POWERS OF APPOINTMENT ACT OF 1967

Act 224 of 1967

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.

History: 1967, Act 224, Eff. Nov. 2, 1967

The People of the State of Michigan enact:

556.111 Powers of appointment act; short title.

Sec. 1.

This act shall be known and may be cited as the "powers of appointment act of 1967".

History: 1967, Act 224, Eff. Nov. 2, 1967

556.112 Powers of appointment act; definitions.

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.

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(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.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 2012, Act 485, Imd. Eff. Dec. 28, 2012

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556.113 Powers of appointment; creation; donors, qualifications.

Sec. 3.

(1) A power may be created by any creating instrument which is executed in the manner required by law for that instrument.

(2) The donor of a power must be a person capable of transferring the interest in property to which the power relates and having a transferable interest in such property.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.114 Manifestation of intent to exercise.

Sec. 4.

Unless otherwise provided in the creating instrument, an instrument manifests an intent to exercise the power if the instrument purports to transfer an interest in the appointive property that the donee would have no power to transfer except by virtue of the power, even though the power is not recited or referred to in the instrument, or if the instrument either expressly or by necessary implication from its wording, interpreted in the light of the circumstances surrounding its drafting and execution, manifests an intent to exercise the power. Subject to the other provisions of this section, if there is a general power exercisable by will with no express gift in default in the creating instrument, a residuary clause or other general language in the donee's will purporting to dispose of all of the donee's estate or property operates to exercise the power, but in all other cases such a clause or language does not in itself manifest an intent to exercise a power exercisable by will.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 1970, Act 195, Imd. Eff. Aug. 6, 1970 ;-- Am. 2000, Act 68, Eff. Apr. 1, 2000

556.115 Methods by which powers may be exercised by donees.

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.

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History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 1970, Act 195, Imd. Eff. Aug. 6, 1970 ;-- Am. 2012, Act 485, Imd. Eff. Dec. 28, 2012

556.115a Second trust.

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:

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(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).

History: Add. 2012, Act 485, Imd. Eff. Dec. 28, 2012

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556.116 Interests appointable by general powers; part of donee's estate.

Sec. 6.

(1) If the will of a donee of a general power exercisable by will either effectively exercises the power or manifests an intent to exercise the power and satisfies the requirements of sections 4 and 5, all interests which the donee could by will appoint and which the donee's will appoints or purports to appoint shall be regarded as part of the donee's estate for the following purposes only:

(a) The payment of the expenses of administration of the donee's estate, to the extent that the donee's individual assets are insufficient for that purpose.

(b) The satisfaction of the claims of the donee's creditors, to the extent provided in section 13.

(c) Inclusion of such interests in determining the right of election of the donee's widow and the satisfaction of such right.

(d) The distribution of any of such interests as the intestate property of the donee, to the extent that the donee's will does not effectively dispose of such interests and the creating instrument does not otherwise provide.

(2) This section does not affect the period during which the vesting of a future interest may be suspended or postponed by an instrument exercising a power as provided in section 14.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 1970, Act 195, Imd. Eff. Aug. 6, 1970

556.117 Naming appointees by donees of powers.

Sec. 7.

The donee of any power may appoint the whole or any part of the appointive assets to any 1 or more of the permissible appointees and exclude others, except as otherwise provided in the creating instrument.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.118 Release of powers; method; delivery.

Sec. 8.

(1) Unless the creating instrument expressly provides that a power cannot be released or expressly restricts the time, manner or scope of release, all powers may be released except as provided in subsection (2).

(2) Unless the creating instrument expressly provides otherwise, a special power may not be released if either the power is not presently exercisable, or the power is exercisable by a trustee or other fiduciary in a fiduciary capacity which requires the exercise of the power.

(3) The release of a power may include all or any part of the property subject to the power; reduce or limit the persons or objects, or classes of persons or objects in whose favor the power is exercisable; or limit in any other respect the extent to or the manner in which the power may be exercised.

(4) A release may be effected, either with or without consideration, by written instrument signed by the donee and delivered.

(5) Delivery of a release may be accomplished in any of the following ways, but this subsection does not preclude a determination that a release has been delivered in some other manner:

(a) Delivery to any person specified in the creating instrument.

(b) Delivery to a trustee or other fiduciary or to 1 of several trustees or other fiduciaries, other than the donee, of the property to which the power relates, or by filing with the court having jurisdiction over the trust.

(c) Delivery to any person, other than the donee, who could be adversely affected by an exercise of the power.

(d) By recording or filing in the office of the register of deeds in the county where the property is located or where the donee resides, which release shall be recorded by the register.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 1970, Act 195, Imd. Eff. Aug. 6, 1970

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556.119 Creation, exercise and release of powers; irrevocability.

Sec. 9.

The creation, exercise or release of a power is irrevocable unless the power to revoke is reserved in the instrument creating, exercising or releasing the power.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.120 Contracts of donees of powers to make appointments; remedies.

Sec. 10.

(1) Unless the creating instrument provides otherwise, the donee of a power, presently exercisable, can contract to make an appointment, if neither the contract nor the promised appointment confers a benefit upon a person who is not a permissible appointee under the power.

(2) Unless the creating instrument provides otherwise, the donee of a power not presently exercisable cannot contract to make an appointment. If the donee cannot contract to make an appointment, but nevertheless does so contract, the promisee cannot obtain either specific

performance or damages, except that he can obtain damages equal to the value given by him for the promise.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.121 Instruments relating to powers to appoint interests in land; recording as conveyances.

Sec. 11.

