A TRAP FOR THE WARY: DELAWARE'S ANTI-DELAWARE-TAX-TRAP STATUTE IS TOO CLEVER BY HALF (OF INFINITY)

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Editors' Synopsis: Delaware's statutory anti-Delaware-tax-trap provision, Delaware Code title 25 section 504, is ineffectual with respect to personal property held in trust. With respect to such property, section 504 fails to disarm the Delaware tax trap for want of a finite perpetuities testing period. In enacting this ineffectual protection, Delaware inadvertently baited the "trap," for with respect to personal property held in trust, section 504 is capable only of creating a false sense of security in those whose exercise of a nongeneral power of appointment may spring the Delaware tax trap on GST exempt or GST-exemption sheltered assets.

I. INTRODUCTION

Any state that repeals its rule against perpetuities (RAP) has to reckon with two federal tax terrors: the Treasury's effective date regulations for application of the generation skipping transfer (GST) tax[1] and the so-

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[1] *See generally* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185 (1995).

called Delaware tax trap.[2] Delaware addressed the latter terror belatedly, enacting its statutory anti-Delaware-tax-trap provision, title 25 section 504 of the Delaware Code, in July of 2000,[3] five years after repealing the state's RAP with respect to personal property held in trust.[4] This Article argues that, with respect to personal property held in trust, section 504 is otiose: the section completely fails to disarm the Delaware tax trap for want of a finite perpetuities testing period. To make that argument, this Article examines in detail not only the Delaware tax trap but also the situation in which a state, like Delaware, antecedently lacks a rule against suspension of absolute ownership or the power of alienation and eschews to invent such a rule pursuant to RAP repeal.[5] For that reason, this Article will compare Delaware's post-RAP-repeal, anti-Delaware-tax-trap provision, section 504, with the post-RAP-repeal, anti-Delaware-tax-trap provision Michigan recently adopted. But first, this Article examines the "trap."

II. THE DELAWARE TAX TRAP

The Delaware tax trap (Trap) is the colloquial name for Internal Revenue Code (Code) section 2041(a)(3) and its gift tax counterpart, Code section 2514(d).[6] These sections provide that assets subject to a power of appointment (First Power) are included in the power holder's (H's) transfer tax base (gift tax base or gross estate, depending on whether the triggering exercise of the power is *inter vivos* or testamentary) if the holder

> exercises a power . . . by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of [interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power.[7]

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[2] *See generally* Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, 28 EST. PLAN. 68 (2001).

[3] *See* DEL. CODE ANN. tit. 25, § 504 revisor's note (Supp. 2008).

[4] *See id.* § 503 revisor's note.

[5] *See* Greer, *supra* note 2, at 69–72.

[6] *See* I.R.C. §§ 2041(a)(3), 2514(d).

[7] I.R.C. § 2041(a)(3). *See also* I.R.C. § 2514(d).

Though the Code is not explicit, legislative history indicates the Trap was not intended to apply to purely fiduciary powers of appointment, such as a trustee's discretionary power to invade principal.[8]

The postponement of vesting is the conceptual province of all forms of RAP, whereas suspension of absolute ownership or the power of alienation is the province of a conceptually distinct group of rules potentially affecting the duration of trusts.[9] Vesting is irrelevant to rules against the suspension of absolute ownership or the power of alienation, under which a suspension occurs when no person or group of persons living can convey absolute ownership of the property in question; for example, when trust principal is directed to someone yet unknown or unborn.[10] A violation occurs when such a suspension may last longer than the length of time allowable under statute, a period often similar to the common law RAP's testing period of a life in being plus twenty-one years.[11]

The Trap refers to postponement of vesting and suspension of absolute ownership or the power of alienation in the disjunctive. However, it has been authoritatively interpreted so that the Trap is sprung, causing inclusion in the relevant transfer tax base, only if under the applicable local law *both* the period during which exercise of the second power of appointment (Second Power) (the power H's exercise of the First Power created) may postpone vesting *and* the period during which exercise of the Second Power may suspend absolute ownership or the power of alienation are ascertainable without regard to the date of the First Power's creation.[12] Therefore, in a jurisdiction without a RAP, a rule against suspension of absolute ownership or the power of alienation may prevent the Trap from springing—if the instrument creating the Second Power (in exercising the first) itself does not avert the Trap by effectively placing one of the relevant limitations on exercise of the Second Power. Contrariwise, in a jurisdiction without a rule against suspension of absolute ownership or the power of alienation, a RAP may disarm the Trap.

