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Michigan Legislature Creates New Opportunities for Asset Protection

As a result of the enactment of the Qualified Dispositions in Trust Act ("Act"), effective as of March 8, 2017, Michigan became the 17th State to approve domestic asset protection trusts. Under the Act, an individual (a "Transferor") can now transfer property into a trust and retain certain rights and powers, including the ability to receive distributions from the trust, while at the same time keep such property immune from the claims of creditors. Previously, these *self-settled* trusts were disregarded under State law with respect to claims by the Transferor's creditors.

What Tranfers Qualify and What Rights and Powers Can the Transferor Retain

For a transfer of assets to a trust to qualify as a "qualified disposition" under the Act: (A) the transfer must be made into an *irrevocable* trust governed by Michigan law, (B) the trustee of the trust must be a Michigan resident or a financial institution licensed in Michigan to act as a trustee and (C) in addition to the ability to receive distributions from the trust at the discretion of the trustee, the Transferor may only retain certain other enumerated rights, powers and interests, including: (i) the power to control investment decisions; (ii) the power to veto distributions from the trust; (iii) the power to remove and replace a trustee; and (iv) the power to change the beneficiaries of the following the Transferor's death.

How Are Creditors' Rights Limited

Creditors' remedies under the Act are significantly reduced. Generally, if the claim arose *before* the transfer, a creditor must commence an action within the later of two years of the transfer of the property into the trust or one year after the transfer was or reasonably could have been discovered by the claimant if the claim was fraudulently concealed. If the claim arose *after* the transfer, the action must be commenced within two years of the transfer. The standard for avoiding a transfer is also heightened under the Act, requiring the creditor to show by *clear and convincing* evidence that the transfer should be set aside. Finally, the remedies under the Act for a creditor that has successfully avoided a transfer are limited to a court requiring the trustee to transfer back to the Transferor only the amount necessary to satisfy the creditor's claim.

Who Can Benefit

While establishing such a trust is not for everyone, certain individuals, particularly professionals who may be subject to malpractice claims and real estate developers who are often asked to provide a personal guarantee, may benefit from establishing a trust under the Act. It also can be used as a substitute for a prenuptial agreement, if the trust is funded 30 days or more before the marriage.

If you are interested in learning more about domestic asset protection trusts, we encourage you to contact a Jaffe attorney to explore planning opportunities.

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