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# Trustee Duties and Liabilities

*Shaheen I. Imami*  
*Patricia Gormely Prince*

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## I. Overview

§2.1 On June 18, 2009, the Michigan Legislature signed into law a comprehensive amendment to the Estates and Protected Individuals Code (EPIC). Officially denoted 2009 PA 46 (and contained in Article VII of EPIC), this amendment is known as the Michigan Trust Code (MTC) and took effect April 1, 2010. Since then, there have been a few technical amendments to the MTC and the formal introduction of the concept of *decanting*.

The MTC contains substantial additions and modifications to EPIC regarding the duties and liabilities of trustees. While many of the additions simply codify existing Michigan common law, a number of provisions are entirely new or represent changes to Michigan common law. It should be noted that the MTC expressly provides that, except in limited instances, a trust instrument may override provisions of the MTC. However, to the extent that common law has not been codified or modified by the MTC, such common law will govern the interpretation and application of the trust instrument. MCL 700.7105. The MTC also contains some changes in terminology (e.g., *current trust beneficiary* has been discarded in favor of *qualified trust beneficiary*, with the definition modified as well). As a result, a prudent attorney representing a fiduciary or beneficiary must be aware of the effective date and repealer provisions contained in MCL 700.8101 et seq. For purposes of this chapter, the most relevant provisions of the MTC are MCL 700.1212, MCL 700.7801 et seq., and MCL 700.7901 et seq.

## II. Basics About Trustees

§2.2 A trustee is “a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another.” *Bankers’ Trust Co v Russell*, 263 Mich 677, 682, 249 NW 27 (1933) (quoting *Taylor v Davis’ Adm’x*, 110 US 330 (1884)). As used in EPIC, a trustee includes an original, additional, or successor trustee, whether or not appointed or confirmed by the court. MCL 700.1107(o). The MTC does not distinguish between testamentary and *inter vivos* trustees. Specifically, the definition of *fiduciary* includes all trustees. MCL 700.1104(e).

Before the effective date of the MTC, neither EPIC nor the previous Revised Probate Code (RPC) contained any provision regarding the moment at which an individual actually becomes a trustee. However, under the MTC, an individual is deemed to have accepted his or her trusteeship by

- substantially complying with a method of acceptance provided by the trust instrument; or
- accepting delivery of trust property, exercising powers or performing duties as trustee, or otherwise indicating an acceptance of the trusteeship, if the trust instrument fails to provide a method of acceptance or such methods are not expressly made exclusive.

MCL 700.7701(1).

Likewise, the MTC also permits an individual to expressly reject a trusteeship, or, alternatively, for the designation to lapse. MCL 700.7701(2). The lapse

provision indicates that an individual is deemed to have rejected a trusteeship if he or she fails to accept it within a reasonable period of time after knowing of the designation. *Id.* Perhaps more interesting is the recognition by the MTC that an individual might need to perform some due diligence or even take a “wait-and-see” approach before accepting trusteeship. MCL 700.7701(3). Once an individual becomes a trustee, he or she must “discharge all of the duties and obligations of a confidential and fiduciary relationship” and will be subject to the following general duties, among others, as defined by the MTC:

- the duties of undivided loyalty, impartiality between beneficiaries, care and prudence in actions, and segregation of assets held in the fiduciary capacity, MCL 700.1212(1)
- the duty to expeditiously administer the trust for the trust beneficiaries’ benefit, MCL 700.7801
- except in limited circumstances where duties to and the powers of a settlor are retained, the duty to administer the trust solely in the interests of the trust beneficiaries, MCL 700.7802(1)
- the duty to exercise care when dealing with the trust, specifically, except as otherwise provided by the trust terms, to observe the standards in dealing with the trust assets that a prudent person would observe in dealing with the property of another and, if the trustee has special skills or is named trustee on the representation of special skills or expertise, to use those skills, MCL 700.7803
- the duty to keep the trust beneficiaries reasonably informed via trustee reports and other documents (the amount of information required to be provided will depend on the status of the particular beneficiary and the composition of the trust’s assets at any particular time), MCL 700.7814; *In re Estate of Butterfield*, 418 Mich 241, 341 NW2d 453 (1983); *In re Childress Trust*, 194 Mich App 319, 486 NW2d 141 (1992)

In addition, common-law duties imposed on all trustees include duties of loyalty, *see* MCL 700.7802, ordinary skill, and prudence as well as prohibitions against self-dealing, *see* MCL 700.1214, malfeasance, misfeasance, and nonfeasance. *See Butterfield*; *Hertz v Miklowski*, 326 Mich 697, 40 NW2d 452 (1950); *In re Green Charitable Trust*, 172 Mich App 298, 431 NW2d 492 (1988); *Sloan v Silberstein*, 2 Mich App 660, 141 NW2d 332 (1966).

