

**STATE OF MICHIGAN
96TH LEGISLATURE
REGULAR SESSION OF 2012**

Introduced by Senators Jones and Schuitmaker

ENROLLED SENATE BILL No. 980

AN ACT to amend 1967 PA 224, entitled “An act relating to powers, the creation and exercise of powers, release of powers, contracts to appoint, dispositions when powers are unexercised, rights of creditors of donees of powers, computations under the rule against perpetuities, reservation of powers of revocation, and recording of instruments; and to repeal certain acts and parts of acts,” by amending sections 2, 5, 12, 14, and 20 (MCL 556.112, 556.115, 556.122, 556.124, and 556.130), section 20 as amended by 2000 PA 68, and by adding section 5a.

The People of the State of Michigan enact:

Sec. 2. As used in this act:

- (a) “Property” means any legal or equitable interest in real or personal property, including choses in action.
- (b) “Power” means a power of appointment over property.
- (c) “Power of appointment” means a power created or reserved by a person having property subject to his or her disposition that enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property or the shares or the interests in which it shall be received. The term power of appointment may include a power of amendment or revocation, but does not include a power of sale or a power of attorney.
- (d) “Donor” means a person who creates or reserves a power.
- (e) “Donee” means a person to whom a power is granted or reserved.
- (f) “Appointee” means a person to whom a beneficial interest in property is designated or transferred by exercise of a power or, if a power is exercised in favor of a trustee, a person for whose benefit property has been designated or transferred in trust.
- (g) “Creating instrument” means a deed, will, trust agreement, or other writing or document that creates or reserves a power.
- (h) “General power” means a power, the permissible appointees of which include the donee, his or her estate, his or her creditors, or the creditors of his or her estate. The term general power includes a power that is not expressly restricted as to appointees. A power may be general as to some property and special as to other property.
- (i) “Special power” means a power, the permissible appointees of which do not include the donee, his or her estate, his or her creditors, or the creditors of his or her estate.
- (j) “Gift in default” means a transfer to a person designated in the creating instrument as the transferee of property if a power is not exercised or is released.
- (k) “Release” means renunciation, relinquishment, surrender, refusal to accept, and any other form of release.
- (l) A power of appointment is “presently” exercisable whenever the creating instrument does not manifest an intent that its exercise shall be solely by will or otherwise postponed.

(m) “EPIC” means the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206.

(n) “MTC” means article VII of EPIC, MCL 700.7101 to 700.7913.

(o) “Trust” means that term as defined in section 2901 of EPIC, MCL 700.2901.

(p) “Irrevocable trust” means a trust over which no person holds a power of revocation. A power holder’s lack of capacity to exercise a power of revocation negates the power of revocation unless an agent of the power holder under a durable power of attorney, a conservator of the power holder, or a plenary guardian of the power holder is serving and the agent, conservator, or guardian is authorized to exercise the power of revocation.

(q) “Trustee” means a fiduciary or set of co-fiduciaries as described in section 2901(2)(j) of EPIC, MCL 700.2901.

Sec. 5. (1) A power may be exercised by any donee capable of transferring the interest in property to which the power relates.

(2) A power may be exercised only by a written instrument that would be sufficient to pass the interest intended to be appointed if the donee were the owner of the interest. Unless otherwise contemplated in the creating instrument, a power may be exercised only by a written instrument that complies with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power, except that a power exercisable only by deed is also exercisable by a written will executed as required by law.

(3) If the donor has authorized the power to be exercised by an instrument not sufficient in law to pass the appointive interest, the power is not void, but may be exercised by an instrument conforming to subsection (2).

(4) If consent of the donor or of any other person is required for the exercise of a power, the consent must be expressed in the instrument exercising the power or in a separate written instrument, signed in either case by the person whose consent is required. If any person whose consent is required dies or becomes legally incapable of consenting, the power may be exercised by the donee without the consent of that person unless the creating instrument, construed with regard to surrounding circumstances, manifests a contrary intent.

