at any time. However, a regulated financial-service institution or licensed trust company is not required to give bond.¹³

¹¹ R.C. 5818.05(D).

¹² R.C. 5818.05(A) and 5818.06.

¹³ R.C. 5818.28(A) and 5818.29.

Vacancy in a protector position occurs under any of the following circumstances, unless the terms of the trust provide otherwise:

- The designated protector rejects the designation;
- The designated protector cannot be identified or does not exist;
- The protector resigns, is disqualified or removed, or dies;
- A guardian of the estate or person is appointed for the individual serving as protector.¹⁴

A person may reject outright the designation as a protector or may reject by failing to accept within a reasonable period of time after learning of the designation. If a person is already serving as protector, the person may resign by providing 30 days' notice to a qualified beneficiary (who is generally a distributee or permissible distributee of trust income or principal in certain scenarios), the settlor (if living), and all trustees, or with the approval of the court. In approving a resignation, the court may issue orders and impose conditions reasonably necessary to protect the trust property. The bill does not discharge a protector's liability for acts or omissions, or that of any sureties on the protector's bond, when the protector resigns.¹⁵

Subject to the terms of a trust instrument, the bill permits a settlor, trustee, or beneficiary to request that the court remove a protector. Additionally, a court may remove a protector on its own initiative. The court may do so if it determines that there is a lack of cooperation among protectors, the protector has engaged in self-dealing, or because of unfitness, willful misconduct, or unwillingness to serve as protector. If the protector is a fiduciary, the court may remove the protector because of (1) a serious breach of trust or (2) the protector's persistent failure to carry out the duties imposed by the trust instrument and removal for that failure is necessary to protect beneficiary interests.

Pending a final decision on a request to remove a protector, or in lieu of or in addition to removing a protector, the court may do any of the following, as necessary to protect the trust property or the interests of the beneficiaries:

- Compel the protector to perform the protector's duties;
- Enjoin the protector from engaging in willful misconduct or self-dealing;
- Enjoin the protector from committing a breach of trust if the protector is a fiduciary;
- Compel the protector to redress an act of willful misconduct if the protector is not serving in a fiduciary capacity;
- Compel the protector to redress a breach of trust if the protector is serving in a fiduciary capacity;
- Order a protector to account;

¹⁴ R.C. 5818.30.

¹⁵ R.C. 5818.28(B) and 5818.31.

- Appoint a special fiduciary to take control of any trust property held by the protector;
- Suspend the protector;
- Reduce or deny the protector's compensation;
- Void an act of the protector, impose a lien or a constructive trust on any trust property held by the protector, or trace trust property wrongfully disposed of by the protector and recover the property or its proceeds;
- Order any other appropriate relief.¹⁶

Compensation

Under the bill, a protector is entitled to reasonable compensation if the terms of a trust do not specify the protector's compensation, except as prohibited by the bill's provisions regarding protectors who are, or are related to, a drafting attorney (see "**Trust protector eligibility**"). If the terms of the trust specify the protector's compensation, the protector is entitled to be compensated as specified. A court also may allow more or less compensation than is required by the terms of a trust if the protector's duties are substantially different than those anticipated when the trust was created, or when the specified compensation is unreasonably high or low. However, the beneficiaries of a trust must be notified in advance whenever there is any change in the method or rate of a protector's compensation.¹⁷

Trust directives

Duty to implement or comply

Under the bill, a trust officeholder, on receipt of a trust directive, must take reasonable steps to implement or comply with the directive. A trust officeholder, however, has no duty to implement or comply with a trust directive until the trust officeholder actually receives it.

Permissible actions

Except to the extent the conduct constitutes willful misconduct, a trust officeholder may do the following:

- Presume that a trust directive is valid and appropriate;
- Rely upon information provided by a protector in connection with a trust directive;
- Ask a protector to clarify a trust directive;
- Require a protector to place a verbal trust directive in writing before the trust officeholder implements or complies with the trust directive.

A trust officeholder has no liability to any person for implementing or complying with a trust directive, except to the extent it constitutes willful misconduct.

¹⁶ R.C. 5818.32.

¹⁷ R.C. 5818.33.

Prohibited actions

A trust officeholder is prohibited from doing the following to the extent the acts would constitute willful misconduct: (1) presume that a trust directive is valid or appropriate, (2) implement or comply with a trust directive, and (3) rely on information a protector provides in connection with a trust directive.

