

An Overview of Important Drafting Considerations Following Enactment of the Michigan Trust Code

By: Sandra D. Glazier, Esq.

The Michigan Trust Code (referred to in this article as the “MTC”) will become effective April 1, 2010. While the MTC may present many enhanced drafting opportunities, it may also create some unintended consequences for uninformed estate planners. This article is not intended to cover all implications of the MTC; rather it is intended to provide practitioners with a cursory overview of only some of the areas upon which practitioners may wish to focus their attention.

Drafting Considerations. While some provisions of the MTC may be overridden by the specific terms of a Trust, other areas will be governed by the provisions of the MTC irrespective of the terms of the Trust instrument. A non-exhaustive list of issues where the MTC will trump the terms of the Trust instrument follows: (1) A Trustee may not be relieved of its obligation to administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with the Code. Because the “terms” and “purposes” of the Trust gain elevated import under the MTC, one might wish to now include “purpose” and “Grantor intent” clauses in documents. (2) A Trust can’t modify the effect of certain creditor’s rights delineated in Part 5 of the MTC. (3) Financial institutions will no longer be required to provide a bond in order to act as a Trustee, but the court may require that any other Trustee post a bond under such terms and conditions as the court deems appropriate. (4) The court retains the power to adjust Trustee compensation, even if such compensation is specified by the Trust or by contract, and to the extent the court deems the compensation to be

too high or too low. It might prove helpful to include an explanation in the Trust as to why higher compensation might be justified in a particular situation, as such language might influence a court's view regarding the appropriateness of such compensation, especially where a Trustee has special knowledge, expertise or skills in a particular area of import to the administration of the Trust or regarding the assets of the trust estate and/or of the family's dynamics. Subject to the power of the court to reduce or increase compensation, the MTC permits the Trust to address Trustee compensation. If a Trust is silent, it will be presumed that compensation must be "reasonable". (5) A Trustee must notify Qualified Trust Beneficiaries¹ within 63 days of a Trust becoming irrevocable that the same has occurred, and the notice must provide information regarding the of the trust's existence, the identity of the Grantor(s), of the court in which the Trust is registered (if applicable), and the right to request a copy of the terms of the Trust that describe or affect the beneficiary's interest. If one follows these notice requirements, and also notifies persons affected by the terms of the Trust (within that period the 63 days period) that they will only have six months from the date of the notice to contest the validity of the terms of the Trust, a six month limitations period in which to bring such contests will be triggered. If this process isn't utilized then such persons will have a longer two year period from the date the Trust became irrevocable to contest the validity and terms of the Trust instrument. Additionally, when a Trustee accepts an appointment to act, it must notify the Qualified Trust Beneficiaries of such acceptance, and provide the beneficiary with the Trustee's name, address and phone number (and the court, if any, that the Trust is registered in). One might, therefore, consider spelling out the notice requirements in the Trust, to put Trustees on notice of these obligations. (6) Any required notices must be provided to the last known personal or business address, but

may now also be made via email under certain circumstances. (7) A Trustee cannot change the venue for trust administration without providing 63 days prior notice and an opportunity for the Qualified Trust Beneficiaries to object. (8) A Trustee must also notify Qualified Trust Beneficiaries in advance, of any change in the method or rate of the Trustee's compensation and the failure to do so may result in the Trustee not being entitled to the increased or modified method of compensation. (9) Even though a Trust may direct that accounts and information be provided to less than all of the Qualified Trust Beneficiaries, the Court may direct that the Trustee provide statements of account and other information to persons otherwise excluded under the terms of the Trust. Therefore, one might consider including language to assist the court in its exercise of discretion and to increase the likelihood that the court will decline requests that information be provided to such additional persons. (10) If exculpatory terms are inserted into a Trust instrument as a result of abuse by a Trust protector, a fiduciary or someone who had a confidential relationship to the Grantor, such terms may be considered inoperative. Nonetheless, one may still draft to relieve a Trustee of liability for the acquisition or retention of a particular asset or asset class or failure to diversify investments. (11) Since the MTC operates as a default in many instances when a Trust is otherwise silent on an issue, it may be important to spell out Co-Trustee rules (i.e. delegation of powers, vacancies, what happens when a Trustee is unable or unwilling to act, how delegations of powers can be revoked, etc).

Termination Provisions. Since trusts will be subject to termination under the MTC when they reach a value of \$50,000², this issue should be considered and potentially addressed when now drafting Trusts. Failure to address this issue could prove problematic if the Trust is intended to hold assets worth less than this amount (such as a trust for a minor or an

incapacitated person, a person with a drug problem, or in a trust that is to permit a beneficiary to continue to qualify for “special needs treatment”).

