EXERCISING SPECIAL POWERS OF APPOINTMENT OVER TAX ADVANTAGED TRUSTS *POST* PERPETUITIES REFORM CAN BE MORE OR LESS HAZARDOUS

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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-called "Delaware tax trap."[2] Delaware addressed the latter terror, its namesake, 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provision, Title 25 section 504 of the Delaware Code, in July of 2000,[3] five years after the state's RAP had been repealed with respect to personal property held in trust.[4] The argument of this article is that, with respect to personal property held in trust, section 504 is useless: with respect to such property, the section completely fails to disarm the Delaware tax trap for want of a finite perpetuities testing period. To make that argument, we shall have to say a good deal, not only about the Delaware tax trap, but also about the particular case in which a state, like Delaware, that antecedently lacks a rule against suspension of absolute ownership or the power of alienation eschews (like Delaware) to *invent* such a rule pursuant to perpetuities reform.[5] For that reason, it will be instructive to compare Delaware's *post*-RAP-reform anti-Delaware-tax-trap provision (section 504) with the *post*-RAP-reform anti-Delaware-tax-trap provision recently enacted in Michigan. But first, we shall examine the "trap."

THE DELAWARE TAX TRAP

"Delaware tax trap" ("Trap") is the colloquial name for Internal Revenue Code section 2041(a)(3) and its gift tax counterpart, Code section 2514(d), which 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 testamentary) if the holder

> exercises the 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.[6]

Though the code is not explicit on the point, 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.[7]

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.[8] Vesting is irrelevant to rules against the suspension of absolute ownership or the power of alienation, under which a suspension occurs when there is no person or group of persons living who can convey absolute ownership of the property in question (as when trust principal is directed to someone yet unknown or unborn).[9] These rules are violated 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 21 years.[10]

Although the Trap refers to postponement of vesting and suspension of absolute ownership or the power of alienation in the *disjunctive*, it has been judicially interpreted such that the Trap is sprung (that is, causes inclusion in the relevant transfer tax base) only if under the applicable local law *both* the period during which vesting may be postponed by exercise of the second power of appointment ("Second Power") (the power created by *H*'s exercise of the First Power) *and* the period during which absolute ownership or the power of alienation may be suspended by exercise of the Second Power can be ascertained without regard to the date of the First Power's creation.[11] So, in a jurisdiction without a RAP, a rule against suspension of absolute ownership or the power of alienation may prevent the Trap from being sprung (if the instrument creating the Second Power—by exercising the first—does not itself avert the Trap—by effectively placing one of the relevant limitations on exercise of the Second Power). And, contrariwise, in a jurisdiction without a rule against suspension of absolute ownership or the power of alienation, a RAP may disarm the Trap.

DELAWARE'S ANTI-DELAWARE-TAX-TRAP PROVISION

Delaware repealed its RAP for personal property held in trust in 1995.[12] The state had previously been an economic leader in trust banking, offering (among other things) a perpetuities testing period of 110 years, which had once been the longest testing period in the nation.[13] But by the time

the Delaware repeal legislation was proposed, several states had done away with their RAPs altogether.[14] 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."[15] Therefore, the legislature amended Title 25 section 503 to exempt personal property held in trust from all RAP-like rules:[16] "no 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."[17]

Repeal of Delaware's RAP did not actually increase the risk of anyone's inadvertently springing the Delaware tax trap in Delaware. That risk was already as high as it could be owing to (1) the absence of any rule against suspension of absolute ownership or the power of alienation for property affected by the repeal[18] and (2) 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.[19] So, even before RAP reform, Delaware law entailed that any exercise of a Delaware 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 powers over tax advantaged trusts in Delaware—trusts applicable-exclusion-amount sheltered, GST-exemption sheltered or GST tax exempt—very dangerous for transfer tax purposes.

