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BILL ANALYSIS

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Senate Bill 597 (Substitute S-1 as passed by the Senate)
Senate Bill 598 (as passed by the Senate)
Sponsor: Senator Tonya Schuitmaker
Committee: Judiciary

Date Completed: 3-30-16

RATIONALE

Trusts are created to hold, manage, and distribute property for the benefit of one or more people. There are various types of trusts and different reasons for creating them. In addition to setting up a trust for estate-planning purposes, for example, a person might do so as a way to manage property while he or she is still alive. One type of trust is called a self-settled trust, in which the settlor (the person who establishes the trust) transfers assets to a trust and retains the ability to benefit from it. Traditionally, an individual could not create a self-settled trust and, at the same time, protect the trust assets from claims by his or her creditors. In order to accomplish this, people created "asset protection trusts" in foreign jurisdictions. In the 1990s, however, states began to enact statutes permitting the creation of "domestic asset protection trusts" (DAPTs). These laws essentially allow a person to transfer assets to an irrevocable trust and retain certain interests in the trust, while preventing his or her creditors from attaching the assets unless the transfer (or "disposition") was made in bad faith or with the intent to defraud, or unless a statutory exception applies. The first prominent statute of the type was Delaware's Qualified Dispositions in Trust Act, which followed a law enacted by Alaska. At present, DAPT laws have been enacted in a total of 15 states, not including Michigan.

One of the requirements of DAPT laws is that the trust have some connection with the state where it is created, typically through the use of an in-state trustee. Since Michigan does not allow DAPTs, this means that a Michigan resident who wants to establish such a trust must do so in another state. In order to keep the trust business in Michigan, while accommodating the needs of residents, it has been suggested that State law should authorize asset protection trusts.

CONTENT

Senate Bill 597 (S-1) would create the "Qualified Dispositions in Trust Act" to provide for the creation of irrevocable trusts whose assets could not be reached by creditors, subject to specific requirements and limitations. The bill would do the following:

- **Specify that a transferor would have only the powers and rights conferred by the trust instrument, and identify certain rights, powers, or interests for which a trust instrument could provide.**
- **Provide that an action by a creditor could be brought only under the Uniform Fraudulent Transfer Act.**
- **As a rule, require a creditor's allegations to be proven by clear and convincing evidence, and require an action to be brought within two years after an obligation was incurred.**
- **Establish requirements for the avoidance of a qualified disposition.**
- **Provide that a creditor would not have a claim or cause of action against the trustee and others related to a trust that was the subject of a qualified disposition.**
- **Require a transferor to sign a qualified affidavit before a qualified disposition was made.**
- **Establish requirements for a fiduciary qualified disposition.**

-- Allow a trustee to modify a trust by conforming to requirements outlined in the proposed Act.
-- Establish requirements for the cessation of a trustee's status and the appointment of a successor trustee.
-- Specify certain responsibilities of a trust beneficiary and trustee.
-- Specify that the probate court would have exclusive jurisdiction over certain actions related to qualified dispositions, and establish the venue for such actions.

The proposed Act would apply to qualified dispositions made on or after its effective date. If any provision of the Act conflicted with any provision of the Estates and Protected Individuals Code or Chapter 63 (Uses and Trusts) of the Revised Statutes of 1846, the provisions of the proposed Act would prevail.

Senate Bill 598 would amend the Uniform Fraudulent Transfer Act to do the following:

-- Specify that a qualified disposition would be fraudulent as to a creditor only if it were made with actual intent to hinder, delay, or defraud any creditor of the debtor.
-- Specify that an action could be brought under the Act with respect to a qualified disposition in the time provided under the proposed Qualified Dispositions in Trust Act.

The bills are tie-barred.

Senate Bill 597 (S-1)

Definitions

"Disposition" would mean a transfer of property that either 1) creates a new fiduciary relation between at least one trustee and a trust beneficiary or 2) newly subjects property to a preexisting fiduciary relation between at least one trustee and a trust beneficiary. The transfer could be by conveyance or assignment, by exercise of a power of appointment, including a power to substitute one trustee for another or to add one or more new trustees, or a power of revocation or amendment, or by disclaimer, release, or relinquishment. A disposition, however, would not include a disclaimer, release, or relinquishment of property that was previously the subject of a qualified disposition.

