

Michigan Trust Code Structure

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Although the Michigan Trust Code was not officially put in place until April 1, 2010, the Michigan Trust Code applies to all revocable Trusts, regardless of when they were signed or drafted. **The Michigan Trust Code does not apply to Trusts that became irrevocable on or before December 31, 2009.**

The Code is intended to preserve the current statutory and common law, but is also designed to fill in the gaps of our current law and modernize our existing Trust and Estate laws. Many of the changes to our statutory and common laws began in April 2000 when the Estates and Protected Individuals Code (EPIC) was enacted.

The Michigan Trust Code contains eleven articles. Those articles include:

1. General Provisions and Definitions.
2. Judicial Proceedings: *This sections addresses Courts and their relationships with Trusts, including issues regarding jurisdiction, venue and even Trust registration.*
3. Representation: *This section deals with the representation of beneficiaries and how that relates to notice and consent.*
4. Creation, Validity, Modification and Termination of Trusts: *This section is somewhat self-explanatory and pertains to the actual creation of Trusts, modification of Trusts and termination of Trusts.*
5. Creditor Claims, Spendthrift and Discretionary Trusts: *This section deals primarily with creditors of the Trust beneficiaries, the actual enforceability of spendthrift provisions and the effect of discretionary distribution powers by a Trustee.*
6. Revocable Trusts: *This section is designed to address some of the unique issues involving revocable Trusts. It is also where we will find existing provisions of the Estates and Protected Individuals Code that allow creditor's of a decedent to bring their claims against the Trust when there is no probate estate being opened or in the event the probate estate assets are insufficient.*
7. Office of Trustee: *This section contains a series of default rules regarding the position of Trustee, including rules governing the Trustee's acceptance, the rights and obligations of Co-Trustees, acceptance, resignation, removal and/or appointment of Trustees and Trustee compensation.*
8. Duties and Powers of Trustee: *This is a fairly clear-cut section and merely updates the duties of the Trustees and the Trustees powers.*

9. *Liability of Trustees and Rights of Persons Dealing with Trustee: This section addresses the liability of a Trustee when acting as Trustee and the beneficiary's rights when there has been a breach of the Trust. This section also addresses the relationship between the Trustee and persons that the Trustee may be dealing with, other than beneficiaries.*

Mandatory Rules Versus Default Rules

The Michigan Trust Codes provides practitioners with mandatory rules and default rules. We will address the mandatory rules first.

The mandatory rules cannot be modified by the practitioner or the creator of the Trust. If the terms of the Trust contradict the mandatory rules, the mandatory rules will prevail.

The mandatory rules include the following guidelines as a brief overview:

1. The requirements for creating a Trust.
2. The duty to administer a Trust in good faith, expeditiously, in accordance with the terms and purposes of the Trust and for the benefit of the Trust beneficiaries. The requirements of the Trust to have a purpose that is lawful, not contrary to public policy and possible to achieve.
3. The power of the court to terminate or modify a Trust under certain circumstances. This provision permits the court to approve the termination or modification of a Trust upon petition of the current income beneficiaries when it is determined that continuance is not necessary to achieve a material purpose of the Trust.
4. The effect of a spendthrift provision, a support provision and a discretionary trust provision on the rights of creditors and assignee's to reach a Trust.
5. The power of the court to require, dispense with, modify or terminate a bond.
6. The power of the court to adjust the Trustee's compensation specified in the terms of the Trust that is unreasonably low or high. The statute makes it clear that Trustees are entitled to reasonable compensation for their services as Trustee. However, it does not attempt to define how this is to be determined, nor does it seek to vary the current law in any way. The new statute permits reimbursement of expenses incurred by a Trustee, with interest if appropriate and it gives the Trustee a lien against Trust property if expenses were incurred to protect Trust property. The Code goes on to make it very clear that advancements and reimbursement of expenses are not considered acts of self-dealing or a breach of the Trust.
7. The fiduciary duties of a Trust Protector and the obligations imposed on a Trust protector. The Michigan Trust Code includes our first law concerning the use of Trust protectors. A Trust protector is someone with the authority to appoint and remove Trustees, modify the Trust, approve distributions and more. Under the Michigan Trust Code, a Trust protector is anyone other than the Trust creator or a holder of a power of appointment and the Trust protector has the power to direct actions of the Trustee. With some exceptions, Michigan Trust Code requires that a Trust Protector be a fiduciary, act in good faith in accordance with the Trust agreement and that the Trust protector be liable for his/her actions. Trust protector provisions are not mandatory within the Trust agreement itself. The Michigan Trust Code

merely identifies that if a Trust protector is addressed in the Trust agreement there are certain guidelines that must be followed.

