

New Michigan Trust Code

*By Daniel J. Dingeman, of Dingeman, Dancer, Christopherson, P.L.C.
Estate and Probate Planning and Litigation Attorneys*

Michigan law pertaining to Trusts was dramatically changed effective April 1, 2010. What does this mean for you? While most of the changes are important to those who draft trusts, advise beneficiaries, and help trustees administer trusts and estates, if you have a trust or are contemplating having a trust created, the changes may only affect you directly in a few areas.

First Things First

First and foremost, do you need a trust? One of the primary advantages of a trust that has been properly funded (meaning after you created a trust, you titled your assets in your trust,) is that there likely be no need for a probate court proceeding to distribute your property at your death. While the probate process has become less complicated, it still is quite involved. Also, since it is a court proceeding, much of the information becomes public, which is generally an undesirable result. Having a trust keeps your wishes regarding the disposition of your assets private. A trust is also a very flexible document that can be tailored to your needs, and can be easily changed as your wishes or circumstances dictate.

The current uncertainty in the estate tax law has also made the need for a trust, for some, a new consideration. The federal estate taxes exemption was set to expire in 2010. In December 2009, the House of Representatives voted to permanently extend the estate tax in its present form, meaning that the first \$3.5 million of a person's estate and the first \$1 million in gifts given during their lifetime would be exempt from the estate tax. However, the Senate has not voted on this yet and so the future of the tax is still uncertain. As the law currently stands, if a person dies in 2010, there is no estate tax. In 2011, the first \$1 million of a decedent's estate will be excluded from estate tax, and the tax rate on assets over \$1 million will be 55%. If you are married, you can take advantage of the marital deduction, with a properly drafted trust. In that case the first \$1 million of your estate is excluded and your spouse would receive the balance in a marital trust also excluded from estate tax until her death. If you have an estate hovering above the \$1 million mark, you may wish to have a trust drafted which can take advantage of exclusions to protect your heirs from paying the estate tax. There is a (long) list of what property is included in your estate, and your financial advisor, accountant, or attorney can help you look at your assets to see if you should be concerned about estate tax.

There are other reasons to have a trust: you have minor children who otherwise would need a court approval of a conservator to manage their inheritance; you may have or will be inheriting property you wish to preserve for your family; you have a dependent for whom you wish to take care of with a special needs trust; or you have a special tax circumstance that would favor a trust. You should consult an estate planning attorney who can advise you on the pros and cons of a trust for you.

Overview of the New Michigan Trust Code (or “MTC”)

The main purpose of the new MTC is to fill in the gaps in our current law governing trusts under the Estates and Protected Individual Code, (often known by its acronym, “EPIC”) and to incorporate the Uniform Trust Code (the “UTC”). EPIC, among other functions, is the set of laws governing the disposition of your property at your death. The UTC was created in 2000 to provide a national model for trust codes and has since been adapted in many states. Michigan decided it was time to conform its code to the national model.

The changes to the code follow four main themes:

1. The MTC is mostly a series of *default* rules, so there is still great flexibility for you to have a trust drafted which will accomplish your goals.
2. The MTC *preserves* many of the long standing laws; ergo, there are not very many changes that will affect a trust created before April 1, 2010. However, a good estate planning attorney should be aware of the new provisions contained in the MTC and if you already have a trust, should alert you to any provisions in your trust that should be updated to conform.
3. The MTC *favors use of UTC language* wherever possible, if that uniformity was advantageous to Michigan Trusts.
4. The MTC recognizes that many people use a trust instead of a will to describe how they would like their property distributed at their death. To that end, the MTC aligns the legal treatment of wills and trusts in several places, mainly in that it sets stricter guidelines for the capacity of a person creating a trust.

The Lingo

Before we get into a description of the changes directly affecting trusts, here is a quick definitions lesson. When you create a trust, you are known as the “settler” or “grantor” of the trust. A “revocable” trust is one that can be revoked entirely, and/or one whose provisions can be changed. The power to change the trust is a power given to the grantor. An “irrevocable” trust is one that cannot be changed. A “trustee” is the person who is in charge of the trust, being sure that the trust provisions are being followed. The trustee is given the specific powers to do this in the trust. The trustee is also referred to as a “fiduciary” or as having “fiduciary” duties”, meaning they are bound by law to act in the best interests of the trust beneficiaries. A “beneficiary” is someone who is receiving a benefit from the trust.

Some of the new provisions directly impacting you.

Practically speaking, there are a few key changes in the MTC that most directly affect our estate planning clients. One is that the new MTC requires that a trust may not have the same person as the sole trustee and the sole beneficiary. When we draft a revocable trust, and you transfer your assets to your trust, we name you as the sole beneficiary. Those assets “live” in your trust until your death, at which point they get distributed. So, you are the sole beneficiary of your assets during your lifetime. Since you cannot also be the sole Trustee, we are now drafting trusts with a co-trustee named. In most cases, that co-trustee is your spouse or a family member.

Secondly, and in that vein, the new MTC does dictate that co-trustees act by majority decision. It means that you need to discuss with your co-trustee any decisions you are making about your trust during your lifetime, but after your death, your co-trustee can become the sole trustee, as long as that person is not also the sole beneficiary of your trust.

Lastly, the new MTC does not give the beneficiaries the power to remove a trustee, which is a departure from the UTC. You can, however, give this power to the beneficiaries if you and your attorney agree it can be done with certain precautions in place. Your attorney can work with you on this.

If you are still with us reading this, congratulations! The scope of this article was to give you a general overview and some of the practical applications of the new MTC. We highly recommend that you seek the advice of an attorney in consideration of creating an estate plan that meets your specific needs.