(5) When a power is vested in 2 or more persons, all must unite in its exercise; but if 1 or more of the donees dies, becomes incapable of exercising the power, or releases the power, the power may be exercised by the others, unless the creating instrument, construed with regard to surrounding circumstances, manifests a contrary intent.

(6) When a power is vested in 2 or more trustees, the trustees’ coordination in the exercise of the power is governed by sections 7703 and 7815(3) of the MTC, MCL 700.7703 and 700.7815, unless the trust instrument manifests a contrary intent.

Sec. 5a. (1) 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 1 or more beneficiaries of the trust may, unless the terms of the first trust expressly provide otherwise, exercise the power by appointing all or part of the property subject to the power in favor of the trustee of a second trust, provided that all of the following conditions are satisfied:

(a) Except as provided in subsection (2), the beneficiaries of the second trust include only permissible appointees, even if fewer than all permissible appointees, of the trustee’s discretionary distribution power as of the time the power is exercised.

(b) For a trust, contributions to which have been excluded from gift tax under section 2503(c) of the internal revenue code, 26 USC 2503(c), the trust instrument of the second trust provides that the beneficiary’s remainder interest will pass or be payable no later than the date on which the interest would have passed or been payable under the terms of the first trust instrument.

(c) The exercise of the discretionary power does not reduce the income, annuity, or unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify for a marital or charitable deduction under federal or state law by virtue of that beneficiary’s interest in the trust, whether or not that deduction is actually taken.

(d) The exercise of the discretionary power does not reduce a presently exercisable general power to withdraw a specified percentage or amount of trust property in a trust beneficiary who is the only trust beneficiary to or for the benefit of whom the trustee has the power to make discretionary distributions.

(2) The second trust instrument may provide 1 or more of the following:

(a) 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 1 or more of the beneficiaries of the second trust.

(b) That at a time or upon the occurrence of an event specified in the second trust instrument, the remaining trust assets shall thereafter be held for the benefit of beneficiaries who are or who would have been beneficiaries of the first trust on terms and conditions substantially identical, with respect to the interests of those beneficiaries, to the terms and conditions of the first trust.

(c) That assets of the first trust discovered after exercise of the power described in subsection (1) shall be property of the first trust if that trust continues in existence after exercise of the power, or that assets of the first trust

discovered after exercise of the power shall be property of the second trust if the first trust terminates upon exercise of the power.

(d) For indemnification of the trustee of the first trust, except as limited by section 7908 of the MTC, MCL 700.7908.

(3) For purposes of this section, all of the following apply:

(a) A discretionary power to make distributions to a given trust beneficiary is presently exercisable when the timeliness of a present distribution to or for the benefit of that beneficiary depends, under the terms of the trust instrument, only on the trustee's judgment as to what is in the beneficiary's best interests.

(b) A power to make distributions is not discretionary if it is limited by a definite and ascertainable standard, but instructions for the trustee to consider such things as a beneficiary's best interests, welfare, comfort, happiness, or general development do not in themselves constitute definite and ascertainable standards, regardless of whether the trustee is also instructed or permitted to consider resources outside the trust that may be available to the beneficiary.

(c) A general power annually to withdraw a specified percentage or amount of trust property is presently exercisable with respect to any year for which the beneficiary who holds the power is entitled, under the terms of the governing instrument, to exercise the power, and each subsequent year for which the beneficiary will be entitled to exercise the power assuming only the beneficiary's survival and the continuation of the trust. For example, if a trust provides that, beginning in the fifth year after the trust becomes irrevocable, the beneficiary shall have the power for the remainder of his or her life annually to withdraw \$5,000.00 or 5% of the value of the trust principal, whichever is greater; then, in the fourth year after the trust becomes irrevocable, the beneficiary's power to make annual withdrawals is not presently exercisable; however, in the fifth year after the trust becomes irrevocable, the beneficiary's power is presently exercisable, for purposes of this section, with respect to the fifth year and each subsequent year during the beneficiary's life.

