# SPILT TO LAST: LONGEVITY PLANNING FOR TAX ADVANTAGED TRUSTS UNDER A NEW STATUTORY DECANTING REGIME IN MICHIGAN

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*Synopsis: States considering decanting legislation may wish to note some special features of a tripartite decanting regime lately enacted in Michigan, under which a trustee can sometimes decant so as to extend the period for vesting of future interests in trust assets indefinitely. Where a tax-advantaged perpetuity is prohibited by federal tax law, i.e., for trusts "grandfathered" under the Treasury's generation-skipping transfer tax effective-date regulations, the Michigan regime is protective. However, the regime also codifies common law principles regarding fiduciary special powers of appointment that may allow a trustee to extend the period for vesting of future interests in a grandfathered trust's assets without threatening grandfathered status. And where perpetuity is in point (because "grandfathered" status is not), the regime bolsters the anti-Delaware-tax-trap provision of Michigan's perpetuities reform in light of the possibility that a trust may be created by the exercise of a nonfiduciary special power of appointment, thereby creating a decanting power in the appointive trustee that might be viewed as a "second power" for purposes of the "trap."*



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## I. INTRODUCTION

Applicability of Michigan's perpetuities reform is simply a function of the vintages of trusts subject to Michigan law: except for certain personal property previously held in trusts that were irrevocable on September 25, 1985, Michigan's Personal Property Trust Perpetuities Act of 2008 (PPTPA) applies to interests in personal property held in any trust that was revocable on, or created after, May 28, 2008.[1] It is a salient feature of Michigan's new, tripartite statutory decanting regime—the subject of this Article—that the receptacle trust to which trust assets are distributed pursuant to a "decanting" may be a new trust created by the trustee of the decanted trust as of the time of decanting and that, in any case, it is the vintage of the receptacle or distribution trust that determines the period during which the vesting of future interests in the assets of that trust may be suspended or postponed under Michigan law.

Thus, unlike many decanting statutes,[2] Michigan's new decanting regime will sometimes allow a trustee to decant so as to extend the period for vesting of future interests in trust assets indefinitely. This, and the fact that the new regime purports to be partly declarative of common law in effect prior to enactment, makes the Michigan regime of special interest to those concerned with longevity planning for tax advantaged trusts. Where a tax-advantaged perpetuity is prohibited by federal tax law, that is, for trusts "grandfathered" under the Treasury's generation-skipping transfer (GST) tax effective-date regulations,[3] the Michigan regime is protective. However, the regime also codifies common law principles regarding fiduciary special powers of appointment that may allow a trustee to extend the period for vesting of future interests in a grandfathered trust's assets without threatening grandfathered status.[4] And where perpetuity is in point—because grandfathered status is not[5]—the regime bolsters the anti-Delaware-tax-trap provision of Michigan's perpetuities reform in light of the possibility that a trust may be created by the exercise of a nonfiduciary special power of

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[1] *See* MICH. COMP. LAWS § 554.94 (2012).

[2] *See infra* note 72 and accompanying text.

[3] *See infra* notes 168–70 and accompanying text.

[4] *See infra* notes 171–85 and accompanying text.

[5] *See infra* notes 236–48 and accompanying text.

appointment, thereby creating a decanting power in the appointive trustee that might be viewed as a "second power" for purposes of the trap.[6]

## II. BACKGROUND OF THE NEW MICHIGAN STATUTES

The new Michigan statutory decanting regime was initially proposed by Greenleaf Trust, the same privately-owned, Michigan-chartered bank that initially proposed the perpetuities reform enacted as PPTPA. Because the Greenleaf decanting proposal contemplated amendments to three separate Michigan statutes, it came to be embodied in three separate 2012 enrolled Michigan Senate bills: Senate Bill 978, comprising amendments to the Michigan Trust Code (MTC) provisions of the Estates and Protected Individuals Code (EPIC);[7] Senate Bill 979, comprising amendments to PPTPA;[8] and Senate Bill 980 comprising amendments to the Powers of Appointment Act of 1967.[9] Having been proposed by Greenleaf Trust and endorsed by the Council of the Probate and Estate Planning Section of the State Bar of Michigan and the Michigan Bankers Association, the three bills passed in the Michigan Senate on May 23, 2012, passed in the Michigan House on December 12, 2012, and were signed into law by Michigan Governor Richard Snyder on December 26, 2012.[10] On December 28, 2012, the bills were filed with the Michigan Secretary of State and assigned 2012 Public Act numbers 483, 484, and 485, respectively, with immediate effect.[11]

Taken together, the new Michigan Acts: (1) codify common law principles regarding a trustee's ability to exercise a fiduciary special power of appointment so as to make purely discretionary trust distributions in further trust—this is the special province of Michigan Public Act 485 of 2012, amending the Michigan Powers of Appointment Act;[12] (2) create the ability to effect administrative changes, and change the vintage of a trust, by means of decanting in trustees whose discretion is truncated (for example, trustees whose discretion to make distributions to beneficiaries is subject to an ascertainable standard)—this is the province of Michigan Public Act 483

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[6] *See infra* notes 272–82 and accompanying text.

[7] *See* 2012 Mich. Legis. Serv. 483 (S.B. 978) (West).

[8] *See* 2012 Mich. Legis. Serv. 483 (S.B. 979) (West).

[9] *See* 2012 Mich. Legis. Serv. 483 (S.B. 980) (West).

[10] *See* Mich. Pub. Acts 485; *see also* MICHIGAN LEGISLATIVE WEBSITE, Senate Bill 0980 (2012), http://www.legislature.mi.gov/(S(qk2acm55zvd35i55je3fj155))/mileg.aspx?page=getObject&objectName=2012-SB-0980 (last visited Jan. 9, 2013) (see links included on webpage cited for the legislative information related to Public Acts 483–85).

[11] *See id.*

[12] *See* 2012 Mich. Pub. Acts 485.

of 2012,[13] amending the MTC; and (3) bolster the anti-Delaware-tax-trap provision of Michigan's perpetuities reform statute in light of the possibility that a trustee's discretionary power to make distributions in trust may be created by the exercise of a nonfiduciary special power of appointment—this is the province of Michigan Public Act 484 of 2012,[14] amending PPTPA.

Each of these features of the Acts is described in Part IV of this Article, which provides detailed explanations of the Acts' discrete provisions, including their interactions with federal tax laws and with integral provisions of existing Michigan statutes that the Acts do not alter. This Article turns next, though, in Part III, to a primer on trust decanting, which is intended to acquaint the reader generally with the subject and with decanting statutes enacted to date in states other than Michigan.

## III. A PRIMER ON TRUST DECANTING

### A. What Do We Mean by Trust Decanting?

By trust decanting, we generally mean the exercise of a discretionary fiduciary power to distribute assets *in trust*. Historically, the relevant power was understood as a fiduciary special power of appointment,[15] which indicates that this metaphorical use of the term decanting is loose: the analogy to pouring spirits from one vessel to another may be apt enough, given our tendency to reify legal interests like property and legal relations like trusts, but there is no analogue in the decanting of spirits to our narrow reference to fiduciary powers—just as an oenophile does not need a sommelier to decant wine, a beneficiary's special power of appointment may be as efficient as a fiduciary's for moving assets from one trust to another. Nevertheless, trust decanting does have this metaphorically under-determined sense of being a fiduciary activity.[16]

The paradigm of that activity is simple: the trustee of *Trust 1*, *T1*, is currently authorized by the trust instrument to distribute trust income and principal to or for the benefit of beneficiary *B* in such amounts—whether none, some, or all—and at such times as *T1* determines, in *T1*'s sole discretion, to be in the best interest of *B*. To the extent trust assets are not distributed to or for the benefit of *B*, those assets are to be distributed

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[13] *See* 2012 Mich. Pub. Acts 483.

[14] *See* 2012 Mich. Pub. Acts 484.

[15] *See, e.g.*, William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 3 (Spring 2010).

[16] *See id.*

outright at *B*'s death to remainder beneficiary *C* or *C*'s estate. *T1* reasonably determines that it is in *B*'s interest that some portion, or all, of the assets of *Trust 1* should be held in trust for *B* under terms different from those provided by *Trust 1*. So, pursuant to the *Trust 1* instrument itself, common law in the jurisdiction in which *T1* administers *Trust 1* or a statutory enactment in that jurisdiction, *T1* transfers the assets in question to *T2*, in trust, under the desiderated terms, for the benefit of *B*. *T2* may be *T1* or someone else, and the trust of which *T2* is trustee, *Trust 2*, may be an existing trust for the benefit of *B* or a new trust created for the purpose by *T1*.

Of course, the paradigm fits the description of decanting with which we began—*T1* is exercising a discretionary fiduciary power to distribute assets in trust. But the paradigm can easily be embellished so as to embarrass that description. For one thing, we do better to think of decanting in terms of a discretionary fiduciary power to appoint assets in trust, rather than to distribute assets in trust, because distribution connotes possession or ownership—like *T1*'s with respect to the assets of *Trust 1*. Whereas one fiduciary—a trustee, a personal representative, or, in some circumstances, a "trust protector"[17]—may have a power to direct another fiduciary who owns the assets in question to make distributions in trust. Such a power is certainly a power of appointment, and there is no reason (based on the metaphor, at least) why we should hesitate to call it a decanting power. Similarly, a fiduciary may be in a position to create a trust involving property that is not antecedently held in trust at all. If, for example, *G* grants *A* a legal life estate in property *P* and grants *B* a vested remainder in *P* subject to divestment by *C* in case *C* decides it is best for *B* or *B*'s descendants that *P* should be held (after *A*'s death) in trust, then we should say that *C* holds a "power in trust,"[18] and, again, there is no reason why we should hesitate to call *C*'s power a decanting power.

The reciprocal of the point just made—that not every fiduciary power over given assets is held by the trustee of those assets—is that not every power over given assets held by the trustee of those assets is a fiduciary power: we have to recognize that a trustee may hold a power to appoint assets in trust in a nonfiduciary capacity,[19] in which case decanting, as it is

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[17] *See* MICH. COMP. LAWS § 700.7103 (2011) (amended by 2012 Mich. Pub. Acts 483). Note, however, that a person with the power described in the text is not a trust protector as defined in the MTC. *See infra* notes 114–19 and accompanying text.

[18] *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. k (2011).

[19] *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. a (2003) (noting that powers of appointment that run with a trusteeship are ordinarily presumed to be fiduciary powers).

conventionally understood, is not in point. And we have also to recognize (for one purpose, at least) that when decanting clearly is in point—because the power to appoint assets "in trust" is clearly held in a fiduciary capacity—the receptacle into which assets are decanted may not actually be a trust. If a trustee *T* has a discretionary power to distribute trust assets so as to effect an "arrangement . . . which, although not a trust, has substantially the same effect as a trust" within the meaning of Internal Revenue Code (IRC) section 2652,[20] then for purposes of the federal GST tax, at least, we may treat an exercise of *T*'s power as an instance of decanting.[21]

Finally, we should be clear about the sense in which the relevant fiduciary power is said to be discretionary. The historical identification of the decanting power with a fiduciary special power of appointment—like *T1*'s in our paradigm—is liable to make us think in terms of the discretion appropriate to a presently exercisable special power of appointment, which is the salient feature of a decanting power recognizable at common law[22] and the reason why the earliest explicit statutory authorizations for decanting required that the decanting fiduciary possess "absolute discretion" to make trust distributions.[23] But decanting statutes enacted more recently have extended limited decanting powers—as, indeed, the Michigan Acts do—to trustees who possess so little discretion to decide whether or not to make trust distributions as to make analogies to special powers of appointment implausible.[24] In general, these statutes, like the Michigan Acts, do not permit trustees with truncated distributive discretion to make material alterations in the trust beneficiaries' beneficial interests.[25] But, we have to take these statutory, low-distributive-discretion powers into account. That means we have to confine our interest in discretion as a defining feature of

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[20] I.R.C. § 2652(b)(1).

[21] *See id.* § 2652(b)(3) (adducing successive legal interests as an example of a relevant trust-like arrangement); *see also* Treas. Reg. § 26.2652-1(b)(1) (1997).

[22] *See, e.g.*, Phipps v. Palm Beach Trust Co., 196 So. 299, 300–01 (Fla. 1940) (discussed *infra* text accompanying notes 33–34).

[23] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1) (McKinney 2002).

