Means to an End: Electively Forcing Vesting to Suit Tax Rules Against Perpetuities

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Editor's synopsis: Exercising special powers of appointment over tax advantaged trusts in a jurisdiction that has enacted perpetuities reform can be hazardous in light of the so-called "Delaware tax trap" and the "constructive additions" and trust-modification rules of the Treasury's GST-tax effective date regulations. Compliance with these federal tax rules against perpetuities may or may not be guaranteed by the applicable reform legislation. This Article examines a particular situation in which self-help is required for compliance, offers a set of forced-vesting provisions to fit the bill, and indicates how those provisions can be adapted for use in other situations in which, in light of local perpetuities reform, the exercise of a special power of appointment threatens the longevity of federal tax advantages.

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I. Introduction

Exercising special powers of appointment over tax advantaged trusts in a jurisdiction that has enacted perpetuities reform can be hazardous in three salient planning situations. One is when a nonfiduciary special power of appointment (first power) is being exercised to create, or newly subject property to, another power of appointment (second power) in a jurisdiction whose perpetuities reform creates a need for, but does not actually provide, a competent anti-"Delaware tax trap" provision.[1] The risk in that situation (Trap Situation) is that if future interests created by exercise of the *second power* will be subject to a reformed perpetuities regime, the power-spawning (or power-enabling) exercise of the first power may cause the value of assets subject to the

[1] *See, e.g.*, 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 *passim* (2009). *See generally* Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, 28 Est. Plan. 68 (2001).

second power to be included in the transfer tax base of the holder of the *first power* under the so-called "Delaware tax trap."

Delaware tax trap (Trap) is the colloquial name for Internal Revenue Code (Code) section 2041(a)(3) and its gift tax counterpart, Code section 2514(d), which provide that assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) transfer tax base (gift tax base or gross estate depending on whether the triggering exercise is effectively testamentary) to the extent *H exercises* the power by creating another power over the assets in question (second power) that "under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[2] If local perpetuities reform will enable the second power (the power created, or to which property is subjected, by *H*) to be exercised so as, for example, to postpone the vesting of future interests in the subject assets for a period *without end*, that period will be "ascertainable," if at all, "without regard to the date of creation of [*H*'s] power,"[3] and the Trap will be sprung.[4]

The second potentially hazardous situation (Grandfathered Assets Situation) is when a special power of appointment (fiduciary or nonfiduciary) is being exercised over trust assets "grandfathered" from the federal generation-skipping transfer (GST) tax in a jurisdiction whose perpetuities reform does not expressly exclude such assets. The Treasury's GST tax effective date regulations generally exempt from GST tax any "generation-skipping transfer" under a trust that was irrevocable on September 25, 1985 provided the trust is not tampered with in any of several prohibited ways.[5] One mode of tampering the regulations proscribe involves extension of the time for vesting of future interests in assets of a grandfathered trust by means of post-GST-tax-effective-date exercises of fiduciary and nonfiduciary special powers of appointment,[6] and for purposes of distinguishing permissible extensions of that kind from impermissible ones, the regulations impose a rule against perpetu-

[2] *See* I.R.C. § 2041(a)(3) (estate tax version of Trap); *see also id.* § 2514(d) (gift tax version).

[3] *Id.* § 2041(a)(3).

[4] *See* Spica, *supra* note 1, at 681; *see also* Greer, *supra* note 1, at 72-74. The Trap Situation is discussed *infra* Part VI.C.

[5] *See* Treas. Reg. § 26.2601-1(b)(1). A fuller description of the effective-date exemption would have to refer also to the regulations' transition rules for wills and revocable trusts executed before October 22, 1986 and for certain cases involving mental incompetency. *See id.* § 26.2601-1(b)(2) to (3).

[6] *See id.* § 26.2601-1(b)(4)(i)(A)(2) (fiduciary special power of appointment); *see also id*. § 26.2601-1(b)(1)(v)(B)(2) (nonfiduciary power).

ities of their very own (Regulatory RAP),[7] one ostensibly independent of state law perpetuities rules.

The Regulatory RAP testing period is twenty-one years 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"—(plus gestation),[8] though in a nod to the uniform statutory rule against perpetuities (USRAP), the regulations grant that

> 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 [or for purposes of some of the regulations, the date the trust became irrevocable]) will not be considered an exercise that postpones or suspends vesting, absolute ownership or power of alienation beyond the [regulatory] perpetuities period.[9]

The effective date regulations expressly acknowledge the transitivity of grandfathered status in certain cases in which a fiduciary or nonfiduciary special power of appointment is used to move assets from a grandfathered trust to another trust *provided* exercise of the power does not make it possible for the vesting, absolute ownership, or power of alienation of an interest in the trust assets to be postponed or suspended beyond the Regulatory RAP testing period.[10] On the other hand, an exercise that *does* make such a postponement or suspension possible will forfeit grandfathered status.[11] The precise effect of that forfeiture is not spelled out in the effective date regulations, and the Internal Revenue Service (Service) has taken inconsistent positions on the point in private letter rulings.[12] But whatever its precise effect(s) may be, loss of grandfathered status must make possible a GST tax event that

[7] *See* James P. Spica, *A Newly Revised Post Perpetuities Reform RAP Applicability Flowchart for Property Subject to Michigan Law*, 59 WAYNE L. REV. 1347, 1364 (2014).

[8] *See* Treas. Reg. § 26.2601-1(b)(4)(i)(A)(2).

[9] *See id.* (fiduciary special power of appointment); s*ee* also *id.* § 26.2601-1(b)(1)(v)(B)(2) (nonfiduciary power); s*ee 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).

[10] *See*, *e.g.*, Treas. Reg. § 26.2601-1(b)(4)(i)(A) (fiduciary special power of appointment), described *infra* in the text accompanying note 57.

[11] *See supra* note 9.

[12] *See* 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, 22 (2010).

grandfathered status would have precluded.[13] So, the risk in the Grandfathered Assets Situation is that owing to perpetuities reform, the exercise of a fiduciary or nonfiduciary special power of appointment to move assets of a grandfathered trust to another trust will bring it about that the vesting of future interests in, or absolute ownership of, those assets may be postponed or suspended beyond the Regulatory RAP testing period and will thereby forfeit grandfathered status.[14]

The third potentially hazardous situation (GST Exemption Situation) is when the holder of a fiduciary or nonfiduciary special power of appointment wants to play safe with assets of a pre-perpetuities-reform trust to which "GST exemption"[15] has been allocated in a jurisdiction in which, *apart* from any exclusion for GST tax *grandfathered* assets, it is possible to appoint *into* the reformed perpetuities regime.[16] Now, the effective date regulations say nothing about the GST exemption;[17] the Regulatory RAP has literally nothing to do with trusts having a zero "inclusion ratio,"[18] for GST tax purposes, because of an allocation of GST exemption.[19] But the Service regularly rules in private letter rulings that there is no threat to GST-exemption-sheltered status in circumstances in which there *would be* no threat to GST-tax-grandfathered status.[20]

So, the risk in the GST Exemption Situation is that owing to perpetuities reform, the exercise of a fiduciary or nonfiduciary special power of appointment over GST-exemption-sheltered assets will bring it about that the vesting, absolute ownership, or power of alienation of an interest in the assets may be postponed or suspended beyond the Regulatory RAP testing period, thereby taking the case *out of* a safe harbor the

[13] *See* I.R.C. §§ 2611 ("generation-skipping transfer" defined for GST tax purposes), 2612 ("taxable termination" and "taxable distribution" defined); *see also* Treas. Reg. § 26.2601-1(b)(1)(i) (effect of grandfathered status).

