

# Recent Developments in Ohio

## Liability of the Ohio Successor Fiduciary—Is a Sound Night's Sleep Now Possible?

C. TERRY JOHNSON\*

“*[T]he law is the last result of human wisdom acting upon human experience for the benefit of the public.*”†

“*‘Tut, tut, child!’ said the Duchess. ‘Everything’s got a moral, if only you can find it.’*”††

In May 1982 the Ohio legislature made a radical change in the law of Ohio<sup>1</sup> concerning the liability of a successor fiduciary as it had been defined in a case decided by the Ohio Supreme Court eight years earlier.<sup>2</sup> If Samuel Johnson was correct in the quote recited above, then in the intervening years between the court decision and the legislative enactment Ohio had seen either a change in human wisdom or in the perception of what would be to the benefit of the public. Human experience on this subject had generally remained unchanged. Unfortunately, Carroll’s Duchess was undoubtedly right; everything has a moral or a meaning, but often it is difficult to find. In changing the law regarding liability of a successor fiduciary, the Ohio legislature took pains to make its meaning clear. Only time will tell if it was successful. This Article will discuss Ohio law prior to the enactment of the recent statute<sup>3</sup> and the development of the common law in other states,<sup>4</sup> review the terms of the new statute and its impact upon the situation,<sup>5</sup> and provide a quick survey of some of the statutes that other states have enacted to deal with the problem.<sup>6</sup>

### I. OHIO LAW PRIOR TO THE 1982 STATUTE

In *In re First National Bank of Mansfield*<sup>7</sup> the Ohio Supreme Court faced squarely the question of the liability of a trustee for the acts or omissions of his predecessor fiduciary. The fact situation was poignant. The bank served as both

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\* A.B., Trinity College 1960; L.L.B., Columbia University 1963. Partner, Smith & Schnacke, Dayton, Ohio. Member, Ohio and American Bar Associations; Board of Governors, Probate and Trust Law Section, Ohio State Bar Association; and American College of Probate Counsel.

† HESTER LYNCH PIOZZI, ANECDOTES OF SAMUEL JOHNSON 88–89 (1st ed. 1786).

†† LOUIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND 70 (Norton Critical ed. 1971).

1. OHIO REV. CODE ANN. § 1339.42 (Page Supp. 1982).

2. *In re First Nat’l Bank of Mansfield*, 37 Ohio St. 2d 60, 307 N.E.2d 23 (1974).

3. See *infra* text part I.

4. See *infra* text part II.

5. See *infra* text part III.

6. See *infra* text part IV.

7. 37 Ohio St. 2d 60, 307 N.E.2d 23 (1974).

executor and trustee under the terms of the will of the decedent, Mr. S.<sup>8</sup> As executor, the bank filed an Ohio inheritance tax return, which was prepared solely by the attorney for the estate, and a nonrefundable overpayment of approximately \$5800 was mistakenly made.<sup>9</sup> The bank filed its final account as executor, which was approved by the probate court without objection. The trust was established, and shortly thereafter the decedent's surviving spouse died. The trust property then passed to Mr. S' daughter by the terms of his will.<sup>10</sup> The daughter made an unsuccessful claim against the trustee for overpayment of the inheritance tax and eventually filed exceptions to the final account of the trustee.

The trial court and the court of appeals ruled in favor of the bank on the grounds that the daughter had not taken exception to the final account of the bank acting as executor.<sup>11</sup> Reversing the lower courts, the Ohio Supreme Court rejected the contention that the daughter's claim was foreclosed by her failure to take exception to the bank's final account as executor.<sup>12</sup> The court held that the bank's liability was based on its failure to discharge its responsibilities as trustee and that, therefore, the failure of the daughter to file exceptions to the executor's final account did not preclude her from filing objections to the bank's trustee account.<sup>13</sup>

The court's definition of Ohio law regarding the liability of a successor fiduciary for the acts or omissions of his predecessor was cursory.<sup>14</sup> The court remarked that upon taking over trust property from an executor, "the trustee of a testamentary trust is under an unqualified duty to a beneficiary of the trust to take reasonable steps to enforce any claim . . . against the executor, to compel the executor [to deliver trust property to the trust], or to redress any breach of duty committed by the executor."<sup>15</sup> Thus, the bank had an obligation as trustee to redress the breach of duty that occurred when it, as executor, overpaid the inheritance tax. The failure to discharge this obligation constituted a breach of its duty as trustee.<sup>16</sup>

The *Mansfield* decision may be justifiable on the basis of the large loss that occurred as a result of the mistake on the part of the executor and the counsel for the estate. After all, one could not reasonably expect the beneficiary to discover this mistake before the executor's account. Two dissenting judges in the case, however,

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8. *Id.* at 61, 307 N.E.2d at 24.

9. *Id.*

10. *Id.* at 61-62, 307 N.E.2d at 24.

11. *Id.* at 62-63, 307 N.E.2d at 25.

12. *Id.* at 64-66, 307 N.E.2d at 25-27.

13. *Id.* at 66, 307 N.E.2d at 27.

