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MICHIGAN[1]

State Decanting Summary 2012 PA 485[2]

STATUTORY HISTORY	
Statutory citation	2012 PA 485[3] [tentatively MICH. COMP. LAWS § 556.115a]
Effective Date	12/28/12
Amendment Date(s)	
ABILITY TO DECANT	
1. Discretionary distribution authority required to decant?	Yes, discretionary non-ascertainable power to make distributions of principal or income[4]
2. Limitation on trustee who may decant?	No
CHANGES PERMITTED	
3. May new trust eliminate beneficiary's mandatory distribution rights?	Yes, except as to marital and charitable trusts[5]
4. May new trust eliminate beneficiary's withdrawal rights?	No, for sole beneficiary[6]
5. Must new and old trust beneficiaries be identical?	No[7]
6. Are beneficiaries of new trust limited to current beneficiaries of old trust?	Yes, with boomerang provision[8]
7. May remainder beneficiaries' interests be accelerated?	Silent
8. New and old trust require same distribution standard?	Silent
9. May trustee grant a power of appointment in new trust?	Yes[9]
10. Must new trust grant identical power of appointment as old trust?	No[10]
11. Supplemental needs trust exception?	No
TAX RESTRICTIONS	
12. Marital deduction savings provision?	Yes[11]
13. Charitable deduction savings provision?	Yes[12]
14. Beneficiary/trustee savings provision?	No, but see MCL 700.7815(2)(A)[13]
15. Other tax savings provisions?	2503(c)[14]
16. Non-grantor trust to grantor trust conversion permitted?	Silent
OTHER RESTRICTIONS	
17. Rule against perpetuities savings provision?	Yes[15]
18. May trustee increase trustee commission?	Silent
19. Other restrictions	
NOTICE, CONSENT & APPROVAL	
20. Notice to interested parties required prior to decanting?	Silent
21. Is decanting prohibited if a beneficiary objects?	Silent
22. Court approval required to decant?	No
FIDUCIARY DUTIES	
23. Provision re: purposes for exercise or explicit fiduciary duty?	No
24. Provision that trustee has no duty to consider decanting?	Yes[16]
25. Standard of review?	No
TRUSTS SUBJECT TO STATUTE	
26. Provision on trusts subject to statute?	No
MISCELLANEOUS	
27. Other unique considerations?	Boomerang provision[17] Indemnification provision for first trustee[18] Codification of common law provision[19]

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MICHIGAN STATUTE
MICH. COMP. LAWS § 556.115A

POWERS OF APPOINTMENT ACT OF 1967 (EXCERPT)
Act 224 of 1967

556.115a Second trust.

Sec. 5a. (1) A trustee with a presently exercisable discretionary power to make distributions of income or principal of an irrevocable trust to or for the benefit of 1 or more beneficiaries of the trust may, unless the terms of the first trust expressly provide otherwise, exercise the power by appointing all or part of the property subject to the power in favor of the trustee of a second trust, provided that all of the following conditions are satisfied:

(a) Except as provided in subsection (2), the beneficiaries of the second trust include only permissible appointees, even if fewer than all permissible appointees, of the trustee's discretionary distribution power as of the time the power is exercised.

(b) For a trust, contributions to which have been excluded from gift tax under section 2503(c) of the internal revenue code, 26 USC 2503(c), the trust instrument of the second trust provides that the beneficiary's remainder interest will pass or be payable no later than the date on which the interest would have passed or been payable under the terms of the first trust instrument.

(c) The exercise of the discretionary power does not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a marital or charitable deduction under federal or state law by virtue of that beneficiary's interest in the trust, whether or not that deduction is actually taken.

(d) The exercise of the discretionary power does not reduce a presently exercisable general power to withdraw a specified percentage or amount of trust property in a trust beneficiary who is the only trust beneficiary to or for the benefit of whom the trustee has the power to make discretionary distributions.

(2) The second trust instrument may provide 1 or more of the following:

(a) A special or general power of appointment, including a power to appoint trust property to persons who are not beneficiaries of the first trust, to 1 or more of the beneficiaries of the second trust.

