Chapter 12

Leasing from Trusts and Estates:
A Survey of Issues in Pennsylvania, Ohio
and West Virginia

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§ 12.01. Introduction.

Certain unique issues arise when leasing from trusts, estates and other artificial entities. For example, what authority does a fiduciary have as a lessor or lessee? Do the terms of the trust or will control in every instance or are there certain statutory requirements that cannot be amended by the instrument? If a lease dispute arises involving a trust or estate, where must the legal action be filed? This chapter explores these and other issues associated with leasing from trusts and estates under the laws of Pennsylvania, West Virginia and Ohio. The differences among the three jurisdictions are also examined. In addition, this chapter contains specific information about West Virginia's new Uniform Trust Code, applicable to West Virginia trusts as of July 1, 2011.

§12.02. Pennsylvania.


[a] — Trusts.

On July 7, 2006, the Governor of Pennsylvania signed Senate Bill 660 into law as Act 98 of 2006. This statute codified the law of trusts in Pennsylvania into a new Chapter 77 of the Pennsylvania Probate, Estates & Fiduciaries Code (Title 20 of Pennsylvania Consolidated Statutes).
The general provisions of the new Pennsylvania Uniform Trust Act\(^2\) took effect on November 6, 2006 and apply to “express trusts, charitable and noncharitable, and trusts created pursuant to a statute, judgment or decree that requires the trust to be administered in the manner of an express trust.”\(^3\) Express trusts do not include resulting or constructive trusts.

The general powers of a Pennsylvania trustee are spelled out in 20 Pa. C.S. Section 7780.5.\(^4\) Generally, “a trustee has all the powers over the trust property that an **unmarried competent owner** has over individually owned property.”\(^5\) The trustee may exercise his/her powers without court approval from the time of creation of the trust until final distribution of the assets of the trust.”\(^6\)

In addition to the general provisions of Section 7780.5, Section 7780.6\(^7\) contains a list of specific powers which a trustee may exercise pursuant to the general grant of powers contained in Section 7780.5.

Those portions of Section 7780.6 relevant to leasing include Section 7780.6(a)(21), which gives the trustee the power “to enter into a lease or arrangements for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.” In addition, subsection (34) permits the trustee to “execute and deliver instruments which will accomplish or facilitate the exercise of the trustee’s powers.”

According to the 2005 comments to 20 Pa. C.S. Section 7780.6, there used to be a five-year limit on trust leases in former 20 Pa. C.S. Section 7142, but that has been replaced with a general reasonableness standard of Sections 7774 and 7780.4.

**The provisions of the trust instrument will always control and must be reviewed carefully.** In addition, Section 7780.5 was intended to grant trustees broad powers, which must always be exercised in accordance with the fiduciary duties of a trustee and within any limits imposed by the trust instrument.

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\(^5\) *Id.*

\(^6\) *Id.*

[b] — Estates.

“Except as otherwise provided by the will of the decedent, if any, the personal representative of an estate may lease any real or personal property that he is entitled to possess. The lease may be for a term expiring not more than one year after the decedent’s death unless it is terminable by the personal representative at any later time on 30 days’ notice, or unless a longer term is approved by the court.”

The one-year time limit was put in place because the normal administration of an estate requires almost one year; it was believed that a lease for that period would not unduly tie up the administration of the estate.

Pursuant to 20 Pa. C.S. Section 3311, the personal representative has the right to and must take possession of, maintain and administer all the real and personal estate of the decedent. An exception to this general rule is real estate occupied at the time of death by an heir or devisee with the consent of the decedent. Persons entitled to possession of the property under this section, cannot be disturbed in their enjoyment of it by a lease to a third person.

The personal representative must also collect all rents and income from each asset in his/her possession until it is sold or distributed; has the right to maintain any action with respect to the property; and must make all reasonable expenditures necessary to preserve the property of the decedent.

[2] — The Power to Lease v. the Power to Buy and/or Sell.

Whether an express power to buy and/or sell implies a power to lease, the Pennsylvania courts have held that general language may be used to show a “similar intent” if such general language, according to its common usage, encompasses such power or powers. In re Weidner, citing Estate of Reifsneider.

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9 Id.
11 Id.
12 In re Weidner, 938 A.2d 354, 360 (Pa. 2007).
However, a power of attorney and not a trust was at issue in *Weidner*. The power of attorney statute provides that a principal may, by inclusion of the language contained in the statute, “or by inclusion of other language showing a similar intent,” empower an agent to do any or all of certain enumerated things, including “To engage in real property transactions.”\(^{14}\) The relevant language of 20 Pa. C.S. Section 7780.6 is not sufficiently similar to conclude that a court might reach the same interpretation when comparing an express power to buy and sell with a statutory power to lease.

