

Legislative Analysis



SEPARATE TRUSTEES PROVISIONS; DIRECTED TRUSTS

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House Bill 6129 (H-1) as reported from committee
Sponsor: Rep. Klint Kesto

House Bill 6130 (H-1) as reported
Sponsor: Rep. Julie Calley

House Bill 6131 (H-1) as reported
Sponsor: Rep. Brandt Iden

Committee: Law and Justice
Complete to 10-24-18

(Enacted as Public Acts 662, 663, and 664 of 2018)

BRIEF SUMMARY:

House Bill 6129 would amend the Estates and Protected Individuals Code (EPIC) to allow for the inclusion of a ***separate trustees provision*** in a trust instrument.

House Bill 6130 would amend EPIC to incorporate a modified version of the Uniform Directed Trust Act, as described below in **Background**, into Michigan statute.

House Bill 6131 would amend EPIC to replace references to a “trust protector” with references to a “trust director,” and specify whether EPIC or the terms of a specific trust would take precedence in various situations.

The three bills are tie-barred to one another, meaning that none could take effect unless all were enacted.

DETAILED SUMMARY:

House Bill 6129

House Bill 6129 would amend Article VII (Michigan Trust Code) of EPIC to allow for the inclusion of a ***separate trustees provision*** in a trust instrument. (As defined in the bill, a ***separate trustees provision*** would be a trust provision that designates or provides a method of designating both a separate resultant trustee and a separate investment trustee or one or more separate distributions trustees.)

Responsibilities when a separate trustees provision is in place

When such a provision is in place, the whole trusteeship of the ***aggregate trust*** would be divided, with separately accepted fiduciary responsibilities applying to each discrete set of trustees. Additionally, all of the following would apply:

- With respect to each of its separate trustee functions, a separate trustee would act on its own authority and would not need approval from any other separate trustee.
- Generally, separate trustees would not be treated as cotrustees in their relations to one another. However, they would be treated as cotrustees only for the following purposes:

- Taking, holding, transferring, and defending title to the property. (In these instances of common title, certain trustees accept the common title only for certain specified purposes).
- Determining venue and interested persons in proceedings considering the aggregate trust.
- Liability, if any, for income, property, or other taxes attributable to trust property.
- The privileges and immunities of cotrustees under general principles of law and equity to comment to a settlor or beneficiary of a trust or others on one another's performance of fiduciary duties.
- The separate trustees would not be cotrustees for the purposes of joinder of necessary parties in a breach of trust proceeding or the requirement that the same person not be the sole trustee and sole beneficiary of a trust. (If the aggregate trust had only one beneficiary, the beneficiary could be a separate trustee only under certain circumstances).
- A separate trustee could not accept the separate trust associated with, or, except as otherwise provided, participate in or provide advice regarding the performance of, a separate trustee function of any other separate trustee of the aggregate trust.
- A separate trustee would not have the duty to ensure that a vacancy in any separate trusteeship is filled. (If the separate trustee did seek to do so, he or she would not be considered to have accepted the separate trust and would not have a duty to ensure that other vacancies in separate trusteeships were filled.)

Items to be included in a separate trustees provision

If a separate trustees provision were included in a trust instrument, it would have to include all of the following:

- If there is a separate investment trustee, that he or she would perform the trustee investment function.
- That one or more separate distributions trustees, if any, would exercise discretion under one or more specified discretionary trust provisions.
- Which of the aggregate trust's separate trustees is responsible for each of the following:
 - Allocating receipts and disbursements or distributions affected by the separate trustees' separate trustee functions, for fiduciary accounting purposes, during periods when the trust is not a unitrust.
 - Preparing and filing tax and information returns for the aggregate trust and responding on behalf of the aggregate trust to inquiries from governmental agencies.
 - Responding to a proceeding challenging a purpose or the validity of the trust.
 - Determining whether cash or property of the trust will be loaned to beneficiaries or to business enterprises in which a beneficiary or the aggregate trust has an ownership interest.
- For a separate investment trustee, whether that person or the separate resultant trustee would determine the aggregate trust's asset allocation for investment purposes.
- That the separate resultant trustee would be responsible for the custody of the aggregate trust's property.

Separate trustee function

A separate trustee would have all of the powers and duties described in Parts 7 and 8 of Article VII of EPIC. The separate trustee would be subject to control by each settlor of a revocable trust and a holder of a power to direct a trustee, under the same circumstances as would be a trustee or cotrusteeship that is not a separate trustee. Likewise, the separate trustee would be required to seek or consider the advice of a designated trust advisor in the same circumstances as would a trustee or cotrusteeship that is not a separate trustee.