[14] *See* Greer, *supra* note 1, at 73. *Cf.* James P. Spica, *Spilt to Last: Longevity Planning for Tax Advantaged Trusts under a New Statutory Decanting Regime in Michigan*, 48 REAL PROP. TR. & EST. L.J. 35, 67 (2013) ("grandfathered" status of "special appointee trusts" expressly protected under Michigan Personal Property Trust Perpetuities Act of 2008). The Grandfathered Assets Situation is discussed *infra* Part VI.B.

[15] I.e., a trust that is *not* generally exempted from GST tax by the effective date regulations (*see supra* note 5 and accompanying text), but one whose assets (or some of whose assets) are sheltered by the limited exemption from that tax described in I.R.C. § 2631.

[16] *See*, *e.g.*, the provisions of Michigan law described *infra* in the text accompanying notes 34-48.

[17] *See* Treas. Reg. § 26.2601-1(b)(1), (b)(4) (as amended in 2004); *see also* I.R.C. § 2631.

[18] I.e., the ratio described in I.R.C. § 2642(a).

[19] *See*, *e.g.*, Culp & Mellen, *supra* note 12, at 23.

[20] *See*, *e.g.*, PLR 200743028 (May 29, 2007); PLR 200919008 (Jan. 12, 2009).

Service seems to have invented and bruited about for preserving the efficacy of prior allocations of GST exemption.

There is a sense in which the third of these planning situations, the GST Exemption Situation, is more general than either of the other two. The Trap Situation, for example, may implicate the Grandfathered Assets Situation or the GST Exemption Situation, but it may not: it may be that the assets subject to the nonfiduciary special power of appointment in question are neither grandfathered from GST tax nor GST-exemption sheltered. The Grandfathered Assets Situation, on the other hand, implicates the Trap Situation whenever the special power in question is a nonfiduciary power[21] whose exercise will create (or newly subject property to) one or more other powers of appointment. But the Grandfathered Assets Situation *never* implicates the GST Exemption Situation: while a grandfathered trust is grandfathered, its assets *cannot* be GST-exemption sheltered because the GST exemption is a provision of the Code[22] that simply does not apply to a trust grandfathered from GST tax.[23]

But the GST Exemption Situation not only implicates the Trap Situation whenever the special power in question is a nonfiduciary power whose exercise will create (or newly subject property to) other powers of appointment, it also analytically *depends*—by way of make-believe—on the Grandfathered Assets Situation, for "playing safe" with GST-exemption-sheltered assets is simply a matter of *pretending* that those assets are grandfathered from GST tax and then being careful not to forfeit that (imagined) status when exercising the special power in question. So, someone in either a Grandfathered Assets Situation or a GST Exemption Situation may or may not thereby be interested in the Trap Situation; but whereas *no one* in a Grandfathered Assets Situation is thereby interested in the GST Exemption Situation, *everyone* in a GST Exemption Situation is thereby interested in the Grandfathered Assets Situation.

The point of this Article is to present and elucidate a set of forced-vesting provisions that can be used by a power holder to disarm the relevant risk(s) in each of the potentially hazardous situations described above. The relative generality of the GST Exemption Situation suggests the following plan of exposition. For exemplification, Part II of the Article describes a hypothetical GST Exemption Situation involving a *fiduciary* special power of appointment. The hypothetical trustee's motivation to force vesting in the exemplified situation is examined in

[21] Legislative history indicates that the Trap was not intended to apply to exercises of purely fiduciary powers of appointment. *See infra* text accompanying note 156.

[22] *See supra* note 15 and accompanying text.

[23] *See* Treas. Reg. § 26.2601-1(b)(1)(i) (effect of grandfathered status).

Part III. Suitable forced-vesting provisions are then presented in Part IV and explicated in Part V. Finally, in Part VI, the forced-vesting provisions are adapted for use in GST Exemption Situations involving *nonfiduciary* special powers, Grandfathered Assets Situations, and Trap Situations. Along the way, we shall encounter two tangential matters that we can conveniently relegate to appendices: one concerning "qualified severance"[24] and one concerning a highly technical aspect of the Trap.[25]

II. A Case in Point—Trustee in a GST Exemption Situation

On his death, by virtue of his having had a testamentary general power of appointment, a trust beneficiary named *Junior* became the "transferor," for GST tax purposes, of the assets of a separate discretionary trust established primarily for his benefit under the 2007 "Children's Trust" created by a settlor named *Senior*.[26] Junior's failure to exercise his testamentary general power caused the assets of Junior's separate trust to be distributed, pursuant to default-of-appointment provisions, to another separate discretionary trust (Sibling Trust) currently being administered under the Children's Trust instrument primarily for the benefit of Junior's sibling, *Sibling*.[27] Because Sibling's general power of appointment over the Sibling Trust is testamentary and the present beneficiaries of the Sibling Trust potentially include people (descendants of Sibling) who are "skip persons" with respect to Junior, the default disposition will have drawn an automatic allocation of Junior's GST exemption at the time of Junior's death.[28]

Thus, after Junior's death, the Sibling Trust included a portion of assets (Exempt Portion) protected from GST tax by an allocation of Junior's GST exemption. For GST tax purposes, the Exempt Portion was part of a separate trust within the Sibling Trust, a separate trust

[24] I.e., the GST tax trust-division facility described in Treasury Regulation section 26.2642-6. *See infra* Appendix A.

[25] *See infra* Appendix B.

[26] *See* I.R.C. §§ 2041 (assets subject to general powers of appointment includable in power holder's gross estate), 2652(a)(1)(A) (in case of property includable in gross estate, "transferor" means decedent).

[27] We may suppose that all separate trusts described in the Children's Trust instrument are governed by the same provisions and that (in each case) the trustee is authorized to pay to or for the benefit of the primary beneficiary or his or her descendants so much (whether some, none, or all) of the net income or principal of the trust as the trustee determines, in her sole discretion, to be in the best interests of those beneficiaries.

[28] *See* I.R.C. §§ 2631(a) (individual's GST exemption may be allocated to any property with respect to which individual is transferor), 2632 (available GST exemption automatically allocated to transfers in trust for the benefit of "skip persons"); *see also* Treas. Reg. § 26.2632-1(d)(2) (automatic allocation of GST exemption after death).

comprising the value of the assets of which Junior had become the GST tax transferor (Junior Portion)—the value, that is, that was added to the Sibling Trust from Junior's separate trust on account of Junior's death.[29] Therefore, when the Junior Portion was later divided from the Sibling Trust (pursuant to state law)[30] to form a separate "Junior Transferor Trust," the entire Exempt Portion of the Sibling Trust was lodged in the resulting Transferor Trust.

It is now proposed that at least the Exempt Portion of the Junior Transferor Trust should be "decanted"[31] into a new discretionary trust for the benefit of Senior's grandchildren (and remoter descendants) in Sibling's line of the family. (It is presumably part of the trustee's motivation that this should avert the Exempt Portion's inclusion in Sibling's estate tax base by removing that Portion from the sway of Sibling's testamentary general power of appointment.[32]) The separate trust for Junior's benefit and the Sibling Trust were both initially funded at the Children's Trust's inception; at its inception, the Children's Trust was irrevocable; and from inception to date, the Children's Trust has been governed (as to validity, effect, and administration) by Michigan law. The Sibling Trust terminates on Senior's death.[33]

III. The Trustee's Decision to Play Safe

Applicability of Michigan's most recent perpetuities reform is a function of (1) the vintages of trusts subject to Michigan law and (2) the type of property held in trust:[34] except for certain personal property previously held in trusts grandfathered from GST tax, Michigan's Per-

[29] *See* Treas. Reg. § 26.2654-1(a)(2).