14. The syllabus by the court reads as follows:

Upon taking over trust property from an executor, the trustee of a testamentary trust is under an unqualified duty to a beneficiary of the trust to take reasonable steps to enforce any claim, which he holds as trustee, against the executor, to compel the executor to transfer to the trustee property which the executor is under a duty to transfer, or to redress any breach of duty committed by the executor; and where failure by the trustee to discharge such obligation will result in a loss to the beneficiary, the trustee is liable to the beneficiary for such loss, even though (1) the trustee is the same corporate entity or person as the executor, and (2) the beneficiary is precluded from recovering from the executor because of his failure to file exceptions to the executor's final account.

*Id.* at 60, 307 N.E.2d at 23-24.

15. *Id.*

16. *Id.* at 64, 307 N.E.2d at 25.

disagreed with the decision of the majority.<sup>17</sup> Pointing out that the tax overpayment was a result of the attorney's error of law, the dissenters noted that an executor is neither negligent nor guilty of any breach of trust in placing reasonable reliance upon advice of counsel in an area particularly requiring legal expertise.<sup>18</sup> Since the mistake was admittedly made by counsel in his preparation of the estate's inheritance tax return and was one of judgment rather than arithmetic, the trustee could not have enforced any claim against the executor. The executor, after all, had done nothing wrong. Therefore, the dissenting judges argued, the trustee breached no duty to the beneficiary when it failed to object to the executor's final account.<sup>19</sup>

## II. COMMON-LAW DUTIES OF SUCCESSOR FIDUCIARIES

### A. *The Restatement*

In so succinctly defining the Ohio law regarding the liability of a successor fiduciary, the Ohio Supreme Court ignored certain of the nuances that had developed in other states. The Restatement (Second) of Trusts addresses the liability of a successor trustee as follows:

- (1) A trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee.
- (2) A trustee is liable to the beneficiary for breach of trust, if he
  - (a) knows or should know of a situation constituting a breach of trust committed by his predecessor and he improperly permits it to continue; or
  - (b) neglects to take proper steps to compel the predecessor to deliver the trust property to him; or
  - (c) neglects to take proper steps to redress a breach of trust committed by the predecessor.<sup>20</sup>

Thus, a trustee is liable if he "knows or should know" or if he "neglects to take proper steps." He is not liable for the breaches of trust committed by a predecessor, but he is liable for his own breaches of trust, which arise if he (1) fails to force his predecessor to redress a breach, (2) retains property improperly purchased or retained by his predecessor, or (3) fails to compel delivery of the trust property by his predecessor.<sup>21</sup>

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17. *Id.* at 66-67, 307 N.E.2d at 27.

18. *Id.* at 67, 307 N.E.2d at 27 (dissenting opinion).

19. *Id.*; see Annot., 68 A.L.R.3d 1265 (1976); see also Note, *Liability of Successor Fiduciary for Accounts of Predecessor*, 1953 WIS. L. REV. 749, 749-55 [hereinafter cited as Note, *Liability of Successor Fiduciary*]; Annot., 91 A.L.R.3d 904 (1979); Annot., 55 A.L.R.3d 785 (1974); Annot., 55 A.L.R.3d 977 (1974); Annot., 47 A.L.R.3d 507 (1973); Annot., 100 A.L.R. 1126 (1926).

20. RESTATEMENT (SECOND) OF TRUSTS § 223 (1959).

21. 3 A. SCOTT, SCOTT ON TRUSTS § 223 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 223 (1959); see Note, *Duties and Responsibilities of a Successor Trustee*, 10 REAL PROP., PROB. & TR. J. 310, 310-13 (1975) [hereinafter cited as Note, *Duties and Responsibilities*]; 76 AM. JUR. 2D TRUSTS § 307 (1975); see also *In re Lane's Will*, 11 Del. Ch. 122, 97 A. 587 (1916); *In re Estate of Campbell*, 46 HAWAII 475, 382 P.2d 920 (1963); *Landau v. Landau*, 409 Ill. 556, 101 N.E.2d 103 (1951); *Piff v. Berresheim*, 405 Ill. 617, 92 N.E.2d 113 (1950), *rev'g* 337 Ill. App. 658, 86 N.E.2d 411 (1949); *Prager v. Heart*, 106 Kan. 14, 186 P. 1015 (1920); *State St. Trust Co. v. De Kalb*, 259 Mass. 578, 157 N.E. 334 (1927); *Green v. Gaskill*, 175 Mass. 265, 56 N.E. 560 (1900); *Large's Estate*, 120 Pa. Super. 45, 181 A. 859 (1935); G. BOGERT, TRUSTS AND TRUSTEES § 583 (rev. 2d ed. 1980); Shattuck, *Trustee's Duty to Inquire into Acts of Predecessor*, 70 TR. & EST. 159, 159-62 (1940); Stone, *The Successor Fiduciary*, 100 TR. & EST. 701, 701-03 (1961); Wohl, *The Successor Trustee as a Scapegoat*, 113 TR. & EST. 504 (1974); Note, *Liability of Successor Fiduciary*, *supra* note 19, at 749-55.

