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## BILL ANALYSIS

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Senate Bills 383 and 384 (as passed by the Senate)  
Senate Bill 385 (Substitute S-3 as passed by the Senate)  
Senate Bills 386 and 387 (as passed by the Senate)  
Sponsor: Senator Wayne Kuipers (S.B. 383, 384, & 386)  
          Senator Hansen Clarke (S.B. 385)  
          Senator Alan L. Cropsey (S.B. 387)  
Committee: Judiciary

Date Completed: 4-28-09

**RATIONALE**

In Michigan, the statute that largely governs the creation and administration of trusts is Article 7 of the Estates and Protected Individuals Code, which was enacted in 1998. At the time, existing trust law was described as cursory and did not reflect modern estate planning techniques. Although Article 7 addressed these shortcomings to some extent, practitioners still consider the trust provisions rather skeletal. In addition, Michigan case law on trusts evidently is less than comprehensive.

In 2000, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Trust Code, which it calls "the first truly national codification of the law of trusts". In 2003, the Council of the Probate and Estate Planning Section of the State Bar of Michigan authorized the formation of a committee to study the Uniform Trust Code (UTC) and draft a Michigan Trust Code. The 14-member committee included trust officers, elder law attorneys, law professors, and estate planners from law firms in Michigan. Two members served as liaisons between this committee and a parallel committee of the Michigan Bankers Association. The Michigan Trust Code Committee also sought input from the Department of Attorney General, the Michigan Probate Judges Association, and others. On June 21, 2008, the Council of the Probate and Estate Planning Section approved the Michigan Trust Code and recommended its enactment.

**CONTENT**

**Senate Bill 387 would amend Article 7 (Trust Administration) of the Estates and Protected Individuals Code (EPIC), naming Article 7 the "Michigan Trust Code", to do the following:**

- **State that the terms of a trust would prevail over Article 7 except in specific areas.**
- **Provide that the capacity required to create, amend, or revoke a revocable trust, or to direct the actions of its trustee, would be the same as that required to make a will.**
- **Allow a settlor to revoke or amend a trust unless the terms of the trust provided that it was irrevocable.**
- **Specify that certain rules of construction that apply to the interpretation and disposition of property by will also would apply to trust property.**
- **Provide for representation of beneficiaries by fiduciaries and others in such matters as the receipt of notice and consent.**
- **Specify requirements for the creation of a trust.**
- **Provide that a trust could be created only to the extent its purposes were lawful, not contrary to public policy, and possible to achieve.**
- **Allow the settlor, a named beneficiary, or the Attorney General, among others, to maintain a proceeding to enforce a charitable trust.**

- Provide that a trust would be void to the extent its creation was induced by fraud, duress, or undue influence.
- Provide for the modification and termination of trusts, and allow the termination of uneconomic trusts.
- Allow the court to modify the terms of a trust to achieve the settlor's tax objectives.
- Allow a creditor or assignee of a beneficiary to reach a mandatory distribution of income or principal, under certain circumstances.
- Establish a limitation on actions to contest a revocable trust.
- Indicate how a trustee would accept a trusteeship.
- Provide for co-trustees, the appointment of a successor trustee if a vacancy in a trusteeship occurred, and circumstances in which a trustee could resign.
- Require a trustee to administer the trust solely in the interests of the trust beneficiaries.
- Allow a trustee to furnish a certificate of trust containing specified information, instead of a copy of the trust instrument, to a person other than a beneficiary.

The bill also would amend Article 2 (Intestacy, Wills, and Donative Transfers) to specify the mental capacity required to make a will, and would amend other provisions of EPIC.

**Senate Bill 383** would amend the statute of frauds to specify exceptions to a provision under which a deed of gift, conveyance, transfer, or assignment of property made in trust for the use of the person making the gift, conveyance, etc. is void against the person's creditors.

**Senate Bill 384** would amend the statute entitled, "Of uses and trusts", to provide that Article 7 of EPIC would control in the event of a conflict between that statute and Article 7.

**Senate Bill 385 (S-3)** would amend the Uniform Fraudulent Transfer Act to exclude from the term "transfer" the disposition of an asset held in trust under certain circumstances, and the lapse, release, waiver, or disclaimer of

a power of appointment given to a donee by a third party.

**Senate Bill 386** would amend the Powers of Appointment Act to provide that the lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a donor would not be a gift, conveyance, transfer, or assignment of property by the donee.

Senate Bills 383 through 386 are tie-barred to Senate Bill 387, which is tie-barred to those bills. Senate Bill 387 specifies that the amendments and additions to Article 7 would take effect on April 1, 2010.

Senate Bills 383, 385 (S-3), and 387 are described below.