Liability

Notwithstanding any contrary provision of the OTPDTA, a trust officeholder that has actually received a trust directive is always liable for any act or omission undertaken in connection with the directive that constitutes willful misconduct by the trust officeholder. Any person who claims that a trust officeholder engaged in willful misconduct when implementing or complying with a trust directive bears the burden of proving that misconduct.

Additional duties and liabilities

The terms of a trust may impose duties or liabilities on a trust officeholder in addition to the applicable duties and liabilities described above.¹⁸

Court determination of trust officeholder duties

A trust officeholder can petition a court of competent jurisdiction for instructions regarding the trust officeholder's duties described above. The right to petition a court is in addition to the trust officeholder's rights to seek clarification of a trust directive from a protector and require a trust directive to be in writing (above under "**Permissible actions**"), and to ask a person to clarify the capacity in which that person is acting (see "**Capacity to act**," below). A trust officeholder may seek such clarification in addition to or instead of petitioning for judicial instructions.¹⁹

Issuing or delivering trust directives

The bill permits the terms of a trust to establish reasonable procedures for issuing or delivering a trust directive or certain related documents, establishing a rebuttable presumption that those procedures are reasonable and exclusive. This presumption can only be rebutted by clear and convincing evidence. This presumption does not impair the right of a trust officeholder to take any of the actions described above for trust directives to seek clarification, instructions, or a written directive. But if the terms of the trust do not establish reasonable procedures or are nonexhaustive, the bill allows a trust directive or certain related documents to be delivered by any method permitted under the Ohio Trust Code as a method of providing notice.²⁰

Communications and monitoring

The bill requires any trustee and protector, or any protector and other protector, to provide information to one another to the extent that the information is reasonably related to

¹⁸ R.C. 5818.15.

¹⁹ R.C. 5818.16.

²⁰ R.C. 5818.27.

the powers or duties of that other trustee or protector. One protector, however, does not need to provide information to another protector if the information relates to any power to direct that the other protector can exercise without the consent and approval of the first protector, or relates to any duty that the protectors do not both share. Yet, if failure to share the information with another protector would constitute willful misconduct by the first protector, the protector must share that information.²¹

The bill also establishes limits on the degree to which a trustee or protector must monitor or report on a protector, trustee, or other protector. Under the bill, a trustee does not have a duty to do any of the following:

- Monitor or supervise a protector;
- Inform a protector of the trustee's communications with beneficiaries regarding the protector's performance or suitability;
- Inform a protector of matters that were communicated in confidence, or which the trustee believes were communicated in confidence, to the trustee by the beneficiary;
- Inform or give advice to a settlor, beneficiary, trustee, or protector regarding any instance in which the trustee may have acted differently than a protector.

The bill further establishes that a protector does not have a duty to do any of the acts listed above with respect to a trustee or with respect to another protector. The bill also provides that no act, omission, or course of conduct undertaken by a trustee or protector impairs, limits, restricts, or waives any of the communication and monitoring requirements described above. A trustee or protector may assume any of the duties above, though not required to do so, by means of an express, written, and signed agreement to wholly or partially assume that duty.²²

If a protector relies on information provided by a trustee or another protector, that protector is not liable for any loss or damage caused by their reliance unless it constitutes willful misconduct. In the same way, a trustee will not be liable for loss or damages caused by the reliance on information provided by a protector. However, the trust may impose duties or liabilities which exceed those set forth in the bill.²³

Capacity to act

A person may have different duties and liabilities regarding a trust depending on the capacity in which that person is acting at a given time. As such, the bill establishes procedures by which a court can determine whether a person is acting in their capacity as a settlor, beneficiary, or protector. These procedures require the court to consider the terms of the trust and any documents or communications regarding the person's exercise or nonexercise of a power or authority.

²¹ R.C. 5818.18.

²² R.C. 5818.19.

²³ R.C. 5818.20.

