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ANALYSIS

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House Bill 6129 (Substitute H-1 as passed by the House)
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Sponsor: Representative Klint Kesto (H.B. 6129)
Representative Julie Calley (H.B. 6130)
Representative Brandt Iden (H.B. 6131)

House Committee: Law and Justice

Senate Committee: Judiciary

Date Completed: 12-10-18

CONTENT

House Bill 6129 (H-1) would amend the Michigan Trust Code to do the following:

- Allow a trust instrument to include a separate trustees provision, and specify that certain conditions would apply while a separate trustees provision applied.
- Require a separate trustees provisions to determine circumstances pertaining to the performance of certain trustee functions and responsibilities.
- Specify that a separate trustee would have a duty to inform and report to trust beneficiaries and other separate trustees on each of the separate trustee's functions.
- Specify that a separate trustee would not have a duty to monitor or review the actions of any other separate trustee, and would not have to notify or warn a settlor or beneficiary of a breach of trust or possible breach of trust on the part of another separate trustee.
- Exempt from liability a separate trustee for the acts or omissions of another separate trustee.
- Modify provisions pertaining to filling a vacancy in a trusteeship.

House Bill 6130 (H-1) would amend the Code to do the following:

- Specify that the bill would not apply to certain nonfiduciary powers associated with a trust.
- Specify that certain rules of construction would apply to powers under a trust.
- Allow the terms of a trust to grant a power of direction to a trust director.
- Prescribe the duties and limitations of a trust director's power of direction.
- Prescribe the duties and limitations of a trustee as they pertained to a trust director.

House Bill 6131 (H-1) would amend the Code to do the following:

- Specify that the terms of a trust would not prevail over provisions of the Code that House Bills 6129 (H-1) and 6130 (H-1) would enact.

- **Specify that terms of a trust designating the principal place of administration would be valid and controlling if a trust director's principal place of business were located in, or a trust director were a resident of, the designated jurisdiction.**
- **Require notice of a proceeding to terminate or modify a trust to be given to a trust director and a person who was given power by terms of the trust.**
- **Delete a provision allowing a remaining trustee or cotrustees to act for the trust if a vacancy in a cotrusteeship occurred.**

The bill also would repeal Section 7809 of the Code, which prescribes the duties of a trust protector.

The bills are tie-barred.

House Bill 6129 (H-1)

Separate Trustees Provision

The bill would allow a trust instrument to include a separate trustees provision. While a separate trustees provision applied, the whole trusteeship of an aggregate trust would be divided, under the terms of the separate trustees provision, into discrete sets of separately accepted fiduciary responsibilities, with each discrete set separately allocated to one or another of the aggregate trust's separate trustees.

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

Certain conditions (described below) would apply while a separate trustee provision applied.

First, except as provided otherwise, an aggregate trust's separate trustees could not be treated as cotrustees in their relations to one another. With regard to common title to the trust property, all of the following would apply:

- A separate investment trustee would accept the common title only for purposes of performing the trustee investment function described by the governing separate trustees provisions for the benefit of the trust beneficiaries.
- A separate distributions trustee would have to accept the common title only for purposes of administering a discretionary trust provision specified in the governing separate trustees provision for the benefit of the trust beneficiaries affected by the specified discretionary trust provisions.
- A separate resultant trustee would have to accept the common title only for purposes of performing all trustee functions not allocated by the governing separate trustees provision to either of the following: a) a separate investment trustee, if any, or b) a separate distributions trustee.

"Trustee investment function" would mean a trustee function expressly allocated by the separate trustee 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 was no readily available market value, determining the methodology for valuing the property and the frequency of valuations.

"Separate investment trustee" would mean a person or a cotrusteeship that is designated to perform the trustee investment function as a trustee or trustees. "Separate distributions trustee" would mean a person or cotrusteeship that is designated by a separate trustees provision to exercise discretion as a trustee or trustees under a discretionary trust provision. "Separate resultant trustee" would mean a person or cotrusteeship that is designated as a trustee or trustees to perform all trustee functions not allocated by the separate trustees provision to a separate investment trustee or to any separate distributions trustee.

