

SENATE BILL No. 978

February 23, 2012, Introduced by Senators SCHUITMAKER and JONES and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 7103, 7401, 7602, 7603, and 7815 (MCL 700.7103, 700.7401, 700.7602, 700.7603, and 700.7815), sections 7103 and 7401 as amended and sections 7602, 7603, and 7815 as added by 2009 PA 46, and by adding section 7820a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 7103. As used in this article:

2 (a) "Action", with respect to a trustee or a trust protector,
3 includes an act or a failure to act.

4 (b) "Ascertainable standard" means a standard relating to an
5 individual's health, education, support, or maintenance within the
6 meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal
7 revenue code, 26 USC 2041 and 2514.

8 (c) "Charitable trust" means a trust, or portion of a trust,

1 created for a charitable purpose described in section 7405(1).

2 (d) "Discretionary trust provision" means a provision in a
3 trust, regardless of whether the terms of the trust provide a
4 standard for the exercise of the trustee's discretion and
5 regardless of whether the trust contains a spendthrift provision,
6 that provides that the trustee has discretion, or words of similar
7 import, to determine 1 or more of the following:

8 (i) Whether to distribute to or for the benefit of an
9 individual or a class of beneficiaries the income or principal or
10 both of the trust.

11 (ii) The amount, if any, of the income or principal or both of
12 the trust to distribute to or for the benefit of an individual or a
13 class of beneficiaries.

14 (iii) Who, if any, among a class of beneficiaries will receive
15 income or principal or both of the trust.

16 (iv) Whether the distribution of trust property is from income
17 or principal or both of the trust.

18 (v) When to pay income or principal, except that a power to
19 determine when to distribute income or principal within or with
20 respect to a calendar or taxable year of the trust is not a
21 discretionary trust provision if the distribution must be made.

22 (e) "Interests of the trust beneficiaries" means the
23 beneficial interests provided in the terms of the trust.

24 (f) "Power of withdrawal" means a presently exercisable
25 general power of appointment other than a power that is either of
26 the following:

27 (i) Exercisable by a trustee and limited by an ascertainable

1 standard.

2 (ii) Exercisable by another person only upon consent of the
3 trustee or a person holding an adverse interest.

4 (g) "Qualified trust beneficiary" means a trust beneficiary to
5 whom 1 or more of the following apply on the date the trust
6 beneficiary's qualification is determined:

7 (i) The trust beneficiary is a distributee or permissible
8 distributee of trust income or principal.

9 (ii) The trust beneficiary would be a distributee or
10 permissible distributee of trust income or principal if the
11 interests of the distributees under the trust described in
12 subparagraph (i) terminated on that date without causing the trust
13 to terminate.

14 (iii) The trust beneficiary would be a distributee or
15 permissible distributee of trust income or principal if the trust
16 terminated on that date.

17 (h) "Revocable", as applied to a trust, means revocable by the
18 settlor without the consent of the trustee or a person holding an
19 adverse interest. A trust's characterization as revocable is not
20 affected by the settlor's lack of capacity to exercise the power of
21 revocation, regardless of whether an agent of the settlor under a
22 durable power of attorney, a conservator of the settlor, or a
23 plenary guardian of the settlor is serving.

24 (i) "Settlor" means a person, including a testator **OR A**
25 **TRUSTEE**, who creates a trust. If more than 1 person creates a
26 trust, each person is a settlor of the portion of the trust
27 property attributable to that person's contribution. The lapse,

1 release, or waiver of a power of appointment shall not cause the
2 holder of a power of appointment to be treated as a settlor of the
3 trust.

4 (j) "Spendthrift provision" means a term of a trust that
5 restrains either the voluntary or involuntary transfer of a trust
6 beneficiary's interest.