"Qualified disposition" would mean a disposition after which both of the following apply to the subject property:

-- The property is owned by one or more trustees at least one of whom is a qualified trustee.
-- The property is governed by a trust instrument under which the transferor has only rights, powers, and interests that are permitted under the proposed Act.

A disposition would not be a qualified disposition to the extent that, at the time of the disposition, the transferor was in arrears on a child support obligation by more than 30 days. A disposition also would not be a qualified disposition if a transferor or any person related or subordinate to the transferor within the meaning of Section 672(c) of the Internal Revenue Code could act as an advisor. For this purpose, "act as an advisor" would not include the power to direct the investment decisions of the trust, the power to veto a distribution from the trust, or the right to remove a trustee or advisor and to appoint a new trustee or advisor. (Section 672(c) of the Internal Revenue Code defines "related or subordinate party" as any nonadverse party who is 1) the grantor's spouse if living with the grantor; or 2) any of the following: the grantor's father, mother, issue, brother, or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; or a subordinate employee of a corporation in which the grantor is an executive.)

"Qualified trustee" would mean a person, other than the transferor, who meets all of the following conditions:

-- For an individual, he or she is a resident of Michigan or, in all other cases, is authorized by Michigan law to act as a trustee and whose activities are subject to supervision by the Department of Insurance and Financial Services, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision.
-- The person maintains or arranges for custody in Michigan of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in Michigan.
-- The person's usual place of business where some of the records pertaining to the trust are kept is located in Michigan or, if the person does not have such a place of business, the person's residence is in Michigan.

"Trust instrument" would mean an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition to which all of the following apply: 1) the instrument expressly incorporates Michigan law to govern the validity, construction, and administration of the trust; 2) the instrument is irrevocable; and 3) the instrument provides that the interest of the transferor or other trust beneficiary in trust property may not be transferred, assigned, pledged, or mortgaged before the qualified trustee or trustees actually distribute trust property to the trust beneficiary, and that provision of the instrument is considered a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law.

Transferor's Powers & Rights

"Transferor" would mean any of the following, as applicable:

-- A person and, for more than one owner of undivided interests, each of several persons, who, as a beneficial owner of certain property, or as the holder of a general power of appointment over certain property, makes a disposition of the property or causes a disposition to be made.
-- For a fiduciary disposition (a disposition made by a fiduciary acting in a fiduciary capacity), the person or persons who, as of the time of the fiduciary disposition, most recently fit that description with respect to the property subject to the fiduciary disposition.

A transferor would have only the powers and rights conferred by the trust instrument. A transferor would not have powers or rights with respect to the property that was the subject of a qualified disposition or the income from the property, and any agreement or understanding that purported to grant or permit the retention of any greater powers or rights would be void.

A trust instrument could provide for one or more of the following rights, powers, or interests, none of which would grant or be considered, either alone or in any combination, a power to revoke a trust:

-- The transferor's power to direct the investment decisions of the trust.
-- The transferor's power to veto a distribution from the trust.
-- A special power of appointment exercisable by will or other written instrument of the transferor effective only on the transferor's death.
-- The transferor's potential or actual receipt of income, including rights to the income retained in the trust instrument.
-- The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or annuity trust; and the transferor's right to release the transferor's interest in the trust in favor of one or more charitable organizations with a succeeding beneficial interest in the trust.
-- The transferor's potential or actual receipt of income or principal from a grantor retained annuity trust or grantor retained unitrust, or the transferor's receipt each year of a percentage, not to exceed 5%, as provided in the governing instrument, of the initial value of the trust property.
-- The transferor's potential or actual receipt or use of principal if it would be the result of a trustee's acting under a discretionary trust provision, a support provision, or the direction of an advisor acting under a discretionary trust provision or support provision.
-- The transferor's potential or actual use of real property held under a qualified personal residence trust, or the transferor's possession and enjoyment of a qualified annuity interest.

