



# Introducing the Michigan Trust Code

By Mark K. Harder

**O**n June 18, 2009, Governor Jennifer Granholm signed into law legislation enacting the Michigan Trust Code (MTC). The MTC provides the citizens of Michigan with the state's first comprehensive codification of the law of trusts. It also represents a continuation of the modernization of Michigan's laws governing trusts and estates, which began in 1998 with the Estates and Protected Individuals Code (EPIC) and continued with the enactment of the Uniform Principal and Income Act in 2004 and the partial repeal of the Rule Against Perpetuities in 2008.

The MTC was drafted by the Michigan Trust Code Committee of the Probate and Estate Planning Section of the State Bar of Michigan in close consultation with the Michigan Bankers Association's Trust Counsel Committee. The result of a five-year drafting effort, the MTC relies on the structure and provisions of the Uniform Trust Code (UTC) as the starting point for many of its provisions. However, the MTC is a uniquely Michigan document that draws from both the UTC and existing Michigan law to preserve long-established procedures, practices, and principles concerning trusts in Michigan while also filling the numerous gaps that have existed.

## Organization

The MTC is part of EPIC and is found in Chapter 700 of the Michigan Compiled Laws.<sup>1</sup> It is organized into nine parts:

- **Part 1—General Provisions and Definitions:** Consists of a series of general provisions and one definitional section. Other definitions are found in Part 1 of Article I of EPIC.<sup>2</sup>
- **Part 2—Judicial Proceedings:** Contains several provisions dealing with the courts and their relationship to trusts, including jurisdiction, venue, and trust registration.
- **Part 3—Representation:** Deals with representation of beneficiaries in matters such as the receipt of notice and consent.
- **Part 4—Creation, Validity, Modification, and Termination of Trusts:** Prescribes rules pertaining to the creation, modification, and termination of trusts.
- **Part 5—Creditor's Claims; Spendthrift and Discretionary Trusts:** Deals with the relationships to the trust of creditors of beneficiaries of trusts, the enforceability of spendthrift provisions, and the effect of discretionary distribution provisions.



The MTC took effect on April 1, 2010, and applies to all trusts, whether they were established before, on, or after that date.

- **Part 6—Revocable Trusts:** Addresses issues unique to revocable trusts. It is also the place to find the provisions permitting creditors of a decedent to bring their claims against the revocable trust when there is no probate estate or the probate estate is inadequate.
- **Part 7—Office of Trustee:** Contains a series of default rules related to the office of trustee, including rules governing trustee acceptance; the rights and obligations of co-trustees; resignation, removal, and appointment of trustees; and trustee compensation.
- **Part 8—Duties and Powers of Trustee:** Sets forth the duties of the trustee and the trustee's powers.
- **Part 9—Liability of Trustees and Rights of Persons Dealing with Trustee:** Addresses the liability of trustees and beneficiaries' rights upon a breach of trust. It also contains provisions describing the relationships between the trustee and persons other than the beneficiaries.

The effective date and transition provisions for the MTC are found at MCL 700.8201 through 700.8206.

### Important Themes and Principles

The MTC contains several important themes:

**It applies to all trusts.** The MTC took effect on April 1, 2010, and applies to trusts whether they were established before, on, or after that date. Only a limited number of provisions will not apply to previously existing trusts.

**It is a series of default rules.** As discussed in a companion article, Section 7105 of the MTC provides that the code is a series

of *default* rules, which can be varied by the settlor of the trust. From a practitioner's standpoint, this is an extremely important rule because it generally recognizes freedom of drafting.

**It preserves existing Michigan law.** A guiding principle throughout the drafting process was to preserve longstanding Michigan law absent significant procedural or policy benefits from changing the law.

**It preserves the UTC's language.** Where Michigan's law and the UTC are substantively similar, the MTC tends to favor the UTC language if uniformity of language among the states might be advantageous. However, because the drafters sought to preserve Michigan law, attorneys should exercise care before relying on the decisions of courts of states in which the UTC has been enacted to ensure that the decisions of other states are based on truly comparable statutory provisions.