[30] *See*, *e.g.*, Mich. Comp. Laws § 700.7417(1) (2015) (division facility requiring resulting trusts with "substantially identical terms" based on Unif. Trust Code § 417, (2010)).

[31] I.e., that the Exempt Portion should be distributed by the trustee of the Transferor Trust *in further trust* for the benefit of permissible distributees of the trustee's discretionary distribution power. *See* Spica, *supra* note 14, at 39-42; Culp & Mellen, *supra* note 12, at 3-7.

[32] *See* I.R.C. § 2041 (assets subject to general powers of appointment includable in power holder's gross estate). We know Sibling has a testamentary general power of appointment over the assets of the Junior Transferor Trust because we know (1) that the Transferor Trust has the same terms as the Sibling Trust, *see supra* note 30 and accompanying text; (2) that Junior had a testamentary general power over the assets of his separate trust, *see supra* text accompanying note 26; and (3) that all separate trusts described in the Children's Trust instrument are governed by the same provisions, *see supra* note 27).

[33] We may suppose that the Children's Trust instrument does not grant Sibling or anyone else a nonfiduciary special power of appointment that provides an alternative means of achieving the trustee's decanting objectives.

[34] *See generally* Spica, *supra* note 7, at 1372-73.

sonal Property Trust Perpetuities Act of 2008 (PPTPA) applies to interests in (and powers of appointment over) personal property held in any trust that was revocable on or created after May 28, 2008;[35] and like Delaware's, Michigan's general exemption from the rule against perpetuities (RAP) (and similar rules affecting the duration of trusts) does not pertain to real property, regardless of whether such property is held in trust.[36] Thus, excepting certain property previously held in trusts grandfathered from GST tax, the vesting of a future interest in personal property held in a Michigan trust created after May 28, 2008 can be postponed *indefinitely* under PPTPA (unless the interest was created by the exercise of a special power appointment (second power) that was itself created by a nonfiduciary special power of appointment (first power), in which case PPTPA's anti-Trap provision requires the interest to vest within 360 years from the creation of the first power).[37]

Now, under Michigan law, a trust distribution *in trust*—that is, *decanting*—is viewed, not as a continuation of the distributing trust, but as a distribution from one trust to *another*.[38] Hence the distribution trust that results from the proposed decanting of the Junior Transferor Trust (Distribution Trust) will be viewed as a new trust created as of the time of decanting. Since (given the date of this Article) that decanting is bound to occur after May 28, 2008, PPTPA is bound to apply to future interests in the Distribution Trust's personal property.[39] So, to the extent the Junior Transferor Trust holds personal property, decanting into the Distribution Trust raises the prospect of extending—*considerably* or *indefinitely*, depending on whether the Children's Trust was or was not created by the exercise of a nonfiduciary special power of appointment—the period during which the vesting of future interests in the decanted assets can be postponed.

That raises the question whether, in order to protect the Exempt Portion's zero inclusion ratio for GST tax purposes, the terms of the Distribution Trust should force future interests in the Exempt Portion (at least) to vest within the relatively short perpetuities testing period prescribed in the GST tax effective date regulations for the Regulatory RAP. If so, the motivation is *not* that the effective date regulations say anything about decanting's effect on prior allocations of GST exemption: again, those regulations say nothing whatever about the GST ex-

[35] *See* MICH. COMP. LAWS § 554.94.

[36] *See* DEL. CODE ANN. tit. 25, § 503 (2014); MICH. COMP. LAWS §§ 554.93, 554.94 (2015).

[37] *See* MICH. COMP. LAWS §§ 554.92, 554.93.

[38] *See id.* § 556.115a(1) (codifying common law decanting power as a power to distribute assets from one trust to *another*).

[39] *See supra* note 35 and accompanying text.

emption.[40] The motivation is only that, again, the Service regularly affects not to have *noticed* that the effective date regulations say nothing whatever about the GST exemption—that the 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.[41]

The proposed decanting also poses a tactical question tangential to forced vesting, *viz*., whether in order to constitute a qualified severance[42] (yielding a separate trust with a GST tax inclusion ratio[43] of zero), a severance of the Exempt Portion (currently lodged in the Junior Transferor Trust) must either precede, rather than follow, or follow, rather than precede, the proposed decanting. This question is too vexed to be handily dispatched, too important to be ignored, and too much of a tangent conveniently to be taken up here apropos of the trustee's decision to force (or not to force) vesting. It will therefore be expedient to relegate the question (of sequence for severance and decanting) to an Appendix[44] and to proceed (in what remains of this Part of the Article) with our examination of the trustee's motivation, such as it is, to force the vesting of future interests in the Exempt Portion.

A. The Regulatory RAP and Its Hypothetical Relevance to Zero Inclusion Ratio Trusts

The considerations noted thus far are these: (1) the Treasury's GST tax effective date regulations generally exempt from GST tax any generation-skipping transfer under a trust that was irrevocable on September 25, 1985;[45] (2) the regulations acknowledge the transitivity of such a trust's grandfathered status in certain circumstances in which the trust's assets are moved to a different trust by means of a fiduciary or nonfiduciary special power of appointment provided exercise of the power does not make it possible for the vesting, absolute ownership, or power of alienation of an interest in the trust assets to be postponed or suspended beyond the Regulatory RAP testing period;[46] (3) the regulations provide, however, that grandfathered status is forfeit if the exercise of such a power *does* make such a postponement or suspension possible;[47] (4) the Children's Trust, let alone the Junior Transferor Trust, was *not* irrev-

[40] *See supra* notes 17-19 and accompanying text.

[41] *See supra* note 20 and accompanying text.

[42] *See supra* note 24.

[43] *See supra* note 18.

[44] *See infra* Appendix A.

[45] *See supra* note 5.

[46] *See supra* note 10.

[47] *See supra* note 9 and accompanying text.

ocable on September 25, 1985 and is *not* otherwise described in the provisions of the effective date regulations; (5) the effective date regulations have literally nothing to do with the GST exemption or zero-inclusion-ratio trusts;[48] but (6) the Service regularly rules in private letter rulings that there is no threat to GST-exemption-sheltered status in circumstances in which there *would be* no threat to GST-tax-grandfathered status.[49]

Now, to infer a *prohibition* from that rulings practice of the Service (consideration (6) above) is illogical. It is a patent example of the logical fallacy of "denying the antecedent"[50] to argue that because there is no threat to GST-exemption-sheltered status in circumstances in which there *would be* no threat to GST-tax-grandfathered status (assuming this is true), there *is* a threat to GST-exemption-sheltered status in circumstances in which there *would be* a threat to GST-tax-grandfathered status. (One might as well deduce that *X is not carrying an umbrella* from the premises (1) that *when it rains, X carries an umbrella* and (2) *it is not raining*. The deduction is invalid because premise (1) says absolutely nothing about the situation described by premise (2)—it may be that *X* just *always* carries an umbrella!) As a matter of logic, the Service's penchant for adverting to the effective date regulations apropos of situations to which they do not apply lends no credence whatever to the idea that the Regulatory RAP *constrains* exercises of special powers of appointment over assets to which GST exemption has been allocated.

The Treasury did once propose to apply the Regulatory RAP in just that way, as a constraint on exercises of nonfiduciary special powers of appointment. Before the adoption of the final GST tax regulations, the proposed regulations under Code section 2652 (on the definition of the term 'transferor' for GST tax purposes) provided:

> The exercise of a power of appointment that is not a general power of appointment (as defined in section 2041(b)) is 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). For purposes of this paragraph (a)(4), the exercise of a power of appointment that validly

[48] *See supra* notes 17-19 and accompanying text.