### **Senate Bill 387**

#### **General Provisions**

**Definitions.** Under the bill, Article 7 would apply to trusts as defined in Section 1107 of EPIC. (Section 1107 defines "trust" as an express trust, private or charitable, with additions to the trust, wherever and however created. The term includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term does not include a constructive trust or a resulting trust, conservatorship, personal representative, common trust fund, liquidation trust, security arrangement, voting trust, or other types of trusts and arrangements specified in EPIC.)

The bill would define a number of terms used in Article 7, including "ascertainable standard", "discretionary trust provision", "power of withdrawal", "qualified trust beneficiary", and "trust protector".

The bill states that a person would have "knowledge" of a fact if one or more of the following applied:

- The person had actual knowledge of it.
- The person had received a notice or notification of it.
- From all the facts and circumstances known to the person at the time in question, the person had reason to know it.

The bill also describes when an organization that conducts activities through employees would have notice or knowledge of a fact.

Default & Mandatory Rules. The bill states that, except as otherwise provided in the terms of the trust, Article 7 would govern the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

The terms of a trust would prevail over any provision of Article 7 except the following:

- The requirements for creating a trust.
- The duty of a trustee to administer a trust in accordance with Section 7801 (in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with Article 7).
- The requirement that a trust have a purpose that is lawful, not contrary to public purpose, and possible to achieve.
- The power of a court to modify or terminate a trust (as specified in the bill).
- The effect of a spendthrift provision, a support provision, and a discretionary trust provision on the rights of certain creditors and assignees to reach a trust as provided in Part 5 of Article 7.
- The power of the court to adjust a trustee's compensation specified in the terms of the trust that was unreasonably low or high.
- The obligations imposed on a trust protector.
- The duty to provide beneficiaries with the terms of the trust and information about its property, and to give qualified trust beneficiaries of an irrevocable trust notice of the trust and the identity of the trustee.
- The power of the court to order the trustee to provide statements of account and other information.
- The effect of an exculpatory term.
- The rights of a person other than a trustee or beneficiary.
- Periods of limitations under Article 7 for commencing a judicial proceeding.
- The power of the court to take action and exercise jurisdiction.
- The subject-matter jurisdiction of the court and venue for commencing a proceeding.

The bill would define "terms of a trust" as the manifestation of the settlor's intent

regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

Choice of Law. Under the bill, the meaning and effect of the terms of a trust would be determined by the law of the jurisdiction designated in the trust unless that designation were contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at large. In the absence of a controlling jurisdiction in the trust terms, the law of the jurisdiction having the most significant relationship to the matter at large would determine the meaning and effect of the terms of a trust.

Place of Administration. The bill would prescribe the principal place of administration of a trust. A trustee would be under a continuing duty to administer the trust at a place appropriate to its purposes and administration, and the interests of qualified trust beneficiaries. In the furtherance of that duty, a trustee could transfer the principal place of administration to another state or to a jurisdiction outside the United States. This would not preclude the right of the court to order, approve, or disapprove a transfer. The trustee would have to give qualified trust beneficiaries at least 63 days' notice of a proposed transfer.

Methods & Waiver of Notice. The bill would prescribe methods of giving notice or sending a document under Article 7. Permissible methods would include first-class mail, personal delivery, delivery to a person's last-known place of residence or business, and a facsimile or electronic message. Notice or the sending of a document could be waived in writing by the person to be notified or sent the document. Notice of a judicial proceeding would have to be given as otherwise provided in EPIC or by court rule.

Others Treated as Qualified Beneficiaries. The bill describes circumstances under which a charitable organization named in a trust would have the rights of a qualified trust beneficiary. Also, a person appointed to enforce a trust created for the care of an animal or another noncharitable purpose would have the rights of a qualified trust beneficiary under Article 7. The Attorney General would have specific rights with

respect to a charitable trust having its principal place of administration in Michigan.

Nonjudicial Settlement Agreements. Except as otherwise provided, the bill would allow interested people to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. Such an agreement could not be used to terminate or modify a trust. The bill describes matters that could be resolved by a nonjudicial settlement agreement.

Any interested person or trustee could request the court to approve or disapprove a nonjudicial settlement agreement.

Rule of Construction. The bill specifies that the rules of construction in Sections 2605 to 2608 of EPIC that apply in Michigan to the interpretation and disposition of property by will also would apply as appropriate to the interpretation of the terms of a trust and the disposition of trust property. (Sections 2605 to 2608 govern the inclusion of an increase in securities in a devise; the rights of a specific devisee to the specifically devised property; the passing of a specific devise subject to a mortgage or other security interest without exoneration; and the treatment of property given by a testator in his or her lifetime as satisfaction of a devise.)

Penalty Clause for Contest of Trust. Under the bill, a provision in a trust purporting to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust could not be given effect if there were probable cause for that action.

