

A Closer Look at the Michigan Trust Code: What's New —What's In—What's Next?

By Mark K. Harder¹

Introduction

Governor Granholm signed enacting legislation² for the Michigan Trust Code into law on June 18, 2009. The Code takes effect April 1, 2010, and will apply to all trusts created before, on, or after the effective date.³ The Code provides Michigan with a comprehensive codification of the law of trusts. It preserves much of our current statutory and common trust law and fills in many of the gaps in the current law.

The purpose of these materials is to review key themes, describe some areas where the Code changes Michigan law, and note some places where the Code draws on prior law found in EPIC and elsewhere.

Key Themes

There are several important themes to the Michigan Trust Code.

Series of default rules. Section 7105 of the Code 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.⁴

Preserves existing Michigan law. The Code preserves long standing Michigan law unless there were significant procedural or policy benefits from changing the law.

Preserves uniform language. Where Michigan's law and the UTC are substantively similar, the Michigan Trust Code favors the UTC language if uniformity of language among the states might be advantageous.

Aligns wills and revocable trusts used as will substitutes. Because of the widespread use of revocable trusts as will substitutes, the Code aligns the legal treatment of wills and revocable trusts in several places.

Continuation of Existing Law

As noted above, many of the Michigan Trust Code provisions represent a continuation of current Michigan law or what many believe the law would be if the courts ruled on particular issues. Therefore, there is much in the Code that will be familiar to Michigan practitioners. Some of the more significant areas where current law has been expressly and carefully continued are as follows:

Trust Registration. The trust registration provisions now found in Sections 7101 through 7105 of EPIC are incorporated into Part 2.

Termination and Modification of Trusts. Michigan Trust Code Section 7411(1) is the principal provision dealing with termination and modification of trusts. It is prospective only. It permits courts to approve the termination or modification of the trust upon petition of the current income and vested remainder beneficiaries when continuance is not necessary to achieve a material purpose of the trust. This is consistent with current Michigan law. See *Rose v Southern Michigan Nat'l Bank*, 255 Mich 275, 238 NW 284 (1931).

The Code also recognizes the authority of trust protectors, alone or with the beneficiaries, to terminate trusts when the trust instrument so provides.

The drafters did not intend the adoption of this provision to be in derogation of existing Michigan law, which permits settlors and beneficiaries to agree to termination of a trust with court approval, see *Hein v Hein*, 214 Mich App 356, 543 NW2d 19 (1995), and when the settlor and the trustee to agree to do so, see *Fredricks v Neer*, 260 Mich 627, 245 NW 537 (1932).

Claims of Beneficiaries' Creditors. Part 5 deals with the relationship to the trust of creditors of beneficiaries of trusts, the enforceability of spendthrift provisions, and the effect of discretionary distribution powers. It codifies the Re-

statement (Second) of the Law of Trusts, which has been incorporated into Michigan's common law in decisions such as *Miller v Dept of Mental Health*, 432 Mich 426, 442 NW2d 617 (1989); *In re Edgar Estate*, 425 Mich 364, 389 NW2d 696 (1986); *Evans & Luptak v Obolensky*, 194 Mich App 708, 487 NW2d 521 (1992); *Coverston v Kellogg*, 136 Mich App 504, 357 NW2d 705 (1984); *In re Estate of Sykes*, 131 Mich App 49, 345 NW2d 642 (1983); and *Hurley v Hurley*, 107 Mich App 249, 309 NW2d 225 (1981). This part of the Code *does not* follow the general approach taken in the Uniform Trust Code and the Restatement (Third) of the Law of Trusts.

Accounting to Incapacitated Settlers of Revocable Trusts. Former EPIC Section 7303 dealt somewhat imperfectly with how the trustee of a revocable trust is to keep an incapacitated settlor of a revocable trust informed of the trust administration. EPIC provides a duty to do so and to provide this information to the settlor's designated agent. Left unclear was what to do if the designated agent is the settlor's trustee. This potentially leaves the incapacitated individual vulnerable and the trustee in ambiguous circumstances.