Delaware attorneys were presumably familiar with that danger and accustomed to drafting around it, but in the spirit of making Delaware's jurisdiction friendlier to dynasty trust enthusiasts resident in other states, the legislature eventually attempted a statutory solution to the problem of inadvertent Trap springing by the exercise of what would otherwise 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 she happens to be unaware of the "somewhat obscure provisions" of the Trap.[20] The upshot was Title 25 section 504, providing with respect to nongeneral powers over trusts that are GST tax exempt or GST-exemption sheltered, that any Second Power for purposes of the Trap "shall, for purposes of any rule of law against perpetuities...be deemed to have been created at the time of the creation of...the first power."[21]

THE PROBLEM AND A COMPREHENDING SOLUTION FOR COMPARISON

No doubt section 504 has its intended effect with respect to *real* property held in trust, for Delaware's RAP reform left *real* property subject to a 110-year perpetuities testing period.[22] The problem is that, *post* RAP reform, there *is* no perpetuities testing period in Delaware for *personal* property held in trust.[23] 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.[24] By focusing on relating nongeneral powers back in this way, section 504 neutralizes the peculiarity under Delaware law that, *prior to RAP reform*, had made Delaware nongeneral powers of appointment especially liable to inadvertent Trap springing.[25] 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 reform itself increases the risk of inadvertent Trap springing. This risk informed the recent RAP reform in Michigan, where the period for which exercise of a nongeneral power can postpone vesting of a future interest is regularly measured from the time of the power's creation.[26]

Michigan's Recent Experience

Michigan is the state that has most recently repealed or modified its RAP. In May of 2008, the Michigan legislature enacted the Personal Property Trust Perpetuities Act.[27] The confluence of that act and an ancillary set of amendments to Michigan's uniform statutory rule against perpetuities ("USRAP")[28] generally makes the RAP and all similar rules affecting the duration of trusts inapplicable under Michigan law[29] 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 so as 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 modified USRAP by reference to the date the First Power was created.[32] This is Michigan's *post*-RAP-reform anti-Delaware-tax-trap provision. (The RAP-applicability flowchart in the Appendix schematically locates this anti-Delaware-tax-trap exception among other circumstances in which Michigan's USRAP applies to property subject to Michigan law after the new reform acts' effective date.)

The Situation in Michigan Prior to RAP Reform

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] So, prior to the new Michigan acts, when a nonfiduciary, nongeneral power of appointment subject to Michigan law was exercised so as 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 exercise of the Second Power), the Trap analysis focused on the RAP—the *US*RAP since 1988.[35] Again, the question was whether the Second Power could validly 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 acts, Michigan law provided that in the case of any power other than a presently exercisable general power, the maximum period for which exercise of the power could postpone vesting of a future interest was measured from the time the power was created; 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 (First Power) over a trust subject to Michigan law and *H* exercised her power by creating a second nonfiduciary, special power (or a testamentary general power) (Second 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 exercise of the Second Power), the Trap did 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 the First Power. If, on the other hand, *H* exercised her power by creating a presently exercisable general power over the trust,[38] the Trap *did* 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 the creation, of *H*'s power.

What Would Have Been Wrong with Simple RAP Repeal?

RAP repeal was obviously liable to change the analysis regarding the Trap in Michigan. Without a rule against suspension of absolute ownership 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 so as 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. And *that* would have made nonfiduciary, nongeneral powers over personal property held in tax advantaged trusts in Michigan—trusts applicable-exclusion-amount sheltered, GST-exemption sheltered or GST tax exempt—very dangerous for transfer tax purposes.

Delaware's "Solution"

Simple RAP repeal would have made such 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 so as 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, for, as we have seen,[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]—evidently thought it sufficient to provide that the Second Power "shall, for purposes 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, again, *there is no RAP-like rule* for personal property held in trust in 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 so as 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, it is trivially true that 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 would also make the Trap *irrelevant*, for if the question were whether under applicable local law, the Second Power 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—*ever*, under *any* circumstance. That proves too much!

