"HEY FIDUCIARIES, THE OHIO TRUST CODE IS STILL YOUR FRIEND"

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Three solid years of deliberation over Ohio law and the Uniform Trust Code (promulgated in 2000) preceded the drafting and ultimate passage of H.B. 416 leading to the creation of the Ohio Trust Code ("OTC") effective January 2007.[1] In the more than 12 years since the OTC has been in effect, court decisions and practical experience has led the Estate Planning, Trust, and Probate Law ("EPTPL") Section of the Ohio State Bar Association, to continue its well-reasoned and active lobbying of the legislature to modify the OTC based on post-2007 realities. While reaction to court decisions from Ohio and other jurisdictions often spurs swift reaction from the EPTPL, we appear to overlook that the OTC was enacted with great deliberation and careful consideration of a body of law and policy. Our reactionary posture is sometimes triggered by a court decision that, on its face may appear troubling, but substantively does not consider or analyze the OTC and attendant nuances in a way that can provide meaningful guidance.

A fiduciary—especially an institutional fiduciary—is selected for resources and expertise necessary to do the job, but also to navigate tough decision making. Failure to make tough decisions might lead a settlor to lose confidence in a third-party fiduciary, particularly to manage family dynamics. This could affect the trust at issue, or create a wider perception that a certain trustee lacks the confidence to make those "tough decisions" that a settlor expects. While fiduciaries should be cognizant of court decisions, particularly in situations where beneficiaries take adverse positions to each other, fiduciaries should closely scrutinize relevant court decisions and not lose sight of the cornerstones of fiduciary law.

The basic tenets of trust administration remain intact. All trustees need to know the controlling instrument. Ohio continues to recognize that a cornerstone of trust administration is to ascertain and honor the settlor's intent by looking at the four corners of the document in its entirety.[2] While case law interpreting language in documents is helpful, all trusts are unique ("*sui generis*")[3] with "subtle

nuances and differences in language" in the trust under review providing "little precedential value" from prior cases.[4] As such, the trust language guides the fiduciary with the OTC as a gap filler. The trust terms provide the guidance to the Trustee to make decisions about administration. Developing a relationship with the beneficiary allows the trustee to administer the trust consistent with the settlor's intent while understanding the realities of the beneficial interest.

Furthermore, the OTC and Ohio law contemplate that a trustee may be required to make difficult decisions and as such, protection must be afforded to a trustee to support and protect reasonable decision making. A trustee's deliberation over, and reasonable reliance on, a term of trust relieves a trustee from liability for a breach of trust under the OTC.[5] Similarly, it is well settled Ohio law that "[s]o long as a trustee executes the trust in good faith and within the limits of a sound discretion, a court of equity will not interfere with that discretion or undertake to substitute its discretion therefor."[6] Consistent with this deference to good faith and reasonableness in fiduciary decision making, the OTC supports removal of the Trustee only if alleged conduct amounts to a "serious" breach of trust.[7] It follows that the OTC is written to allow for deliberate and reasonable decisions. As such when a case comes along that basically tells a Trustee it may not make a reasonable, good faith, deliberate decision selecting one of two competing positions in a Trust dispute, close scrutiny of that decision is required before fiduciaries divert from what they know to be sound fiduciary practice.

Much has been written on *Dueck v. Clifton Club Company*, 2017-Ohio-7161, 95 N.E.3d 1032 (Ohio Ct. App. 8th Dist. Cuyahoga County 2017), appeal not allowed, 152 Ohio St. 3d 1409, 2018-Ohio-723, 92 N.E.3d 879 (2018), a case out of the Eighth District Court of Appeals. Indeed, the EPTPL's reaction to the case was forceful and swift in denouncing one of its holdings, which resulted in an amendment to R.C. 5815.16 to ensure attorney-client privilege remains between an attorney and the trustee client. We must remind ourselves, though, that even the doctrine of *stare decisis* allows for departure from case law that is not well reasoned. As the Ohio Supreme Court stated, if "adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it."[8] Here, *Clifton Club* presents a good lesson on case law as an aberration and not useful precedent because it provides doubt and confusion in the face of the OTC.

