

Report on Public Policy Position

Name of section:

Probate & Estate Planning Section

Contact person:

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Regarding:

Proposed Technical Amendments to the Michigan Trust Code

Date position was adopted:

December 12, 2009

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

20 Voted for position

0 Voted against position

0 Abstained from vote

3 Did not vote

Position:

Support

Explanation of the position, including any recommended amendments:

The Section endorsed and recommended technical amendments to EPIC sections 1209 and 2519, to add headings to the parts that comprise Article VII of EPIC, to divide Article VIII of EPIC into parts 1 and 2 and to add headings for them, and to approve technical amendments to MTC sections 7411, 7414, 7817, 7821, and 7910.

MICHIGAN TRUST CODE

Proposed Technical Amendments

As Approved December 12, 2009

§1209

Proposed change:

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative, including relief from liability or penalty for failure to post bond or to perform other duties, the sole holder or all coholders of a presently exercisable or testamentary general or special power of appointment, including 1 in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests, as permissible appointees, takers in default, or otherwise, are subject to the power ~~and to the extent there is no conflict of interest between the holder and the persons represented.~~

Reason:

Section 1209 is a representation provision. As it existed prior to enactment of 2009 PA 46 it did not include an exception making it inapplicable if a conflict of interest existed between the holder of a power of appointment and the persons whose interests were subject to the interest. No such exception exists in §1403(b)(i), which is similar.

UTC §302 contains a representation rule pursuant to which holders of powers of appointment represent those whose interests are subject to the power. However, it does not apply when a conflict of interest exists. Because §1209 and §1403(b)(i) did not include this exception, §7302 ultimately did not include the exception found in the UTC provision. An early draft of possible revisions to §1209 considered adding a conflict of interest exception, which was not removed when the representation rules were finalized. As a result §1209 was amended to add a requirement that had not previously existed, was not found in §1403(b)(i), and was not included in §7302. The inconsistency between §1209, on the one hand, and §1403(b)(i) and §7302, on the other, was not noted until the Commentary was being prepared this fall. The proposed change restores §1209 to its form prior to the enactment of 2009 PA 46 and makes it consistent with §1403(b)(i) and §7302.

§2519

Proposed change:

(b) All to be distributed to my heirs as if I did not have a will.

(Your signature)

ARTICLE 3. NOMINATIONS OF PERSONAL REPRESENTATIVE, GUARDIAN, AND CONSERVATOR

Personal representatives, guardians, and conservators have a great deal of responsibility. The role of a personal representative is to collect your assets, pay debts and taxes from those assets, and distribute the remaining assets as directed in the will. A guardian is a person who will look after the physical well-being of a child. A conservator is a person who will manage a child's assets and make payments from those assets for the child's benefit. Select them carefully. Also, before you select them, ask them whether they are willing and able to serve.

3.1 PERSONAL REPRESENTATIVE.

Reason:

When the updated EPIC Commentary was being prepared, it was noted that the Michigan Statutory Will is missing a heading for Article 3, as it does for other articles of the Will. It has existed this way since EPIC was enacted in 1998. The change will correct this omission.

Headings

Proposed change:

Add headings to each part of Article VII that state as follows:

Part 1
General Provisions and Definitions

Part 2
Judicial Proceedings

Part 3
Representation

Part 4
Creation, Validity, Modification, and Termination of Trust

Part 5
Creditor's Claims; Spendthrift, Support and Discretionary Trusts

Part 6
Revocable Trusts

Part 7

Office of Trustee

Part 8

Duties and Powers of Trustee

Part 9

Liability of Trustees and Rights of Persons Dealing with Trustee

Divide Article VIII into Part 1 (encompassing §8101 through §8102) and Part 2 (encompassing §8201 through §8206) and include headings as follows:

Part 1

Miscellaneous Provisions

Part 2

Michigan Trust Code Miscellaneous Provisions; Effective Date

Reason:

The omission of headings for each Part of the Michigan Trust Code was the result of a misunderstanding with LSB during the bill drafting process. The Committee Chair was advised that the compiler would add catchlines after the passage of the legislation and understood this to mean that the compiler would add the headings to parts as well. After passage, when the catchlines were being inserted, we learned that the compiler could not add headings for parts, but that this must be included in the legislation. The rest of EPIC contains headings for each part, which are useful to the users, and headings for each part of Article VII are therefore being proposed for addition.