7 (k) "Support provision" means a provision in a trust that
8 provides the trustee shall distribute income or principal or both
9 for the health, education, support, or maintenance of a trust
10 beneficiary, or language of similar import. A provision in a trust
11 that provides a trustee has discretion whether to distribute income
12 or principal or both for these purposes or to select from among a
13 class of beneficiaries to receive distributions pursuant to the
14 trust provision is not a support provision, but rather is a
15 discretionary trust provision.

16 (l) "Trust beneficiary" means a person to whom 1 or both of the
17 following apply:

18 (i) The person has a present or future beneficial interest in a
19 trust, vested or contingent.

20 (ii) The person holds a power of appointment over trust
21 property in a capacity other than that of trustee.

22 (m) "Trust instrument" means a governing instrument that
23 contains the terms of the trust, including any amendment to a term
24 of the trust.

25 (n) "Trust protector" means a person or committee of persons
26 appointed pursuant to the terms of the trust who has the power to
27 direct certain actions with respect to the trust. Trust protector

1 does not include either of the following:

2 (i) The settlor of a trust.

3 (ii) The holder of a power of appointment.

4 Sec. 7401. (1) A trust may be created by any of the following:

5 (a) Transfer of property to another person as trustee during
6 the settlor's lifetime or by will or other disposition taking
7 effect upon the settlor's death.

8 (b) Declaration by the owner of property that the owner holds
9 identifiable property as trustee.

10 (c) Exercise of a power of appointment in favor of a trustee.

11 **(D) EXERCISE OF A POWER DESCRIBED IN SECTION 7820A.**

12 **(E)** ~~(d)~~—A promise by 1 person to another person, whose rights
13 under the promise are to be held in trust for a third person.

14 (2) The instrument establishing the terms of a trust is not
15 rendered invalid because property or an interest in property is not
16 transferred to the trustee or made subject to the terms of the
17 trust concurrently with the signing of the instrument. Until
18 property or an interest in property is transferred to the trustee
19 or made subject to the terms of the trust, the person nominated as
20 trustee has no fiduciary or other obligations under the instrument
21 establishing the terms of the trust except as may have been
22 specifically agreed by the settlor and the nominated trustee.

23 Sec. 7602. (1) Unless the terms of a trust expressly provide
24 that the trust is irrevocable, the settlor may revoke or amend the
25 trust. This subsection does not apply to ~~a~~ **ANY OF THE FOLLOWING:**

26 **(A) A** trust created under a trust instrument executed before
27 ~~the effective date of the amendatory act that added this~~

1 ~~section~~ APRIL 1, 2010.

2 (B) A TRUST CREATED BY THE EXERCISE OF A POWER DESCRIBED IN
3 SECTION 7820A.

4 (C) A TRUST CREATED BY THE EXERCISE OF A POWER OF APPOINTMENT
5 HELD BY A TRUSTEE IN A FIDUCIARY CAPACITY.

6 (2) If a revocable trust is created or funded by more than 1
7 settlor, all of the following apply:

8 (a) To the extent that the trust consists of community
9 property, the trust may be revoked by either spouse acting alone
10 but may be amended only by joint action of both spouses.

11 (b) To the extent that the trust consists of property other
12 than community property, each settlor may revoke or amend the trust
13 with regard to the portion of the trust property attributable to
14 that settlor's contribution.

15 (c) Upon notification by the settlor of the revocation or
16 amendment of the trust by fewer than all of the settlors, the
17 trustee shall promptly notify the other settlors of the revocation
18 or amendment.

19 (3) The settlor may revoke or amend a revocable trust in any
20 of the following ways:

21 (a) By substantially complying with a method provided in the
22 terms of the trust.

23 (b) If the terms of the trust do not provide a method or the
24 method provided in the terms is not expressly made exclusive, in
25 either of the following ways:

26 (i) If the trust is created pursuant to a writing, by another
27 writing manifesting clear and convincing evidence of the settlor's

1 intent to revoke or amend the trust.

2 (ii) If the trust is an oral trust, by any method manifesting
3 clear and convincing evidence of the settlor's intent.