Clifton Club involved the construction of a deed of trust executed in the early 1900s, and how it affected the rights of certain claimed beneficiaries. The Trustee in *Clifton Club* was faced with beneficiaries asserting competing and adverse positions. The Trustee secured an independent legal opinion, which opined on settlor intent and the rights of beneficiaries.[9] The Trustee then asserted its position aligned with one set of the beneficiaries in declaratory judgment proceedings commenced by one set of the beneficiaries. The probate court denied a motion to remove the Trustee and denied a motion for attorney's fees filed against the Trustee. Ultimately, the Court of Appeals reversed the probate court's summary judgment for the Trustee on the declaratory issue. The Court of Appeals went further in basically serving as a finder of fact and determining that, while removal was not warranted, the appellants were entitled to an award of attorney's fees because the Trustee breached its fiduciary duty by "engaging in advocacy between the beneficiaries" (even if reasonably and in good faith reliance on the terms of the trust in an effort to honor settlor intent).[10] There are numerous reasons why *Clifton Club* should not be read to require a trustee take a neutral position when beneficiaries disagree.

First, *Clifton Club* was a 2-1 opinion from a Court of Appeals consisting of 12 judges total, from an Appellate District that covers one county (Cuyahoga) out of a total of 88 Ohio counties. Eighty-seven of 88 Ohio counties are not obligated to follow *Clifton Club*. Further, in over two years since it was decided, no other court has followed *Clifton Club* for any of the holdings addressing fiduciary conduct.

Second, *Clifton Club* departs from well settled Ohio law in the court concluding the trustee "crossed the fine line" of duty of impartiality to beneficiaries amounting to breach of duty.[11] In its departure from Ohio law, *Clifton Club* cites to the *Northern Trust Co. v. Heuer* case out of Illinois, which was decided 29 years before Illinois enacted its own Trust code,[12] to imply that R.C. 5802.01(A) and/or (C) mandates the Trustee seek instructions in the face of diverging beneficiary positions. However, *Heuer* does not cite to the UTC and is based on Illinois common law going back to 1976. *Clifton Club* does nothing to demonstrate how *Heuer* is consistent with the OTC.

Third, even if the *Clifton Club* court was correct in finding a breach of impartiality under that particular set of facts, the Court went beyond the scope of its judicial function as a reviewing court of appeal and served as finder of fact and imposed a remedy instead of remanding to the probate court to consider the facts and circumstances of the case to fashion an appropriate remedy. It is well settled that "the trial court is in the best position to determine whether the possible legal remedies * * * are an adequate remedy."[13] R.C. 5810.01(B) provides nine "Remedies for Breach of Trust" and, as further emphasis to the discretion afforded the trial court to impose the remedy, includes a "catch-all" provision under R.C. 5810.01(B)(10) allowing the court to "order any other appropriate relief." The Ohio legislature crafted R.C. 5810.01(B) in a manner that follows the principle that the trial court is in the best position to fashion a remedy to a case. As one court of appeals summarized: "[W]e first acknowledge that the trial judge has first-hand exposure to the litigants and the evidence and, thus, is in a considerably better position to bring the scales of into balance than this court [of appeals] would be."[14] Yet, without explanation, the *Clifton Club* court held that after it found a breach of impartiality (which the probate court did not) "we [the Court of Appeals] find the appropriate remedy in this case" to be an award of attorney's fees citing jointly to R.C. 5810.01(B) and R.C. 5810.04.[15]

Fourth, the *Clifton Club* court found the Trustee was required to disclose attorney-client privileged information between the Trustee and its attorney. Without squaring R.C. 2317.02 (Ohio's attorney-client privilege statute) and R.C. 5815.16 (no duty owed from attorney to beneficiaries by attorney who represents trustee) the *Clifton Club* court instead imposed a "duty of full disclosure of all material facts known to [the trustee] that might affect [the beneficiary's] rights."[16] In addition, the court appears to ignore the language in R.C. 5808.13, which relieves a Trustee from potential liability for not promptly responding to a beneficiary's request for information if the request is "unreasonable under the circumstances[.]" In other words, the *Clifton Club* court's apparent imposition of an absolute duty upon the Trustee to disclose facts to beneficiaries, including otherwise confidential and privileged information, appears inconsistent with the OTC and Ohio law.[17]

Interestingly, the *Clifton Club* court relied on *Huie v. DeShazo* out of the Texas Supreme Court, which holds that communications between an attorney and trustee client remain privileged. In so holding, the Texas Supreme Court stated that since a Trustee "must be able to consult freely with his or her attorney to obtain the best possible legal guidance"[18] and

without the attorney-client privilege that would be not possible. "[W]e should not thwart such legitimate expectations by retroactively amending the rule [relating to privilege] through judicial decision."[19] As such, this Texas case law relied upon by the *Clifton Club* court expressly contradicts the *Clifton Club* court creating (the now legislatively overruled) fiduciary exception to the attorney client privilege.