(4) The trustee of the second trust may be the trustee of the first trust, the second trust may be a trust under the governing instrument of the first trust or another governing instrument, the governing instrument may be one created by the trustee of the first trust, and the governing instrument may be the instrument that exercises the power described in subsection (1).

(5) A second trust shall be treated as both of the following:

(a) A new irrevocable trust for purposes of the notice requirements of section 7814(2)(c) of the MTC, MCL 700.7814.

(b) A continuation of the first trust for purposes of the notice requirements of section 7814(2)(d) of the MTC, MCL 700.7814, and the charge of any fee or commission on the transfer of assets from the first trust to the second trust shall be treated as a change in the rate of the trustee's compensation.

(6) A discretionary power under subsection (1) is a power of appointment and a discretionary power for purposes of section 7815 of the MTC, MCL 700.7815.

(7) This section shall not abridge the right of a trustee who has a power to distribute trust property in further trust under this act, any other statute, or the common law. This section shall not abridge the right of a trustee who has a power to amend or revoke a trust.

(8) It is the intent of the legislature that this section be a codification of the common law of this state in effect before the effective date of the amendatory act that added this section.

(9) As used in this section, "first trust" means an irrevocable trust over which a trustee has a presently exercisable discretionary power to make distributions that is exercised as described in subsection (1).

Sec. 12. If the donee of a special power fails to exercise the power effectively or totally releases a releasable special power, the interests that might have been appointed under the power pass as follows:

(a) If the creating instrument contains an express gift in default, then in accordance with the terms of the gift.

(b) Except as provided in subdivision (d), if the creating instrument contains no express gift in default and does not clearly indicate that the permissible appointees are to take only if the donee exercises the power, then equally to the permissible appointees living at the time of the termination or release of the power, but if the power is to appoint among a class, such as "relatives", "issue" or "heirs", then to those persons in the closest degree of kinship or representing others in the same degree of kinship who would have taken had there been an express appointment per stirpes to the described class effective as of the termination or release of the power.

(c) Except as provided in subdivision (d), if the creating instrument contains no express gift in default and clearly indicates that the permissible appointees are to take only if the donee exercises the power, then by reversion to the donor or his or her estate. If the creating instrument expressly states that there is no reversion in the donor, then any language in the creating instrument indicating or stating that the permissible appointees are to take only if the donee exercises the power is to be disregarded and the interests shall pass under subdivision (b).

(d) If the power was created by the exercise of a discretionary power described in section 5a, then according to the provisions that governed the assets subject to the power under the first trust described in section 5a(1).

Sec. 14. (1) The period during which the vesting of a future interest may be suspended or postponed by an instrument exercising 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.

(2) 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. In all other situations, the second power is considered to have been created at the time of the creation of the first power.

(3) The length of the period, whether finite or infinite, during which the vesting of a future interest may be suspended or postponed by exercise of a power is determined, from the beginning date specified in subsection (1), under the personal property trust perpetuities act, 2008 PA 148, MCL 554.91 to 554.94, or section 5(2) of the uniform statutory rule against perpetuities, 1988 PA 418, MCL 554.75, to the extent that all of the following conditions are satisfied:

(a) An instrument exercises a power of appointment so as to subject property to or to create a trust that is either revocable on or created after May 28, 2008.

(b) The appointive property is personal property.

(c) The trust is not a special appointee trust.

(4) As used in this section:

(a) "First power" means a power of appointment, an exercise of which has created another power of appointment.

(b) "Second power" means a power of appointment created by the exercise of a first power.

(c) "Special appointee trust" means that term as defined in section 4 of the personal property trust perpetuities act, 2008 PA 148, MCL 554.94.

Sec. 20. If an attempted testamentary exercise of a power is ineffective because of an appointee's death before the effective date of the exercise, section 2603 of EPIC, MCL 700.2603, applies.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Ray E. Randall

Clerk of the House of Representatives

Approved

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Governor