[49] *See supra* note 20.

[50] *See*, *e.g.*, Richard Jeffrey, Formal Logic: Its Scope and Limits 65-66 (2d ed. 1981); Wesley C. Salmon, Logic 29 (3d ed. 1984).

> 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.[51]

But a subsequent amendment to the proposed regulations deleted this provision,[52] leaving no trace of the Treasury's faint-hearted attempt to extend the prohibitive force of the Regulatory RAP beyond the effective date provisions. The upshot is that there is currently no GST tax prohibition, in the effective date regulations or elsewhere, against extending—by decanting or, for that matter, the exercise of any special power of appointment—the period during which future interests in GST-exemption-sheltered assets can be postponed.[53]

But if a *prohibition* cannot be inferred from the Service's rulings practice, perhaps a *safe harbor* can. The trustee's best reason for affecting to "comply" with the Regulatory RAP as if it applied to the Exempt Portion is, perhaps, that the effect of decanting on trusts having a zero inclusion ratio is a "no-ruling" area "under study" by the Service.[54] As a practical matter, this means that for the immediate future, the only *positive* guidance to be found is in the rulings described above in which the Service has said that there is no threat to GST-exemption-sheltered status in circumstances in which there would be no threat to GST-tax-grandfathered status.[55] "Complying" with the Regulatory RAP (assuming it is possible on our facts) will allow the trustee of the Junior Transferor Trust to point to the Service's rulings practice as positive authority (such as it is) *for*—as opposed to "pointing" to a *lack* of any authority

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

[52] Treas. Reg. § 26.2652-1.

[53] *See* Jonathan G. Blattmachr et al., *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 169-70 (2012); Culp & Mellen, *supra* note 12, at 25; 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), http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf; *see also* Dep't of the Treasury, *General Explanations of the Administration's Fiscal Year 2012 Revenue Proposals* 129-30 (2011), http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2012.pdf (same proposal).

[54] *See* Rev. Proc. 2013-3, 2013-1 I.R.B. 113, § 5.01(24).

[55] *See supra* note 20.

against—the proposition that the Exempt Portion's zero inclusion ratio should survive decanting.

It is therefore relevant to our story that *if* the Sibling Trust *were* a grandfathered trust, then under the effective date regulations, (1) the assets of the Junior Transferor Trust would still be grandfathered and (2) the proposed decanting of the Transferor Trust could be carried out so that the assets of the Distribution Trust would also continue to be grandfathered. (Otherwise, it would simply not be available to the trustee to "comply" with the Regulatory RAP, even if she considers the Service's rulings practice sufficient motivation to try.)

B. Decanting under the Effective Date Regulations

The GST tax effective date regulations explicitly permit the use of a fiduciary special power of appointment to distribute assets from one trust to another (that is, *decanting*) without loss of grandfathered status, provided the exercise does not (1) shift a beneficial interest in the trust assets to a younger generation of beneficiaries or (2) "extend the time for vesting of any beneficial interest in the trust beyond the period provided for *in the original trust*."[56] The regulations also provide an alternative safe harbor for the exercise of a fiduciary special power of appointment in case (1) the time for vesting of future interests in the trust assets is not extended beyond *the Regulatory RAP testing period* measured from the time the grandfathered trust became irrevocable and (2) the terms of the grandfathered trust or state law "*at the time the [grandfathered] trust became irrevocable* . . . authorized the distribution to a new trust . . . without the consent or approval of any beneficiary or court."[57]

The first of the decanting safe harbors just described (No-Shift-No-Stretch Safe Harbor) does not depend on the vintage of the trustee's decanting power, but it does depend on the continuity of the period for vesting: the No-Shift-No-Stretch Safe Harbor cannot be used to extend the time for the vesting of future interests beyond the period provided in *the original grandfathered trust*, even if that period is shorter than the Regulatory RAP would allow. On the other hand, the second of the regulations' safe harbors (Vintage-Power Safe Harbor) *can* be used to extend the period for vesting, *within the limits prescribed by the Regulatory RAP*, but the Vintage-Power Safe Harbor is only available if the trustee's decanting authority is as old as the original grandfathered trust's irrevocability.

[56] *See* Treas. Reg. § 26.2601-1(b)(4)(i)(D) (emphasis added).

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

Now, *if* the Children's Trust *were* a grandfathered trust, the division of the Sibling Trust that yielded the Junior Transferor Trust would be within the No-Shift-No-Stretch Safe Harbor, for the terms of the Junior Transferor Trust are identical with those of the Sibling Trust: we know that neither beneficial interests nor the period for vesting of future interests was changed as a result of the division, because *nothing* was changed other than the number of separate trusts recognized under state law.[58] So, *if* the Children's Trust *were* a grandfathered trust, then under the effective date regulations, the assets of the Junior Transferor Trust would still be grandfathered, thanks to the No-Shift-No-Stretch Safe Harbor.

But the prospective decanting into the Distribution Trust cannot be done in the same way, with the same degree of hypothesized safety under the effective date regulations, for the decanting is intended *to shift beneficial interests* away from the current beneficiary of Junior's generation (*viz.*, Sibling) to the younger generation of Junior's nieces and nephews. It is true that Sibling might be named as a permissible distributee of the Distribution Trust, but the confluence of the basic dispositive objective and the presumptive goal of avoiding inclusion of the Distribution Trust's assets in Sibling's gross estate[59] entails that the testamentary general power of appointment Sibling now has under the Junior Transferor Trust[60] will at least be cut down, in the Distribution Trust, to a special power exercisable in favor of Sibling's descendants.

The following analysis will show, however, that the prospective decanting into the Distribution Trust *can* be brought within the Vintage-Power Safe Harbor. And *that* raises the question whether the terms of the Distribution Trust should "protectively" force future interests in the Exempt Portion (at least) to vest within the Regulatory RAP testing period—in light of the Service's penchant for suggesting in private letter rulings that what is said in the effective date regulations about grandfathered trusts may pertain protectively to a trust having a zero inclusion ratio.[61] For, again, without special provisions to govern the Exempt Portion, the period during which the vesting of future interests in that Portion may be postponed after decanting will be *infinite* under PPTPA (unless the Children's Trust was created by the exercise of a nonfiduciary special power of appointment, in which case, under PPTPA's anti-Trap provision, the period would be 360 years from the

[58] *See supra* note 30.

[59] *See supra* text accompanying notes 31-32.

[60] *See supra* note 32.

[61] *See supra* note 20 and accompanying text.

date the special power was created—a pale vastly beyond that of the Regulatory RAP).[62]

C. Decanting Michigan Trusts in the Vintage-Power Safe Harbor

There is explicit authority in section 5a of the Michigan Powers of Appointment Act for the decanting that will yield the Distribution Trust.[63] But section 5a was added to the amended Act in 2012, and 2012 is too recent a vintage for purposes of the Vintage-Power Safe Harbor: again, that safe harbor requires that the terms of the grandfathered trust or state law *"at the time the [grandfathered] trust became irrevocable* . . . authorized the distribution to a new trust."[64] So, the argument we want to make here depends on the plausibility of a claim about the common law. The argument is that *if* the Children's Trust *were* a grandfathered trust, and if decanting of the Transferor Trust did not allow the vesting of future interests in the Exempt Portion to be postponed beyond the Regulatory RAP testing period, then under the effective date regulations' Vintage-Power Safe Harbor, the assets of the Exempt Portion of the Distribution Trust could continue to be grandfathered. And the claim is that given the terms of the Children's Trust, the *common law* in effect in Michigan when that Trust became irrevocable authorized the trustee to decant.