4 (4) Upon revocation of a revocable trust, the trustee shall
5 deliver the trust property as the settlor directs.

6 (5) A settlor's powers with respect to revocation, amendment,
7 or distribution of trust property may be exercised by an agent
8 under a durable power of attorney only to the extent expressly
9 authorized by the terms of the trust or the power of attorney.

10 (6) A conservator or plenary guardian of the settlor may
11 exercise a settlor's powers with respect to revocation, amendment,
12 or distribution of trust property only to the extent expressly
13 authorized by the terms of the trust and with the approval of the
14 court supervising the conservatorship or guardianship.

15 (7) A trustee who does not know that a trust has been revoked
16 or amended is not liable to the settlor or the settlor's successors
17 in interest, including the trust beneficiaries, for distributions
18 made and other actions taken on the assumption that the trust had
19 not been amended or revoked.

20 Sec. 7603. (1) Subject to subsection (2), while a trust is
21 revocable, rights of the trust beneficiaries are subject to the
22 control of, and the duties of the trustee are owed exclusively to,
23 the settlor. **THIS SUBSECTION DOES NOT APPLY TO EITHER OF THE**
24 **FOLLOWING:**

25 (A) A TRUST CREATED BY THE EXERCISE OF A POWER DESCRIBED IN
26 SECTION 7820A.

27 (B) A TRUST CREATED BY THE EXERCISE OF A POWER OF APPOINTMENT

1 **HELD BY A TRUSTEE IN A FIDUCIARY CAPACITY.**

2 (2) If the trustee reasonably believes that the settlor of a
3 revocable trust is an incapacitated individual, the trustee shall
4 keep the settlor's designated agent or, if there is no designated
5 agent or if the sole agent is a trustee, each beneficiary who, if
6 the settlor were then deceased, would be a qualified trust
7 beneficiary informed of the existence of the trust and reasonably
8 informed of its administration.

9 (3) While a trust is not revocable and while a person has a
10 currently exercisable power of withdrawal over the entire principal
11 of the trust, the duties of a trustee are owed exclusively to the
12 person.

13 (4) A person who succeeds to the position of trustee of a
14 revocable trust upon the death, resignation, or incapacity of a
15 trustee who was also the trust settlor is not liable for an action
16 of the settlor while the settlor was serving as trustee.

17 (5) With respect to a predecessor trustee who was also the
18 settlor, the successor trustee has no responsibility to investigate
19 a transaction by the predecessor trustee, to review an account, to
20 review an action of the predecessor trustee, or to take action for
21 a breach of trust by the predecessor trustee.

22 Sec. 7815. (1) A beneficiary of a discretionary trust
23 provision as described in section 7505 has no property right in a
24 trust interest that is subject to a discretionary trust provision,
25 and has no right to any amount of trust income or principal that
26 may be distributed only in the exercise of the trustee's
27 discretion. However, **EXCEPT AS PROVIDED IN SUBSECTION (2)** and

1 notwithstanding the breadth of discretion granted to a trustee in
2 the terms of the trust, including the use of such terms as
3 "absolute", "sole", or "uncontrolled", a trustee abuses the
4 trustee's discretion in exercising or failing to exercise a
5 discretionary power if the trustee does any of the following:

6 (a) Acts dishonestly.

7 (b) Acts with an improper motive, even though not a dishonest
8 motive.

9 (c) Fails to exercise the trustee's judgment in accordance
10 with the terms and purposes of the trust.

11 (2) **UNLESS THE TRUST INSTRUMENT EXPRESSLY PROVIDES OTHERWISE,**
12 **A TRUSTEE IS NOT LIABLE TO A BENEFICIARY FOR FAILURE TO EXERCISE**
13 **THE POWER DESCRIBED IN SECTION 7820A OR THE POWER DESCRIBED IN**
14 **SECTION 5A OF THE POWERS OF APPOINTMENT ACT OF 1967, 1967 PA 224,**
15 **MCL 556.115A.**

16 (3) ~~(2)~~—Subject to subsection ~~(4)~~, ~~(5)~~, the following rules
17 apply to a trustee's exercise of a power unless the terms of the
18 trust expressly indicate that the rule does not apply:

19 (a) A person other than a settlor who is a trust beneficiary
20 and trustee of a trust that confers on the trustee a power to make
21 distributions pursuant to a discretionary trust provision to or for
22 the trustee's benefit may exercise the power only in accordance
23 with an ascertainable standard.