(b) That at a time or upon the occurrence of an event specified in the second trust instrument, the remaining trust assets shall thereafter be held for the benefit of beneficiaries who are or who would have been beneficiaries of the first trust on terms and conditions substantially identical, with respect to the interests of those beneficiaries, to the terms and conditions of the first trust.

(c) That assets of the first trust discovered after exercise of the power described in subsection (1) shall be property of the first trust if that trust continues in existence after exercise of the power, or that assets of the first trust discovered after exercise of the power shall be property of the second trust if the first trust terminates upon exercise of the power.

(d) For indemnification of the trustee of the first trust, except as limited by section 7908 of the MTC, MCL 700.7908.

(3) For purposes of this section, all of the following apply:

(a) A discretionary power to make distributions to a given trust beneficiary is presently exercisable when the timeliness of a present distribution to or for the benefit of that beneficiary depends,

under the terms of the trust instrument, only on the trustee's judgment as to what is in the beneficiary's best interests.

(b) A power to make distributions is not discretionary if it is limited by a definite and ascertainable standard, but instructions for the trustee to consider such things as a beneficiary's best interests, welfare, comfort, happiness, or general development do not in themselves constitute definite and ascertainable standards, regardless of whether the trustee is also instructed or permitted to consider resources outside the trust that may be available to the beneficiary.

(c) A general power annually to withdraw a specified percentage or amount of trust property is presently exercisable with respect to any year for which the beneficiary who holds the power is entitled, under the terms of the governing instrument, to exercise the power, and each subsequent year for which the beneficiary will be entitled to exercise the power assuming only the beneficiary's survival and the continuation of the trust. For example, if a trust provides that, beginning in the fifth year after the trust becomes irrevocable, the beneficiary shall have the power for the remainder of his or her life annually to withdraw $5,000.00 or 5% of the value of the trust principal, whichever is greater, then, in the fourth year after the trust becomes irrevocable, the beneficiary's power to make annual withdrawals is not presently exercisable; however, in the fifth year after the trust becomes irrevocable, the beneficiary's power is presently exercisable, for purposes of this section, with respect to the fifth year and each subsequent year during the beneficiary's life.

(4) The trustee of the second trust may be the trustee of the first trust, the second trust may be a trust under the governing instrument of the first trust or another governing instrument, the governing instrument may be one created by the trustee of the first trust, and the governing instrument may be the instrument that exercises the power described in subsection (1).

(5) A second trust shall be treated as both of the following:

(a) A new irrevocable trust for purposes of the notice requirements of section 7814(2)(c) of the MTC, MCL 700.7814.

(b) A continuation of the first trust for purposes of the notice requirements of section 7814(2)(d) of the MTC, MCL 700.7814, and the charge of any fee or commission on the transfer of assets from the first trust to the second trust shall be treated as a change in the rate of the trustee's compensation.

(6) A discretionary power under subsection (1) is a power of appointment and a discretionary power for purposes of section 7815 of the MTC, MCL 700.7815.

(7) This section shall not abridge the right of a trustee who has a power to distribute trust property in further trust under this act, any other statute, or the common law. This section shall not abridge the right of a trustee who has a power to amend or revoke a trust.

(8) It is the intent of the legislature that this section be a codification of the common law of this state in effect before the effective date of the amendatory act that added this section.

(9) As used in this section, "first trust" means an irrevocable trust over which a trustee has a presently exercisable discretionary power to make distributions that is exercised as described in subsection (1).

MICHIGAN
ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)
Act 386 of 1998

MICH. COMP. LAWS § 700.7103 (Definitions)

700.7103 Definitions.

Sec. 7103. As used in this article:

(a) "Action", with respect to a trustee or a trust protector, includes an act or a failure to act.

(b) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.

(c) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).

(d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:

(i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.

(ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.

(iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.

(iv) Whether the distribution of trust property is from income or principal or both of the trust.