Of course, the Children's Trust instrument could explicitly authorize decanting: it might expressly provide that the trustee's discretionary power to make distributions pursuant to the trust instrument is a fiduciary special power of appointment that includes the power to make distributions *in trust* and to create powers of appointment. In that case, the trustee has all the facility she needs for her purpose.[65] On the other hand, the trust instrument could explicitly forbid decanting, in which case, decanting is simply not on.[66]

[62] *See supra* notes 35-39 and accompanying text. Apropos of PPTPA's anti-Trap provision (mentioned parenthetically in the text), consider that if, for example, the Children's Trust was created by the exercise of a nonfiduciary special power of appointment that could be "related back" to the beginning of the American civil war, the anti-Trap provision would allow the vesting of future interests in the Exempt Portion to be postponed until the year 2,221, 206 years hence. *See supra* note 37 and accompanying text. *See also infra note* 172 ("relation-back" doctrine).

[63] *See* MICH. COMP. LAWS § 556.115a (2015) (added to Michigan Powers of Appointment Act of 1967 by Act effective Dec. 28, 2012, Act. No. 485, 2012 Mich. Pub. Acts 217).

[64] *See supra* note 57.

[65] *See*, *e.g.*, *In re* Estate of Resiman, 702 N.W.2d 658, 664 (Mich. Ct. App. 2005) (discussed *infra* in the text accompanying notes 70-71).

[66] *See*, *e.g.*, MICH. COMP. LAWS §§ 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

We must suppose, therefore, that the Children's Trust instrument does not explicitly forbid decanting. But we need not suppose that the instrument explicitly authorizes it, for (1) a purely discretionary fiduciary power of distribution (like the one described in the Children's Trust instrument)[67] is a special power of appointment,[68] and (2) the Restatement (Second) of Property: Donative Transfers (Restatement (Second)) and Restatement (Third) of Property: Wills and Other Donative Transfers 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 power manifests a contrary intent.[69]

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*,[70] 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*.[71]

Still, 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 obviously cannot be de-

as to the manner, time, and conditions of the exercise of the power"); Hannan v. Slush, 5 F.2d 718, 722 (E.D. Mich. 1925) (requiring that power of appointment be exercised in the mode prescribed by donor).

[67] *See supra* note 27.

[68] *See* MICH. COMP. LAWS § 556.112(c), (i); *see also*, *e.g.*, *id.* § 556.118(2) (stating that a special power of appointment exercisable by a trustee is presumptively nonreleasable). *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. g (2011); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 cmt. d (1986); JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 591 (7th ed. 2005); J. E. PENNER, THE LAW OF TRUSTS ¶¶ 3.16-3.17 (8th ed. 2012); SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 153-55 (3d ed. 2011); W. Bryan Bolich, *The Power of Appointment: Tool of Estate Planning and Drafting*, 32 DUKE L.J. 32, 35, 61-62 (1964).

[69] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 19.3 cmt. a illus. 2, 19.4.

[70] *In re* Estate of Resiman, 702 N.W.2d 658 (Mich. Ct. App. 2005).

[71] *See id.* at 664.

duced from the doctrine of precedent alone.[72] The *Phipps* case,[73] for example, a Florida case that strongly supports the Restatements' view, was not wrongly decided by the Florida Supreme Court just because, at the time of decision, 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 wherever it exists.[74] 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[75] did not prevent the Ohio legislature from asserting that its decanting statute is partly declarative of common law applicable before the statute's enactment.[76]

Indeed, the portion of the 2012 Michigan decanting legislation that amended Michigan's Powers of Appointment Act expressly purports to be declarative of Michigan common law.[77] That statutory declaration (of legislative intent to codify) directly supports an argument apropos of trusts grandfathered from GST tax that would likely be made, in any case, pursuant to the nonpreemption provision of section 5a(7) of the amended Act—according to which the decanting power the Act newly describes does not *abridge* the right of any trustee who has a power to distribute trust property in further trust under the common law.[78] In this case, that argument is—or *would be* if the Children's Trust *were* a

[72] *See*, *e.g*., Millar v. Taylor, 98 Eng. Rep. 201, 206; 4 Burr. 2303, 2312 (1769) (bases for "common law without precedent"); Mirehouse v. Rennell, 6 Eng. Rep. 1015, 1023; 1 Cl. & Fin. 527, 546 (1833) (reasoning by analogy in application of "rules of law [derived] form legal principles and judicial precedents").

[73] Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940). In *Phipps*, the Supreme Court of Florida held that a trustee's "sole 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 fee simple interest in trust assets (that is, to make *outright* distributions) includes the power to create any lesser estate unless the trust instrument clearly expresses a contrary intent. *See id.* at 300. Iowa has similar authority. *See In re* Estate of Spencer, 232 N.W.2d 491, 494-95 (Iowa 1975). So has Georgia. *See* Regents of the Univ. Sys. v. Trust Co. of Ga., 198 S.E. 345 (Ga. 1938). And so has Massachusetts. *See* Morse v. Kraft, No. SJC-11233, 2013 Mass. LEXIS 629 (Mass. July 29, 2013).

[74] *See, e.g*., Rupert Cross, Precedent in English Law 21-24 (2d ed. 1968); Neil MacCormick, Legal Reasoning and Legal Theory 120-21, 155-56 (1979).

[75] *See* William J. McGraw, III, *Report of the Estate Planning, Trust and Probate Law Section to the Ohio State Bar Association Council of Delegates* 66-67, *available at* https://www.ohiobar.org/General%20Resources/pubs/councilfiles/EstPlanComReport.pdf (explaining a proposal to enact section 5808.18 of the Ohio Trust Code authorizing decanting).

[76] *See* Ohio Rev. Code Ann. § 5808.18(O)(1) (LexisNexis 2015).

[77] *See* Mich. Comp. Laws § 556.115a(8) (2015).

[78] *See id.* § 556.115a(7).

grandfathered trust—that given the terms of the Children's Trust, Michigan common law *at the time the Children's Trust became irrevocable* authorized the trustee to make distributions *in trust* for the benefit of permissible distributees.

On that argument, *if* the Children's Trust *were* a grandfathered trust, and if decanting the Exempt Portion of the Junior Transferor Trust did not allow the vesting of future interests in that Portion to be postponed beyond the Regulatory RAP testing period, then under the effective date regulations, the assets of the Exempt Portion could continue to be grandfathered within the Distribution Trust. Thus, provided she forces future interests in the Exempt Portion to vest within the Regulatory RAP testing period, the trustee can decant the Exempt Portion of the Junior Transferor Trust into the Distribution Trust *as if* within the Vintage-Power Safe Harbor.[79] And *that* means the trustee can elect to come within the safe harbor for GST-exemption-sheltered assets that is implied in the Service's practice of ruling that there is no threat to GST-exemption-sheltered status in circumstances in which there would be no threat to GST-tax-grandfathered status.[80]

D. Trust Longevity Planning under the Regulatory RAP

The trustee's decision (if she makes it) to play safe with the Exempt Portion—by forcing future interests in that Portion to vest within the Regulatory RAP testing period—does not utterly foreclose trust longevity planning. Though the effective date regulations preclude a tax-advantaged perpetuity for grandfathered assets subject to Michigan law, by imposing the Regulatory RAP *regardless* of Michigan law, the Regulatory RAP authorizes a ninety-year testing period or, alternatively, one measured by "*any* life in being at the date the original trust became irrevocable plus . . . 21 years."[81] And as to the latter alternative, the regulations adopt the common law conception of the equivalence of lives potentially affecting vesting by expressly permitting the use of extraneous measuring lives.[82]

Thus, for example, if future interests in the Exempt Portion of the Distribution Trust are forced to vest within twenty-one years from the death of the survivor of Junior's nieces and nephews—or, indeed, the survivor of a set of younger persons, whether related or wholly unrelated to Senior—who were living at the time the Children's Trust be-

[79] *See supra* note 57 and accompanying text.