24 (b) A trustee may not exercise a power to make distributions
25 pursuant to a discretionary trust provision in a manner to satisfy
26 a legal obligation of support that the trustee personally owes
27 another person.

1 (4) ~~(3)~~—A power whose exercise is limited or prohibited by
2 subsection ~~(2)~~—(3) may be exercised by a majority of the remaining
3 trustees whose exercise of the power is not so limited or
4 prohibited. If the power of all trustees is so limited or
5 prohibited, the court may appoint a special fiduciary with
6 authority to exercise the power.

7 (5) ~~(4)~~—Subsection ~~(2)~~—(3) does not apply to any of the
8 following:

9 (a) A power held by the settlor's spouse who is the trustee of
10 a trust for which a marital deduction, as defined in section
11 2056(b)(5) or 2523(e) of the internal revenue code, 26 USC 2056 and
12 2523, was previously allowed.

13 (b) Any trust during any period that the trust may be revoked
14 or amended by its settlor.

15 (c) A trust if contributions to the trust qualify for the
16 annual exclusion under section 2503(c) of the internal revenue
17 code, 26 USC 2503.

18 **SEC. 7820A. (1) IF AN IRREVOCABLE TRUST INCLUDES A**
19 **DISCRETIONARY TRUST PROVISION, THE TRUSTEE OF THE TRUST MAY, UNLESS**
20 **THE TERMS OF THE FIRST TRUST EXPRESSLY PROVIDE OTHERWISE,**
21 **DISTRIBUTE BY WRITTEN INSTRUMENT ALL OR PART OF THE PROPERTY**
22 **SUBJECT TO THAT PROVISION TO THE TRUSTEE OF A SECOND TRUST,**
23 **PROVIDED THAT BOTH OF THE FOLLOWING CONDITIONS ARE SATISFIED:**

24 **(A) THE TERMS OF THE SECOND TRUST DO NOT MATERIALLY CHANGE THE**
25 **BENEFICIAL INTERESTS OF THE BENEFICIARIES OF THE FIRST TRUST.**

26 **(B) IF THE GOVERNING INSTRUMENT OF THE FIRST TRUST EXPRESSLY**
27 **INDICATES AN INTENTION THAT THE FIRST TRUST QUALIFY FOR A TAX**

1 BENEFIT OR THE TERMS OF THE FIRST TRUST ARE CLEARLY DESIGNED TO
2 QUALIFY THE FIRST TRUST FOR A TAX BENEFIT, AND IF THE FIRST TRUST
3 WOULD QUALIFY FOR THE INTENDED TAX BENEFIT, THE GOVERNING
4 INSTRUMENT OF THE SECOND TRUST IS NOT INCONSISTENT WITH THE TAX
5 PLANNING THAT INFORMED THE FIRST TRUST.

6 (2) A DISTRIBUTION OF PROPERTY TO THE TRUSTEE OF A SECOND
7 TRUST UNDER SUBSECTION (1) SHALL NOT RESULT IN ANY OF THE
8 FOLLOWING:

9 (A) AN INCREASE IN OR A CHANGE IN THE METHOD OF DETERMINING
10 THE COMPENSATION OF A TRUSTEE, UNLESS THE INCREASE OR CHANGE HAS
11 BEEN CONSENTED TO IN WRITING BY ALL BENEFICIARIES ENTITLED TO
12 RECEIVE REPORTS REGARDING THE FIRST TRUST.

