

(R.C. § 5807.06). Ohio simply added the express language. It does not appear that Ohio's addition of this language was intended to narrow the application of R.C. § 5804.11(B) beyond that of the UTC language.

What would be the result in Ohio if the beneficiaries of a trust, as in the Pennsylvania case, desired to add flexibility by amending a trust to allow the beneficiaries to remove a corporate trustee and replace with another corporate trustee? Would they be required to show grounds for removal of the current trustee under § 5807.06? Would the court be required to determine whether the beneficiaries intended to immediately remove the current trustee or whether it was for future use?

See Brucken, *When It's Not Removal of a Trustee*, 27 PLJO 4 (March/April 2017) for a practical example where un-nominating a future trustee by amendment can be very useful. Perhaps § 5804.11(B) and R.C. § 5807.06 should be amended to remove any ambiguity and make it clear that there is a difference between amending the trust and removing a trustee.

ENDNOTES:

¹The author represented the beneficiaries in the case discussed in this article.

²*In Re Trust Under Agreement of Taylor*, 2015 PA Super 199 (PA. Super. 2015).

³Newman, Report on H.B. 416: The Ohio Trust Code as Enacted (May, 2006).

FINALLY. . . CONFIRMATION THAT FINALITY AND PROTECTIONS ARE AVAILABLE TO TRUSTEES UNDER THE OHIO TRUST CODE

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INTRODUCTION

Years after the initial enactment of the Ohio Trust Code and articles published in this journal¹ the Tenth District Ohio Court of Appeals in *Zook, et*

al. v. JP Morgan Chase Bank National Association, et al., 10th Dist. No. 15AP-751, 2017-Ohio-838, confirmed the viability of options under the Trust Code that afford trustees a path to finality in trust administration not subject to continuing court jurisdiction. Specifically, the *Zook* court confirmed what readers of this journal and those familiar with the Trust Code already “know”:

“Ohio law provides for two alternative mechanisms by which a trustee may conclude its roles as a trustee and finally settle all questions of responsibility with respect to the trustee’s action. The first option is a judicial proceeding under R.C. 5802.01 and 2721.05. As an alternative to such judicial proceedings, the trustee may obtain a release from beneficiaries under R.C. 5810.09, 5808.17(c) and 5808.02(B)(4).

* * *

* * * [A judicially] expressed aversion to releases in fiduciary cases does not comport with the manifest intent of the legislature to allow such releases as a means of terminating a trust. R.C. 5810.09, 5808.17(c), and 5808.02(B)(4) all contemplate use of releases as routine in trust matters. * * *

Id. ¶¶ 23, 36. While the overarching takeaway from *Zook* is that judicial and non-judicial closure is legislatively afforded trustees, a close look at the case also reveals factual and procedural distinctions worthy of attention.

RELEVANT FACTS

In *Zook*, a closely held advertising business had an appraised value of \$1,036,000 on a probate inventory. *Id.* ¶ 8. The probate estate poured over into an inter vivos trust where the \$1,036,000 appraised value was listed on trust account statements. *Id.* Upon the death of the settlor, the trust benefited the settlor’s surviving spouse and upon her death was outright distributable to the settlor’s children from a marriage other than to the surviving spouse. The trust gave the surviving spouse authority to operate and manage the advertising business pursuant to a management agreement to be entered into with the Trustee. *Id.* at ¶ 4. The surviving spouse immediately took over operation and control of the business but never entered into a management agreement with the Trustee. *Id.* The business went into rapid decline and, in part because the business “presented a significant risk of liability that could compromise the other as-

sets still held by the trust,” the Trustee sold the business to the surviving spouse for \$740.00. *Id.* at ¶ 6.