Second, a separate trustee would have to act on its own authority with respect to each of its separate trustee functions, and would not need approval from any other separate trustee to conduct its separate trustee functions.

Third, an aggregate trust's separate trustees would be treated as cotrustees in their relations to another only for the following purposes:

- Taking, holding, transferring, and defending title to trust property.
- Determining venue and interested people in proceedings attributable to trust property
- 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 settlor or beneficiary of a trust or others on one another's performance of fiduciary duties.

Fourth, the aggregate trust's separate trustees would not be cotrustees for either of the following purposes:

- Joinder of necessary parties in a proceeding for breach of trust.
- The requirement that the same person could not be the sole trustee and sole beneficiary of a trust.

If the aggregate trust had only one beneficiary, the beneficiary could not be a separate trustee of the trust unless both of the following applied: a) the separate trustee comprised a cotrusteeship of which the beneficiary was a cotrustee; and b) the trust instrument prohibited the beneficiary from serving alone. "Cotrusteeship" would mean a set of one or more cotrustees whose relations to one another in respect of trust property is governed by the MTC.

Fifth, a separate trustee could not accept the separate trust associated with, or, except as provided otherwise, participate in or provide advice regarding the performance of, a separate trustee function of any other separate trustee of the aggregate trust. Ministerial acts performed by one of separate trustee in connection with a separate trustee function of another separate trustee of the aggregate trust would not be considered an acceptance of the separate trust associated with the separate trustee function of the other separate trustee.

"Ministerial acts" would include both of the following: a) confirming that an investment or distribution directive of another separate trustee had been carried out; and b) recording and reporting the actions of another separate trustee or conferring with another separate trustee for purposes of administrative coordination or efficiency.

Sixth, a separate trustee would not have a duty to petition the court or to take other affirmative action to ensure that any vacancy in any separate trusteeship was filled. If a

separate trustee petitioned the court or took other affirmative action to ensure that vacancy was filled, both of the following would apply:

- The separate trustee would not be considered to have accepted the separate trust associated with the vacant separate trusteeship.
- The separate trustee would not have a duty to petition the court or take other affirmative action to ensure that any other vacancy was filled.

"Affirmative action" would not include a failure to act.

Separate Trustee Provision Determination

A separate trustees provision would have to determine all of the following:

- If there were a separate investment trustee, that the trustee would have to perform the trustee investment function.
- That one or more separate distributions trustees, if any, would have to exercise discretion under one or more specified discretionary trust provisions.
- Which of the aggregate trust's separate trustees would have to perform, during any period in which the aggregate trust was not a unitrust, the function of allocating between principal and income, for fiduciary accounting purposes, receipts and disbursements or distributions affected by the separate trustees' separate trustee functions.
- Which of the aggregate trust's separate trustees would be responsible for preparation and filing of tax and information returns for the aggregate trust and for responding on behalf of the aggregate trust to inquiries from governmental agencies.
- Which of the aggregate trust's separate trustees would be responsible for responding to a proceeding challenging a purpose or the validity of the trust.
- For a separate investment trustee, whether the separate investment trustee or the separate resultant trustee would have to 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.

Additionally, a separate trustee provision would have to determine which of the aggregate trust's separate trustees would be responsible for determining whether at any time cash or other property would be loaned by the trust to any of the following: a) one or more trust beneficiaries; b) one or more business enterprises in which a trust beneficiary had an ownership interest; and c) one or more business enterprises in which the aggregate trust itself had an ownership interest.

Separate Trustee Function

With regard to a separate trustee function of a separate trustee, all of the following would apply:

- The separate trustee would have all of the duties and powers of a trustee in the bill and Part 8 (Duties and Powers of Trustee) of the Code.
- The separate trustee would be subject to control by both of the following in the same circumstances as would be a trustee or cotrusteeship that was not a separate trustee: a) each settlor of a revocable trust, and b) a holder of a power to direct a trustee, if any.
- The separate trustee would be required to seek or consider the advice of a designated trust advisor, if any, in the same circumstances as would a trustee or cotrusteeship that was not a separate trustee.

Cotrusteeship

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 the bill.