13 (B) A CHARGE OF A FEE OR COMMISSION ON THE TRANSFER OF ASSETS
14 FROM THE FIRST TRUST TO THE SECOND TRUST, UNLESS THE FEE OR
15 COMMISSION HAS BEEN CONSENTED TO IN WRITING BY ALL BENEFICIARIES
16 ENTITLED TO RECEIVE REPORTS REGARDING THE FIRST TRUST.

17 (C) A REDUCTION IN THE STANDARD OF CARE APPLICABLE TO THE
18 TRUSTEE'S ACTIONS OR AN EXPANSION OF EXONERATION OF THE TRUSTEE.

19 (D) A DIMINUTION IN THE AUTHORITY OF A PERSON WHO HAS A POWER
20 EXERCISABLE IN A FIDUCIARY CAPACITY TO DIRECT OR REMOVE THE
21 TRUSTEE.

22 (3) FOR PURPOSES OF THIS SECTION, ALL OF THE FOLLOWING APPLY:

23 (A) IN DETERMINING WHETHER A TRUST IS IRREVOCABLE, A SETTLOR'S
24 LACK OF CAPACITY TO EXERCISE A POWER OF REVOCATION NEGATES THE
25 POWER UNLESS AN AGENT OF THE SETTLOR UNDER A DURABLE POWER OF
26 ATTORNEY, A CONSERVATOR OF THE SETTLOR, OR A PLENARY GUARDIAN OF
27 THE SETTLOR IS SERVING AND THE AGENT, CONSERVATOR, OR GUARDIAN IS

1 AUTHORIZED TO EXERCISE THE POWER OF REVOCATION.

2 (B) AN INCREASE IN THE MAXIMUM PERIOD DURING WHICH THE VESTING
3 OF A FUTURE INTEREST MAY BE SUSPENDED OR POSTPONED UNDER APPLICABLE
4 LAW DOES NOT CONSTITUTE A MATERIAL CHANGE IN THE INTEREST OF A
5 BENEFICIARY.

6 (C) AN INCREASE IN COMPENSATION ARISING SOLELY BECAUSE THE
7 DURATION OF THE SECOND TRUST IS LONGER THAN THE DURATION OF THE
8 FIRST TRUST DOES NOT CONSTITUTE AN INCREASE IN OR A CHANGE IN THE
9 METHOD OF DETERMINING THE COMPENSATION OF THE TRUSTEE.

10 (4) THE DISTRIBUTION POWER DESCRIBED IN SUBSECTION (1) SHALL
11 NOT BE EXERCISED OVER ANY PORTION OF THE FIRST TRUST AS TO WHICH
12 THE EXERCISING TRUSTEE IS THE SETTLOR, UNLESS THE EXERCISING
13 TRUSTEE WAS ACTING IN A FIDUCIARY CAPACITY WHEN HE OR SHE CREATED
14 THE FIRST TRUST.

15 (5) THE TRUSTEE OF THE SECOND TRUST MAY BE THE TRUSTEE OF THE
16 FIRST TRUST, THE SECOND TRUST MAY BE A TRUST UNDER THE GOVERNING
17 INSTRUMENT OF THE FIRST TRUST OR ANOTHER GOVERNING INSTRUMENT, THE
18 GOVERNING INSTRUMENT MAY BE CREATED BY THE TRUSTEE OF THE FIRST
19 TRUST, AND THE GOVERNING INSTRUMENT MAY BE THE INSTRUMENT THAT
20 EXERCISES THE POWER DESCRIBED IN SUBSECTION (1).