In addition, the designation of Parts 1 and 2 and their headings in Article VIII also were overlooked in the bill drafting process and are being recommended for addition.

§7411(3), (6)

Proposed change:

(3) Notice of any proceeding to terminate or modify a trust shall be given to the settlor, ~~or~~and 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, and any other person named in the terms of the trust to receive notice of such a proceeding.

(6) As used in this section, "settlor's representative" means the settlor's agent under a durable power of attorney, if the ~~attorney in fact~~agent is known to the petitioner, or, if an agent has not been appointed, the settlor's conservator, plenary guardian, or partial guardian.

Reason:

During the course of writing proposed MCR 5.125(C)(32)(b) it was observed that notice might not be required under the statute to a settlor who may have capacity because the person giving notice has a reasonable basis to believe the settlor is incapacitated, even though that belief is inaccurate or not correct. Although the proposed court rule requires giving notice to the settlor and the representative, the Committee felt it appropriate to add a requirement of notice to the settlor in all circumstances and not leave the matter to the proposed court rule.

In addition, it was observed that the Code generally uses the phrase “agent” rather than “attorney in fact”, including elsewhere in §7411(6). To avoid confusion, the Committee has recommended a change from “attorney in fact” to “agent”. This is the only place the term “attorney in fact” is used in the MTC.

§7414

Proposed change:

(3) Upon termination of a noncharitable trust under this section, the trustee shall distribute the trust property in the manner provided for in the terms of the trust, if any, and otherwise to the current income beneficiaries or, if there are no current income beneficiaries, in the manner directed by the court. Upon termination of a charitable trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

Reason:

Section 7414 currently requires trust property be distributed to the income beneficiaries upon termination of a trust pursuant to §7414, unless the terms of the trust provide otherwise. In the case of a charitable remainder trust, this would disqualify the trust. Although well drafted charitable remainder trusts should provide that upon termination the trust property passes to organizations qualified under IRC §170(c), this may not always be the case. To avoid possible disqualification of these trusts, the Committee has recommended a technical amendment.

§7817(w)

Proposed change:

(w) To employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for ~~that~~ this or her employment.

Reason:

The drafting of §7817(2) was completed in the early fall of 2005 and was based largely upon §7401 as it then existed. 2005 PA 204 was passed and given immediate effect in November 2005 and changed §7401(w). The changed was

not noted until the summer of 2009 after enactment of the Michigan Trust Code. The proposed change will restore the language now found in §7401(w) that was inadvertently omitted.

§7821(3)(b)

Proposed change:

(3) A release by a trust beneficiary of a trustee from liability for breach of trust is invalid to the extent either of the following applies:

(a) The release was induced by improper conduct of the trustee.

(b) The trust beneficiary, at the time of the release, did not know of the ~~trust beneficiary's rights or of the~~ material facts relating to the breach.

Reason:

Sections 7821(3)(b) and 7909 each recognize consents, waivers, and releases by beneficiaries. Section 7909 is a general provision. Section 7821(3)(b) applies in the case of terminating or partially terminating distributions. The UTC antecedents to each provision create exceptions when the beneficiary did not know of material facts related to a breach of trust or the beneficiary's legal rights. Section 7909 removes the exception for lack of knowledge of legal rights, but it was not removed from §7821(3)(b). There is no good reason for treating the subset of terminating distributions differently from other circumstances and the Committee has recommended aligning §7821(3) with §7909.

§7910(1)

Proposed change:

(1) Unless otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust estate unless the trustee fails to reveal the trustee's representative capacity ~~and identify the trust estate in the contract.~~

Reason:

Section 7910 is based upon current §7306. There are two concerns with its terms: First, the statement that the trustee must reveal the "trust estate" could be construed to require disclosure of the *property* held in trust. See §7104(b) ("Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration.")

Second, the requirement of disclosure of the trustee's fiduciary status *and* the trust estate or name of the trust in a contract potentially creates a trap for unwary trustees if the trust is not fully and accurately described. UTC §1009,

on which §7909 is based, only requires disclosure of the trustee's representative capacity. Third parties who are advised by the trustee that s/he or it is acting in a representative capacity puts the third party on notice to inquire further into the exact trust with which the third party is interacting and the nature and extent of its assets.

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