



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

House Bill 4602 (Substitute H-2 as passed by the House)  
House Bill 5909 (as passed by the House)  
Sponsor: Representative Tonya Schuitmaker (H.B. 4602)  
Representative Andy Meisner (H.B. 5909)  
House Committee: Judiciary  
Senate Committee: Judiciary

Date Completed: 5-6-08

### **CONTENT**

**House Bill 4602 (H-2) would amend the Uniform Statutory Rule Against Perpetuities to do the following:**

- Specify that provisions governing the validity of a nonvested property interest or a power of appointment would not apply to an interest in, or a power of appointment over, personal property held in a trust that was revocable or created after the effective date of the Personal Property Trust Perpetuities Act (proposed by House Bill 5909).**
- Apply the existing provisions if the interest in, or power of appointment over, personal property held in trust were created by the exercise of a nonfiduciary second power, but require the use of a 360-year, rather than the current 90-year, period in a determination of whether criteria for validity were satisfied.**
- In the existing provisions, provide that language in a document governing the effect of an exercise of a power of appointment over property exempt from Federal generation-skipping transfer (GST) tax would be inoperative to a certain extent, under particular circumstances.**

**House Bill 5909 would create the "Personal Property Trust Perpetuities Act" to:**

- Provide that an interest in, or a power of appointment over, personal property held in trust would not be invalidated by a rule against perpetuities or other specified rules, except as provided regarding a second power.**
- Allow the indefinite suspension or postponement of the vesting of a future interest, the satisfaction of a condition precedent to the exercise of a general power of appointment, or the exercise of a nongeneral or testamentary power of appointment, with respect to personal property held in trust, subject to provisions involving a second power.**

The bills are tie-barred to each other.

### **House Bill 4602 (H-2)**

#### **Current Provisions**

Under Section 2 of the Uniform Statutory Rule Against Perpetuities, a nonvested property interest, a general power of appointment not presently exercisable because of a condition

precedent, or a nongeneral power of appointment or a general testamentary power of appointment is invalid unless certain criteria are met. Each set of criteria includes what is commonly called a 90-year wait-and-see period.

Specifically, a nonvested property interest is invalid unless 1) the interest either vests or terminates within 90 years after its creation; and/or 2) when the interest is created, it is certain to vest or terminate within 21 years after the death of an individual alive at that time. (A "nonvested property interest" is an interest to which the transferee is not presently entitled and might never become entitled.)

A general power of appointment not presently exercisable because of a condition precedent is invalid unless 1) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation; and/or 2) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy within 21 years after the death of an individual alive at the time. (A "power of appointment" is the authority conferred upon a person to select the recipient of an interest in property. "General power" means that the person may select whomever he or she chooses. A "condition precedent" is a condition or event that must happen or be performed before a right may be exercised.)

A nongeneral power of appointment or a general testamentary power of appointment is invalid unless 1) the power is irrevocably exercised or otherwise terminates within 90 years after its creation; and/or 2) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate within 21 years after the death of an individual alive at the time. ("Nongeneral power of appointment" means that the document creating the power restricts the person or people who may be appointed to receive the interest. "Testamentary" means pursuant to a will.)

Under the bill, these provisions would apply except as provided in Section 5 (described below).

#### Personal Property Held in Trust

Section 5 lists circumstances under which Section 2 does not apply. Under the bill, Section 2 also would not apply to an interest in, or a power of appointment over, personal property held in a trust that was either revocable on or created after the effective date of the proposed Personal Property Trust Perpetuities Act.

Section 2 would continue to apply, however, to an interest in, or a power of appointment over, personal property held in trust if the interest or power were created, or property were made subject to the interest or power, by the exercise of a second power. In that case, Section 2 would apply only to the extent of the exercise of the second power and, instead of the 90-year period used to determine validity, a period of 360 years would have to be used.

A 360-year period also would have to be used in a determination of whether to reform a disposition under Section 4. (That section requires a court, upon the petition of an interested person, to reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution that is within the 90 years allowed by Section 2, if certain conditions are met.)