#### Judicial Proceedings

The bill would authorize a court of this State to intervene in the administration of a trust to the extent the court's jurisdiction was invoked by an interested person or as provided by law. A trust would not be subject to continuing judicial supervision unless ordered by the court. A proceeding involving a trust could relate to any matter involving the trust's administration, including a request for instructions and a determination of the validity, internal affairs, or settlement of a trust; the distribution, modification, reformation, or termination of a trust; or the declaration of rights involving a trust, trustee, or trust beneficiary.

Under the bill, a trustee would submit personally to the jurisdiction of the courts of this State by registering a trust or accepting the trusteeship of a registered trust or a trust having its principal place of administration in Michigan, or by moving the principal place of administration of a trust to Michigan. With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration or having been properly registered in this State would be subject to the jurisdiction of Michigan courts regarding any matter involving the trust.

The bill would grant the court exclusive subject matter jurisdiction of trust proceedings in Michigan brought by a trustee or beneficiary that concerned the administration of a trust. The court would have concurrent jurisdiction with other courts of this State of other proceedings involving a trust, as provided in EPIC.

The bill also would prescribe venue for a proceeding involving a trust, and would address specific jurisdictional matters.

In addition, the bill would incorporate trust registration provisions currently found in EPIC.

#### Representation

The bill would provide for representation of beneficiaries in such matters as the receipt of notice and consent. Various provisions pertain to representation in circumstances in which a court was not involved, and other provisions deal with representation in matters before the court. Particular provisions would address representation by the following:

- Holders of testamentary general powers of appointment.
- Other fiduciaries, including conservators, guardians, personal representatives, and parents.
- A person having a substantially identical interest with respect to a question or dispute.

The bill also would allow a court to appoint a guardian ad litem to receive notice, give consent, and otherwise represent a minor, incapacitated, or unborn person, or a person whose identity or location was unknown.

## Creation, Validity, Modification, & Termination

**Creation.** Under the bill, a trust could be created by any of the following:

- Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death.
- Declaration by the owner of property that the owner held identifiable property as trustee.
- Exercise of a power of appointment in favor of a trustee.
- A promise by one person to another, whose rights under the promise were to be held in trust for a third person.

A trust would be created only if the following conditions were met: The settlor had capacity to create a trust and indicated an intention to do so; the trust had a definite beneficiary or was either a charitable trust or a trust for a noncharitable purpose or for the care of an animal; the trustee had duties to perform; and the same person was not the sole trustee and sole beneficiary.

A trust beneficiary would be definite if the trust beneficiary could be ascertained now or in the future, subject to any applicable rule against perpetuities. A power in a trustee to select a trust beneficiary from an indefinite class would be valid only in a charitable trust.

The bill would recognize nontestamentary trusts if they would be valid in the jurisdiction where the trust instrument was executed, or if they complied with the law of the jurisdiction in which the settlor was domiciled, had a residence, or was a citizen; the jurisdiction in which a trustee was domiciled or had a place of business; or the jurisdiction where any trust property was located.

A trust could be created only to the extent its purposes were lawful, not contrary to public policy, and possible to achieve.

A charitable trust could be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes, any purpose described in Section 501(c)(3) of the Internal Revenue Code, or another

purpose whose achievement was beneficial to the community. If the terms of a charitable trust did not identify a particular charitable purpose or beneficiary, the court could select one or more purposes or beneficiaries.

The settlor, a named beneficiary, or the Attorney General, among others, could maintain a proceeding to enforce a charitable trust.

A trust would be void to the extent its creation was induced by fraud, duress, or undue influence.

Except as required by a statute other than Article 7, a trust would not have to be evidenced by a trust instrument, but the creation of an oral trust and its terms could be established only by clear and convincing evidence.

**Modification & Termination.** In addition to prescribing particular methods of termination, the bill provides that a trust would terminate to the extent it was revoked or expired pursuant to its terms, no purpose of the trust remained to be achieved, or the purposes of the trust had become impossible to achieve or were found by a court to be unlawful or contrary to public policy. A trustee or beneficiary could commence a proceeding to confirm the termination of a trust under this provision or to approve or disapprove a proposed modification or termination under the specific methods. A proceeding to modify a charitable trust could be commenced by a person with the power to enforce the terms of a charitable trust.

A noncharitable irrevocable trust could be modified or terminated in any of the following ways:

- By the court upon the consent of the trustee and the qualified trust beneficiaries.
- Upon the consent of the qualified trust beneficiaries and a trust protector who was given the power to grant, veto, or withhold approval of termination or modification.
- By a trustee or trust protector to whom the terms of the trust had given a power to direct the termination or modification.