8. The duty of a Trustee to provide beneficiaries with the terms of the Trust and information about the Trust property and to “notify Qualified Trust Beneficiaries of an irrevocable Trust, of the existence of the Trust and identity of the Trustee”. The Trustee must notify "Qualified Trust Beneficiaries” of the Trust existence, the identity of the Trustmaker, and of the right to request a copy of the terms of the Trust that describe or affect the Trust beneficiary’s interest. The notice must also identify the court in which the Trust is registered, if any. The Trustee must provide this notice within 63 days after the Trustee acquires knowledge of the creation of an irrevocable Trust, or the date the Trustee acquires knowledge that a formally revocable Trust has become irrevocable, whether by death of the Trustmaker or otherwise. MCL 700.7105(2)(I) Should this matter be presented to the court, the court shall have the authority to order the Trustee to provide statements of account and other information pursuant to MCL 700.7814(4) and 700.7105(2)(j).
9. If a beneficiary feels that information has not been provided under the Trust accounting, the court now has jurisdiction to order the Trustee to provide a statement of account and any other information that may be needed to ensure that the beneficiaries are receiving proper notice.
10. Trustee Removal: The Michigan Trust Code does not automatically give Trust beneficiaries the power to remove a Trustee. The creator of a Trust is free to provide this power to the beneficiaries, it is not an automatic or mandatory provision.
11. Periods or statute of limitations for commencing a judicial proceeding.
12. The power of the court to take action and exercise jurisdiction.
13. The subject matter, jurisdiction of the court and venue of commencing a proceeding.
14. The Trust Code limits the ability of a Trust agreement to exculpate the Trustee from liability. Trustees cannot be relieved of liability for a breach of Trust committed in bad faith or with reckless indifference to the purpose of the Trust or the interest of the beneficiaries.

Discretionary Provisions

Primarily the default rules provide that the practitioner can override the default rules within the document. However, if a practitioner does not override the default rules within the document and/or the Trust is silent, the default rules serve as the guideline for any issues that may arise.

Although the mandatory provisions cannot be changed by the terms of the Trust, the Trust creator can draft around the non-mandatory provisions or the non-mandatory provisions can be modified. Although the discretionary rules are too many to cover in this article, I will highlight some of the key provisions that should be considered when reviewing your Trust or when setting up your revocable Living Trust:

1. Non-Redemption of a Specific Devise. Basically, this new rule addresses the issue of a specific gift not existing at the time of the Trustmaker’s death. If the gift is not in existence

at the time of death, the question that is raised is whether or not the Trustmaker intended for the beneficiary to receive a gift of equivalent value or the proceeds from the sale of the gift? If the Trust is silent, then the default provision will assume that the beneficiary was to receive something of equivalent value. The Trustmaker can opt out of this assumption by merely indicating in the Trust that an equivalent or replacement gift shall be provided to the beneficiary or the Trustmaker can indicate that if the item no longer exists than the gift is deemed void.

2. **Non-Exoneration, Specific Gifts to Beneficiaries that Carry Debt.** This rule addresses whether specific gifts to a Trust beneficiary passes subject to any mortgage or other security interest. For example, when distributing a gift of real estate that is subject to a mortgage to a specific beneficiary, unless provided otherwise, the Trustee must distribute the real estate to the beneficiary subject to the mortgage. Even if the general terms of the Trust provide for the payment of all debts and expenses, this provision is not sufficient to assume that the Trustmaker would have wanted the mortgage on the specific gift paid ahead of time. Again, this is a default rule and if the Trustmaker wants any outstanding mortgage or lien on the property paid off as a general debt of the estate, the terms of the Trust must provide for the (exoneration) payment of the debt.
3. **Accountings.** Although the Michigan Trust Code has mandatory provisions regarding accountings and what must be included in the accountings, the discretionary portion of that accounting allows the Trustmaker or creator to limit the group that actually receives the accounting.
4. **Termination of Small Trusts.** The Michigan Trust Code sets the threshold for the termination of a Trust at \$50,000 without having to seek court approval. This amount is indexed for inflation based on the process used under EPIC. However, this amount can be modified by the Trust maker in the document.
5. **Trust Protector.** The new Michigan Trust Code includes Michigan's first laws concerning the use of trust protectors. A trust protector is anyone other than the Trust creator or Trust maker that holds the power to direct the actions of the Trustee. It can be an independent third party who serves as a fiduciary and must act in good faith and in accordance with the terms of the Trust and ultimately can be liable for their actions if they do not act appropriately. Many times the trust protectors are named to resolve issues within the trust, oversee actions of the trustee or to resolve other matters that may arise without forcing the trustee to seek the courts involvement.