### B. *The Duty to Compel Redress*

A successor trustee is liable for breach of trust if he neglects to take proper steps to compel his predecessor to redress a breach of trust committed by that predecessor. In *State Street Trust Co. v. DeKalb*,<sup>22</sup> the leading case in this area, the predecessor trustees made a mortgage loan but took no steps to collect the note when it came due.<sup>23</sup> Some years later a trust company was appointed cotrustee and eventually became the sole trustee after the original trustees died or resigned.<sup>24</sup> The neighborhood in which the mortgaged building was located was deteriorating. More than a decade after being appointed, the trust company foreclosed on the mortgage, but collected considerably less than the balance due on the note.<sup>25</sup> The court held that the trust company was liable for the loss since it had accepted the mortgage as a proper investment without investigation and had taken no steps to have the cotrustees charged with the loss that the trust had suffered under their management.<sup>26</sup>

The variety of breaches by a predecessor that must be discovered and redressed by the successor appears to be unlimited. Improper investment by the predecessor is one example; misappropriation of the trust assets by the predecessor is yet another example.<sup>27</sup> Court decisions in this area point out that the successor trustee knew or should have known of the prior breach, but the standards applied are varied and range from absolute liability to a "reasonable man" test.<sup>28</sup>

### C. *The Duty to Correct a Breach*

A successor trustee is also liable for breach of trust if he receives and continues to retain for an unreasonable length of time property improperly purchased or retained by his predecessor.<sup>29</sup> In one case, *Villard v. Villard*,<sup>30</sup> a testator left in trust a sum large enough to make annuities to his daughter and sister. The trustee was authorized to retain any bonds or other securities that had belonged to the testator at the time of his death, but otherwise was authorized to invest only in certain United States or municipal bonds and certain mortgage bonds and real estate.<sup>31</sup> At the express request

22. 259 Mass. 578, 157 N.E. 334 (1927).

23. *Id.* at 579, 157 N.E. at 335.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.,* McClure v. Middletown Trust Co., 95 Conn. 148, 110 A. 838 (1920).

28. *See* Wohl, *supra* note 21. This article notes that in certain of these cases the successor fiduciary has become a scapegoat, "a person bearing the blame for others." *Id.* at 505.

29. Brigham v. Morgan, 185 Mass. 27, 69 N.E. 418 (1904); Michigan Home Missionary Soc'y v. Corning, 164 Mich. 395, 129 N.W. 686 (1911); Dickerson v. Camden Trust Co., 1 N.J. 459, 64 A.2d 214 (1949); Villard v. Villard, 219 N.Y. 482, 114 N.E. 789 (1916); Bank of N.Y. v. New Jersey Title Guarantee & Trust Co., 256 A.D. 609, 11 N.Y.S.2d 181, 183 (1939); *In re* Estate of Brunner, 49 Misc. 2d 139, 267 N.Y.S.2d 332 (Sur. Ct.), *aff'd*, 26 A.D.2d 838, 274 N.Y.S.2d 414 (1966); *In re* Morris' Estate, 153 Misc. 905, 276 N.Y.S. 254 (Sur. Ct. 1934); *In re* Casani's Estate, 342 Pa. 468, 21 A.2d 59 (1941); Coxie Trust, 23 Pa. D. & C.2d 182 (1960); 3 A. SCOTT, *supra* note 21, § 223.1; G. BOGERT, *supra* note 21, § 583; RESTATEMENT (SECOND) OF TRUSTS § 223 comment b (1959); *accord*, Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp. 834, 840 n.4 (S.D.N.Y. 1977). *But see* City of Fairview v. Norris, 234 F.2d 199 (10th Cir. 1956).

30. 219 N.Y. 482, 114 N.E. 789 (1916).

31. *Id.* at 488-91, 114 N.E. at 790.

of the residuary legatees, the executor sold certain stocks and bonds and invested half of the proceeds in stocks of two railroad companies of a type not authorized by the testator.<sup>32</sup> These stocks were delivered to the trustee to be held as part of the trust funds. The trustee did not discover that these stocks did not belong to the testator until ten years after it had received them, and by that time they had greatly depreciated in value.<sup>33</sup> The trustee was held liable for the loss because it had ample opportunity to make an investigation.<sup>34</sup>

#### D. *The Duty to Compel Delivery*

##### 1. *The Duty in General*

In addition, a successor fiduciary is liable for breach of trust if he neglects to take proper steps to compel his predecessor to deliver trust assets to him.<sup>35</sup> For example, in *In re Kline's Estate*<sup>36</sup> the trustee allowed property to remain in the hands of the executor for four years after the testator's death.<sup>37</sup> During this time the executor embezzled the property and died insolvent. The court held that the trustee should be surcharged with the loss of trust property because it failed to secure possession of the property.<sup>38</sup>

Commentators have noted that the duty to collect trust assets imposes on a successor the duty to monitor the predecessor's entire administration to be certain that the predecessor has collected all assets and claims and that the estate has not been diminished by improper payments.<sup>39</sup> Obviously, an all-encompassing duty of this nature is an anathema to a successor fiduciary.<sup>40</sup>

32. *Id.* at 491-94, 114 N.E. at 791.

33. *Id.* at 494-97, 114 N.E. at 791-92.

34. *Id.* at 498-504, 114 N.E. at 793-95.

