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BILL ANALYSIS

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Senate Bills 383 through 387 (as enacted)

PUBLIC ACTS 42-46 of 2009

Sponsor: Senator Wayne Kuipers (S.B. 383, 384, & 386)
Senator Hansen Clarke (S.B. 385)
Senator Alan L. Cropsey (S.B. 387)
Senate Committee: Judiciary
House Committee: Judiciary

Date Completed: 7-28-09

RATIONALE

In Michigan, the principal statute that 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 considered the statutory trust provisions rather skeletal. In addition, Michigan case law on trusts is said to be 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 amends 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 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, is the same as that required to make a will.**
- **Allow a settlor to revoke or amend a trust unless the terms of the trust provide that it is irrevocable.**
- **Apply to trust property certain rules of construction that govern the interpretation and disposition of property by will.**
- **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.**
- **Permit a trust to be created only to the extent its purposes are 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 is 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 accepts a trusteeship.
-- Provide for co-trustees, the appointment of a successor trustee if a vacancy in a trusteeship occurs, and circumstances in which a trustee may 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 amends Article 2 (Intestacy, Wills, and Donative Transfers) to specify the mental capacity required to make a will, and amends other provisions of EPIC.

<u>Senate Bill 383</u> amends 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.

<u>Senate Bill 384</u> amends the statute entitled, "Of uses and trusts", to provide that Article 7 of EPIC controls in the event of a conflict between that statute and Article 7.

<u>Senate Bill 385</u> amends 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.

<u>Senate Bill 386</u> amends 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 is not a gift, conveyance, transfer, or assignment of property by the donee.

All of the bills will take effect on April 1, 2010.

Senate Bills 383 through 386 were tie-barred to Senate Bill 387, which was tie-barred to those bills.

The following is a detailed description of Senate Bills 383, 385, and 387. (Please note: The bills are described as if they were already in effect.)

<u>Senate Bill 387</u>

(Except as indicated, the following description refers to provisions of the bill, rather than current law.)

<u>General Provisions</u>

<u>Definitions</u>. Under the bill, Article 7 applies 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 defines 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 has "knowledge" of a fact if one or more of the following apply:

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

The bill also describes when an organization that conducts activities through employees has 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 governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

The terms of a trust 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 is 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 defines "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. The bill states that the meaning and effect of the terms of a trust are determined by the law of the jurisdiction designated in the trust unless that designation is 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 determines the meaning and effect of the terms of a trust.

Place of Administration. The bill prescribes the principal place of administration of a trust. A trustee is 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 may transfer the principal place of administration to another state or to a jurisdiction outside the United States. This does not preclude the right of the court to order, approve, or disapprove a transfer. The trustee must give qualified trust beneficiaries at least 63 days' notice of a proposed transfer.

Methods & Waiver of Notice. The bill prescribes methods of giving notice or sending a document under Article 7. Permissible methods 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 may be waived in writing by the person to be notified or sent the document. Notice of a judicial proceeding must 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 has 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 has the rights of a qualified trust beneficiary under Article 7. The Attorney General has 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 allows interested people to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust. Such an agreement may not be used to terminate or modify a trust. The bill describes matters that may be resolved by a nonjudicial settlement agreement.

Any interested person or trustee may 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 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 may not be given effect if there is probable cause for that action.

Judicial Proceedings

The bill authorizes a court of this State to intervene in the administration of a trust to the extent the court's jurisdiction is invoked by an interested person or as provided by law. A trust is not subject to continuing judicial supervision unless ordered by the court. A proceeding involving a trust may 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 submits 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 are subject to the jurisdiction of Michigan courts regarding any matter involving the trust.

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

The bill also prescribes venue for a proceeding involving a trust, and addresses specific jurisdictional matters.

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

Representation

The bill provides 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 is not involved, and other provisions deal with representation in matters before the court. Particular provisions 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 allows 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 is unknown.

Creation, Validity, Modification, & Termination

Creation. Under the bill, a trust may 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 holds 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 are to be held in trust for a third person.

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

A trust beneficiary is definite if the trust beneficiary can 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 is valid only in a charitable trust.

The bill recognizes nontestamentary trusts if they are valid in the jurisdiction where the trust instrument was executed, or if they comply with the law of the jurisdiction in which, at the time of creation, any of the following applied: the settlor was domiciled, had a residence, or was a citizen; a trustee was domiciled or had a place of business; or any trust property was located.