Section 7603 of the Michigan Trust Code builds on this provision and offers a more complete default rule that is more protective of the incapacitated individual. If the trustee reasonably believes the settlor of a revocable trust is an incapacitated individual, the trustee must keep the settlor's designated agent, or if none or if the sole designated agent is a trustee, each person who would be a qualified trust beneficiary if the settlor were deceased, informed of the existence of the trust and reasonably informed of its administration.

Claims Against Decedent's Revocable Trusts. The Michigan Trust Code incorporates into its Part 6 the existing provisions that allow a decedent's creditors to bring their claims against the decedent's revocable trust if there is no probate proceeding or the assets of the probate estate are insufficient to satisfy all of the claims. See

§7605 through §7615.

Compensation of Trustees. Section 7708 makes clear that trustees are entitled to reasonable compensation for their service as trustee. It does not attempt to define how this is to be determined nor does it seek to vary current law in any fashion.

Section 7709 also permits reimbursement of expenses incurred by a trustee, with interest if appropriate, and gives the trustee a lien against trust property if expenses were incurred to protect trust property. The Code also makes clear that advances and reimbursements of expenses are not considered acts of self-dealing or a breach of trust.

Notice of Trust Existence and Accountings. Although it relies on the UTC structure for organizing these provisions, the Michigan Trust Code adopts the conceptual approach to disclosing trusts, providing information about the trust status, and accountings that was found in EPIC. These provisions are found in MTC Section 7814. By continuing the existing rules found in EPIC, the existence of the trust, the identity of the trustee and its address, and a copy of relevant portions of the trust instrument must be provided to the beneficiaries. However, the settlor of a trust will remain free to limit the group that receives annual accountings.

An important distinction to note is a change in terminology. EPIC refers to "current trust beneficiary" and "interested trust beneficiary". These terms are not be used in the MTC and the definitions have been deleted. The Michigan Trust Code uses the terms distributees, permissible distributees, and "qualified trust beneficiary" to describe the same persons.

Trustee Powers. Sections 7816 and 7817 of the Michigan Trust Code set forth the general and specific powers of the trustee. Section 7816 sets forth the general rule. Section 7817 relied upon the provisions of EPIC for a list of specific powers.

There are five new powers expressly provided for in MTC Section 7817:

- Powers related to employee benefit and retirement plans; added as Section 7817(jj).
- Making loans; added as Section 7817(kk).
- Pledging trust property to guarantee debts of others; added as Section 7817(ll).
- Using alternative dispute resolution mechanisms; added as Section 7817(mm).
- Exercising powers to wind up the trust and distribute property to those entitled to it; added as Section 7817(nn).

In addition,

- The provisions dealing with environmental matters now found in EPIC are included without change as Michigan Trust Code Section 7818.
- The provisions found in EPIC dealing with the trustee's authority over tax matters are continued as Section 7819.
- EPIC's facility of payment provision has been included in the Michigan Trust Code as Section 7820.

Attorneys Fees in Litigation. Section 7904 gives the courts the right to assess attorney fees and costs as part of the relief for disputes involving the trust. The Code allows awards from the trust to the beneficiaries only when the matter enhances, preserves, or protects the trust. The provision follows the law in *Becht v Miller*, 279 Mich 629, 273 NW 294 (1937), and *Temple v Temple (In re Estate of Temple)*, 278 Mich App 122, 748 NW2d 265 (2008). In addition, the Code provides for reimbursement of a trustee who defends or prosecutes a matter in good faith, unless it involves a breach of trust for which a court orders relief described in Section 7902(2).

Important New Provisions or Changes

As one might expect in a Code as comprehensive as the Michigan Trust Code, it includes a number of provisions that fill gaps, extend the law, and in a small number of cases affirmatively

change the law. Some of the more important provisions include the following:

Transferring the Principal Place of Administration. Section 7108 defines the principal place of administration of trusts in a manner consistent with EPIC.