If a person asserts a capacity in a document, the court must presume that the person has correctly asserted the person's capacity when the person executes the document, the document states the capacity in which the person is acting, and the trust grants the person the capacity specified in the executed document. But if a person's capacity remains unclear after a court considers all of these factors, the bill permits the court to consider other facts or circumstances that may be relevant.²⁴

The bill permits a trust officeholder to ask a person who issues a communication or instruction whether it was issued in that person's capacity as a settlor, beneficiary, or trust officeholder. If that person asserts that they are acting in their capacity as a trust officeholder, any other trust officeholder may ask the person to specify the official capacity in which they are acting.²⁵

Fiduciary status and liability

Under the bill, a person's status as a fiduciary or acting in a fiduciary capacity may change the scope of that person's discretion and duties, and may impact the degree to which they are liable for certain losses or for a breach of trust. Under the bill, a protector acting in a fiduciary capacity can exercise any power of direction to the same extent as, but also subject to the same limits and fiduciary obligations as, a trustee of the trust authorized to exercise the same power. On the other hand, a protector not acting in a fiduciary capacity can exercise any protector's power in their sole and absolute discretion, subject to the terms of the trust. This provision, however, does not limit or impair any power or discretion that a protector may have in their capacity as a settlor or beneficiary.²⁶

The bill permits the terms of a trust to impose additional duties and liabilities on a protector.²⁷

Liability

The bill establishes certain explicit circumstances in which liability may attach to a protector. First, a protector holding a power of direction in a fiduciary capacity can be found liable for breach of trust based on either the exercise or nonexercise of that power of direction whenever the protector has committed such a breach. If the protector is found liable for a breach of trust, the liability that attaches is the same as the liability that would attach to a trustee holding the same power in a fiduciary capacity. If there is more than one protector, then the liability will match that for a co-trustee's liability instead. The protector may be found liable for wrongful acts or omissions other than, or in addition to, breach of trust.

If a protector holds a power of direction in a nonfiduciary capacity, then the protector is *not* liable for any breach of trust or for breach of any other fiduciary duty based on their exercise

²⁴ R.C. 5818.22.

²⁵ R.C. 5818.23.

²⁶ R.C. 5818.09 and 5818.13(A).

²⁷ R.C. 5818.12(D).

or nonexercise of their power. The protector may still be liable for other wrongful acts or omissions other than a breach of trust or fiduciary duty.²⁸

The bill provides that a protector is always liable for any act or omission that constitutes willful misconduct or self-dealing. A term of a trust that varies, limits, restricts, or eliminates the duties or liability of a protector when not acting in a fiduciary capacity is valid, except that the trust cannot do either of the following:

- Eliminate a protector's liability for acts or omissions that constitute self-dealing or willful misconduct;
- Preclude a court of competent jurisdiction from removing a protector for self-dealing or willful misconduct.

Any term of a trust that relieves a protector acting in a fiduciary capacity from liability is unenforceable when either of the following apply:

- The term relieves liability for breaches of trust committed through self-dealing, in bad faith, or with reckless indifference to the purposes of the trust or the interests of the beneficiaries;
- The term was added as the result of an abuse by the protector of a fiduciary or confidential relationship with the settlor.²⁹

Civil actions

Under the bill, a beneficiary must commence any action against a protector for a breach of trust based on their actions or omissions in a fiduciary capacity within two years after being sent an accounting or other report disclosing the breach of trust and informing the beneficiary, representative of the beneficiary, or beneficiary surrogate of the allotted time to commence an action.

For any claim brought against a protector for a breach of trust based on actions in a nonfiduciary capacity, or for any other cause of action, the action must be commenced within the same limitation period that would otherwise apply to that claim.³⁰

Defenses

The bill permits a protector to use the following defenses in an action brought against them:

- Any defense available at law or equity, including any defense available under the OTPDTA or under the terms of the trust;

²⁸ R.C. 5818.12(A) and (B).

²⁹ R.C. 5818.13(A), (B), and (C).

³⁰ R.C. 5818.25.

- Any defense that would be available to a trustee in that position under similar circumstances, but only when the protector is a fiduciary and the defense is being asserted in connection with a claim for a breach of trust by that protector.³¹

The bill includes certain instances where a protector is exempt from liability. As mentioned above, if a protector holds a power of direction in a nonfiduciary capacity, then the protector is not liable for any breach of trust or for any other fiduciary duty based on their exercise or nonexercise of their power. Similarly, a protector who undertakes acts or omissions in a nonfiduciary capacity is not liable for a breach of trust based on those acts or omissions.