Upon the surviving spouse’s death, in lieu of the cost and delay associated with the Trustee seeking court approval of its administration and final accounting, the beneficiaries all ultimately signed a release presented by the Trustee that approved the Trustee accountings, the Trustee administration and further provided that “all acts, doings, administration, and omissions of [the Trustee] with respect to the Trusts are hereby ratified, affirmed and approved[.]” *Id.* at ¶ 9. Further language released, indemnified and held harmless (for damages and attorney fees) the Trustee in its fiduciary and corporate capacities. *Id.* After all beneficiaries signed the releases the Trustee made final distributions. Ultimately, several of the beneficiaries sued the Trustee for loss to the Trust due to the decline in value in the advertising business. *Id.* at ¶ 10.

After conducting an oral hearing on cross-motions for summary judgment, the trial court granted the Trustee summary judgment on the basis that the beneficiaries’ claims were barred by signed releases.² Some beneficiaries appealed and the only issue advanced by the beneficiaries’ on appeal was “the validity and preclusive effect of those releases[.]” *Id.* at ¶ 22.

Following the Court of Appeals’ acknowledgment that the Trust Code affords finality to the Trustee administration by way of judicial action or private agreement, the *Zook* court conducted a de novo review of the trial court’s award of summary judgment. In affirming the award of summary judgment, the *Zook* Court addressed a threshold burden of proof issue and analyzed whether the beneficiaries were excused from their release.

BURDEN OF PROOF/PROCEDURAL ISSUE

The Court of Appeals held that “once the trustee presents an executed release, the burden shifts to the beneficiaries to demonstrate that an R.C. 5808.17(c) exception applies to invalidate the release.” *Id.* at ¶ 31. In agreeing with the trial court

below, the Court of Appeals distinguished and rejected a prior holding of the First District Ohio Court of Appeals in *Cundall v. U.S. Bank, N.A.*, 174 Ohio App.3d 421, 2007-Ohio-7067, *rev’d on other grounds*, 122 Ohio St.3d 188, 2009-Ohio-2523 which held that the Trustee bore the burden to establish “both the existence of the release and the validity thereof[.]” *Zook*, 2017-Ohio-838, at ¶ 31. The *Zook* Court noted that *Cundall* involved a self-dealing transaction where a trustee and beneficiary “coerced other beneficiaries” into a transaction encompassed by the Trustee’s release submitted to the beneficiaries. *Id.* at ¶ 32. In noting that the alleged conduct sought to be released was a self-dealing transaction predicated on fraud (coercive conduct), the *Zook* court noted that the *Cundall* burden of proof was inapplicable. *Id.* at ¶ 35. As one of at least four grounds for distinguishing *Cundall*, the Court noted that:

* * * Releases perhaps, should remain highly scrutinized in self-dealing cases like *Cundall*, but we do not have such a case before us. On the facts here, we conclude that once the beneficiaries admit that they executed a release, the burden shifts to the party to seeking to invalidate it.”

Id. at ¶ 36.³ Accordingly, once the Trustee presents a release signed by beneficiaries that encompasses alleged claims, the burden shifts to beneficiaries to invalidate the release instrument.

VALIDITY OF RELEASES

R.C. 5808.17(c) states “A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent that it was induced by improper conduct of the trustee or that the beneficiary, at the time of the release, did not know of the beneficiary’s rights or of the material facts relating to the breach.” While the trial court reviewed the evidence applicable to all three exceptions under R.C. 5808.17(c),⁴ the beneficiaries on appeal only sought review as to whether the appellants were “unaware of certain material facts concerning [the Trustee’s] actions[?]” *Zook*, 2017-Ohio-838, at ¶ 27. In summary, the beneficiaries claimed they were excused from the release since they were unaware of facts pertaining to the management of the advertising business and the devaluation of the business and resulting loss to the Trust corpus. *Id.*