Both private and institutional or professional Trustees regularly transfer or relocate the principal places of administration of trusts. In many cases the trust agreement expressly permits the trustee to do so; in other cases the trustee simply does so subject to the existing EPIC requirement that the trustee "administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management." The MTC will continue to permit the trustee to transfer the principal place of administration without court approval.

However, the MTC will require the trustee to give written notice of the proposed change. The notice is given to the qualified trust beneficiaries. The trustee is free to change the place of administration after 63 days unless a beneficiary objects. If an objection is raised, the trustee will need to either cancel plans to transfer the principal place of administration or obtain court approval of the change. If no objection is raised, the transfer of the place of administration can freely occur. Settlers will remain free to provide their own rules as well.

Nonjudicial Settlement Agreements. Michigan Trust Code Section 7111 recognizes nonjudicial settlement agreements. These may be used in a variety of areas and matters related to trust administration, such as interpretation or construction of the trust, approval of accountings, resignation, appointment or compensation of the trustee, transfers of the principal place of administration, and trustee liability.

The list provided in the statute is not exclusive; it is illustrative. However, nonjudicial settlement agreements cannot be used to achieve termination or modification of trusts. These actions remain subject to the provisions found in Part 4 of the Code.

Expanded Representation Rules. The UTC includes an entire article dealing with representation of beneficiaries in matters such as the receipt of notice and consent. The Michigan Trust Code incorporates these sections in substantially the form presented, with some conforming changes to EPIC. These sections build from and closely track the representation provisions of the Uniform Probate Code, which are found in Sections 1209 and 1403 of EPIC.

Due to their similarity to existing provisions of EPIC, the concepts embodied in this Part will be familiar to practitioners. However, current EPIC Sections 1209 and 1403 only apply in the context of judicial proceedings. One significant change Part 3 represents from current law is that it would be applicable at all times, not just when a judicial proceeding is ongoing. This means, for example, that notice and delivery of an accounting given to parents or guardians of minor children can be binding on the child when no conflict exists between the parent and the children.

Enforcement of Charitable Trusts. Section 7405 continues to recognize and permit a wide variety of charitable trusts. Prior to the MTC, however, only the charitable beneficiary and the Attorney General may enforce the terms of the charitable trust. The settlor was not permitted under current law to enforce his or her own trust. *Prentis Family Found, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 698 NW2d 900 (2005).

The Michigan Trust Code includes a provision granting Settlers and named beneficiaries the right to maintain proceedings to enforce charitable trusts. This right is personal to the trustee and may not be exercised by the settlor's heirs, the Settlor's personal representative, or the trustee of the Settlor's revocable trust, and may be exercised by a an agent under power of attorney only if the right is specifically conferred. The Attorney General continues to have the rights contained in the Supervision of Trusts for Charitable Purposes Act, 1961 P.A. 101, MCL 14.251 *et seq.*

Termination of Small Trusts. Courts have routinely authorized the termination of trusts that

have become too small to administer effectively or efficiently. Many trust agreements expressly permit the trustees to also terminate trusts under similar circumstances. Section 7414 specifically authorizes the modification or termination of un-economic trusts with or without court approval. The threshold for termination is \$50,000 and is adjusted for inflation. The Michigan Trust Code directs the distribution of the assets of small trusts to the current beneficiaries if no manner is provided for in the trust instrument.

Capacity Standard. Section 7601 states that the standard of capacity to create a revocable trust is the same as the standard of capacity to make a will.⁵

In recent years, the Michigan courts have used language invoking a contract standard for capacity to set standards for durable powers of attorney and for beneficiary designations.⁶ It makes sense to have more aspects of citizens' estate planning governed by a common standard. Consequently, EPIC section 2501 has been modified to include a more expansive definition of the standard of capacity for making wills, which includes language invoking a contract standard. The definition is based on the Michigan Civil Jury Instructions and adds a requirement that the settlor understand in a reasonable manner the general nature and effect of his actions. This change aligns the rules for determining the capacity required of wills, revocable trusts, durable powers of attorney, and beneficiary designations.