Also, in another power of attorney case, the Pennsylvania Superior Court expressly stated that the “power to lease and power to sell are necessarily separate and distinct.”\(^ {15}\) The issue in that case was whether a power to lease included the power to grant the lessee a right of first refusal to purchase the property at issue and the court held that it did not. The court went on, however, to examine whether the principal in the case subsequently ratified the agent’s impermissible act and held that he did.

In another case involving a disputed right to lease coal, a special act of assembly was passed that gave guardians the right to “sell” the land of the minors who the guardians represented and also the right to “lease” the coal underneath the land. In interpreting the act, the Pennsylvania Supreme Court noted that if the guardian had simply been given the power to sell, without the express power to lease, a question might have arisen whether or not the guardians had the power to lease the coal. *See Myers v. Kingston Coal Co.*\(^ {16}\)

On the other hand, the power to “purchase outright” does include the “power to lease and operate for a definite term” because “the greater includes the lesser power.” *Kaufman v. Pittsburgh & C.S.R. Co.*\(^ {17}\)

It appears, then, that a trustee with the power to “buy” property may also enter into a lease with respect to that property, but the power to “sell” property already in the trust estate does not include the power to lease that trust property, unless the trust instrument contains additional language that could be relied upon to reach such a conclusion.

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§ 12.02


Unlike some other states (Ohio and West Virginia for example), the Pennsylvania recording statutes do not expressly provide for the recording of a Memorandum of Trust. However, Memorandums of Trust are still recorded and are useful in conducting a title exam because the trustee’s powers to lease should be spelled out in the Memorandum of Trust and therefore placed of record and confirmed by the title examiner.

However, the Uniform Trust Act does provide for a “Certification of Trust,” 18 which may be furnished to someone other than a beneficiary upon request and in lieu of the full trust instrument.

A Certification of Trust must contain the following:

1. The trust’s existence and the date the trust instrument was executed;
2. The identity of the settlor;
3. The identity and address of the currently acting trustee;
4. The powers of the trustee;
5. The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
6. The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
7. The trust’s taxpayer identification number;
8. The manner of taking title to trust property.

The Certification must also include assurances that the trust has not been revoked, modified or amended in a manner that would cause the representations contained in the certification of trust to be incorrect. A person who acts in reliance on a certification without knowledge that the representations contained in the certification are incorrect is not liable to any person and may assume the existence of the facts contained in the

certification without further inquiry. A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

According to 21 P.S. Section 404, leases “may but need not, unless otherwise required by law,” be recorded. However, according to Pennsylvania case law, oil and gas leases are considered the type of conveyance that must be recorded in order to be valid. When the lease is recorded, it serves as constructive notice to subsequent purchasers, mortgagees and judgment creditors of the making and of the provisions of such lease.

In lieu of recording the entire oil and gas lease, 21 P.S. Section 405 permits a Memorandum of Lease to be recorded, as long as the Memorandum contains the following information:

(1) The name of the lessor in such lease, sublease or agreement;
(2) The name of the lessee therein;
(3) The addresses, if any, set forth therein as addresses of such parties;
(4) A reference to the date thereof;
(5) The description of the demised premises in the form set forth therein;
(6) The date of commencement of the term of the lease, if a fixed date, and if not the full provision or provisions thereof pursuant to which such date of commencement is to be fixed;
(7) The term of the lease;
(8) If the lessee has a right of extension or renewal, the date of expiration of the final period for which such right is given;

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22 Id. at § 405.
(9) If the lessee has a right of purchase of or refusal on the demised premises or any part thereof, a statement of the term during which said right is exercisable.

Where a conveyance is made to a trustee without stating for whom and for what purpose, a later conveyance by the trustee may be valid:

Whenever heretofore real property has been conveyed to any person as “Trustee,” without naming the cestuis que trustent (beneficiaries), and without declaring the purpose of the trust, and such trustee has thereafter, in good faith, made a conveyance of such property to a third person, in his own name as “Trustee,” without disclosing the cestuis que trustent (beneficiaries), or without showing his right to make such conveyance, when the deed given by such trustee is otherwise in proper form and capable of conveying the estate intended – such deed and conveyance are hereby made good and valid and effectual to transfer, pass, and convey the estate, right, title, and interest of the cestuis que trustent (beneficiaries) for whom the trustee held, in and to such real property.23


The Act suggests the following form of acknowledgment for any trustee, administrator, guardian or executor:

State of ____________ County of ______________ On this, the _____ day of _______, 19____, before me ____________, the undersigned officer, personally appeared ___________, of the State (County or City as the case may be) of __________, known to me (or satisfactorily proven) to be the person described

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23 Id. at § 262 (Act of Sept. 1, 1967).
25 21 Pa. Stat. § 291.1 (“Any instrument may be acknowledged in the manner and form now provided by the laws of this State or as provided by this act.”).
in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof, I hereunto set my hand and official seals.