35. *Village of Brookfield v. Pentis*, 101 F.2d 516 (7th Cir. 1939); *McClure v. Middletown Trust Co.*, 95 Conn. 148, 110 A. 838 (1920); *Burnham v. Bennison*, 126 Neb. 312, 253 N.W. 88 (1934); *In re Estate of Brunner*, 49 Misc. 2d 139, 267 N.Y.S.2d 332 (Sur. Ct.), *aff'd*, 26 A.D.2d 838, 274 N.Y.S.2d 414 (1966); *In re Estate of Kistler*, 167 Misc. 528, 4 N.Y.S.2d 223 (Sur. Ct. 1938); *In re Estate of Gould*, 1 Ohio Op. 2d 366, 140 N.E.2d 793 (Prob. Ct. 1956); *In re Kline's Estate*, 280 Pa. 41, 124 A. 280 (1924); 3 A. SCOTT, *supra* note 21, § 223.2; G. BOGERT, *supra* note 21, § 583; RESTATEMENT (SECOND) OF TRUSTS § 223 comment c (1959); 2 A. SCOTT, *supra* note 21, § 175; Stone, *supra* note 21, at 702; Schreiber, *The Successor Fiduciary—Profits or Pitfall* (Thesis of National Graduate Trust School (1973)), *cited in Note, Duties and Responsibilities*, *supra* note 21, at 313 n.23; 76 AM. JUR. 2D *Trusts* § 342 (1975).

36. 280 Pa. 41, 124 A. 280 (1924).

37. *Id.* at 44, 124 A. at 281.

38. *Id.* at 44-49, 124 A. at 281-84.

39. Stone, *supra* note 21, at 702-04; Schreiber, *supra* note 35.

40. *See Villard v. Villard*, 219 N.Y. 482, 114 N.E. 789 (1916); Stone, *supra* note 21, at 702-04; Shattuck, *supra* note 21, at 159-62.

Imposing a duty to investigate does not in itself define the extent of this duty, and successor fiduciaries have feared being required to expend an unreasonable amount of effort to protect themselves against possible liability for the acts or omissions of their predecessors. Certain of the cases in this area or at least some of the language contained in those cases did little to reassure them. In *Mansfield*, for example, the court stated that a trustee was under an "unqualified duty" to take action to recover for the beneficiary that portion of the trust property which had been wrongly disbursed and thus not distributed to it by the executor. 37 Ohio St. 2d 60, 66, 307 N.E.2d 23, 27 (1974). The insertion of the word "unqualified" undoubtedly did not go unnoticed and might well have been the reason for the enactment of Ohio Revised Code § 1339.42.

The problem with imposing such an ill-defined duty upon a successor trustee is that the amount of investigation required might vary with the degree of injury sustained by the beneficiary. This situation gives rise to a concern that the duty might approach that of an insurer or a scapegoat. *See supra* note 28.

## 2. *The Duty in Ohio Prior to the 1982 Statute*

What constitutes an unreasonable delay in securing the assets is an interesting question; how soon must the successor acquire control? This issue no longer arises in cases covered by the 1982 Ohio statute. When the issue does arise, however, several other Ohio statutes have a potential impact.<sup>41</sup>

Section 2113.53 of the Ohio Revised Code authorizes immediate distribution in both testate and intestate situations if a fiduciary has been appointed and (in a testate situation) no action is pending to set the will aside.<sup>42</sup> Therefore, one could argue that the successor fiduciary has the duty to acquire the property immediately even when his appointment as successor takes place very early in the course of the administration. This argument can be overcome, however, since under the statute a fiduciary runs the risk of personal liability if he makes a distribution before the time for filing claims against the estate or the time for the surviving spouse to elect against the will.<sup>43</sup> One commentator has noted that this section did not relieve the fiduciary of any responsibility.<sup>44</sup>

Pursuant to section 2113.54 of the Ohio Revised Code, after five months have expired a legatee or distributee may apply to the probate court for an order requiring the fiduciary to distribute the assets of the estate.<sup>45</sup> This section is the muscle behind a beneficiary's request for distribution: after the five-month period has run, a fiduciary cannot refuse to distribute without good reason.<sup>46</sup> Thus, when a successor fiduciary is appointed after the time limit set forth in this section, one could argue that he should demand all of the trust assets immediately.<sup>47</sup> It has been suggested, however, that a trustee should not have to demand the trust assets until at least after the settlement of the state and federal death taxes, although a partial distribution might be obtained pending audits or investigation.<sup>48</sup>

Also of potential impact is section 2113.25, which provides that, so far as he is able, the fiduciary shall complete the administration of the estate within nine months after the date of his appointment.<sup>49</sup> One commentator has pointed out that this statement is merely suggestive and does not set an absolute outside limit for distribution.<sup>50</sup> Nevertheless, the successor fiduciary who is appointed later than nine months after the estate was originally opened should bear this provision in mind. This section also contains a seldom-used provision for an extension of time "[u]pon application of the executor or administrator"<sup>51</sup> (successor as well?), and the successor fiduciary might consider using it to preclude criticism.

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41. See OHIO REV. CODE ANN. §§ 2113.53, .531, .54, .25 (Page 1976).

