

**Quick-Take:** A trust settlor can choose the law that is to govern his/her Trust. Until a court finds that there is a conflict of laws at which point the court gets to decide which state law applies in the construction or validity of the Trust or one of its provisions.

**Background:** Most Trust instruments state something like “this Trust is to be governed by the laws of the State of Michigan.” That is the case, until a ‘conflict of laws’ question arises, either in construing the instrument, or when litigation arises where beneficiaries reside in different jurisdictions. Consequently, a question will sometimes arise in the probate court: ‘which state law does apply, despite what the settlor intends and tells us in his/her Trust instrument?’ The topic of conflict of laws regarding Trusts arises for three different reasons.

**People are Mobile:** People are more mobile these days. They move from state to state either for jobs, to escape high state income taxes, or for retirement. As children grow up, to often move away from their ‘home’ state. This trend can lead a Trust to being subject to multiple jurisdictions, if the settlor with a Michigan Trust moves to Florida, for example.

**Wealth is Mobile:** Unlike decades ago, financial assets, not real estate, comprise the bulk of most people’s estates. While the law of the settlor’s domicile usually controls the laws that pertain to tangible and intangible personal property, the law where real property is located is controlling. Consider a Transfer on Death beneficiary designation where a stock portfolio is directed to be distributed to the account owner’s Trust in another state. The Trust may be located in Michigan, but the TOD arrangement may be

controlled by the laws of Massachusetts, Pennsylvania, or New York.

**Growth in Trust Havens:** Trust law is rapidly evolving. Several states have adopted laws solely to attract Trust assets by authorizing various types of trusts that are unavailable in other states. These types of Trusts include directed Trusts, self-settled asset protection Trusts, purpose Trusts, dynasty Trusts not subject to any rule against perpetuities, or *silent/ undisclosed* Trusts. With the proliferation of 'Trust haven' states, more options exist, which are not the law of the settlor's domicile that would otherwise control which law governs the Trust and its construction.

These changes and trends all lead to the risk of a conflict of laws. And when disputes arise, litigators will attempt to choose the court that has the most favorable law to support their litigation position.

**Michigan Trust Code:** The Michigan Trust Code (MTC) attempts to address a Trust's governing law. MTC 700.7107 provides:

*The meaning and effect of the terms of a trust are determined by the following:*

- a. *The law of the jurisdiction designated in the terms of the trust unless the designation of that jurisdiction's laws is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.*
- b. *In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.*

Unfortunately, the phrase *strong public policy* is not defined. Nor is there any guidance with respect to the determination of which state has the *most significant relationship with the matter at issue*. However, the Michigan Court of Appeals did have the occasion a half dozen years ago to comment on the *strong public policy* exception. In *In re Alexander L.*

*Ringer Testamentary Trust, Michigan Court of Appeals, No. 340350 (December 20, 2018)* an Illinois resident provided that Illinois law was to govern their Trust. The only relationship of the Trust to Michigan was that the trustee resided in Michigan, leading to the Trust being administered in Michigan. The issue before the Court was the validity of a purported disclaimer. The Court of Appeals found that there is *no strong public policy* for Michigan law to control the terms of the Trust, and that Michigan “*does not have the most significant relationship to the matter at issue.*” Accordingly, the Court applied Michigan law to determine the validity of the disclaimer.

**Restatement of Conflict of Laws:** While the *Restatement (Second) of Conflict of Laws* can be a bit more helpful to determine which state’s law should apply, it’s rules point out to different jurisdictions depending on whether the Trust contains real property or personal property, which is not too helpful if the real property is held in a limited liability company (LLC) which in effect ‘converts’ the real property to personal property. Moreover, the *Restatement* was last drafted in 1971, well before the onset of ‘trust havens’ which invite settlors to invoke the laws of far-flung jurisdictions (Alaska anyone?) Fortunately, the American Law Institute (ALI) is hard at work on a *Restatement (Third) of Conflict of Laws* to address the limitations of prior versions.

**Uniform Law Commission:** More importantly, the Uniform Law Commission is also working on a new uniform act regarding conflict of laws in Wills and Trusts. Currently it is expected that the Uniform Law Commission will approve the new uniform law until the summer of 2025 at the earliest. Some of the points that this proposed uniform Act will address include:

- Simplify the current law and rules.
- Eradicate the distinction between real estate and personal property.
- Deemphasize the distinction between testamentary and inter-vivos trusts.
- Eliminate, if possible, the application of different laws to matters of

construction and interpretation; and

- If possible, apply laws of different states to apply to different aspects of a Trust or an estate.

Remember that this is only a uniform law. Once it has been adopted, Michigan would then have to make it part of EPIC by enactment.

**Conclusion:** Obviously, this is not yet the law in Michigan. But it is something to watch, especially since the MTC permits a settlor to choose the law that governs his/her Trust.