_______________________
_______________________
Title of Officer


The Pennsylvania Orphans’ Court divisions of the County Courts of Common Pleas exercise mandatory jurisdiction over issues involving the administration and distribution of the realty and personalty of estates, testamentary trusts and *inter vivos* trusts. In addition, the Orphans’ Courts exercise mandatory jurisdiction over the construction of an administrative power as to real estate proposed to be exercised by a fiduciary of an estate or trust.

Subsection (15) was included to make it clear that the Orphans’ Court has jurisdiction to determine the extent of the testamentary or statutory power of a fiduciary subject to its jurisdiction to possess, *lease*, sell, exchange or exercise a similar administrative power in regard to real estate.

Thus, a question of whether a trustee or personal representative has the authority to lease pursuant to the terms of a trust or will would be filed in the Orphans’ Court division pursuant to 20 Pa. C.S. Section 711(15).

The Orphans’ Courts also exercise non-mandatory jurisdiction over actions to determine the persons to whom title to real estate of a decedent or of the creator of an estate or trust has passed by devise or descent or by the terms of the trust instrument (where jurisdiction of such estate or trust is exercised through the Orphans’ Court Division).

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27 *Id.* at § 711(15).
28 *Id.* at § 712.
In addition, either the Orphans’ Court or the civil division of the Court of Common Pleas may exercise jurisdiction where there are substantial questions concerning matters enumerated in Section 711 as well as matters not enumerated in that Section. The purpose of this subsection was to avoid multiple actions being filed in separate divisions of the same court.

Based on the above statutory authority, it is not always easy to determine whether a litigated trust/estate matter needs to be filed in the Orphans’ Court pursuant to 20 Pa. C.S. Section 711. Further, it has been held that the issue of which division of the Court of Common Pleas is proper is not a question of jurisdiction or of venue and therefore a preliminary objection raising an issue of jurisdiction on such grounds will be deemed improper. There, a trust beneficiary challenged an unsecured loan that was made from the trust to the decedent’s estate. An action for negligent estate planning and administration, unfair trade practices, malpractice, fraud and intentional infliction of emotional distress was filed in the civil division of the Court of Common Pleas. The action was first transferred to the Orphans’ Court but then re-transferred back to the civil division. The court held that while actions involving the administration and distribution of the real and personal property of a decedent must be filed in the Orphans Court pursuant to 20 Pa. C.S. Section 711, the instant action was only collaterally related to the administration and distribution of the decedent’s estate and his revocable life insurance trust.

Jurisdiction in the civil division was proper because the main issues involved in the case were only collaterally related to administration of the decedent’s estate and trust and there were other issues involved over which the Orphans’ Court did not have mandatory jurisdiction (20 Pa. C.S. Section 712(3)).

The court further explained that the issue of which division of the Court of Common Pleas is proper is not a question of jurisdiction or of venue and therefore a preliminary objection raising an issue of jurisdiction on such grounds will be deemed improper.

29 Id. at § 712(3).

Below are some additional cases which examine the relationship between the Orphans Court and Civil Divisions of the Courts of Common Pleas when it comes to trust and estate issues.

[a] — *Estate of Gilbert.*

The Orphans’ Court ordered appellant daughter to return assets transferred prior to her father’s death to his estate. Appellant sought review arguing that the Orphans’ Court did not have jurisdiction to compel a retransfer of assets. The appellate court held that the Orphans’ Court had mandatory jurisdiction through 20 Pa. Cons. Stat. Section 711(17), to adjudicate ownership of personalty registered in decedent’s name at death, whether in his name alone or combined with someone else, including jointly held bank accounts. The trial court’s jurisdiction covered other related matters which might be decided by another trial division, including undue influence and the circumstances surrounding a deed transferring real estate.

[b] — *In re Estate of Frano.*

In this case, the court held that the Civil Division had jurisdiction over a declaratory judgment action to terminate an agreement granted by a decedent to purchase real estate.