Conclusion

What is wanted, if the Trap is to be avoided, is the specification of 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*. This is why RAP repeal in a state without a rule

against suspension of absolute ownership or the power of alienation is liable to make nonfiduciary, nongeneral powers dangerous for transfer tax purposes, and it 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 useless, for 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 a state like Delaware or Michigan that is without a rule against suspension of absolute ownership or the power of alienation and wants to reform its 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.

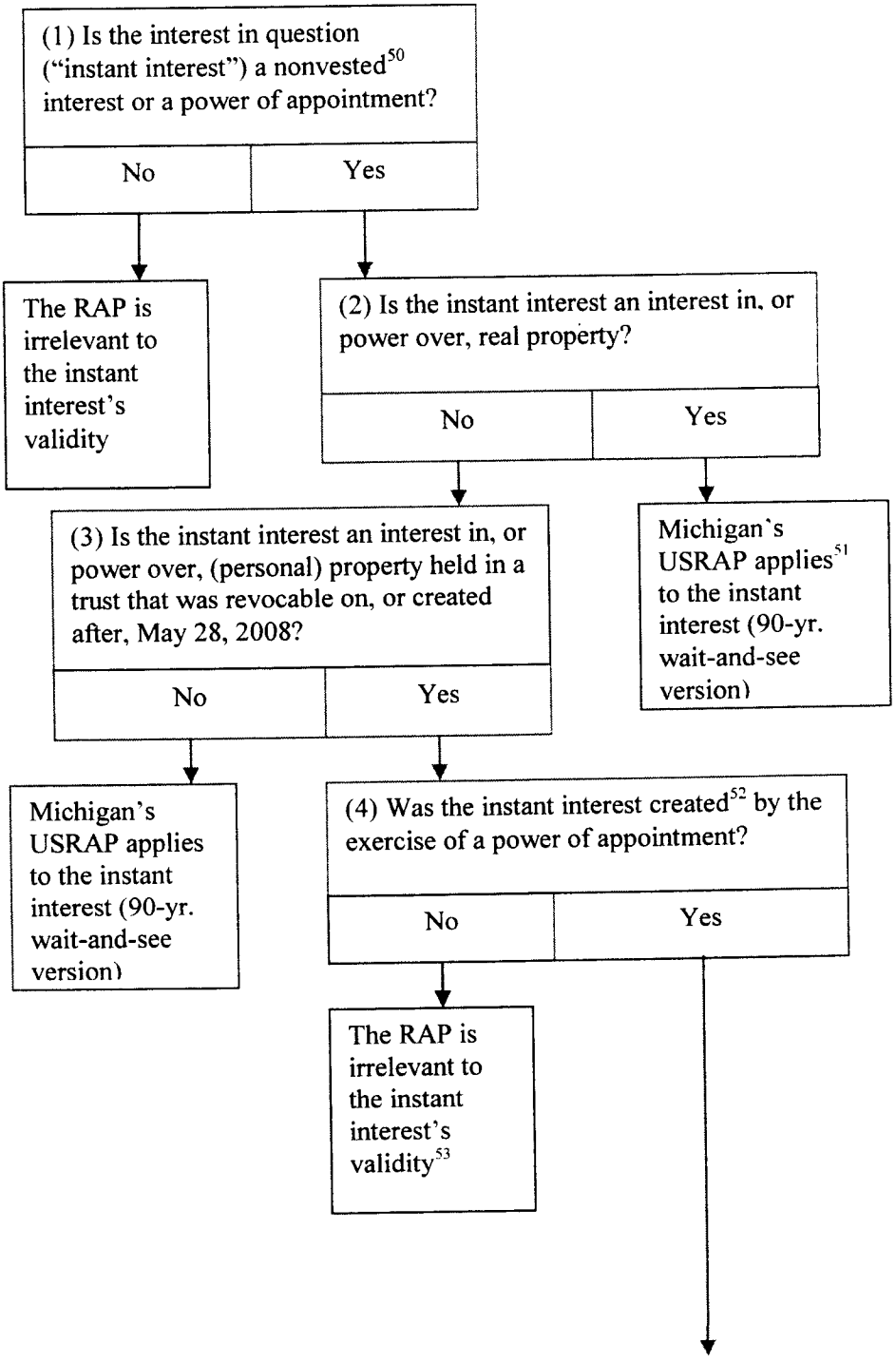
Inventing a rule against suspension of absolute ownership or the power of alienation is bound to be inelegant. For one thing, it requires the state's lawyers and judges to become scholars of other states' laws, for, by hypothesis, the inventing state is, at the time of invention, without a rule against suspension of absolute ownership or the power of alienation. Furthermore, the invented rule has to 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 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 has 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 has plumped for the alternative tack of retaining 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, the general exemption from the RAP notwithstanding, whenever a nonfiduciary, nongeneral power of appointment over personal property held in trust (First Power) is exercised so as 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 vesting of a future interest in the property may be postponed by exercise of the Second Power 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. The latter is what crucially is missing, with respect to personal property held in trust, under Delaware's law.[49]