Separate Trustee Duties & Responsibilities

A separate trustee would have a duty to inform and report on each of its separate trustee functions to both of the following:

- Trust beneficiaries; however, a separate trustee would not have to provide a beneficiary a report that the separate trustee knew would duplicate a report that another separate trustee of the aggregate trust provided or would provide to the beneficiary.
- Each other separate trustee of the aggregate trust as was reasonably necessary for the other separate trustee to perform a separate trustee function of the other trustee.

A separate trustee would not have a duty to do any of the following:

- Monitor or review the actions of any other separate trustee of the aggregate trust.
- Notify or warn a settlor or beneficiary of the aggregate trust of a breach of trust or possible breach of trust on the part of any other separate trustee.

If a separate trustee notified or warned a settlor or beneficiary of a breach of trust or possible breach of trust on the part of any other separate trustee, both of the following would apply:

- The separate trustee would not be considered to have accepted the separate trust associated with the separate trustee function of the other separate trustee.
- The separate trustee would not have a duty to notify or warn a settlor or beneficiary of any other breach or possible breach of trust on the part of any other separate trustee.

Liability

Absent clear and convincing evidence of collusion in a breach of trust, all of the following would apply:

- A separate trustee would not be liable for the act or omission of any other separate trustee of the aggregate trust.
- A separate trustee in breach of a trustee duty of a separate trustee function of the separate trustee would be the only trustee obliged to defend or otherwise respond to any proceeding brought by a trust beneficiary regarding that breach.
- Except as provided below a separate trustee would be liable to trust beneficiaries for breach of a trustee duty of a separate trustee function of the separate trustee as if the other separate trustees of the aggregate trust were not in office and the separate trustee were the sole trustee of the aggregate trust.
- A separate trustee could be liable concerning a trustee function of another separate trustee only for the separate trustee's own actions in the performance of ministerial acts pursuant to the other separate trustee's instruction and only to the extent the separate trustee acted in bad faith.

Trusteeship Vacancy

A vacancy in a trusteeship occurs if one or more of the following occur:

- A person designated as trustee rejects the trusteeship.
- A person designated as trustee cannot be identified or does not exist.
- A trustee resigns.
- A trustee is disqualified or removed.
- A trustee dies.
- A guardian or conservator is appointed for an individual serving as trustee.

If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

The bill, instead, would require a vacancy in a trusteeship to be filled if the vacancy left either of the following:

- A trust that was 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.

Also, the bill would specify that though any separate trustee could comprise a cotrusteeship, the relation between respective separate trustees serving under a given separate trustee provision would not itself be a cotrusteeship.

House Bill 6130 (H-1)

Applicability

Excepting the rules of construction (described below) the bill would not apply to:

- A power of appointment that was intended to be held by a donee in a nonfiduciary capacity.
- A power that was intended to be held in a nonfiduciary capacity that enabled the holder to create a power of appointment, regardless of whether the created power was intended to be held by the donee of the created power in a fiduciary or a 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 settlor had a power to revoke the trust.
- A power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affected either of the following: a) the beneficial interest of the beneficiary, or b) the beneficial interest of another beneficiary represented by the beneficiary under Part 3 (Representation) of the Code with respect to the exercise or nonexercise of the power.
- A power over a trust if both of the following applied: a) the terms of the trust provided that the power was held in a nonfiduciary capacity, and b) the power would have to be held in a nonfiduciary capacity to achieve the settlor's tax objectives under the Internal Revenue Code.

"Donee" would mean that term as defined in Section 2 of the Power of Appointment Act (the person who whom a power is granted or reserved).

Rules of Construction

All of the following rules of construction would apply to powers under a trust:

First, a power described above that was 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 above. A trustee would not be liable for taking an action required under the bill; however, a trustee could not comply with the exercise or nonexercise of a power if the exercise or nonexercise was obtained with the trustee's collusion or by the trustee's fraud, and compliance would be in pursuance of that collusion or fraud.

Second, except as otherwise provided, all of 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 a power of appointment in the form of a power to do any of the following: a) adjust between principal and income, b) convert to or from a unitrust, c) modify, reform, or terminate the trust, or d) distribute trust assets in further trust.
- A power that enabled the holder to create a power of appointment.