Here, the Guardian of an incapacitated person’s Estate filed an ejectment action in the Civil Division. The tenant that was being ejected argued that the Orphans’ Court had proper jurisdiction over the matter. The court disagreed. Even though the ejectment action was brought in the context of the administration of real estate of an incapacitated person, jurisdiction in either division was proper.

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[d] — Trust Established Under Trust Agreement of Golub.\textsuperscript{34}

Here, the trustee alleged improper distribution of trust assets to the settlors’ granddaughter. The trial court, as an Orphans’ Court, had subject matter jurisdiction pursuant to 20 Pa. C.S. Section 711(3) and 20 Pa. C.S. Section 762 over resolution of issues relating to proper distribution of trust assets.

[e] — Powell v. Best (In re Powell).\textsuperscript{35}

In this case, the bankruptcy court was not precluded by 20 Pa. C.S. Section 711 from hearing a debtor’s action seeking a determination that a trust the debtor’s father created was invalid and an order requiring the trustee to transfer title to real property to the debtor.

Although the debtor’s father’s estate was being probated in the Pennsylvania Orphan’s Court, the property was not in the Orphan’s Court and resolution of the issue would not interfere with the probate proceedings.

[f] — Golden v. Golden.\textsuperscript{36}

Here, the federal court lacked diversity jurisdiction over action to invalidate an addendum to a trust because the matter was one of pure probate that was exclusively reserved to the Pennsylvania orphans’ courts.

[5] — Pennsylvania Uniform Principal and Income Act.\textsuperscript{37}

Pennsylvania’s Act is “based on the 1997 Uniform Principal and Income Act”\textsuperscript{38} promulgated by the National Conference of Commissioners on Uniform State Laws with some changes. Any differences are explained in the comments to the Pennsylvania statutes.

\textsuperscript{38} \textit{Id}. at § 8101.
20 Pa. C.S. Section 8151\(^39\) sets forth how a trustee must allocate receipts from interests in minerals or other natural resources, including water. To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources under this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income.

(2) If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus or delay rental is more than nominal: (i) sixty-six and two-thirds percent shall be allocated to principal; and (ii) the balance shall be allocated to income.

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2) or (3): (i) sixty-six and two-thirds percent of the net amount received shall be allocated to principal; and (ii) the balance shall be allocated to income.\(^40\)

This provision of the Uniform Principal and Income Act applies whether or not a decedent or donor was extracting minerals, water or other natural resources before the interest became subject to the trust. Thus, the “Open Mine Doctrine”\(^41\) was abolished as it may have applied to the rights of

\(^39\) Id. at § 8151.

\(^40\) Id.

\(^41\) The Open Well Doctrine, often referred to as the “Open Mine Doctrine” as applied to all mineral rights, generally prohibits life tenants from removing minerals from the land except where the mine or well existed before the life tenant’s period of ownership. “As a general rule, a life tenant cannot produce oil and gas without the joinder of the remainderman, as such independent production would constitute waste[.] It is a recognized exception to this rule that a life tenant may operate oil and gas wells, mines, and quarries if they were opened before his life estate began.” Cronan v. Castle Gas Co., 512 A.2d 1, 3-4 (Pa. Super. Ct. 1986).
an income beneficiary and a remainder beneficiary in receipts from the production of minerals from land owned or leased by a trust. Instead, such receipts must be allocated pursuant to Section 8151.42

§ 12.03. Ohio.


[a] — Trusts.

Ohio adopted its Ohio Trust Code effective January 1, 2007, ORC Ann. Section 5801.01,43 et seq., and generally applies to charitable and noncharitable inter vivos express trusts and to trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.44

Section 5808.15 lists the general powers of a trustee, which may be limited by the terms of the trust, and includes “all powers over the trust property that an unmarried competent owner has over individually owned property.”45

Section 5808.16 lists more specific powers of a trustee.46 Powers specific to the issue of leasing include:

Section 5808.16(I) – “enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for the exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust.”47

In Pennsylvania, the Open Mine Doctrine is a rule of construction and interpretation, not a rule of law, and should only be invoked where the document is unclear or silent with respect to the intended rights of the life tenant. Doverspike v. Chambers, 516 A.2d 392, 395 (Pa. Super. Ct. 1986). “In function it is very much like evidentiary presumptions or the rules of statutory construction found in 1 Pa. C.S. § 1501-1991. The open mine doctrine is not paramount to the grantor’s express intent concerning the life tenant’s rights to the proceeds or development of open minds in a deed or a lease.” Id.