No Contest Provisions. The MTC attempts to resolve issues relating to no contest clauses. Under the MTC such clauses will not preclude contests or proceedings premised upon probable cause. Consequently, if a Grantor anticipates that a particular person or beneficiary may cause a problem, one might consider specifically indicating the concern which the Grantor has regarding such individual(s) to make it easier for a court to determine whether probable cause for the contest actually exists.

Notice/Accounting/Waiver Issues. A Trust may permit notice to be provided by email. Because of spam guards, if notices are to be sent by email the Trustee might consider obtaining the recipient’s consent to delivery by email and receive confirmation from the intended recipient of his/her correct email address. A Trust may now permit waivers of notice and accounts; further, such waivers may be either in writing or oral. That being said, one might still wish to obtain written waivers in order to provide documentation of the waiver. Importantly, a beneficiary may waive the right to receive trustee reports and/or accountings. If a beneficiary waives the right to receive trustee reports or accountings, he will not be precluded from commencing an action for breach of trust more than one year after the end of the calendar year in which an alleged breach occurred, when a waiver existed for that time frame. While waivers are permissible, it is also important to note that they may be revoked at any time.

In the absence of a waiver of the right to receive an accounting, a beneficiary will have one year in which to object to an accounting (provided sufficient notice of the transaction giving rise to a potential claim was reflected in the accounting), and further **provided** the accounting

also specifically puts the beneficiary on notice that they must act within that one year period or any alleged claim for breach of Trust will be barred. In the absence of fulfilling both of these requirements, the statute of limitations for actions covered in an accounting will be five years from: (i) the removal, resignation or death of the Trustee; (ii) the termination of the beneficiary's interest in the Trust; and/or (iii) termination of the Trust. Notwithstanding the above, if a partial or full termination of a Trust is to occur, a Trustee may shorten the period to object to proposed distributions from the Trust by providing notice reflecting the planned distributions and by informing the beneficiaries that they (i) have the right to object to the proposed distribution within 28 days of the notice and (ii) if they fail to object within that period of time any objections which they might have had to the planned distribution will be deemed to have been waived. Additionally, while the MTC will shorten the objection period with regard to an account (for which a waiver and consent was not obtained) to one year, if court approval of the account is obtained, then the limitations period may be reduced even further to the applicable appeal period or 28 days. Consequently, there may be circumstances when a Trustee might wish to close administration under court supervision or to have an annual account allowed by the court.

Is the Trust Revocable? In juxtaposition to prior law, unless a Trust specifically states otherwise it will be construed to be revocable. Moreover, incapacity of the Grantor will not necessarily make a Trust irrevocable during such period of incapacity, so one might wish to draft so as to address this issue.

Certificates of Trust. Certificates of Trust must now reflect: (1) the name and date of the trust instrument; (2) each and every amendment; (3) the name and address of each currently acting Trustee; (4) the powers of the Trustee relating to the purposes for which the certificate is

offered; (5) the revocability or irrevocability of the Trust and the identity of any person holding a power to revoke the Trust; (6) the authority of co-Trustees to sign or otherwise authenticate and whether all or less than all of the Trustees are required to act in order to exercise powers of the Trustee; (7) the certificate must be in the format of an affidavit; (8) it must state that the Trust has not been revoked, modified or amended in any manner that would cause the representations contained in the certificate to be incorrect; and (9) it may contain exculpatory language permitting third parties to rely upon the representations contained in the certificate.

Potential Benefits of Utilizing MTC Compliant Certificates of Trust. While someone receiving a MTC compliant Certificate of Trust may still require the Trustee to furnish copies of pertinent excerpts from the Trust as well as excerpts from later amendments to the extent such provisions designate the Trustee and confer upon the Trustee the power to act in the pending transaction, there may now be penalties imposed (in the form of damages, costs, expenses and legal fees) if a party requires the Trustee to provide more than the statutorily required provisions of the Trust instrument (inclusive of the powers relating to the pending transaction), to the extent that such penalties are determined to be appropriate by a court.

The Court's Power to Modify or Terminate Trusts. The court is empowered to modify or terminate a Trust for (i) circumstances not anticipated by the Grantor, (ii) to further the Grantor's stated purpose, (iii) if no stated purpose the Grantor's is set forth to further the Grantor's "probable" intention. Consequently, scrivener's might consider expressly stating, where appropriate, the purposes of the trust, its goals with regard to beneficiaries as well as desired tax results.