If the trustee failed or refused to consent to a proposed modification or termination, or not all the qualified trust beneficiaries consented, the court could approve the modification or termination if it were satisfied that 1) the trust could have been modified or terminated under these provisions if the trustee and all the qualified beneficiaries had consented; and 2) the interests of a qualified beneficiary who did not consent would be adequately protected.

The court could modify the administrative terms of a trust if continuation on its existing terms would be impracticable or wasteful or would impair the trust's administration. The court also could modify the administrative or dispositive terms of a trust or terminate a trust if, because of circumstances not anticipated by the settlor, modification or termination would further the settlor's stated purpose or, if none, the settlor's probable intention.

If a particular charitable purpose became unlawful, impracticable, or impossible to achieve, no alternative taker were named or provided for, and the court found that the settlor had a general, rather than a specific, charitable intent, all of the following would apply:

- The trust would not fail.
- The trust property would not revert to the settlor or the settlor's successors in interest.
- The court could apply "cy pres" to modify or terminate the trust by directing that the trust property be applied or distributed in a manner consistent with the settlor's general charitable intent.

("Cy pres" is the legal doctrine that the intention of a donor or testator should be carried out as nearly as possible when literal compliance is impossible.)

The terms of a charitable trust would prevail over the power of the court to apply cy pres if the terms conferred a power on the trustee, or another designated person, to modify or terminate the charitable trust, a charitable gift to the trust, or the charitable purpose of the trust or gift in favor of another charitable trust, gift, or purpose.

Uneconomic Trusts. The trustee of a trust consisting of trust property having a total value less than \$50,000 could terminate the

trust if the trustee concluded that the value of the property was insufficient to justify the cost of administration. The trustee could do so after 63 days' notice to the qualified trust beneficiaries and, if the trust were a charitable trust, to the Attorney General. The \$50,000 amount would have to be adjusted annually.

The court could modify or terminate a trust or remove a trustee and appoint a different trustee if it determined that the value of the trust property was insufficient to justify the cost of administration.

If a trust were terminated under these provisions, the trustee would have to distribute the trust property in the manner provided for in the terms of the trust, if any, and otherwise to current income beneficiaries or, if none, in the manner directed by the court.

Reformation. The court could reform the terms of a trust, even if they were unambiguous, to conform the terms to the settlor's intention if it were proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law.

Tax Objectives. To achieve the settlor's tax objectives, the court could modify the terms of a trust in a manner that was not contrary to the settlor's probable intention.

Division or Consolidation. After notice to the qualified trust beneficiaries and to the holders of powers of appointment, a trustee could divide trust property into two or more separate portions or trusts and allocate property between them if the trusts had substantially identical terms and conditions or if the result did not impair rights of any beneficiary or adversely affect achievement of the trust's purposes.

Also, after notice to qualified beneficiaries and holders of powers of appointment, a trustee could consolidate two or more trusts and administer them as one if the trusts had substantially identical terms and conditions or if the result did not impair rights of any beneficiary or adversely affect achievement of the trust's purposes.

## Creditor's Claims; Spendthrift & Discretionary Trusts

Scope. Under the bill, Part 5 of Article 7 would apply to a creditor's or transferee's claims with respect to spendthrift, support, and discretionary trusts.

Spendthrift Provision. A spendthrift provision would be valid and enforceable. A term of a trust providing that the interest of a beneficiary was held subject to a "spendthrift trust", or similar words, would restrain both voluntary and involuntary transfer of the beneficiary's interest. Except as provided below, the beneficiary's interest could not be transferred in violation of a valid spendthrift provision and trust property would not be subject to enforcement of a judgment until distributed directly to the trust beneficiary.

Notwithstanding the existence of a spendthrift provision in the terms of a trust, a trustee would not be liable to the beneficiaries of the trust for making a distribution to which a beneficiary was otherwise entitled pursuant to the direction of the beneficiary.

Support Provision. Subject to the exceptions described below, the interest of a beneficiary that was subject to a support provision could not be transferred and the trust property would not be subject to the enforcement of a judgment until income or principal was distributed directly to the beneficiary. After this distribution, the income and principal distributed would be subject to the enforcement of a judgment only to the extent that the income or principal was not necessary for the beneficiary's health, education, support, or maintenance.

Enforceable Claim. The interest of a trust beneficiary that was subject to a spendthrift provision, a support provision, or both could be reached to satisfy an enforceable claim against the beneficiary by any of the following:

- A beneficiary's child or former spouse who had a judgment or court order against the beneficiary for support or maintenance.
- A judgment creditor who had provided services that enhanced, preserved, or

protected a beneficiary's interest in the trust.

-- This State or the United States.

The court would have to order the trustee to satisfy such a judgment only out of distributions of income or principal as they became due.