- -- The transferor's potential or actual receipt of income or principal to pay income taxes due on income of the trust, if the income or principal were under a provision in the trust instrument that expressly provided for the payment of those taxes.
- -- After the transferor's death, the power of a qualified trustee to pay the transferor's debts, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate, without regard to the source of the payment.
- -- The transferor's actual or potential receipt of a minimum required distribution with respect to a retirement benefit.

The transferor's right and power to receive income or principal to pay income taxes due on the income of the trust would apply if the potential or actual receipt of income or principal would be the result of a qualified trustee's or qualified trustees' acting in either of the following ways:

- -- In the qualified trustee's or qualified trustees' discretion or under a mandatory direction in the trust instrument.
- -- At the direction of an advisor who was acting in the advisor's discretion.

"Advisor" would mean a person who is given authority by the terms of a trust instrument to remove, appoint, or both, one or more trustees or to direct, consent to, approve, or veto a trustee's actual or proposed investment or distribution decisions. A person would be considered an advisor even if he or she were denominated by another title, such as protector. Any person could serve as advisor.

Action by Creditors

With respect to any qualified disposition, a creditor would have only the rights provided below and as discussed under the heading, "Avoidance of Qualified Disposition". "Creditor" would mean, with respect to a transferor, a person who has a claim whether directly or indirectly.

Claim & Limitation Period. For an action brought by a creditor for an attachment or other provisional remedy against property that was the subject of a qualified disposition or for avoidance of a qualified disposition, all of the following would apply:

- -- Except for the limitation period provided under the proposed Act, the action could be brought only under Sections 4 and 5 of the Uniform Fraudulent Transfer Act.
- -- For a creditor whose claim arose after a qualified disposition, the action would have to involve a qualified disposition that was made with actual intent to defraud the creditor.
- -- The allegations in the action would have to be proven by clear and convincing evidence.

A person could not bring or maintain an action described above unless it was commenced within either of the periods described below.

If the claim arose before the qualified disposition was made, the limit would be the later of the following:

- -- Two years after the qualified disposition was made or the obligation was incurred.
- -- One year after the qualified disposition or obligation was or could reasonably have been discovered by the claimant, if the person who was or could be liable for any claim fraudulently concealed the existence of the claim or the identity of any person who was liable for it from the knowledge of the person entitled to sue for the claim.

If the claim arose concurrent with or after the qualified disposition, the limit would be two years after the qualified disposition was made.

(Under Section 4 of the Uniform Fraudulent Transfer Act, a transfer made or obligation incurred by a debtor is fraudulent as to a creditor if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor; or without receiving a reasonably equivalent value in exchange and other conditions are met. Senate Bill 598 would amend this section, as described below.

Under Section 5 of that Act, a transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor did not receive a reasonably equivalent value in exchange and was insolvent at the time or became insolvent as a result of the transfer or obligation. A transfer made by a debtor also is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe the debtor was insolvent.)

Trust Beneficiary: Divorce. If a trust beneficiary who had an interest in a qualified disposition or in property that was subject to a qualified disposition were a party to an action for annulment of a marriage, divorce, or separate maintenance, the provisions described below would apply.

If the trust beneficiary were not the transferor of the qualified disposition, his or her interest in the qualified disposition or in property that was the subject of it would not be considered marital property, would not be considered part of the trust beneficiary's real or personal estate, and could not be awarded to the trust beneficiary's spouse in a judgment for annulment, divorce, or separate maintenance.

If the trust beneficiary were the transferor of the qualified disposition, his or her interest in it or in property that was the subject of it would not be considered part of the trust beneficiary's real or personal estate, and could not be awarded to the trust beneficiary's spouse in a judgment for annulment, divorce, or separate maintenance if either of the following applied:

-- The trust beneficiary transferred the property more than 30 days before his or her marriage that was subject to the action.
-- The parties to the marriage agreed that these provisions applied to the qualified disposition.