42 Id.
43 The Ohio Trust Code, Ohio Rev. Code Ann. § 5801.01.
44 Id. at § 5801.02.
45 Id. at § 5808.15(A)(1).
46 Id. at § 5808.16.
47 Id.
The Official Comment to this subsection notes that it was meant to negate the older view, reflected in the Restatement (2nd) of Trusts Section 189, cmt. c, that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

The exercise of any of the powers of a trustee is always subject to the fiduciary duties prescribed by Chapter 5808 of the Revised Code.

[b] — Estates.

Unlike Pennsylvania, there does not appear to be any express statutory authority for an Executor in Ohio to lease Estate property or property on behalf of an Estate. However, the Will may always give the Executor the power to lease. See, e.g., Bernheim v. Stark. There, the Will gave the executor and trustee power to lease estate property, without any restrictions or limitations as to terms or conditions of a lease.

The statutes governing the powers and duties of a personal representative in Ohio mostly refer to the sale (rather than lease) of real property of the decedent:

Any interest in real estate, whether legal or equitable, which the deceased had a right to sell or dispose of at the time of death, including coal, iron ore, limestone, fireclay, or other mineral upon or under such real estate, or the right to mine them, may be sold by an executor or administrator pursuant to Section 2127.01-2127.43.

In addition, Section 2113.311 permits an Executor/Administrator to take over the “management and rental” of any real estate of the decedent, upon approval of the probate court and Section 2113.48 permits an Executor/Administrator to obtain authority, with the consent of the purchaser, to complete a written contract for the “sale and conveyance of an interest in real estate” that the decedent began before he/she died. The probate court may also order the alteration or cancellation of a contract for the “sale and conveyance of an interest in real estate.”

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48 Bernheim v. Stark, 9 Ohio App. 40 (1918).
49 Ohio Rev. Code Ann. § 2127.01.
50 Id. at § 2113.311.
51 Id. at § 2113.49.
Most of these actions are subject to court approval and it must first be established that the action is in the best interests of the decedent.

Unlike trustees and personal representatives, the Ohio Code contains specific statutory authority for guardians to lease the real property of their wards. Guardians may also lease, upon such terms and for such time as the probate court approves, any lands belonging to the ward containing coal, gypsum, petroleum oil, natural gas, gravel, stone, or any other mineral substance for the purpose of drilling, mining, or excavating for and removing any of such substances.

Leases may only be made or modified by guardians with court approval and if in the best interests of the ward.

[2] — The Power to Lease v. the Power to Buy and/or Sell.

The case law in Ohio appears to establish that the power to sell does not include the power to lease. In addition, there is no statutory authority for a personal representative to lease Estate property. If the power to sell does not include power to lease, and none of the statutory powers of personal representatives expressly include the power to lease, unless the Will provides otherwise, personal representatives do not have the power to lease estate property.

In addition, if the power to sell does not include the power to lease, the trust instrument must expressly incorporate the statutory power of a trustee to lease or must expressly grant the trustee the power to lease.

Example: Decedent’s Will gives Executor the power to “sell to any person or persons, and for such price and upon such terms as they may deem best, at public or private sale, any part of my real estate which they may think best to sell, either for the payment of debts or for the purpose of making division of my estate amongst my heirs, and the purchasers from my said executors shall not be bound to see to the application of the purchase-money.”

52 See Ohio Rev. Code Ann. § 2111.26, which permits a guardian to lease the possession and use of the real estate of his ward or any part of it for a term of years, renewable or otherwise, by perpetual lease, with or without the privilege of purchase.
53 Id. at § 2111.26.
54 Id.
The Executors entered into a long-term lease and their power to lease was challenged. After examining the language of the Will and attempting to ascertain the testamentary intent of the decedent, the court held that the power of the executors to sell did not include the power to lease.\textsuperscript{56}

The court reached a similar conclusion in \textit{Haldeman v. Cottrell}.\textsuperscript{57}

\textbf{[3] — Recording/Title Issues.}

Ohio has not adopted a Uniform Acknowledgment Act. Section 5301.01 of the Ohio Revised Code governs acknowledgments of leases and Memorandums of Trust.\textsuperscript{58} Pursuant to Section 5301.01, leases must be “signed by the Lessor and Memorandums of Trust must be signed by the Trustee. The signature must be acknowledged by the Lessor or by the Trustee, before a judge or clerk of a court, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official’s name to the certificate of the acknowledgement.”\textsuperscript{59}

Prior to February 1, 2002, a Lease or Memorandum of Trust was required to be acknowledged in the presence of and attested by two (2) witnesses. However, if the Lease or Memorandum of Trust were executed prior to February 1, 2002 and was not acknowledged in the presence of, or not attested by, two witnesses as required, the instrument will be deemed properly executed and presumed valid unless the signature of the Lessor or Trustee was obtained by fraud and recording of the instrument serves as constructive notice of the instrument, even if the instrument was recorded after February 1, 2002.