"Power of appointment" would mean that term as defined in Section 2 of the Powers of Appointment Act: a power created or reserved by a person having property subject to his or her disposition that enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it must be received.

Third, a power to do any of the following would be intended to be held in a fiduciary capacity even though the holder was not a trustee of the trust if the holder otherwise did not have a beneficial interest in the trust:

- Adjust between principal and income.
- Convert to or from a unitrust.
- Modify, reform, or terminate the trust.
- Distribute trust assets in further trust.

Trust Director

Powers. The terms of a trust could grant a power of direction to a trust director. Both of the following rules of construction apply to powers of direction:

- 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" 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. The term would include a power over the investment, management, or distribution of trust property or other matters of trust administration. The term would not include powers to which the bill would not apply (described above).

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 a further power regarding both of the following:

- A payback provision in the terms of the trust necessary for compliance with the reimbursement requirements of Medicaid.

- A charitable interest in the trust, including required notices regarding the interest to the attorney general.

Duties & Limitations. Both of the following would apply with respect to a power of direction or a further power appropriate to the exercise or nonexercise of the director's power of direction:

- A trust director would have the same fiduciary duty and liability in the exercise or nonexercise of the power as a sole trustee in a like position and under similar circumstances if the power is held individually or, if the power is held jointly with a trustee or another trust director, as a cotrustee in a like position and under similar circumstances.
- A term of a trust that relieved a trust director from liability for breach of fiduciary duty would be unenforceable to the extent that either of the following applies: a) the term relieved 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 the trust beneficiaries, and b) the term was inserted as the result of an abuse by the trust director of a fiduciary or confidential relationship to the settlor.

If a trust director were licensed, certified, or otherwise authorized or permitted by law other than the bill to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acted in that capacity, the director would have no duty or liability under the bill.

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

"Directed trustee" would mean a trustee that is subject to a power of direction.

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 any of the following applied:

- The breach involved the trustee's or other director's bad faith or reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
- The release was induced by improper conduct of the trustee or other director in procuring the release.
- At the time of the release, the director did not know the material facts relating to the breach.

"Breach of trust" would include a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust or by the bill.

A trust director would have to provide information to a trustee or another trust director to the extent the information was reasonably related to both of the following:

- The powers or duties of the director.
- The powers or duties of the trustee or other director.

A trust director does not have a duty to do either of the following:

- Monitor a trustee or another trust director.
- Inform or give advice to a settlor, beneficiary, trustee, or another trust director concerning an instance in which the director might have acted differently than a trustee or another trust director.

By monitoring a trustee or another trust director or informing or giving advice as described above, a trust director would not assume a duty excluded by the bill.

A trust director that acted in reliance on information provided by a trustee or another trust director would not be liable for a breach of trust to the extent the breach resulted from the reliance if the trust director's reliance were not in bad faith.

Action Against Trust Director. An action against a trust director for breach of trust would have to be commenced within the same limitation period as an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

(Section 7905 specifies the following limitations on commencing proceedings apply in addition to other limitations provided by law:

- A trust beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the trust beneficiary or a representative of the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.
- A trust beneficiary who has waived the right to receive reports may not commence a proceeding for a breach of trust more than one year after the end of the calendar year in which the alleged breach occurred.)

If the above provision did not apply, a judicial proceeding by a trust beneficiary against a trustee for breach of trust would have to be commenced within five years after the first of the following to occur:

- The removal, resignation, or death of the trustee.
- The termination of the trust beneficiary's interest in the trust.
- The termination of the trust.

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 the report or accounting would have in an action for breach of trust against a trustee in a like position and under similar circumstances under section 7905.

In an action against a trust director for breach of trust, the director could assert the same defenses a trustee in a like position and under similar circumstances could assert in an action for breach of trust against the trustee.

By accepting appointment as a trust director, the director would have to submit personally to jurisdiction in the State regarding any matter related to a power or duty of the director. This provision would not preclude use of another method to obtain jurisdiction over a trust director.

The rules applicable to a trusteeship would apply to a trust directorship regarding all of the following matters:

- Acceptance.
- Giving of bond to secure performance.

