

**SUBSTITUTE FOR
HOUSE BILL NO. 4863**

A bill to amend 1967 PA 224, entitled
"Powers of appointment act of 1967,"
by amending sections 5a and 14 (MCL 556.115a and 556.124), section
5a as added and section 14 as amended by 2012 PA 485.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 5a. (1) A trustee with a presently exercisable
2 discretionary power to make distributions of income or principal of
3 an irrevocable trust to or for the benefit of 1 or more
4 beneficiaries of the trust may, unless the terms of the first trust
5 expressly provide otherwise, exercise the power by appointing all
6 or part of the property subject to the power in favor of the
7 trustee of a second trust, ~~provided that~~ **if** all of the following
8 conditions are satisfied:

1 (a) Except as provided in subsection (2), the beneficiaries of
2 the second trust include only permissible appointees, even if fewer
3 than all permissible appointees, of the trustee's discretionary
4 distribution power as of the time the power is exercised.

5 (b) For a trust, contributions to which have been excluded
6 from gift tax under section 2503(c) of the internal revenue code **of**
7 **1986**, 26 USC 2503(c), the trust instrument of the second trust
8 provides that the beneficiary's remainder interest will pass or be
9 payable no later than the date on which the interest would have
10 passed or been payable under the terms of the first trust
11 instrument.

12 (c) The exercise of the discretionary power does not reduce
13 the income, annuity, or unitrust interest or general power of
14 appointment of a beneficiary of a trust that was intended to
15 qualify for a marital or charitable deduction under federal or
16 state law by virtue of that beneficiary's interest in the trust,
17 whether or not that deduction is actually taken.

18 (d) The exercise of the discretionary power does not reduce a
19 presently exercisable general power to withdraw a specified
20 percentage or amount of trust property in a trust beneficiary who
21 is the only trust beneficiary to or for the benefit of whom the
22 trustee has the power to make discretionary distributions.

23 (2) The second trust instrument may provide 1 or more of the
24 following:

25 (a) A special or general power of appointment, including a
26 power to appoint trust property to persons who are not
27 beneficiaries of the first trust, to 1 or more of the beneficiaries
28 of the second trust **who are permissible appointees of the trustee's**
29 **presently exercisable discretionary distribution power over the**

1 **first trust.**

2 (b) That at a time or upon the occurrence of an event
3 specified in the second trust instrument, **the trustee shall hold**
4 ~~the remaining trust assets shall thereafter be held~~ for the benefit
5 of beneficiaries who are or who would have been beneficiaries of
6 the first trust on terms and conditions substantially identical,
7 with respect to the interests of those beneficiaries, to the terms
8 and conditions of the first trust.

9 (c) That assets of the first trust discovered after exercise
10 of the power described in subsection (1) shall be property of the
11 first trust if that trust continues in existence after exercise of
12 the power, or that assets of the first trust discovered after
13 exercise of the power shall be property of the second trust if the
14 first trust terminates upon exercise of the power.

15 (d) For indemnification of the trustee of the first trust,
16 except as limited by section 7908 of the MTC, MCL 700.7908.

17 (3) For purposes of this section, all of the following apply:

18 (a) A discretionary power to make distributions to a given
19 trust beneficiary is presently exercisable when the timeliness of a
20 present distribution to or for the benefit of that beneficiary
21 depends, under the terms of the trust instrument, only on the
22 trustee's judgment as to what is in the beneficiary's best
23 interests.

24 (b) A power to make distributions is not discretionary if it
25 is limited by a definite and ascertainable standard, but
26 instructions for the trustee to consider such things as a
27 beneficiary's best interests, welfare, comfort, happiness, or
28 general development do not in themselves constitute definite and
29 ascertainable standards, regardless of whether the trustee is also

1 instructed or permitted to consider resources outside the trust
2 that may be available to the beneficiary.

3 (c) A general power annually to withdraw a specified
4 percentage or amount of trust property is presently exercisable
5 with respect to any year for which the beneficiary who holds the
6 power is entitled, under the terms of the governing instrument, to
7 exercise the power, and each subsequent year for which the
8 beneficiary will be entitled to exercise the power assuming only
9 the beneficiary's survival and the continuation of the trust. For
10 example, if a trust provides that, beginning in the fifth year
11 after the trust becomes irrevocable, the beneficiary shall have the
12 power for the remainder of his or her life annually to withdraw
13 \$5,000.00 or 5% of the value of the trust principal, whichever is
14 greater, then, in the fourth year after the trust becomes
15 irrevocable, the beneficiary's power to make annual withdrawals is
16 not presently exercisable; however, in the fifth year after the
17 trust becomes irrevocable, the beneficiary's power is presently
18 exercisable, for purposes of this section, with respect to the
19 fifth year and each subsequent year during the beneficiary's life.