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

A charitable trust may 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 is beneficial to the community. If the terms of a charitable trust do not identify a particular charitable purpose or beneficiary, the court may select one or more purposes or beneficiaries.

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

A trust is 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 need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

Modification & Termination. In addition to prescribing particular methods of termination, the bill provides that a trust terminates to the extent it is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become impossible to achieve or are found by a court to be unlawful or contrary to public policy. A trustee or beneficiary may 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 may be commenced by a person with the power to enforce the terms of a charitable trust.

A noncharitable irrevocable trust may 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 is 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 have given a power to direct the termination or modification.

If the trustee fails or refuses to consent to a proposed modification or termination, or not all the qualified trust beneficiaries consent, the court may approve the modification or termination if it is 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 does not consent will be adequately protected.

The court may 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 may 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 will further the settlor's stated purpose or, if none, the settlor's probable intention.

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

-- The trust does not fail.
-- The trust property does not revert to the settlor or the settlor's successors in interest.
-- The court may 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 prevail over the power of the court to apply cy pres if the terms confer 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 may terminate the trust if the trustee concludes that the value of the property is insufficient to justify the cost of administration. The trustee may do so after 63 days' notice to the qualified trust beneficiaries and, if the trust is a charitable trust, to the Attorney General. The $50,000 amount must be adjusted annually.

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

If a trust is terminated under these provisions, the trustee must 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 may reform the terms of a trust, even if they are unambiguous, to conform the terms to the settlor's intention if it is 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 may modify the terms of a trust in a manner that is 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 may divide trust property into two or more separate portions or trusts and allocate property between them if the trusts have substantially identical terms and conditions or if the result does 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 may consolidate two or more trusts and administer them as one if the trusts have substantially identical terms and conditions or if the result does 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 applies to a creditor's or transferee's claims with respect to spendthrift, support, and discretionary trusts.

Spendthrift Provision. The bill states that a spendthrift provision is valid and enforceable. A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or similar words, restrains both voluntary and involuntary transfer of the beneficiary's interest. Except as provided below, the beneficiary's interest may not be transferred in violation of a valid spendthrift provision and trust property is not 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 is not liable to the beneficiaries of the trust for making a distribution to which a beneficiary is otherwise entitled pursuant to the direction of the beneficiary.

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

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

-- A beneficiary's child or former spouse who has a judgment or court order against the beneficiary for support or maintenance.
-- A judgment creditor who has provided services that enhance, preserve, or protect a beneficiary's interest in the trust.
-- This State or the United States.

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

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

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

During the lifetime of the settlor, the property of a revocable trust is 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 will be paid, the property of a trust that was revocable by the settlor at his or her death is subject to expenses, claims, and allowances as provided in the bill.

With respect to an irrevocable trust, the amount that a creditor may reach is limited as provided in the bill.

A trust beneficiary will 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 may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

"Mandatory distribution" means 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" does not include a distribution subject to the exercise of the trustee's discretion.

Personal Obligations of Trustee. Trust property is not subject to personal obligations of the trustee, even if the trustee becomes 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, is the same as that required to make a will.

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

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

A person may 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 may proceed to distribute the trust property in accordance with the terms of the trust. A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

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

<u>Trustees</u>

Under the bill, Part 7 of Article 7 prescribes 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 accepts 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 do not provide a method or the method provided is not expressly made exclusive, by exercising powers or performing duties as trustee or otherwise indicating acceptance of the trusteeship.

Part 8 governs the duties of a trustee and a trustee's powers. Upon acceptance of a trusteeship, the trustee must 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 entered into by the trustee for the trustee's own personal account or otherwise affected by a substantial conflict between the trustee's fiduciary and personal interests is voidable by a trust beneficiary affected by the transaction, except under specific circumstances.

A trustee must 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 has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.

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

Specific provisions apply to a trust protector, other than one who is a beneficiary. The trust protector is 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 allow 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 must act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

A trustee must 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 may invest the property of two or more separate trusts together, as long as clear records are kept.

A trustee must take reasonable steps to enforce claims of the trust and to defend claims against it. A trustee also must 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 may retain a reasonable reserve for the payment of debts, taxes, and expenses.