Presumption of Revocability. Section 7602 reverses the common law presumption and provides a general rule that trusts created after the effective date of the enactment of the Code are revocable and amendable unless the trust instrument states otherwise. The Code also provides for how revocation or amendment occurs, and the powers others (such as an agent under a power of attorney or conservator) may have to exercise the settlor's powers.

Statute of Limitations for Challenges to the Validity of Revocable Trusts. Michigan Trust Code Section 7604 brings finality to the question of

when a contest may be brought regarding the validity of a revocable trust. It provides for an end to contests upon the earlier of two years after the settlor's death or six months after the trustee sends notice of the trust's existence, relevant portions of the terms of the trust that describe or affect the person's interest, the trustee's name and address, and the time allowed for commencing a proceeding to contest the trust.

The notice is similar to the required disclosures regarding the trust's existence under Section 7814. This section also provides protection to trustees administering the trust and distributing trust property without knowledge of any pending contest or plans to bring a contest of the trust. The provision also obligates beneficiaries to return any distributions received if the trust is later determined to be invalid.

Trust Protectors. The Code includes Michigan's first law concerning the use of trust protectors. For purposes of the Michigan Trust Code, a trust protector is anyone, other than a settlor or holder of a power of appointment, with the power to direct actions of the trustee. See §7103(n), MCL 700.7103(n).

With certain exceptions, section 7809 requires that trust protectors be fiduciaries, act in good faith, act in accordance with the terms of the trust instrument, and be liable for their actions. The exceptions include trust protectors who are beneficiaries of the trust and trust protectors whose powers are powers of administration within the meaning of Section 675(4) of the Internal Revenue Code.

When a trust protector is serving, the trustee may not act without approval of the court if a trust protector's instruction is contrary to the terms of the trust or would result in a breach of a duty that the trust protector owes to the beneficiaries. However, when the trust protector's directions are within the scope of the protector's authority and are consistent with the protector's duties, the trustee is protected from liability for compliance with the directions of the trust protector. The trustee is also protected from liability

for not taking actions that requires trust protector approval if the trustee has timely sought, but not received, approval. The trustee is also protected if it seeks court approval if the trustee has any question about the propriety of the direction.

The trust protector provisions also ensure that the trust protector is subject to the jurisdiction of Michigan's courts. Finally, the trust protector provisions place nonmodifiable limits on the exculpation of trust protectors, which match the limits on exculpation that apply to trustees.

Distributions Upon Termination. Section 3908 of EPIC permits a personal representative of a probate estate to provide to the beneficiaries a proposal for distributions. The beneficiaries of the estate have 28 days to object. Section 7821 of the Michigan Trust Code provides a similar rule for trusts. It permits the trustee to offer a proposal for distribution of trust property upon termination of the trust and gives the beneficiaries 28 days to object or be bound. The notice of proposed distribution must include provisions informing the trust beneficiaries of the right to object and the time permitted.

EPIC Rules of Construction Applicable to Wills. The widespread use of trusts as will substitutes prompted a decision to make applicable to trusts several rules of construction that are applicable to wills and that are found in EPIC. These include:

- Section 2605 (increase in securities and accessions)
- Section 2606 (nonademption of specific devises)
- Section 2607 (nonexoneration)
- Section 2608 (ademption by satisfaction)

These are incorporated by reference in Section 7112.