Delaware has yet to make its choice. With respect to personal property held in trust, the question how, if at all, Delaware's legislature will 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 is liable, section 504 notwithstanding, to spring the Trap on GST exempt or GST-exemption sheltered assets.

APPENDIX

***Post* Personal Property Trust Perpetuities Act Michigan RAP Applicability Flowchart**



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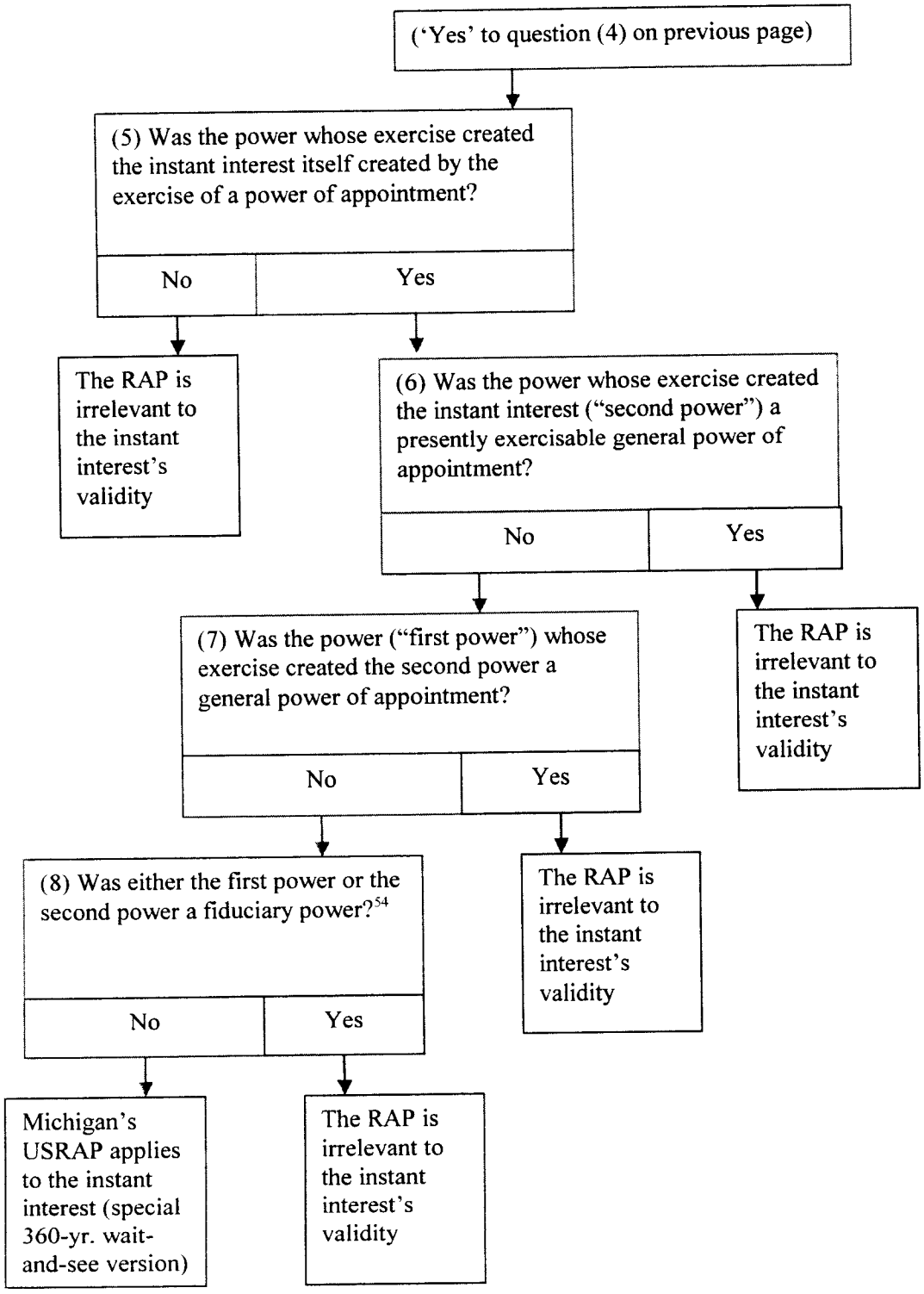
('Yes' to question (4) on previous page)
(5) Was the power whose exercise created the instant interest itself created by the exercise of a power of appointment?
No
Yes
The RAP is irrelevant to the instant interest's validity
(6) Was the power whose exercise created the instant interest ("second power") a presently exercisable general power of appointment?
No
Yes
The RAP is irrelevant to the instant interest's validity
(7) Was the power ("first power") whose exercise created the second power a general power of appointment?
No
Yes
The RAP is irrelevant to the instant interest's validity
(8) Was either the first power or the second power a fiduciary power?[54]
No
Yes
Michigan's USRAP applies to the instant interest (special 360-yr. wait-and-see version)
The RAP is irrelevant to the instant interest's validity

