

## Revocable Trusts and Duty to Report

Take-Away: The trustee of a revocable trust, where the trust settlor is incapacitated, generally reports its administration of the trust to the settlor's agent acting under a durable power of attorney, but not the beneficiaries of the revocable trust. That changes if there is no agent to whom the trustee can report.

Background: A question that periodically comes up is the role and responsibilities of a successor trustee when the trust's settlor is incapacitated. The Michigan Trust Code (MTC) contains a provision that is expressly on point, which reflects the principle that the rights of the trust beneficiaries are subject to the control of the settlor, and that the duties of the trustee are owed *exclusively* to the settlor, and not to the revocable trust's beneficiaries.

Michigan Trust Code: The key sections of the MTC are MCL 700.7603 (1) and (2).

*(1) Subject to subsection (2), while a trust is revocable, rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to the settlor. This subsection does not apply to either of the following: (a) A trust created by the exercise of a power described in section 7820a; (b) A trust created by the exercise of a power of appointment held by the trustee in a fiduciary capacity [i.e., by a decanting power].*

*(2) If the trustee reasonably believes that the settlor of a revocable trust is an incapacitated individual, the trustee shall keep the settlor's designated agent or, if there is no designated agent or if the sole agent is a trustee, each beneficiary who, if the settlor were then deceased, would be a qualified trust beneficiary informed of the existence of the trust and reasonably informed of its administration."*

Reporter's Comments: The Reporter's Comments to MCL 700.7603 explains: "*Subsection (2)...creates a mechanism for ensuring supervision of a trustee while the settlor is incapacitated. It provides specific rules for notice of existence of a revocable trust and for delivery of accountings for revocable trusts. As a result, notice to beneficiaries other than the settlor, of the existence of the trust and delivery of accountings in the manner described in MCL 700.7814 are not appropriate unless the trustee reasonably believes the settlor of the revocable trust is incapacitated or the trust directs otherwise, or both. The provisions of MCL 700.7814, which otherwise would require notice of the existence of the trust and*

*delivery of accountings, should not be construed to apply to trusts while the trust is revocable, and the settlor is not incapacitated.”*

Accordingly, qualified trust beneficiaries are entitled to information about the revocable trust and its administration, only if there is no agent of the settlor under a durable power of attorney, and/or the trustee of the revocable trust is the named agent under the durable power of attorney. If there is a named agent acting under the settlor’s valid durable power of attorney, then there is no obligation to fulfill the reporting obligations of MCL 700.7814 to the beneficiaries of the incapacitated settlor’s revocable trust.

**Legal Standing:** While the MTC is clear on the trustee’s duties when the trust settlor is incapacitated, Michigan courts have held that a beneficiary of the incapacitated settlor’s trust may nonetheless be an *interested person*, as described in MCL 700.1105(c) and the Michigan Court Rules [MCR 125(C)(33)(g)] with legal standing to pursue claims associated with the revocable trust and its administration.

In *In re Rhea Brody Living Trust*, 325 Mich. App. 476 (2018) the petitioner sought the removal of the trustee of a revocable trust where the settlor was incapacitated. The petitioner was the settlor’s child and a contingent beneficiary of the revocable trust. The Court of Appeals held that the trust was (i) revocable and (ii) the settlor was incapacitated, such that the trustee had duties to the *qualified trust beneficiaries* under MCL 700.7603(2), there being no agent acting under the settlor’s durable power of attorney. Consequently, the petitioner-child was entitled to enforce the terms of the trust because she was both the object of a specific gift and a contingent remainder beneficiary under the revocable trust’s terms, thus giving her legal standing as a *qualified trust beneficiary* [defined at MCL 700.7103(g)] and as an *interested person* with authority to pursue her petition to remove the trustee.

**Conclusion:** As a generalization, when the settlor of a revocable trust becomes incapacitated, the successor trustee of that trust should only communicate and report to the settlor’s agent acting under a durable power of attorney. If there is no such agent able to receive the successor trustee’s accountings, then the trustee must furnish the information pertaining to the trust and its administration or all qualified trust beneficiaries, who will then have standing to challenge the trustee and its administration of the revocable trust.

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