

SENATE BILL No. 980

February 23, 2012, Introduced by Senators JONES and SCHUITMAKER and referred to the Committee on Judiciary.

A bill to amend 1967 PA 224, entitled "Powers of appointment act of 1967," 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:

1 Sec. 2. As used in this act:

2 (a) "Property" means any legal or equitable interest in real
3 or personal property, including choses in action.

4 (b) "Power" means a power of appointment over property.

5 (c) "Power of appointment" means a power created or reserved
6 by a person having property subject to his **OR HER** disposition ~~which~~
7 **THAT** enables the donee of the power to designate, within any limits
8 that may be prescribed, the transferees of the property or the
9 shares or the interests in which it shall be received. ~~/ but it THE~~

1 **TERM POWER OF APPOINTMENT MAY INCLUDE A POWER OF AMENDMENT OR**
2 **REVOCATION, BUT** does not include a power of sale ~~, OR~~ a power of
3 attorney. ~~or a power of amendment or revocation.~~

4 (d) "Donor" means ~~the A~~ person who creates or reserves ~~the A~~
5 power.

6 (e) "Donee" means ~~the A~~ person to whom ~~the A~~ power is granted
7 or reserved.

8 (f) "Appointee" means ~~the A~~ person to whom ~~an A~~ **BENEFICIAL**
9 interest in property is designated or transferred by exercise of
10 ~~the A~~ power **OR, IF A POWER IS EXERCISED IN FAVOR OF A TRUSTEE, A**
11 **PERSON FOR WHOSE BENEFIT PROPERTY HAS BEEN DESIGNATED OR**
12 **TRANSFERRED IN TRUST.**

13 (g) "Creating instrument" means ~~the A~~ deed, will, trust
14 agreement, or other writing or document ~~which~~ **THAT** creates or
15 reserves ~~the A~~ power.

16 (h) "General power" means a power, ~~exercisable in favor of the~~
17 **PERMISSIBLE APPOINTEES OF WHICH INCLUDE THE** donee, his **OR HER**
18 estate, his **OR HER** creditors, or the creditors of his **OR HER**
19 estate. ~~, whether or not it is exercisable in favor of others. A~~
20 **THE TERM GENERAL** power ~~to appoint to any person or a power which~~
21 **INCLUDES A POWER THAT** is not expressly restricted as to appointees.
22 ~~is a general power. A power may be general as to some property and~~
23 special as to other property.

24 (i) "Special power" means a power, ~~exercisable only in favor~~
25 ~~of 1 or more persons not including the~~ **PERMISSIBLE APPOINTEES OF**
26 **WHICH DO NOT INCLUDE THE** donee, his **OR HER** estate, his **OR HER**
27 creditors, or the creditors of his **OR HER** estate.

1 (j) "Gift in default" means a transfer to a person designated
2 in the creating instrument as the transferee of property if a power
3 is not exercised or is released.

4 (k) "Release" means renunciation, relinquishment, surrender,
5 refusal to accept, and any other form of release.

6 (l) A power of appointment is "presently" exercisable whenever
7 the creating instrument does not manifest an intent that its
8 exercise shall be solely by will or otherwise postponed.

9 (M) "EPIC" MEANS THE ESTATES AND PROTECTED INDIVIDUALS CODE,
10 1998 PA 386, MCL 700.1101 TO 700.8206.

11 (N) "MTC" MEANS ARTICLE VII OF EPIC, MCL 700.7101 TO 700.7913.

12 (O) "TRUST" MEANS THAT TERM AS DEFINED IN SECTION 2901 OF
13 EPIC, MCL 700.2901.

14 (P) "IRREVOCABLE TRUST" MEANS A TRUST OVER WHICH NO PERSON
15 HOLDS A POWER OF REVOCATION. A POWER HOLDER'S LACK OF CAPACITY TO
16 EXERCISE A POWER OF REVOCATION NEGATES THE POWER OF REVOCATION
17 UNLESS AN AGENT OF THE POWER HOLDER UNDER A DURABLE POWER OF
18 ATTORNEY, A CONSERVATOR OF THE POWER HOLDER, OR A PLENARY GUARDIAN
19 OF THE POWER HOLDER IS SERVING AND THE AGENT, CONSERVATOR, OR
20 GUARDIAN IS AUTHORIZED TO EXERCISE THE POWER OF REVOCATION.

21 (Q) "TRUSTEE" MEANS A FIDUCIARY OR SET OF CO-FIDUCIARIES AS
22 DESCRIBED IN SECTION 2901(2)(J) OF EPIC, MCL 700.2901.