Under the bill, a protector licensed or certified to provide healthcare in the ordinary course of their business or practice has no duty or liability under the OTPDTA to the extent that the protector acts in their capacity as a health care provider. This provision ensures that there is no possible fiduciary duty that could attach to the protector's acts providing healthcare under the terms of a trust which might discourage the person to accept the office of protector.³²

Prohibitions

The bill contains several prohibitions regarding the actions of protectors and trustees. As discussed above, a person cannot concurrently serve as both a trustee and a protector of a trust. Additionally, the bill prohibits a protector from exercising their power of direction to require or compel a distribution to themselves, or for their own benefit. Similarly, a protector must not use the power of direction to engage in self-dealing or to solely benefit themselves, except as permitted by the bill's compensation provisions. Lastly, a protector cannot use their power of direction to relieve any trust officeholder from liability for willful misconduct by requiring another person to release the trust officeholder from liability, or by altering the terms of the trust to eliminate the trust officeholder's liability.³³

Exceptions

Terms of a trust

Throughout the OTPDTA, there is a general exception included in most provisions that permits the terms of a trust to prevail over the bill's requirements. This priority is not permitted regarding acts or omissions which constitute willful misconduct, however. In such situations, the bill does not permit the terms of the trust to sanction or exculpate willful misconduct.

Settlers and beneficiaries

The bill provides that the OTPDTA does not apply to any exercise or nonexercise of a power or authority by a settlor, in their capacity as a settlor, if that power or authority is conferred on or retained by the settlor under the terms of the trust. Similarly, OTPDTA does not

³¹ R.C. 5818.14(A) and (B).

³² R.C. 5818.12(B) and (C) and 5818.14(C).

³³ R.C. 5818.05(A), 5818.10, and 5818.11.

apply to any exercise or nonexercise of a power or authority by a beneficiary, in their capacity as a beneficiary, if that power is conferred on the beneficiary under the terms of the trust.³⁴

Drafting attorneys

Trust protector eligibility

The bill prohibits either of the following from serving or being compensated as a trust protector:

- The attorney that prepared, or supervised the execution of, the trust instrument that appointed the attorney, or a relative of the attorney, as a protector (“drafting attorney”);
- Any relative of the drafting attorney.

The bill provides exceptions for a drafting attorney or a person related to a drafting attorney to serve as a protector when that person is related to the settlor of the trust or when the drafting attorney makes certain required disclosures to the settlor (see “**Required disclosures**”).³⁵

For the purposes of determining whether a person is a relative of a drafting attorney or the settlor, the bill provides that a person is related to an individual if, at the time the attorney prepared, or supervised the execution of, the trust instrument the person is any of the following:

- A spouse of the individual;
- A lineal ascendant or descendant of the individual;
- A sibling of the individual;
- A person related to the individual, or the individual’s spouse, by consanguinity or affinity, with whom the individual maintains a close, familial relationship, or that related person’s spouse;
- A person who cohabitates with the individual;
- An employee or attorney employed by the same firm as the individual at the time the trust instrument is executed.

Furthermore, an attorney is deemed to have prepared, or supervised the execution of, a trust instrument when that preparation or supervision was performed by an employee or other attorney employed by the same firm at the time of the execution. This means that an attorney can be a “drafting attorney” regardless of whether the preparation or supervision is performed by that attorney or another employee or attorney at the same firm.

³⁴ R.C. 5818.21.

³⁵ R.C. 5818.34(A).

Lastly, the bill provides that a drafting attorney, or a person related to the drafting attorney, is deemed to have been appointed as protector in the trust instrument when the trust instrument does any of the following:

- Vests the power of direction in the drafting attorney or the attorney's relative;
- Vests the power of direction in the drafting attorney or the attorney's relative, in the event that another person designated as protector is unable or unwilling to accept the designation;
- Vests the drafting attorney or the attorney's relative with the power to appoint a protector, and the appointed protector vests the power of direction in the drafting attorney or the attorney's relative.³⁶

Required disclosures

The bill requires a drafting attorney to disclose all of the following information to the trust settlor before the trust instrument is executed:

- Unless specifically disqualified by the terms of the trust, any person, including a family member or friend, is eligible to serve as a protector;
- Any person, including an attorney, who serves as a protector is entitled to receive reasonable compensation for serving as protector;
- Compensation payable to the protector is in addition to any attorney's fees payable to the attorney that prepared, or supervised the execution of, the trust instrument, or to that attorney's firm, for legal services rendered to the protector;
- Should compensation for the protector change, beneficiaries must be notified;
- Subject to the bill's trustee removal provisions (see "**Trustee removal**"), a protector may remove trust officeholders unless otherwise restricted by the terms of the trust.³⁷

A settlor must execute a written statement, using a form substantially similar to that provided in the bill, acknowledging that the required disclosures described above were made prior to executing the trust instrument. This written statement must be separate from the trust instrument, but may be annexed to it. Additionally, this written statement may be executed before or after the trust instrument is executed, so long as the disclosures are made prior to the trust instrument's execution. Failure to obtain the written statement does not affect the validity of the trust instrument.³⁸

³⁶ R.C. 5818.34(C).

³⁷ R.C. 5818.34(B).

³⁸ R.C. 5818.35.

Trustee removal

Under the bill, a drafting attorney that is serving as protector of that trust who seeks to remove a trustee of the trust must file a petition in a court of competent jurisdiction. Upon a finding of good cause by the court, the drafting attorney may remove the trustee. However, the bill prohibits a drafting attorney from removing any trustee of the trust if the court has not issued a finding of good cause.³⁹

Applicability

The bill specifies that nothing in its provisions related to required disclosures shall be construed to limit any rights or remedies by an interested party, except for the limitations on a drafting attorney, or a person related to a drafting attorney, serving or being compensated as a protector in the absence of the required disclosures having been made.⁴⁰

Estate administrators

Estate administrators, under both Ohio's Fiduciaries Law and the Executors and Administrators Law, are legal representatives of an estate ordinarily appointed by the presiding probate court to represent a decedent's estate. Continuing law, changed in part by the bill, requires that any person appointed by the court as an administrator, special administrator, administrator de bonis non, or administrator with the will annexed ("administrator") must be a resident of Ohio. Furthermore, if the court is provided with proof that an administrator is no longer a resident of Ohio, that person must be removed from that position.

The bill repeals the requirement that an administrator be removed from the position upon no longer being an Ohio resident and instead permits certain nonresidents to serve as administrators under specified circumstances. Namely, an administrator may be a nonresident of Ohio if that person is related to the decedent by consanguinity (blood) or affinity (marriage). Additionally, the bill provides that a nonresident administrator shall not be refused appointment or removed solely because that administrator is not a resident of Ohio. These changes apply to both the Fiduciaries Law and the Executors and Administrators Law.⁴¹

Under the bill, the court may require that a nonresident administrator assure that all of the decedent's assets that are in the county at the time of the decedent's death remain in the county until distribution or until the court determines that they may be removed from the county. So although the bill permits certain administrators to be nonresidents, it does not permit unapproved removal of the decedent's assets.⁴²

³⁹ R.C. 5818.36.

⁴⁰ R.C. 5818.37.

⁴¹ R.C. 2109.21(A)(1) and (2) and 2113.06(C).

⁴² R.C. 2109.21(A)(3).

Ohio Trust Code

Trust administration

The bill makes several changes to continuing law regarding the administration of trusts in Ohio. First, it adds a statement that it is the policy of Ohio to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments. Basically, this makes clear that the state wants a person to be able to choose what happens to their property or estate after death and that the governing instruments of a trust or estate should be given extremely high priority when making determinations about that property.⁴³

Secondly, the bill adds a provision that the duty of a trustee to act in good faith and in accordance with a trust is subject to the OTPDTA. This ensures that the powers of direction and other acts by which a trustee's discretion may be limited or through which they may be required to act at the direction of someone else are not superseded by the current law's requirement for them to act in good faith and in accordance with the trust.⁴⁴

The bill also expands the discretion of a trustee with respect to the place of trust administration, allowing the trustee to administer the trust at any reasonably appropriate place if there is more than one.⁴⁵

Beyond this, the bill clarifies the scope of an agent's powers under a power of attorney. Continuing law limits an agent under a power of attorney to exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only to the extent expressly allowed by both the terms of the trust and the power of attorney. The bill expands the list of powers limited by the terms and the power of attorney to include the withdrawal of trust property, and replaces the power of "distribution of trust property" to instead refer to "*the ability to direct* the distribution of trust property" (emphasis added).⁴⁶

Direction of settlor and power of modification

The bill repeals current law regarding the power to direct the modification or termination of a trust and liability for losses related to that power. Under current law, a trustee may follow a direction of a settlor contrary to the terms of a revocable trust. Furthermore, current law allows a trust to confer powers to direct the modification or termination of the trust upon a trustee or other person. As part of this, there is a presumption of a fiduciary duty for a person other than a beneficiary with the power to direct, which requires the person to act in good faith, and establishes liability for losses resulting from a breach of that fiduciary duty.