Discretionary Trust. The transferee or creditor of the beneficiary of a discretionary trust provision would not have a right to any amount of trust income or principal that could be distributed only in the exercise of the trustee's discretion, and trust property would not be subject to the enforcement of a judgment until income and/or principal was distributed directly to the trust beneficiary.

Creditor's Claim against Settlor. The following rules would apply whether or not the terms of a trust contained a spendthrift provision.

During the lifetime of the settlor, the property of a revocable trust would be subject to claims of the settlor's creditors.

After the settlor's death, and subject to the settlor's right to direct the source from which liabilities would be paid, the property of a trust that was revocable by the settlor at his or her death would be subject to expenses, claims, and allowances as provided in the bill.

With respect to an irrevocable trust, the amount that a creditor could reach would be limited as provided in the bill.

A trust beneficiary would not be considered a settlor merely because of a lapse, waiver, or release of a power of withdrawal over the trust property.

Mandatory Distribution. A creditor or assignee of a trust beneficiary could reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee had not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

"Mandatory distribution" would mean a distribution of income or principal that the trustee is required to make to a trust beneficiary under the terms of the trust,

including a distribution upon termination of the trust. "Mandatory distribution" would not include a distribution subject to the exercise of the trustee's discretion.

Personal Objections of Trustee. Trust property would not be subject to personal obligations of the trustee, even if the trustee became insolvent or bankrupt.

#### Revocable Trusts

Under the bill, the capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, would be the same as that required to make a will.

Unless the terms of a trust provided that it was irrevocable, the settlor could revoke or amend the trust. The bill describes ways in which a settlor could revoke or amend a revocable trust, and provides for powers that others (such as an agent under a durable power of attorney) would have to exercise the settlor's powers.

While a trust was revocable, rights of the trust beneficiaries would be subject to the control of, and the duties of the trustee would be owed exclusively to, the settlor. If a trustee reasonably believed that the settlor was an incapacitated individual, the trustee would have to keep his or her designated agent, or each beneficiary under certain circumstances, informed of the existence of the trust and its administration.

A person could commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within two years after the death or within six months after the trustee notified a person of the existence of the trust and other matters.

Upon the death of the settlor of a revocable trust, the trustee could proceed to distribute the trust property in accordance with the terms of the trust. A beneficiary of a trust that was determined to have been invalid would be liable to return any distribution received.

The bill would incorporate current provisions under which the creditors of a decedent may bring claims against his or her revocable trust if there is no probate proceeding.

#### Trustees

Under the bill, Part 7 of Article 7 would prescribe rules related to the office of trustee. The provisions include rules governing trustee acceptance, the rights and obligations of co-trustees, the resignation, removal, and appointment of trustees, and trustee compensation and reimbursement.

A person designated as trustee would accept the trusteeship either by substantially complying with a method of acceptance provided in the terms of the trust, or, if the terms of the trust did not provide a method or the method provided were not expressly made exclusive, by exercising powers or performing duties as trustee or otherwise indicating acceptance of the trusteeship.

Part 8 would govern the duties of a trustee and a trustee's powers. Upon acceptance of a trusteeship, the trustee would be required to administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with Article 7.

Subject to the rights of people dealing with or assisting the trustee, a sale, encumbrance, or other transaction involving the investment or management of trust property that was entered into by the trustee for the trustee's own personal account or that was otherwise affected by a substantial conflict between the trustee's fiduciary and personal interests would be voidable by a trust beneficiary affected by the transaction, except under specific circumstances.

A trustee would have to act as a prudent person would in dealing with the property of another, including following the standards of the Michigan Prudent Investor Rule. If the trustee had special skills or were named trustee on the basis of representation of special skills or expertise, the trustee would be under a duty to use those skills.

While a trust was revocable, the trustee could follow a direction of the settlor that was contrary to the terms of the trust.

Specific provisions would apply to a trust protector, other than one who was a beneficiary. The trust protector would be a fiduciary to the extent of the powers, duties,



and discretion granted to the trust protector under the terms of the trust, unless the terms allowed the trustee to exercise powers of administration (as described in a section of the Internal Revenue Code) in a nonfiduciary capacity. In exercising or refraining from exercising any power, duty, or discretion, the trust protector would have to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

A trustee would be required to take reasonable steps to take control of and protect the trust property; keep adequate records of the administration of the trust; and keep trust property separate from the trustee's own property. A trustee could invest the property of two or more separate trusts together, as long as clear records were kept.

A trustee would have to take reasonable steps to enforce claims of the trust and to defend claims against it. A trustee also would have to take reasonable steps to locate trust property and to compel a former trustee or other person to deliver trust property to the trustee.

A resigning trustee or a trustee being replaced by a successor could retain a reasonable reserve for the payment of debts, taxes, and expenses.

