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Senate Bill 1376 (as reported without amendment) *(as enrolled)*
 Senate Bill 1377 (Substitute S-1 as reported) *(as enrolled)*
 Senate Bill 1378 (as reported without amendment) *(as enrolled)*
 Sponsor: Senator Alan L. Cropsy (S.B. 1376)
 Senator Hansen Clarke (S.B. 1377)
 Senator Tony Stamas (S.B. 1378)
 Committee: Judiciary

Date Completed: 9-28-10

RATIONALE

Public Act 46 of 2009 made numerous amendments to Article 7 of the Estates and Protected Individuals Code (EPIC), naming Article 7 the Michigan Trust Code, and made conforming changes to the balance of EPIC. This legislation was the product of a five-year drafting process by the Michigan Trust Code Committee, which included representation from the elder law community, estate planners, trust officers, and the banking industry. Based on the Uniform Trust Code promulgated by the National Conference of Commissioners on Uniform State Laws, the Michigan Trust Code (MTC) was designed to modernize the law of trusts while preserving established Michigan law. Public Act 46 was enacted in June 2009 and took effect on April 1, 2010. During that time, practitioners discovered several internal inconsistencies and provisions that apparently had been inadvertently included or inadvertently omitted.

CONTENT

Senate Bill 1376 would make amendments to the Michigan Trust Code concerning the powers and liability of a trustee, the distribution of property of a trust worth less than \$50,000, and a provision of Article 7 that would override the terms of a trust. The bill also would make an amendment to EPIC regarding the representation of beneficiaries by the holder of a power of appointment.

Senate Bills 1377 (S-1) and 1378 would amend the Cemetery Regulation Act and the Prepaid Funeral and Cemetery Sales Act, respectively, to revise citations to several sections of EPIC.

A more detailed description of Senate Bill 1376 follows.

The Michigan Trust Code states that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding related to the trust may not be given effect if there is probable cause to institute a proceeding to contest the trust or another proceeding related to the trust. Under the bill, this requirement would prevail over the terms of a trust. (Under the MTC, the terms of a trust prevail over any provision of Article 7 except for specified requirements, duties, powers of the court, rights, etc. under particular sections of the Code.)

If a trust consists of property worth less than \$50,000, the MTC allows the trustee to terminate the trust upon concluding that the value of the property is insufficient to justify the cost of administration. Upon termination, the trustee must distribute the trust property as provided in the terms of the trust, if any, and otherwise to current income beneficiaries or, if none, as directed by the court. Under the bill, this would apply to a noncharitable trust. If the trust were a charitable trust, the trustee would have to distribute the property in a manner consistent with the purposes of the trust.

The MTC lists specific powers of a trustee, including the power to employ an attorney to perform necessary legal services or to advise or assist the trustee in performing administrative duties. Under the bill, the trustee could do so even if the attorney were associated with the trustee, and the trustee could act without independent investigation upon the attorney's recommendation.

Currently, unless otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust estate, unless the trustee fails to reveal the trustee's representative capacity and to identify the trust estate in the contract. The bill would delete the requirement that the trustee identify the trust estate.

Under the MTC, a trust beneficiary's release of a trustee from liability for breach of trust is invalid to the extent the beneficiary, at the time, did not know of the material facts relating to the breach or of the beneficiary's rights. Under the bill, a beneficiary's lack of knowledge of rights would not invalidate a release.

Under EPIC, for the purpose of granting consent or approval regarding acts or accounts of a personal representative, the holder or coholders of a power of appointment are considered to act for beneficiaries to the extent their interests are subject to the power, and to the extent there is no conflict of interest between the holder or holders and the people represented. The bill would delete the requirement that there be no conflict of interest. (A power of appointment is the authority conferred upon a person to create new ownership interests in assets or select the recipient of an interest in property.)

The bill also would amend the heading of Article 3 of EPIC and add headings to the parts of Article 7.

MCL 700.1209 et al. (S.B. 1376)
456.536 (S.B. 1377)
328.222 (S.B. 1378)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The Michigan Trust Code Committee was formed by the Council of the Probate Law Section of the State Bar of Michigan to study the Uniform Trust Code and draft a Michigan Trust Code. A comprehensive codification of Michigan trust law, the MTC both modernizes the statute and preserves longstanding law in this State. After the legislation was enacted, the need for a small number of technical amendments was discovered, according to the chairperson of the MTC Committee. By making these amendments, Senate Bill 1376 would add clarity to the statute and remove internal inconsistencies.

Specifically, the provision in the bill dealing with a trustee's authority to hire an attorney would restore language that had been in EPIC before Article 7 was amended, but was inadvertently omitted. Also, the bill would delete current language requiring a trustee to reveal the "trust estate" in a contract, in order to avoid personal liability; this requirement could be construed to require disclosure of the *property* held in trust, and potentially creates a trap for trustees if a trust is not described fully and accurately.

Regarding the provision that invalidates the release of a trustee from liability for a breach of trust if the beneficiary did not know of the beneficiary's legal rights, that exception was inadvertently included and creates potentially conflicting provisions within the Code, according to the MTC Committee. The bill therefore would delete that ground for invalidating a release.

Regarding a trust consisting of property worth less than \$50,000, that is insufficient to justify the costs of administration, the current requirement for distribution to income beneficiaries upon termination may disqualify a charitable remainder trust unless the terms of the trust provide otherwise. (A charitable remainder trust is an arrangement in which a charitable organization is to receive the principal of the trust upon the death of the grantor or at a specific time.) To avoid disqualification, the bill would require the trustee of a charitable trust to distribute the property in a manner consistent with the purposes of the trust.

Because the MTC is a default statute, the terms of a trust may override the provisions of the Code, subject to specific exceptions.

The bill would reflect the understanding that the MTC's so-called "no contest" provision also cannot be modified by a trust. Under this provision, which parallels a provision in EPIC for wills, language in a trust that would penalize someone for contesting the trust with probable cause may not be given effect.

In addition, regarding the power of appointment language, the bill would remove a requirement that there be no conflict of interest; that requirement did not exist before Article 7 was amended and does not appear in other provisions of EPIC that are similar.

Senate Bills 1377 (S-1) and 1378 simply would correct statutory citations to sections of EPIC, including sections of the MTC, and update other statutory references.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bills would have no fiscal impact on State or local government.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.