23 Sec. 5. (1) A power ~~can~~**MAY** be exercised by any donee capable
24 of transferring the interest in property to which the power
25 relates.

26 (2) A power ~~can~~**MAY** be exercised only by a written instrument
27 ~~which~~**THAT** would be sufficient to pass the interest intended to be

1 appointed if the donee were the owner of the interest. Unless
2 otherwise contemplated in the creating instrument, a power ~~can~~**MAY**
3 be exercised only by a written instrument ~~which~~**THAT** complies with
4 the requirements, if any, of the creating instrument as to the
5 manner, time, and conditions of the exercise of the power, except
6 that a power exercisable only by deed is also exercisable by a
7 written will executed as required by law.

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

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

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

27 **(6) WHEN A POWER IS VESTED IN 2 OR MORE TRUSTEES, THE**

1 TRUSTEES' COORDINATION IN THE EXERCISE OF THE POWER IS GOVERNED BY
2 SECTIONS 7703 AND 7815(3) OF THE MTC, MCL 700.7703 AND 700.7815,
3 UNLESS THE TRUST INSTRUMENT MANIFESTS A CONTRARY INTENT.

4 SEC. 5A. (1) A TRUSTEE WITH A PRESENTLY EXERCISABLE
5 DISCRETIONARY POWER TO MAKE DISTRIBUTIONS OF INCOME OR PRINCIPAL OF
6 AN IRREVOCABLE TRUST TO OR FOR THE BENEFIT OF 1 OR MORE
7 BENEFICIARIES OF THE TRUST MAY, UNLESS THE TERMS OF THE FIRST TRUST
8 EXPRESSLY PROVIDE OTHERWISE, EXERCISE THE POWER BY APPOINTING ALL
9 OR PART OF THE PROPERTY SUBJECT TO THE POWER IN FAVOR OF THE
10 TRUSTEE OF A SECOND TRUST, PROVIDED THAT ALL OF THE FOLLOWING
11 CONDITIONS ARE SATISFIED:

12 (A) EXCEPT AS PROVIDED IN SUBSECTION (2), THE BENEFICIARIES OF
13 THE SECOND TRUST INCLUDE ONLY PERMISSIBLE APPOINTEES, EVEN IF FEWER
14 THAN ALL PERMISSIBLE APPOINTEES, OF THE TRUSTEE'S DISCRETIONARY
15 DISTRIBUTION POWER AS OF THE TIME THE POWER IS EXERCISED.

16 (B) FOR A TRUST, CONTRIBUTIONS TO WHICH HAVE BEEN EXCLUDED
17 FROM GIFT TAX UNDER SECTION 2503(C) OF THE INTERNAL REVENUE CODE,
18 26 USC 2503(C), THE TRUST INSTRUMENT OF THE SECOND TRUST PROVIDES
19 THAT THE BENEFICIARY'S REMAINDER INTEREST WILL PASS OR BE PAYABLE
20 NO LATER THAN THE DATE ON WHICH THE INTEREST WOULD HAVE PASSED OR
21 BEEN PAYABLE UNDER THE TERMS OF THE FIRST TRUST INSTRUMENT.

22 (C) THE EXERCISE OF THE DISCRETIONARY POWER DOES NOT REDUCE
23 THE INCOME, ANNUITY, OR UNITRUST INTEREST OR GENERAL POWER OF
24 APPOINTMENT OF A BENEFICIARY OF A TRUST THAT WAS INTENDED TO
25 QUALIFY FOR A MARITAL OR CHARITABLE DEDUCTION UNDER FEDERAL OR
26 STATE LAW BY VIRTUE OF THAT BENEFICIARY'S INTEREST IN THE TRUST,
27 WHETHER OR NOT THAT DEDUCTION IS ACTUALLY TAKEN.

1 (D) THE EXERCISE OF THE DISCRETIONARY POWER DOES NOT REDUCE A
2 PRESENTLY EXERCISABLE GENERAL POWER TO WITHDRAW A SPECIFIED
3 PERCENTAGE OR AMOUNT OF TRUST PROPERTY IN A TRUST BENEFICIARY WHO
4 IS THE ONLY TRUST BENEFICIARY TO OR FOR THE BENEFIT OF WHOM THE
5 TRUSTEE HAS THE POWER TO MAKE DISCRETIONARY DISTRIBUTIONS.

6 (2) THE SECOND TRUST INSTRUMENT MAY PROVIDE 1 OR MORE OF THE
7 FOLLOWING:

8 (A) A SPECIAL OR GENERAL POWER OF APPOINTMENT, INCLUDING A
9 POWER TO APPOINT TRUST PROPERTY TO PERSONS WHO ARE NOT
10 BENEFICIARIES OF THE FIRST TRUST, TO 1 OR MORE OF THE BENEFICIARIES
11 OF THE SECOND TRUST.