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[8] *See* S. REP. No. 82-382, at 1 (1951), *as reprinted in* 1951 U.S.C.C.A.N. 1535, 1535.

[9] *See, e.g.*, Greer, *supra* note 2, at 70–71.

[10] *See* Ira Mark Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 ALB. L. REV. 261, 267–69 (1981).

[11] *See id.*

[12] *See* Estate of Murphy v. Comm'r, 71 T.C. 671 (1979), *acq. in result*, 1979-2 C.B. 1.

III. DELAWARE'S POST-RAP-REPEAL, ANTI-DELAWARE-TAX-TRAP PROVISION

Delaware repealed its RAP for personal property held in trust in 1995.[13] Previously an economic leader in trust banking, the state had offered a perpetuities testing period of 110 years, once the longest testing period in the nation.[14] But by the time the Delaware repeal legislation was proposed, several states had done away with their RAPs all together.[15] The legislative synopsis speaks of "Delaware's continued vigilance in maintaining its role as a leading jurisdiction for the formation of capital and the conduct of trust business."[16] Therefore, the legislature amended title 25 section 503 to exempt personal property held in trust from all RAP-like rules:[17] "[N]o interest created in personal property held in trust shall be void by reason of any rule, whether the common-law rule against perpetuities, any common-law rule limiting the duration of noncharitable purpose trusts, or otherwise."[18]

Repealing Delaware's RAP actually did not increase the risk of inadvertently springing the Trap in Delaware. That risk was already as high as it could be because of both the absence of any rule against suspension of absolute ownership or the power of alienation for property affected by the repeal[19] and the peculiarity under Delaware law that the period for which exercise of a nongeneral power of appointment could postpone vesting of a future interest was measured from the time the power was exercised, not from the time the power was created.[20] Thus, even before RAP repeal, Delaware law provided that any exercise of a nonfiduciary, nongeneral power of appointment that created another nonfiduciary power of any kind would cause the Trap to include assets subject to the Second Power in the transfer tax base of the holder of the First Power. This made nonfiduciary, nongeneral Delaware powers over personal

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[13] *See* H.B. 245, 138th Gen. Assem., Reg. Sess. (Del. 1995), 70 Del. Laws 164.

[14] *See* DEL. CODE ANN. tit. 25, § 503(b) (Supp. 2008).

[15] *See* Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities*, 24 CARDOZO L. REV. 2097, 2101–02 (2003).

[16] H.B. 245, 138th Gen. Assem., Reg. Sess. (Del. 1995) (introduced version). This earlier version of H.B. 245 included a synopsis, which indicates the drafters' intent.

[17] *See* Del. H.B. 245.

[18] DEL. CODE ANN. tit. 25, § 503.

[19] *See* Greer, *supra* note 2, at 74.

[20] *See id.*; *see also* Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes*, 68 J. TAX'N 242, 243–46 (1988). This measuring method is the peculiarity of Delaware law from which the Trap gets its colloquial name.

property held in trusts that were either applicable-exclusion-amount or GST-exemption sheltered potentially dangerous for transfer tax purposes.

Delaware attorneys presumably were familiar with that danger and accustomed to drafting around it, but in the spirit of making Delaware's jurisdiction friendlier to dynasty trust enthusiasts residing in other states, the legislature eventually attempted a statutory solution to the problem of inadvertent Trap springing by the exercise of what otherwise would be nontaxable powers. In July 2000, the legislature enacted Delaware Senate Bill 313 noting, apropos of the Trap, that a donee of a power of appointment might inadvertently incur federal transfer tax if the donee happens to be unaware of the "somewhat obscure provisions" of the Trap.[21] The upshot was title 25 section 504, providing with respect to nongeneral powers over trusts that are GST exempt or GST-exemption sheltered, that any Second Power for purposes of the Trap "shall, for the purpose of any rule of law against perpetuities, . . . be deemed to have been created at the time of the creation of . . . the first power."[22]

