
Folks:

Take-Away: The presence of a spendthrift clause in a Trust instrument may prevent the future modification or termination of that Trust.

Background: Over the years these ‘missives’ have summarized the provisions of the Michigan Trust Code (MTC) that authorize the modification, and sometimes termination, of an irrevocable Trust. These MTC sections are a departure from the common law rule that the alteration of the terms of a Trust are not permitted if they are contrary to the settlor’s intent, even decades after the settlor’s death. This common law rule that preserves the settlor’s intent, regardless of the change in circumstances of the Trust or its beneficiaries, is sometimes called the *dead hand* rule.

This rule was first articulated in the famous Massachusetts case, *Clafin v. Clafin*, 20 N.E. 454, (1889) when the Massachusetts’ Supreme Court noted: “... a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule against public policy.” Hence the origins of the paternalistic *dead hand* rule.

UTC and MTC: The Uniform Trust Code (UTC) and the MTC are a response to the reality that many Trusts these days are expected to continue for multiple generations considering the repeal of the Rule Against Perpetuities in many states and the settlor’s desire to avoid federal estate and generation skipping transfer taxes in later generations. The philosophy of the UTC and MTC are that modifications, or terminations of an irrevocable Trust may be appropriate so long as they are consistent with the settlor’s intent, or what the settlor would have wanted, but only if the Trust’s modification or termination does not impair the settlor’s *material purposes* of the Trust.

What is important is that while the MTC contains several provisions that authorize the modification or termination of an irrevocable Trust, these statutory trust alteration doctrines typically require fidelity to the settlor's intent when the Trust was first created. Consequently, if a settlor wishes to constrain or curb the power of a probate court to modify the original trust terms, the settlor must articulate this donative intent by reciting their material purposes in the Trust instrument.

Material Purpose: Finding a Trust's *material purpose* may not be as easy as it sounds. In the comments to UTC Section 411 refer to the *Restatement (Third) of Trusts*, Section 65, comment (d), which states:

“Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern with regard to the beneficiary’s management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.”

Accordingly, identifying the settlor's *material purposes* is the pivotal inquiry in disputes that concern the modification, or termination, of an irrevocable Trust. Neither the UTC nor the MTC provide a list of the factors or state a 'standard' that is to be used to ascertain the settlor's material purposes. However, there is one important exception- a spendthrift provision, which is addressed below.

MTC: The current iteration of the *Claffin* doctrine in the MTC is MCL 700.4711(1)(a) which provides, in part:

“A noncharitable trust may be modified or terminated in any of the following ways: (a) By the court on the consent of the trustee and the qualified trust beneficiaries, if the court concludes that the modification or termination of the trust is consistent with the material purposes of the trust or that the

continuance of the trust is not necessary to achieve any material purpose of the trust.”

Spendthrift Clauses: Spendthrift clauses are nearly ubiquitous in modern Trusts. Most states have established presumptions for ascertaining the materiality of spendthrift protection. At common law, the presumption was that a spendthrift Trust could not be terminated or modified while such inalienable interest still existed. [*Restatement (Second) Trusts*, Section 337, comment 1.] The modern trend, as reflected in the UTC regarding spendthrift provisions, relaxes this doctrine by eliminating the common law presumption of materiality.

To this end, UTC 411 contains the following optional subsection: *“A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.”* [UTC 411(c).]

MTC and Spendthrift Clauses: However, Michigan is one of 12 states that have pretty much adopted the entire UTC, but which did **not adopt proposed UTC 411(c)**. This omission from the MTC has the effect of retaining, without modification, the common law materiality presumption regarding the presence of a spendthrift provision in a Trust. The Reporter’s Comments to MCL 700.7411 make this clear:

*“Finally, Section 7411 is also noteworthy for what does not appear in this section. Michigan joined numerous other states that excluded an optional provision found in UTC 411(c) that stated a spendthrift provision is not a material purposes of a trust. Despite the routine inclusion of spendthrift provisions in trusts, settlors almost universally consider them material. The presence of a spendthrift provision might otherwise make termination or modification of a trust more difficult. Therefore, if a settlor does not consider the spendthrift provision to be a material purpose of the trust or does not wish the provision to be an impediment to the termination or modification of a trust, **the settlor should make their intentions clear in the trust instrument.**”* [Emphasis added.]