With respect to trusts, Ohio Revised Code Section 5301.255\textsuperscript{60} provides express instructions for the recording of a Memorandum of Trust.

“A memorandum of trust that satisfies both of the following may be recorded in the office of the county recorder of any county in which real

\begin{itemize}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Haldeman v. Cottrell, 1994 Ohio App. LEXIS 4796} (Ohio Ct. App. Sept. 28, 1994)(“Appellants’ argument that the ‘power to sell’ must necessarily include the lesser power to lease is deficient.”).
\item \textsuperscript{58} \textit{Ohio Rev. Code Ann. § 5301.01.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id. at § 5301.255.}
\end{itemize}
property that is subject to the trust is located: (1) Executed by the Trustee and properly acknowledged (Ohio Rev. Code Section 5301.01); and (2) Containing the following information: (i) The name and address of the trustee; (ii) The date of execution of the trust; and (iii) The powers specified in the trust relative to the acquisition, sale, or encumbering of real property by the trustee or the conveyance of real property by the trustee, and any restrictions upon those powers."

As for leases, Ohio Revised Code Ann. Section 5301.251 provides that in lieu of the recording of a lease, there may be recorded a memorandum of that lease, executed and acknowledged in accordance with Section 5301.01 of the Revised Code.

The memorandum of lease must contain: (1) the names of the lessor and the lessee and their addresses as set forth in the lease; (2) a reference to the lease with its date of execution; (3) a description of the leased premises with such certainty as to identify the property (including a reference by volume and page to the record of the deed or other recorded instrument under which the lessor claims title); and (2) the term of the lease, together with any rights of renewal or extension of the lease and the date of commencement of the term or the manner of determining the commencement of the term as set forth in the lease.


“A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." A judicial proceeding involving a trust may relate to any matter involving the trust’s administration, including a request for instructions and an action to declare rights under the trust. The court’s jurisdiction may even be invoked in the absence of an actual dispute, such as a declaratory judgment action.

61 Id. at § 5301.01.
62 Id. at § 5301.251.
63 Id. at § 5802.01 (“Role of court in administration of trust.”).
64 Id. at § 5802.01.
An Ohio Trustee submits to the jurisdiction of the Ohio courts upon acceptance of the trusteeship. Until a distribution is made, jurisdiction over a trust beneficiary is limited to the beneficiaries’ interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon making a distribution.

The probate division of the court of common pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders and to hear and determine any action that involves an inter vivos trust.

The Ohio Uniform Trust Code does not create a system of routine or mandatory court supervision. However, the probate court must authorize many actions that in other jurisdictions (PA for example), the trustees, executors and administrators are permitted to do without court permission. In addition, the probate court has concurrent jurisdiction with the general division of the court of common pleas over actions involving inter vivos trusts, special needs trusts, charitable trusts or foundations (Ohio Revised Code Ann. Section 2101.24(B)(1)(b)). With respect to leasing, the probate court has jurisdiction to authorize the sale or lease of any estate created by will if the estate is held in trust and on petition by the trustee pursuant to Ohio Revised Code Ann. Section 2101.24.

Some examples of cases involving jurisdictional disputes are included below for guidance.

In In re Logan, the probate court in which a decedent’s estate was being administered had jurisdiction to determine what rights, if any, the administratrix of the deceased’s estate has in a purported oral lease of land occupied by the deceased at the time of his death.

In Nat’l City Bank v. de Laville, the probate court properly exercised jurisdiction over a successor trustee’s declaratory judgment action, seeking construction of a decedent’s trust.

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65 Id. at § 5802.02.
66 Id.
67 Id. at § 5802.03.
68 Id. at § 2101.24.
69 In re Logan, 131 N.E.2d 454 (Ohio Misc. 1955).
70 Nat’l City Bank v. de Laville, 867 N.E.2d 416 (Ohio 2006).
See also, Martin v. Wayne County Nat’l Bank Trust & Inv. Div., where a trustee was appointed via an *inter vivos* trust agreement during the lifetime of the settlor, it was an “*inter vivos* trustee” and accordingly, the probate court had jurisdiction, pursuant to Ohio Revised Code Section 2101.24(B)(1)(b), over a matter wherein a beneficiary of the trust alleged that the trustee had breached its fiduciary duties and the trustee’s removal was sought so that a new appointment could be made.

