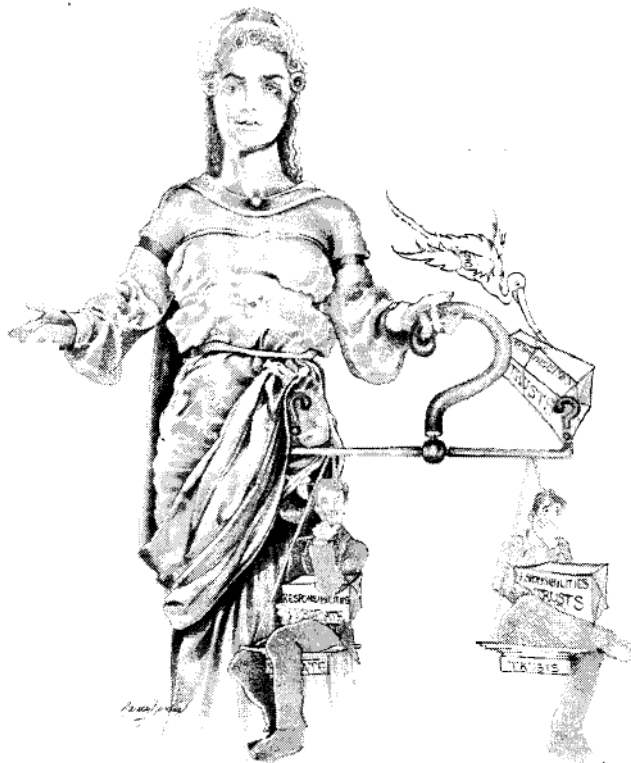


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EPIC: Extending Probate Claims Procedures to Decedent's Revocable Living Trust

By Patricia Gormely Prince
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With the popularity of revocable living trusts as probate avoidance devices, the drafters of Michigan's Estates and Protected Individuals Code (EPIC)¹ sought to bring uniformity and more certainty in the area of claims brought against decedents without probate estates, whose assets passed under these trusts. Article VII, Part 5 of EPIC has a claims procedure that includes not only probate estates, but revocable living trusts as well.

Accordingly, beginning on April 1, 2000, trustees of revocable trusts that have become irrevocable because of the grantor's death (referred to as "trust" or "trusts" in this article), can add publishing a notice to known creditors and paying creditors' claims to their list of statutory duties. Of course, there are certain exceptions to this rule, and not every trust will be subject to the new claims procedures. Therefore, after you have read the highlights of the claims procedure contained below, read EPIC's claims procedure before acting, and then proceed carefully.

*The authors wish to thank John H. Martin, whose *A Guide To The Estates And Protected Individuals Code*, With Comparisons To The Revised Probate Code, and Reporter's Commentary on EPIC were used as reference tools in the preparation of this article. See forthcoming ICLE publication *Estates and Protected Individuals with Reporter's Commentary*, by John H. Martin

TRUST LIABILITY AND A TRUSTEE'S DUTY TO PAY

Section 7501 of EPIC provides that the assets of a trust are subject to satisfy all of the following claims, expenses, and allowances of the grantor, but only to the extent that the grantor's probate estate is unable to satisfy such claims, expenses, and allowances:

- Administration expenses of grantor's estate
- Enforceable and timely presented creditors' claims, including funeral and burial expenses
- Homestead, family, and exempt property allowances²

Section 7501 does not apply however, to any of the following:

- trusts that are part of a qualified retirement plan
- trusts that were not revocable by the decedent/grantor at the time of his or her death
- assets that would not have been subject to creditors' claims if they were paid to a testamentary trust or to other than the decedent's probate estate³

In addition, Section 7501 does not affect rights acquired pursuant to a Qualified Domestic Relations Order?

If the personal representative of a decedent's estate is in need of money to pay expenses or claims, he or she must certify in writing, to the trustee the amount needed to pay administrative expenses of the decedent's estate: enforceable and timely presented claims of decedent's creditors, including funeral and burial expenses;

and homestead, family, and exempt property allowances. The trustee must pay the amounts requested to the personal representative and may rely on the personal representative's certification without liability to trust beneficiaries or third parties?

If there is no estate and, thus, no personal representative, the trustee shall pay directly to creditor the amounts owed by the decedent in connection with enforceable and timely filed claims. This includes claims for funeral and burial expenses.

If a decedent was the granted of two or more trusts, the estate charges are payable pro rata from each trust based on the gross value in each trust on the date of the decedant's death.

However, in situations where there is no estate the trustee is not liable for the payment of the homestead, family, or exempt property allowances. Thus, it is more important than ever to have clients fully fund their trusts.