"Second power" would mean that term as defined in the proposed Personal Property Trust Perpetuities Act.

#### Property Exempt from GST Tax

The bill would amend Section 2 to provide that if, in measuring a period from the creation of a trust or other property arrangement that was irrevocable on September 25, 1985,

language in an instrument governing the effect of an exercise of a power of appointment over property exempt from Federal generation-skipping transfer tax a) sought to allow the vesting or termination of any interest or trust *beyond*, b) sought to postpone the vesting or termination of any interest or trust *until*, or c) sought to operate in effect in any similar fashion *upon*, the later of one of the following:

1. the expiration of a period of time ending with, or not exceeding 21 years after, the death of the survivor of specified lives in being at the creation of the trust or other property arrangement, or
2. the expiration of a period of time that exceeded or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement,

that language would be inoperative to the extent it produced a period of time exceeding 21 years after the death of the survivor of the specified lives.

(The generation-skipping transfer tax is a tax separate from income, estate, and gift taxes, and applies to transfers of property to successive generations. That is, it taxes transfers to grandchildren and those deemed to be two or more generations below that of the person making the transfer. A \$2.0 million lifetime exemption applies to each individual making a transfer or transfers. The present version of the GST tax was enacted in 1986 and does not apply to trusts that were irrevocable and in existence on September 25, 1985 (the date on which the 1986 legislation was introduced in Congress).)

### **House Bill 5909**

Under the proposed Personal Property Trust Perpetuities Act, an interest in, or a power of appointment over, personal property held in trust would not be invalidated by a rule against any of the following (except as provided below regarding a second power):

- Perpetuities.
- Suspension of absolute ownership.
- Suspension of the power of alienation.
- Accumulations of income.

In addition, all of the following could be indefinitely suspended, postponed, or allowed to go on with respect to personal property held in trust (except as provided below):

- The vesting of a future interest.
- The satisfaction of a condition precedent to the exercise of a general power of appointment.
- The exercise of a nongeneral or testamentary power of appointment.
- Absolute ownership.
- The power of alienation.
- Accumulations of income.

If a first power were exercised so as to subject the property to, or to create, a second power, the period during which the vesting of a future interest in the property could be postponed by the exercise of the second power, would have to be determined under the Uniform Statutory Rule Against Perpetuities by reference to the time the first power was created. A nonvested, general power of appointment not presently exercisable because of a condition precedent, or a nongeneral or testamentary power of appointment created, or to which property was subjected, by the exercise of the second power would be invalid, to the extent of the exercise of the second power, unless the interest or power satisfied the Uniform Statutory Rule Against Perpetuities measured from the time the first power was created.

("First power" would mean a nonfiduciary, nongeneral power of appointment over personal property held in trust that is exercised so as to subject the property to, or to create, another power of appointment. "Second power" would mean a nonfiduciary power of appointment over personal property held in trust that is created or to which property is subjected by the exercise of a first power and that is not a presently exercisable general power. "Nonfiduciary" would mean, with respect to a power of appointment, that the power of appointment is not held by a trustee in a fiduciary capacity.

Generally speaking, the term "future interest" refers to a legal right to receive real or personal property at some time in the future, on a particular date or upon the occurrence of an event. "Power of alienation" refers to power to assign, transfer, or otherwise dispose of property.)

The proposed Act would apply only to a nonvested interest in, or power of appointment over, personal property held in trust that is either revocable on, or created after, the Act's effective date.

MCL 554.72 & 554.75 (H.B. 4602)

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

The bills would have an indeterminate fiscal impact on State government. It is unclear whether the bills would have an impact on Michigan tax revenue. Currently, Michigan does not have an estate tax, so there would be no immediate revenue implications relating to it. However, given the scheduled changes to the estate tax at the Federal level, there could be other consequences in the future.

Fiscal Analyst: Stephanie Yu

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.