If none of the provisions described above applied, the time limitations on filing a claim would not limit the transferor's spouse's property division claims.

Fiduciary Qualified Disposition. A fiduciary qualified disposition would be considered made as of the time the property that was subject to the disposition was first transferred to the trustee who was making the fiduciary qualified disposition, or any predecessor of the trustee in an unbroken succession of fiduciary ownership of the property, in a form that met the requirements of the qualified disposition, or both of the following applied:

-- The subject property was governed by a trust instrument under which the transferor only had rights, powers, and interests that were permitted for a trust instrument under the proposed Act.
-- The requirements to be considered a qualified disposition or its equivalent under the laws of another state were met.

"Fiduciary qualified disposition" would mean a qualified disposition made by a trustee acting in a fiduciary capacity.

Modified Power of Appointment. If a trustee of an existing trust proposed to make a disposition that, but for the exercise of authority granted in this provision, would not be a qualified disposition because of a nonconforming power of appointment of the transferor, the trustee could modify the trust instrument by delivering to the qualified trustee an irrevocable written election to modify the nonconforming power of appointment to conform to requirements outlined in the proposed Act. An irrevocable written election described in this provision would have to include both of the following:

-- A description of the modified power of appointment.
-- The transferor's written consent to the modification (which consent would not be a disposition).

No Creditor Claim. With respect to a qualified disposition, a creditor would not have a claim or cause of action against any of the following:

-- The trustee of a trust that was the subject of a qualified disposition.

- An advisor of a trust that was the subject of a qualified disposition.
- A person involved in the counseling, drafting, preparation, execution, or funding of a trust that was the subject of a qualified disposition.

Multiple Qualified Dispositions. If more than one qualified disposition were made by means of the same trust instrument, the provisions described below would apply.

With respect to a prior qualified disposition, the making of a subsequent qualified disposition would be disregarded in determining whether a creditor's claim was extinguished. In addition, the making of a subsequent qualified disposition would have to be disregarded in determining whether a trust beneficiary's interest in it or in property that was the subject of it would be considered marital property, would be considered part of a trust beneficiary's real or personal estate, or could be awarded to the trust beneficiary's spouse in a judgment for annulment of a marriage, divorce, or separate maintenance. A distribution to a trust beneficiary would be considered to have been made from the most recent qualified disposition.

Cessation of Trustee Status. In an action against a trustee that received property in a qualified disposition, if a court took any action declining to apply Michigan law in determining the validity, construction, or administration of the trust, or the effect of a spendthrift provision in the trust instrument, the trustee immediately on the court's action and without further order of any court would have to cease in all respects to be trustee of the trust. The former trustee would not have any power of a trustee described in the proposed Act except to convey the trust property to the successor trustee and to petition the court for appointment of a successor trustee and collect attorney fees, costs, and expenses.

If the trust instrument did not provide for a successor trustee and the trust would otherwise be without a trustee, the probate court, on the request of a qualified trust beneficiary, would have to appoint a successor trustee on the terms and conditions it determined to be consistent with the purposes of the trust and the proposed Act. A former trustee could, but would have no duty to, petition the probate court to appoint a successor trustee if a petition for appointment were not brought by a qualified trust beneficiary within 30 days after the date on which the former trustee ceased to be a trustee. If the former trustee elected to petition for the appointment of a successor trustee, the former trustee would be entitled to reimbursement for all attorney fees, costs, and expenses associated with the petition, and the amount of those fees, costs, and expenses would be a lien against the trust's property.

A valid lien attaching to property before a qualified disposition of the property would survive the disposition, and the trustee would take title to property subject to the valid lien. The trustee would be subject to any agreements that created or perfected the valid lien.

Creditor Agreement. A written agreement between a transferor and a creditor could provide for any of the following:

- The transferor would have a continuing or periodic obligation to disclose any qualified dispositions to the creditor.
- A qualified disposition would require the creditor's prior written approval.
- The transferor would be under other obligations as the creditor required with respect to qualified dispositions.