42. OHIO REV. CODE ANN. § 2113.53 (Page 1976).

43. *Id.*

44. Johnson, *Distribution and Accounts*, 43 OHIO ST. B.A. REP. 291, 293, 296-97 (1970).

45. OHIO REV. CODE ANN. § 2113.54 (Page 1976).

46. *Id.*

47. Note, *Duties and Responsibilities*, *supra* note 21, at 313.

48. Stone, *supra* note 21, at 733; Schreiber, *supra* note 35.

49. OHIO REV. CODE ANN. § 2113.25 (Page 1976).

50. Johnson, *supra* note 44, at 293.

51. OHIO REV. CODE ANN. § 2113.25 (Page 1976).

## III. THE 1982 OHIO STATUTE

In May 1982 Ohio enacted a statute that attempted to define the liability of a successor fiduciary.<sup>52</sup> The enactment of this statute by the Ohio legislature was similar to pressing the hyperspace button on an electronic game: instantly Ohio law concerning successor fiduciary liability was moved light years ahead of its previous position. The Ohio statute defines the word "fiduciary" in the broadest of terms, including, *inter alia*, a guardian, a receiver, an officer of a public or private corporation, a public officer, and any other person acting in a fiduciary capacity for any person, trust, or estate.<sup>53</sup> The statute does not include a "custodian" in the definition of "fiduciary."<sup>54</sup>

The statute relieves fiduciaries and custodians of certain common-law responsibilities.<sup>55</sup> The relevant language is extremely broad: a fiduciary or custodian "is not required to inquire into any act, or audit any account."<sup>56</sup> By its terms, the statute does not apply when the fiduciary or custodian was also the predecessor,<sup>57</sup> has knowledge of wrongdoing by the predecessor, or is required to inquire by the instrument governing him.<sup>58</sup>

The statute also deals with the issue of trust funds advanced to the personal representative of a decedent's estate.<sup>59</sup> The trustee is relieved from liability for the application of the trust property by the personal representative unless the trustee had actual knowledge, prior to payment or advancement, that the personal representative did not intend to use the trust property for the purposes for which it was advanced.<sup>60</sup>

52. OHIO REV. CODE ANN. § 1339.42 (Page Supp. 1982). This section provides as follows:

(A) As used in this section, "fiduciary" means a trustee under any expressed, implied, resulting, or constructive trust; an executor, administrator, public administrator, committee, guardian, conservator, curator, receiver, trustee in bankruptcy, or assignee for the benefit of creditors; a partner, agent, officer of a public or private corporation, or public officer; or any other person acting in a fiduciary capacity for any person, trust, or estate.

(B) A fiduciary, or a custodian, who is a transferee of real or personal property that is held by a fiduciary other than the person or entity serving as the transferee, is not required to inquire into any act, or audit any account, of the transferor fiduciary, unless the transferee is specifically directed to do so in the instrument governing him or unless the transferee has actual knowledge of conduct of the transferor that would constitute a breach of the transferor's fiduciary responsibilities.

(C) If a trustee is authorized or directed in a trust instrument to pay or advance all or any part of the trust property to the personal representative of a decedent's estate for the payment of the decedent's legal obligations, death taxes, bequests, or expenses of administration, the trustee is not liable for the application of the trust property paid or advanced to the personal representative and is not liable for any act or omission of the personal representative with respect to the trust property, unless the trustee has actual knowledge, prior to the payment or advancement of the trust property, that the personal representative does not intend to use the trust property for such purposes.

*Id.*

53. *Id.* § 1339.42(A).

54. *Id.*

55. *Id.* § 1339.42(B)-(C); *see supra* text accompanying notes 7-13.

56. OHIO REV. CODE ANN. § 1339.42(B) (Page Supp. 1982).

57. It appears, therefore, that *In re First Nat'l Bank of Mansfield*, 37 Ohio St. 2d 60, 307 N.E.2d 23 (1974), is still law in Ohio. It applies when the same person or bank is both the predecessor and successor—for example, when the same person is appointed as both executor and trustee. Following *Mansfield*, concern was expressed that the case might apply when the successor is not the same person or institution as the predecessor, but that concern has been put to rest by the present Ohio statute. *See* Annot., 68 A.L.R.3d 1265 (1976).

58. OHIO REV. CODE ANN. § 1339.42(B) (Page Supp. 1982).

59. *Id.* § 1339.42(C).

60. *Id.*

The Ohio statute appears to represent the state of the art in protecting a successor fiduciary. It applies to a large number of situations, and the exonerating language is very broad concerning both the liability of a successor fiduciary or custodian for the acts or omissions of his predecessors and the responsibility of a trustee for the application of funds advanced to a decedent's estate.<sup>61</sup> The courts will ultimately define the exact parameters of this statute, but it is clear that *Mansfield*<sup>62</sup> no longer defines the Ohio law on the subject of the liability of a successor fiduciary except in those cases that have been specifically excluded from coverage by the terms of the new statute.

Whenever a change of this magnitude occurs, one cannot resist wondering why. Did a change occur in human wisdom or in the perception of what would be to the benefit of the public of Ohio between 1974 and 1982? Evidently so, if Samuel Johnson was correct in his observation noted at the beginning of this article.<sup>63</sup> But exactly what was the nature of this change and what caused it?