Payments made by a trustee as described above shall be made solely out of property, or the proceeds of property, that is includable in the grantor's gross estate for federal estate tax purposes, other than those assets described above, to which EPIC Section 7501 does not apply.

When the trustee is compelled to pay expenses of, or claims against, the estate, unless the decedent designated otherwise in his or her will or trust, the expenses and/or claims will be paid from the trust pursuant to the following order of priority:

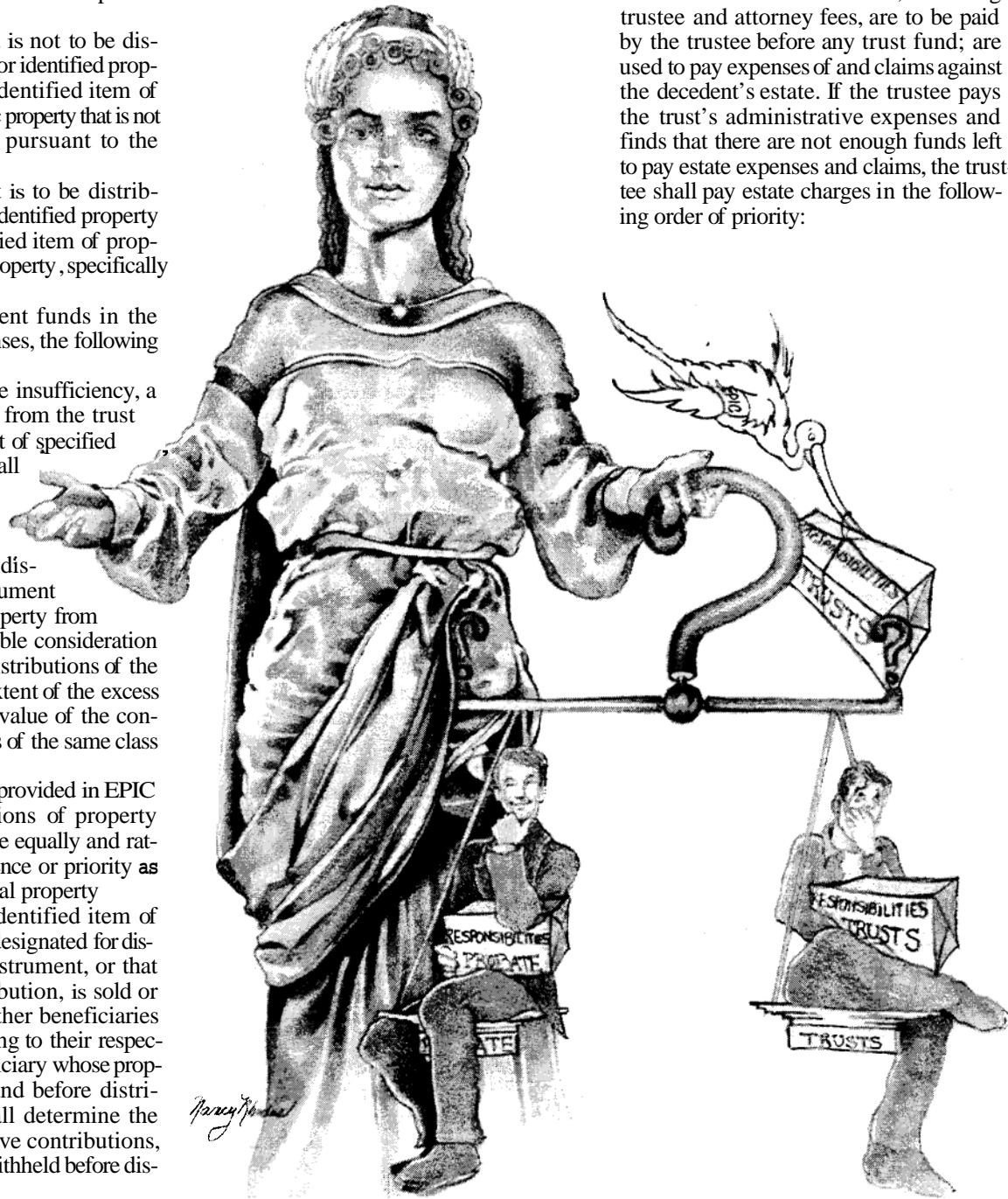
- from property of trust residue that remains after all distributions that are to be satisfied by reference to a specific property or type of property, fund, money, or statutory amount, i.e., the residue after specific bequests)
- from property that is not to be distributed out of specified or identified property or a specified or identified item of property (i.e., from specific property that is not specifically distributed pursuant to the terms of the document)
- from property that is to be distributed out of specified or identified property or a specified or identified item of property, (i.e., from specific property, specifically distributed)⁶