[24] *See, e.g.*, N.C. GEN. STAT. ANN. §§ 36C-8-816.1(b), (c)(7) (West 2011) (providing for decanting pursuant to a trust distribution power subject to an ascertainable standard, regardless whether the relevant standards are satisfied, provided the interests of trust beneficiaries are not materially altered). As to the Michigan Acts, see MICH. COMP. LAWS §§ 700.7820a (2012) (limiting decanting authority based on a "discretionary trust provision"), 700.7103(d) (2012) (defining "discretionary trust provision" to include powers subject to ascertainable standards).

[25] *See, e.g.*, N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7) (West 2011). As to the Michigan Acts, see MICH. COMP. LAWS § 700.7820a(1)(a) (2012).

decanting to a fiduciary's discretion to decide, not whether to make trust distributions at all, but whether to make authorized trust distributions in trust. The latter, weaker form of discretion is expressly provided in most recently enacted decanting statutes.[26]

Thus, by successive approximation, we arrive at the following, serviceable, if technically sophisticated description of decanting: by trust decanting we mean the discretionary exercise of a fiduciary power to appoint assets in trust—or so as to effect an "arrangement . . . which, although not a trust, has substantially the same effect as a trust" within the meaning of IRC section 2652.[27]

B. Common Law Authority for Decanting

A trustee's discretionary power to distribute trust assets, that is, fiduciary discretion to decide whether or not to make trust distributions at all, is a special power of appointment within the meaning of the Michigan Powers of Appointment Act[28] and is so classified by the Restatement (Second) of Property: Donative Transfers (Restatement (Second)), and Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement (Third)).[29] This is textbook knowledge on the classification of special powers of appointment.

> To be absolutely accurate, we should point out that a power of appointment may be created in a trustee, a beneficiary of a trust, a person with a legal interest not held in trust, or in a person who has no other interest in the property. . . . A trustee who has discretion to pay income or principal to a named beneficiary, or discretion to spray income among a group of beneficiaries, has a special power of appointment.[30]

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[26] *See, e.g.*, N.C. GEN. STAT. ANN. §§ 36C-8-816.1(b), (g) (West 2011) (indicating, respectively, that decanting does not require court authorization or beneficiary consent and that the statute does not imply a duty to decant); *see also*, IND. CODE ANN. § 30-4-3-3(a) (Lexis Nexis 2011); MO. ANN. STAT. § 456.8-815(1) (West 2007); NEV. REV. STAT. ANN. §§ 163.419(1), (2) (Lexis Nexis Supp. 2011). As to the Michigan Acts, see MICH. COMP. LAWS §§ 700.7815(2), 700.7820a(7) (2012).

[27] I.R.C. § 2652(b)(1).

[28] *See* MICH. COMP. LAWS § 556.112(c) (2011) (amended by 2012 Mich. Pub. Acts 485).

[29] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 cmt. d (1986); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. g (2011).

[30] JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 591 (7th ed. 2005).

The Restatements (Second) and (Third) both support the proposition that unless the instrument that created the power manifests a contrary intent, a special power of appointment may be exercised so as to appoint property in trust for the benefit of permissible appointees and to create powers of appointment in permissible appointees. "Except to the extent that the donor has manifested a contrary intention, the donee of a nongeneral power is authorized to make an appointment in any form, *including one in trust and one that creates a power of appointment in another*, that only benefits permissible appointees of the power."[31]

Thus, unless the trust instrument that created the power manifests a contrary intent, a trustee's power to make discretionary distributions, as a special power of appointment, entails the powers (1) to make distributions in trust for permissible distributees, and (2) to create powers of appointment in such distributees over trust assets.[32]

There may or may not be actual case authority in a given jurisdiction for the proposition thus supported by the Restatements, that at common law, a discretionary power to distribute trust property presumptively implies the power to decant. In Florida, the proposition is strongly supported by *Phipps v. Palm Beach Trust Company*,[33] in which the Supreme Court of Florida held that a trustee's "sole and absolute discretion" to direct trust distributions for the benefit of one or more of the settlor's descendants permitted distributions in trust, because (the court said) a fiduciary power to transfer a

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[31] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 (2011) (emphasis added); *see also* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 19.3 cmt. a illus. 2, 19.4 (1986). The identification of the class of permissible distributees of the relevant fiduciary's distribution power with the permissible appointees of a special power of appointment is the cardinal feature of the common law conception of trust decanting. It is possible for a trust settlor to grant a power to appoint in favor of unborn members of a class (e.g., the settlor's descendants), and, if granted to a trustee, such a power would constitute a strong, settlor-specified decanting power. Ordinarily, though, a trustee's discretionary power to make distributions is expressed so as to be exercisable at any given time only in favor of then living beneficiaries of the trust. Thus, a power to decant will ordinarily pertain, at the time it is exercised, only to then living beneficiaries of the trust being decanted. And, of course, the idea that a power of appointment may be exercised by a transfer in trust entails that for purposes of constraints as to potential appointees, legal title may be separated from beneficial interests; the power holder may transfer legal ownership to someone on whom he or she has no power to confer beneficial enjoyment, provided beneficial enjoyment is lodged with (and only with) permissible appointees. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.3 cmt. a illus. 2.

[32] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.3 cmt. a illus. 2 (1986); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. g (2011).

[33] 196 So. 299 (Fla. 1940).

fee simple interest in trust assets—to make outright distributions—includes the power to create any lesser estate unless the trust instrument clearly expresses a contrary intent.[34] In New Jersey, a common law basis for decanting was fairly implied when the Appellate Division of the Superior Court examined a decanting exercise of a trustee's "absolute and uncontrolled discretion" to distribute trust assets for the beneficiary's best interests as a question of abuse of discretion.[35]

There is (as far as this author knows) no decided case binding as precedent on Michigan judges that stands for the Restatements' proposition that a discretionary power to distribute trust property presumptively implies the power to decant. In *Paine v. Kaufman* (*In re Estate of Resiman*),[36] the Michigan Court of Appeals adduced the relevant foundational provisions of the Restatement (Second), but the case before the court involved a nonfiduciary power and the instrument creating the power expressly authorized appointment in trust.[37]

Nevertheless, the mere absence of binding case authority in a jurisdiction cannot establish the absence of a common law basis for decanting there, since the method of common law adjudication cannot be deduced from the doctrine of precedent alone.[38] The *Phipps* case, for example, was not wrongly decided by the Florida Supreme Court just because there was no *Phipps* case for the court to rely upon: reasoning by analogy and the use of nonbinding precedent are potent forces in the development of common law.[39] Thus, the fact that there is no decided case binding as precedent on Ohio judges that clearly stands for the proposition that a discretionary power to distribute trust assets presumptively implies the power to decant[40] did not prevent the Ohio legislature from asserting that its decanting statute is partly declarative of common law applicable prior to enactment.[41] Indeed,

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[34] *See id.* at 300. Iowa has similar authority. *See In re* Estate of Spencer, 232 N.W.2d 491, 494–95 (Iowa 1975).

[35] Wiedenmayer v. Johnson, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969).

[36] 702 N.W.2d 658 (Mich. Ct. App. 2005).

[37] *See id.* at 664.

[38] *See, e.g.*, Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 *passim* (1967).

[39] *See, e.g.*, Neil MacCormick, Legal Reasoning and Legal Theory 120–21, 155–56 (1979).

[40] *See* William J. McGraw III, *Report of the Estate Planning, Trust and Probate Law Section 66-67* (n.d.), OHIO STATE BAR ASSOCIATION, https://www.ohiobar.org/General%20Resources/pubs/councilfiles/EstPlanComReport.pdf (explaining a proposal to enact new section 5808.18 of the Ohio Trust Code authorizing decanting).

[41] *See* OHIO REV. CODE ANN. § 5808.18(O)(1) (2012).

the portion of the new Michigan Acts that amends the Powers of Appointment Act—Michigan Public Act 485 of 2012—purports to be declarative of Michigan common law.[42]

Of course, a trust instrument may prohibit decanting.[43] However, absent such a prohibition, the common law will infer from a trustee's broad discretion to make distributions that the trustee may decant. This is the view expressed in the Restatements (Second) and (Third), and it is the view of the law in Michigan expressed in the portion of the Michigan Acts that amends the Michigan Powers of Appointment Act.[44]

C. Decanting Statutes in States Other Than Michigan[45]

The first decanting statute in the country, New York's original decanting statute, was enacted in 1992.[46] Since the enactment of the New York statute, and prior to the new Michigan Acts, thirteen other states, including Alaska,[47] Delaware,[48] Florida,[49] Tennessee,[50] South Dakota,[51] New Hampshire,[52] North Carolina,[53] Arizona,[54] Nevada,[55] Indiana,[56] Missouri,[57]

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[42] *See* MICH. COMP. LAWS § 556.115a(8) (2012).

[43] *See id.* §§ 556.112(c) (defining 'power of appointment' as "a power . . . that enables the donee of the power to designate, within any limits that may be prescribed, the transferees of the property [subject to the power]"), 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"); Hannan v. Slush, 5 F.2d 718, 722 (E.D. Mich. 1925) (requiring that power of appointment be exercised in the mode prescribed by the donor).

[44] *See* MICH. COMP. LAWS § 556.115a(8) (2012).

[45] In preparing the following survey of state statutes, the author has benefited from materials prepared by Meryl Finkelstein (Senior Counsel with Fulbright & Jaworski LLP) in connection with (1) a Stafford Publications national CLE webinar for which Ms. Finkelstein and the author were presenters, "Trust Decanting: Flexibility and Danger" (Oct. 6, 2011), *available at* http://media.-straffordpub.com/products/trust-decanting-flexibility-and-danger-2011-10-06/reference-material.pdf; and (2) an American Bar Association Income and Transfer Tax Planning Group ad hoc committee, of which Ms. Finkelstein and the author were members, formed to draft the ABA's response to Treasury's request (in I.R.S. Notice 2011-101, 2011-52 I.R.B. 932) for comments on the tax consequences of trust decanting.

[46] *See* N.Y. EST. POWERS & TRUST LAW § 10-6.6(b) (2011).

[47] *See* ALASKA STAT. ANN. § 13.36.157 (West 2012).

[48] *See* DEL. CODE ANN. tit. 12, § 3528 (West 2011).

[49] *See* FLA. STAT. ANN. § 736.04117 (West 2012).

[50] *See* TENN. CODE ANN. § 35-15-816(b)(27) (2012).

[51] *See* S.D. CODIFIED LAWS §§ 55-2-15 to -21 (2011).

[52] *See* N.H. REV. STAT. ANN. § 564-B:4-418 (2012).

[53] *See* N.C. GEN. STAT. ANN. § 36C-8-816.1 (West 2012).

[54] *See* ARIZ. REV. STAT. ANN. § 14-10819 (2012).

and Ohio,[58] have enacted decanting statutes. Under a majority of the state decanting statutes, the trustee's power to appoint property to a new trust is expressly equated with the exercise by the trustee of a special power of appointment.[59] The statutes commonly address: (1) the requisite level of fiduciary discretion to make distributions from the trust to be decanted (original trust); (2) whether decanting may be predicated on a power to invade trust income as well as a power to invade principal; (3) the class of permissible beneficiaries of the receptacle trust (or distribution trust); (4) restrictions intended to ensure the availability of certain tax benefits; (5) limitations on a trustee who is also a beneficiary of the original trust; and (6) procedural aspects of decanting.

Though some decanting statutes require that the decanting trustee's power to invade principal or income be "absolute" or "unlimited,"[60] the majority of statutes permit decanting even if the trustee's distributive discretion is subject to an ascertainable standard,[61] provided in most cases that limitations are observed.[62] The current New York statute, for example, requires that if the trustee's discretion to make distributions is limited under the original trust, the distribution trust must have the same beneficiaries as the original one and must impose the same limitations on the trustee's discretion.[63] All of the statutes permit decanting based on a trustee's discretionary authority to distribute trust principal, some also expressly permit decanting based on discretionary authority to distribute trust income,[64] and others refer only to the trustee's power to make trust distributions without distinguishing between income and principal.[65]

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[55] *See* NEV. REV. STAT. ANN. § 163.556 (Lexis Nexis 2011).

[56] *See* IND. CODE ANN. § 30-4-3-36 (Lexis Nexis 2012).

[57] *See* MO. ANN. STAT. § 456.4-419 (West 2013).

[58] *See* OHIO REV. CODE ANN. § 5808.18 (Lexis Nexis 2012).

[59] *See, e.g.*, NEV. REV. STAT. ANN. § 163.556(7) (Lexis Nexis 2011).

