

Article VII: Michigan Trust Code

Reporter's Comment

The Michigan Trust Code (MTC) is a comprehensive codification of the law of trusts. In many cases the MTC codifies long-standing principles familiar to practitioners from Michigan statutes, caselaw in Michigan and elsewhere, and the Restatements (Second) and (Third) of Trusts. Many sections of the MTC fill gaps in current law, and some sections break new ground or depart from our traditional understanding of the law of trusts.

There are several important themes found in the MTC:

- **It applies to all trusts.** The MTC applies to trusts created before, on, or after April 1, 2010. MCL 700.8206. Only a very limited number of provisions do not apply to trusts created before the effective date.
- **It is a series of default rules.** Section 7105, MCL 700.7105, provides that the MTC is a series of *default* rules that can be overridden by the settlor in the terms of the trust. From a practitioner's standpoint this is an extremely important rule, because it generally recognizes freedom of drafting. There are, however, a number of exceptions, which are detailed in §7105(2), MCL 700.7105(2).
- **It aligns wills and revocable trusts used as will substitutes.** Because of the widespread use of revocable trusts as will substitutes, a trend in recent years has been to align the legal treatment of them. The MTC follows this trend. Notable examples may be found in §§7112–7113, MCL 700.7112–7113, and Part 6, MCL 700.7601 et seq.
- **Continued independent administration of trusts free of judicial supervision.** EPIC has reflected the philosophy that the probate court should be available to resolve disputes involving trusts and to provide certainty and guidance on matters related to the administration of trusts, but that trusts ordinarily are not subject to ongoing judicial supervision. This philosophy continues under the MTC.

The MTC relies on the structure and provisions of the Uniform Trust Code (UTC) for many of its provisions. However, the MTC is a uniquely Michigan document that draws from both the UTC and prior Michigan law to preserve long-established procedures, practices, and principles concerning trusts in Michigan while also filling the numerous gaps that existed in the law. On balance the MTC tends to preserve long-standing Michigan law absent significant procedural or policy benefits from changing the law. In all, approximately one-third of the MTC is essentially consistent with either prior Michigan common law or statute. Nearly half relates to sections of the UTC that have been modified or are sections that have been added, in either case so the MTC more closely follows existing Michigan common law or current statutes than the UTC does.

Because the MTC modifies many of the UTC provisions to reflect long-standing Michigan law and practice, practitioners and judges should be cautious in their reliance on either the UTC reporter's comments, the decisions of the other jurisdictions with UTC-based trust codes, and the Restatement (Third) of Trusts, which was the source of the UTC. In looking to these other sources, care and attention is warranted to make certain that the provisions are truly comparable.

Practitioners also should remember to read and interpret the MTC within the context of EPIC as a whole. The MTC is a *part* of EPIC. The definitions of several terms used in the MTC are found not

in §7103, MCL 700.7103, but in the definitional provisions in Part 1 of Article I of EPIC. This is because these terms are used throughout EPIC and not just within the MTC. In addition, the general provisions of EPIC found within Article I of EPIC continue to apply to trusts unless otherwise directly supplanted or made inapplicable by a provision of the MTC.

The MTC displaced the former Article VII of EPIC. As a result, there is some risk of confusion when referring to the sections of Article VII in the reporter's comments that follow. Section references in the comments below refer to provisions of Article VII as they exist after the effective date of the MTC. Where reference to a section is made or intended to refer to the provisions of Article VII as they formerly existed, the reporter's comments clearly refer to former EPIC sections, or they refer to provisions as they existed under EPIC before the effective date of the MTC.

Part 1

General Provisions and Definitions

Reporter's Comment

Part 1 of the Michigan Trust Code consists of a series of general provisions and one definitional section. It relies on Article 1 of the UTC for its structure and many of its provisions. However, it also includes a unique provision dealing with the validity of *in terrorem* or no contest clauses. See §7113, MCL 700.7113. It does not include UTC §106, which provides that the common law of trusts and principles of equity supplant the UTC. This exclusion does not mean or imply a rejection of these principles; rather, these principles are found in §1203, MCL 700.1203.