IV. THE PROBLEM AND A COMPETENT SOLUTION FOR COMPARISON

No doubt section 504 has its intended effect with respect to real property held in trust, for Delaware's RAP repeal left real property subject to a 110-year perpetuities testing period.[23] The problem is, post-RAP repeal, no perpetuities testing period exists in Delaware for personal property held in trust.[24] This is a problem because, without a finite testing period, the relating back, for purposes of any RAP, of a Second Power to the time of the First Power's creation is irrelevant to the Trap.[25] In focusing on relating nongeneral powers back, section 504 neutralizes the peculiarity under Delaware law that, prior to RAP repeal, had made Delaware nongeneral powers of appointment especially liable to inadvertent Trap springing.[26] But what Delaware's legislature evidently did not comprehend is that, in the absence of the peculiarity under Delaware law that section 504 amends, RAP repeal itself increases the risk of inadvertent Trap springing. This risk informed the recent RAP repeal in Michigan, where the period for which exercise of a nongeneral power can postpone

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[21] *See* S.B. 313, 140th Gen. Assem., Reg. Sess. (Del. 2000), 72 Del. Laws 397.
[22] DEL. CODE ANN. tit. 25, § 504 (Supp. 2008).
[23] *See id.* § 503(a).
[24] *See* H.B. 245, 138th Gen. Assem., Reg. Sess. (Del. 1995), 70 Del. Laws 164.
[25] See *infra* Part V for a full discussion of the issue.
[26] *See supra* note 20 and accompanying text.

vesting of a future interest is regularly measured from the time of the power's creation.[27]

A. Michigan's Recent Experience

Michigan is the most recent state to repeal or modify its RAP. This past spring, the Michigan legislature enacted the Personal Property Trust Perpetuities Act.[28] The confluence of that act and an ancillary set of amendments to Michigan's Uniform Statutory Rule Against Perpetuities (USRAP)[29] generally makes the RAP and all similar rules affecting the duration of trusts inapplicable under Michigan law with respect to personal property[30] held in trusts that are revocable on, or created after, May 28, 2008.[31] But the new Michigan acts provide a narrow exception to this broad exemption: whenever a nonfiduciary, nongeneral power of appointment over personal property held in trust (First Power) is exercised to subject property to, or to create, another nonfiduciary power of appointment other than a presently exercisable general power (Second Power), the period during which exercise of the Second Power may postpone the vesting of a future interest in the property is determined under a

[27] *See infra* notes 28–34 and accompanying text.

[28] *See* Personal Property Trust Perpetuities Act, 2008 Mich. Pub. Acts 148 [hereinafter PPTPA].

[29] Uniform Statutory Rule Against Perpetuities, 2008 Mich. Pub. Acts 149 [hereinafter USRAP Amendments].

[30] As in Delaware, Michigan's general exemption from the RAP and similar rules does not pertain to real property, regardless of whether the property is held in trust. *See* DEL. CODE ANN. tit. 25, § 503(e) (Supp. 2008); PPTPA § 3(1)–(2); USRAP Amendments § 5(1)(f).

[31] *See* PPTPA §§ 3(1)–(2), 4; USRAP Amendments § 5(1)(f), enacting sec. 1. The motivation for this reform in Michigan—initially proposed by Greenleaf Trust and subsequently endorsed by the Michigan Bankers Association—was evidently not an ambition to enter the "jurisdictional competition for trust funds." Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 356 (2005). The reform did not include tax situs or asset protection liberalization. On May 6, 2008, the author testified before Michigan's Senate Judiciary Committee that, without such liberalization, RAP repeal in Michigan will be of well-informed interest only to dynasty trust enthusiasts who are (1) marginally indifferent to asset protection and (2) subject, in any case, to Michigan's tax situs rules—repeal in Michigan is primarily an attempt to prevent certain trust banking business from leaving the state, not an attempt to attract such business from outside.

modified USRAP by reference to the date the First Power was created.[32] This is Michigan's post-RAP-repeal, anti-Delaware-tax-trap provision.