21 (6) THE SECOND TRUST INSTRUMENT MAY PROVIDE 1 OR BOTH OF THE
22 FOLLOWING:

23 (A) THAT ASSETS OF THE FIRST TRUST DISCOVERED AFTER EXERCISE
24 OF THE POWER DESCRIBED IN SUBSECTION (1) SHALL BE PROPERTY OF THE
25 FIRST TRUST IF THAT TRUST IS TO CONTINUE IN EXISTENCE AFTER
26 EXERCISE OF THE POWER, OR THAT ASSETS OF THE FIRST TRUST DISCOVERED
27 AFTER EXERCISE OF THE POWER SHALL BE PROPERTY OF THE SECOND TRUST

1 IF THE FIRST TRUST TERMINATES UPON EXERCISE OF THE POWER.

2 (B) FOR INDEMNIFICATION OF THE TRUSTEE OF THE FIRST TRUST,
3 EXCEPT AS LIMITED BY SECTION 7908.

4 (7) A TRUSTEE OF THE FIRST TRUST MAY EXERCISE THE POWER
5 DESCRIBED IN SUBSECTION (1) WITHOUT THE CONSENT OF THAT TRUST'S
6 SETTLOR, ANY BENEFICIARY, OR A COURT. HOWEVER, THE TRUSTEE SHALL
7 GIVE WRITTEN NOTICE OF AN INTENDED EXERCISE OF THE POWER TO THE
8 SETTLORS OF THE FIRST TRUST, IF LIVING, AND QUALIFIED TRUST
9 BENEFICIARIES NO LATER THAN 63 DAYS BEFORE EXERCISE OF THE POWER.
10 THE NOTICE REQUIRED BY THIS SECTION SHALL INCLUDE A COPY OF THE
11 PROPOSED INSTRUMENT OF EXERCISE. IF THE LIVING SETTLORS AND
12 QUALIFIED TRUST BENEFICIARIES WAIVE THE 63-DAY NOTICE PERIOD IN
13 WRITING, A DISTRIBUTION UNDER SUBSECTION (1) MAY BE MADE BEFORE
14 EXPIRATION OF THE NOTICE PERIOD.

15 (8) THE PERIOD DURING WHICH THE VESTING OF A FUTURE INTEREST
16 MAY BE SUSPENDED OR POSTPONED BY THE EXERCISE OF THE POWER
17 DESCRIBED IN SUBSECTION (1) IS DETERMINED UNDER THE POWERS OF
18 APPOINTMENT ACT OF 1967, 1967 PA 224, MCL 556.111 TO 556.133,
19 TREATING THE POWER UNDER SUBSECTION (1) AS A POWER OF APPOINTMENT
20 FOR PURPOSES OF THIS SUBSECTION.

21 (9) THIS SECTION SHALL NOT ABRIDGE THE RIGHT OF A TRUSTEE WHO
22 HAS A POWER TO DISTRIBUTE TRUST PROPERTY IN FURTHER TRUST UNDER THE
23 TERMS OF A TRUST INSTRUMENT, ANY OTHER STATUTE, OR THE COMMON LAW.
24 THE PROVISIONS OF THIS SECTION SHALL NOT ABRIDGE ANY RIGHT OF A
25 TRUSTEE WHO HAS A POWER TO AMEND OR TERMINATE A TRUST.

26 (10) AS USED IN THIS SECTION:

27 (A) "FIRST TRUST" MEANS AN IRREVOCABLE TRUST THAT HAS A

1 DISCRETIONARY TRUST PROVISION THAT IS EXERCISED AS DESCRIBED IN
2 SUBSECTION (1).

3 (B) "TAX BENEFIT" MEANS A FEDERAL OR STATE TAX DEDUCTION,
4 EXEMPTION, EXCLUSION, OR OTHER PARTICULAR TAX ATTRIBUTE. THE TERM
5 TAX BENEFIT DOES NOT INCLUDE GRANTOR TRUST STATUS. A TRUST HAS
6 GRANTOR TRUST STATUS TO THE EXTENT THAT THE ASSETS OF THE TRUST ARE
7 TREATED, FOR FEDERAL INCOME TAX PURPOSES, AS OWNED BY THE GRANTOR
8 OR ANOTHER PERSON UNDER SECTIONS 671 TO 679 OF THE INTERNAL REVENUE
9 CODE, 26 USC 671 TO 679.