12 (B) THAT AT A TIME OR UPON THE OCCURRENCE OF AN EVENT
13 SPECIFIED IN THE SECOND TRUST INSTRUMENT, THE REMAINING TRUST
14 ASSETS SHALL THEREAFTER BE HELD FOR THE BENEFIT OF BENEFICIARIES
15 WHO ARE OR WHO WOULD HAVE BEEN BENEFICIARIES OF THE FIRST TRUST ON
16 TERMS AND CONDITIONS SUBSTANTIALLY IDENTICAL, WITH RESPECT TO THE
17 INTERESTS OF THOSE BENEFICIARIES, TO THE TERMS AND CONDITIONS OF
18 THE FIRST TRUST.

19 (C) THAT ASSETS OF THE FIRST TRUST DISCOVERED AFTER EXERCISE
20 OF THE POWER DESCRIBED IN SUBSECTION (1) SHALL BE PROPERTY OF THE
21 FIRST TRUST IF THAT TRUST CONTINUES IN EXISTENCE AFTER EXERCISE OF
22 THE POWER, OR THAT ASSETS OF THE FIRST TRUST DISCOVERED AFTER
23 EXERCISE OF THE POWER SHALL BE PROPERTY OF THE SECOND TRUST IF THE
24 FIRST TRUST TERMINATES UPON EXERCISE OF THE POWER.

25 (D) FOR INDEMNIFICATION OF THE TRUSTEE OF THE FIRST TRUST,
26 EXCEPT AS LIMITED BY SECTION 7908 OF THE MTC, MCL 700.7908.

27 (3) FOR PURPOSES OF THIS SECTION, ALL OF THE FOLLOWING APPLY:

1 (A) A DISCRETIONARY POWER TO MAKE DISTRIBUTIONS TO A GIVEN
2 TRUST BENEFICIARY IS PRESENTLY EXERCISABLE WHEN THE TIMELINESS OF A
3 PRESENT DISTRIBUTION TO OR FOR THE BENEFIT OF THAT BENEFICIARY
4 DEPENDS, UNDER THE TERMS OF THE TRUST INSTRUMENT, ONLY ON THE
5 TRUSTEE'S JUDGMENT AS TO WHAT IS IN THE BENEFICIARY'S BEST
6 INTERESTS.

7 (B) A POWER TO MAKE DISTRIBUTIONS IS NOT DISCRETIONARY IF IT
8 IS LIMITED BY A DEFINITE AND ASCERTAINABLE STANDARD, BUT
9 INSTRUCTIONS FOR THE TRUSTEE TO CONSIDER SUCH THINGS AS A
10 BENEFICIARY'S BEST INTERESTS, WELFARE, COMFORT, HAPPINESS, OR
11 GENERAL DEVELOPMENT DO NOT IN THEMSELVES CONSTITUTE DEFINITE AND
12 ASCERTAINABLE STANDARDS, REGARDLESS OF WHETHER THE TRUSTEE IS ALSO
13 INSTRUCTED OR PERMITTED TO CONSIDER RESOURCES OUTSIDE THE TRUST
14 THAT MAY BE AVAILABLE TO THE BENEFICIARY.

15 (C) A GENERAL POWER ANNUALLY TO WITHDRAW A SPECIFIED
16 PERCENTAGE OR AMOUNT OF TRUST PROPERTY IS PRESENTLY EXERCISABLE
17 WITH RESPECT TO ANY YEAR FOR WHICH THE BENEFICIARY WHO HOLDS THE
18 POWER IS ENTITLED, UNDER THE TERMS OF THE GOVERNING INSTRUMENT, TO
19 EXERCISE THE POWER, AND EACH SUBSEQUENT YEAR FOR WHICH THE
20 BENEFICIARY WILL BE ENTITLED TO EXERCISE THE POWER ASSUMING ONLY
21 THE BENEFICIARY'S SURVIVAL AND THE CONTINUATION OF THE TRUST. FOR
22 EXAMPLE, IF A TRUST PROVIDES THAT, BEGINNING IN THE FIFTH YEAR
23 AFTER THE TRUST BECOMES IRREVOCABLE, THE BENEFICIARY SHALL HAVE THE
24 POWER FOR THE REMAINDER OF HIS OR HER LIFE ANNUALLY TO WITHDRAW
25 \$5,000.00 OR 5% OF THE VALUE OF THE TRUST PRINCIPAL, WHICHEVER IS
26 GREATER, THEN, IN THE FOURTH YEAR AFTER THE TRUST BECOMES
27 IRREVOCABLE, THE BENEFICIARY'S POWER TO MAKE ANNUAL WITHDRAWALS IS