Unintended Trust Protectors. When a committee (comprised of any non-beneficiaries) is utilized to address any aspect of Trust administration (i.e. the selection of successor Trustees, the operation of a business, discretionary decisions provided for by the Trust, to modify provisions, etc.) the non-beneficiary member will be deemed to be a “Trust Protector” and will be held to be a fiduciary subject to fiduciary standards. Unless one drafts around this issue, such a committee member may be held responsible for the actions and supervision of successor Trustees whom they select. Trust Protectors will also include anyone who, but not be limited to persons who can: (i) change the dispositive terms of the Trust; (ii) direct investment decisions; (iii) remove or replace Trustees; (iv) approve or veto discretionary distributions to beneficiaries; (v) turn “grantor trust” provisions on or off; (vi) add or remove beneficiaries; or (vii) add, remove, or change powers of appointment. Therefore, if such powers are granted to a non-beneficiary and/or third parties who aren’t acting as Trustees, careful drafting is required. Moreover, if one is deemed a Trust Protector subject to a fiduciary duty, they may be held liable for any loss that results from a breach of those duties. While a Trust can provide exculpatory language for the Trust Protectors benefit, it cannot relieve the Trust Protector of liability for acts (i) committed in bad faith, (ii) with reckless indifference to the purposes of the Trust, or (iii) otherwise provide exculpations to Trust beneficiaries or a Trust Protector if such provisions were included in the Trust as the result of the abuse by the Trust Protector of a fiduciary of a confidential relationship to the Grantor. Therefore, there it is unclear whether exculpatory terms will be deemed effective as to an attorney who drafts the Trust instrument and who is also treated as a Trust Protector. In light of the expansive class of persons who will be deemed to be Trust Protectors, one might wish to consider specifying which powers should be deemed non-fiduciary

in nature as opposed to those which should be construed to be of a fiduciary nature. Additionally, while there are various powers which are treated as being non-fiduciary under the Internal Revenue Code (“IRC”), some of those same powers may now be construed to be fiduciary for purposes of the MTC.

Additional Administrative Issues. One may now complete Trust administration much the same as a decedent estate. But, if a Trustee wishes to complete administration with the court’s blessing the Trustee will also have to provide beneficiaries with accountings that comport with the probate accounting requirements previously provided for decedent estates under EPIC. Additionally, a Trustee may also submit proposed distributions to the beneficiaries for review and then have them approved by the court, much the same as could be done in the closure of a decedent estate under court supervision. During a Grantor’s incapacity, unless otherwise specified in the Trust, the Trustee must provide trust accountings to the Grantor’s designated agent, but if that agent is the same person who is then acting as the Trustee, the Qualified Trust Beneficiaries must be provided with such accountings.

Capacity Issues. The standard or requirements with regard to the capacity to make a will or a trust will now be identical. A Grantor or Testator must have the ability to (i) understand that he or she is providing for the disposition of his or her property after death; (ii) know the nature and extent of his or her property; (iii) know the natural objects of his or her bounty; and, (iv) understand in a reasonable manner the general nature and effect of his or her act in signing the will/trust. Therefore, one may now wish to reflect that the person is of “sufficient mental capacity” instead of “of sound mind”.

Other areas of concern which scriveners may wish to consider relate to: (1) Trust advisors (those being persons who can make recommendations but whose advice the Trustees are not obligated to follow, but who aren't fiduciaries and don't fall within the Trust protector rules) to the extent that such advice may cause problems for the Trustees who don't follow the advice so rendered; (2) the impact of fraud, duress, undue influence or mistake and whether the existence of the same results merely renders the bequest or provision resulting from actions or the entire amendment/document invalid; (3) revised rules with regard to the termination of non-charitable trusts (with or without court intervention); (4) that joint trusts will only be subject to amendment by joint action if funded with community property and to the extent that a joint trust doesn't contain community property, each grantor may revoke or amend **only to the extent of his/her contribution** to the trust; (5) Trustees will be permitted to make loans to trust beneficiaries as well as to guarantee loans by 3rd parties to trust beneficiaries (which given the intent behind some spendthrift provisions, one may wish to draft around); (6) a Trust may permit the utilization of mediation and/or arbitration or other similar processes for resolution of disputes regarding interpretation of the Trust and/or its administration; (7) new requirements imposed when a Trustee desires to change the principal place of administration for a Trust; and, (8) the creation of what amount to "super-creditors" with regard to obligations pertaining to alimony, child support, persons who supplied services that enhance, preserve or protect a beneficiary's interest in the trust and who has a judgment for the same, the State of Michigan and the US Government (under a variety of circumstances).

Drafting Opportunities. Despite the areas of concern raised above, there are also many enhancements and drafting opportunities provided under the MTC with regard to spendthrift

provisions **and** solely discretionary distribution trust provisions. Therefore, one might wish to review such options and the potential benefits that might be provided by utilization of the same.