B. The Situation in Michigan Prior to RAP Repeal

Michigan has not had a rule against suspension of absolute ownership or the power of alienation with respect to land since 1949[33] and has never had such a rule with respect to personal property.[34] Thus, prior to the new Michigan acts, when a nonfiduciary, nongeneral power of appointment subject to Michigan law was exercised to create a Second Power, and the instrument creating the Second Power did not itself avert the Trap (by effectively placing one of the relevant limitations on the exercise of the Second Power), the Trap analysis focused on the RAP—the USRAP since 1988.[35] Again, the question was whether the Second

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[32] *See* PPTPA § 3(3); USRAP Amendments § 5(2). For this purpose, a power is nonfiduciary if it is not held by a trustee in a fiduciary capacity. *See* PPTPA § 2(b); USRAP Amendments § 5(3). The relevant modification to the USRAP is that the standard 90-year "wait-and-see" period is extended to 360 years. USRAP Amendments § 5(2).

[33] *See* MICH. COMP. LAWS ANN. § 554.51 (West 2005).

[34] The common law RAP was partly superseded in Michigan, from 1847 to 1949, by statutory provisions limiting suspension of the power of alienation. *See* Lantis v. Cook, 69 N.W.2d 849 (Mich. 1955). Those provisions applied to only real property. *See* Rodney v. Stotz, 273 N.W. 404 (Mich. 1937). Later amendments repealed the provisions and restored the applicability of the common law RAP to real property, "thereby making uniform the rule as to perpetuities applicable to real and personal property." Public Act. No. 38, 1948 Mich. Acts 38 (effective Sept. 23, 1949) (codified as MICH. COMP. LAWS ANN. § 554.51). No rule against suspension of the power of alienation existed at common law. *See* JOHN C. GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942). Of course, the rule against suspension of the power of alienation must be distinguished from prohibitions against direct restraints on alienation, which are ineffective per se, without regard to their duration. *See* Greer, *supra* note 2, at 70.

[35] The adoption of the USRAP displaced the common law RAP in Michigan. *See* MICH. COMP. LAWS ANN. § 554.53 ("Unless as otherwise provided by statute, this act shall not apply to nonvested property interests created on or after the effective date of the uniform statutory rule against perpetuities.") The common law perpetuities testing period is still relevant under Michigan's USRAP, for an interest that must vest, if at all, within that period is for that reason valid under the USRAP. *See* MICH. COMP. LAWS ANN. § 554.72. But an interest that may vest beyond the common law period is not invalid under the USRAP until the relevant "wait-and-see" period elapses, a result that flatly contradicts the common law RAP. *See id.* One should not confuse the continued relevance of the common law testing period with the continued application of the common law RAP itself; the USRAP makes use of the former while displacing the latter.

Power validly could be exercised to postpone vesting for a period ascertainable without regard to the date of the First Power's creation.[36]

Prior to the new Michigan acts, Michigan law provided that in the case of any power other than a presently exercisable general power, the time of the power's creation determined the maximum period for which exercise of the power could postpone vesting of a future interest; in the case of a presently exercisable general power, the period was measured from the time the power was exercised.[37] So, if H had a nonfiduciary, special testamentary power of appointment over a trust subject to Michigan law and H exercised that power by creating a second nonfiduciary, special power (or a testamentary general power), then even if the instrument creating the Second Power did not itself avert the Trap by effectively placing one of the relevant limitations on the exercise of the Second Power, the Trap would not include the trust in H's gross estate, because any exercise of the Second Power would be subject to a vesting period reckoned from the creation of H's power. If, on the other hand, H exercised the power by creating a presently exercisable general power over the trust,[38] the Trap would include the trust in H's gross estate because any exercise of the general power would begin a new vesting period, one reckoned from the date of the exercise, not from the creation, of H's power.

C. What Would Have Been Wrong with Simple RAP Repeal?

RAP repeal obviously was liable to change the analysis regarding the Trap in Michigan. Without a rule against suspension of absolute owner-

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[36] *See supra* note 7 and accompanying text.

[37] *See* MICH. COMP. LAWS ANN. § 556.124.