[60] *See, e.g.*, FLA. STAT. ANN. § 736.04117(1)(a) (West 2012); IND. CODE ANN. § 30-4-3-36(a) (Lexis Nexis 2012).

[61] *See, e.g.*, OHIO REV. CODE ANN. § 5808.18(B) (Lexis Nexis 2012); S.D. CODIFIED LAWS § 55-2-15 (2011).

[62] *See, e.g.*, OHIO REV. CODE ANN. § 5808.18(B).

[63] *See* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(c) (2011); *see also*, ALASKA STAT. ANN. § 13.36.157(a)(4) (West 2012) (requiring duplication in distribution trust of any discretion-limiting standard in original trust).

[64] *See, e.g.*, NEV. REV. STAT. § 163.556 (2011).

[65] *See, e.g.*, N.H. REV. STAT. ANN. § 564-B:4-418(a) (2012).

All of the existing statutes require that the power to decant be exercised in favor of beneficiaries of the original trust, but at least where the trustee's discretion to make distributions from the original trust is not limited by a standard,[66] the statutes contemplate that the beneficiaries of the distribution trust may be a proper subset of the beneficiaries of the original trust. Most of the statutes expressly or impliedly prohibit the addition of new beneficiaries in the distribution trust,[67] but some statutes expressly permit the interests of remainder beneficiaries of the original trust to be accelerated under the distribution trust,[68] and many expressly permit the distribution trust to grant powers of appointment that may be exercised in favor of persons who are not beneficiaries of the original trust.[69]

Many of the statutes, particularly more recently enacted ones, contain provisions intended to preserve tax benefits available under the original trust, including marital and charitable deductions[70] and annual gift tax exclusions.[71] Many statutes have perpetuities saving provisions.[72] Where the trustee is also a beneficiary, some statutes restrict—or prevent—the beneficiary-trustee's ability to decant.[73] And the statutes contain varying provisions relating to procedures for exercising decanting powers,[74] whether and what notice of decanting must be given to the beneficiaries of the original trust,[75] and whether court approval of a proposed decanting is required.[76] None of the decanting statutes requires beneficiary consent, except for the Nevada statute in one very narrow circumstance: when decanting nullifies a special

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[66] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10819(A) (2011) ("regardless of whether a standard is provided . . .").

[67] *See, e.g.*, NEV. REV. STAT. § 163.556(2)(a) (2011) (express prohibition).

[68] *See, e.g.*, S.D. CODIFIED LAWS § 55-2-15(1)(b) (2011).

[69] *See, e.g.*, DEL. CODE ANN. tit. 12, § 3528(a) (2011).

[70] *See, e.g.*, FLA. STAT. ANN. § 736.04117(1)(a)(3) (West 2012).

[71] *See, e.g.*, NEV. REV. STAT. § 163.556(2)(c) (2011).

[72] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 14-10819(A)(6), 14-2905 (2011); OHIO REV. CODE ANN. § 5808.18(E) (Lexis Nexis 2012); *cf.* DEL. CODE ANN. tit. 12, § 3528(c) (2011).

[73] *See, e.g.*, NEV. REV. STAT. § 163.556(3) (2011).

[74] *See, e.g.*, DEL. CODE ANN. tit. 12, § 3528(b) (2011) (exercise must be made by a writing signed and acknowledged by the trustee and filed with the records of original trust); *see also* NEV. REV. STAT. § 163.556(6) (2011).

[75] *See, e.g.*, FLA. STAT. ANN. § 736.04117(4) (West 2012) (requiring sixty days notice to "qualified trust beneficiaries" with specified content).

[76] The Ohio statute expressly requires court approval for the decanting of a testamentary trust. *See* OHIO REV. CODE ANN. § 5808.18(K) (Lexis Nexis 2012). As a practical matter, the same requirement will presumably remain in every instance of court-supervised trust administration in every state that affords such supervision.

allocation of specific trust property for the benefit of a specific beneficiary of the original trust, that beneficiary must consent to the decanting.[77]

D. Comparing the New Michigan Acts with Statutes in Other States

Taken together, the new Michigan Acts incorporate the best features of the various statutes surveyed above: the decanting regime they effect has the bifurcate structure of the New York and Ohio statutes with respect to fiduciary distributive discretion that rises to the level of a special power of appointment, on the one hand, and lesser distributive discretion, on the other;[78] that regime imposes calibrated limitations on the decanting facility of trustee-beneficiaries;[79] it requires notice to certain trust beneficiaries in case of a decanting based on distributive discretion that does not rise to the level of a power of appointment;[80] it expressly permits decanting based on discretionary authority to distribute trust income;[81] it prohibits the use of decanting to effect a surreptitious increase in trustee compensation;[82] etc.

However, the new Michigan Acts are suppler than the statutes of other states in codifying common law authority to decant;[83] the decanting regime effected by the Michigan Acts is more explicit than other existing statutes on the coordination of decanting and recent perpetuities reform;[84] it is more

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[77] *See* NEV. REV. STAT. § 163.556(2)(e) (2011).

[78] *See* 2012 Mich. Pub. Acts 485 (comprising amendments to the Powers of Appointment Act of 1967); *cf.* MICH. COMP. LAWS §§ 700.7820a(1) (2012) (limited decanting authority based on a "discretionary trust provision"), 700.7103(d) ("discretionary trust provision" defined to include powers subject to ascertainable standards).

[79] *See* MICH. COMP. LAWS §§ 556.115a(6) (incorporating MTC section 7815 limitations), 700.7820a(1) (limited decanting authority based on "discretionary trust provision" within meaning of MTC section 7815), 700.7815(3) (pertinent limitations).

[80] *See id.* § 700.7820a(7) (sixty-three day notice requirement).

[81] *See* MICH. COMP. LAWS §§ 556.115a(1) (reference to discretion to distribute income *or* principal), 700.7820a(1) (limited decanting authority based on a "discretionary trust provision"), 700.7103(d) ("discretionary trust provision" defined to include powers to distribute income *or* principal).

[82] *See id.* §§ 556.115a(5)(b) (incorporating MTC section 7814(2)(d) notice requirements), 700.7820a(2)(a)-(b) (requiring prior consent to compensation adjustment or fee imposition).

[83] The new Michigan Acts' codification of the decanting authority of trustees wielding purely discretionary distributive powers is fully integrated into the Michigan Powers of Appointment Act as well as the MTC. *See generally* 2012 Mich. Pub. Acts 485 (comprising amendments to the Powers of Appointment Act).

[84] *See* MICH. COMP. LAWS §§ 556.124 (restating within the Powers of Appointment Act certain effects of PPTPA), 700.7820a(8) (incorporating the Powers of Appointment Act's restatement of the effect of PPTPA); 2012 Mich. Pub. Acts 484 (bolstering PPTPA's anti-Delaware-tax-trap provision in light of the new Michigan Acts' decanting facility).

protective than any of the existing statutes of important tax planning imperatives;[85] and it is more outgoing than other existing statutes in the instruction it offers to trustees.[86] To appreciate these and other virtues of the new Acts, we shall have to examine them in detail, which is the aim of Part IV of this Article.

## IV. ANALYSIS OF THE NEW MICHIGAN ACTS

### A. Amendments to the Michigan Powers of Appointment Act

Michigan Public Act 485 of 2012, amending the Michigan Powers of Appointment Act of 1967,[87] generally codifies common law principles regarding a trustee's ability to exercise a fiduciary special power of appointment so as to make purely discretionary trust distributions in further trust.[88] The new Act amends sections 2, 5, 12, 14, and 20 of the 1967 Act[89] and adds a new section 5a. The confluence of these amendments makes explicit within the Powers of Appointment Act the common law conception that a trustee's power to make discretionary distributions is presumptively a special power of appointment that entails the powers (1) to make distributions in trust for permissible distributees and (2) to create powers of appointment in such distributees over trust assets.[90]

#### *1. General Definitions Pertaining to Powers of Appointment*

Through the definition of "Power of appointment," the new Act clarifies that the term may include a power of amendment or revocation.[91] That it is a mistake to exclude (as the 1967 Act did)[92] all powers of revocation and

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[85] *See* MICH. COMP. LAWS § 556.115a(1)(d), (3)(c) (protecting the whole expectancy of a beneficiary's matured right to make annual withdrawals, which can dramatically affect the efficacy of post-mortem planning involving the IRC section 2013 credit for tax on prior transfers).

[86] *See id.* §§ 556.115a(2)(c)–(d) (permissive authority for indemnification of the trustee of the original trust and for advance allocations of trust assets discovered after decanting), 700.7820a(6) (same).

[87] *See* MICH. COMP. LAWS §§ 556.111–33 (2012).

[88] *See* MICH. COMP. LAWS § 556.115a(8) (indicating a legislative intent to declare Michigan common law).

[89] MICH. COMP. LAWS §§ 556.112, 556.115, 556.122, 556.124, 556.130 (1967) (amended by 2012 Mich. Pub. Acts 485).

[90] *See supra* note 32.

[91] *See* MICH. COMP. LAWS § 556.112(c) (2012).

[92] *See* MICH. COMP. LAWS § 556.112(c) (1967) (amended by 2012 Mich. Pub. Acts 485).

amendment from the definition of "power of appointment" is indicated, not only by the Restatement (Second),[93] the Restatement (Third)[94] and federal tax law,[95] but also by EPIC section 1209, which refers to "a presently exercisable or testamentary general or special power of appointment, *including 1* [sic] *in the form of a power of amendment or revocation*."[96] The new Act corrects the existing statute on this point by expressly recognizing that a power of amendment or revocation may be a power of appointment.

Of course, not every power of amendment constitutes a power of appointment; witness the conventional power in the trustee to amend a grantor retained annuity trust to the extent required solely for the purpose of ensuring that the grantor's interest in the trust is a qualified interest within the meaning of IRC section 2702.[97] Hence, the amendatory language is, "*may* include a power of amendment . . . ."[98]

The new Act amends the definition of "appointee" to mean "a person to whom a *beneficial* interest in property is designated or transferred by exercise of a power of appointment or, *if a power is exercised in favor of a trustee, a person for whose benefit property has been designated or transferred in trust*."[99] By limiting the extension of the term appointee to people having beneficial interests in property subject to a power of appointment, the amendment provides that a trustee qua trustee may be a donor or a donee but not an appointee of such a power. This is important, because as we have already noted, the idea that a transfer in trust may exercise a power of appointment entails that, for purposes of constraints as to potential appointees, legal title may be separated from beneficial interests. Thus, the power holder may transfer legal ownership to someone on whom he or she has no power to confer beneficial enjoyment, provided beneficial enjoyment is lodged with, and only with, permissible appointees.[100]

The new Act amends the definition of "General power" to mean "a power permissible *appointees* of which include the donee, his or her estate,

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[93] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 cmt. c (1986).

[94] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. e (2011).

[95] *See* Treas. Reg. § 20.2041-1(b)(1).

[96] MICH. COMP. LAWS § 700.1209 (2012) (emphasis added).

[97] I.R.C. § 2702(b).

[98] MICH. COMP. LAWS § 556.112(c) (emphasis added).

[99] *Id.* § 556.112(f) (emphasis added).

[100] *See supra* note 31 and accompanying text.

his or her creditors, or the creditors of his or her estate."[101] By deploying the defined term appointee,[102] the amended definition of general power avoids the implication that by virtue of the power to decant, a mere trustee (one who is neither a beneficiary of the trust nor owes a legal obligation of support to a beneficiary of the trust) has a general power of appointment. If the meaning of "appointee" were not limited to persons having beneficial interests, any trustee, *T*, with a discretionary power to distribute trust assets to a second trust of which *T* is, or may be, the trustee would have a general power of appointment within the meaning of the Powers of Appointment Act, even though *T* could not appoint a beneficial interest to herself, her creditors, her estate, or the creditors of her estate.

The new Act similarly involves the defined term appointee in the definition of "Special power" as a "power, permissible appointees of which do *not* include the donee, his or her estate, his or her creditors, or the creditors of his or her estate."[103] On this definition, a mere trustee—that is, again, one who is neither a beneficiary of the trust nor someone who owes a legal obligation of support to a beneficiary of that trust—who has the power to make discretionary distributions will regularly be said to have a special power of appointment. This is consistent with section 8 of the 1967 Act, under which a trustee presumptively may not release a special power of appointment.[104] And it tracks the treatment of a trustee's power to make discretionary distributions in the Restatements (Second) and (Third), under which a trustee's special power of appointment entails the power to make distributions in trust for permissible distributees unless the trust instrument that created the discretionary distribution power manifests a contrary intent.[105]

The new Act adds a definition of "Trust" to the Powers of Appointment Act, by referencing the definition found in EPIC section 2901.[106] Whereas the definition of "Trust" provided in EPIC section 1107(n) is merely ostensive and nonexclusive,[107] section 2901 offers an abstract characterization of

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[101] MICH. COMP. LAWS § 556.112(h) (2012) (emphasis added).