- Reasonable compensation.
- Resignation.
- Removal.
- Vacancy and appointment of successors, treating any instance in which two or more trust directors have the same power of direction as analogous to a cotrusteeship.

Trustee Duties & Responsibilities

A trustee would have to provide information to a trust director to the extent the information is reasonably related to the powers or duties of the trustee and of the director.

A trustee would not have a duty to do either of the following:

- Monitor a trust director.
- Inform or give advice to a settlor, beneficiary, trustee, trust director concerning an instance in which the trustee might have acted differently than the director.

By monitoring a trust director or informing or giving advice as specified above, a trustee would not assume a duty excluded by the bill.

A trustee that acted in reliance on information provided by a trust director would not be liable for a breach of trust to the extent the breach resulted from the reliance if the trustee's reliance is not in bad faith.

Applicability

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

- If the trust were created before the bill's effective date, the bill would apply only to decisions or actions taken on or after that date.
- If the trust's principal place of administration were changed to this State on or after the bill's effective date, the bill would apply only to decisions or actions taken on or after the date of the change.

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

House Bill 6131 (H-1)

Prevailing Terms

Under the Code, the terms of a trust prevail over any provision of the Code, except under certain listed circumstances.

The bill would add to this list the following circumstances under which the terms of a trust would not prevail:

- The same person was not the sole trustee and sole beneficiary.
- The obligations imposed on a trust director in Section 7703a(4) and (5) (which House Bill 6130 (H-1) would enact).
- The effect of an exculpatory term under Section 7703a(5)(b) (which House Bill 6130 (H-1) would enact).

- The effect of a release of a trustee or trust director from liability for the breach of a trust.
- The requirements under Section 7703b(2)(d) regarding the eligibility of a trust's sole beneficiary to be a separate trustee, as that term is defined in Section 7703b (which House Bill 6129 (H-1) would enact).

Designated Jurisdiction

The Code specifies that without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if either of the following applies:

- A trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction.
- All or part of the administration occurs in the designated jurisdiction.

Under the bill, terms of a trust designating the principal place of administration also would be valid and controlling if any of the above applied, or if a trust director's principal place of business was located in, or a trust director was a resident of, the designated jurisdiction.

Irrevocable Trust Modification, Termination

The Code allows a noncharitable irrevocable trust to be modified or terminated in any of the following ways:

- By the court on the consent of the trustee and the qualified trust beneficiaries, if the court concludes that the modification or termination of the trust is consistent with the material purposes of the trust or that continuance of the trust is not necessary to achieve any material purpose of the trust.
- On the consent of the qualified trust beneficiaries and a trust protector who is given the power under the terms of the trust to grant, veto, or withhold approval of termination or modification of the trust.
- By a trustee or trust protector to whom a power to direct the termination or modification of the trust has been given by the terms of a trust.

Instead of trust protector, the bill would refer to a *person or committee* that is given a power by the terms of a trust.

The Code requires notice of any proceeding to terminate or modify a trust to be given to a settlor, the settlor's representative if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, the trust protector, if any, the trustee, any other person named in the terms of the trust to receive notice of such a proceeding. The bill also would require notice to be given to a trust director and a person who is given power by terms of the trust.

Cotrusteeship Vacancy

Under the Code, if a vacancy occurs in a cotrusteeship, the remaining cotrustee or cotrustees may act for the trust. The bill would delete this provision.

The Code also requires cotrustees to act by a majority decision. Under the bill, 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 of the other cotrustee to the same extent that a directed trustee could be relieved from duty and liability with respect to a trust director's power of direction under Section 7703a (which House Bill 6130 (H-1) would enact).

MCL 700.7704 et al. (H.B. 6129)
Proposed MCL 700.7703a (H.B. 6130)
MCL 700.7103 et al. (H.B. 6131)

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

House Bill 6129 (H-1)

The bill would have no fiscal impact on the State and an indeterminate fiscal impact on local government. To the extent that separate trustees petition local courts in filling separate trusteeship vacancies, the bill could impact court caseloads and related administrative costs.

House Bills 6130 (H-1) & 6131 (H-1)

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

Fiscal Analyst: Abbey Frazier

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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.