Duties of a separate trustee

If a separate trustee comprised a cotrusteeship, with regard to a separate trustee function of the separate trustee, the cotrustees would have all of the duties and powers of cotrustees described in Part 7 of Article VII of EPIC.

A separate trustee would have the duty to inform and report on each of its separate trustee functions to a trust beneficiary (except for reports the trustee knows would be duplicative), as well as to each other separate trustee of the aggregate trust as reasonably necessary for that individual to perform his or her functions.

A separate trustee would not have a duty to monitor or review the actions of any other separate trustees of the aggregate trust or to notify or warn a settlor or beneficiary of the aggregate trust of a breach of trust by any other separate trustee. (If the separate trustee did notify a settlor or beneficiary of such a breach of trust, he or she would not be considered to have accepted the separate trust and would not have a duty to warn of breaches of trust by any other separate trustees.)

Liability of separate trustees

Without clear and convincing evidence of collusion in a breach of trust, a separate trustee would not be liable for the act or omission of any other separate trustee. Likewise, the only separate trustee obliged to defend or otherwise respond to any proceeding brought by a trust beneficiary would be the separate trustee in breach of a trustee duty. Generally, that separate trustee would be liable to beneficiaries for breach of a trustee duty as if he or she were the sole trustee of the aggregate trust.

Definitions

The bill would define 10 terms, including the following:

Aggregate trust would mean the inclusive set of separate relations of trust to be separately accepted by the separate trustees under a given separate trustees provision.

Trustee investment function would mean a trustee function expressly allocated by the separate trustees provision to a separate investment trustee. A trustee investment function could be broadly or narrowly defined by the separate trustees provision and could include any of the following:

- Determining for trust investment purposes the retention, purchase, sale, assignment, exchange, tender, or encumbrance of trust property and the

investment and reinvestment of undistributed income and principal of the aggregate trust.

- Management, control, and exercise of voting powers related directly or indirectly to any trust asset.
- For nonpublicly traded investments or property for which there is no readily available market value, determining the methodology for valuing the property and the frequency of valuations.

Vacancies in a trusteeship

Currently, if one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. Under the bill, the relation between separate trustees serving under a given separate trustees provision would not be a cotrusteeship, although any separate trustee could comprise a cotrusteeship.

The bill would also provide that a vacancy in a trusteeship would have to be filled if it left either of the following:

- A trust that is not subject to a separate trustees provision as of the time of the vacancy without any remaining trustee.
- Any of the several separate trusteeships governed by an operative separate trustees provision without any remaining trustee.

MCL 700.7704; proposed MCL 700.7703b

House Bill 6130

House Bill 6130 would amend EPIC, largely to incorporate a modified version of the Uniform Directed Trust Act¹ into Michigan statute, as described below in **Background**. This summary includes parallel provisions under the same headings as are used in the Uniform Act, with the corresponding section number in the Uniform Act noted.

Except as otherwise provided, the bill would not apply to any of the following:

- A power of appointment that is intended to be held by the donee in a nonfiduciary capacity.
- A power that is intended to be held in a nonfiduciary capacity that enables the holder to create a power of appointment, regardless of whether the created power is intended to be held by the donee of the created power in a fiduciary or nonfiduciary capacity.
- A power to appoint or remove a trustee or trust director.
- A power of a settlor over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of the beneficiary or another beneficiary represented by the beneficiary under Part 3 of Article VII of EPIC.
- A power over a trust if the terms of the trust provide that the power is held in a nonfiduciary capacity and if the power must be held in that capacity to achieve the settlor's tax objectives under the Internal Revenue Code.

¹ http://www.uniformlaws.org/shared/docs/divided%20trusteeship/UDTA_Final_2017nov3.pdf

An above-listed power that is intended to be held in a nonfiduciary capacity would not be subject to fiduciary constraint and could be exercised by the holder in any manner consistent with the scope of the power and any express requirements or limitations imposed by the terms of the trust. A trustee would have to take action to comply with the exercise or nonexercise of a power described in the bill. The trustee would not be liable for taking a required action. However, the trustee could not comply with the exercise or nonexercise of a power described in the bill if it were obtained by the trustee's collusion or fraud and compliance would be in pursuance of that collusion or fraud.