[102] *See supra* note 99 and accompanying text.

[103] MICH. COMP. LAWS § 556.112(i) (2012) (emphasis added).

[104] *See id.* § 556.118(2).

[105] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. g (2011); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.3 cmt. a, illus. 2 (1986).

[106] *See* MICH. COMP. LAWS § 556.112(o) (2012).

[107] *See* MICH. COMP. LAWS ANN. § 700.1107(n) (Supp. 2012).

the trust relation.[108] The definition includes testamentary as well as inter vivos trusts.[109]

The new Act defines "Irrevocable trust" to mean: "a trust over which no person holds a power of revocation,"[110] and specifies that for this purpose:

> A power holder's lack of capacity to exercise a power of revocation negates the power of revocation unless an agent of the power holder under a durable power of attorney, a conservator of the power holder, or a plenary guardian of the power holder is serving and the agent, conservator, or guardian is authorized to exercise the power of revocation.[111]

This definition would be unremarkable were it not practical in two respects in which its MTC counterpart, MTC section 7103(h), is not: the definition in the amended Powers of Appointment Act indicates (1) that a trust is revocable if anyone, not just the trust's settlor, has a power to revoke it and, (2) that the power holder's actual capacity to exercise the power is relevant to the question of whether the power exists at any given time.[112]

Finally, we should note that the new Act's definition of "Trustee" does not include a "Trust protector" as defined in the MTC. The new Act defines a trustee as a fiduciary or set of co-fiduciaries described in EPIC section 2901(2)(j).[113] A trust protector described in MTC section 7103[114] is a fiduciary,[115] but presumably not one described in EPIC section 2901(2)(j), for the latter section assumes that the fiduciary in a trust relation holds title to the *res*.[116] There is, however, nothing to regret in the new Act's failure to account for the possibility that a trust protector, as defined in the MTC, may have a decanting power, for (1) 2012 Michigan Public Act 485 assimilates the decanting power to special power of appointment[117] and (2) the term trust protector within the meaning of the MTC excludes "[t]he holder of a

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[108] *See id.* § 700.2901(2)(j).
[109] *See id.*
[110] *Id.* § 556.112(p).
[111] *Id.*
[112] *See id.* § 700.7103(h).
[113] *See id.* § 556.112(q).
[114] *See id.* § 700.7103(n).
[115] *See id.* § 700.7809(1)(a).
[116] *See id.* § 700.2901(2)(j).
[117] *See id.* § 556.115a *passim.*

power of appointment."[118] Thus, for purposes of the new Act amending the Powers of Appointment Act, there can be no point in assimilating a trust protector to a trustee in respect of a decanting power: someone who has a power to direct the trustee to distribute income or corpus certainly has a power of appointment[119] and, therefore, with respect to that power, the person in question is not a trust protector for purposes of the MTC.

*2. Coordination on Decanting Power in Case of Multiple Trustees*

Michigan Public Act 485 of 2012 adds a new subsection (6) to section 5 of the Powers of Appointment Act, providing that when a power of appointment is vested in two or more co-trustees, the co-trustees' coordination in the exercise of the power is governed by MTC sections 7703 and 7815(3), unless the trust instrument manifests a contrary intent.[120] This prevents the general coordination rule of subsection (5), according to which "[w]hen a power is vested in 2 or more persons, all must unite in its exercise"[121] from trumping MTC section 7703's majority rule, prompt action or delegation facility for co-trustees.[122]

*3. Making the Decanting Power Explicit*

Michigan Public Act 485 of 2012 adds a new subsection (5a) to the Powers of Appointment Act, which provides that if a trustee has a presently exercisable discretionary power to make distributions of the income or principal of an irrevocable trust—which is referred to in the statute as the "first trust"—to or for the benefit of one or more beneficiaries of the first trust, then unless the terms of the first trust expressly provide otherwise, the trustee may exercise such power by appointing all or part of the property subject to the power in favor of the trustee of another trust—the "second trust"—if certain conditions are met.[123] The terms "presently exercisable" and "discretionary" are both specially defined for this purpose.

The term "presently exercisable" is specially defined in section 5a(3)(a), according to which

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[118] *Id.* § 700.7103(n)(ii).

[119] *See id.* § 556.112(c); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. f (2011).

[120] *See* MICH. COMP. LAWS § 556.115(6).

[121] *Id.* § 556.115(5).

[122] *See id.* § 700.7703.

[123] *See id.* § 556.115a(1), (9) (coinage of first trust).

> [a] discretionary power to make distributions to a given trust beneficiary is presently exercisable when the timeliness of a present distribution to or for the benefit of that beneficiary depends, under the terms of the trust instrument, only on the trustee's judgment as to what is in the beneficiary's best interests.[124]

The idea here is that a discretionary power subject to a condition precedent is not presently exercisable until the relevant condition is satisfied.[125]

The term "discretionary" is defined, by three degrees of elimination, in section 5a(3)(b), according to which

> [a] power to make distributions is *not* discretionary if it is limited by a definite and ascertainable standard, but instructions for the trustee to consider such things as a beneficiary's best interests, welfare, comfort, happiness, or general development do *not* in themselves constitute definite and ascertainable standards, *regardless* whether the trustee is also instructed or permitted to consider resources outside the trust that may be available to the beneficiary.[126]

Michigan Public Act 485 of 2012—the new Act amending the Powers of Appointment Act—deals only with trustees' special powers of appointment, and this definition simply avoids the question at what point constraints on a trustee's discretion to make distributions, constraints such as ascertainable standards, may make classification as a power of appointment doubtful. A trustee's ability to decant by means of such a truncated distribution power is dealt with in Michigan Public Act 483 of 2012—the new Act amending the MTC.[127]

We should note that unlike many decanting statutes—for example, Ohio's—the new Act acknowledges a basis for decanting in a fiduciary special power to appoint income.[128] Thus, a trustee who has no discretion at all to make distributions of principal, but who has broad discretion to

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[124] *Id.* § 556.115a(3)(a); *see also id.* § 556.112(l) (general definition of presently exercisable for purposes of Powers of Appointment Act).

[125] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4(c) (2011).

[126] MICH. COMP. LAWS § 556.115a(3)(b) (2012) (emphasis added).

[127] *See infra* notes 199–269 and accompanying text.

[128] *See* MICH. COMP. LAWS § 556.115a(1); *cf.* OHIO REV. CODE ANN. § 5808.18(A)(1) (Supp. 2012).

appoint the trust's net income in a given year to one or more of the trust's beneficiaries, is authorized by section 5a to distribute part of such income in a given year (some or all) by creating a trust for the benefit of one or more of the permissible income distributees to hold the income in question. The trustee is so authorized, provided the trust instrument itself does not prohibit decanting[129] and all of the other express conditions set out in section 5a are satisfied.

*4. Statutory Conditions*

The new Act requires that the beneficiaries of the distribution trust, the "second trust," include only permissible appointees of the trustee's discretionary distribution power as of the time of exercise, though subsection (1) of section 5a makes it clear that the beneficiaries of the second trust may be a proper subset of such permissible appointees.[130] As we have already noted, it is possible for a settlor to grant a power to make purely discretionary distributions in favor of unborn members of a class such as the settlor's descendants. If granted to a trustee, such a power would constitute a strong, settlor-specified decanting power.[131] Ordinarily though, a trustee's discretionary power to make distributions is expressed so as to be exercisable, at any given time, only in favor of then-living beneficiaries of the trust.[132] Thus, at the time it is exercised, the power described in section 5a will ordinarily pertain only to then-living beneficiaries of the first trust.

The Act also requires that to the extent a trust is funded with contributions excluded from gift tax under IRC section 2503(c), the second trust instrument must provide that "the beneficiary's remainder interest will pass or be payable no later than the date on which the interest would have passed or been payable under the terms of the first trust."[133] The point of this and other tax-saving provisions of Michigan Public Act 485 of 2012 is (1) accurately to declare limitations on fiduciary special powers of appointment that presumably would be recognized at common law in the

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[129] *See* MICH. COMP. LAWS § 556.115a(1) ("unless the terms of the first trust expressly provide otherwise . . . .").

[130] *See id.* § 556.115a(1)(a).

[131] *See supra* note 31. Apropos of the possibility mentioned in the text, it should be noted that if the donee of a power to appoint in favor of *unborn* members of a class means to appoint to *all* permissible appointees of the power, the instrument of exercise must include language to overcome the contrary presumption in section 21. *See* MICH. COMP. LAWS § 556.131.

[132] *See supra* note 31.

[133] MICH. COMP. LAWS § 556.115a(1)(b).

atmosphere of certain routine tax planning, and (2) to prevent section 5a itself from ruling out the relevant tax planning opportunities. In this case it is the gift-tax advantage of trusts described in IRC section 2503(c) that is at stake, and the new Act's requirement regarding such trusts is designed to ensure that the existence of the trustee's decanting power (when the trust instrument itself does not rule out decanting) will not prevent a trust from satisfying section 2503(c)'s requirement for termination distributions.[134]

The new Act requires that exercise of the decanting power "not reduce the income, annuity, unitrust interest or general power of appointment of a beneficiary of a trust that was intended to qualify [by virtue of that beneficiary's interest(s) in the trust] for a marital or charitable deduction under federal or state law" regardless of whether any such deduction is actually taken.[135] Again, the point of this requirement evidently is to ensure that the existence of the trustee's decanting power, when the trust instrument itself does not rule out decanting, will not prevent a trust from qualifying for the marital or charitable deductions under federal or state tax law.[136]

Protecting the specified interests "whether or not [the relevant] deduction is actually taken"[137] ensures that the first trust's eligibility for the relevant deduction is conceptually prior, and, therefore, independent of, the question of whether any deduction is actually claimed. There are many circumstances in which maximum flexibility requires maximum eligibility for a given deduction while contingency planning has to acknowledge that the maximum available deduction may be suboptimal. One important example involves the marital deduction against federal estate tax, and the credit for tax on prior transfers under IRC section 2013 when spouses die within a

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[134] *See* I.R.C. § 2503(c)(2). Note that the Michigan decanting regime's 2503(c)-saving provision is superior to those of decanting statutes (e.g., Missouri's) that refer in this context to the trust beneficiary's remainder interest's *vesting*, as opposed to "passing or being payable," at a given time. *See* MICH. COMP. LAWS § 556.115a(1)(b). *Cf.* MO. REV. STAT. § 456.4–419(2)(4) (2011). Under IRC section 2503(c), a transfer in trust for the benefit of a minor will be deemed a "present interest" for purposes of the annual gift tax exclusion if, among other things, the remainder of the trust's assets "pass" to the beneficiary on his or her attaining twenty-one years of age. *See* I.R.C. § 2503(c)(2)(A). That requirement would not be satisfied by the remainder's timely vesting in interest with enjoyment postponed. *See* Treas. Reg. § 25.2503-4(c). As to the varieties of common law vesting other than vesting in possession, *see, e.g.*, Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1660 (1985); John C. Gray, THE RULE AGAINST PERPETUITIES §§ 102, 121.5 at 120 (4th ed. 1942).

[135] MICH. COMP. LAWS § 556.115a(1)(c).

[136] *See, e.g.*, I.R.C. §§ 664(d) (requirements for charitable remainder annuity trusts and charitable remainder unitrusts), 2056 (requirements for estate tax marital deduction).

[137] MICH. COMP. LAWS § 556.115a(1)(c).

short time of one another.[138] When this post-mortem planning angle can be worked, the basic drill is to determine how much marital deduction to forgo, or avoid, in the estate of the first spouse to die in order to yield the optimum section 2013 credit for the estate of the second spouse to die.