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ENDNOTES

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

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 Greer, *supra* note 2, 69-72.

6 I.R.C. § 2041(a)(3) (2005).

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

8 *See, e.g.*, Greer, *supra* note 2, at 70-71.

9 *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).

10 *See id.*

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

12 H.B. 245, 138th Gen. Assem., Reg. Sess. (Del. 1995), 70 Del. Laws 164.

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

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

15 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.

16 *See* Del. H.B. 245.

17 DEL. CODE ANN. tit. 25, § 503.

18 Greer, *supra* note 2, at 74.

19 This is the peculiarity of Delaware law from which the Trap gets its colloquial name. *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).

20 *See* S.B. 313, 140th Gen. Assem., Reg. Sess. (Del. 2000), 72 Del. Laws 397.

21 DEL. CODE ANN. tit. 25, § 504 (Supp. 2008).

22 *See id.* § 503(a).

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

24 *See infra* Part V text accompanying notes 41-44 for a full discussion of this point.

25 *See supra* note 19 and accompanying text.

26 *See infra* notes 27-34 and accompanying text.

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

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

29 More strictly: the new Michigan acts make the RAP and similar rules affecting the duration of trusts irrelevant to the *validity* of interests in personal property held in trust. Note that this is *not* to say that such interests cannot be affected by "saving clauses"—provisions in trust or other governing instruments designed to ensure that the RAP is not violated. Saving clauses do not *apply* the RAP to the interests they govern; rather, they prevent the RAP from invalidating those interests by forcing the interests either to vest or terminate within the relevant perpetuities testing period. If a saving clause specifies what it takes to be the relevant testing period, it may have application regardless whether any RAP is actually applicable to the interests in question at the time of application. A trust provision, for instance, that simply terminates all nonvested interests twenty-one years after the death of the survivor of certain people living at the time of the trust's creation is liable to have that effect *regardless* whether any form of RAP is

applicable. Saving clauses vest or terminate interests; they do not *invalidate* them. So, to say that the RAP is irrelevant to a given interest's *validity* says nothing about whether the interest is liable to be convulsed by the effect of a saving clause.