Finally, in *Galbreath v. Del Valle*, the court explained that for a probate court to exercise its subject matter jurisdiction in a proceeding involving a trust and multistate beneficiaries, the court must have jurisdiction over the trust, the trust property or the trust parties. Personal jurisdiction over the beneficiaries is not necessary unless affirmative relief is demanded from them.


Ohio’s Uniform Principal and Income Act became effective January 1, 2003.

Section 5812.34 sets forth the manner in which receipts from interests in minerals or other natural resources must be allocated by a trustee:

1. If received as nominal delay rental or nominal annual rent on a lease – income.

2. If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

3. If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal – 90 percent to principal and the balance to income.

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73 Ohio Rev. Code Ann. § 5812.01.

74 *Id.* at § 5812.34.
(4) If an amount is received from a working interest or any other interest not provided for elsewhere – 90 percent to principal and the balance to income.

This section applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.\textsuperscript{75} If a trust owned an interest in minerals, water, or other natural resources on January 1, 2003, the trustee may allocate receipts from the interest as provided in Section 5812.34 or in the manner used by the trustee before that date.\textsuperscript{76} Any after acquired interests would need to be allocated pursuant to Section 5812.34.\textsuperscript{77}

\textbf{§ 12.04. West Virginia.}


West Virginia recently adopted its own version of the Uniform Trust Code. House Bill 2551 was passed on to the legislature on March 12, 2011, effective 90 days from the date of passage.

[a] — Summary of H.B. 2551.

The purpose of H.B. 2551 is to make comprehensive revision to West Virginia's trust laws by substantially enacting the Uniform Trust Code and integrating it into the existing estate and trust administration statutes. The original language of the Uniform Trust Code was modified where necessary to conform to existing West Virginia practices and procedures. Clarifications were also made to existing statutory provisions that previously applied to all “fiduciaries” (trustees and personal representatives).


Prior to the adoption of the new West Virginia Uniform Trust Code, Article 5A of Chapter 44 of the West Virginia Code (Administration of Estates & Trusts)\textsuperscript{78} governed the powers of “fiduciaries” in West Virginia.

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
A “fiduciary” was defined as an executor or trustee so there were no separate provisions that apply to only trustees or only personal representatives. Because the substantive provisions relating to any fiduciaries’ power to act have not been amended, this chapter continues to refer to trustees and personal representatives collectively as “fiduciary” or “fiduciaries.”

The statutory powers of a trustee and an executor, administrator, guardian or other fiduciary are still set forth in W. Va. Code Section 44-5A-3. Under the prior law, both a will and a trust instrument had to expressly incorporate the statutory powers of a fiduciary set forth in Section 44-5A-3. Under the revised statute, the powers set forth may be incorporated by reference in a Will but apply without any express incorporation in a trust governed by the new Uniform Trust Code.

With respect to the power to lease, Trustees, without incorporation by reference, and personal representatives, with incorporation by reference, have the power to lease all or part of any property the fiduciary controls upon such terms and conditions, including options to renew or purchase, and for such period or periods of time as the fiduciary considers advisable although such period or periods may extend beyond the duration of the trust or the administration of the estate involved.

Fiduciaries also have the specific power to make coal, gravel, sand, oil, gas and other mineral leases, contracts, licenses, conveyances or grants of every nature and kind which are lawful in the jurisdiction in which the property lies.

In addition, fiduciaries may modify, renew or extend leases and may receive additional property from any source.

Finally, fiduciaries have the power to make contracts and execute instruments as necessary in the exercise of any of the above powers.

79 Id. at § 44-5A-3.
80 Id.
81 Id. at § 44-5A-3(h)(5).
82 Id. at § 44-5A-3(h)(6).
83 Id. at § 44-5A-3(h)(8).
84 Id. at § 44-5A-3(j).
85 Id. at § 44-5A-3(dd).
As in Pennsylvania and Ohio, fiduciary actions are subject to certain prudent investor rules. The prudent investor rule applicable to trustees in West Virginia states that “A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.” 86

West Virginia adopted its Uniform Prudent Investor Act, applicable to trustees, in 1996.87 The Act requires a trustee who invests and manages trust assets to comply with the prudent investor rule for the protection of beneficiaries.

The rule may be expanded, restriction, eliminated or otherwise altered by the provisions of the trust. In addition, a trustee is not liable to the beneficiaries to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

Article Six of Chapter 44 of the West Virginia Code,88 applies to investments by other fiduciaries (executors, administrators, guardians, curators or committees).