1 NOT PRESENTLY EXERCISABLE; HOWEVER, IN THE FIFTH YEAR AFTER THE
2 TRUST BECOMES IRREVOCABLE, THE BENEFICIARY'S POWER IS PRESENTLY
3 EXERCISABLE, FOR PURPOSES OF THIS SECTION, WITH RESPECT TO THE
4 FIFTH YEAR AND EACH SUBSEQUENT YEAR DURING THE BENEFICIARY'S LIFE.

5 (4) THE TRUSTEE OF THE SECOND TRUST MAY BE THE TRUSTEE OF THE
6 FIRST TRUST, THE SECOND TRUST MAY BE A TRUST UNDER THE GOVERNING
7 INSTRUMENT OF THE FIRST TRUST OR ANOTHER GOVERNING INSTRUMENT, THE
8 GOVERNING INSTRUMENT MAY BE ONE CREATED BY THE TRUSTEE OF THE FIRST
9 TRUST, AND THE GOVERNING INSTRUMENT MAY BE THE INSTRUMENT THAT
10 EXERCISES THE POWER DESCRIBED IN SUBSECTION (1).

11 (5) A SECOND TRUST SHALL BE TREATED AS BOTH OF THE FOLLOWING:

12 (A) A NEW IRREVOCABLE TRUST FOR PURPOSES OF THE NOTICE
13 REQUIREMENTS OF SECTION 7814(2)(C) OF THE MTC, MCL 700.7814.

14 (B) A CONTINUATION OF THE FIRST TRUST FOR PURPOSES OF THE
15 NOTICE REQUIREMENTS OF SECTION 7814(2)(D) OF THE MTC, MCL 700.7814,
16 AND THE CHARGE OF ANY FEE OR COMMISSION ON THE TRANSFER OF ASSETS
17 FROM THE FIRST TRUST TO THE SECOND TRUST SHALL BE TREATED AS A
18 CHANGE IN THE RATE OF THE TRUSTEE'S COMPENSATION.

19 (6) A DISCRETIONARY POWER UNDER SUBSECTION (1) IS A POWER OF
20 APPOINTMENT AND A DISCRETIONARY POWER FOR PURPOSES OF SECTION 7815
21 OF THE MTC, MCL 700.7815.

22 (7) THIS SECTION SHALL NOT ABRIDGE THE RIGHT OF A TRUSTEE WHO
23 HAS A POWER TO DISTRIBUTE TRUST PROPERTY IN FURTHER TRUST UNDER
24 THIS ACT, ANY OTHER STATUTE, OR THE COMMON LAW. THIS SECTION SHALL
25 NOT ABRIDGE THE RIGHT OF A TRUSTEE WHO HAS A POWER TO AMEND OR
26 REVOKE A TRUST.

27 (8) IT IS THE INTENT OF THE LEGISLATURE THAT THIS SECTION BE A

1 CODIFICATION OF THE COMMON LAW OF THIS STATE IN EFFECT BEFORE THE
2 EFFECTIVE DATE OF THE AMENDATORY ACT THAT ADDED THIS SECTION.

3 (9) AS USED IN THIS SECTION, "FIRST TRUST" MEANS AN
4 IRREVOCABLE TRUST OVER WHICH A TRUSTEE HAS A PRESENTLY EXERCISABLE
5 DISCRETIONARY POWER TO MAKE DISTRIBUTIONS THAT IS EXERCISED AS
6 DESCRIBED IN SUBSECTION (1).

7 Sec. 12. If the donee of a special power fails to exercise **THE**
8 **POWER** effectively ~~the power,~~ or totally releases a releasable
9 special power, the interests ~~which~~ **THAT** might have been appointed
10 under the power pass **AS FOLLOWS:**

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

13 (b) ~~IF~~ **EXCEPT AS PROVIDED IN SUBDIVISION (D), IF** the creating
14 instrument contains no express gift in default and does not clearly
15 indicate that the permissible appointees are to take only if the
16 donee exercises the power, then equally to the permissible
17 appointees living at the time of the termination or release of the
18 power, but if the power is to appoint among a class, such as
19 "relatives", "issue" or "heirs", then to those persons in the
20 closest degree of kinship or representing others in the same degree
21 of kinship who would have taken had there been an express
22 appointment per stirpes to the described class effective as of the
23 termination or release of the power.