Exclusions (comparable to Section 5 of the Uniform Directed Trust Act)

Generally, the following powers would be intended to be held in a nonfiduciary capacity if granted to a person other than a trustee of the trust:

- A power of appointment, including one to adjust between principal and income; convert to or from a unitrust; modify, reform, or terminate the trust; or distribute trust assets in further trust. (However, these powers would be intended to be held in a fiduciary capacity if the holder otherwise did not have a beneficial interest in the trust.)
- A power that enables the holder to create a power of appointment.

Powers of trust director (Section 6)

Generally, the terms of a trust could grant a *power of direction* to a trust director. A trust director could exercise any further power appropriate to the exercise or nonexercise of the director's power of direction. Trust directors with joint powers would have to act by majority decision.

Power of direction, as defined in the bill, would mean a power over a trust granted by the terms of the trust to the extent the power is exercisable while the person to whom it is granted is not serving as a trustee. Power of direction would include a power over the investment, management, or distribution of trust property or other matters of trust administration. (Power of direction would not include the powers specifically excluded in the bill.)

Limitations on trust director (Section 7)

A trust director would be subject to the same rules as a trustee in a like position and under similar circumstances in the exercise or nonexercise of a power of direction or further power regarding both a payback provision necessary for compliance with Medicaid reimbursement requirements and a charitable interest in the trust.

Duty and liability of trust director (Section 8)

A trust director would have the same fiduciary duty and liability in the exercise or nonexercise of a power of direction or further power as a similarly situated sole trustee for a power held individually or as a similarly situated cotrustee for a power held jointly with a trustee or another trust director. A term of a trust that relieved a trust director from liability for breach of fiduciary duty would be unenforceable to the extent that it would relieve the trust director of liability for acts committed in bad faith or with reckless indifference to the purposes of the trust or the interests of trust beneficiaries, or if the term were inserted as the result of an abuse by the trust director. (However, if the trust director were licensed or

otherwise authorized to provide health care, the trust director would have no duty or liability for acts in that capacity.)

Duty and liability of directed trustee (Section 9)

A directed trustee would have to take action to comply with the exercise or nonexercise of a power of direction or further power, and would not be liable for taking a required action. However, the directed trustee could not comply if the exercise or nonexercise were obtained by the directed trustee's collusion or fraud and compliance would be in pursuance of that collusion or fraud.

An exercise of a power of direction under which a trust director could release a trustee or another trust director from liability for breach of trust would not be effective if it involved certain bad faith or reckless indifference, if it was induced by the trustee's or director's improper conduct, or if, at the time of the release, the director did not know material facts relating to the breach.

Duty to provide information to trust director or trustee (Section 10)

Under the bill, a trustee would have to provide information to the trust director when it is reasonably related to the powers or duties of the trustee and director. This provision would apply to trust directors as well, but trust directors would also have to provide the listed information to and about another trust director.

No duty to monitor, inform, or advise (Section 11)

However, the trustee would not have a duty to monitor a trust director or inform or give advice to a settlor, beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the director. If the trustee chose to monitor, inform, or give advice as described above, the trustee would not then assume the duty to monitor, inform, or give advice.

This provision would also apply to trust directors regarding a trustee or another trust director.

Liability

The bill would provide that if a trustee relied on information provided by a trust director, the trustee would not be liable for a breach of trust as long as the reliance was not in bad faith. Likewise, if a trust director relied on information provided by a trustee or another trust director, he or she would not be liable for a breach of trust as long as the reliance was not in bad faith.

Limitation of action against trust director (Section 13)

An action against a trust director for breach of trust would have to be commenced within the same limitations period as an action for breach of trust against a similarly situated trustee, and a trust director could use the same defenses as a similarly situated trustee. A report or accounting would have the same effect on the limitation period for an action against a trust director for breach of trust that it would have against a similarly situated trustee.

Defenses in action against trust director (Section 14)

In an action against a trust director for breach of trust, the director could assert the same defenses as a similarly situated trustee.

Jurisdiction over trust director (Section 15)

By accepting appointment as a trust director, the director would submit personally to jurisdiction in Michigan in matters related to his or her powers or duties as director. (This section would not preclude use of another method to obtain jurisdiction over the trust director.)

Office of trust director (Section 16)

The rules applicable to a trusteeship, as described in EPIC, would apply to a trust directorship in matters regarding acceptance, giving of bond to secure performance, reasonable compensation, resignation, removal, and vacancy and appointment of successors.

Application of the bill; principal place of administration (Section 3)

The bill's application with respect to a given trust would be subject to both of the following:

- If the trust was created before the bill takes effect, the bill would only apply to decisions or actions taken on or after the date of the change.
- If the trust's principal place of administration were changed to Michigan on or after the bill takes effect, the bill would only apply to decisions or actions taken on or after the date of the change.