If a transfer that would otherwise be a qualified disposition violated such an agreement with a creditor, with respect to the creditor only, the transfer would not be a qualified disposition and the proposed Act would not affect the creditor's rights.

Qualified Affidavit

A transferor would have to sign a qualified affidavit before a qualified disposition was made.

Except as otherwise provided in the proposed Act, "qualified affidavit" would mean an affidavit in which the transferor states that at the time of the transfer of the property to the trust all of the following apply:

-- The transferor has full right, title, and authority to transfer the property to the trust.
-- The transfer of the property to the trust will not render the transferor insolvent.
-- The transferor does not intend to defraud a creditor by transferring the property to the trust.
-- The transferor does not know of or have reason to know of any pending or threatened court actions against the transferor, except for those identified by the transferor on an attachment to the affidavit.
-- The transferor is not involved in any administrative proceedings, except for those identified on an attachment to the affidavit.
-- The transferor is not currently in arrears on a child support obligation by more than 30 days.
-- The transferor does not contemplate filing for relief under the Bankruptcy Code.
-- The property being transferred to the trust was not derived from unlawful activities.

A qualified affidavit would be defective if it materially failed to meet the criteria listed above, except that a qualified affidavit would not be defective because of any of the following:

-- Nonsubstantive variances from the language in those criteria.
-- Statements or representations in addition to those specified in the criteria, if the statements or representations did not contradict the criteria.
-- Technical errors in administering an oath if the errors were not the fault of the transferor and the transferor reasonably relied on another person to prepare or administer the oath.

A qualified affidavit would not be required in any of the following circumstances:

-- From the settlor for a fiduciary qualified disposition.
-- From a transferor who was not the settlor of the qualified disposition, except to the extent the transferor was a beneficiary of the qualified disposition and the property subject to it was not previously subject to a qualified disposition with respect to which the transferor signed a qualified affidavit.
-- In connection with dispositions that were part of, required by, or the direct result of a prior qualified disposition supported by a qualified affidavit that otherwise complied with the criteria listed above.

If a qualified affidavit were required, and a transferor failed to timely sign one or signed a defective affidavit, the failure or defect could be considered as evidence in an action brought by a creditor for an attachment or another provisional remedy against property that was the subject of a qualified disposition or for avoidance of a qualified disposition to the extent permitted by Michigan Rules of Evidence. The validity of the qualified disposition, however, would not be affected in any other way because of the failure or defect.

Avoidance of Qualified Disposition

A qualified disposition could be avoided only to the extent necessary to satisfy or provide for the present value, taking into consideration any uncertainty of the transferor's debt to the creditor at whose instance the disposition had been avoided.

If all or any portion of a qualified disposition were avoided, the provisions described below would apply.

If the court were satisfied that a trustee had not acted in bad faith in accepting or administering the property that was the subject of the qualified disposition, the trustee would have a lien against the property in an amount equal to the entire cost, including attorney fees, incurred by the trustee in the defense of an action to avoid the qualified disposition. The lien would have priority over all other liens against the property, whether or not the other liens accrued or were recorded before the accrual of the lien created by the proposed Act. The qualified disposition would be avoided subject to the fees, costs, preexisting rights, claims, and interests of the trustee and of any

predecessor trustee that had not acted in bad faith. It would be presumed that a trustee did not act in bad faith merely by accepting the property, with or without a qualified affidavit, or by making any distribution under the terms of the trust.

Also, if the court were satisfied that a trust beneficiary had not acted in bad faith, the avoidance of the qualified disposition would be subject to the right of the trust beneficiary to retain any distribution received before the creditor's commencement of an action to avoid the qualified disposition. It would be presumed that the trust beneficiary, including one who was also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made under the terms of the trust.

A creditor would have the burden of providing by clear and convincing evidence that a trustee or trust beneficiary acted in bad faith, except that, for a trust beneficiary who also was the transferor, the burden on the creditor would be to prove that the transferor-beneficiary acted in bad faith by a preponderance of the evidence. This provision would provide substantive, not procedural, rights.