[38] For these purposes, a "presently exercisable" power is one whose exercise is neither required to be by will nor otherwise constrained to be postponed. *See id.* § 556.112(l). And a "general" power is one exercisable in favor of the holder, the holder's creditors, holder's estate, or the creditors of holder's estate. *See id.* § 556.112(h). The instrument creating a power of appointment can limit the manner of the power's exercise in any particular. *See id.* § 556.112(c) (defining "power of appointment" as "a power . . . which enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property [subject to the power]"); *id.* § 556.115(2) (requiring that an exercise comply "with the requirements, if any, of the creating instrument as to the manner, time and condition of the exercise"); MICH. COMP. LAWS ANN. §§ 556.114–.115. *See also* Hannan v. Slush, 5 F.2d 718, 722 (E.D. Mich. 1925) (requiring that the power be exercised in the mode prescribed by donor). But unless the instrument is prohibitive, nothing impedes the exercise of a power of appointment to create another power of any quality in any permissible appointee.

ship or the power of alienation,[39] the absence of a RAP for personal property held in trust would have meant that any Second Power H might create in the hypothetical described above (to the extent the power governed personal property held in trust) could postpone vesting for a period *without end*, a period that would therefore be "ascertainable," if at all, "without regard to the date of creation of [H's] power."[40] That would have meant that anytime a nonfiduciary, nongeneral power of appointment was exercised to create another nonfiduciary power of any kind, the Trap would have caused assets subject to the Second Power to be included in the transfer tax base of the holder of the First Power. That result would have made Michigan nonfiduciary, nongeneral powers over personal property held in trusts that were either applicable-exclusion-amount or GST-exemption sheltered very dangerous for transfer tax purposes.

V. DELAWARE'S "SOLUTION"

Simple RAP repeal would have made nonfiduciary, nongeneral powers dangerous, that is, *if* the Trap is properly read as raising the question whether, under applicable local law, the Second Power can be exercised to postpone vesting, or suspend absolute ownership or the power of alienation, for a period *from the date of the Second Power's exercise* that is ascertainable without regard to the date of creation of the First Power. This is surely the most natural reading of the Trap's language, but it is a reading Delaware's legislature has either missed or ignored. As discussed earlier in this Article,[41] in dealing with the problem of inadvertent Trap springing, Delaware—which, like Michigan, is without a rule against suspension of absolute ownership or the power of alienation for property affected by its RAP repeal[42]—thought it sufficient to provide that the Second Power "shall, for the purpose of any rule of law against perpetuities . . . be deemed to have been created at the time of the creation of . . . the first power."[43]

Again, the result is that in Delaware, exercise of a Second Power over personal property held in trust relates back to the date of the creation of the First Power for purposes of RAP-like rules. But, as previously mentioned, no RAP-like rule exists for personal property held in trust in

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[39] *See supra* note 34 and accompanying text.

[40] I.R.C. § 2041(a)(3); *see supra* note 7 and accompanying text.

[41] *See supra* notes 21–22 and accompanying text.

[42] *See* Greer, s*upra* note 2, at 74.

[43] DEL. CODE ANN. tit. 25, § 504 (Supp. 2008). *See supra* note 22 and accompanying text.

Delaware! So, how is the relation back to the creation of the First Power supposed to avoid the Trap? After all, the Second Power can be exercised to postpone the vesting of interests in personal property held in trust *forever*, and the period that runs forever *from the date of the Second Power's exercise* is certainly ascertainable, if at all, without regard to the date of creation of the First Power—and, therefore, the Trap is sprung!

Of course, the period that runs forever from the date of the *First Power's* creation is ascertainable, if at all, only with regard to the date of the First Power's creation, but a reading of the Trap that would make that point relevant also would make the Trap irrelevant: if the question were whether, under applicable local law, the Second Power validly can be exercised to postpone vesting for a period from the date of the *First Power's* creation that is ascertainable without regard to the date of creation of the First Power, the Trap could not possibly be sprung. *Reductio ad absurdum*! (Q.E.D.)

VI. CONCLUSION

To avoid the Trap, it is necessary to specify a period during which vesting may be postponed, or absolute ownership or the power of alienation suspended, that begins on the date of the Second Power's exercise and ends on a date that cannot be ascertained without regard to the date of creation of the First Power. Such a period must be finite. Lack of a finite period is why RAP repeal in a state without a rule against suspension of absolute ownership or the power of alienation is likely to make nonfiduciary, nongeneral powers dangerous for transfer tax purposes. This is why Delaware's anti-Trap provision does not work with respect to personal property held in trust: a relation-back rule without a RAP, or rule against suspension of absolute ownership or the power of alienation, is otiose because it cannot yield a terminus that would be different if the date of the First Power's creation were different.[44]

The real choices, then, for states like Delaware and Michigan that are without a rule against suspension of absolute ownership or the power of alienation and want to repeal their RAP-like rules without increasing the risk of unwanted Trap springing, are (1) to invent a rule against suspension of absolute ownership or the power of alienation for the narrow purpose of avoiding the Trap or (2) to retain, for that purpose, a narrow application of some form of RAP. Inventing a rule against suspension of absolute ownership or the power of alienation is bound to be inelegant.