The *Zook* Court noted that R.C. 5801.03(A) provides a definition of “knowledge” with respect to trust matters. The *Zook* Court held that R.C. 5801.03(A) imposes both an actual and constructive knowledge standard holding that beneficiaries “must be charged with constructive knowledge of not only matters of which they have actual knowledge, but facts that they would have ‘reason to know,’ R.C. 5801.03(A)[(3)], from the perspective of an objective, reasonable person, including all matters that are of public record.” *Zook*, 2017-Ohio-838, at ¶ 39. Applying this standard, the *Zook* Court found that the beneficiaries were charged with constructive knowledge of information “freely available in the public record.” *Id.* at ¶ 41 (citing *Lawyers Title Ins. Corp. v. MHD Corp.*, 6th Dist. No. E-10-007, 2010-Ohio-5174, ¶ 25). Charging beneficiaries with constructive knowledge of information in a public record is important because it prevents beneficiaries from “‘bury[ing] their head in the sand’ with matters affecting an inheritance or expectancy.” *Zook*, 2017-Ohio-838, at ¶ 41 (quoting *Graceteck, Inc. v. Perez*, 8th Dist. No. 96813, 2012-Ohio-700, ¶ 16, fn. 3). The *Zook* court concluded that the beneficiaries had constructive knowledge regarding material facts concerning the alleged breach of fiduciary duty since the probate inventory was a public record showing the advertising business valued at more than \$1,000,000 (with a total estate of \$1,470,000), that the will filed for probate as a matter of public record referenced the Trust, that the beneficiaries knew the advertising business had failed, and that after the surviving spouse died the periodic trust statements did not list the advertising business as a Trust asset. *Id.* at ¶ 43.⁵ Since the beneficiaries had constructive knowledge of the Trustee’s alleged breach of fiduciary duty they were unable to demonstrate being unaware of the material facts relating to the breach and, accordingly, the release terms remained binding upon them.

CONCLUSION

The *Zook* Court’s well-reasoned and detailed examination of the underlying facts confirms the validity of the statutory mechanisms providing finality to trust administration. *Zook* also gives insight into the types of facts and disclosures that may be

of importance in drafting release agreements sufficient to withstand judicial scrutiny.

ENDNOTES:

¹See, e.g., K. Moore, J. Furniss, “The Trustee’s Toolkit: Use of Releases in Achieving Finality,” 24 *Probate Law Journal of Ohio* 181, Issue 3, Jan/Feb 2014

²The trial court concluded that any alleged negligence claim was subsumed into the breach of fiduciary duty claim. *Zook*, 2017-Ohio-838, at ¶ 17.

³The *Zook* court found *Cundall* also inapplicable because 1) it pre-dated the Trust Code, 2) even if the Trust Code was controlling law R.C. 5810.09 would not be applicable since the release was procured by alleged improper conduct of the trustee, and 3) the Ohio Supreme Court’s reversal of the Court of Appeals’ decision “did not reflect any approval of the First District’s decision on [the validity of the releases].” *Zook*, 2017-Ohio-838, at ¶ ¶ 33-35.

⁴While not reviewed for purposes of the appeal, the Court of Appeals opinion recites many of the trial court’s finding on the first two exceptions under R.C. 5808.17(c) which may provide useful to practitioners.

⁵Further, the Court of Appeals noted that while the Trustee did not affirmatively provide information regarding the alleged breach, the beneficiaries did not allege the Trustee “hid or refused to provide requested information.” *Zook*, 2017-Ohio-838, at ¶ 40 (citing *Schwab v. Huntington Nat’l Bank*, 516 Fed. Appx. 545 (6th Cir. 2013)).

“EXIT IN AN ORDERLY FASHION”: DEPARTING AN OHIO IRREVOCABLE TRUST IN THE UTC AGE

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Based on presentation by the author to the OSBA Ohio Legal Forum (aka OSBA annual meeting) in August 2017.

Selected statutes referenced in this article are included in an APPENDIX. Due to space limitations for this issue of the *Probate Law Journal of Ohio*, the APPENDIX will appear in the Sept/Oct issue of the PLJO.