[80] *See supra* note 20.

[81] Treas. Reg. § 26.2601-1(b)(4)(i)(A)(2) (emphasis added).

[82] *See id.* § 26.2601-1(b)(1)(v)(D) ex. 4. As to the common law conception, see Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1654 n.14, 1660-63 (1985).

came irrevocable, decanting likely will have caused the period during which vesting can be postponed to be extended, since by its terms, the Junior Transferor Trust is set to terminate on Senior's death,[83] and it will have done that *without* violating the Regulatory RAP.

But, again, *that* extension of the period for vesting is quite limited compared to the extension that would otherwise result from decanting, for (again) the period during which the vesting of future interests in the Transferor Trust's assets may be postponed after decanting would be infinite under PPTPA (or as much as 352 years in case the Children's Trust was created by the exercise of a nonfiduciary special power of appointment).[84] So, the trustee of the Junior Transferor Trust must carefully evaluate her motivation to play safe by affecting to "comply" with the Regulatory RAP as if it applied to the Exempt Portion—the very Portion of the Distribution Trust that, other things being equal, the beneficiaries (with a view to tax efficiency) might wish to have remain in trust the longest.

IV. Forced-Vesting Provisions

If the trustee decides "protectively" to force future interests in the Exempt Portion to vest within the relatively short perpetuities testing period described in the GST tax effective date regulations, she may do so by means of the following special provisions.

> 1.3 This Declaration [that is, the declaration of the Distribution Trust] is intended to ensure, among other things, that the vesting and exercise requirements of Treasury regulation section 26.2601-1(b)(4)(i)(A)(2) ("Regulatory RAP") are observed as fully as would be necessary to preserve the Trust assets' exemption from federal generation-skipping transfer tax *if* (contrary to fact) the Children's Trust had been irrevocable on September 25, 1985. Though the settlor [of the Distribution Trust, *viz*., the trustee of the Junior Transferor Trust] believes the Regulatory RAP literally does not apply to the assets of the Children's Trust, she intends, nevertheless, that regardless of state law perpetuities rules, all interests in the Distribution Trust and all powers of appointment over the Distribution Trust's assets shall be so constrained by the provisions of this Declaration as fully—if also unnecessarily—to comply with the vesting and exercise requirements of the Regulatory RAP.
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[83] *See supra* note 27 and text accompanying note 33.

[84] *See supra* notes 35-39 and accompanying text.

[Heading:] Article V - Ultimate Time for Vesting of Beneficial Interests in Trusts Administered under the Provisions of This Declaration

5.1 Regardless of state law perpetuities rules, every beneficial interest in the assets of every Trust administered under the provisions of this Declaration shall be indefeasibly vested no later than the "Ultimate Date," which shall be the day immediately preceding the twenty-first anniversary of the death of the last survivor of the persons listed on Schedule B who were living on [the date the Children's Trust became irrevocable].

5.2 On the Ultimate Date, the trustee [of the Distribution Trust ("Trustee")] shall distribute to the Primary Beneficiary of each Trust[85] still being administered under the provisions of this Declaration (as of the Ultimate Date) all assets of the Trust in question that are not then (on the Ultimate Date) subject either to a vested interest in someone other than the Primary Beneficiary or to a presently exercisable general power of appointment (in anyone).

5.3 If assets of a Trust still being administered under the provisions of this Declaration as of the Ultimate Date are subject to a vested interest in someone other than the Trust's Primary Beneficiary, then on the Ultimate Date, by operation of this Section [5.3], all interests in those assets that are neither vested nor subject to a presently exercisable general power of appointment (in anyone) shall vest in the Primary Beneficiary, and any class subject to open shall close. When the last vested interest prior to the remotest vested remainder terminates, Trustee shall distribute to the holder of the remotest vested remainder, or his or her estate, all of the assets in question that are not then subject to a presently exercisable general power of appointment (in anyone).

5.4 The "Penultimate Date" shall be the day immediately preceding the Ultimate Date. On the Penultimate Date, by operation of this Section [5.4], every testamentary general power of appointment, every nontestamentary general power subject to an unsatisfied condition precedent, and every special power of appointment, over any asset(s) of a Trust still being administered under the provisions of this Declaration (as of the Penultimate Date), including Trustee's discretionary power

[85] I.e., the person for whom, and for whose descendants, the separate discretionary trust in question was established pursuant to the Distribution Trust declaration.

to make distributions, shall lapse. These effects shall all be deemed to occur, simultaneously, in the last discernable moment of the Penultimate Date's duration.

5.5 For purposes of this Article [V] and of Article VI, a distinct trust under terms that differ in any way from those of this Declaration ("Outside Trust") to which Trust assets are transferred by the exercise of a power of appointment, including Trustee's discretionary power to make distributions, is *not* a "Trust administered under the provisions of this Declaration," even if some of the provisions of this Declaration are incorporated in the Outside Trust's governing instrument.

[Heading:] Article VI - Ultimate Time for Exercise of, and for Vesting of Future Interests Created by Exercise of, Certain Powers of Appointment

6.1 A "Subject Power" is any power of appointment, including Trustee's discretionary power to make distributions, that is expressly created by this Declaration. Regardless of state law perpetuities rules, any interest created by the exercise of a Subject Power must either indefeasibly vest or fail no later than the "Vesting Date," which shall be one day less than twenty-one years from the death of any person (any specified person, regardless of relation to [Senior's] family or any other circumstance having to do with the Subject Power's creation) who was living on [the date the Children's Trust became irrevocable].

6.2 A "Derivative Power" is any power of appointment, other than a presently exercisable general power, that is created by the exercise of a Subject Power. The effective transitivity of the restrictions contained in this Article [VI] is a necessary condition for the effectiveness of any exercise of any Subject Power to the extent the exercise attempts to create a Derivative Power. In order to be effective in the creation of any Derivative Power, the instrument exercising the Subject Power must subject the Derivative Power to all of the vesting and exercise requirements described in this Article. For purposes of this Article, to the extent an exercise of a power of appointment *p2* newly subjects assets to a preexisting power of appointment *p1*, *p1* has been "created" by the exercise of *p2*.

6.3 Any Derivative Power must be exercised, if at all, on or before the Vesting Date; any interest created by the exercise of a Derivative Power must either indefeasibly vest or fail no later than the Vesting Date; in order effectively to create any power of appointment other than a presently exercisable general power ("Secondary Derivative Power"), the instrument exercising the Derivative Power must subject the Secondary Derivative Power to all of the vesting and exercise requirements described in this Article [VI]. Thus, any Secondary Derivative Power must be exercised, if at all, on or before the Vesting Date; any interest created by the exercise of a Secondary Derivative Power must either indefeasibly vest or fail no later than the Vesting Date; and in order effectively to create of any power of appointment other than a presently exercisable general power ("Tertiary Derivative Power"), the instrument exercising the Secondary Derivative Power must subject the Tertiary Derivative Power to all of the vesting and exercise requirements described in this Article. And so on through "Quaternary Derivative Powers" and beyond.