Unless a distribution or payment could no longer be questioned, a person who received property that was improperly distributed or paid from a trust would have to return it and any income and gain from the property since distribution, if the recipient had the property. If not, the recipient would have to pay the value of the property as of the date of distribution or payment, and any income or gain since distribution.

If a person embezzled or wrongfully converted trust property, or refused without colorable claim of right to transfer possession of trust property to the current trustee upon demand, the person would be liable in an action brought by the current trustee, or the beneficiary for the benefit of the trust, for double the value of any property embezzled, converted, or wrongfully withheld.

A trustee would be obligated to keep qualified trust beneficiaries reasonably

informed about the administration of the trust and of the material facts necessary for them to protect their interests; to furnish beneficiaries with a copy of the trust instrument; to give notice of the trustee's status as trustee and of the creation of the trust; and to provide information regarding the trustee's compensation. The bill also would retain current requirements for annual accountings.

Specific rules would apply to a trustee's power to make distributions pursuant to a discretionary trust provision. The bill also identifies powers that a trustee could exercise without authorization by the court, and describes other specific powers of a trustee. In addition, the bill would retain current provisions allowing a trustee to take certain actions in connection with an environmental concern or hazard, and in connection with a tax matter.

Upon termination or partial termination of a trust, the trustee could send the beneficiaries a proposal for distribution. A beneficiary would have the right to object to the proposal within a certain time frame.

Upon the occurrence of an event terminating or partially terminating a trust, the trustee would have to proceed expeditiously to distribute the trust property to the people entitled to it, subject to the right of the trustee to retain a reasonable reserve for payment of debts, taxes, and expenses.

A beneficiary's release of a trustee from liability for breach of trust would be invalid to the extent the release was induced by improper conduct of the trustee, or to the extent that the beneficiary, at the time of the release, did not know of his or her rights or of the material facts related to the breach.

#### Liability of Trustees & Rights of Others

The bill specifies that a trustee's violation of a duty the trustee owed to a trust beneficiary would be a breach of trust. A court could take specific actions to remedy a breach that had occurred or could occur.

A trustee who committed a breach would be liable to the trust beneficiaries affected for the larger of the following: the profit the trustee made due to the breach, or the amount required to restore the value of the

trust property and trust distributions to what they would have been if the breach not occurred.

A trustee would be accountable to an affected beneficiary for any profit the trustee made arising from the administration of the trust, even absent a breach of trust. Absent a breach, a trustee would not be liable to a beneficiary for a loss or depreciation in the value of trust property, for failure to generate income, or for not having made a profit.

Proceedings against a trustee would have to be commenced within time limits specified in the bill.

A trustee who acted in reasonable reliance on the terms of the trust as expressed in the trust instrument would not be liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

A term of a trust relieving a trustee of liability for breach would be unenforceable to the extent that 1) it relieved the trustee of liability for a breach committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or 2) the term was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

A trustee would not be liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for it, or ratified the transaction constituting the breach, unless 1) the consent, release, or ratification was induced by improper conduct of the trustee; or 2) at the time of the consent, release, or ratification, the beneficiary did not know one or more of the material facts relating to the breach.

The bill would provide for limits on the personal liability of a trustee on a contract under various circumstances, including situations in which a trustee held an interest as a general partner in a general or limited partnership.

A person other than a trust beneficiary who in good faith assisted a trustee for value or dealt with a trustee, not knowing that the trustee was exceeding or improperly exercising the trustee's powers, would be

protected from liability as if the trustee properly exercised the power.

### Certificate of Trust

Instead of furnishing a copy of the trust instrument to a person other than a trust beneficiary, a trustee could give the person a certificate of trust containing specified information. A certificate would have to be in the form of an affidavit, and could be signed or otherwise authenticated by the settlor, any trustee, or an attorney for the settlor or trustee.

A certificate of trust would not have to contain the dispositive terms of the trust.

A recipient of a certificate of trust could require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designated the trustee and conferred upon the trustee the power to act in the pending transaction.

A person who in good faith entered into a transaction in reliance on a certificate of trust could enforce the transaction against the trust property as if the representations contained in the certificate were correct.

A person making a demand for the trust instrument or excerpts would be liable for damages, costs, expenses, and legal fees if the court determined that the person was not acting pursuant to a legal requirement in demanding the trust instrument.

### Construction & Purposes

The bill would require Article 7 to be construed and applied to promote its underlying purposes and policies, which would be as follows:

- "To make more comprehensive and to clarify the law governing trusts in this state."
- "To permit the continued expansion and development of trust practices through custom, usage, and agreement of the parties."
- "To foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust."

