

Take-Away: Michigan finally recognizes a *silent trust*, which may be appealing to some settlors, but it will probably not be a welcome option by trustees.

Background: Under the Michigan Trust Code (MTC) a trustee is required to provide beneficiaries with the terms of the Trust and other information about the Trust's property, and the trustee must notify qualified trust beneficiaries of the Trust of the existence of the Trust and the identity of the trustee. [MCL 700.7105(2)(i); MCL 700.7814(2)(a).]

Silent Trusts: However, the recently enacted EPIC Omnibus bill [HB 4898], effective in early March, 2024 now permits a *silent trust* in Michigan. In general, this amendment to the MTC allows a settlor to create a noncharitable Trust under which the trustee may refrain from disclosing *prime disclosure information* from one or more trust beneficiaries for a nondisclosure period of up to 25 years. [MCL 700.7409a.] *Prime disclosure information* means the fact of the Trust's existence, the identity of the trustee, the terms of the Trust, or the nature or extent of the Trust's property. [MCL 700.7409a(5)(d).]

Why a Silent Trust? *Silent trusts* may be popular with some settlors who fear that their Trust might create 'trust fund babies' and who thus are inclined to use a *silent trust* to create an artificial sense of scarcity through secrecy and deception, followed years later by a BIG REVEAL to the beneficiaries. However, before every settlor jumps on the bandwagon and adopts a *silent trust*, several important rhetorical questions need to be asked. Moreover, there may be several problems with a *silent trust*, not the least of which is that it sends a message of distrust and lack of confidence in the beneficiary.

Trustee's Perspective: From the trustee's perspective, it will be extremely difficult to effectively administer a *silent trust*. Consider the following general observations that pertain to a *silent trust* administered by the trustee:

1. How will the trustee effectively evaluate the distribution needs of the trust beneficiary if the Trust is a secret?
2. How will the trustee effectively make distributions to, or for the benefit of, the trust beneficiary who does not know that the Trust even exists? [***Where did that money come from?***]
3. How will the trustee keep the Trust's existence from the trust beneficiary when the trustee fulfills tax reporting (K-1's) associated with the distributions? [Tax reporting obligations when distributions of trust income are made to or for the benefit of the trust beneficiary.]
4. How will the trustee keep the Trust *silent* when some trust beneficiaries are made aware of the Trust's existence e.g., some reach the magical age of awareness when they are directed to be told of the Trust's existence, while younger trust beneficiaries remain 'in the dark?'
5. How will the trustee handle beneficiaries who possess *Crummey* withdrawal rights?
6. How will the trustee keep the Trust's existence from trust beneficiaries if there is litigation that involves the Trust, or the trustee, or some other party seeks judicial instructions regarding the Trust's administration, like a nonjudicial settlement agreement or a petition to modify the terms of the Trust?
7. How will the trustee maintain a healthy relationship with the trust beneficiary when the beneficiary later learns that the trustee has

operated in secrecy for several years? Years of *silence* can irreparably create a suspicion of impropriety.

8. A *silent trust* can poison the trustee's relationship with the trust beneficiary; it prevents collaboration and growth of the beneficiary, since there is no opportunity for financial education and gained maturity through shared decision-making?
9. Will an individual be willing to serve under the *silent trust* as the holder of a *nondisclosure correlative right* or a *protection power* under Michigan's statute [MCL 700.7409a(4)(b) and (e)- the right to demand information from the trustee with regard to the Trust, its assets, and any other information that a trust beneficiary could have demanded under MCL 700.7814(2)] when they take on potential liability. This role-player can bind the trust beneficiaries. This essentially shifting fiduciary risk away from the trustee and onto powerholder? Who is willing to take on that liability?

Observation: Greenleaf Trust prides itself on the time that it is willing to spend with all trust beneficiaries to establish a long-term relationship that is built on trust and candor. Often one of the purposes of a Trust is to develop financial competence and build confidence in the trust beneficiary while the assets remain held in the Trust. Thus, it is a key role that Greenleaf's trust officers and wealth manager advisors play to educate trust beneficiaries over time, to share in 'teaching moments' with the trust beneficiary, and to prepare the beneficiary to ultimately become a steward of the family's wealth in the future. There will be neither dialogue between these advisors and the trust beneficiary, nor any 'teaching moments' if it is a *silent trust*.

Conclusion: While the impetus for a *silent trust* is usually the settlor's fear of too much wealth creating lazy and unproductive 'trust fund babies,' or that access to too much wealth may become harmful to the beneficiary, it is also important to remember that the use of a *silent trust* does not make the wealth disappear; eventually that wealth will make an appearance in

the beneficiary's life at some point. It is far better than keeping the Trust a 'secret' that the Trust be used to prepare the trust beneficiaries to handle what will be coming their way in the future, instead of hiding it from them with the 'hope' that they will be ready when that wealth is finally revealed.