

Quiet Trusts Come to Michigan

Thursday, November 9, 2023

Take-Away: Hold onto your seats! Move over Delaware! Michigan is about ready to adopt a new *quiet* trust statute as part of the amended Michigan Trust Code. This might easily lead to a ‘blind leading the blind’ situation if a clients says he/she wants to create a *quiet* Trust.

Background: The long awaited Omnibus EPIC Bill(s) is about ready to be enacted by the Michigan Legislature after several years languishing in Lansing. It will be adopted either late in 2023 or early 2024. One of the Bill’s provisions is the addition of a new provision that is added to the Michigan Trust Code (MTC) [which is part of the Estates and Protected Individuals Code (EPIC)] that provides that if the terms of the Trust, other than a charitable trust, are contained in the Trust instrument that clearly expresses the settlor’s intent that one or more items of *prime disclosure information* should be withheld from one or more trust beneficiaries, the specific provisions of this new statute will apply to that Trust.

MTC Provision: New Section 7409a [MCL 700.7409a] will be added to the MTC to authorize a settlor’s use of a *quiet* Trust.

New Concepts: The *quiet* Trust statute uses some new concepts that we will have to learn to use. [Don’t kill the messenger if you, like me, find these terms a bit confusing.]

Prime Disclosure Information: This means: (i) the fact of the Trust’s existence; (ii) the identity of the trustee; (iii) the terms of the Trust; (iv) or, the nature and extent of Trust property.

Nondisclosure Period: This means the shorter of: (i) the Trust’s maximum *nondisclosure period*; or (ii) the period from the beginning of the maximum nondisclosure period to the Trust’s termination.

Nondisclosure Correlative Right: This means a right granted by the Trust's terms that allows the right of the holder to remove a trustee for the trustee's failure during the Trust's *nondisclosure period* to follow, to the extent practicable, the Trust terms that prescribe nondisclosure of *prime disclosure information*. This appears to be the sole remedy against the trustee that fails to adhere to the *quiet* Trust's directives.

Undisclosed Trust: This means a Trust that is administered under this new MTC section during the *nondisclosure period*.

Maximum Nondisclosure Period: This means a period of 25 years from the *first* date on which property becomes subject to the Trust's terms or the date on which the Trust ceases to be revocable by its settlor.

Protection Power: This means a power that is granted by the Trust's terms that allows the power holder, who acts in a fiduciary capacity, to direct the trustee for the benefit of the trust beneficiaries during the Trust's *nondisclosure period*. A *protection power* could authorize the power holder to represent the trust beneficiaries under MCL 700.7301(1) to (2) with regard to representation without regard to the application of other new sections 73002 to 7304. In short, this *power* holder acts as the surrogate for the trust beneficiaries from whom *prime disclosure information* is withheld.

Nondisclosure Period: This is the period during which *prime disclosure information* is intentionally withheld from one or more trust beneficiaries. Included within this provision are the following:

- (i) To the extent necessary to carry out the settlor's expressed intent, the trustee does not have the duty to provide beneficiaries with the terms of the Trust and information about the Trust's property. Nor does the trustee have to notify *qualified* trust beneficiaries of the existence of the Trust and the identity of the trustee.

- (ii) The trustee may administer the Trust in accordance with the settlor's expressed intent with regard to nondisclosure of *prime disclosure information* to the extent made practicable by the Trust's terms and in light of the trust beneficiaries' circumstances and any other reporting obligations that are imposed on the trustee other than by EPIC or the MTC.
- (iii) If the Trust instrument grants a *nondisclosure correlative right*, the trustee has a duty to administer the Trust according to the settlor's expressed intent with regard to nondisclosure to trust beneficiaries, but only to the extent made practicable by the Trust's terms given the circumstances of the trust beneficiaries and any other reporting obligations that are imposed by law other than EPIC or the MTC.
- (iv) Any purported appointment or distribution of Trust assets to another *undisclosed trust* will be ineffective to the extent that it could cause the appointed or distributed assets to be administered continuously under the authority of these new MTC provisions for a period that ends *after* the date on which the Trust's *maximum nondisclosure period* ends. Thus, apparently a trustee cannot decant the Trust's assets to a 'new *undisclosed trust* just to keep the trust beneficiaries 'in the dark' longer than what this statute allows.

Termination of *Undisclosed Trust*: On the date the *nondisclosure period ends*, the Trust will cease to be an *undisclosed trust*. To the extent to which the Trust terms are inconsistent with the trustee's duty to provide beneficiaries with the terms of the Trust, or information about the Trust's property, or to notify *qualified* trust beneficiaries of the Trust's existence and the trustee's identity, those Trust nondisclosure terms will cease to be effective.

Trustee's Duties: If the *undisclosed trust* grants either a *nondisclosure correlative right* or a *protection power*, all of the following apply:

- (i) On the reasonable request of a *nondisclosure correlative right holder* or a *protection power holder* at any time during the Trust's nondisclosure period, the Trustee will be responsible to promptly furnish to the *right or power holder* a copy of the Trust's terms that describe or affect the holder's *right or power*.
- (ii) Within 63 days after accepting trusteeship of an *undisclosed trust*, the trustee will have to notify all *nondisclosure correlative right holders* and *protection power holders* of the acceptance, of the court in which the Trust is registered, if it is registered, and of the trustee's name, address, and telephone number.
- (iii) Within 63 days after the date that the trustee acquires knowledge of the creation of an *undisclosed trust* or the date on which the trustee acquires knowledge that a formerly revocable Trust of which the trustee is trustee has, by becoming irrevocable (by the settlor's death or otherwise) become an *undisclosed trust*, the trustee must notify all *nondisclosure correlative right holders* and *protection power holders* of the Trust's existence, the identity of the settlor or settlors, of the court in which the Trust is registered (if registered,) and the right to request a copy of the Trust's terms that describe or affect the *power holder's rights or powers*.

Reaction: Admittedly, this is a lot to digest along with the somewhat awkward terminology that is to be used in the statute. Nor is it clear just how many settlors are eagerly awaiting the arrival of *quiet* Trusts in Michigan. Much thought needs to go into the reasons for the adoption of a *quiet* Trust.

Conclusion: There are a lot of questions about how a *quiet* Trust is to be administered by its trustee, not the least is the inadvertent disclosures of the Trust's existence or its assets/income to the trust beneficiary. For example, a trust beneficiary may be issued a K-1 from the trustee for distributions made to or on behalf of the beneficiary. It is hard to keep the Trust *quiet* if the beneficiary receives a K-1 each year. How a trustee ascertains the beneficiary's current

circumstances or needs in order to make a discretionary distribution will become a challenge if the beneficiary does not even know that he/she is a beneficiary of the trust, or the trustee appears to be a *stranger* making these inquiries. My sense is that a *quiet* Trust is more intriguing in theory than it is as a practical tool used to provide for its beneficiaries.