The new Act also requires that exercise of the decanting power "not reduce a presently exercisable general power to withdraw a specified percentage or amount of trust property in a trust beneficiary who is the only trust beneficiary to or for the benefit of whom the trustee has the power to make discretionary distributions."[139] This condition has to do with the credit for tax on prior transfers under IRC section 2013 in the connection just mentioned above.[140] When a surviving spouse is granted a life income interest and a power to withdraw annually the greater of $5,000 or five percent of the value of trust principal, the combined value of the survivor's income interest and the "five-by-five" power may be computed with reference to the formula for determining a regular single-life remainder factor.[141] This increases the value of the surviving spouse's interest in the portion of the estate of the first spouse to die with respect to which the marital deduction is electively eschewed, and thereby, increases the amount of the IRC section 2013 credit.

That is why section 5a(3)(c) of the new Act protects the whole expectancy of a matured right to make annual withdrawals. Section 5a(3)(c) provides that for purposes of the statutory saving provision for a presently exercisable general withdrawal power,[142] a general power annually to withdraw a specified percentage or amount of trust property is presently exercisable

> with respect to any year for which the beneficiary who holds the power is entitled, under the terms of the governing instrument, to exercise the power, and each subsequent year for which the beneficiary will be entitled to exercise the power assuming only the beneficiary's survival and the continuation of the trust.[143]

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[138] *See* I.R.C. § 2013.

[139] MICH. COMP. LAWS § 556.115a(1)(d).

[140] *See supra* note 138 and accompanying text.

[141] As reflected in Treas. Reg. § 20.2031-7A(e)(4) Table S (based on Table 80CNSMT) (2012).

[142] *See* MICH. COMP. LAWS § 556.115a(1)(d).

[143] *Id.* § 556.115a(3)(c).

Thus,

> if a trust provides that, beginning in the fifth year after the trust becomes irrevocable, the beneficiary shall have the power for the remainder of . . . her life annually to withdraw $5,000.00 or 5% of the value of the trust principal, . . . then, in the fourth year after the trust becomes irrevocable, the beneficiary's power to make annual withdrawals is not presently exercisable; however, in the fifth year after the trust becomes irrevocable, the beneficiary's power is presently exercisable, for purposes of this section, with respect to the fifth year and each subsequent year during the beneficiary's life.[144]

*5. Permissive Authorization for Specific Provisions of the Second Trust*

Michigan Public Act 485 of 2012 expressly allows the "second trust" instrument to provide one or more of the beneficiaries of the distribution trust, or second trust, "[a] special or general power of appointment, including a power to appoint trust property to persons who are not beneficiaries of the first trust,"[145] or

> [t]hat at a time or upon . . . an event specified in the second trust instrument, the remaining trust assets shall thereafter be held for the benefit of beneficiaries who are or who would have been beneficiaries of the first trust on terms and conditions substantially identical, with respect to the interests of those beneficiaries, to the terms and conditions of the first trust.[146]

This allows for the relative permanence of the second trust, notwithstanding that the current beneficiaries of the first trust are—if they are—the only permissible appointees of the trustee's distribution power as of the time of exercise.[147] If the class of such permissible appointees does not include possible future beneficiaries of the trust, the trustee of the first trust can make provisions for future beneficiaries under the governing instrument of the second trust, provided those provisions are substantially identical to

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[144] *Id.*

[145] *Id.* § 556.115a(2)(a).

[146] *Id.* § 556.115a(2)(a)-(b).

[147] *See supra* note 31 and text accompanying notes 131–32.

the provisions for those beneficiaries in the first trust, or one of the beneficiaries of the second trust can appoint the assets in further trust. But for these provisions, assets of the second trust remaining on the termination of the interest of the last surviving permissible appointee of the trustee's power of distribution under the first trust—as of the time of the exercise that created the second trust—might revert to the first trust (and would perhaps then, for example, be subject to whatever perpetuities regime applied to interests in the first trust).

The new Act also provides a statutory hint to exercising trustees that they may want to think in advance about trust assets that may be discovered *post*-exercise. Under section 5a(2)(c), the second trust instrument may provide

> [t]hat assets of the first trust discovered after exercise of the [decanting] power . . . shall be property of the first trust if that trust continues in existence after exercise of the power, or that assets of the first trust discovered after exercise . . . shall be property of the second trust if the first trust terminates upon exercise of the power.[148]

And in another purely permissive provision, the Act indicates that the second trust instrument may provide for the "indemnification of the trustee of the first trust, except as limited by" MTC section 7908, which concerns exculpation of trustees.[149] The point of the reference to MTC section 7908 is to clarify that it should not be possible to indemnify the trustee of the first trust for actions taken in bad faith or with reckless indifference to the interests of the beneficiaries of that trust.[150]

*6. The Second Trust Instrument*

The new Act provides

> [t]he trustee of the second trust may be the trustee of the first trust, the second trust may be a trust under the governing instrument of the first trust or another governing instrument, the governing instrument may be one created by the trustee of the first trust, and the governing

[148] MICH. COMP. LAWS § 556.115a(2)(c).
[149] *Id.* § 556.115a(2)(d).
[150] *See id.* § 700.7908(1)(a).

> instrument may be the instrument that exercises the [decanting power] . . . .[151]

Thus, it is possible for a trustee to decant so as to change nothing more than the vintage of the trust—something the trustee may wish to do, for instance, to put a trust that became irrevocable prior to May 28, 2008 in the way of PPTPA, which applies to personal property held in trusts that are revocable on, or *created after* May 28, 2008.[152] On the other hand, the second trust instrument may be cut, by the trustee or another settlor, from whole cloth. That the governing instrument of the second trust may be the instrument exercising the decanting power comports with the general requirements for exercise of a power of appointment under section 5 of the Powers of Appointment Act.[153]

*7. Prescribed Treatment of the Second Trust*

The new Act provides that the second trust involved in a decanting is treated as "[a] new irrevocable trust for purposes of the notice requirements" (concerning the trust's existence, etc.) of MTC section 7814(2)(c).[154] But for this provision, MTC section 7814(2)(c) would arguably not apply to the second trust in the narrow circumstance that the trustee of the first trust is the trustee of the second trust and the second trust is revocable by the trustee. For in that case, the second trust is "revocable" within the meaning of the MTC.[155] And in case the first trust was created before April 1, 2010, the MTC's effective date,[156] the provision also prevents the trustee of the second trust, who is or was the trustee of the first trust, from arguing that, because the second trust is (as she might say) "really just a continuation of the first," MTC section 7814(6) applies and that therefore, notice of the second trust's existence is not required under the MTC in light of the first trust's vintage.[157]

On the other hand, the new Act also provides that the second trust is treated as "[a] continuation of the first trust for purposes of the notice requirements" of MTC section 7814(2)(d)—concerning a change in the method or rate of the trustee's compensation—"and the charge of any fee or

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[151] *Id.* § 556.115a(4).

[152] *See id.* § 554.94(1).

[153] *See id.* § 556.115.

[154] *Id.* § 556.115a(5)(a).

[155] *See id.* § 700.7103(h).

[156] *See id.* 2009 Mich. Pub. Acts 46 (effective Apr. 1, 2010).

[157] *See* Mich. Comp. Laws § 700.7814(6).

commission on the transfer of assets from the first trust to the second trust shall be treated as a change in the rate of the trustee's compensation."[158] This provision is designed to prevent a trustee from putting over a fee change or charging a transfer fee, without notice, by means of decanting pursuant to the amended Powers of Appointment Act.

*8. Prescribed Treatment of the Decanting Power and Limitations on Trustees Who Are also Trust Beneficiaries*

The new Act expressly provides that the decanting power described within the Powers of Appointment Act is (1) a power of appointment and (2) a discretionary power for purposes of MTC section 7815.[159] Stating what should be obvious—that the decanting power described in the Powers of Appointment Act is a power of appointment—presumably avoids any confusion about whether the general provisions of the Powers of Appointment Act (for example, section 14, on the period during which vesting of future interests can be suspended by the exercise of a power)[160] apply to the decanting power described in section 5a of the amended Act. And in addition to making explicit the obvious point that a trustee is bound by fiduciary duties in exercising the decanting power,[161] adverting to MTC section 7815 imports the MTC's carefully calibrated set of limitations on what a trustee who is also a beneficiary can do with a discretionary power.[162]

*9. Non-preemption*

The new Act provides that the decanting power described within the Powers of Appointment Act "shall not abridge [either] the right of a trustee who has a power to distribute trust property in further trust under . . . any other statute, or the common law . . . [or] the right of a trustee who has a power to amend or revoke a trust."[163] One important implication of this non-preemption is that a trustee who has the broad discretion to make trust distributions described in the Powers of Appointment Act as amended by Michigan Public Act 485 of 2012 is not thereby relegated to that broad power to effect a decanting that can be achieved by the lesser power

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[158] *Id.* § 556.115a(5)(b).
[159] *See id.* § 556.115a(6).
[160] *See id.* § 556.124.
[161] *See id.* § 700.7815(1).
[162] *See id.* §§ 700.7815(2), (4).
[163] *Id.* § 556.115a(7).

described in the MTC as amended by Michigan Public Act 483 of 2012.[164] Thus, the combined decanting facility of the several new Acts is additive, in one direction: any trustee who has a discretionary power to make trust distributions as described in section 5a of the amended Powers of Appointment Act also has a discretionary power under section 7820a of the amended MTC,[165] though the contrary is not true.

*10. Avowed Legislative Intent to Codify Common Law*

The new Act expressly states that the decanting power described in the Powers of Appointment Act is intended to be a codification of the common law of the State of Michigan in effect prior to enactment.[166] The least technical motivation for this statement of intent is that trusts subject to Michigan law have already sometimes been decanted without the benefit of explicit authority in the governing instrument, based on the strength of the reasoning from common law principles reflected in the Restatements (Second) and (Third), indicating that a trustee's power to make discretionary distributions entails the power to make distributions in trust for permissible distributees, unless the trust instrument that created the discretionary distribution power manifests a contrary intent.[167] The decanting authority described in 2012 Michigan Public Act 485 is, therefore, not intended to be innovative.

A much more technical ground for appreciation of the Act's expression of declarative intent has to do with longevity planning for trusts "grandfathered" under the Treasury's GST tax effective-date regulations: the declaration may have the effect of preserving a certain, narrow facility (described below) for extending the duration of generation-skipping trusts, distributions from which are exempt from the federal GST tax by virtue—in most cases—of the trusts' having been irrevocable on September 25, 1985.[168]

In general, the imperative limits on the longevity of the tax advantage of grandfathered-trust status are imposed, not by state perpetuities laws, but by the GST tax effective date regulations themselves. Indeed, for purposes of determining the effects of post-GST tax effective-date exercises of fiduciary and nonfiduciary powers of appointment over grandfathered trusts, the

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[164] *See infra* discussion in the text accompanying notes 217–29.

[165] *See infra* discussion in the text accompanying notes 217–19.

[166] *See* MICH. COMP. LAWS § 556.115a(8).

[167] *See supra* notes 31–32 and accompanying text.

[168] *See* Treas. Reg. § 26.2601-1(b)(1)(i) (as amended in 2004).

Treasury regulations impose a rule against perpetuities of their very own, one completely independent of state law perpetuities rules (Regulatory RAP). The Regulatory RAP period is twenty-one years (plus gestation) from the death of any life in being at the time the grandfathered trust became irrevocable—or, for purposes of some of the regulations, the time the grandfathered trust was created;[169] though in a nod to the Uniform Statutory Rule Against Perpetuities (USRAP), the regulations grant that:

> [T]he exercise of a trustee's distributive power that validly postpones or suspends the vesting, absolute ownership, or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date the original trust became irrevocable) will not be considered an exercise that postpones or suspends vesting, absolute ownership, or the power of alienation beyond the [regulatory] perpetuities period.[170]

First note that decanting a grandfathered trust subject to Michigan law will not in itself violate the Regulatory RAP, Michigan's perpetuities reform notwithstanding, because PPTPA does not apply to assets that still enjoy the tax advantage of grandfathered status.[171] We may also note that the nod to the USRAP in the effective date regulations is the cause of marvelous complexity in the relation between state law and the Treasury regulations.[172] But we can focus here on the Regulatory RAP alternative of the common law testing period because that alternative probably offers the greater scope for the longevity planning that concerns us. The common law alternative authorizes a testing period that does not "extend . . . beyond *any* life in being at the date the original trust became irrevocable plus a period of 21 years,"[173] and the regulations adopt the common law conception of the commensurability of lives affecting vesting by expressly permitting the use

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[169] *See id.* § 2601-1(b)(4)(i)(A)(2).

[170] *Id.* § 26.2601-1(b)(4)(i)(A)(2); *see also id.* § 26.2601-1(b)(1)(v)(B)(2); *see generally* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. TR. & EST. L.J. 185, 189–90 (1995).