In Terrorem or No Contest Clauses. Section 7113 borrows from EPIC Sections 2518 and 3905 the provisions recognizing *in terrorem* or no contest clauses and extends them to trusts.⁷

Revocability of Trust During Settlor's Incapacity. Whether a "revocable" trust remains revocable during the period of a settlor's incapacity

sometimes is misunderstood or uncertain. The definition of “revocable” makes clear that the characterization of a trust as revocable is not affected by the settlor’s lack of capacity to exercise the power, regardless of whether an agent, conservator, or plenary guardian is serving. See §7103(h), MCL 700.7103(h).

Familiarize Yourself with the Code

The Michigan Trust Code takes effect on April 1, 2010. Practitioners will need to use the time between now and then to take a number of steps. The first priority for Michigan attorneys is to familiarize themselves with the structure, scope, and meaning of the Michigan Trust Code. The Code continues current law and fills in many gaps in a way that is consistent with most practitioners’ understanding of the law or what they believe the law would be if the courts ruled on a matter. However, as these materials indicate, there are some substantive changes. In addition, many familiar concepts are now codified or located in different places than previously.

The most important concept to remember about the Code is that it is a default statute. Section 7105(2) provides that the terms of the trust will prevail over the terms of the Code except in a limited number of specific areas described in the section. See Section I.C, above, for the list of exceptions. For planners this provision means they and their clients are free to create terms of the trust that meets their needs. For those administering trusts it means that the terms of the trust must be reviewed and understood because these terms will generally prevail over the provisions of the Code.

Revisit Your Forms

Those engaged in estate planning will want to use the time between enactment and the April 1, 2010, effective date to revisit their forms, compare them to the Trust Code’s default provisions, and determine whether the judgments of the drafters of the UTC and the Michigan Trust Code are consistent with their views and the views of

their clients. Where there are differences, forms will need to be updated.

Some particular areas where practitioners might want to focus their attention include:

Exculpation. The Trust Code limits the ability of the trust agreement to exculpate the trustee from liability. Trustees cannot be relieved of liability for a breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

Trustee Removal. The Michigan Trust Code does not give trust beneficiaries the power to remove trustees. This is a departure from the UTC provision. Settlers remain free to confer this power upon trust beneficiaries and drafters should be careful to consult with their clients and consider whether the trust beneficiaries should be given this power.

Co-trustees. Drafting and providing for the powers of co-trustees is remarkably more complex than may initially appear. Special care and attention should be given to the default rules found in Section 7703 of the Michigan Trust Code and consideration given to this subject and whether the practitioner’s trust forms need to be modified to depart from the default rules.

Accounting Provisions. The Michigan Trust Code provisions requiring notice of the existence of trusts and accounting to beneficiaries are consistent with current law. However, some of the terminology differs. Because these provisions are integral to the administration of trusts, language in forms should be reviewed to ensure that any changes are made to avoid ambiguity.

Discretionary, Support, and Spendthrift Trusts. The Trust Code preserves the common law embodied in the Restatement (Second) and adopted by Michigan’s courts in the areas of discretionary, support, and spendthrift trusts. The Code’s definitions of what is a discretionary provision, support provision, and spendthrift provision should be carefully reviewed and compared to forms to make certain the practitioner understands the forms’ language and how the courts are likely to classify and interpret them.

Rethink Trust Protectors. If practitioners are using trust protectors, these provisions must be reviewed. If the terms of the trust provide that trust protectors are acting in a nonfiduciary capacity,

this language usually will not be effective after the Code becomes effective. Similarly, language that exculpates a trust protector will not be effective if it goes beyond what the statute permits.

In addition, practitioners should consider whether there are persons acting with respect to a trust who are not designated as a trust protector in the document, but who have been given powers over a trust that will make the individual a trust protector under the statute. For example, if a nonbeneficiary holds a power to remove trustees, this person meets the definition of a trust protector and will be held to a fiduciary standard in the exercise of this power. Results such as this may prompt drafters and their clients to reconsider the terms under which these powers are conferred.