⁴³ R.C. 5801.04(D).

⁴⁴ R.C. 5801.04(B)(2).

⁴⁵ R.C. 5801.07(B).

⁴⁶ R.C. 5806.02(E); conforming changes in R.C. 1337.52(B).

Under the bill, this repealed provision is replaced with language permitting a trustee to follow a direction of a settlor contrary to the terms of a revocable trust.⁴⁷

Income tax liability payment and reimbursement

Continuing law provides a list of specific powers granted to trustees under the Ohio Trust Code. The bill enacts new provisions which specifically address a trustee's authority regarding income tax liability for certain trusts where settlors or others are considered owners. This starts with trustees being permitted to either pay to the appropriate taxing authority or reimburse a person treated as an owner of the trust whatever amount of the person's income tax liability is due to income, capital gains, deductions, or credits from the trust. In this case, the trustee has sole discretion whether to pay the tax directly or whether to reimburse the person treated as owner. However, the bill expands the list of disbursements that a trustee is required to make, meaning that while the trustee has discretion over how to make this disbursement, it must be done one way or another.

In doing so, there is a rebuttable presumption that a trustee who acts in good faith in exercising this authority is acting in accordance with the terms of the trust and beneficiaries interests. Additionally, no inference of impropriety will arise based on a trustee exercising this power or not.

If a trust requires the trustee to act at the direction of or with the consent of a protector, or that the decisions be made directly by a protector, then the authority granted to the trustee is either granted to the protector in addition to or instead of the trustee, based on the terms of the trust. In that case, the protector is subject to the same limitations as the trustee.

However, the bill places limits on the scope of these new provisions. A person is not considered a beneficiary of the trust solely due to the application of these provisions. Additionally, these requirements apply to all trusts, regardless of the date of creation, unless any of the following apply:

- The provisions would reduce or prevent a contribution to the trust from qualifying for a federal tax benefit that was, or could have been, claimed for the contribution;
- The trust is a settlor retained annuity trust or settlor retained unitrust during a term interest;
- Applying the provisions would be the only trigger for a trust being treated as a trust with income, deduction, and credits attributable to settlors and other substantial owners – in other words, the trust would otherwise not cause a person treated as an owner to have additional income tax liability.⁴⁸

⁴⁷ R.C. 5806.03; R.C. 5808.08, repealed.

⁴⁸ R.C. 5808.161 and 5812.43(A)(8).

Trustee and fiduciary liability

The bill updates provisions regarding trustee liability to ensure that they align with the new provisions enacted by the OTPDTA. Continuing law prohibits a term of a trust to relieve a trustee from liability when either of the following apply:

- The term relieves liability for a breach of trust committed in bad faith or with reckless indifference to the purposes of the trust of the interests of the beneficiaries;
- The term was added as the result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor.

These requirements mirror those included and applied to protectors in the OTPDTA. The bill supplements this existing prohibition by permitting a term to relieve a trustee of liability for complying with a trust directive, but only to the extent that the relief is permitted under the OTPDTA, and term of trust permitted under the OTPDTA, or is otherwise permitted under the Ohio Trust Code.⁴⁹

Additionally, the bill repeals current law provisions which shield excluded fiduciaries from certain losses incurred when an instrument reserves any power to the settlor, an advisory committee, or other individuals. These provisions would likely overlap with the OTPDTA provisions regarding powers of direction and the liability which attaches under those circumstances. As such, the provisions and other references to excluded fiduciaries are removed from current law. Additionally, a reference to the “grantor” has been replaced with a reference to the “settlor” instead. “Grantor” and “settlor” mean the same thing: the person who created a trust. As such, this change ensures that Ohio law relating to trusts uses internally consistent terminology.⁵⁰

Legacy trusts

In accordance with the OTPDTA, the bill prohibits any person from concurrently serving as a trustee and advisor of a legacy trust, because advisors of legacy trusts are considered protectors under the new chapter. Additionally, the bill imposes the same provisions from the OTPDTA to a person who concurrently serves or purports to concurrently serve as both a legacy trust advisor and trustee.⁵¹

Applicability

The bill expands the definition of “beneficiary” for the purpose of anti-lapse provisions to include the beneficiary of a primary gift. However, the bill does not define what a primary gift is. The bill includes a direction to give this new definition retroactive effect to the fullest extent

⁴⁹ R.C. 5810.08.