[171] *See supra* note 1 and accompanying text.

[172] *See* Dukeminier, *supra* note 170, *passim*; James P. Spica, *Michigan's RAP Reform Becomes More Instructive for Those Wielding Special Powers of Appointment over Personal Property Held in "Grandfathered" Generation-Skipping Trusts*, MICH. PROB. & EST. PLAN. J., Summer 2011, at 25–27.

[173] Treas. Reg. § 26.2601-1(b)(4)(i)(A)(2) (fiduciary, special powers) (emphasis added); *see also id.* § 26.2601-1(b)(1)(v)(B)(2) (nonfiduciary, special powers of appointment).

of extraneous measuring lives.[174] So, if a grandfathered trust is set by its terms to terminate on the death of the survivor of the settlor's prolific but now elderly children, and the trust instrument neither provides any beneficial, special power of appointment nor rules out decanting, then we can imagine a new, receptacle trust set to terminate twenty-one years after the death of the survivor of a pool of measuring lives comprising people, all of whom were born on—or, perhaps, up to a few years before—the date on which the grandfathered trust became irrevocable.

The regulations explicitly permit the use of a fiduciary, special power of appointment to distribute assets from one trust to another—decanting—without loss of grandfathered status, provided (1) that the Regulatory RAP is not violated, and (2) that the terms of the grandfathered trust or state law "[a]t the time the [grandfathered] trust became irrevocable, *state law* authorized distributions to [a] new trust or retention of principal in the continuing trust, without the consent or approval of any beneficiary or court."[175] There is no scope for longevity planning at all in the regulations' alternative safe harbor for the exercise of a fiduciary, special power of appointment, which must be an exercise that does not shift a beneficial interest in the trust to a younger generation of beneficiaries. That alternative requires that the exercise not "extend the time for vesting of any beneficial interest in the trust beyond the period provided for *in the original trust*."[176] So, although the regulations provide two safe harbor rules for trust decanting, it is only the one that refers to the vintage of the trustee's decanting authority that will avail for longevity planning.

Now, as noted above, a "grandfathered" trust (in most cases) is one that was irrevocable on September 25, 1985.[177] And the oldest decanting statute in the country, New York's original statute, was enacted in 1992.[178] So, the scope for the kind of longevity planning we have in view—use of a fiduciary, special power of appointment to subject grandfathered assets to more favorable trust-termination provisions—depends in *every* common-law jurisdiction, *regardless* of the enactment of a decanting statute, on the plausibility of the claim that, given the terms of the grandfathered trust in

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[174] *See id.* § 26.2601-1(b)(1)(v)(D), ex. 4. As to the common law conception, *see* Dukeminier, *supra* note 134, at 1654 n.14 1660–63.

[175] *Id.* § 26.2601-1(b)(4)(i)(A)(1)(ii).

[176] *Id.* § 26.2601-1(b)(4)(i)(D) (emphasis added).

[177] *See id.* § 26.2601-1(b)(1)(i).

[178] *See* N.Y. EST. POWERS & TRUST LAW § 10-6.6 (McKinney 2002).

question, the common law authorizes the trustee to make distributions in trust for the benefit of permissible distributees.

Of course, the trust instrument itself can explicitly authorize the trustee to "decant," in which case the trustee has all the facility she needs for this purpose.[179] On the other hand, (as we have already noted) the trust instrument can explicitly forbid decanting,[180] in which case the longevity planning in question is simply not on. The interesting case is the one in which the grandfathered trust instrument neither expressly authorizes nor expressly rules out use of the trustee's discretionary distribution power to decant. This brings us back to the following points: (1) a purely discretionary fiduciary power of distribution is a special power of appointment;[181] (2) the Restatements (Second) and (Third) both support the proposition that as a special power of appointment, a trustee's power to make discretionary distributions entails the power to make distributions in trust for permissible distributees unless the trust instrument that created the discretionary distribution power manifests a contrary intent;[182] and (3) the mere absence of a decided case binding on Michigan judges that directly stands for the proposition supported by the Restatements cannot establish the absence of a common law basis for decanting in Michigan.[183]

Thus, the statutory declaration that the description of the decanting power contained in the amended Powers of Appointment Act is intended to be a codification of Michigan common law[184] directly supports an argument, apropos of trusts "grandfathered" from GST tax, that would likely be made, in any case, pursuant to the non-preemption provision of section 5a(7) of the amended Act. Again, according to section 5a(7), the decanting power the amended Act describes does not abridge the right of any trustee who has a power to distribute trust property in further trust under the common law.[185]

*11. Resulting Trust Rather Than Power in Trust*

The new Act provides that if a trustee decants so as to create a special power of appointment over assets of the second trust, and the second trust

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[179] *See supra* text accompanying notes 36–37.

[180] *See* MICH. COMP. LAWS § 556.112(c) (2012).

[181] *See supra* notes 28–30 and accompanying text.

[182] *See supra* notes 31–32 and accompanying text.

[183] *See supra* notes 38–41 and accompanying text.

[184] *See* MICH. COMP. LAWS § 556.115a(8) (2012).

[185] *See supra* discussion in the text accompanying note 163.

instrument does not provide an alternative disposition in default of the exercise of the decanting-spawned power, then if such a default occurs, the assets pass according to the provisions of the first trust that governed the assets in question.[186] This avoids implied fiduciary reversion and the implication that the unexercised, decanting-spawned power of appointment is a so-called "imperative" power or "power in trust," an implication that might readily be suggested, in many circumstances, by the reflection (already noted) that ordinarily, a trustee's decanting power will be exercisable, at any given time, only in favor of then living beneficiaries of the first trust.[187]

*12. Postponement of Vesting*

The new Act amends the Powers of Appointment Act to make clear that for purposes of determining the period during which the vesting of a future interest may be suspended or postponed by the exercise of a power of appointment, which now expressly includes a trustee's power to decant,[188] if a power (second power) is created by the exercise of another power (first power) and the first power is a presently exercisable general power, the second power is deemed to have been created on the effective date of the instrument of exercise of the first power; and if the first power is anything *other than* a presently exercisable general power (that is, a testamentary general power or a special power), the second power is deemed to have been created at the time of the creation of the first power.[189] This expresses what has always been implicit in (1) what the Restatement (Third) calls "the relation-back theory" of powers of appointment,[190] and (2) the evidently wide-spread assumption that the exercise of a special power of appointment subject to Michigan law so as to create another power of appointment other than a presently exercisable general power does *not* cause the assets subject to the second power to be included in the transfer tax base (taxable gifts or gross estate depending on whether the triggering exercise of the first power is testamentary) of the holder of the first power under the so-called

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[186] *See* MICH. COMP. LAWS § 556.122(d).

[187] *See supra* note 31; *see also supra* text accompanying notes 131–32. As to the nature of so-called "imperative" powers or "powers in trust," *see, e.g.*, JOHN A. BORRON JR. ET AL., THE LAW OF FUTURE INTERESTS § 877 (3d ed. 2004).

[188] *See supra* text accompanying notes 159–60.

[189] *See* MICH. COMP. LAWS § 556.124(2).

[190] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f (2011).

"Delaware tax trap"—IRC section 2041(a)(3) and its gift tax counterpart section 2514(d).[191]

The new Act also provides that to the extent (1) an instrument exercises a power of appointment—which now expressly includes a trustee's power to decant[192]—so as to subject property to, or to create, a trust that is either revocable on, or created after, May 28, 2008; (2) the appointive property is personal property; and (3) the trust is not a "special appointee trust" within the meaning of PPTPA, the length of the period—whether finite or infinite—during which the vesting of a future interest may be suspended or postponed by exercise of the power is determined under PPTPA and the adjunct provisions of the Michigan USRAP.[193] This provision merely declares within the Powers of Appointment Act the effect of PPTPA's own effective date provisions.[194]

### *13. A Little Clean-up Regarding Untimely Death of Permissible Appointee*

But for amendments effected by the new Act, section 20 of the Powers of Appointment Act might seem to apply when a trustee has purported to exercise the decanting power by appointing assets of the first trust to a named individual as trustee of the second trust, the appointive trustee has died, and the instrument of the second trust does not provide a successor trustee.[195] The new Act makes it clear that section 20 of the Powers of Appointment Act pertains only to testamentary exercises of powers of appointment.[196] As amended, the section provides that "if an attempted *testamentary* exercise of a power is ineffective because of an appointee's death before the effective date of the exercise," the appointment does not lapse and EPIC section 2603 (an anti-lapse provision) applies.[197] This is as it should be, for EPIC section 2603 is found in EPIC's "Part 6 Rules of Construction Applicable Only to Wills."[198]

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[191] *See* James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 REAL PROP. TR. & EST. L. J. 673, 680 (2009).

[192] *See supra* text accompanying notes 159–60.

[193] *See* MICH. COMP. LAWS § 556.124(3).

[194] *See id.* § 554.94.

[195] *See* MICH. COMP. LAWS § 556.130 (1967) (amended by 2012 Mich. Pub. Acts 485).

[196] *See id.*

[197] *Id.* (emphasis added)

[198] *See id.* § 700.2603.

B. Amendments to the MTC

Michigan Public Act 483 of 2012 amends MTC sections 7103, 7401, 7602, 7603, and 7815, and adds a new section 7820a.[199] The confluence of these amendments coordinates the MTC with the decanting amendments to the Powers of Appointment Act effected by Michigan Public Act 483 of 2012 (discussed in the preceding Section) and creates a power to make administrative changes—and change the vintage of a trust—by means of decanting in trustees whose discretion is less broad than that described in section 5a of the amended Powers of Appointment Act, including trustees whose discretion is subject to an ascertainable standard.[200]

*1. General MTC Definitions*

The new Act amends the MTC's definition of "Settlor" expressly to include a testator or a trustee who creates a trust.[201] This reference to the trustee-settlor makes it clear that the same legal person may be referred to in two different capacities in the same MTC section referring to both a trustee and a settlor; not just because a settlor may act as trustee, but also because a trustee may act as settlor.

*2. Additional Means of Creating a Trust*

The new Act amends MTC section 7401—on the methods of creating trusts—to indicate that a trust may be created by the exercise of the limited decanting power described in new MTC section 7820a.[202] Distribution powers subject to "ascertainable standards" within the meaning of MTC section 7103(b)[203] are not "discretionary" for purposes of section 5a of the amended Powers of Appointment Act.[204] They do, however, fall under "discretionary trust provisions" within the meaning of the MTC,[205] which brings them within the limited decanting power described in the new MTC section 7820a added by Michigan Public Act 483 of 2012.[206] A distribution power subject to an ascertainable standard arguably is not a presently

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[199] *See id.* §§ 700.7103, .7401, .7602, .7603, .7815, .7820a (amended by 2012 Mich. Pub. Acts 483).

[200] *See infra* notes 217–29 and accompanying text.

[201] *See* MICH. COMP. LAWS § 700.7103(i).

[202] *See id.* § 700.7401(d).

[203] *See id.* § 700.7103(b).

[204] *See supra* notes 126–27 and accompanying text.

[205] *See* MICH. COMP. LAWS § 700.7103(d).

[206] *See infra* text accompanying notes 217–18.

exercisable power of appointment until such time as the relevant standard is actually satisfied.[207] So, the exercise of some section 7820a powers arguably may not be described in MTC section 7401(c) ("exercise of a power of appointment in favor of a trustee"),[208] which explains the added reference in section 7401(d) to the new section 7820a.[209]

*3. An Exception to the Presumption of Revocability*

The new Act adds two exceptions to the MTC's presumption that a trust is revocable by the settlor: as amended by the Act, MTC section 7602 provides that the presumption does not apply to a trust created under a trust instrument executed before the effective date of the MTC or by the exercise of either "a power described in section 7820a" or "a power of appointment held by a trustee in a fiduciary capacity."[210] With respect to distribution powers that are discretionary for purposes of section 5a of the Powers of Appointment Act, this amendment is in line with section 9 of the Powers of Appointment Act, which makes irrevocability the presumption.[211] Like the Powers of Appointment Act, the new MTC section 7820a leaves open the possibility that the trustee of the first trust could retain the power to amend or revoke the second trust,[212] but, by the amendment to MTC section 7602, the presumption is set the other way.[213]

*4. Powers-of-Settlor Provision*

MTC section 7603(1) provides that while a trust is revocable by the settlor, "rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."[214] As amended by the new Act, section 7603(1) does not apply to a trust created by the exercise of either a power described in the new MTC section 7820a or a power of appointment held by a trustee in a fiduciary capacity.[215] As just noted above, the new Acts do not exclude the possibility that a trustee could exercise either the power described in section 5a of the Powers of

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[207] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4(c) (2011).

