



**House
Legislative
Analysis
Section**

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RULE AGAINST PERPETUITIES

House Bill 5626 as enrolled
Second Analysis (1-20-89)

RECEIVED

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Sponsor: Rep. David Honigman
House Committee: Judiciary
Senate Committee: Judiciary

Mich. State Law Library

THE APPARENT PROBLEM:

Under the common law "rule against perpetuities," which Michigan law incorporates, a nonvested interest in property is not good unless it must vest, if at all, not later than 21 years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest. (A "nonvested property interest" refers to an interest to which the transferee is not presently entitled and might never become entitled.) Because the common law rule may invalidate what otherwise would be considered reasonable transfers of property, it is often noted for its harshness. Thus, the Michigan Law Revision Commission has recommended the adoption of the Uniform Statutory Rule Against Perpetuities, drafted by the National Conference of Commissioners on Uniform State Laws. The uniform rule allows a so-called "wait and see" approach, based on actual events that occur within a 90-year post-creation period, to determine the validity of a nonvested property interest, instead of basing the validity of an interest solely on the certainty — at the time of creation — of vesting or failing to vest within the 21-year period. (For more information on the common law and uniform rules, see BACKGROUND INFORMATION.)

THE CONTENT OF THE BILL:

The bill would amend Public Act 38 of 1949, which incorporates the common law rule against perpetuities, to specify that, unless otherwise provided by statute, the act would not apply to nonvested property interests created on or after the effective date of the Uniform Statutory Rule Against Perpetuities (proposed by Senate Bill 79).

House Bill 5626 also would repeal a provision under which no estate for life may be limited as a remainder on a term of years, except to a person in being at the creation of the estate (MCL 554.21). (That is, a life estate cannot be granted as a remainder interest after a term of years. A "life estate" is an interest in property that terminates upon the death of the person having the interest. A "remainder" is a property interest that takes effect after the termination of an interest in the same property held by another person.)

The bill, to take effect December 1, 1988, is tie-barred to Senate Bill 79, which would create a new law to enact the Uniform Statutory Rule Against Perpetuities to provide an alternative rule under which an interest that would be valid under the common law rule against perpetuities would continue to be valid; but also to provide that an interest that would have violated the common law rule would be invalid only if it did not actually vest or terminate within 90 years after its creation. The new act would cover nonvested property interests and powers of appointment, describe when a nonvested property interest or power or appointment would be created, and authorize a court to "reform" a disposition in a manner that approximated the transferor's plan and was within the 90 years allowed.

Senate Bill 79 also specifies exceptions that would apply to the uniform rule.

MCL 554.53

BACKGROUND INFORMATION:

The common law rule against perpetuities evolved over a 200-year period that culminated in the seventeenth century with the 21-years-plus-lives-in-being rule. The rule was designed as a restraint on the power of a landowner to create nonvested interests in property; that is, to tie up property in long-term or even perpetual family trusts. Under the rule, a nonvested property interest is void unless it is certain at the time of the interest's creation that the interest will either vest or fail to vest during the permitted period. As a result, because actual post-creation events are irrelevant, even an interest that was likely to vest and actually would have vested (if allowed) well within the period of a life in being plus 21 years is nevertheless invalid if, at the time of the interest's creation, there was even a remote possibility that it would not have done so. Consequently, reasonable dispositions are invalidated because of such unlikely possibilities as the following:

- that a woman who has passed menopause would give birth to, or a "fertile octogenarian" would father, additional children;
- that the probate of an estate would take more than 21 years to complete;
- that a middle-aged or older married man or woman would become remarried to a person born after the testator's death.

The prospect of striking down interests on such a basis led to a movement to reform the common law rule, by shifting the criterion for validity from possible post-creation events to actual post-creation events; that is, instead of invalidating an interest because of what might happen, wait and see what does happen following the interest's creation. As a result, both the Restatement (second) of Property and the uniform statutory rule validate interests that would be valid under common law, take a "wait-and-see" approach to interests that would be invalid under common law, and allow judicial reformation of an instrument that would be invalid. The restatement, however, specifies the applicable "measuring lives," while the uniform rule adopts a flat 90-year post-creation period. The 90-year rule approximates the period that would be derived by taking the youngest measuring life allowed under the Restatement (six years), and adding the average life expectancy, plus the 21 years allowed under common law.

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have no fiscal impact. (10-10-88)

H.B. 5626 (1-20-89)

OVER

ARGUMENTS:

For:

The uniform statutory rule drafted by the National Conference of Commissioners on Uniform State Laws serves to ensure the validity of reasonable dispositions that otherwise would be struck down under common law. The rule not only continues to validate interests that are valid under the common law rule, but also gives a second chance to otherwise invalid interests. Further, in addition to providing an alternative 90-year wait-and-see period, the uniform rule authorizes the judicial reformation of dispositions that were made before the rule's adoption and would fail under common law, or made after the rule's adoption and would also fail the wait-and-see test. By using a flat 90 years, the rule provides an unmistakable termination of the permitted period, thus avoiding the need to identify and trace measuring lives.