If there are insufficient funds in the trust to meet such expenses, the following rules apply:

- to the extent of the insufficiency, a distribution of property from the trust that is to be satisfied out of specified or identified property shall be classed as a distribution to be satisfied out of the general trust property not otherwise disposed of in the trust instrument
- a distribution of property from the trust given for valuable consideration shall abate with other distributions of the same class only to the extent of the excess over the amount of the value of the consideration until all others of the same class are exhausted
- except as otherwise provided in EPIC Section 7503, distributions of property from the trust shall abate equally and ratable and without preference or priority as between real and personal property
- if a specified or identified item of property that has been designated for distribution in the trust instrument, or that is charged with a distribution, is sold or taken by the trustee, other beneficiaries shall contribute according to their respective interests to the beneficiary whose property is sold or taken, and before distribution, the trustee shall determine the amounts of the respective contributions, which shall be paid or withheld before distribution is made⁷

The new requirements, although not necessarily welcome by already overworked trustees, will provide fairness and more certainty in the area of creditors' regardless of the probate avoidance techniques utilized in a decedent's estate plan.

Trust administration costs, including trustee and attorney fees, are to be paid by the trustee before any trust fund; are used to pay expenses of and claims against the decedent's estate. If the trustee pays the trust's administrative expenses and finds that there are not enough funds left to pay estate expenses and claims, the trustee shall pay estate charges in the following order of priority:



- administrative expenses
- homestead, family, and exempt property allowances
- reasonable funeral and burial expenses
- debts and taxes with priority under federal law
- medical expenses of last illness
- debts and taxes with priority under other laws of this state
- all other claims⁸

Charges of the same class are to be paid *pro rata* if all the charges of the same class can not be paid. Charges due and payable do not receive preference over charges not yet due.⁹ The priority of payment applicable to trusts is the same as the priority of payments from an estate EPIC's priority scheme for estates is identical to the priority scheme of the RPC), except that homestead, family, and exempt property allowances are paid first when dealing with an estate.¹⁰

If a decedent was the grantor of two or more trusts, the estate charges are payable *pro rata* from each trust based on the gross value in each trust on the date of the decedent's death. Each trustee is entitled to a right of contribution from the other trustee(s) in order that each trust may fulfill its *pro rata* liability, subject to provisions in each trust on this subject. If there is a conflict between the trusts regarding the allocation and burden of the charges, the decedent's will controls.¹¹

NOTICE REQUIREMENTS AND PRESENTMENT OF CLAIMS

EPIC continues the claims notice requirements of the RPC. However, under EPIC, the notice requirements fall upon the trustee of a decedent's trust in certain circumstances. Specifically, Section 7504 provides that if there are no probate proceedings and, thus, notice to creditors has not been made, the trustee of a decedent's trust is required to publish a creditors notice and follow all other notice requirements otherwise imposed on the personal representative of a decedent's estate.¹²

If claims notice is given by a trustee as described above, claimants must present their claims against the trust by either mailing or delivering a written statement of the claim to the trustee or commencing an action regarding the claim against the trust in a court of proper jurisdiction.¹³ This is the same procedure used with estates except that a claim may also be presented against an estate by filing a written statement of the claim with the court and delivering or mailing a copy of the statement to the personal representative or proposed personal representative.¹⁴ EPIC's procedure for the presentment of claims when an estate is involved is virtually identical to the RPC's procedure.¹⁵

On the other hand, if an estate has been opened and a personal representative has been appointed, the claim must be presented against the decedent's estate, and this suffices to assert liability against the decedent's trust, without additional presentment against the trustee.¹⁶ Therefore, communication between the personal representative and trust, if they are different persons or entities, is a must.