The probate court has exclusive jurisdiction to adjudicate matters relating to trustees and trusts, including matters relating to a trustee’s powers and duties. MCL 700.1302(b), .7203. *See* §10.18 for further discussion of the probate court’s power to determine a trustee’s powers and duties and §§10.22–10.33 for the applicable procedures.

### III. The Trustee’s Powers

§2.3 The MTC clarifies the role of the trust instrument in empowering a trustee to act without court approval and also adopts the specific trustee powers previously in EPIC. MCL 700.7816–.7819. A trustee has the general

authority to perform any act that is authorized by the trust instrument and to do so without court approval. MCL 700.7816. A trustee also has the authority to perform any act that a prudent person would perform for the purposes of trust administration. MCL 700.7816, .7817. A trustee's specific powers enumerated under the MTC are basically the same as they were in EPIC before the amendment and include powers relating to assets, real property, stock and securities, insurance, investments, allocation of income and expenses to trust income or principal, distributions, contracts, transfer of trust property to another jurisdiction, environmental matters, and taxes. MCL 700.7816–.7819. However, see MCL 700.7817(jj)–(nn) for the addition of five trustee powers. See chapter 3 for a discussion of the Michigan Prudent Investor Rule and chapter 4 for a discussion of the trustee's power to respond to environmental concerns. In any event, the exercise of a power by a trustee still is subject to his or her fiduciary duties prescribed in Part 8 of the MTC. MCL 700.7816(2).

The MTC did not change the authority previously granted by EPIC to a trustee to combine or divide trusts if the trusts have substantially identical provisions or the result does not impair the rights of any beneficiary or adversely affect the achievement of the trust's purposes. MCL 700.7417. However, the MTC contains specific notice provisions not included in EPIC. If a trustee desires to combine or divide trusts, notice must be given to both the qualified trust beneficiaries and those holding powers of appointment. *Id.*

If a trustee needs more expansive powers or needs clarification from the probate court regarding the execution of a power, he or she may seek relief from the probate court. MCL 700.7201.

#### IV. The Trustee's Duties

##### A. Fiduciary Duty

§2.4 Under EPIC, trustees are fiduciaries by statutory definition. MCL 700.1104(e). It stands to reason that a trustee's most important duty, underlying all other duties, is his or her *fiduciary duty*. A trustee stands in a fiduciary relationship with the trust and with the trust's beneficiaries. MCL 700.1212. This fiduciary relationship involves a duty on the part of the fiduciary (the trustee) to act for the benefit of the other parties to the relationship (the trust beneficiaries) regarding matters within the scope of the relationship. 1 Austin Wakeman Scott & William Franklin Fratcher, *The Law of Trusts* §2.5 (4th ed 1987). In describing a trustee's duty, the Michigan Supreme Court opined in *In re Estate of Butterfield*, 418 Mich 241, 256–257, 341 NW2d 453 (1983):

Many forms of conduct permissible in the workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.... Only thus has the level of conduct for fiduciaries been kept at

a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

(Citations omitted.)

A trustee has the duties of undivided loyalty, impartiality between beneficiaries, care and prudence in actions, and segregation of assets held in the fiduciary capacity. MCL 700.1212(1). The MTC provides that a trustee's fiduciary duty requires the trustee to observe the standard of care of a prudent person dealing with the property of another and requires the trustee to use his or her special skills to the extent that he or she possesses such skills or was named trustee on the basis of the representation of special skills or expertise. MCL 700.7803.