Practical Observations: In drafting or reviewing Trusts, in light of the above comments, consider the following:

Material Purpose Provision: With more substantial gifts being made in trust these days with the settlor's goal to exploit the donor's large applicable exemption amount prior to 2026, and/or with the additional goal to avoid both federal estate and GST taxes when trust distributions are made to future generation trust beneficiaries with the use of a dynasty-type Trust, the importance of the ability to modify the terms of the Trust in the future, or to terminate the Trust, due to changes in circumstances becomes paramount. MCL 700.7411 (1)(a) (modification or termination by beneficiary consent). MCL 700.7412(2) modification due to unanticipated circumstances, MCL 700.7415 (reformation of the terms of the Trust), MCL 700.7416 (modification to achieve settlor's tax objectives) and MCL 700.7111(2) (nonjudicial settlement agreements) all refer to either the settlor's *material purpose* or to the settlor's *purpose* for the Trust before a probate court can act to change, or terminate, a Trust. Rather than ask a probate judge to search for the settlor's purposes in the Trust instrument through interpretation, the Trust instrument should set for a recital of the settlor's primary, or material, purposes that the settlor envisions for his/her Trust. Alternatively, if the settlor does not want any future modifications of the Trust, or an early termination of the Trust, the Trust instrument should expressly specify that intent, i.e., reinforcing the *dead hand* control of the Trust and its assets despite future changes in circumstances.

Spendthrift Provision: Indeed, spendthrift provisions are ubiquitous in most Trusts these days. But how many drafters know, at least in Michigan, the presence of a spendthrift provision in the Trust instrument arguably prevents a probate judge from later entertaining a subsequent Trust modification since the presence of the spendthrift provision is presumed to be a *material purpose* of the Trust under Michigan common law. As the Reporter's Comment to MCL 700.7411 suggests, if the settlor does not intend that the Trust's spendthrift provision to be viewed by the probate judge as a *material purpose* of the Trust, thus precluding any

future modification or termination of the Trust, then that statement should be clearly stated in the Trust instrument. In the absence of such a statement in the Trust instrument, the common law presumption of materiality for spendthrift provisions applies.

Postponement of Enjoyment: If a Trust instrument does not contain a spendthrift provision, the postponement of enjoyment of a beneficial interest may not rise to the level of a *material trust purpose*. Often a Trust will postpone distributions of a trust interest until the beneficiary reaches a specified milestone, such as age of maturity and, during the delay, authorize invasions of income and principal by trustees pursuant to some form of distribution standard. If the beneficiary's needs are significant, the trustee acting under such a standard could distribute the entire corpus of the Trust, which would effectively terminate the Trust. Arguably, this means that all such delayed-distribution Trusts administered under the MTC are subject to accelerated distribution upon the consent of all the qualified trust beneficiaries and that the delayed-distribution feature of the Trust will not be presumed to be a *material purpose* of the Trust.

This conclusion was reached in a fairly recent Tennessee decision, *Miller v. Maples*, 2018 WL 6267123 (Tenn Court of Appeals, November 310, 2018). In that case the Trust instrument provided for staged distributions of trust corpus to the settlor's three children over a period of ten years. The three children were named as co-trustees, who possessed the discretion to make distributions subject to a HEMS distribution standard. The three children agreed to terminate the Trust early, distributing the assets to themselves. One child died unexpectedly, before the distribution, and the children of that deceased child opposed the distribution and termination claiming that the early distribution of the Trust corpus was contrary to the settlor's *material purpose* to postpone enjoyment for the 10-year period. The court disagreed with the grandchildren because "*the provision for periodic distribution cannot be read as a material purpose of the Trust when the provision immediately preceding it allows for full distribution at any time.*"

Conclusion: We often speak of modifying the terms of a Trust that are no longer workable, or which do not accommodate the needs of the trust beneficiaries. Clearly the MTC contains several provisions that enable the trustee and the trust beneficiaries to either modify, or terminate, an irrevocable Trust. But the hurdle to accommodate the Trust's *material purposes* can be challenging, especially if the Trust instrument also contains a spendthrift provision. When a long-term Trust is contemplated, attention needs to be given to identifying the Trust's *material purposes* and also whether the inclusion of a spendthrift provision is considered by the settlor to be material to the Trust's purpose and administration.

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