20 (4) The trustee of the second trust may be the trustee of the
21 first trust, the second trust may be a trust under the governing
22 instrument of the first trust or another governing instrument, the
23 governing instrument may be one created by the trustee of the first
24 trust, and the governing instrument may be the instrument that
25 exercises the power described in subsection (1).

26 (5) A second trust shall be treated as both of the following:

27 (a) A new irrevocable trust for purposes of the notice
28 requirements of section 7814(2)(c) of the MTC, MCL 700.7814.

29 (b) A continuation of the first trust for purposes of the

1 notice requirements of section 7814(2)(d) of the MTC, MCL 700.7814,
2 and the charge of any fee or commission on the transfer of assets
3 from the first trust to the second trust shall be treated as a
4 change in the rate of the trustee's compensation.

5 (6) A discretionary power under subsection (1) is a power of
6 appointment and a discretionary power for purposes of section 7815
7 of the MTC, MCL 700.7815.

8 (7) This section ~~shall~~**does** not abridge the right of a trustee
9 who has a power to distribute trust property in further trust under
10 this act, any other statute, or the common law. This section ~~shall~~
11 **does** not abridge the right of a trustee who has a power to amend or
12 revoke a trust.

13 (8) It is the intent of the legislature that this section be a
14 codification of the common law of this state in effect before ~~the~~
15 ~~effective date of the amendatory act that added this~~
16 ~~section.~~**December 28, 2012.**

17 (9) As used in this section, "first trust" means an
18 irrevocable trust over which a trustee has a presently exercisable
19 discretionary power to make distributions that is exercised as
20 described in subsection (1).

21 Sec. 14. (1) ~~The~~**Any finite** period during which the vesting of
22 a future interest may be ~~suspended or postponed by an instrument~~
23 ~~exercising the exercise of~~ a power of appointment begins on the
24 effective date of the instrument of exercise in the case of a
25 general power presently exercisable, and in all other situations,
26 at the time of the creation of the power.

27 (2) In determining ~~the~~**any finite** period during which the
28 vesting of a future interest may be ~~suspended or postponed by the~~
29 exercise of a power of appointment, if a second power is created by

1 the exercise of a first power, and the first power is a presently
 2 exercisable general power, the second power is considered to have
 3 been created on the effective date of the instrument of exercise.
 4 In all other situations, the second power is considered to have
 5 been created at the time of the creation of the first power.

6 (3) The length of the period, whether finite or infinite,
 7 during which the vesting of a future interest may be ~~suspended or~~
 8 postponed by **the** exercise of a power is determined ~~, from the~~
 9 ~~beginning date specified in subsection (1),~~ under the personal
 10 property trust perpetuities act, 2008 PA 148, MCL 554.91 to 554.94,
 11 or section 5(2) of the uniform statutory rule against perpetuities,
 12 1988 PA 418, MCL 554.75, to the extent that all of the following
 13 conditions are satisfied:

14 (a) An instrument exercises a power of appointment so as to
 15 subject property to or to create a trust that is either revocable
 16 on or created after May 28, 2008.

17 (b) The appointive property is personal property.

18 (c) The trust is not a special appointee trust.

19 **(4) For purposes of subsection (3), a trust that is created by**
 20 **the exercise of a power of appointment is created when the power**
 21 **has been irrevocably exercised or when a revocable exercise becomes**
 22 **irrevocable.**

23 (5) ~~(4)~~As used in this section:

24 (a) "First power" means a power of appointment, an exercise of
 25 which has created another power of appointment.

26 (b) "Second power" means a power of appointment created by the
 27 exercise of a first power.

28 (c) "Special appointee trust" means that term as defined in
 29 section 4 of the personal property trust perpetuities act, 2008 PA

1 148, MCL 554.94.

2 Enacting section 1. This amendatory act does not take effect
3 unless House Bill No.4864 of the 102nd Legislature is enacted into
4 law.