Despite the MTC's codification of many of a trustee's duties, it is still advisable to review the common law to get an idea of the practical application of the duties. Consistent with MCL 700.1212(1), common-law duties imposed on all trustees include honesty, loyalty, restraining from self-interest, and good faith. *See Hertz v Miklowski*, 326 Mich 697, 40 NW2d 452 (1950) (trustee breached fiduciary duty when he failed to inform minor beneficiary of status of trust property); *Sloan v Silberstein*, 2 Mich App 660, 141 NW2d 332 (1966). In assessing the standard under MCL 700.7803, common law defines a *prudent person* as one who acts with care, diligence, integrity, fidelity, and sound business judgment. *In re Green Charitable Trust*, 172 Mich App 298, 431 NW2d 492 (1988) (trustees removed for breach of fiduciary duty because they sold estate property under conflict of interest for less than highest possible price). In *Green*, the Michigan Court of Appeals described the fiduciary duty owed by a trustee as follows:

The standard of care expected of a trustee is[: "The trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills." MCL 700.7803.] To be prudent includes acting with care, diligence, integrity, fidelity and sound business judgment. [*In re Bubl's Estate*, 211 Mich 124, 127, 132, 178 NW 651 (1920)]. In addition, the courts have imposed on the fiduciary duties of honesty, loyalty, restraint from self-interest and good faith. [*Hertz v Miklowski*, 326 Mich 697, 700, 40 NW2d 452 (1950); *Kelsey v Detroit Trust Co*, 265 Mich 358, 362, 251 NW 555 (1933)].

Paragraph VII of the trust gives the trustees broad powers "to do everything they in good faith deem advisable even though it would not be authorized or appropriate for fiduciaries (but for this power) under any statutory or other rule of law ...." Paragraph V empowers Comerica and Jaffe "in their sole discretion" to determine the timing of any sale of the real property so as to realize its "full value."

Giving trustees discretionary or broad powers does not mean that there are no limits to those powers. Trustees' actions will be reviewed for abuse of that discretion. [*Moss v Axford*, 246 Mich 288, 294, 224 NW 425 (1929); *In re Estate of Sykes*, 131 Mich App 49, 54, 345 NW2d 642 (1983)]. The trustee is bound to exercise his discretion honestly and in good faith. [*Moss*, 246 Mich at 294].

The duty imposed is something more than that expected in everyday business dealings. “A trustee is held to something stricter than the morals of the market place.” [*Butterfield*, 418 Mich at 256 (quoting *Meinhard v Salmon*, 249 NY 458, 464, 164 NE 545 (1928))], adopted in Michigan in the case of [*In re Culhane Estate*, 269 Mich 68, 76, 256 NW 807 (1934)].

*Green*, 172 Mich App at 312–313.

A trustee’s breach of fiduciary duties may result in his or her removal by the probate court. In *Comerica Bank v Adrian*, 179 Mich App 712, 729, 446 NW2d 553 (1989), the Michigan Court of Appeals clearly restated that a probate court has the authority to remove a trustee for misconduct, such as failing to make required distributions, failing to file annual accounts (“reports” under the MTC, as discussed below) on a timely basis, and taking fees contrary to a court order. In fact, the court of appeals also approved removal of a trustee where a trustee’s hostility toward a beneficiary “would interfere with the administration of the trust.” *Id.* at 730. In *Pollack v Barron (In re Gerald L. Pollack Trust)*, Nos 309796, 310844, 310846, 318883, 2015 Mich App LEXIS 171 (Jan 29, 2015), the court of appeals specifically addressed the interplay between MCL 700.7706 and the common law regarding the removal of a trustee, stating that MCL 700.7706(2) “superseded and replaced the common-law bases for removal.” 2015 Mich App LEXIS 171, at \*48. The court found that permitting removal of a trustee under the common law for “any good cause” as set forth in *Kelsey v Detroit Trust Co*, 265 Mich 358, 361–362, 251 NW 555 (1933), would nullify the detailed and specific requirements for removal listed in MCL 700.7706(2). 2015 Mich App LEXIS 171, at \*46.

In short, any competent review of a trustee’s duties and performance must take into account not only the trust instrument but also provisions of EPIC, the MTC, and common law.

## **B. Inventory and Appraisal**

§2.5 Trustees have a duty to provide information to trust beneficiaries concerning the assets in the trust upon a reasonable request. MCL 700.7814(3). In connection with this duty, a trustee should prepare an inventory of the trust assets and be prepared to supply a copy to the trust beneficiaries if requested to do so. An accurate initial inventory of the trust assets is also a necessary tool for the trustee’s own use in preparing subsequent trustee reports. See §8.7.

The trust inventory is a list of all trust assets that indicates the fair market value and the nature and amount of any encumbrances on each listed asset as of the date of the trustee’s acceptance of trust or the date of the settlor’s death (for testamentary trustees and successors on death to settlor-trustees of revocable trusts). The fair market value of publicly traded stocks may be found in the *Wall Street Journal* or a similar source. For assets with a less readily determinable fair market value, the trustee should obtain an appraisal. For a further discussion of valuation, see §1.25.