Uniformity of application and construction (Section 17)

In applying and construing the bill as based on the Uniform Directed Trust Act, the bill states that weight should be given to the goal of promoting uniformity in the law on directed trusteeships among the states that have enacted the Act.

Proposed MCL 700.7703a

House Bill 6131

House Bill 6131 would replace references to a "trust protector" with references to a "trust director."

<i>Trust protector</i> (to be removed)	<i>Trust director</i> (as defined in HB 6130)
A person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following: • The settlor of a trust. • The holder of a power of appointment.	An organization permitted to exercise trust powers in this state as described in the Michigan Banking Code, or an individual, if that person is granted a power of direction whether or not either of the following applies: • The terms of the trust refer to the person as trust director. • The person is a beneficiary or settlor of the trust.

Currently and under the bill, the terms of a particular trust prevail over any provision in EPIC except in certain specified areas. The bill would add the following instances to the list of specified areas:

- The requirement for creating a trust that the same person not be the sole trustee and sole beneficiary.
- The obligations of a trust director added in HB 6130, which impose the same rules, duties, and liability on a trust director as exist for a similarly situated trustee, in certain circumstances.
- The effect of a release of a trustee or trust director from liability for breach of trust under HB 6130—namely, that it is not effective if it involved certain bad faith, reckless indifference, improper conduct, or lack of knowledge of a material breach.
- The requirement in HB 6129 regarding the eligibility of a trust’s sole beneficiary to be a separate trustee.

The bill would also state that the terms of a trust designating the principal place of administration would be valid and controlling if the trust director’s principal place of business were located in, or the director were a resident of, the designated jurisdiction (in addition to the other bases under which that designation is valid and controlling).

Additionally, the bill would state that the terms of a trust could relieve a cotrustee from duty and liability with respect to another cotrustee’s exercise or nonexercise of a power to the other trustee to the same extent that a directed trustee may be relieved from duty and liability with respect to a trust director’s power of direction (as described in HB 6130).

Finally, the bill would repeal Section 7809 of EPIC, which describes the powers of a *trust protector*, a term that would be replaced by *trust director* in the bill.

MCL 700.7103 et al.

BACKGROUND:

The Uniform Law Commission (ULC) completed its Directed Trust Act in 2017 in an effort to provide consistency in the area of directed trusts. According to the ULC website,² in addition to Michigan’s consideration of House Bill 6130, bills to implement the rules in the Act on a statewide level have been passed in Georgia (Act 366 of 2018/HB 121) and New Mexico (Chapter 63/SB 101). Additionally, Connecticut’s General Assembly is considering SB 397. ULC’s description of the Directed Trust Act states the following:

The Uniform Directed Trust Act (UDTA) addresses the rise of directed trusts. In a directed trust, a person other than a trustee has a power over some aspect of the trust’s administration. Such a person may be called a “trust protector,” “trust advisor,” or in the terminology of the UDTA, a “trust director.” The division of authority between a trust director and a trustee raises difficult questions about how

² <http://www.uniformlaws.org/Act.aspx?title=Directed%20Trust%20Act>

to divide fiduciary power and duty. The Uniform Directed Trust Act provides clear, functional rules that allow a settlor to freely structure a directed trust while preserving key fiduciary safeguards for beneficiaries. The UDTA also provides sensible default rules for a variety of matters that might be overlooked in the drafting of a directed trust, including information sharing among trustees and trust directors, the procedures for accepting appointment as a trust director, the appointment, and many other matters.

House Bills 6129, 6130, and 6131 were developed by the Divided and Directed Trusteeships Ad Hoc Committee (DDTC) of the Council of the Probate and Estate Planning Section of the State Bar of Michigan.

BRIEF DISCUSSION:

In committee testimony, the bill sponsors stressed that the regimes offered in the bills—separate and directed trusts—are elective, and are simply intended to provide settlors with additional options. No one testified or voted against the bills in committee.

FISCAL IMPACT:

House Bill 6129 would have no fiscal impact on the state, but could have an indeterminate fiscal impact on local courts. Any fiscal impact would depend on the extent to which separate trustees petition courts to ensure that vacancies in separate trusteeships are filled, and how these filings affect court caseloads and related administrative costs.

House Bills 6130 and 6131 would have no fiscal impact on the state or on local units of government.

POSITIONS:

A representative of the Probate Section of the State Bar of Michigan testified in support of the bills. (9-25-18)

The Michigan Bankers Association supports the bills. (9-25-18)

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Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.