(1) Any of the following instruments relating to powers to appoint interests in land is entitled to be recorded as a conveyance upon compliance with section 23 of chapter 65 of the Revised Statutes of 1846, being section 565.23 of the Compiled Laws of 1948:

(a) An instrument, other than a will, exercising a power.

(b) An instrument expressing consent to exercise.

(c) A release.

(2) If a power is exercised by a will, a certified copy of the will and of the certificate of probate thereof may be recorded.

History: 1967, Act 224, Eff. Nov. 2, 1967

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556.122 Special power; passing on donee's default.

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).

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 1970, Act 195, Imd. Eff. Aug. 6, 1970 ;-- Am. 2012, Act 485, Imd. Eff. Dec. 28, 2012

556.123 General powers; creditors' rights in appointable interests.

Sec. 13.

(1) If a donee has a general power of appointment, any interest that the donee has power to appoint or has appointed is to be treated as property of the donee for the purposes of satisfying claims of the donee's creditors, as provided in this section.

(2) If a donee has an unexercised general power of appointment and the donee can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest that the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. If the donee has exercised the power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances the creditor could reach property that the donee has owned and transferred.

(3) If a donee has at the time of his or her death a general power of appointment, whether or not he or she exercises the power, the personal representative or other legal representative of the donee may reach on behalf of creditors any interest that the donee could have appointed to the extent that the claim of a creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

(4) Under a general assignment by a donee for the benefit of the donee's creditors, the assignee may exercise any right that a creditor of the donee would have under subsection (2).

(5) A purchaser without actual notice and for a valuable consideration of any interest in property, legal or equitable, takes the interest free of any rights that the donee's estate or a creditor of the donee has under this section.

(6) If more than 1 person is the donee of a general power of appointment, it shall be presumed that the interests of the donees in the property subject to the power are equally owned among them unless the creating instrument indicates otherwise.

(7) The lapse, release, waiver, or disclaimer of a power of appointment given to a donee by a donor is not a gift, conveyance, transfer, or assignment of property by the donee.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 2009, Act 45, Eff. Apr. 1, 2010

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556.124 Suspension or postponement of vesting of future interests; time period; definitions.

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.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 2012, Act 485, Imd. Eff. Dec. 28, 2012

556.125 Suspension or postponement of vesting of future interests; time period when trust creator reserves power to amend or revoke.

Sec. 15.

When the creator of a trust reserves to himself an unqualified power to amend or revoke, the period during which the vesting of a future interest may be suspended or postponed begins when the unqualified power to amend or revoke terminates, whether by reason of the death of the trust creator, by release or otherwise; or on the effective date of the instrument exercising the power to revoke.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.126 Postponement of vesting of future interests; law determining period.

Sec. 16.

When the provisions of sections 14 or 15 apply, the permissible period for the postponement of a vesting of a future interest shall be fixed in accordance with either the law in effect at the time of the exercise of the power or of the termination of the unqualified power of amendment or revocation, or in accordance with the law in effect at the time of the creation of the power, whichever will support the validity of the exercise of the power.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.127 Postponement of vesting of future interests; facts and circumstances to be considered.

Sec. 17.

When the period during which the vesting of a future interest may be postponed must be computed from the time of the creation of a power, with respect to interests sought to be created by an instrument exercising the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account.

History: 1967, Act 224, Eff. Nov. 2, 1967

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556.128 Reserved power of revocation; effect on creditors and purchasers.

Sec. 18.

When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned. If the grantor dies without exercising such power, the executor or other legal representative of the grantor may reach the estate conveyed on behalf of any creditor whose claim has been filed and allowed in the grantor's probate estate but not paid because the assets of the probate estate are insufficient to satisfy his claim. This section shall not confer upon the executor or other legal representative of the grantor the right to obtain on behalf of creditors any of the proceeds of life insurance policies or other distributions from qualified pension, profit sharing and stock bonus plans that might be payable as a result of the death of the grantor.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 1970, Act 195, Imd. Eff. Aug. 6, 1970

556.129 Law applicability; construction of act.

Sec. 19.

As to all matters not within this act or any other applicable statute, the common law is to govern. This section is not intended to restrict in any manner the meaning of any provision of this act or any other applicable statute.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.130 Death of appointee prior to exercise of power.

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.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 2000, Act 68, Eff. Apr. 1, 2000 ;-- Am. 2012, Act 485, Imd. Eff. Dec. 28, 2012

556.131 Membership of class; determination; after born members.

Sec. 21.

Except as provided in section 20, when the donee of a power executes an instrument exercising the power in favor of a class, the membership of the class shall be determined as of the effective date of the exercise and include any person otherwise qualified as a member of the class who was born after the execution of the instrument exercising the power and before the effective date of the exercise unless a different intention is apparent from the instrument exercising the power.

History: 1967, Act 224, Eff. Nov. 2, 1967 ;-- Am. 1970, Act 195, Imd. Eff. Aug. 6, 1970

556.132 Applicability of act.

Sec. 22.

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The provisions of this act are applicable to any power existing on the effective date of this act, as well as a power created after that date.

History: 1967, Act 224, Eff. Nov. 2, 1967

556.133 Repeal.

Sec. 23.

Chapter 64 of the Revised Statutes of 1846, being sections 556.1 to 556.62 of the Compiled Laws of 1948, and Act No. 296 of the Public Acts of 1945, being sections 556.101 to 556.106 of the Compiled Laws of 1948, are repealed.

History: 1967, Act 224, Eff. Nov. 2, 1967

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