The time period for presenting a claim against the decedent's trust is the same as it is for presenting claims against a decedent's estate. That is, if notice has been given in the proper manner, claims must be presented within four months after the date of publication of notice to creditors. In contrast, if the required notice has not been given, claimants have up to three years from the date of the decedent's death to present their claims. In the case of creditors known to the trustee prior to or during the publication period, claims must be presented before the later of (a) 28 days after the subsequent sending of notice (one month for estates), or (b) four months after the date of publication.¹⁷

The time limitations listed above do not apply to any of the following:

- a proceeding to enforce a mortgage, pledge, or other lien upon property held in the trust
- a proceeding to establish the settlor's or the trustee's liability for which the settlor or the trustee is protected by liability insurance to the limits of the insurance protection only
- collection of compensation for services rendered and reimbursement of expenses advanced by the trustee or by an attorney, auditor, investment advisor, or other specialized agent or assistant for the trustee.¹⁸

These are the same time restraints and exceptions found in the RPC.¹⁹

ALLOWANCE/DISALLOWANCE OF CLAIMS²⁰

If there is a probate estate, the personal representative will decide whether to allow or disallow claims. If a probate estate does not exist, the trustee of the decedent's trust determines whether to allow or disallow claims. With a few minor exceptions, the rules in this area are the same, whether it is a personal representative or trustee who is making the decision regarding the claim.²¹ Note that EPIC's requirements when an estate is involved are the same as the requirements under the RPC.

Specifically, the trustee may mail or deliver notice to the claimant stating that the claim has been disallowed, in whole or in part, and the notice must warn the claimant of the impending bar described below. If the trustee fails to deliver or mail such notice within 63 days after the time for the presentation of such claim has expired, the claim shall be considered to have been allowed.

A claimant has 63 days following the disallowance of his or her claim, whether in whole or in part, to challenge the disallowance. This is done by filing a petition for allowance in the court or commencing a proceeding against the trustee within 63 days of the mailing of the notice of disallowance.

The trustee may change his or her decision regarding the allowance of a claim if the time for the claimant to file a petition for allowance, or if the time to commence a proceeding on the claim, has not passed. The trustee must notify the claimant of any such change. Nonetheless, after



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a claim is barred, it may only be allowed and paid if the trust is solvent and all interested parties consent to its allowance and payment.

The trustee may change his or her decision regarding the allowance of a claim before payment has been made, but not after allowance by a court order or judgment, or an order directing payment of the claim. The trustee must notify the claimant of the change to disallowance, and the claim then becomes subject to the rules regarding its basis as provided above.

The court may allow in whole or in part, a claim timely and properly presented. Also, a judgment in another court against a trustee to enforce a claim against a decedent's estate constitutes an allowance of the claim.

Note that EPIC'S requirements when an estate is involved are identical to the RFC requirements, except that EPIC contains additional provisions regarding the personal representative's ability to change his or her decision regarding the allowance or disallowance of a claim.²²

PAYMENT OF CLAIMS

If there is a probate estate, the personal representative pays the claims, although the money may come from decedent's trust. In contrast, if there is no probate estate, the trustee will pay claims directly. Payment procedures are virtually the same whether payment is made by the trustee or personal representative and mirror payment procedures for a personal representative under the RFC.²³ Those payment procedures are:

- the trustee is required to pay claims allowed against the trust once the four-month claims period has expired
- claims are paid in the order of priority set out in EPIC Section 7503(2)(c) to (e), which is described above

- prior to paying such claims, the trustee must make provision for costs and expenses of trust administration, each claim already presented that is not yet allowed or whose allowance is appealed, and each unbarred claim that may yet be presented.

If a claimant whose claim has been allowed has not been paid as provided above, he or she may petition the court to obtain an order requiring the trustee to pay the claim to the extent that trust funds are available for payment.²⁴

If the trustee does not wish to wait the required four months before paying credi-

tors, he or she may pay a claim that has not been barred, with or without formal presentation of such claim. The trustee, however, will be personally liable to other creditors whose claims are allowed and who are injured by the payment, in either of the following circumstances: (a) payment is made prior to the expiration of the four-month claims period and the trustee does not require the payee to provide adequate security for the refund of any of the payment needed to pay another claimant; or (b) the trustee, due to negligence or willful fault, pays a creditor in a manner that deprives the injured claimant of priority.²⁵

If, when the trustee is ready to pay an allowed claim, the creditor can not be located, the trustee may petition the court to disallow the claim. If proper notice has been given, the court may disallow the claim if it feels that such action is advisable. A claim disallowed in this manner is considered barred.²⁶

Payment of a secured claim will be based on the amount allowed if the creditor relinquishes the security. If the creditor has exhausted the security, payment will be based on the amount of the allowed claim, less the fair value of the security. If the creditor does not, or cannot, exhaust the security the payment amount is based upon the claim amount allowed less the value of the security as determined by converting it into money according to the terms of the agreement under which the security is delivered to the creditor, or as determined by the creditor and trustee by agreement, arbitration, compromise, or litigation?

A trustee, like a personal representative, must also make provisions for contingent or unliquidated claims. EPIC provides a procedure for dealing with claims not yet due. The procedure is the same for trustees and personal representatives, and is the same as the RFC procedure. Specifically, if such claims become due or certain before the trust has been distributed, and if the claim is allowed or established by a proceeding, the claim must be paid in the same fashion as presently due and absolute claims of the same class.