Review Trustee Powers. Although the provisions of EPIC that define a trustee's powers were the basis for the Trust Code's trustee powers provisions, there are some changes and practitioners may wish to modify their trust agreements to incorporate the new powers that were added.

Termination of Small Trusts. The default provision for distribution of trust assets upon the termination of small trusts is to distribute the assets to the income beneficiaries. This may not always be appropriate. For example, if the trust is for the benefit of a second spouse and a marital deduction is not important, it may be more appropriate that upon termination the trust property be distributed between the income beneficiary and the remainder beneficiaries on the basis of their actuarial interests.

Similarly, if a trust was established for Medicaid planning purposes, it may be appropriate to require that the trust terminate only with court approval or only after the trustee considers the impact on the qualification of trust beneficiaries for governmental benefits and finds there will be none.

Review Durable Powers of Attorney. Several sections of the Michigan Trust Code address how agents under Durable Powers 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), Section 7603 (receive information about the administration of revocable trusts). These provisions and their intersection with forms of Durable Power of Attorney need to be considered.

Revisit Trust Administration Procedures

Procedures for administering trusts and settling decedent's estates through revocable trusts will also need to be considered.

Besides the items noted here, consider also how the provisions dealing with notice of the existence of trusts and trust accountings, as well as the trust protector provisions, will affect trust administration and settlement.

Statute of Limitations to Contest Revocable Trusts. The new period of limitations to contest the validity of revocable trusts creates an opportunity for persons administering decedent's estates to bring certainty the validity of the trust within a reasonable time of notice of the trust. This notice should be added to checklists for decedent's estates. In addition, practitioners will want to consider whether and how they will satisfy the requirement to provide relevant portions of the terms of the trust in satisfaction of the requirement that these be delivered to the trust beneficiaries with the notice.

Transfers of the Principal Place of Administration. As noted above, transferring the principal place of administration can still occur, but will require prior notice to the beneficiaries.

Representation. The representation rules found in Part 3 of the Michigan Trust Code will be helpful in bringing closure to a number of routine administration matters. Practitioners will need to carefully study these rules for how they could benefit and affect a variety of day to day matters involving trusts.

Nonjudicial Settlement Agreements. These agreements can provide greater certainty in the administration of trusts and should be consid-

ered when there are matters affecting the trust and the beneficiaries or trustee want to achieve final resolution regarding them.

Delegation Between Trustees. The provisions dealing with delegation among co-trustees have been changed to eliminate the (widely ignored) requirement of court approval to delegation. However, practitioners must give notice of the delegation if the power is not one that can be delegated to a non-agent trustee.

Notice of Proposed Distribution. The extension of the provision now found in EPIC Section 3908 to the distribution of the proceeds of a trust upon its termination means practitioners should add an item to their checklists for the administration of trusts for this item.

Conclusion

Enactment of the Michigan Trust Code represents a continuation of the process of modernizing the law of estates and trusts that began in Michigan in 1998 with the enactment of EPIC and continued in 2004 with the adoption of the Uniform Principal and Income Act, in 2005 with passage of the Uniform Prudent Investor Act, and occurred most recently in 2008 with the repeal of the Rule Against Perpetuities. The Code represents a significant advance in the law of trusts and ensures that Michigan's citizens and bar has 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.

Notes

1. The author chairs the Michigan Trust Code Committee of the State Bar of Michigan Probate and Estate Planning Section. He also serves as Secretary of the Section and is a Fellow of the American College of Trust and Estate Counsel, where he is a member of the College's State Laws Committee. Together with John H. Martin, Reporter for EPIC, the author is the co-author of the forthcoming "ESTATES AND PROTECTED INDIVIDUALS CODE AND MICHIGAN TRUST CODE WITH REPORTERS' COMMENTARY", which will be published by the Institute for Continuing Legal Education in approxi-