With respect to a qualified disposition, a levy, attachment, garnishment, notice of lien, sequestration, or other legal or equitable process would be permitted only in those circumstances permitted by the proposed Act.

A creditor would not have a right against the interest of a trust beneficiary in a trust or portion of a trust that was a qualified disposition solely because the trust beneficiary had the right to authorize or direct the trustee to pay all or part of the trust property in satisfaction of estate or inheritance taxes imposed on or with respect to the trust beneficiary's postdeath estate, the debts of the estate, or the expenses of administering it, unless the trust beneficiary actually directed the payment of the taxes, debts, or expenses, and then only to the extent of the direction.

Except as otherwise provided in the trust instrument, if a married couple made a qualified disposition of property and, immediately before the qualified disposition, the property, any part of it, or any accumulation to the property were, under applicable law, owned by the married couple as tenants by the entireties, then the property, any part of it, or any accumulation to it, would be treated as though it were tenancy by the entireties property while it was held in trust during the lifetime of both spouses. In an action concerning whether a creditor of either or both spouses could recover the debt from the trust, on avoidance of the qualified disposition, the sole remedy available to the creditor with respect to such property would be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.

Except as otherwise described above, on avoidance of a qualified disposition to the extent permitted under the proposed Act, the sole remedy available to the creditor would be an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor's debt to the creditor at whose instance the disposition had been avoided.

Trust Beneficiary/Trustee

A trust beneficiary would not have the power or capacity to transfer any of the income from a trust or portion of a trust that was a qualified disposition by his or her order, voluntary or involuntary, or by an order or direction of a court.

Except as other provided in the proposed Act, the interest of a beneficiary in a trust or portion of a trust that was a qualified disposition would not be subject to a process of attachment issued against the beneficiary, and could not be taken in execution under any form of legal process directed against the beneficiary, trustee, trust estate, or any part of the income of the trust estate. The whole of the trust estate and the income of it would have to go and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged of and from all obligations of the beneficiary.

The trustee of a qualified disposition would have to disregard and oppose an assignment or other act, voluntary or involuntary, that was attempted contrary to the proposed Act. The trustee would be entitled to reimbursement for all attorney fees, costs, and expenses associated with carrying

out the duty of a trustee, and the amount of the attorney fees, costs, and expenses would be a lien against the property that was the subject of the qualified disposition. A trustee would not be liable, and a trust beneficiary or any successor trust beneficiary would not have a claim or cause of action against a trustee, for a breach of duty unless the trustee's breach was in bad faith or the result of reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.

These provisions would not prohibit a beneficiary from disclaiming an interest in a trust or portion of a trust that was a qualified disposition or from exercising a power of appointment.

Successor Qualified Trustee

If a person serving as qualified trustee ceased to meet the requirements of a qualified trustee and no trustee who met those requirements remained, the person serving in that capacity would be considered to have resigned as of the time of the cessation, and the successor qualified trustee provided for in the trust instrument would become a qualified trustee of the trust on the successor qualified trustee's acceptance of trusteeship. In the absence of a successor qualified trustee provided for in the trust instrument, the probate court, upon petition of a qualified trust beneficiary, would have to appoint a successor qualified trustee.

A disposition that was a qualified disposition would not cease to be considered a qualified disposition as a result of a subsequent vacancy in the position of qualified trustee if a successor were appointed or a proceeding for the appointment of a successor were commenced within a reasonable time after a person with authority to appoint a qualified trustee or commence a proceeding to appoint one knew of the vacancy.

Probate Court Jurisdiction & Venue

The probate court would have exclusive jurisdiction over an action that addressed either of the following:

-- Whether a transfer was a qualified disposition.
-- The extent of the transferor's interest in, or the income from, a qualified disposition.

The probate court would have concurrent jurisdiction over an action brought by a creditor for an attachment or other provisional remedy against property that was the subject of a qualified disposition or for avoidance of a qualified disposition.

Venue for a proceeding described above would be as follows:

-- For a trust registered under Section 7209 of the Estates and Protected Individuals Code (EPIC), the place of registration.
-- For a trust that was not registered, any place where the trust property could be registered.