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

If a person embezzles or wrongfully converts trust property, or refuses without colorable claim of right to transfer possession of trust property to the current trustee upon demand, the person is 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 is 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 retains current requirements for annual accountings.

Specific rules apply to a trustee's power to make distributions pursuant to a discretionary trust provision. The bill also identifies powers that a trustee may exercise without authorization by the court, and describes other specific powers of a trustee. In addition, the bill retains 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 may send the beneficiaries a proposal for distribution. A beneficiary has 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 must 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 is 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.

<u>Liability of Trustees & Rights of Others</u>

The bill specifies that a trustee's violation of a duty the trustee owes to a trust beneficiary is a breach of trust. A court may take specific actions to remedy a breach that has occurred or may occur.

A trustee who commits a breach is 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 had not occurred.

A trustee is 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 is not 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 must be commenced within time limits specified in the bill.

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not 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 is unenforceable to the extent that 1) it relieves 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 is not 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 provides for limits on the personal liability of a trustee on a contract under various circumstances, including situations in which a trustee holds an interest as a general partner in a general or limited partnership.

A person other than a trust beneficiary who in good faith assists a trustee for value or deals with a trustee, not knowing that the trustee is exceeding or improperly exercising the trustee's powers, is 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 may give the person a certificate of trust containing specified information. A certificate must be in the form of an affidavit, and may be signed or otherwise authenticated by the settlor, any trustee, or an attorney for the settlor or trustee.

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

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

A person who in good faith enters into a transaction in reliance on a certificate of trust may 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 is liable for damages, costs, expenses, and legal fees if the court determines that the person is not acting pursuant to a legal requirement in demanding the trust instrument.

Construction & Purposes

The bill requires Article 7 to be construed and applied to promote its underlying purposes and policies, which are 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, conform to the requirements of Section 102 of the Federal Electronic Signatures in Global and National Commerce Act, and 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 repeals 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 must have sufficient mental capacity, rather than be of sound mind, to make a will. An individual has sufficient mental capacity to make a will if all of the following are met:

-- The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
-- The individual has the ability to know the nature and extent of his or her property.
-- The individual knows the natural objects of his or her bounty.
-- The individual has 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 amends 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

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 frauds provision does not apply to, and under Senate Bill 385 the term "transfer" does not include, the lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a third party. Senate Bill 383 defines "donee" as 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 does not apply to the creation of a trust by an individual if all of the following apply:

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

In addition, under Senate Bill 383 the statute of frauds provision does not apply to a gift, conveyance, transfer, or assignment from a trust to a person who created the trust, and under Senate Bill 385 the term "transfer" does 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 apply:

-- The trust is an irrevocable trust for the benefit of third parties.
-- The trust is a grantor trust with regard to the person for income tax purposes under specific sections of the IRC.
-- The trustee has 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, is the exercise by the trustee of that discretionary authority.

MCL 566.131 (S.B. 383)
555.28 (S.B. 384)
566.31 (S.B. 385)
556.123 (S.B. 386)
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, 2nd and the subsequent, still being drafted, Restatement of the Law of Trusts, 3rd. The restatements come from the American Law Institute…

"In the year 2000, however, the Uniform Law Commissioners…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 (excluding Michigan) 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. The Code will 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 is a comprehensive codification of Michigan trust law that practitioners, courts, and trustees will be able to rely on. Also, since the MTC is based on the Uniform Trust Code, Michigan courts will be able to look easily to decisions of courts in other states where the UTC has been adopted. In addition, enacting the MTC removes 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 preserves 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 make significant changes in existing law.

Changes that the MTC makes 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 fill gaps in 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" will reduce the need to go to court for guidance and direction, which in turn will reduce costs and preserve trust property.

One of significant changes the MTC makes 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 is 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 modifies the standard of capacity to make a will. The changes draw upon the Michigan Civil Jury Instructions and are consistent with the standard of capacity required to execute durable powers of attorney and beneficiary designations.

Under another change to Michigan law, the MTC gives 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 establishes a presumption that a trust created after the MTC's effective date is revocable, unless the trust states that it is 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 continues 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 is a uniquely Michigan document that relies on the structure and provisions of the UTC, preserves longstanding Michigan law, and fills numerous gaps in the law.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

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

Fiscal Analyst: Lindsay Hollander

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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.