

MICHIGAN PROBATE AND ESTATE PLANNING JOURNAL

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STATE BAR OF MICHIGAN
PROBATE AND ESTATE PLANNING SECTION

TERMINATION OF TRUSTS

by Patricia Gormely Prince and Michael O. Love

A trust may decline to such a value that its continued existence becomes economically impractical in light of the expenses incurred by the trustee in administering the trust. A trust also may decline to such an extent that the objective of holding it beyond the currently vested life interest is no longer practicable. Careful draftsmanship, anticipating that such circumstances might occur, calls for the inclusion of a provision in the trust agreement terminating the trust if it falls below some specified amount. This practice has only recently become widespread, however, leaving many older trusts without a means specified in the instrument to terminate the trust and distribute its assets. This article examines what alternatives are available to terminate such a trust.

Michigan follows the general, common law rule that a trust does not terminate if its purpose is yet to be fulfilled, or if the trust's own requirements for termination have not been met.

More than half the states have no legislation dealing with termination of trusts, regardless of the size of the trust. Those states with statutes fall into two categories. Some states allow termination if the trust corpus falls below a specific dollar amount, varying from \$5,000 in the Wisconsin statute to \$20,000 in the California statute. Other states incorporate a standard that if the fair market value of the corpus is low in relation to the costs of administration so that continuance would defeat or substantially impair the accomplishment of the purpose of the trust, termination is allowable.

Michigan is among the states that have no specific statute for termination of Trusts. Michigan follows the general, common law rule that a trust does not terminate if its purpose is yet to be fulfilled, or if the trust's own requirements for termination have not been met. *Lyle v. Burke*, 40 Mich. 499 (1879); *Ward v. Ward*, 163 Mich. 570, 128 NW 761 (1910). Michigan also follows the rule that a trustee cannot wind up the trust by delivering the trust corpus to a beneficiary or withdrawing from the office of trustee absent specific authorization for such act in the trust document. *Fredericks v. Near*, 260 Mich. 627, 245 NW 537 (1932); *Henderson v. Sherman*, 47 Mich. 267, 11 NW 153 (1882). It does appear that an agreement between the trustee, the beneficiaries, and the settlor, when all are competent, may terminate the trust. *Fredericks, supra*. Neither the parties nor a court, however, would have the power to terminate a valid spendthrift trust, even though there is an agreement to do so between the

heirs. *Rose v. Southern Michigan National Bank*, 255 Mich. 275, 238 NW 284 (1931); See also *Hay v. LeBus*, 317 Mich. 698, 27 NW2d 309 (1947).

A new alternative may exist in the powers now given to probate courts in the Revised Probate Code, under M.S.A. 27.5021-22; MCL 700.21-22.

A statutory mechanism that can be used to terminate an irrevocable trust in the absence of the grantor is the Compromises and Settlements of Trust Controversies Act of 1966 (P.A. 185 of 1966). MSA 26.81(1)-(4) MCL 555.81-84. Under the Act, a compromise, settlement or adjustment may be made after the death of the grantor, if there is a controversy regarding the construction of the instrument, the rights or interests of any beneficiary, or otherwise developing out of the administration of the trust. Where there is such a controversy, and the parties all agree to a compromise, settlement or adjustment, the court is empowered to approve the settlement making it lawful, valid, and binding upon all parties. Note, however that a guardian ad litem will be required for contingent remainderman as well as unborn and unascertained beneficiaries. The court approval will be binding upon the trustee, any beneficiaries, guardians or beneficiaries, and guardians ad litem for all unborn, unascertained, or unavailable beneficiaries.

A new alternative may exist in the powers now given to probate courts in the Revised Probate Code, under M.S.A. 27.5021-22; MCL 700.21-22. The new act, addressing the powers of the probate court over trusts, gives the court exclusive jurisdiction over all trust matters as well as extensive equitable powers. Public Act 69 of 1989. It appears that the probate courts now have the power to terminate a trust and cause its assets to be distributed. There would, of course, need to be production of sufficient evidence that the continuation of the trust will be economically impracticable and that grantor's purposes cannot be attained. This interpretation of the probate court's authority over trusts does not suggest that a beneficiary now has a means to terminate a trust which does not suite his or her purposes. The intentions of the grantor in establishing the trust are still paramount guides to the court. When the grantor's intention is impaired by the costs of continuing a small trust, the court may be persuaded to terminate the trust and order the assets distributed to current income beneficiaries. It also may be possible to use the theory of impairment of grantor's purposes to justify termination of a trust that is large enough to sustain its own existence. The authority of the probate court over trusts and the Compromises and Settlements of Trust Controversies Act certainly apply to all trusts, not just those of a small value.

Parties interested in pursuing this method ought to keep several factors in mind. The principal characteristic of this approach in that it is entirely a matter of the judge's discretionary exercise of equitable power; there is

no right to terminate a trust under this new statute and case law does not encourage the termination of trusts. The consent of all parties to the trust will probably be essential. A creditor of a trust beneficiary probably should not rely on this approach, particularly if the assets sought are in a spendthrift trust.

Thus, while Michigan doesn't have statutory guidance

as do other states, under appropriate circumstances, existing Michigan statutory and common law may allow termination of an uneconomical Trust. No doubt these authorities will be used by creative practitioners to extricate trustees and beneficiaries from an unanticipated situation.

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30th ANNUAL PROBATE SEMINAR

The 30th Annual Probate Seminar, co-sponsored by the Probate and Estate Planning Section and The Institute of Continuing Legal Education, is the state's oldest and most respected probate seminar. Council member and Vice Chairperson of the Section, W. Michael Van Haren, of Grand Rapids, has organized an outstanding program. This year's seminar will focus on the Family business and address a number of topics of interest to all attorneys practicing in this ever-changing field of the law. For example, speakers will address Section 2036(c), pre and postnuptial agreements, the generation-skipping tax, buy and sell agreements and irrevocable trusts. Please refer to pages 31 and 32 for a complete publication of the course schedule.

The seminar will again be held at two locations. The first program is scheduled at the Grand Traverse Resort in Acme from May 17 to May 19. The second session is scheduled at the Fairlane Manor in Dearborn on June 8 and 9.

Remember, Section members are entitled to a \$10 discount off the standard course registration fee. In addition, new lawyers can use their \$50 "chit" toward the course fee and attend either session at a tremendous discount. Refer to the ICLE course calendar or the separate *30th Annual Probate Seminar* notice for more information and registration forms. Continuing legal education is critical if we are to give clients our best advice and counsel. You are strongly encouraged to attend one of these seminars.