(Section 7209 of EPIC allows a trustee of a trust that has its principal place of administration in Michigan to register the trust in the court at the place designated in the terms of the trust or, if none is designated, at the principal place of administration.)

If a trust had no qualified trustee and were not registered, and there were no place in Michigan where the trust properly could be registered, venue would be in the following order of priority, except to the extent otherwise provided by court rule:

-- In a county in which the immediately preceding qualified trustee had its usual place of business or residence.
-- In a county in which a trust beneficiary lived.
-- In a county in which any trust property was located.
-- In any county in Michigan.

Senate Bill 598

The Uniform Fraudulent Transfer Act identifies various circumstances under which a transfer made or obligation incurred by a debtor is fraudulent as to a creditor.

Under one set of circumstances, a transfer or obligation is fraudulent as to a creditor if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor; or without receiving a reasonably equivalent value in exchange and the debtor was engaged in a business or transaction for which the debtor's remaining assets were unreasonably small in relation to the business or transaction, or the debtor intended to incur or believed that he or she would incur debts beyond his or her ability to pay as they became due. Under the bill, this would apply except as provided below.

The bill specifies that a qualified disposition would be fraudulent as to the creditor whose claim arose after the qualified disposition only if the qualified disposition were made with actual intent to hinder, delay, or defraud any creditor of the debtor.

Currently, a cause of action with respect to a fraudulent transfer or obligation under the Act is extinguished unless the action is brought within certain time periods (generally six years after the claim accrues or, if a person fraudulently concealed the existence of a claim or the identity of a person who is liable for the claim, within two years after the person entitled to bring the action discovers or should have discovered the existence of the claim or the identity of the liable person).

Under the bill, an action under the Act with respect to a qualified disposition would have to be brought in the time provided under the proposed Qualified Dispositions in Trust Act.

"Qualified disposition" would mean that term as defined in the proposed Act.

MCL 566.31 et al. (S.B. 598)

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

Until approximately 20 years ago, the laws throughout the United States prevented an individual from creating a self-settled trust and protecting the trust assets from claims by his or her creditors. With limited exceptions in the area of pension and retirement trusts, this rule applied to virtually all self-settled trusts, including self-settled spendthrift trusts. (A spendthrift trust prevents the voluntary or involuntary transfer of trust assets by a beneficiary before the property is distributed to the beneficiary by the trustee.) As a result, if a person created an irrevocable trust and gave the trustee discretion to use the income and principal for the person, his or her creditors could reach all of the trust assets. As society became more litigious, however, and people felt the need to shelter their assets, some states began to follow the practice of other countries that allow asset protection trusts.

To date, Michigan law has not evolved in this manner. Although the Michigan Trust Code recognizes spendthrift trusts and generally protects the interests of the beneficiary from claims of creditors, the trust property may be reached by creditors of the settlor if the trust is revocable, and the assets are subject to limited protection if the trust is irrevocable. With one exception (for a type of trust in which the settlor retains a beneficial interest that follows his or her spouse's life interest), the Michigan Trust Code does not authorize domestic asset protection trusts. As a result, if a Michigan resident wants to create a DAPT in the United States, he or she must do so in one of the other 15 states, including Ohio, that allow these trusts.

Michigan needs to enact DAPT legislation in order to remain competitive. For many individuals, particularly those with considerable assets, an asset protection trust may be attractive for a variety of purposes. When Michigan residents go to another state to establish the trust, there is an

economic cost to this State. Every state's DAPT law requires the trust to have some presence in or connection with that state, typically through the use of a local trustee (or co-trustee), such as a bank or trust company. Thus, states with a DAPT law are drawing trust business away from Michigan.

If Michigan enacted a DAPT law, as proposed by this legislation, it not only would permit Michigan residents to create asset protection trusts in this State, but also could make Michigan a destination for out-of-State residents to establish DAPTs. Nationwide, the DAPT industry is growing, and the positive economic impact could be significant.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bills would have no fiscal impact on State or local government.

Fiscal Analyst: Ryan Bergan

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.