6.4 Any Derivative Power (Secondary Derivative Power, Tertiary Derivative Power, etc.) over assets of a Trust administered under the provisions of this Declaration shall be subject, on the Penultimate Date described in Article V (if that Trust is still being administered on that Date), to the provisions of Article V. For purposes of this Section [6.4], an Outside Trust to which assets are transferred by the exercise of a Subject Power, a Derivative Power, a Secondary Derivative Power, a Tertiary Derivative Power, etc. is *not* a "Trust administered under the provisions of this Declaration," even if some of the provisions of this Declaration are incorporated in the Outside Trust's governing instrument.

6.5 For purposes of this Article [VI], an instrument exercising a power of appointment so as to create another power of appointment may "subject the [created power] to all of the vesting and exercise requirements described in this Article" without either reproducing those requirements as they appear here or expressly referring to this Article of this Declaration. As long as compliance with the instrument's express provisions entails that any effective exercise of the created power will necessarily comply with all of this Article's vesting and exercise requirements, it is irrelevant whether the instrument expressly refers to those requirements or sets them out.

V. Commentary on Forced-Vesting Provisions

A. Article V of the Hypothetical Distribution Trust Declaration

1. *The "Ultimate Date"*

Article V of the hypothetical Distribution Trust declaration prevents the trustee's decanting into the Distribution Trust itself from violating the Regulatory RAP. Article V is needed for that purpose because, again, as far as Michigan law is concerned, future interests in the Distribution Trust need never vest (or, in case the Children's Trust was created by the exercise of a nonfiduciary special power of appointment, need not vest for what could be as much as 352 years).[86] So, Section 5.1 pegs the "Ultimate Date" as (1) a date within the Regulatory RAP testing period and (2) the remotest time for the vesting of future interests in the assets of the Distribution Trust.[87] The Ultimate Date is determined by adding the margin of the common law perpetuities testing period (twenty-one years) to the remaining life (as of the time of decanting) of the survivor of a specified pool of measuring lives, all of which were in existence when the Children's Trust became irrevocable.[88]

As already noted, the Vintage-Power Safe Harbor requires the Regulatory RAP testing period to be measured from the date on which the grandfathered trust in question became irrevocable.[89] But why should Section 5.1 assume that for purposes of analogizing the Exempt Portion to a grandfathered trust (in order to "comply" with the Regulatory RAP) the *Children's Trust* is the analogue of the hypothetical grandfathered trust in question? We have already said, after all, that for GST tax purposes, the Junior Portion of the Sibling Trust was treated as a separate trust even before it was actually segregated (as the Junior Transferor Trust) pursuant to state law.[90] Why then is the *Junior Portion* not the analogue of the hypothetical grandfathered trust in question? That presumably would make the date of Junior's death the relevant date of irrevocability.

That argument is cogent, as far as it goes. But the regulation makes irrevocability the touchstone, and irrevocability is surely a question of state law.[91] In terms of trusts recognizable under Michigan law, Junior's

[86] *See supra* notes 35-39 and accompanying text.

[87] *See supra* Part IV.5.1.

[88] *See supra* Part IV.5.1.

[89] *See supra* note 57 and accompanying text.

[90] *See supra* notes 29-30 and accompanying text.

[91] *See, e.g.*, Mich. Comp. Laws § 700.7602(1) (2015) (presumption that an express trust is revocable based on Unif. Trust Code § 602(a) (2010)); *see also* Restatement (Third) of Trusts § 63 cmt. c (2007) (presumptions regarding revocability).

death simply caused a transfer, under the terms of the Children's Trust, from one subtrust of the Children's Trust (the separate trust for Junior's benefit) to another (the Sibling Trust).[92] A federal regulatory convention according to which the Junior Portion is treated as a separate trust *for GST tax purposes* is simply not competent to establish a trust under Michigan law.[93] Thus, as far as Michigan law is concerned, the trust to which Junior's GST exemption was allocated was the *Sibling Trust*.[94] And the Sibling Trust became irrevocable when the Children's Trust did.[95]

Happily, there is nothing in the deployment of the forced-vesting provisions that hangs on whether the Ultimate Date is determined by reference to the date of Junior's death, on the one hand, or that of the Children's Trust's irrevocability, on the other. For purposes of the exposition that follows, we do not care which of the alternative measuring dates the trustee of the Junior Transferor Trust chooses, so long as she chooses *one*. We have her plumping for the date of the Children's Trust's irrevocability, but we need not assume she thinks that choice reflects the best analogy between the Exempt Portion and the hypothetical (nonexistent) grandfathered trust: in the spirit of playing safe, she may simply prefer the date of the Children's Trust's irrevocability as the more conservative (that is, less advantageous) of the two alternatives.

There is another questionable decision reflected in Section 5.1. The trustee of the Junior Transferor Trust has evidently plumped for the common law testing period, as opposed to the Regulatory RAP's alternative ninety-year term.[96] That may seem quite plausible as a choice between one or the other of those alternatives: given a sufficiently large pool of measuring lives,[97] sufficient youth in the pool, a sufficient probability of the pool members' access to, and effective use of, healthcare (owing, perhaps, to affluence and education), etc., it is reasonable to expect that the Ultimate Date described in Section 5.1 will occur sometime after 2097, the ninetieth anniversary of the Children's Trust's

[92] *See supra* Part II.

[93] *See* MICH. COMP. LAWS §§ 700.7401 (methods of creating express trusts), 700.7417(1) (trust division facility).

[94] *See supra* text accompanying notes 27-28.

[95] *See supra* Part II.

[96] *See supra* notes 8-9 and accompanying text.

[97] *N.b.*, again, that for purposes of the Regulatory RAP, the measuring lives may be *extraneous*. *See supra* note 82 and accompanying text. But note too that it is possible for a pool for measuring lives to be *too* large: "If the validating lives are so numerous they cannot reasonably be traced, the gift may be void." Dukeminier, *supra* note 82, at 1654 n.14 (citing *In re* Villar, 1 Ch. 243, 246-51 (C.A. 1929)); *see also* RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 88-90 (1979); Lawrence Waggoner, *Perpetuity Reform*, 18 MICH. L. REV. 1718, 1724 n.15 (1979).

irrevocability. But why guess? Why not simply peg the Ultimate Date as *the later of* the ninetieth anniversary of the Children's Trust's irrevocability *or* the twenty-first anniversary of the death of the survivor of a pool of people who were living when the Children's Trust became irrevocable?

The answer is that the ninety-year period specified in the Treasury regulations as the Regulatory RAP alternative to the common law perpetuities testing period is *not* a "wait-and-see" period.[98] The effective date regulations set out two alternative tests, one or the other of which must be satisfied (if grandfathered status is to be preserved) *at the time of exercise* of a special power of appointment over grandfathered trust assets. Thus, a decanting may be unoffending under the regulations if either (1) it cannot cause postponement of vesting or suspension of absolute ownership or the power of alienation beyond twenty-one years from the death of some life in being when the grandfathered trust became irrevocable or (2) it cannot cause such a postponement or suspension beyond ninety years from the date of that irrevocability.[99]

It follows that a decanting that may allow vesting to be postponed for whichever of the regulations' alternative testing periods (the common law period or ninety years) turns out to be the *longer* will satisfy *neither* of the alternative tests, for *as of the time of decanting*, it is possible (1) that vesting will be postponed for longer than twenty-one years from the death of a life in being when the grandfathered trust became irrevocable (in case all of the measuring lives terminate prematurely) *and* (2) that postponement will continue beyond the ninetieth anniversary of that irrevocability (in case any of the measuring lives demonstrates pronounced longevity).[100] So, a later-of-the-two-periods specification of the Ultimate Date would violate the Regulatory RAP.[101]

2. *Forced Vesting in Possession or in Interest*

Section 5.2 forces interests in certain trust assets to vest *in possession* on the Ultimate Date.[102] It is a defining characteristic of the assets in question that they are "still being administered under the provisions of [the Distribution Trust] as of the Ultimate Date." This seemingly triv-

[98] For a discussion of the so-called "wait-and-see" provision of the USRAP, see *infra* note 176 and accompanying text.