30 Like Delaware's, Michigan's general exemption from the RAP and similar rules does not pertain to real property, regardless whether such property is held in trust. *See* DEL. CODE ANN. tit. 25, § 503(e) (Supp. 2008); PPTPA § 3(1)-(2); USRAP Amendments § 5(1)(f); *see also* James P. Spica, *Rule Against Perpetuities Repeal in Michigan*, MICH. PROB. & EST. PLAN. J., Vol. 27, No. 3, at 3 (Summer 2008).

31 *See* PPTPA §§ 3(1)-(2), 4; USRAP Amendments § 5(1)(f), enacting sec. 1. The motivation for this reform in Michigan—which was 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 LAW J. 356 (2005)), for 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 reform 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—reform 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.

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. PPTPA § 2(b); USRAP Amendments § 5(3). And 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 only to real property. 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 September 23, 1949) (codified as MICH. COMP. LAWS ANN. § 554.51). And there was no rule against suspension of the power of alienation 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 has to be distinguished from prohibitions against direct restraints on alienation that may be 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 [i.e., Public Act. No. 38, 1948 Mich. Acts 38, discussed *supra* note 34] 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.* Thus, one should not confuse the continued relevance of the common law *testing period* with continued *application* of the common law RAP itself: the USRAP makes use of the former while displacing the latter.

36 *See supra* note 6 and accompanying text.

37 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 conditions 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, there is no impediment to the exercise of a power of appointment so as to create another power of any quality in any permissible appointee.

39 *See supra* note 34 and accompanying text.

40 I.R.C. § 2041(a)(3); *see supra* note 6 and accompanying text.

41 *See supra* notes 20-21 and accompanying text.

42 *See* Greer, *supra* note 2, at 74.

43 DEL. CODE ANN. tit. 25, § 504 (Supp. 2008). *See supra* note 21 and accompanying text.

44 Stephen E. Greer too has expressed doubt as to whether a relation-back rule by itself could be sufficient for Delaware's purposes. *See* Greer, *supra* note 2, at 74.

45 *Id.*, at 73.

46 *See* DEL. CODE ANN. tit. 25, § 504; MICH. COMP. LAWS ANN. § 556.124; *see also supra* notes 20-21, 37 and accompanying text.

47 *See supra* notes 8-10 and accompanying text.

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

49 It is important to note that 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 would otherwise be a "taxable termination" for purposes of the GST tax, and the attributable GST tax would be more than the attributable estate tax under the Trap. *See generally* Blattmachr & Pennell, *supra* note 19; 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 her nongeneral power so as to create a presently exercisable general power. *See supra* notes 37-38 and accompanying text. And the new acts' anti-Trap exception preserves 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.

50 I.e., previously *transferred* and *contingent*.

51 The adoption of the USRAP displaced the common law RAP in Michigan with respect to interests created on or after the USRAP's 1988 effective date. *See supra* note 35.

52 For purposes of this flowchart, a preexisting power of appointment *p1* is "created" by another power *p2* to the extent an exercise of *p2* newly subjects assets to *p1*. Thus, for example, if a power holder *H* exercises her power to appoint asset *A* by adding *A* to a preexisting trust *T* over which a beneficiary *B* has a power of appointment, then (for purposes of this flowchart) *B*'s power over *A* is "*created*" by the exercise of *H*'s power.

53 Remember, to say that the RAP is irrelevant to a given interest's *validity* says nothing about whether the interest is liable to be affected by a saving clause. *See supra* note 29.

54 I.e., a power of appointment held by a trustee in a fiduciary capacity. *See supra* note 32.