⁵⁰ R.C. 5815.25(C) and (D); R.C. 5815.25(C), repealed.

⁵¹ R.C. 5816.11 and 5818.06.

under the Ohio Constitution, unless doing so would invalidate or supersede any recorded instrument that conveys real property or an interest in such.⁵²

Fraudulent transfers

The bill exempts certain transfers made or obligations incurred by a debtor from civil actions under Ohio's fraudulent transfers laws. Under current law, a creditor may bring an action for a fraudulent transfer against a debtor when they make a transfer or incur an obligation where the debtor does not receive a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was engaged in or about to engage in certain business practices or was intending to incur debts beyond the debtor's ability to pay. Similar actions can be brought for fraudulent transfers when the debtor is insolvent or the transfer or obligation makes them insolvent, and where the transfer or obligation was made to an insider for a prior debt, and the insider had reasonable cause to believe the debtor was insolvent. All of these situations involve fraudulent transfers in which the debtor would receive the value of the transfer, but be unable to fulfill their obligations.

The bill amends these provisions so that a creditor cannot commence an action for a fraudulent transfer when the transfer is made or the obligation is incurred by a debtor as a result of the debtor's death.⁵³

Additionally, the bill requires that any person seeking relief based on a transfer made or obligation incurred by a debtor as a result of their death must bring that claim within six months after the debtor's death or the claim is extinguished.⁵⁴

Power of attorney

Duties and powers

The bill makes various changes to the duties and powers afforded to agents under a power of attorney. Current law includes a list of duties which, all of which an agent must do. The bill specifies that these duties are mandatory, and prohibits an agent from waiving any of the duties. Furthermore, the agent's duties are specified to include attempting to preserve the principal's estate plan and the default duties contained in continuing law.⁵⁵

Additionally, the bill expands the list of powers which a trust agreement for a revocable trust may expressly authorize an agent to exercise by replacing the power of distribution with the power to withdrawal trust property and to direct the distribution of trust property.⁵⁶

⁵² R.C. 5808.19(A)(1).

⁵³ R.C. 1336.04(A) and (C) and 1336.05(A) and (C).

⁵⁴ R.C. 1336.09.

⁵⁵ R.C. 1337.34(A) and 1337.42(H).

⁵⁶ R.C. 1337.42(A).

Judicial proceedings

Under current law, the court may provide appropriate relief in judicial proceedings involving the administration of a power of attorney. However, attorney’s fees are not automatically presumed to be “appropriate relief.” As such, the bill expands the relief available under an action to permit a court to award costs and expenses, including reasonable attorney’s fees, as justice may require.⁵⁷

Probate claim expiration period

The bill amends the period during which an executor or administrator must present any claim they have against an estate to the probate court for allowance. Current law only requires that the claim be brought within three months after the executor or administrator is appointed. The bill narrows this timeframe by requiring that a claim be brought before the expiration of the period described for claims brought by creditors against a decedent, which is currently six months after the death of the decedent. This means that regardless of the date of appointment, the executor or administrator must bring the claim within six months. This ensures that these claims are brought within the same timeframe as claims brought by creditors against the decedent.⁵⁸

Trust conveyance validity

The bill corrects an erroneous use of the term “memorandum of understanding” with “memorandum of trust” in the Conveyances and Encumbrances Law. This fixes the error for the purposes of the provisions regarding the validity of a conveyance and the conveyance instrument, if the instrument is not recorded.⁵⁹

HISTORY

Action	Date
Introduced	09-15-2025
Reported, House Judiciary	05-20-2026
Passed House (96-0)	05-20-2026

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⁵⁷ R.C. 1337.36(C).

⁵⁸ R.C. 2117.02; R.C. 2117.06, not in the bill.

⁵⁹ R.C. 5301.071(F).