[208] MICH. COMP. LAWS § 700.7401(c).

[209] *See id.* § 700.7401(d).

[210] *Id.* § 700.7602(1).

[211] *See id.* § 556.119.

[212] *See id.* § 700.7820a.

[213] *See id.* § 700.7602(1).

[214] *Id.* § 700.7603(1).

[215] *See id.*

Appointment Act or the power described in MTC section 7820a so as to create a second trust that is revocable by the trustee of the first trust. In that case, the new amendment to MTC section 7603(1) avoids the result that the trustee of the second trust would report only to the trustee of the first trust—who may or may not (depending on the circumstances) have an obligation to report to the beneficiaries of the second trust.

*5. Presumption Against Liability for Failure to Exercise Decanting Powers*

The new Act amends MTC section 7815 to provide that, unless the trust instrument expressly provides otherwise, a trustee shall not be liable to any beneficiary for failure to exercise either the power described in the new MTC section 7820a or the power described in section 5a of the amended Powers of Appointment Act.[216] This leaves open the possibility that a given trust instrument may place a trustee under an affirmative duty to decant, but the presumption is set the other way.

*6. A Limited Power to Decant Based on Lesser Discretion*

Michigan Public Act 483 of 2012 adds a new section to the MTC, section 7820a, which provides that if the governing instrument of an irrevocable trust (the first trust) includes a "discretionary trust provision," then, unless the terms of the first trust expressly provide otherwise, the trustee of the first trust may distribute, by a written instrument, all or any part of the property subject to such provision to the trustee of another trust (the second trust) if certain conditions are met.[217] As already noted, whereas distribution powers subject to "ascertainable standards" within the meaning of MTC section 7103(b) are not discretionary for purposes of section 5(a) of the amended Powers of Appointment Act, such limited powers do fall under "discretionary trust provisions" as defined in MTC section 7103(d), which brings them within the new MTC section 7820a.[218] Thus, a trustee whose discretion to make distributions is too limited to allow decanting pursuant to the amended Powers of Appointment Act may be able to avail of the limited

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[216] *See id.* § 700.7815(2).

[217] *See id.* § 700.7820a(1); *see also id.* § 700.7820a(10)(a) (definition of first trust).

[218] *See supra* text accompanying notes 202–06. It should be noted that because a power under a "discretionary trust provision," as defined in MTC section 7103(d), is the basis for the decanting power described in MTC section 7820a, the section 7820a power, like the decanting power described in section 5a of the amended Powers of Appointment Act, is subject to the MTC's calibrated limitations on what a trustee who is also a beneficiary can do with a discretionary power. *See supra* notes 161–62 and accompanying text.

decanting power now provided in the MTC. Again, this is the sense in which the combined decanting facility of the several new Acts is additive, in one direction; any trustee who has a discretionary power to make trust distributions that is described in section 5a of the amended Powers of Appointment Act also has a discretionary power that is described in section 7820a of the amended MTC,[219] but the contrary is not true.

*7. Statutory Conditions*

The new Act requires that exercise of the decanting power described in MTC section 7820a "do[es] not materially change the beneficial interests of the beneficiaries of the first trust."[220] The effect of this limitation is that, within the regime of the several new Acts, a trustee who has less discretion than that described in section 5a of the amended Powers of Appointment Act can decant only to effect administrative changes (as broadly defined in the new MTC section 7820a itself). It is important to note that, for purposes of this condition on the exercise of the section 7820a power, the "beneficiaries" of the first trust include the holders of nonfiduciary powers of appointment over the assets of the first trust.[221]

The new Act also provides that if the governing instrument of the first trust expressly indicates an intention that the first trust qualify for any federal or state tax deduction, exemption, exclusion, or particular tax attribute other than "grantor trust" status (a "tax benefit"), or if terms of the first trust are clearly designed to qualify the first trust for a tax benefit, and if the first trust would qualify for the intended tax benefit(s), the governing instrument of the second trust must neither include any term the inclusion of which would prevent the first trust from qualifying for such tax benefit(s), nor omit any term the omission of which would prevent the first trust from qualifying for such tax benefit(s).[222]

Thus, unlike a trustee wielding the broader decanting power described in section 5a of the amended Powers of Appointment Act,[223] a trustee wielding merely the MTC section 7820a power has almost no ability to thwart intentional tax planning—she is allowed only to switch grantor trust

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[219] *See supra* text accompanying note 165.

[220] MICH. COMP. LAWS § 700.7820a(1)(a).

[221] *See id.* § 700.7103(l)(ii).

[222] *See id.* § 700.7820a(1)(b); *see also id.* § 700.7820a(10)(b) (definition of "tax benefit").

[223] As to the much narrower tax-saving provisions applicable to the decanting power described in the amended Powers of Appointment Act, see *supra* text accompanying notes 133–44.

status on or off.[224] As a practical matter, this broad constraint may be liberating: the point of this tax-benefit-saving provision is no doubt partly to make trustees less unwilling to exercise the decanting power described in MTC section 7820a for fear of fouling complicated technical tax planning imperatives.

The new Act prohibits a distribution to the trustee of a second trust pursuant to section 7820a from resulting in "an increase in or a change in the method of determining the compensation of the trustee, unless the increase or change has been consented to in writing by all beneficiaries entitled to receive reports regarding the first trust."[225] The Act also prohibits such a distribution from resulting in the charge of any fee or commission on the transfer of assets from the first trust to the second, unless such fee or commission has been approved in writing.[226] Like the similar provisions of section 5a of the amended Powers of Appointment Act (discussed above), these constraints prevent a trustee's putting over a fee change or charging a transfer fee, without notice, by means of decanting—in this case, decanting pursuant to MTC section 7820a.[227]

The new Act also prohibits a distribution to the trustee of a second trust pursuant to section 7820a from resulting in a reduction in the standard of care applicable to the trustee's actions, an expansion of exoneration of the trustee, or a diminution in the authority of any person who has a power, exercisable in a fiduciary capacity, to direct or remove the trustee.[228] In light of MTC section 7809(1)(a)—positing the fiduciary status of trust protectors[229]—the latter provision protects the authority of trust protectors, as well as trustees and personal representatives, who are given powers under the terms of the first trust over the trustee(s) of that trust.

*8. Special Definition of "Irrevocable"*

Like the new Act amending the Powers of Appointment Act, Michigan Public Act 483 of 2012 defines "Irrevocable trust" for purposes of MTC section 7820a to mean a trust over which no one holds a power of revocation and that for this purpose, a power holder's lack of capacity to

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[224] *See supra* note 222.

[225] MICH. COMP. LAWS § 700.7820a(2)(a).

[226] *See id.* § 700.7820a(2)(b).

[227] As to the similar provisions of section 5a of the amended Powers of Appointment Act, *see supra* text accompanying note 158.

[228] *See* MICH. COMP. LAWS § 700.7820a(2)(c)–(d).

[229] *See id.* § 700.7809(1)(a).

exercise the power of revocation negates the power, unless an agent of the power holder under a durable power of attorney, a conservator of the power holder, or a plenary guardian of the power holder is serving, and the agent, conservator, or guardian is authorized to exercise the power of revocation.[230] This definition would be unremarkable were it not practical in two respects in which the MTC's general definition of "revocable" is not: the new Act's definition indicates that a trust is revocable if anyone (not just the trust's settlor) has a power to revoke it, and it makes the power holder's actual capacity to exercise the power relevant to the question whether the power exists at any given time.[231]

*9. Special Stipulations Regarding Extension of the Period for Vesting*

The new Act provides that, for purposes of the requirement that exercise of the section 7820a decanting power shall not materially change the beneficial interests of the beneficiaries of the first trust,[232] an increase in the maximum period during which the vesting of a future interest may be suspended or postponed under applicable law shall not constitute a material change in the interest of any beneficiary.[233] But for this stipulation, a trustee using MTC section 7820a to decant personal property from a first trust that became irrevocable prior to May 28, 2008 into a new trust might be bound by the no-material-change-in-beneficial-interests-constraint to force non-vested future interests in that property to vest sooner than would otherwise be necessary; for as we have already noted, PPTPA applies to personal property held in trusts created after May 28, 2008.[234]

The stipulation that an increase in the maximum period for vesting does not constitute a material change in beneficial interests[235] may allow section 7820a to increase the longevity of trusts having a "zero inclusion ratio" for GST tax purposes because of an allocation of the "GST exemption"

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[230] *See id.* § 700.7820(3)(a); *see also supra* note 111 and accompanying text.

[231] *See supra* note 112 and accompanying text.

[232] *See* MICH. COMP. LAWS § 700.7820a(1)(a).

[233] *See id.* § 700.7820a(3)(b). The new Act also provides that for purposes of the requirement, the exercise of the section 7820a power shall not result in an increase or change in the method of determining the compensation of the trustee, unless such increase or change has been consented to in writing (*see id.* § 700.7820a(2)(a)). An increase in compensation arising solely because the duration of the second trust is longer than the duration of the first trust shall not constitute an increase or change in the method of determining the compensation of the trustee. *See id.* § 700.7820a(3)(c).

[234] *See* MICH. COMP. LAWS § 554.94.

[235] *See id.* § 700.7820a(3)(b).

described in IRC section 2631,[236] and to do so without regard to the Regulatory RAP provided in the Treasury's GST tax effective date regulations.[237] For nothing in the effective date regulations has anything to do with the GST exemption.[238]

It is true that the Internal Revenue Service (Service) regularly rules that there is no threat to GST-exemption-sheltered status in circumstances in which there would be no threat to GST-tax-"grandfathered" status.[239] But it is a patent example of the logical fallacy of "denying the antecedent"[240] to argue that, because there is no threat to GST-exemption-sheltered status in circumstances in which there is no threat to GST-tax-grandfathered status (assuming this is true), there *would* be a threat to GST-exemption-sheltered status in case there would be a threat to GST-tax-grandfathered status. The Service's penchant for adverting to the effective date regulations, apropos of situations to which they do not apply, lends no credence whatsoever to the idea that the Regulatory RAP applies to the exercise of special powers of appointment over GST exempted assets.

The Treasury did once propose to apply the Regulatory RAP in just that way, that is to exercises of special powers of appointment over assets to which GST exemption has been allocated. Prior to the adoption of the final GST tax regulations, the proposed regulations under section 2652 provided:

> [T]he exercise of a power of appointment that is not a general power of appointment [(as defined in section 2041(b))] is also treated as a transfer subject to Federal estate or gift tax by the holder of the power if the power is exercised in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any specified life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation [(perpetuities period)].

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[236] *See* I.R.C. § 2631.

[237] *See supra* notes 169–70 and accompanying text.

[238] *See* Treas. Reg. § 26.2601-1(b)(4) (as amended in 2004); *see also* Culp & Mellen, *supra* note 15, at 23.

[239] *See, e.g.*, Priv. Ltr. Rul. 2007-43-028 (May 29, 2007); Priv. Ltr. Rul. 2009-19-008 (May 8, 2009).

[240] *See, e.g.*, RICHARD JEFFREY, FORMAL LOGIC: ITS SCOPE AND LIMITS 65–66 (2d ed. 1981); WESLEY C. SALMON, LOGIC 29 (3d ed. 1984).

> For purposes of this paragraph (a)(4), the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust) is not an exercise that may extend beyond the perpetuities period.[241]

However, a subsequent amendment to the proposed regulation deleted this provision,[242] leaving no trace of the Treasury's faint-hearted attempt to extend the Regulatory RAP beyond the effective-date provisions.

The upshot is that there seems to be no GST tax prohibition against extending, by the exercise of a special power of appointment, the period during which GST-exemption-sheltered assets will be held in trust.[243] With respect to personal property in Michigan, that seems to mean access to perpetuity (or, at least, the 360-year "wait-and-see" period provided in PPTPA's anti-Delaware-tax-trap provision), for (except with regard to certain personal property previously held in GST tax "grandfathered" trusts) PPTPA applies to interests in personal property held in any trust revocable on or created after May 28, 2008.[244] So, if assets of a pre-May 28, 2008 trust to which GST exemption was allocated are decanted into a post-May 28, 2008 trust, the assets' GST-exemption-sheltered status may last either forever, or if the power thus exercised was created by another power under the circumstances described in PPTPA's anti-Delaware-tax-trap provision, then for 360 years from the date the earlier power was created.[245]

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[241] Prop. Treas. Reg. § 26.2652-1(a)(4), 61 Fed. Reg. 29654 (June 12, 1996) (subsequently amended by T.D. 8720, 1997-1 C.B. 187). *Cf* Treas. Reg. §§ 26.2601-1(b)(1)(v)(B), .2601-1(b)(4)(i)(A).