Louis Carroll's Duchess would delight in our plight.<sup>64</sup> Given the dearth of history on the Ohio legislative process, it is nearly impossible to determine what motivated the Ohio legislature to enact section 1339.42 of the Ohio Revised Code. However, one or two flickering lights shine to guide our footsteps in the otherwise dark night.

As noted above,<sup>65</sup> certain of the cases dealing with the liability of a successor fiduciary for the acts or omissions of his predecessor seem to impose a burden of almost absolute liability upon the successor to investigate the administration carried out by his predecessor. Given this situation and assuming that the existence of successor fiduciaries should be encouraged since they serve a necessary and useful function in society, one can see a classic example of two basic forces in opposition to each other. As in most circumstances of this kind, mere adaptation of the two forces to each other was impossible; something had to give. In view of the terms of section 1339.42 of the Ohio Revised Code, a cynic might be tempted to comment that in this instance the interest of Ohio beneficiaries gave way to the interests of Ohio successor fiduciaries.

This is not, however, the only interpretation possible; indeed, it is probably incorrect. In his report to the Council of Delegates on behalf of the Probate and Trust Law Section which had sponsored the new law, the Vice Chairman of the Board of Governors made clear that the drafters of the proposed statute intended to make a radical change in the Ohio law. The report states in part:

It is submitted that normally when one selects his executor and trustee, he does so with considerable care and he does not want the trustee to be required by law to review the

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61. *Id.* § 1339.42(B)-(C).

62. *See supra* text part I.

63. *See supra* text accompanying note †.

64. LOUIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 70 (Norton Critical ed. 1971); *see supra* text accompanying note ††.

65. *See supra* notes 39-40 and accompanying text.



work of his executor or to subject the trustee which is the distributee from the executor to the expense of such an investigation. Further, where he authorized the trustee to give assistance to the executor in the payment of estate obligations, he does not wish to burden the trustee with the duty to see to the application of funds remitted to the executor. He has every reason to assume the person he selects as executor will use the funds properly.<sup>66</sup>

The report subsequently recommends the adoption of language very similar to that eventually codified in section 1339.42.<sup>67</sup> The report notes that the proposed section would not apply when the same entity serves as both executor and trustee and that the person for whom the will and trust is prepared would have the privilege of waiving the application of the recommended section if desired.<sup>68</sup> In addition, the report observes that many modern estate planning documents contain language similar to that in the recommended section.<sup>69</sup>

The observations noted above have the cold, clear ring of truth. Extensive investigation into the acts of a predecessor fiduciary would take time and manpower. Such things cost money. Successor fiduciaries are often banks or trust companies, and the Ohio legislature must have been tempted to impose upon them the duty of conducting investigations for the good of the Ohio public in general and Ohio beneficiaries in particular. To assume, however, that Ohio banks and trust companies would simply absorb the expense of carrying on such investigations as a cost of doing business is to be extremely naive. These costs would undoubtedly have been passed on to the public by way of increased trustee fees at the earliest possible opportunity.

Perhaps in the belief that every lunch must be paid for in one way or another, the Ohio legislature relieved successor fiduciaries from the responsibility of inquiring into any act or auditing any account of their predecessors except when the successor also acted as the predecessor, when the successor has knowledge of wrongdoing by the predecessor, and when the appointing instrument requires the successor to make such investigations.<sup>70</sup>

#### IV. ATTEMPTS TO SOLVE THE PROBLEM BY STATUTE OUTSIDE OF OHIO

A number of Ohio's sister states enacted statutes addressing the liability of a successor fiduciary before Ohio did, but all of them were far more timid in approaching the subject.

Colorado originally adopted a statute that provided only slightly more protection to a fiduciary than the previously existing law, but later adopted a far more protective statute. The original statute provided that a successor trustee was not liable for the

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66. *Report of the Probate and Trust Law Section*, 50 OHIO ST. B.A. REP. 551, 551 (1977).

67. *Id.* at 551-52.

68. *Id.* at 552.

69. Attempting to convince the Council of Delegates that the change would not be too radical, the report points out that a very similar provision is found in the statutes of Georgia. *Id.* Note, however, that the Georgia section seems to apply to a trustee who was also the executor and does not exclude the situation in which the trustee has actual knowledge. See *infra* note 87 and text accompanying notes 87-92.

70. OHIO REV. CODE ANN. § 1339.42 (Page Supp. 1982).

acts or omissions of his predecessor, but was liable for his own acts or omissions.<sup>71</sup> Although the section applied to a successor trustee, successor executors or administrators were not mentioned.

The present Colorado statute states that unless the successor has actual knowledge or information that would cause a reasonable fiduciary to inquire further, he "shall be under no duty to examine the accounts and records of or inquire into the acts or omissions of a predecessor."<sup>72</sup> Moreover, he is not liable for failing to seek redress for any act or omission of a predecessor.<sup>73</sup> This section gives far broader protection to a successor fiduciary than the earlier statute. At least one question remains, however. The section imposes a duty to examine, inquire, or seek redress when the successor has information "which would cause a reasonable fiduciary to inquire further."<sup>74</sup> What would cause a reasonable fiduciary to inquire further, and how much effort must be expended by the fiduciary to acquire this information? Successor fiduciaries in Colorado probably do not sleep as soundly as they might if this clause had been deleted from the present statute.

