

**Public Policy Position
Substitute for SB 0721**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,240 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 21 members. On September 20, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 18 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 3 members did not vote.

Support

Explanation:

The Council supports the proposed amendments to MCL 554.92 to 554.93 as presented in the attached pages.

Contact Person: James P. Spica

Email: spica@mielderlaw.com

DRAFT 2
SUBSTITUTE FOR
SENATE BILL NO. 721

A bill to amend 2008 PA 148, entitled
"Personal property trust perpetuities act,"
by amending sections 2 and 3 (MCL 554.92 and 554.93), as amended by
2012 PA 484.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 2. (1) Except as provided in subsection (2), the period
2 during which the vesting of a future interest in property may be
3 postponed by the exercise of a second power is determined under the
4 uniform statutory rule against perpetuities by reference to the
5 time of the creation of the power of appointment that subjected
6 property to, or created, the second power. Except as provided in
7 subsection (2), a nonvested interest, a general power of



1 appointment not presently exercisable because of a condition
 2 precedent, or a nongeneral or testamentary power of appointment
 3 created, or to which property is subjected, by the exercise of the
 4 second power is invalid to the extent of the exercise of the second
 5 power unless the interest or power satisfies the uniform statutory
 6 rule against perpetuities measured from the time of the creation of
 7 the power of appointment that subjected property to, or created,
 8 the second power.

9 (2) To the extent a second power is created or has property
 10 subjected to it by the exercise of a first power, subsection (1)
 11 does not apply to any future interest created by exercise of the
 12 second power if both of the following apply:

13 (a) The first power was not itself created or augmented by the
 14 exercise of either a nonexcluded first power or a nonexcluded
 15 second-order fiduciary power.

16 (b) The instrument exercising the first power to subject
 17 property to or create the second power expressly declares that
 18 subsection (1) does not apply to any future interest created by
 19 exercise of the second power or, if the second power is a
 20 nonfiduciary power, otherwise clearly indicates that the donee of
 21 the first power intends to spring the so-called Delaware tax trap
 22 by subjecting property to or creating the second power. For
 23 purposes of an express declaration that subsection (1) does not
 24 apply, subsection (1) may be referred to as the anti-Delaware-tax-
 25 trap provision of the personal property trust perpetuities act.

26 (3) As used in this ~~act~~ section:

27 (a) "Fiduciary" means, with respect to a power of appointment,
 28 that the power is held by a trustee in a fiduciary capacity.

29 (b) "First power" means a nonfiduciary, nongeneral power of



1 appointment over personal property held in trust that is exercised
2 so as to subject the property to, or to create, another power of
3 appointment.

4 (c) "Nonexcluded first power" means a first power any future
5 interest created by the exercise of which is subject to subsection
6 (1) because the power was itself created or augmented by the
7 exercise of a nonfiduciary, nongeneral power of appointment and the
8 election described in subsection (2) was not made by the donor of
9 the power.

10 (d) "Nonexcluded second-order fiduciary power" means a second-
11 order fiduciary power that is created or has property subjected to
12 it by the exercise of 1 of the following:

13 (i) A nonexcluded first power.

14 (ii) A fiduciary power of appointment that was created or had
15 property subjected to it by the exercise of a nonexcluded first
16 power.

17 (iii) A fiduciary power of appointment whose creation or control
18 over property subject to the power is traceable through an unbroken
19 succession of previous exercises of fiduciary powers to the
20 exercise of a fiduciary power that was created or had property
21 subjected to it by the exercise of a nonexcluded first power.

22 (e) ~~(e)~~—"Nonfiduciary" means, with respect to a power of
23 appointment, that the power of appointment is not held by a trustee
24 in a fiduciary capacity.

25 (f) ~~(d)~~—"Second-order fiduciary power" means a fiduciary power
26 of appointment that is created or has property subjected to it by
27 the exercise of 1 of the following:

28 (i) A first power.

29 (ii) A fiduciary power of appointment that was created or had



1 property subjected to it by the exercise of a first power.

2 (iii) A fiduciary power of appointment whose creation or control
3 over property subject to the power is traceable through a
4 succession of previous exercises of fiduciary powers to the
5 exercise of a fiduciary power that was created or had property
6 subjected to it by the exercise of a first power.

7 (g) ~~(e)~~—"Second power" means a power of appointment over
8 personal property held in trust, other than a presently exercisable
9 general power, that is created or to which property is subjected by
10 the exercise of either a first power or a second-order fiduciary
11 power.

12 (h) ~~(f)~~—"Uniform statutory rule against perpetuities" means
13 the uniform statutory rule against perpetuities, 1988 PA 418, MCL
14 554.71 to 554.78.

15 Sec. 3. (1) Except as provided in ~~subsection (3)~~, **section 2**,
16 an interest in, or power of appointment over, personal property
17 held in trust is not invalidated by a rule against any of the
18 following:

- 19 (a) Perpetuities.
- 20 (b) Suspension of absolute ownership.
- 21 (c) Suspension of the power of alienation.
- 22 (d) Accumulations of income.

23 (2) Except as provided in ~~subsection (3)~~, **section 2**, all of
24 the following may be indefinitely suspended, postponed, or allowed
25 to go on with respect to personal property held in trust:

- 26 (a) The vesting of a future interest.
- 27 (b) The satisfaction of a condition precedent to the exercise
28 of a general power of appointment.
- 29 (c) The exercise of a nongeneral or testamentary power of



1 appointment.

2 (d) Absolute ownership.

3 (e) The power of alienation.

4 (f) Accumulations of income.

5 ~~(3) The period during which the vesting of a future interest~~
6 ~~in property may be postponed by the exercise of a second power~~
7 ~~shall be determined under the uniform statutory rule against~~
8 ~~perpetuities by reference to the time of the creation of the power~~
9 ~~of appointment that subjected property to, or created, the second~~
10 ~~power. A nonvested interest, general power of appointment not~~
11 ~~presently exercisable because of a condition precedent, or~~
12 ~~nongeneral or testamentary power of appointment created, or to~~
13 ~~which property is subjected, by the exercise of the second power is~~
14 ~~invalid, to the extent of the exercise of the second power, unless~~
15 ~~the interest or power satisfies the uniform statutory rule against~~
16 ~~perpetuities measured from the time of the creation of the power of~~
17 ~~appointment that subjected property to, or created, the second~~
18 ~~power.~~