[242] *See* T.D. 8720, 1997-1 C.B. 187.

[243] *See* Jonathan G. Blattmachr, Jerold I. Horn & Diana S.C. Zeyder, *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 169–70 (Spring 2012); Culp & Mellen, *supra* note 15, at 23; CAROL A. HARRINGTON ET AL., GENERATION-SKIPPING TRANSFER TAX: ANALYSIS WITH FORMS ¶ 2.02[1][d] (2d ed. 2001). The Treasury has lately proposed a limit for the useful life of an allocated GST exemption, by means of legislation under which property could be GST-exemption sheltered only for ninety years from the date the GST exemption is allocated. *See* DEP'T. OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2013 REVENUE PROPOSALS 81–82 (2012).

[244] *See* MICH. COMP. LAWS § 554.94 (2012).

[245] *See id.* § 554.93. It should perhaps be noted that the ability to appoint into the PPTPA regime by the creation of a new trust raises what may be one important difference between decanting the assets of an old trust into a new one, on the one hand, and the merger of an old trust with a new one, on the other: the MTC's merger provision may require the segregation of

In any case, the stipulation that an increase in the maximum period for vesting under applicable law does not constitute a material change in beneficial interests[246] creates the need for the provision in subsection (4) of section 7820a, according to which "the distribution power described in section [7820a(1)] shall not be exercised over any portion of the first trust as to which the exercising trustee is the settlor, unless the exercising trustee was acting in a fiduciary capacity when he or she created the first trust."[247] This prohibition is important because the stipulation that an increase in the maximum period for vesting does not constitute a material change in beneficial interests controls for purposes of MTC section 7820a only—it will not be binding on the Service. Thus, the stipulation notwithstanding, the power described in section 7820a could be viewed as a power described in IRC section 2038,[248] in which case trust assets subject to the power would be includable in a settlor-trustee's gross estate for federal estate tax purposes.[249] Subsection (4)[250] averts such problems by denying a settlor-trustee the ability to decant under section 7820a. We should note that if a settlor-trustee needs section 7820a in order to decant, and the trust instrument itself does not provide a means of appointing a special trustee, the settlor-trustee may avail of EPIC section 1309[251] and the appointment of a special fiduciary.[252]

*10. The Second Trust Instrument*

Like the new section 5a of the amended Powers of Appointment Act,[253] MTC section 7820a provides that

> [t]he trustee of the second trust may be the trustee of the first trust, the second trust may be a trust under the governing instrument of the first trust or another governing instrument, the governing instrument may be created by the trustee of the first trust, and the governing instrument

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perpetuities parcels, depending how the phrase "the rule against perpetuities *speaks from* different dates with reference to the trusts" is interpreted. *Id.* § 700.7417(2) (emphasis added).

[246] *See* MICH. COMP. LAWS § 700.7820a(3)(b).

[247] *Id.* § 700.7820a(4).

[248] *See* I.R.C. § 2038.

[249] *See id.*

[250] *See* MICH. COMP. LAWS § 700.7820a(4).

[251] *See id.* § 700.1309.

[252] *See id.*

[253] *See supra* text accompanying note 151.

> may be the instrument that exercises the power described in [section 7820a].[254]

As we similarly noted apropos of section 5a of the Powers of Appointment Act,[255] this means, on the one hand, that a trustee may decant pursuant to section 7820a[256] so as to change nothing more than the vintage of the trust—in order, for instance, to put a trust that became irrevocable prior to May 28, 2008 in the way of PPTPA—and, on the other hand, that the second trust instrument may be cut, by the trustee or another settlor, from whole cloth.[257]

*11. Permissive Authorization for Specific Provisions of the Second Trust*

Like the new section 5a of the amended Powers of Appointment Act,[258] MTC section 7820a provides a statutory hint to exercising trustees that they may want to think in advance about trust assets that may be discovered *post*-exercise: section 7820a(6)(a)[259] provides the second trust instrument may stipulate that assets of the first trust

> discovered after exercise of the [decanting] power . . . shall be property of the first trust if that trust is to continue in existence after exercise . . ., or that assets of the first trust discovered after exercise . . . shall be property of the second trust if the first trust terminates upon exercise.[260]

And, in another purely permissive provision, the section indicates that the second trust instrument may provide for the indemnification of the trustee of the first trust, except as limited by MTC section 7908—concerning exculpation of trustees.[261] Again, the point of the reference to MTC section 7908 is that it should not be possible to indemnify the trustee of the first trust for actions taken "in bad faith or with reckless indifference" to the interests of the beneficiaries of that trust.[262]

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[254] MICH. COMP. LAWS § 700.7820a(5).
[255] *See id.*
[256] *See id.*
[257] *See supra* text accompanying note 153.
[258] *See supra* text accompanying note 148.
[259] *See* MICH. COMP. LAWS § 700.7820a(6)(a).
[260] *Id.*
[261] *See id.* § 700.7820a(6)(b).
[262] MICH. COMP. LAWS § 700.7908(1)(a).

*12. Special Notice Provision*

The new Act provides that although the trustee of the first trust "may exercise the power described in [MTC section 7820a] without the consent of that trust's settlor, any beneficiary, or a court,"[263] the trustee must "give written notice of an intended exercise of the power to the settlors of the first trust, if living, and qualified trust beneficiaries no later than 63 days before exercise."[264] The notice must include "a copy of the proposed instrument of exercise"; and "[if] the living settlors and qualified trust beneficiaries waive," in writing, the sixty-three day period from receipt of notice, the noticed distribution "may be made before expiration of the notice period."[265] This notice provision has no counterpart in the amended Powers of Appointment Act. The idea is that advance notice is, perhaps, warranted where the settlor has granted the trustee less discretion than that ordinarily associated with a special power of appointment.

*13. Postponement of Vesting*

The new Act provides that "the period during which the vesting of a future interest may be suspended or postponed by the exercise of the power described in [MTC section 7820a] is determined under the [amended Powers of Appointment Act], treating the power [for this purpose] as a power of appointment."[266] Thus, the power described in section 7820a is assimilated to a power of appointment for the limited purpose of determining, through the amended Powers of Appointment Act, the application of PPTPA to trusts created by exercise of the section 7820a decanting power. And so, a trustee's ability to decant into Michigan's perpetuities reform regime, that is, PPTPA, is made explicit in the amended MTC as well as the amended Powers of Appointment Act.[267]

*14. Non-preemption*

The new Act provides that the decanting power described in MTC section 7820a does not abridge either the right of any trustee who has a power to distribute trust property in further trust under any other statute, or the common law, or the right of any trustee who has a power to amend or

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[263] *Id.* § 700.7820a(7).

[264] *Id.*

[265] *Id.*

[266] *Id.* § 700.7820a(8).

[267] As to the latter, see *supra* notes 188–94 and accompanying text.

revoke a trust.[268] This is, once again, the sense in which we have said that the decanting facility of MTC section 7820a is "additive."[269]

C. Amendments to the PPTPA

Michigan Public Act 484 of 2012 amends PPTPA sections 2 and 3[270] to bolster PPTPA's anti-Delaware-tax-trap provision[271] in light of the possibility that a trustee's discretionary power to make distributions in trust may be created by the exercise of a nonfiduciary special power of appointment. The so-called "Delaware tax trap" (Trap)—IRC section 2041(a)(3) and its gift tax counterpart, IRC section 2514(d)—provides that assets subject to a power of appointment (first power) are included in the power holder's transfer tax base (taxable gifts or gross estate depending on whether the triggering exercise of the power is testamentary) if the holder:

> [e]xercises 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 the creation of the first power.[272]

The assurance we have from the legislative history that the Trap will not be sprung by the exercise of a fiduciary power of appointment is limited to what we may call "first-order" fiduciary powers—that is, fiduciary powers of appointment created by transfers in trust that are *not* themselves proximately attributable to the exercise of a nonfiduciary power of appointment: and the assurance seems to be only that, in that case, the Trap will not cause assets to be included in the *fiduciary's* transfer tax base.[273] The

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[268] *See* MICH. COMP. LAWS § 700.7820a(9).

[269] *See supra* notes 163–65, 218–19 and accompanying text.

[270] *See* MICH. COMP. LAWS §§ 554.92, 554.93 (amended by 2012 Mich. Pub. Acts 484).

[271] *See id.* § 554.93(3).

[272] I.R.C. § 2041(a)(3); *see also id.* § 2514(d). As to the origin of the colloquial name "Delaware tax trap," see Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes*, 68 J. TAX'N 242, 243–46 (1988); Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, EST. PLAN., Feb. 2001, at 69–70; Spica, *supra* note 191, at 676.

[273] *See* S. REP. No. 82-382 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1530, 1535 (trap not intended to apply to purely fiduciary powers of appointment, such as trustee's discretionary power to invade principal). *See generally* Spica, *supra* note 191, at 674–75.

amendments to PPTPA comprised by Michigan Public Act 484 of 2012 are designed to prevent the decanting powers described in section 5a of the amended Powers of Appointment Act and in the new MTC section 7820a from causing the Trap to be sprung when a nonfiduciary power is exercised so as to create a trust, thus giving rise, in light of the possibility of decanting, to what the new Act calls a "second-order fiduciary power."[274]

The new Act redefines PPTPA's anti-Delaware-tax-trap provision's coined term "second power" to mean a "power of appointment over personal property held in trust, other than a presently exercisable general power, that is created or to which property is subjected by the exercise of either a first power or a *second-order fiduciary power*."[275] A "first power" is defined for this purpose as "a nonfiduciary, nongeneral power of appointment over personal property held in trust that is exercised so as to subject the property to, or to create, another power of appointment."[276] A second-order fiduciary power is defined as

> a fiduciary power of appointment that is created or has property subjected to it by the exercise of . . . (i) a first power, (ii) a fiduciary power of appointment that was created or had property subjected to it by the exercise of by a first power, [or] (iii) a fiduciary power of appointment whose creation or control over property subject to the power is traceable through a succession of previous exercises of fiduciary powers to the exercise of a fiduciary power that was created or had property subjected to it by the exercise of a first power.[277]

The effect is that the exercise of a first power, within the meaning of PPTPA, (that is "a nonfiduciary, nongeneral power of appointment over personal property held in trust")[278] to create a new trust will not allow a decanting of the new trust to suspend vesting for a period that can be determined without regard to the date of creation of the first power.[279] That will prevent the possibility of decanting under the amended Powers of Appointment Act and MTC from causing the trust assets to be included, under the Trap, in

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[274] *See* MICH. COMP. LAWS § 554.92(d).
[275] *Id.* § 554.92(e) (emphasis added).
[276] *Id.* § 554.92(b).
[277] *Id.* § 554.92(d).
[278] *Id.* § 554.92(b).
[279] *See id.* § 554.93(3).

the transfer tax base of the holder of the first power when she exercises the power to create a trust that does not, by its terms, rule out decanting.[280]

## V. CONCLUSION

The most technical of the three 2012 Michigan amendatory Acts discussed in this Article, Public Act 484, amends the most technical of the affected statutes, PPTPA, to bolster the anti-Delaware-tax-trap provision of Michigan's perpetuities reform in light of the possibility that a trust may be created by the exercise of a nonfiduciary special power of appointment, thereby creating a decanting power in the appointive trustee that might be viewed as a second power for purposes of the Trap. Public Act 485 describes one form of decanting power by amending the Michigan Powers of Appointment Act to codify a trustee's common-law authority to make purely discretionary distributions in further trust. Public Act 483, in addition to coordinating administrative provisions of the MTC with the new decanting amendments to the Powers of Appointment Act, creates another form of decanting power within the MTC, one that allows a trustee to make administrative changes (and change the vintage of a trust) even if her discretion to make distributions to beneficiaries is limited by an ascertainable standard. The new Acts offer something old—by way of codification—something new—a statutory, fiduciary power that arguably did not exist prior to enactment—and something unusual: a decanting regime carefully designed, among other things, to provide access to the benefits of perpetuities reform.

[280] *See supra* note 272 and accompanying text.