**It aligns wills and revocable trusts used as will substitutes.** Because of the widespread use of revocable trusts as will substitutes, the MTC aligns the treatment of wills and revocable trusts in several of its provisions.

**It does not provide for self-settled asset protection trusts.** Self-settled asset protection trusts are not part of the UTC, and the MTC does not address this subject.

### Some New Provisions

The MTC introduces some new concepts or changes some existing ones:

- Transferring the principal place of administration is generally permitted without court oversight, but will require prior notice.<sup>3</sup>
- Nonjudicial settlement agreements are recognized.<sup>4</sup>
- The representation rules are extended to nonjudicial matters, including nonjudicial settlement agreements, consents, waivers, and approvals of accountings.<sup>5</sup>
- A first-time provision permits nonjudicial termination of small trusts.<sup>6</sup>
- A common standard of capacity is used for wills and revocable trusts, with modifications to the standard of capacity to make a will.<sup>7</sup>

### Fast Facts:

The Michigan Trust Code (MTC) provides the citizens of Michigan with the state's first comprehensive codification of the law of trusts.

The MTC is a uniquely Michigan document that draws from both the Uniform Trust Code and existing Michigan law to preserve long-established procedures, practices, and principles concerning trusts in Michigan while also filling the numerous gaps that have existed.

The MTC is a series of *default* rules, which in most cases can be varied by the settlor of the trust. From a practitioner's standpoint this rule generally recognizes freedom of drafting.

- All trusts created after March 31, 2010, are presumed revocable unless they state otherwise.<sup>8</sup>
- A first-time statute of limitations regulates challenges to the validity of revocable trusts.<sup>9</sup>
- It includes a first-time provision dealing with the powers and status of trust protectors.<sup>10</sup>
- The MTC has a provision for binding approval of a plan of distribution for terminating trusts.<sup>11</sup>
- The ademption and exoneration provisions applicable to wills under EPIC § 2605 through § 2608 will now apply to trusts.
- A new provision validates *in terrorem* or no-contest clauses in trusts unless probable cause for a challenge exists.<sup>12</sup>

### Some Continued Provisions

The MTC continues a number of provisions found in current law:

- It retains optional trust registration.<sup>13</sup>
- The rules for termination, modification, reformation, combination, and division of trusts are largely unchanged.<sup>14</sup> This includes the *cy pres* rules for charitable trusts.<sup>15</sup>
- It codifies common law regarding the rights of creditors of beneficiaries and the rules related to spendthrift, support, and discretionary trusts.<sup>16</sup>
- It retains provisions for claims against a decedent's revocable trust when the probate estate does not exist or is inadequate to pay claims.<sup>17</sup>
- Notice of the existence of trusts and the law concerning trust accountings is retained without substantive changes.<sup>18</sup>

- Trustee powers are carried over from EPIC, but with the addition of five new powers expressly provided for in the UTC:<sup>19</sup>
  - (1) Powers related to employee benefit and retirement plans
  - (2) Making loans
  - (3) Pledging trust property to guarantee debts of others
  - (4) Using alternative dispute resolution mechanisms
  - (5) Exercising powers to wind up the trust and distribute property to those entitled to it
- Caselaw is codified regarding attorneys' fees in litigation.<sup>20</sup>

### Implications for Clients and their Advisors

The implications of enactment of the MTC will vary depending on the level of thoroughness with which the existing trust agreements were drafted and the decisions that were made by the settlor and his or her attorney. The MTC is a series of default rules. Comprehensive, well-drafted trust agreements likely already address most of the topics addressed in the code. As a result, the default rules are not likely to have a significant impact. Nevertheless:

- Attorneys should review their forms to compare the MTC's default rules against how the forms are drafted. Where issues are not addressed or the attorney wishes to rule out the code's application on a particular subject, forms should be updated and clients should consider making changes.
- The "nonmodifiable" provisions should be reviewed and compared to the terms of trusts to see whether they are consistent with the statute, and changes should be made as needed.<sup>21</sup>
- Evaluate whether the application of the ademption and exoneration rules is desirable.<sup>22</sup>
- Trusts in which a trust protector is named should be reviewed to see how the trust protector provision affects the trust. Thought should be given to whether a trust protector exists even when the term is not used.<sup>23</sup>
- Provisions dealing with termination and modification should be evaluated, especially how small trusts are terminated.<sup>24</sup>



- The settlor's intent and the purposes of the trust are important. Consideration should be given to whether intentions and purposes are clear or need clarification.
- Distribution provisions should be evaluated to determine whether provisions are discretionary and the impact if they are (or are not). Discretionary trusts are extremely protective of the property of the trust, but afford the beneficiary limited rights to enforce distributions. The tax savings provisions may also blunt the settlor's intent.<sup>25</sup>
- Consider the efficacy of existing exculpatory provisions in light of the new (nonmodifiable) rules that do not permit exculpation of breaches of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries, or if it was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship.<sup>26</sup>
- Align forms to match terminology of the MTC. For example, the code discontinues the terms "current trust beneficiary" and "interested trust beneficiary."
- Revisit trust powers so they conform to the new powers in the MTC.<sup>27</sup>
- Review durable powers of attorney. Several sections of the MTC address how an agent under a durable power of attorney can act on behalf of the settlor. These provisions include the representation rules in Part 3, Section 7405 (enforcement of charitable trusts), Section 7602 (revocation and amendment of revocable trusts), and Section 7603 (receive information about the administration of revocable trusts).

Attorneys assisting in trust administration and estate settlement will also want to consider some modifications to practices and procedures, including:

- Whether and how to use the new statute of limitations for contesting revocable trusts.<sup>28</sup>
- Procedures for transferring the principal place of administration.<sup>29</sup>
- Representation rules and how to use them to a client's advantage.<sup>30</sup>

The implications of enactment of the MTC will vary depending on the level of thoroughness with which the existing trust agreements were drafted.

- How to use nonjudicial settlement agreements to avoid a trip to probate court.<sup>31</sup>
- Delegation of duties between co-trustees.<sup>32</sup>
- The new notice of proposed distributions upon termination or partial termination.<sup>33</sup>

## Conclusion

Enactment of the Michigan Trust Code represents a continuation of the process of modernizing the law of estates and trusts. It is a significant advance in the law of trusts and ensures that Michigan's citizens and bar have a single-source, comprehensive, modern body of law to govern an area of importance to its citizens, its legal and financial communities, and its courts. ■

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Commentary published by the Institute for Continuing Legal Education.

## FOOTNOTES

1. MCL 700.7101 *et seq.*
2. MCL 700.1103 *et seq.*
3. MCL 700.7108.
4. MCL 700.7111.
5. MCL 700.7301 through 700.7305.
6. See MCL 700.7414.
7. See MCL 700.7601; MCL 700.2501.
8. MCL 700.7602.
9. MCL 700.7604.
10. MCL 700.7809.
11. MCL 700.7821.
12. MCL 700.7113.
13. See MCL 700.7209 through 700.7211.
14. See MCL 700.7410 through 700.7417.
15. See MCL 700.7413.
16. See MCL 700.7501 through 700.7507.
17. MCL 700.7605 through 700.7615.
18. MCL 700.7814.
19. MCL 700.7817.
20. MCL 700.7904.
21. See MCL 700.7105.
22. See MCL 700.7112; MCL 700.2605 through 700.2608.
23. See MCL 700.7103(n); MCL 700.7809.
24. See MCL 700.7410 through 700.7417.
25. See MCL 700.7815.
26. See MCL 700.7908.
27. See MCL 700.7816 and 700.7817.
28. See 700.7604.
29. See 700.7108.
30. See 700.7301 through 700.7305.
31. MCL 700.7111.
32. See MCL 700.7703.
33. See MCL 700.7821.