24 (c) ~~IF~~ **EXCEPT AS PROVIDED IN SUBDIVISION (D), IF** the creating
25 instrument contains no express gift in default and clearly
26 indicates that the permissible appointees are to take only if the
27 donee exercises the power, then by reversion to the donor or his **OR**

1 ~~HER~~ estate. ~~, but if~~ **IF** the creating instrument expressly states
2 that there is no reversion in the donor, then any language in the
3 creating instrument indicating or stating that the permissible
4 appointees are to take only if the donee exercises the power is to
5 be disregarded and the interests shall pass ~~in accordance with~~
6 **UNDER** subdivision (b).

7 **(D) IF THE POWER WAS CREATED BY THE EXERCISE OF A**
8 **DISCRETIONARY POWER DESCRIBED IN SECTION 5A, THEN ACCORDING TO THE**
9 **PROVISIONS THAT GOVERNED THE ASSETS SUBJECT TO THE POWER UNDER THE**
10 **FIRST TRUST DESCRIBED IN SECTION 5A(1).**

11 Sec. 14. (1) The period during which the vesting of a future
12 interest may be suspended or postponed by an instrument exercising
13 a power **OF APPOINTMENT** begins **ON THE EFFECTIVE DATE OF THE**
14 **INSTRUMENT OF EXERCISE** in the case of ~~an instrument exercising a~~
15 general power presently exercisable, ~~on the effective date of the~~
16 ~~instrument of exercise,~~ and in all other situations, at the time of
17 the creation of the power.

18 **(2) IN DETERMINING THE PERIOD DURING WHICH THE VESTING OF A**
19 **FUTURE INTEREST MAY BE SUSPENDED OR POSTPONED BY THE EXERCISE OF A**
20 **POWER OF APPOINTMENT, IF A SECOND POWER IS CREATED BY THE EXERCISE**
21 **OF A FIRST POWER, AND THE FIRST POWER IS A PRESENTLY EXERCISABLE**
22 **GENERAL POWER, THE SECOND POWER IS CONSIDERED TO HAVE BEEN CREATED**
23 **ON THE EFFECTIVE DATE OF THE INSTRUMENT OF EXERCISE. IN ALL OTHER**
24 **SITUATIONS, THE SECOND POWER IS CONSIDERED TO HAVE BEEN CREATED AT**
25 **THE TIME OF THE CREATION OF THE FIRST POWER.**

26 **(3) THE LENGTH OF THE PERIOD, WHETHER FINITE OR INFINITE,**
27 **DURING WHICH THE VESTING OF A FUTURE INTEREST MAY BE SUSPENDED OR**

1 POSTPONED BY EXERCISE OF A POWER IS DETERMINED, FROM THE BEGINNING
 2 DATE SPECIFIED IN SUBSECTION (1), UNDER THE PERSONAL PROPERTY TRUST
 3 PERPETUITIES ACT, 2008 PA 148, MCL 554.91 TO 554.94, OR SECTION
 4 5(2) OF THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES, 1988 PA
 5 418, MCL 554.75, TO THE EXTENT THAT ALL OF THE FOLLOWING CONDITIONS
 6 ARE SATISFIED:

7 (A) AN INSTRUMENT EXERCISES A POWER OF APPOINTMENT SO AS TO
 8 SUBJECT PROPERTY TO OR TO CREATE A TRUST THAT IS EITHER REVOCABLE
 9 ON OR CREATED AFTER MAY 28, 2008.

10 (B) THE APPOINTIVE PROPERTY IS PERSONAL PROPERTY.

11 (C) THE TRUST IS NOT A SPECIAL APPOINTEE TRUST.

12 (4) AS USED IN THIS SECTION:

13 (A) "FIRST POWER" MEANS A POWER OF APPOINTMENT, AN EXERCISE OF
 14 WHICH HAS CREATED ANOTHER POWER OF APPOINTMENT.

15 (B) "SECOND POWER" MEANS A POWER OF APPOINTMENT CREATED BY THE
 16 EXERCISE OF A FIRST POWER.

17 (C) "SPECIAL APPOINTEE TRUST" MEANS THAT TERM AS DEFINED IN
 18 SECTION 4 OF THE PERSONAL PROPERTY TRUST PERPETUITIES ACT, 2008 PA
 19 148, MCL 554.94.

20 Sec. 20. If an attempted **TESTAMENTARY** exercise of a power is
 21 ineffective because of an appointee's death before the effective
 22 date of the exercise, ~~the appointment does not lapse and section~~
 23 ~~2603 of the estates and protected individuals code, 1998 PA 286~~
 24 **EPIC**, MCL 700.2603, applies.