No Good Deed Goes Unpunished: The Peril for Trustees With Big Hearts

By Michelle C. Harrell

Imagine that you get “that” phone call and learn that your dear friend has passed away. As you consider the personal impacts upon his family and friends, you recall that he may have asked you to be the trustee of his trust many years ago. Eventually, you find out that you are the acting trustee of his trust. Upon his death as a trust settlor, if you accept the appointment, you now must act like a trustee within the related legal requirements.

In the world of trusts, there is a mythological creature known as a neutral, all-knowing and yet benevolent trustee that understands and perfectly complies with even the most complicated, ambiguous trust agreement. In the real world, trustees are human beings who are subject to the persuasion of emotions and relationships, and the desire to be kind to the settlor’s family (particularly while they are grieving his death) while trying to comply with a trust agreement that they might not fully understand. This reality creates a perilous trap for trustees.

Michigan law imposes many duties upon trustees that are codified in the Michigan Trust Code (MTC). The MTC is a series of statutory sections that contain provisions that a trust settlor may choose to include in his trust as written or in a modified form. There are some MTC provisions that are mandatory rules of trust construction that cannot be waived, deleted or modified by the trust settlor. A violation by a trustee of a duty that a trustee owes to a beneficiary of the trust is called a breach of trust. MCL 700.7901. Breaches can be the result of malfeasance (bad faith conduct), nonfeasance (failing to act when required) or misfeasance (acting but performing incorrectly). Examples generally include but are not limited to failing to perform any trustee duty under the trust or the MTC, failing to report, failing to follow the trust’s instructions, failing to make required distributions to beneficiaries, or failing to properly maintain, invest or secure trust funds or property. MCL 700.7018, MCL 700.7801-7821.

Regarding the trust’s enforceability, the MTC provides that a person can commence a proceeding to contest the validity of a trust that was revocable at the settlor's death within the shorter of either (a) two years after the settlor's death; or (b) six months after the trustee sent notice informing the person of the settlor's name, the trust's existence, the date of the trust instrument, the date of any amendments to the trust instrument known to the trustee, the time allowed for the person to begin proceedings, and providing a copy of the relevant portions of the trust agreement the describe or affect the person's interest in the trust. MCL 700.7604.

Most trustees are earnest, honest and intend to act capably and in good faith. They plan to comply with the trust document and perform as it says. However, sometimes what seems simple at the outset turns out to be less than simple. Complications are increased if the trustee has a long-standing or close relationship to the trust settlor's family and, even more so, if the trustee has a fond relationship with any particular beneficiaries. Trust administration is further complicated by circumstances that can occur during the MTC holding period for objections.

The peril lies in the situation where a *proposed* beneficiary is in dire need of financial or other support during the holding period and the trustee seeks to assist that proposed beneficiary due to kindness, assumptions about the person's trust beneficiary status, or unwritten knowledge of what the settlor would have wanted the trustee to do. Because the trust beneficiaries are determined by the trust agreement, the trustee must not make interim or early payments to a needy proposed trust beneficiary until his status is determined with finality.

First, trust documents are not always simple and straightforward. This is especially true if there has been a significant lapse of time between when the trust document was executed and the settlor's death. A legal analysis may be needed to determine the identity of the rightful beneficiaries of the trust. Named beneficiaries may have predeceased the settlor, and even some of the beneficiaries' children may have also passed away.

In addition, the identity of the beneficiaries may be tied to a definition in the trust that may not have a clear and obvious meaning. For example, the beneficiaries may be defined as the settlor's children who are "living at the time of the division" of the trust assets, instead of those who are "living at the time of the settlor's death." While the date of the settlor's death is determinable with certainty (and the children who were alive on that date), the date of "division" (and by implication, the children who were alive on that date), may be open to challenge.

The reason is that a settlor’s child could die *after* the settlor but *before* the division is made. The result is that such child although living at the time of the settlor’s death would not be “living at the time of the division” and therefore would no longer be a beneficiary under the trust.

Trustees who act before the beneficiaries are determined with finality act at their own peril. For example, consider again the situation where the trust defines its beneficiaries to be the settlor’s children who are “living at the time of the division.” If the trustee makes interim payments to ease the financial need of a purported beneficiary during the holding period, the trustee may run into serious trouble if that purported beneficiary dies during the holding period or before the division is made. In complicated estates, the division of the trust estate can take a significant period of time which increases the chance that a potential beneficiary may pass away and become disqualified as a beneficiary. If the trustee has made a distribution to that person in advance, the trustee can face a claim for breach of his trustee duties. Even worse, if the funds are not recoverable, then the trustee could face personal liability for the loss to the trust.

Although it can be difficult to hold off on requests from potential beneficiaries in need, a trustee must comply with the trust agreement regarding the identity of its beneficiaries and the allowable time for payment considering the applicable holding period. Otherwise, a trustee could be punished for what was intended to be a good deed.