700.7101 Short title of article

Sec. 7101. This article shall be known and may be cited as the "Michigan trust code".
As amended by 2009 PA 46 (eff. Apr 1, 2010).

700.7102 Scope

Sec. 7102. This article applies to trusts as defined in section 1107.
As amended by 2009 PA 46 (eff. Apr 1, 2010).

Reporter's Comment

The MTC applies to trusts as defined in §1107(n), MCL 700.1107(n). Using the EPIC definition ensures consistency with other provisions of Michigan law where the term *trust* is defined by reference to §1107(n). The definition of *trust* has not changed from prior law.

The trusts to which EPIC and the MTC apply are express trusts. Most often these trusts are created by the terms of a governing instrument, including instruments denominated as a declaration of trust or a trust agreement, or are set forth in the terms of a will. However, the MTC also recognizes oral trusts. See §7407, MCL 700.7407. Trusts that are subject to the MTC can also be the result of a court order establishing or approving the terms of a trust. Examples of court-imposed trusts include trusts created pursuant to the terms of a divorce decree or by an order pursuant to §5407, MCL 700.5407.

The definition of *trusts* found in §1107(n) excludes several devices that are commonly called trusts. Some of them, such as resulting trusts and constructive trusts, are not trusts at all, but are remedial devices used by the courts. Business trusts are a form of business organization, which are created and governed by specific enabling statutes. Other devices are trusts, but EPIC, including the MTC, nevertheless does not apply. These other devices include voting trusts, liquidating trusts, and trusts used in retirement planning. The focus of the MTC is on the kinds of trusts used in estate planning and donative (charitable) planning. Although this codification of the law related to these

kinds of trusts may be influential in determining the law applicable to voting trusts, liquidating trusts, or trusts that form the basis of retirement planning, the MTC was not intended to, and does not, apply to them.

700.7103 Definitions

Sec. 7103. As used in this article:

(a) “Action”, with respect to a trustee or a trust protector, includes an act or a failure to act.

(b) “Ascertainable standard” means a standard relating to an individual’s health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.

(c) “Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).

(d) “Discretionary trust provision” means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee’s discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:

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

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

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

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

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

(e) “Interests of the trust beneficiaries” means the beneficial interests provided in the terms of the trust.

(f) “Power of withdrawal” means a presently exercisable general power of appointment other than a power that is either of the following:

(i) Exercisable by a trustee and limited by an ascertainable standard.

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

(g) “Qualified trust beneficiary” means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary’s qualification is determined:

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

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

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

(h) “Revocable”, as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust’s characterization as revocable is not affected by the settlor’s lack of capacity to exercise the power of revoca-

tion, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

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

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

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

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

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

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

(n) "Trust protector" means 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:

(I) The settlor of a trust.

(ii) The holder of a power of appointment.

As amended by 2009 PA 46 (eff. Apr 1, 2010), 2012 PA 483 (eff. Dec 28, 2012).

Reporter's Comment

Section 7103 includes definitions for many, but not all, of the defined terms in the MTC. *Knowledge* is defined in §7104, MCL 700.7104.

Because the MTC is embodied within and is a part of EPIC, the meaning of some terms used are provided within the definitions in §§1103 through 1108, MCL 700.1103–.1108. Several of the terms that are defined in the UTC have been made generally applicable throughout EPIC by including them in the general EPIC definitions. Important terms that are used in the MTC but that are defined in Article I include the following:

- *conservator*, defined in §1103(h), MCL 700.1103(h)
- *environmental law*, defined in §1104(a), MCL 700.1104(a)
- *guardian*, defined in §1104(l), MCL 700.1104(l)
- *jurisdiction*, defined §1105(f), MCL 700.1105(f)
- *person*, defined in §1106(n), MCL 700.1106(n)
- *property*, defined in §1106(u), MCL 700.1106(u)
- *state*, defined in §1107(f), MCL 700.1107(f)
- *terms of a trust* and *terms of the trust*, defined in §1107(k), MCL 700.1107(k)
- *trust*, defined in §1107(n), MCL 700.1107(n)
- *trustee*, defined in §1107(o), MCL 700.1107(o)