Clifton Club provides a cautionary tale to Trustees. Trustees should continue to be aware of case law decided on relevant issues. Yet the OTC provides well thought out guidance on trust administration and remains an excellent tool—even in family disputes. Trustees must closely scrutinize case law before changing best practices for it is these precise best practices that often result in the nomination and service as the trusted fiduciary in the first place.

ENDNOTES:

[1]Alan Newman, The Uniform Trust Code: An Analysis of Ohio's Version, 34 Ohio Northern University Law Review 135 (2008).

[2]*Pack v. Osborn*, 117 Ohio St. 3d 14, 2008-Ohio-90, ¶ 8, 881 N.E.2d 237, 241 (2008); *In re Trust of Brooke*, 82 Ohio St. 3d 553, 557, 1998-Ohio-185, 697 N.E.2d 191 (1998).

[3]See *Ohio Nat. Bank of Columbus v. Adair*, 54 Ohio St. 2d 26, 37, fn. 5, 8 Ohio Op. 3d 15, 374 N.E.2d 415, 7 A.L.R.4th 1073 (1978).

[4]*Polen v. Baker*, 2000 WL 776931, at *4, fn. 5 (Ohio Ct. App. 4th Dist. Pickaway County 2000), judgment aff'd, 92 Ohio St. 3d 563, 2001-Ohio-1286, 752 N.E.2d 258 (2001) (citing *Anderson v. Gibson*, 116 Ohio St. 684, 688-689, 5 Ohio L. Abs. 365, 157 N.E. 377, 378, 54 A.L.R. 92 (1927); *Moon v. Stewart*, 87 Ohio St. 349, 101 N.E. 344 (1913), at paragraph one of the syllabus; *Brasher v. Marsh*, 15 Ohio St. 103, 109, 1864 WL 11 (1864).

[5]R.C. 5810.06

[6]*Stevens v. National City Bank*, 45 Ohio St. 3d 276, 279-280, 544 N.E.2d 612, 616 (1989); *Weygandt v. Ward*, 2013-Ohio-1937, ¶ 16, 2013 WL 1946396 (Ohio Ct. App. 9th Dist. Wayne County 2013).

[7]R.C. 5807.06*; Tomazic v. Rapoport*, 2012-Ohio-4402, ¶ 34, 977 N.E.2d 1068, 1075 (Ohio Ct. App. 8th Dist. Cuyahoga County 2012); *Kidd v. Alfano*, 2016-Ohio-7519, ¶ ¶ 26-27, 44, 64 N.E.3d 1052, 1060, 1066 (Ohio Ct. App. 2d Dist. Montgomery County 2016).

[8]*Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St. 3d 435, 438, 1994-Ohio-519, 628 N.E.2d 46, 49, 58 A.L.R.5th 929 (1994).

[9]*Dueck v. Clifton Club Company*, 2017-Ohio-7161, at ¶ 81, 95 N.E.3d 1032, 1055 (Ohio Ct. App. 8th Dist. Cuyahoga County 2017), appeal not allowed, 152 Ohio St. 3d 1409, 2018-Ohio-723, 92 N.E.3d 879 (2018).

[10]*Clifton Club Company*, 2017-Ohio-7161, at ¶ 104, 95 N.E.3d at 1059.

[11]*Clifton Club Company*, 2017-Ohio-7161, at ¶ 103, 95 N.E.3d at 1059.

[12]*Clifton Club Company*, 2017-Ohio-7161, at ¶ 103, 95 N.E.3d at 1059, citing *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 148 Ill. Dec. 364, 560 N.E.2d 961 (1st Dist. 1990).

[13]*Fodor v. First Natl. Supermarkets, Inc.*, 63 Ohio St. 3d 489, 496, 589 N.E.2d 17 (1992) (concurrence).

[14]*Willson v. Board of Trustees of Ohio State University*, 1991 WL 274862, at *18 (Ohio Ct. App. 10th Dist. Franklin County 1991), cause dismissed, 63 Ohio St. 3d 1434, 588 N.E.2d 133 (1992).

[15]*Clifton Club Company*, 2017-Ohio-7161, at ¶ 123, 95 N.E.3d at 1064.

[16]*Clifton Club Company*, 2017-Ohio-7161, at ¶ 112, 95 N.E.3d at 1061.

[17]Note the "fiduciary exception" to the attorney-client privilege found in *Clifton Club* has been legislatively overruled in R.C. 5815.16(B) effective March 22, 2019.

[18]*Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996).

[19]*Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996).

CASE SUMMARIES

Verhoff v. Verhoff

Headnote: Self-dealing

Citation: *Verhoff v. Verhoff*, 2019-Ohio-3836, 2019 WL 4594201 (Ohio Ct. App. 3d Dist. Allen County 2019)

Decedent left five children and a family