

Legislative Analysis



POWERS OF APPOINTMENT

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4863 as reported from committee
Sponsor: Rep. Jim Haadsma

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4864 as reported from committee
Sponsor: Rep. Douglas C. Wozniak

Committee: Judiciary
Complete to 1-16-24

SUMMARY:

House Bill 4863 would amend the Powers of Appointment Act as follows:

1. The act now provides that, to the extent that certain specified conditions are met,¹ the length of the period during which the vesting of a future interest may be *suspended or* postponed by the exercise of a power is determined, *from the time of the creation of the power or, for a general power presently exercisable, the effective date of the instrument of exercise*, under the Personal Property Trust Perpetuities Act² or section 5(2) of the Uniform Statutory Rule Against Perpetuities.³

The bill would remove the language italicized above. For purposes of this provision, which applies whether the applicable period is finite or infinite, the bill would provide that a trust that is created by the exercise of a power of appointment is created when the power has been irrevocably exercised or when a revocable exercise becomes irrevocable.

2. The act also currently provides both of the following:

The period during which the vesting of a future interest may be *suspended or* postponed by the exercise of a power of appointment begins on the effective date of the instrument of exercise in the case of a general power presently exercisable, and in all other situations, at the time of the creation of the power.

In determining *the period* during which the vesting of a future interest may be *suspended or* postponed by the exercise of a power of appointment, if a second power is created by the exercise of a first power and the first power is a presently exercisable general power, the second power is considered to have been created on the effective date of the instrument of exercise.

¹ Those conditions are: An instrument exercises a power of appointment to subject property to, or create, a trust that is either revocable on or created after May 28, 2008; the appointive property is personal property; and the trust is not a special appointee trust.

² <http://legislature.mi.gov/doc.aspx?mcl-Act-148-of-2008>

³ <http://legislature.mi.gov/doc.aspx?mcl-554-75> Section 5(2) of the Uniform Statutory Rule Against Perpetuities would be amended by House Bill 4864, as described below.

The bill would replace “the period” with “any finite period” and delete “suspended or” in the places indicated with italics above.

3. The act now allows 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 one or more beneficiaries of the trust to exercise the power by appointing all or part of the property subject to the power in favor of the trustee of a second trust, unless the terms of the first trust expressly provide otherwise and provided that certain conditions are satisfied. Among other things, the second trust may provide 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 one or more of the beneficiaries of the second trust.

The bill would add that the beneficiaries of the second trust must be permissible appointees of the trustee’s presently exercisable discretionary distribution power over the first trust.

MCL 556.115a and 556.124

House Bill 4864 would amend the Uniform Statutory Rule Against Perpetuities.

For purposes of the act, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

The bill would amend section 5(2) to add that, despite the above provision, section 2 of the act⁴ is applicable to an interest or power of appointment created, or to which property is subjected, by the exercise of a second power that is subject to section 2(1) of the Personal Property Trust Perpetuities Act,⁵ but only to the extent of the exercise of the second power, and instead of using a period of 90 years to determine whether section 2(1)(b), (2)(b), or (3)(b) of the act is satisfied, or whether to reform a disposition under section 4 of the act,⁶ a period of 360 years must be used.⁷

MCL 554.73 and 554.75

BRIEF DISCUSSION:

According to House committee testimony, House Bills 4863 and 4864 are related to changes made to the Personal Property Trust Perpetuities Act by 2022 PA 154.⁸ The bills would make

⁴ <http://legislature.mi.gov/doc.aspx?mcl-554-72>

⁵ <http://legislature.mi.gov/doc.aspx?mcl-554-92>

⁶ <http://legislature.mi.gov/doc.aspx?mcl-554-74>

⁷ The bill revises this provision in current law (which is not now specified to be an exception to the provision regarding the creation of a nonvested property interest or power of appointment as described above): “Section 2 is applicable to an interest or power of appointment to which the Personal Property Trust Perpetuities Act... applies if the interest or power was created, or property was made subject to the interest or power, by the exercise of a second power. If section 2 is applicable to an interest or power under this subsection, it applies only to the extent of the exercise of the second power, and instead of using a period of 90 years to determine whether section 2(1)(b), (2)(b), or (3)(b) is satisfied, or whether to reform a disposition under section 4, a period of 360 years shall be used.”

⁸ <http://legislature.mi.gov/doc.aspx?2021-HB-4619>

technical changes to ensure that Michigan-based trusts can use a tool commonly known as the Delaware tax trap to limit a trust's exposure to the federal generation-skipping transfer tax. As described in committee, the bills would add language to the Powers of Appointment Act and the Uniform Statutory Rule Against Perpetuities to make explicit how certain provisions function in relation to other provisions of those acts, the Personal Property Trust Perpetuities Act, and the common law. The bills would not change the meaning of the amended acts as determined under the judicial rules for interpreting laws passed by the legislature. However, not all professionals who must deal with the acts are trained in those rules, so it has been suggested that the acts be amended to provide clearer guideposts as to what they mean, and how they should be applied, in coordination with one another and the other law described above. Supporters argued that the bills will ensure that Michigan-based lending institutions and trust advisors remain attractive options for Michiganders who want to establish trusts, noting that, in the absence of these technical fixes, they may either wind up engaged in costly litigation to resolve trust issues in the courts or feel the need to seek options for establishing a trust in another state.

FISCAL IMPACT:

The bill would not have a fiscal impact on the state or on local units of government.

POSITIONS:

A representative of the Probate and Estate Planning Section of the State Bar of Michigan testified in support of the bills. (10-18-23)

The Department of Attorney General indicated support for the bills. (10-25-23)

Legislative Analyst: Rick Yuille
Fiscal Analyst: Marcus Coffin

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.