Michigan Undisclosed Trusts - Proceed with Caution

Quick-Take: Under a Michigan undisclosed, or *silent,* trust the trustee is not required to produce trust accounts to anyone. If that is the case, does the statute of limitations on the trustee's administration of the trust ever run?

Background: Earlier this year Michigan amended its Trust Code to authorize the use of *silent,* or undisclosed, trust. [MCL700.7409a.] A handful of other states like Florida, Delaware, and New Hampshire also authorize the use of a *silent* trust, but Michigan's version stands out in one major aspect, in that that the trust instrument can expressly relieve the trustee from its statutory obligations to periodically produce and deliver trust accountings. Presumably, this means that a trust could be administered as a *silent* trust for a period of up to 25 years without the trustee ever delivering an accounting to *anyone.*

While a *silent* trusts is usually viewed as a tool used to protect beneficiaries who are immature or who misuse wealth, or who may have behavioral issues that present unwarranted challenges to the trust and its administration, a trustee that administers the trust without any periodic disclosures to anyone runs the very serious risk of exposing itself to liability claims years later for actions it took while as trustee.

Statute of Limitations: Under the Michigan Trust Code, the statute of limitations starts to run to protect the trustee from claims of breach of trust for claims that could be discerned from a report that adequately disclosed the existence of a potential claim for breach of trust. The Michigan Trust Code, [MCL 700.7905] provides the following limitations periods to commence a proceeding against the trustee:

(1) The following limitations on commencing proceedings apply in addition to other limitations provided by law:

(A) A trust beneficiary shall not commence a proceeding against a trustee for breach of trust more than 1 year after the date the trust beneficiary or a representative of the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.

(B) [deals with a beneficiary who waives the right to receive reports under MCL 700.7814(5).]

(2) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the trust beneficiary or representative knows of the potential claim or should have inquired into the potential claim's existence.

(3) If subsection (1) does not apply, a judicial proceeding by a trust beneficiary against a trustee for breach of trust shall be commenced within 5 years after the first of the following to occur: (i) the removal, resignation or death of the trustee; (ii) the termination of the trust beneficiary's interest in the trust; or (iii) the termination of the trust.

According to the Reporter's Comments to MCL 700.7905(1) this statute is the exclusive statute of limitations regarding trusts, despite the reference in the introductory phrase to other statutes of limitations that might apply to a trust.

Protection Power: Because a trustee is always exposed to potential claims of breach of trust regarding its actions, the trustee of a *silent* trust should always require that the trust instrument grant a 'protection power', where another individual directs the trustee of the trust to provide trust reports and accountings to a trust director, who serves in a fiduciary capacity. In short, to protect the trustee and to start the statute of limitations running against potential claims, the trustee should be directed to provide periodic reports and accountings to a trust director.

Conclusion: There may be good reasons why a settlor wishes to establish a *silent* trust for his/her beneficiaries. But that does not mean that the trustee cannot protect itself and insist that periodic reports and accountings be provided to a trust director, or that the trust instrument include a *protection power* that can be used to require disclosures by the trustee consistent with its reporting obligations under the Michigan Trust Code.