West Virginia adopted a “Uniform Notary Act” in 1984 to simplify, clarify and modernize the law governing notaries public; to make uniform notary laws; and to promote, serve and protect the public interest.89

West Virginia also has a Uniform Recognition of Acknowledgment Act, W. Va. Code Section 39-1A-1, et seq.90 The form for any public officer, trustee or personal representative is as follows:

State of
County of

The foregoing instrument was acknowledged before me this (date).................................................................................................................................

87 Id. at § 40-6C-1.
88 § 44-6-1, et seq.
A Memorandum of Trust may be presented for recordation in the office of the clerk of the county commission of any county in which real property that is subject to a trust is located.\textsuperscript{91}

Section 36-1-4a requires the following:

(1) Executed by the currently acting trustee(s) of the trust, and, if living, by the settlor(s), personally, or by a duly appointed attorney-in-fact or conservator of the settlor(s), and acknowledged in the manner a deed must be acknowledged in order to be recorded.

(2) Containing at least the following information:

a. The existence of the trust and the date of the trust;

b. The names and mailing addresses of the settlor(s) and of the currently acting trustees(s) or the names and mailing addresses of any successor trustee(s) and the circumstances under which any successor trustee(s) will assume trust powers;

c. The revocability or irrevocability of the trust; and

d. A verbatim recitation of the trust powers specified in the trust relative to the acquisition, sale, disposition, or encumbering of real property by the trustee(s) or the conveyance or disposition of real property by the trustee(s), and any restrictions upon those powers, or a statement that the trust powers include at least all those trust powers contained in the West Virginia Code.

\textsuperscript{91} W. Va. Code § 44D-2-201(b).
A Memorandum of Lease may be recorded in lieu of the entire Lease as long as it contains the following information:

(1) The name of the lessor and the name of the lessee and the addresses of such parties as set forth in the lease;
(2) a reference to the lease, with its date of execution;
(3) a description of the leased premises;
(4) the term of the lease, with the date of commencement and the date of termination of such term, and if there is a right of extension or renewal, the maximum period for which, or date to which, the lease may be extended, or the number of times or date to which it may be renewed and the date or dates on which such rights of extension or renewal are exercisable.  


The West Virginia County Circuit Courts have jurisdiction over all estate and trust matters. There is no separate division. A judicial proceeding involving a trust may relate to any matter involving the trust’s administration, including a request for instructions and an action to declare rights. However, trusts are not subject to continuing judicial supervision unless ordered by the court.

A trustee submits to the jurisdiction of the West Virginia courts by accepting the trusteeship. With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in West Virginia are subject to the jurisdiction of the courts regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts in any matter involving the trust.

92 Id. at § 40-6C-1, et seq.$ 40-1-8.
93 Id. at § 40-6C-1, et seq.$ 44D-2-201.
94 Id. at § 44D-2-201(b).
95 Id. at § 44D-2-202.
96 Id. at § 44D-2-202(b).
97 Id.
Section 44D-2-202 “does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary or other person receiving property from the trust.”98

With respect to venue, “venue for a judicial proceeding involving a trust is in the county in which the trust’s principal place of administration is or will be located unless the proceeding is to recover land, determine title to the land or subject it to a debt, determine the county where the land or any part may be, or, if the trust is created by will and the estate is not yet closed, in the county in which the decedent’s estate is being administered.”99

If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a county of this state in which a beneficiary resides, in a county in which any trust property is located, or if the trust is created by will, in the county in which the decedent’s estate was or is being administered.100


Effective July 1, 2000, West Virginia adopted the Uniform Principal and Income Act.101

Section 44B-4-411102 outlines the allocation of trust receipts from an interest in minerals or other natural resources:

(1) If received as nominal delay rental or nominal annual rent on a lease – income.

(2) If received from a production payment – income, if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance is allocated to principal.

98 Id.
100 Id. at § 44D-2-204.
102 Id. at § 44B-4-411.
(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus or delay rental is more than nominal – 90 percent to principal, balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in subdivision (1), (2) or (3) – 90 percent to principal, balance to income.

The Act “applies whether or not a decedent or donor was extracting minerals, water or other natural resources before the interest became subject to the trust.”\(^{103}\) If a trust owned an interest in minerals, water or other natural resources on July 1, 2000, the trustee may allocate receipts from the interest as provided in the Act or in the manner used by the trustee before July 1, 2000.\(^{104}\) However, if the trust acquires an interest in minerals, water or other natural resources after July 1, 2000, the trustee must allocate receipts from the interest as provided in the Act.\(^{105}\)

\(^{103}\) Id.
\(^{104}\) Id.
\(^{105}\) Id.