

Undisclosed Trusts

Quick-Take: Not all trusts will qualify as an undisclosed trust under Michigan's Trust Code, nor should they. New definitions and several limitations best describe Michigan's relatively new *undisclosed trust*.

Background: Michigan amended its Trust Code a couple of years ago to permit an *undisclosed*, aka *silent or quiet*, trust. [MCL 700.7409a(5)(f).] If the trust instrument clearly expresses the settlor's intent that one or more items of *prime disclosure information* should be withheld generally, or withheld in specific circumstances, from one or more trust beneficiaries, during the *nondisclosure period*, the trustee neither has the duty to provide to the trust beneficiaries the terms of the trust and/or information about the trust's property, nor notify qualified trust beneficiaries of the existence of the trust and/or the identity of the trustee, which are trustee disclosure duties that would otherwise be required under the Michigan Trust Code [MCL 700.7814(2).] Some interesting aspects or new role players under an *undisclosed* trust under Michigan's Trust Code follow.

Charitable Trusts: The rules regarding an *undisclosed* trust do not apply to any charitable trust. In short, you cannot have an undisclosed charitable trust.

Nondisclosure Period: The maximum period that the *undisclosed* trust can exist is 25 years, which is determined from when property was first added to the *undisclosed* trust. [MCL 700.7409a(5)(a).] The original nondisclosure period of an *undisclosed* trust cannot be extended by decanting the trust to a new trust to extend the nondisclosure period. [MCL 700.7409a(1)(iv).]

Prime Disclosure Information: This withheld information is generally: (i) the existence of the trust; (ii) the identity of the trustee; (iii) the terms of the trust; and (iv) information about the nature and extent of the trust property. [MCL 700.7409a(5)(d).] Note that this definition does **not** include trust accountings, since the settlor is permitted under MCL 700.7814 to relieve the trustee of the obligation to provide trust accountings to the trust beneficiaries. The trustee of an *undisclosed* trust cannot be held liable for its failure to follow the terms of the trust prescribing nondisclosure of *prime disclosure information*. [MCL 700.7409a(1)(b).]

Trustee Removal: The trust instrument can give another individual a *nondisclosure correlative right* that allows its holder to remove the trustee for its failure during the trust's *nondisclosure period* to follow, to the extent practicable, the terms of the trust prescribing nondisclosure of *prime disclosure information*. [MCL 700.7409a(5)(b).] If an individual is given a *nondisclosure correlative right* under the trust instrument, the trustee's duties under the trust will shift from the trust beneficiaries to the holder of the *nondisclosure correlative right*.

Protection Power: The trust instrument can give another individual a *protection power* that allows the power holder, always acting in a fiduciary capacity, to direct the trustee for the benefit of the trust beneficiaries during the trust's *nondisclosure period*. This *protection power* may authorize the power holder to represent the trust beneficiaries for some, but not all, virtual representation purposes under EPIC. [700.7409a(5)(e).] The trustee's duties under the trust will shift from the trust beneficiaries to the holder of a *protection power*.

Termination of the *Nondisclosure Period*: When the *nondisclosure period* ends the trust then ceases to be an undisclosed trust to the extent that the terms of the trust are inconsistent with the trustee's duties under MCL 700.7814(2)(a). Thereafter, the trustee will have to provide trust beneficiaries with the terms of the trust and information about the trust's property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee. The trust's *nondisclosure* terms thus cease to be effective once the *nondisclosure period* comes to an end. [MCL 700.7409a(3).]

Challenging the Undisclosed Trust's Validity: Since the beneficiaries of an undisclosed trust are presumably 'kept in the dark' regarding the trust's existence, there must be new rules to protect that future exercise of a right to challenge the trust's validity. A separate and potentially additional period is given to contest the validity of a trust that was revocable at the time of the settlor's death when the trust became an *undisclosed* trust. The Trust Code adds an additional two-year period to make such a challenge, which starts either after the trustee provides the information described in MCL 700.7814(2)9a)-(c), or six months after the trustee gives notice described in MCL 700.7604(1)(b), i.e., the trust's existence, the date of the trust instrument, the date of any amendments known to the trustee, a copy of the relevant portions of the terms of the trust that describe or affect the beneficiary's interest in the trust, the settlor's name, the trustee's name and address, and the time allowed to commence a proceeding (these disclosure requirements are imposed

when a proceeding is initiated to contest the validity of a revocable trust.) However, if the trustee of the *undisclosed* trust follows the requirements under MCL 700.7409a, the virtual representation provided either by the holder of a *noncorrelative right*, or a *protection power* will bind a trust beneficiary, and the additional two-year period will not be applicable.

Conclusion: There is a healthy debate within the estate planning bar if an *undisclosed* trust is all that useful of a tool. Often wealthy individuals are anxious that a beneficiary's knowledge of the existence of a trust and the size of wealth that it holds will produce sloth or unproductive 'trust fund babies.' But then there is the counter observation that knowledge of the trust's existence and its assets will help to prepare the trust beneficiary for the future day that they come into control of the accumulated wealth of the trust. And then there is the 'reality check' usually cited by trustees that it is extremely difficult to keep the existence of the trust under wraps when distributions are made from the *undisclosed* trust for the benefit of the trust beneficiary, i.e., debts or expenses mysteriously get paid.

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