Other Impacted Areas. In addition to the above, one should be cognizant of the following non-exhaustive list of impacted areas: (1) the doctrine of cy pres; (2) current beneficiaries will now include holders of powers of appointment; (3) the court may review the propriety of the employment of any person employed by a Trustee, including, an attorney, auditor, investment advisor, or other specialized agent or assistant; (4) oral trusts are expressly authorized and governed by the act; (5) a court may reform a Trust even if the Trust is unambiguous to conform the Trust to the Grantor's intention if such intent is proven by clear and convincing evidence of both the Grantor's intent and the terms were affected by a mistake of fact or law; (6) a Trust may be modified (retroactively) to achieve the Grantor's tax objectives as long as the modification isn't contrary to the Grantor's "probable" intention; (7) when Trusts are consolidated for administration issues relating to the rule against perpetuities are addressed; (8) distributions in satisfaction of a support provision which are tied to an ascertainable standard will only be subject to enforcement of a judgment (except as to "super creditors") to the extent that the income or principal, or both, so distributed is not necessary for the health, education, support or maintenance of the trust beneficiary, and only to the extent that such distribution is made directly to such beneficiary; (9) notwithstanding a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income, if the time for a distribution has been reached and not distributed within a reasonable period of the distribution due date; (10) a Grantor's power to revoke, amend or request a distribution, is personal to the Grantor and may only be exercised by an agent under a power of attorney to the extent expressly authorized by the

terms of the Trust or in the power of attorney, (11) a conservator or plenary guardian of a Grantor may only exercise Grantor's power to revoke, amend or request a distribution of trust property to the extent authorized by the terms of the Trust **and** with the approval of the court supervising the conservatorship or plenary guardianship; (12) rules regarding abatement of bequests and satisfaction of specific devises of property that no longer exists will also apply to bequests contained in a Trust; (13) claims against Trusts may be made, with regard to insurance benefits, in a similar to the process relating to probate estates (to the extent of the insurance coverage) after the claims period has passed even if any applicable statute of limitations has not; (14) steps for disallowing a claim after allowance or allowing a previously disallowed claim are specified and a Trustee's failure to follow such may create liability for the Trustee; (15) claims (against a Trust or probate estate) will bear interest from 63 days following the date after the claims period expires until satisfied, at judgment interest rates unless the contract upon which the claim was premised contained a different rate of interest; (16) if a claim is allowed, but then the claimant can't be found, such claims may be then disallowed in a court proceeding; (17) Trustees may offset an allowed claim against a counterclaim of the Trust against the claimant; (18) a Trustee may inadvertently be deemed to have accepted the Trust, if the method for accepting the Trust isn't spelled out as being the exclusive method for doing so; (19) Trustees who advance funds to preserve the Trust may receive interest on such advancements and a lien against Trust assets for reimbursement of the advanced funds; (20) expenses that are advanced to prevent unjust enrichment to the Trust, even if not properly incurred in the administration of the Trust may now be reimbursed from the Trust estate; (21) there may be an automatic right to reclaim property erroneously distributed to a beneficiary in addition to recovery of the income and/or

gain experienced on the property following distribution or the value thereof if the property no longer exists; (23) any person who converts trust property or refuses to transfer property to the Trustee, without colorable claim, may be subject to double damages; (24) Trustees will be obligated to timely respond to reasonable requests for information regarding the administration of the Trust; (25) Trust accountings must be provided at least once annually and contain a report of trust property, liability, receipts, disbursements, source and amount of trustee compensation, as well as a listing of trust property remaining at the end of the accounting period (and to the extent feasible its fair market value); (26) any beneficiary may waive the requirement of trust reports or other information and may, with regard to future reports, withdraw such waiver; (27) a Trustee may satisfy a charitable pledge of the Grantor, even if the same isn't enforceable or binding, and even if a claim was not properly filed, if the Trustee believes the Grantor would have wanted the pledge satisfied; (28) if a Trustee loans Trust assets to beneficiaries the obligation to repay such loan may be offset against future distributions; (29) a release signed by a beneficiary (including waivers and consents) will not be binding to the extent that the beneficiary's rights or a material fact relating to the Trustee's breach was not disclosed in advance of the waiver/release being provided; (30) absent a breach of trust the Trustee will not be liable for loss or depreciation in the value of trust property or the failure to generate income or make a profit; and, (31) attorney fees may be awarded to **anyone who** enhances, preserves or protects trust property from the trust that is the subject of such proceeding.

While this article is not intended to be an exhaustive analysis of issues raised by the MTC nor does it address all areas which will now require one's attention, hopefully it provides the

reader with a starting point for the review, modification and future drafting of estate planning documents.

¹ Qualified Trust Beneficiary is a defined term under the MTC which includes current income beneficiaries, holders of powers of appointment and first tier contingent beneficiaries.

² This amount will be indexed for inflation.

Sandra Glazier of Lipson, Neilson, Cole, Seltzer & Garin, P.C. concentrates her practice in family law, probate and estate planning. She's also a mediator and arbitrator, belongs to the OCBA Family and Probate Court committees, is a fellow of the OCBA Foundation, a liaison to the Legislative Committee and has served as chairperson of the Family Court Committee. Sandra taught Valuation for Federal, Estate and Gift Tax Purposes and has given presentations on valuation, tax, and separate property.