## Electronic Records & Signatures

The bill specifies that the provisions of Article 7 governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of electronic records or signatures, would conform to the requirements of Section 102 of the Federal Electronic Signatures in Global and National Commerce Act, and would supersede, modify, and limit the requirements of that Act. (Section 102 establishes criteria for a state statute, regulation, or rule of law to supersede, modify, or limit the Act's requirements, with respect to state law.)

## Repeals

The bill would repeal sections of Article 7 that pertain to the following: personal liability of trustees (Section 7306); limitations on proceedings against trustees (Section 7307); duties and liabilities of successor trustees (Section 7308); trustee authority regarding tax matters (Section 7408); payment provisions (Section 7409); secured claims (Section 7509); claims not due and contingent or unliquidated claims (Section 7510); and counterclaims of trustees (Section 7511).

## Amendments to Other Articles

Currently, under Article 2, an individual 18 years of age or older who is of sound mind may make a will. Under the bill, an individual would have to have sufficient mental capacity, rather than be of sound mind, to make a will. An individual would have sufficient mental capacity to make a will if all of the following were met:

- The individual had the ability to understand that he or she was providing for the disposition of his or her property after death.
- The individual had the ability to know the nature and extent of his or her property.
- The individual knew the natural objects of his or her bounty.
- The individual had the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

The bill also would amend provisions of EPIC regarding a fiduciary's breach of duty; formal proceedings involving an estate of a decedent, minor, protected individual, or incapacitated individual, or in a judicially supervised settlement, with respect to cases in which a person is bound by an order binding others and regarding the appointment of a guardian ad litem; trusts for pets; and transactions in which a personal representative or a conservator has an interest.

## **Senate Bills 383 and 385 (S-3)**

Under the statute of frauds, a deed of gift, conveyance, transfer, or assignment of property made in trust for the use of the person making the gift, conveyance, transfer, or assignment is void as against the person's creditors. The Uniform Fraudulent Transfer Act identifies circumstances under which a transfer made by a debtor is fraudulent as to creditors. ("Transfer" means disposing of or parting with an asset or an interest in an asset.)

Under Senate Bill 383 the statute of fraud provision would not apply to, and under Senate Bill 385 (S-3) the term "transfer" would not include, the lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a third party. "Donee" would mean that term as defined in the Powers of Appointment Act. (That Act defines "donee" as the person to whom the power is granted or reserved. A power of appointment is the authority conferred upon a person, the donee, to create new ownership interests in assets or select the recipient of an interest in property.)

Also, under Senate Bill 383, the statute of frauds provision would not apply to the creation of a trust by an individual if all of the following applied:

- The individual created the trust for the benefit of his or her spouse.
- The trust was treated as qualified terminable interest property under a section of the Internal Revenue Code (IRC).
- The individual retained a beneficial interest in the trust income and/or principal, and the beneficial interest followed the termination of the spouse's prior beneficial interest in the trust.

In addition, under Senate Bill 383 the statute of frauds provision would not apply to a gift, conveyance, transfer, or assignment from a trust to a person who created the trust, and under Senate Bill 385 (S-3) the term "transfer" would not include the disposing of or parting with an asset or interest in an asset held in trust to the person who created the trust, if all of the following applied:

- The trust was an irrevocable trust for the benefit of third parties.
- The trust was a grantor trust with regard to the person for income tax purposes under specific sections of the IRC.
- The trustee had the discretionary authority to reimburse or advance trust property to the person for taxes concerning income attributable to the trust property.
- The gift, conveyance, transfer, or assignment, or the disposing of or parting with the asset or interest, was the exercise by the trustee of that discretionary authority.

MCL 566.131 (S.B. 383)  
Proposed MCL 555.28 (S.B. 384)  
MCL 566.31 (S.B. 385)  
MCL 556.123 (S.B. 386)  
MCL 700.1103 et al. (S.B. 387)

## **BACKGROUND**

The following is a discussion of the Uniform Trust Code from the National Conference of Commissioners on Uniform State Laws.

"When a person transfers property to another person 'in trust' for beneficiaries or for a legally-acknowledged beneficial purpose, a 'trust' is formed. The recipient of the property is called a 'trustee.' The person who transfers property to the trustee 'in trust' is usually called the settlor. Most trusts have identifiable beneficiaries. There are, however, charitable and honorary trusts, which do not have actual beneficiaries...Trusts are recognized in the law for many purposes. Trusts are commonly used as part of an individual's estate plan, to avoid probate and to obtain favorable tax consequences...

"The prior law governing the trust relationship is fundamentally American common law, best represented in the Restatement of the Law of Trusts, 2<sup>nd</sup> and the subsequent, still being drafted, Restatement of the Law of Trusts, 3<sup>rd</sup>. The

restatements come from the American Law Institute...