For all other contingent or unliquidated claims, the trustee, or the court, may provide for payment as follows:

- if the claimant consents, the trustee may pay the claimant the present or agreed value of the claim, taking into account any uncertainty

- arrange for future payment or possible payment on the happening of the contingency or on liquidation by creating a trust giving a mortgage obtaining a bond or security from a distributee or otherwise.²⁸

Finally, a trustee, like a personal representative, may deduct any counterclaim the decedent had against a creditor when determining the net amount of a claim.²⁹

CONCLUSION

Prior to EPIC, trustees have often paid claims from trust assets. However, under EPIC, trustees of trusts may find themselves subject to claims procedures that were unique to personal representatives under prior law. The new requirements, although not necessarily welcome by already overworked trustees, will provide fairness and more certainty in the area of creditors' claims, regardless of the probate avoidance techniques utilized in a decedent's estate plan. This should ultimately promote better efficiency in connection with the administration of a decedent's estate.

Some of the trustee's new duties are as follows:

- The decedent's trust must satisfy administration expenses, creditors' claims, and statutory allowances of grantor's estate to the extent the estate is unable to satisfy such obligations.

- If there is no estate, the trustee must pay creditors' claims directly, however, the trust is not liable for allowances.

- The trustee is responsible for notifying creditors if there is no probate estate.

- The trustee will allow or disallow claims if there is no probate estate.

- If there is a probate estate, the personal representative pays the claims, although money may come from the trustee. If there is no probate estate, the trustee pays the creditors' claims directly from the trust. ■

Footnotes

1. 1998 PA 386, as amended by 1999 PA 52. MCL 700.1101, et seq.
2. EPIC 700.7501(1).
3. EPIC 700.7501(2).
4. EPIC 700.7501(3).
5. EPIC 700.7502(1).
6. EPIC 700.7502(2).
7. EPIC 700.7503(1).
8. EPIC 700.7503(2).
9. EPIC 700.7503(3).
10. EPIC 700.3805, RFC 700.715.
11. EPIC 700.7503(4).
12. EPIC 700.7504.

13. EPIC 700.7505 (1)
14. EPIC 700.3804.
15. RPC 700.712. Note that under EPIC, if a claim is presented, a proceeding on the claim shall not be commenced more than 63 days after the personal representative has mailed or *delivered* a notice of disallowance.
16. EPIC 700.7505(2).
17. EPIC 700.7506(1) for trusts, and EPIC 700.3803(1) for estates.
18. EPIC 700.7506(2) for trusts, and EPIC 700.3803(3) for estates.
19. RPC 700.710. The RPC, like estates under EPIC, also uses one month instead of 28 days for creditors known to the personal representative at the time of publication or during the four months following publication. That is, the claim must be presented within *one month* after the subsequent sending of notice or four months after the publication date, whichever is later.
20. EPIC 700.7507 for trusts, and EPIC 700.3806 for estates.
21. When an estate is involved, the personal representative must respond to a claim by the latter of 63 days after the time for the claim's presentment expires or within 63 days after the personal representative's appointment. Also, there are additional procedures when dealing with estates due to the fact that the personal representative may make his or her own claim against the estate. If this occurs, an interested person must object to the personal representative's claim within 63 days after the time for the claim's original presentment expires or the claim will be considered to have been allowed. In addition, an interested person may petition the court concerning a personal representative's claim, and the court may allow the claim, in whole or in part.
22. EPIC 700.3806(3). RPC 700.717.
23. There are a few differences in the payment procedures when a trust is involved. Specifically, if a trustee is paying the claim directly, this means there was no probate estate. Accordingly, the trustee does not need to provide for homestead, family, and exempt property allowances prior to paying claims. A second difference is that the trustee must provide for trust administration costs prior to paying claims.
24. EPIC 700.7508(1) for trusts and EPIC 700.3807(1) for estates. RPC 700.720(1).
25. EPIC 700.7508(2) for trusts and EPIC 700.3807(2) for estates. RPC 700.720(2).
26. EPIC 700.7508(3) for trusts, and EPIC 700.3807(3) for estates: RPC 700.720(3).
27. EPIC 700.7509 for trusts and EPIC 700.3809 for estates. RPC 700.730.
28. EPIC 700.7510 for trusts and EPIC 700.3810 for estates. RPC
29. EPIC 700.7511 for trusts and EPIC 700.3811 for estates. RPC 700.736.