The Indiana statute sets out the ways a successor can be liable for the breaches of his predecessor, but it fails to mention events for which the successor would not be liable.<sup>75</sup> In addition, the statute applies only to trustees and does not exclude from its protection a trustee with actual knowledge of a prior wrongdoing.<sup>76</sup> Finally, the statute does not address whether a successor trustee can escape liability if he was also the predecessor.<sup>77</sup>

The Illinois statute relieves the successor trustee from inquiring into the acts of a predecessor trustee, but it applies only to a trustee succeeding another trustee and does not include the more common situation of a trustee succeeding an executor.<sup>78</sup>

71. COLO. REV. STAT. § 15-16-306 (1973) (repealed 1977). The statute provided in pertinent part as follows:

In the absence of actual knowledge or information which would cause a reasonable trustee to inquire further, no trustee shall be liable for any act or omission of any predecessor executor, trustee, or other fiduciary. The provisions of this section shall not be construed to limit the fiduciary liability of any trustee for his own acts or omissions with respect to the trust estate.

*Id.*

72. COLO. REV. STAT. § 15-1-112.5 (1982).

In the absence of actual knowledge or information which would cause a reasonable fiduciary to inquire further, a fiduciary shall be under no duty to examine the accounts and records of or inquire into the acts or omissions of a predecessor fiduciary and shall not be liable for failure to seek redress for any act or omission of any predecessor fiduciary.

*Id.*

73. *Id.*

74. *Id.*

75. IND. CODE § 30-4-3-13 (1971).

A successor trustee becomes liable for a breach of trust of his predecessor if he: (a) fails to take whatever action is necessary to compel the predecessor trustee to deliver the trust property; or (b) fails to make a reasonable effort to compel a redress of a breach of trust committed by the predecessor trustee.

*Id.*

76. *Id.*

77. *Id.*

78. ILL. ANN. STAT. ch. 17, ¶ 1684 (Smith-Hurd 1981).

(1) A successor trustee shall have all the rights, powers and duties, which are granted to or imposed on the predecessor. (2) A successor trustee shall be under no duty to inquire into the acts or doings of a predecessor trustee, and is not liable for any act or failure to act of a predecessor trustee. (3) With the approval of a majority in interest of the beneficiaries then entitled to receive or eligible to have the benefit of the income from the trust,

One commentator has noted that the Illinois statute may inadvertently absolve a successor with actual knowledge of an act or omission of his predecessor since the statute fails to mention this situation.<sup>79</sup>

The New York statute is the inverse of the Illinois statute in that the New York provision applies only to a trustee succeeding an executor and does not cover the situation of a trustee succeeding another trustee.<sup>80</sup> At first blush, the section appears to limit the successor's liability more than the previously existing New York law. The practice commentary following the section, however, points out that this section is both a codification of the existing common law on the subject and a partial legislative adoption of section 223 of the Restatement (Second) of Trusts.<sup>81</sup> The commentary remarks that the common-law rule in New York was that "a trustee will not be held liable for the acts or misconduct of the predecessor executor. He neither assumes the liabilities incurred by the executor, nor are they imputed to him. Any potential surcharge of the trustee's account must be based upon his own nonfeasance or malfeasance."<sup>82</sup> Therefore, this section can be criticized as being merely a codification of the existing law that offers no additional direction or protection to a successor fiduciary.

The Virginia statute<sup>83</sup> has been complimented as being the best statute to date

a successor trustee may accept the account rendered and the property received as a full and complete discharge to the predecessor trustee without incurring any liability for so doing.

*Id.*

79. Note, *Duties and Responsibilities*, *supra* note 21, at 318.

80. N.Y. Surr. Ct. Proc. Act Law § 1506 (McKinney 1967).

A trustee who was not an executor of the estate of the same decedent shall not be liable for breach of trust committed by the executor in any of the following cases:

1. He received the assets for the trust pursuant to a final decree of the court.
2. He did not know of a situation constituting a breach of trust committed by the executor, and does not improperly permit it to continue.
3. He does not neglect to take proper steps to compel the executor to deliver trust property to him.
4. He does not neglect to take proper steps to redress a breach of trust committed by the executor.

*Id.*

81. *Id.* § 1506 practice commentary.

82. *Id.*

83. VA. CODE § 26-5.1 (1979).

(a) The trustee of a testamentary trust or the trustee of a trust which is to receive assets by devise or bequest in a will, who is not the personal representative, may rely upon the account of the personal representative as being correct when confirmed in a manner prescribed by law, and such trustee shall not be obligated to inquire into the acts or omissions of the personal representative in the absence of actual knowledge of an act or omission which would subject the personal representative to liability.

(b)(1) Any substituted trustee, or any successor trustee named in or appointed pursuant to the terms of the trust instrument, may rely upon the account of any prior trustee as being correct when confirmed in a manner prescribed by law, and such substituted or successor trustee shall not be obligated to inquire into the acts or omissions of such prior trustee in the absence of actual knowledge of an act or omission which would subject the prior trustee to liability.