"In the year 2000, however, the Uniform Law Commissioners have promulgated the first truly national codification of the law of trusts with the Uniform Trust Code. It draws from the common law sources, including the Restatements. The existing statutory law is also a source. The objective is a codification of existing law, but there are elements of law reform, also. The reforms tune trust law to modern needs. The Uniform Code provides fundamental rules that apply to all voluntary trusts.

"However, the Uniform Trust Code does not try to incorporate detailed rules for every conceivable kind of trust, nor does it incorporate all of the kinds of trusts there are. It does not contain statutory rules that are already governing trusts in many jurisdictions...What the Uniform Trust Code contains is a set of basic default rules that fairly, consistently and clearly govern voluntary trusts. It is a default statute for the most part, because the terms of a trust agreement will govern even if inconsistent with the statutory rule."

Since 2002, the Uniform Trust Code, or a variation of it, has been enacted by 20 states and the District of Columbia. The NCCUSL amended the UTC in 2001, 2003, 2004, and 2005 to reflect input and decisions of some of the first states that reviewed and enacted it.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

The Michigan Trust Code (MTC) is the product of a five-year painstaking drafting process with representation from diverse constituencies. Enacting the Code would modernize the law of trusts and provide certainty that is currently lacking in Michigan due to sparse case law and incomplete and dated statutes. The MTC would provide a comprehensive codification of Michigan trust law that practitioners, courts, and trustees could rely on. Also, since the MTC is based on the Uniform Trust Code, Michigan courts could easily look to decisions of courts in other states where the UTC has been adopted. In addition, enacting the MTC

would remove an incentive for Michigan residents to take their trust business to those states, which include Arizona, Florida, and Ohio.

While modernizing this State's trust law, the MTC also would preserve well established Michigan law. According to the Michigan Trust Code Committee, 30 provisions are essentially consistent either with Michigan common law or with existing statutes; 48 sections involve modifying or adding to sections of the UTC to bring it in line with Michigan law; 34 sections represent "common sense 'gap fillers'" that are consistent with the law or practice in Michigan today; and only three sections would make significant changes in existing law.

Changes that the MTC would make to the Uniform Trust Code, in order to preserve longstanding Michigan law, include provisions for notification to beneficiaries of the existence of trusts and accountings; voluntary trust registration; the rights of creditors of trust beneficiaries; environmental issues; and tax matters; as well as provisions allowing a decedent's creditors to bring claims against the decedent's revocable living trust when no probate proceeding exists or the probate estate is inadequate.

Provisions that would fill gaps in current Michigan law include the creation of a statutory basis to terminate small or uneconomical trusts; a statute of limitations on challenges to the validity of revocable trusts used as will substitutes; provisions related to accepting or declining trusteeships; rules related to trustees' duty of loyalty; and authorization for the use of certificates of trust beyond the area of real estate transactions. These "gap fillers" would reduce the need to go to court for guidance and direction, which in turn would reduce costs and preserve trust property.

One of significant changes the MTC would make to Michigan law involves the standard of capacity to create revocable trusts. Under the MTC, the capacity to create, amend, revoke, or add property to a trust would be the same as the capacity required to make a will. According to the MTC Committee, this standard has been adopted by all of the UTC states, and the basis for it is the widespread use of revocable trusts as will substitutes, and a desire to have a common standard for the principal means of

testamentary transfers. At the same time, the MTC would modify the standard of capacity to make a will. The proposed changes draw upon the Michigan Civil Jury Instructions and would be consistent with the standard of capacity required to execute durable powers of attorney and beneficiary designations.

Under another change to Michigan law, the MTC would give settlors, as well as beneficiaries and the Attorney General, the right to maintain proceedings to enforce charitable trusts. Currently, a settlor does not have this ability even if the trust is being administered contrary to his or her intentions.

The third significant change to Michigan law would establish a presumption that a trust created after the MTC's effective date was revocable, unless the trust stated that it was irrevocable. Under existing law, if a trust is silent as to revocability, it is presumed to be irrevocable. This is not consistent with today's common use of revocable trusts as will substitutes. With a revocable trust, the settlor retains the power to control, amend, or terminate the trust, and the trust property reverts to the settlor if the trust is revoked. A trust can easily be made irrevocable if that is the settlor's intention.

Finally, enacting the MTC would continue the modernization of Michigan's laws governing trusts and estates, which began in 1998 with EPIC and continued with the enactment of the Uniform Principal and Income Act in 2004 and Public Acts 148 and 149 of 2008 which, in effect, repealed the rule against perpetuities. The Michigan Trust Code would be a uniquely Michigan document that would rely on the structure and provisions of the UTC, preserve longstanding Michigan law, and fill numerous gaps in current law.

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

While the bills would affect the role of the courts on the governance of trusts, there would be no overall fiscal impact on the judiciary.

Fiscal Analyst: Stephanie Yu

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.