mately February 2010. This article draws heavily from the author's outline for the 49th Annual Probate and Estate Planning Institute presented by the Institute of Continuing Legal Education in May and June 2009 in Acme and Plymouth, Michigan, respectively. The Institute featured a Michigan Trust Code Track and readers may wish to obtain materials from the Institute for further information about the Michigan Trust Code. In addition, readers may also wish to consult the author's articles *The Michigan Trust Code: An Overview*, available at www.michbar.org/probate/trust-code.cfm, *The Michigan Trust Code: Some Things Old, Some Things New*, Michigan Prob & Est Plan J, Winter 2008, and *The Michigan Trust Code: Its Organization and Structure*, Michigan Prob & Est Plan J, Spring 2009.

2. The enacting legislation consists of five Public Acts. The main Act is 2009 P.A. 46, which amends the Estates and Protected Individuals Code by deleting Article VII and replacing it with the Michigan Trust Code, as well as making conforming changes to the balance of EPIC. The other four Acts are:

- 2009 PA 42 amending 1846 R.S. 41 related to fraudulent conveyances
- 2009 PA 43 amending the Statute of Uses and Trusts, MCL 555.1 *et seq.*
- 2009 PA 44 amending the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq.*
- 2009 PA 45 amending the Powers of Appointment Act, MCL 556.123.

2009 PA 43 ensures that in the event of a conflict between the Michigan Trust Code and the Statute of Uses and Trusts, the Michigan Trust Code prevails. The remaining bills are designed to address potential creditor concerns arising out of the use of lifetime or *inter vivos* QTIP gift trusts, intentionally defective grantor trusts, and withdrawal powers. Copies of the legislation can be found on the Michigan legislature's website: <http://www.legislature.mi.gov>.

3. See §8206(1)(a), MCL 700.8206(1)(a). The Code applies to judicial proceedings commenced on or after the effective date. The Code also applies to judicial proceedings commenced before the effective date unless the court finds the particular provision would substantially interfere with the conduct of the proceedings or would prejudice the rights of the parties.

4. There are, however, a number of exceptions, which include:

- The requirements for creating a trust
- The duty to administer a trust in good faith, expeditiously, in accordance with the terms and purposes of the trust and for the benefit of the trust beneficiaries
- The requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve

- The power of the court to terminate or modify a trust under certain circumstances
- The effect of a spendthrift provision, a support provision, and a discretionary trust provision on the rights of creditors and assignees to reach a trust
- The power of a court to require, dispense with, or modify or terminate a bond
- The power of the court to adjust a trustee's compensation
- The fiduciary duty of a trust protector
- The duty to provide trust beneficiaries with the terms of the trust and information about the trust properties and to give notice of the trust to qualified trust beneficiaries
- The power of the court to order statements of account and other information be provided
- The effect of an exculpatory term
- The rights of persons other than a trustee or trust beneficiary
- Periods of limitation
- The power of a court to take action and exercise jurisdiction
- The subject matter jurisdiction of the court and venue

5. Having a common standard for wills and revocable trusts is important for several reasons:

- The trend among states is clearly in favor of the will standard.
- If the standard of capacity for revocable trusts is that of the capacity to contract and the standard of capacity for a will is different, odd results could occur. Consider that if a court finds a person lacked capacity to create a revocable trust, but possessed capacity to make a will, it would invalidate the person's trust that was signed on the same day immediately before a valid will was executed.

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6. For the standard of capacity required to create a Durable Power of Attorney, see *Persinger v Holst*, 248 Mich App 499, 639 NW2d 594 (2001). For the standard of capacity required to create a beneficiary designation, see *In re Erickson Estate*, 202 Mich 329, 508 NW2d 181 (1993).

7. Coincidentally the court of appeals did likewise in late 2008. *Nacovsky v Hall (In re Griffin Trust)*, 281 Mich App 532, 760 NW2d 318 (2008). However, on June 22, 2009, the Michigan Supreme Court simultaneously granted leave to appeal and reversed the court of appeals decision without explanation.



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