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[44] Stephen E. Greer also expresses doubt as to whether a relation-back rule alone could be sufficient for Delaware's purposes. *See* Greer, *supra* note 2, at 74.

For one thing, it requires the state's lawyers and judges to become scholars of other states' laws because, by hypothesis, the inventing state is, at the time of invention, without a rule against suspension of absolute ownership or the power of alienation. Furthermore, the invented rule must comport with the broader objective of allowing perpetual trusts, which means that in addition to a rule against suspension of absolute ownership or the power of alienation, it must be provided that the absolute ownership or the power of alienation is not suspended if the trustee has a power of sale,[45] thus holding control of the trustee's ability to sell assets hostage to perpetuity. And, of course, the invention of a rule against suspension of absolute ownership or the power of alienation for this purpose requires the state's relation-back provision for nongeneral and testamentary general powers of appointment[46] to be transposed from the key of vesting to the key of ownership or alienation.[47]

Michigan made its choice. Rather than invent a rule against suspension of absolute ownership or the power of alienation for the narrow purpose of avoiding the Trap, Michigan chose to retain a narrow application, aimed only at the Trap, of a modified form of the USRAP for personal property held in trust. Again, the new Michigan acts provide that, notwithstanding the general exemption from the RAP, whenever a nonfiduciary, nongeneral power of appointment over personal property held in trust (First Power) is exercised to subject property to, or to create, another nonfiduciary power of appointment other than a presently exercisable general power (Second Power), the period during which the exercise of the Second Power may postpone the vesting of a future interest in the property is determined under a modified USRAP by reference to the date the First Power was created. In the circumstances described, this disarms the Trap by the confluence of (1) Michigan's relation-back provision for nongeneral and testamentary general powers of appointment[48] and (2) the applicability of a finite perpetuities testing period, which is missing, in regard to personal property held in trust, under Delaware's law.[49]

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[45] *See* Greer, *supra* note 2, at 73.

[46] *See* DEL. CODE ANN. tit. 25, § 504; MICH. COMP. LAWS ANN. § 556.124 (West 2005); *see also supra* notes 21–22, 37 and accompanying text.

[47] *See supra* notes 9–11 and accompanying text.

[48] *See* MICH. COMP. LAWS ANN. § 556.124; *see also supra* note 37 and accompanying text.

[49] Importantly, the new Michigan acts' anti-Trap exception does not entirely preclude springing the Trap. Trap springing can be beneficial in some circumstances, as when a nonfiduciary, nongeneral power holder's death otherwise would be a taxable termination for purposes of the GST tax, and the attributable GST tax would be more

Delaware, however, has yet to decide. With respect to personal property held in trust, the question of how, if at all, Delaware's legislature will attempt to disarm the threat of inadvertent Trap springing has yet to be answered. With respect to that property, the state's current anti-Delaware-tax-trap provision, title 25 section 504, is useless for want of a finite perpetuities testing period. Unfortunately, section 504 is dangerous as well as useless, for with respect to personal property held in trust, the section is capable only of creating a false sense of security in those whose exercise of a nongeneral power of appointment may, section 504 notwithstanding, spring the Trap on GST exempt or GST-exemption sheltered assets.

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than the attributable estate tax under the Trap. *See generally* Blattmachr & Pennell, *supra* note 20; James P. Spica, *A Practical Look at Springing the Delaware Tax Trap to Avert Generation Skipping Transfer Tax*, 41 REAL PROP. PROB. & TR. J. 165 (2006). In those circumstances, prior to the new acts, it might be within the power holder's election in Michigan to spring the Trap by exercising the nongeneral power to create a presently exercisable general power. *See supra* notes 37–38 and accompanying text. And the new acts' anti-Trap exceptions preserve that election by applying the modified USRAP only for purposes of determining the validity of interests created by the exercise of power-of-appointment-generated powers *other than* presently exercisable general powers.