(v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.

(e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.

(f) "Power of withdrawal" means a presently exercisable general power of appointment other than a power that is either of the following:

(i) Exercisable by a trustee and limited by an ascertainable standard.

(ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(g) "Qualified trust beneficiary" means a trust beneficiary to whom 1 or more of the following apply on the date the trust beneficiary's qualification is determined:

(i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.

(ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.

(iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

(j) "Spendthrift provision" means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary's interest.

(k) "Support provision" means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

(l) "Trust beneficiary" means a person to whom 1 or both of the following apply:

(i) The person has a present or future beneficial interest in a trust, vested or contingent.

(ii) The person holds a power of appointment over trust property in a capacity other than that of trustee.

(m) "Trust instrument" means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) "Trust protector" means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment.

[1] Reviewed by Mark Harder 10/15/12.

[2] ***Circular 230 Disclosure***. To comply with certain Treasury regulations, we inform you that these materials are not intended or written to be used, and cannot be used, by any person for the purpose of avoiding U.S. federal tax penalties that may be imposed on such person, and each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor. These materials do not constitute, and should not be treated as legal advice. Although every effort has been made to assure the accuracy of these materials, the author and Sidley Austin LLP do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in these materials and should independently determine both the tax and nontax consequences of any particular transaction before recommending or implementing that transaction.

[3] This statute amends the "Powers of Appointment Act of 1967" (1967 PA 224). This statute codifies common law principles regarding a trustee's exercise of special powers of appointment.

[4] "A power to make distributions is not discretionary if it is limited by a definite and ascertainable standard, but instructions for the trustee to consider such things as a beneficiary's best interests, welfare, comfort, happiness, or general development do not in themselves constitute definite and ascertainable standards, regardless of whether the trustee is also instructed or permitted to considered resources outside the trust that may be available to the beneficiary." § 556.115A(3)(b).

[5] "The exercise of the discretionary power does not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to quality for a marital or charitable deduction under federal or state law by virtue of that beneficiary's interest in the trust, whether or not that deduction is actually taken." § 556.115A(1)(c).

[6] "The exercise of the discretionary power does not reduce a presently exercisable general power to withdraw a specified percentage or amount of trust property in a trust beneficiary who is the only trust beneficiary to or for the benefit of whom the trustee has the power to make discretionary distributions." § 556.115A(1)(d).

[7] The beneficiaries of the second trust may include only permissible appointees, but may include fewer than all permissible appointees. § 556.115A(1)(a).

[8] The beneficiaries of the second trust include only permissible appointees. § 556.115A(1)(a). "The second trust instrument may provide . . . (b) That at a time or upon the occurrence of an event specified in the second trust instrument, the remaining trust assets shall thereafter be held for the benefit of beneficiaries who are or who would have been beneficiaries of the first trust on terms and conditions substantially identical, with respect to the interests of those beneficiaries, to the terms and conditions of the first trust." § 556.115A(2)(b).

[9] § 556.115A(2)(a).

[10] § 556.115A(2)(a).

[11] The decanting may not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a marital deduction under federal or state law, whether or not that deduction was actually taken. § 556.115A(1)(c).

[12] The decanting may not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a charitable deduction under federal or state law, whether or not that deduction is actually taken. § 556.115A(1)(c).

[13] MCL section 700.7815(2)(A) provides: "A person other than a settlor who is a trust beneficiary and trustee of a trust that confers on the trustee a power to make distributions pursuant to a discretionary trust provision to or for the trustee's benefit may exercise the power only in accordance with an ascertainable standard."

[14] § 556.115A(1)(b).

[15] § 556.124(3).

[16] § 700.7815(2).

[17] § 556.115A(2)(b).

[18] "The second trust instrument may provide 1 or more of the following: . . . (d) For indemnification of the trustee of the first trust, except as limited by section 7908 of the MTC, MCL 700.7908." § 556.115A(2)(d). MCL § 700.7908 provides limitations on the exculpation of a trustee.

[19] § 556.115A(8).