

## T E S T I M O N Y

**Submitted To:** House Financial Services Standing Committee

**By:** James P. Spica on Behalf of the Probate and Estate Planning Section of the State Bar of Michigan\*

**Re:** HB 4619 S-1 Amending Sections 2 and 3 of the Personal Property Trust Perpetuities Act (Mich. Comp. Laws §§ 554.92–554.93)

**Date:** May 26, 2021

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I thank the Chair and the members of this Committee for allowing me time to present the position of the Probate and Estate Planning Section in support of SB 4619.

Sometimes, wills and trusts grant individuals certain powers to “appoint” gifts to others. A federal estate tax rule called the “Delaware tax trap” can cause assets subject to such a “power of appointment” to be included in the taxable estate of the powerholder if the power is exercised to create another power of appointment. Michigan law provides protection against accidental triggering the Delaware tax trap, but there are circumstances in which, for highly technical estate-planning reasons, it can be beneficial to spring the “trap”: it can be a way of converting what would otherwise be a federal-generation-skipping-transfer-tax bill to a less expensive federal-estate-tax bill; it can be a way using an otherwise unused “effective exclusion” to get a “step-up” in basis.

Michigan law currently allows powerholders to spring the trap on purpose, but only by creating something called a “presently exercisable general power,” and creating a presently exercisable general power is often undesirable (in the relevant planning situations) because it effectively relinquishes control of the trap-springer’s estate-planning arrangements to the “donee” (i.e., the holder) of the presently exercisable general power. When springing the Delaware tax trap is an important strategy for people for whom the creation of a presently exercisable general power of

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\* James P. Spica, Chalgian & Tripp Law Offices, Southfield, Michigan. The witness is a Uniform Law Commissioner, a member of the ULC’s Conflict of Laws in Trusts and Estates Drafting Committee, a sometime American Bar Association Advisor to the ULC, and the principal author of several Michigan statutes, including the Personal Property Trust Perpetuities Act (2008 Mich. Pub. Act 148). He is the Secretary of the Probate and Estate Planning Section of the State Bar of Michigan, a Fellow of the American Bar Foundation, and a Fellow of the American College of Trust and Estate Counsel. He clerked for Hon. Richard C. Wilbur on the United States Tax Court (1985) and taught jurisprudence, taxation, and trusts and estates as an Assistant/Associate Professor of Law at the University of Detroit Mercy (1989–2000, tenured 1996).

**The witness appears before the Committee as an authorized representative of the Council of the Probate and Estate Planning Section of the State Bar of Michigan. The Probate and Estate Planning Section is not the State Bar of Michigan itself, but rather a Section whose members join voluntarily based on common professional interest. The position expressed is that of the Probate and Estate Planning Section only and is not the position of the State Bar of Michigan. To date, the State Bar does not have a position on this matter.**

appointment is inconvenient, they regularly seek to attract the jurisdiction of other states (e.g., Delaware, South Dakota, Nevada, Alaska) under whose law the trap can be sprung without having to create a presently exercisable general power. And seeking the jurisdiction of another state regularly involves appointing a fiduciary in, and moving the administration of a trust to, that other state.

HB 4619 will allow holders of powers of appointment subject to Michigan law to trigger the Delaware tax trap intentionally—by the use of specific language (in a will or trust instrument), the requirement for which will continue to prevent inadvertent trap springing—without having to create a presently exercisable general power of appointment, which, in many cases, will mean not having to move a trust that is being administered in Michigan elsewhere.

The Probate and Estate Planning Section of the State Bar of Michigan supports the proposal.

Thank you.

JPS