(2) In the case of a trust which does not require accountings to be filed with the commissioner of accounts, the court appointing the substitute trustee pursuant to § 26-48 may appoint a special commissioner to review the account of any prior trustee and report his findings with respect thereto, and the substituted trustee may rely upon such account as being correct when confirmed by the court, and such substituted trustee shall not be obligated to inquire into the acts or omissions of such prior trustee in the absence of actual knowledge of an act or omission which would subject the prior trustee to liability; or the court may, in its discretion, by order relieve the substituted trustee from personal liability in the same manner as if such trustee had relied upon the account of the prior trustee when confirmed. . . .

dealing with the liability of a successor fiduciary.<sup>84</sup> Upon reflection, perhaps less enthusiasm is warranted. The statute relieves a testamentary trustee or the trustee of any trust receiving assets from an estate and any substituted trustee or successor trustee from the burdensome common-law responsibilities.<sup>85</sup> Apparently overlooked is the successor executor. Moreover, the statute does not apply to a trustee who is a personal representative and does not relieve a successor executor from liability for retaining improper investments.<sup>86</sup>

The Georgia statute<sup>87</sup> appears to be the harbinger of the Ohio statute. The Georgia statute exonerates the successor from the common-law requirement that he "inquire into or audit the actions of the executor . . . of the testator's estate," except when the trust instrument specifically directs the successor to do so.<sup>88</sup> The statute also addresses the question of whether the trustee must inquire into the application of money advanced from the trust to the executor of the decedent's estate.<sup>89</sup> Of all the statutes considered, this one appears to go the furthest in protecting the successor fiduciary. Here is no cautious attempt to rephrase the existing law on the subject; rather, this statute boldly relieves the trustee from any requirement to "inquire into or audit the actions of the executor."<sup>90</sup> Unfortunately, it might go too far. The section seems to apply even to a trustee who was also the executor.<sup>91</sup> In addition, it does not exclude a trustee with actual knowledge of his predecessor's wrongdoing from its protection.<sup>92</sup> One might argue, therefore, that a trustee who was also the executor will not be liable for his acts as executor even though he has actual knowledge of those acts. This seems unfair, and although the New York and Virginia statutes similarly do not apply to a successor fiduciary who was also the predecessor, neither of these statutes exempts the successor who had actual knowledge.<sup>93</sup>

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(c) Nothing contained in this section shall relieve any substituted or successor fiduciary from any liability for retaining improper investments, nor shall this section in any way bar the substituted or successor fiduciary, the beneficiaries of the trust, or any other party in interest, from bringing any action which they might otherwise have against any prior fiduciary arising out of the acts or omissions of such prior fiduciary, nor shall it relieve the substituted or successor fiduciary of any liability which it may have for its own acts or omissions except as specifically stated herein.

*Id.*

84. Note, *Duties and Responsibilities*, *supra* note 21, at 318.

85. VA. CODE § 26-5.1 (1979); *see supra* text part II.

86. VA. CODE § 26-5.1 (1979).

87. GA. CODE ANN. § 53-14-3 (1982).

The trustee or trustees of a trust established by the testator or others as provided in Code Section 53-14-2 shall not be required to inquire into or audit the actions of the executor or executors of the testator's estate or to make any claim against the executor or executors unless specifically directed to do so by the trustor or trustors in the trust instrument. In the event that the trustee or trustees are authorized or directed by the trustor or trustors in the trust instrument to pay or advance any part or all of the trust property to the executor or executors of the testator's estate for the payment of debts, taxes, and expenses of administration of the testator's estate, the trustee or trustees shall not be liable for the application of the trust property so paid or advanced and shall not be liable for any act done or omitted to be done by the executor or executors with regard to the trust property.

*Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *See supra* text accompanying notes 80-86.

## V. CONCLUSION

The passage of the 1982 statute changed, *eo instanti*, Ohio law concerning the liability of a successor fiduciary from an approach that seemingly protected beneficiaries at the expense of successor fiduciaries to one that has the opposite effect.<sup>94</sup> Prior to the passage of the 1982 statute certain of the cases dealing with the liability of a successor fiduciary for the acts or omissions of his predecessor seemed to impose a burden of almost absolute liability upon the successor to investigate the administration carried out by his predecessor.<sup>95</sup> This had the salutary effect of giving relief to blameless beneficiaries who had suffered loss, but was understandably unpopular with successor fiduciaries. The 1982 statute ensured that the successor fiduciary in Ohio is now largely protected from liability for the acts and omissions of a predecessor.<sup>96</sup> The cynic might comment that the peace of mind of successor fiduciaries in Ohio has been purchased at the expense of the blameless beneficiaries of the trusts involved. Upon examination, however, it appears that the legislature made a knowing decision based upon a desire to keep down the expenses of being a successor fiduciary in Ohio and thus prevent these expenses from being passed on to the general public.<sup>97</sup> Whether this was a wise decision is a philosophical question, but it seems certain that the legislature has done all that it could to guarantee the sound sleep of Ohio successor fiduciaries.

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94. See *supra* text part III.

95. See *supra* text parts I & II.

96. See *supra* text part III.

97. See *supra* text accompanying notes 65-70.