[99] *See supra* notes 8-9 and accompanying text; *see also* Spica, *supra* note 7, at 1365.

[100] *See* Treas. Reg. § 26.2601-1(b)(1)(v)(D) ex. 6; *see also* Spica, *supra* note 7, at 1365-66.

[101] *See generally* Dukeminier, *supra* note 9, at 194-95.

[102] *See supra* Part IV.5.1. As indicated *infra* in the text, vesting *in possession* is just one (and not necessarily the most advantageous) form of vesting. *See*, *e.g.*, MAUDSLEY, *supra* note 97, at 11-13.

ial condition is illuminated by Section 5.5, which provides that if assets of the Distribution Trust are transferred to another trust by the exercise of a power of appointment (including Trustee's discretionary power to make distributions), that other trust is not "administered under the provisions of [the Distribution Trust]" for purposes of Article V.[103] As we shall see, this means that assets of the Distribution Trust can be appointed out from under Article V. And though the assets *cannot* be appointed out from under the requirements of the Regulatory RAP (not, at least, without judicial modification of the Distribution Trust declaration), "compliance" with the Regulatory RAP may be achieved by reference (in the appointment) to a (then) more promising pool of measuring lives (all in being as of the Children's Trust's irrevocability)—a pool promising greater longevity, that is, than the pool used to determine the Ultimate Date under the Distribution Trust declaration.[104]

The patently *nontrivial* condition for assets to be affected by Section 5.2 is that they are not subject, on the Ultimate Date, "either to a vested interest in someone other than the Primary Beneficiary or to a presently exercisable general power of appointment (in anyone)."[105] It may seem surprising that presently exercisable general powers of appointment[106] are distinguished here from vested interests, given that "a general power of appointment presently exercisable is, for perpetuities purposes, treated as absolute ownership in the donee [of the power]."[107] But powers of appointment are not classically regarded as property.[108] So, to be accurate, Section 5.2 differentiates presently exercisable general powers of appointment and "vested [property] interests."

Similarly, it may seem surprising that Section 5.2 forces vesting by transfer of possession. Given that (again) the granting of a presently exercisable general power of appointment is as good as a distribution

[103] *See supra* Part IV.5.2.

[104] *See infra* text accompanying notes 166-68.

[105] *See supra* Part IV.5.2.

[106] A general power of appointment is a power whose permissible appointees include the donee, his or her estate, his or her creditors, or the creditors of his or her estate. *See, e.g.*, MICH. COMP. LAWS § 556.112(h) (2015). A power is "presently exercisable" if its exercise is neither required to be by will nor otherwise constrained to be postponed. *See, e.g.*, *id.* § 556.112(l).

[107] Dukeminier, *supra* note 82, at 1669. *See also*, *e.g.*, JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 474.2 at 467 (4th ed. 1942).

[108] *See*, *e.g.*, Laurence M. Jones, *The Rule Against Perpetuities as Applied to Powers of Appointment in Maryland*, 18 MD. L. REV. 93, 96 (1958). *Cf.* GRAY, *supra* note 107, § 474.2 (acknowledging the historical point, but suggesting that for the RAP's purposes, at least, there need be no objection to treating a power of appointment as a property interest); JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 1272, at 270 (3d ed. 2004) (to the same effect).

outright for purposes of vesting,[109] why not dispense with the logistics of timely distribution and simply provide the "Primary Beneficiary," by operation of Section 5.2, a presently exercisable general power of appointment over the assets in question? The answer is that though it may be preferable in some circumstances for the Primary Beneficiary to hold a presently exercisable general power of appointment over assets to which Section 5.2 would otherwise apply, (1) it is within Trustee's discretion to grant the Primary Beneficiary such a power before the Ultimate Date (thus making Section 5.2 inapplicable to the extent of that power)[110] and (2) automatic creation of such a power, by operation of Section 5.2, could cause a problem under the Trap if someone were to exercise a nonfiduciary special power of appointment so as to subject assets to the provisions of the Distribution Trust.

The explanation of that problem is complicated enough to warrant its relegation to an appendix.[111] It will suffice to say here that (1) Trustee's discretionary power to create a presently exercisable general power of appointment in a beneficiary does not implicate the Trap in the way a springing (that is, automatically created) power of that quality would do,[112] and (2) the Trap-related concern explained in Appendix B (below) recommends that we eschew to force vesting under Article V by means of springing presently exercisable general powers of appointment and that we rely instead on a combination of mandatory distributions (pursuant to Section 5.2 itself) and springing vested interests (pursuant to Section 5.3).

Section 5.2 differentiates powers of appointment and vested interests not only in legal kind,[113] but also as to interested persons: it is only vested interests in persons other than the Primary Beneficiary that exclude assets from Section 5.2's distribution imperative; whereas a presently exercisable general power of appointment in *any* person, including the Primary Beneficiary, is exclusory.[114] The reason for the narrower exclusion for vested interests is that, though there is no awkwardness in distributing to the Primary Beneficiary assets in which the Primary Beneficiary, and only the Primary Beneficiary, has vested interests, there can be awkwardness when interests are vested in persons *other than* the distributee. Suppose, for example, that Trustee had previously granted the Primary Beneficiary, *PB*, a presently exercisable special power of

[109] *See supra* note 107.

[110] *See infra* text accompanying notes 132-36.

[111] *See infra* Appendix B.

[112] Legislative history indicates the Trap was not intended to apply to fiduciary powers of appointment. *See infra* note 156 and accompanying text.

[113] *See supra* text accompanying notes 107-08.

[114] *See supra* Part IV.5.2.

appointment, whereupon, *PB* appointed the annual net income of the separate trust in question to the children of person *A* (who was living on the date the Children's Trust became irrevocable); on the Ultimate Date, *A* and two of her children are living. In that case, though the class of *A*'s children is subject to open (because *A* is alive),[115] the interests of *A*'s living children are vested.[116] Rather than force the distribution of the assets subject to *A*'s children's income interest, Section 5.2 leaves the assets to be dealt with by Section 5.3.

Section 5.3 does three things pertaining to those assets: (1) it causes all interests in them that, as of the Ultimate Date, are neither vested nor subject to a presently exercisable general power of appointment (in anyone) to vest, on the Ultimate Date, by the operation of the Section itself, in the Primary Beneficiary; (2) it closes, as of the Ultimate Date, every class (concerning vesting) that is subject to open on that Date; and (3) it allows the assets to continue to be held in trust until the last interest prior to the remotest remainder terminates.[117] Thus, in our example above, on the Ultimate Date, *PB* would obtain (by operation of Section 5.3) a vested remainder in the assets subject to the income interest in *A*'s children,[118] the class of *A*'s children would close (for this purpose), the assets would continue to be held in trust until the death of the survivor of those of *A*'s children who were living on the Ultimate Date, and on the death of that survivor, the assets would be distributed to *PB* or her estate.

At common law, the existence of a power of appointment by which a remainder in default might be destroyed did not render the subject remainder contingent—the remainder was *vested* (if it was not otherwise contingent) notwithstanding that it was liable to be cut off by the exercise of the power.[119] So, if remainders created by operation of Section 5.3[120] were cast as reminders *in default* of any outstanding power of ap-

[115] *See*, *e.g.*, MAUDSLEY, *supra* note 97, at 20.

[116] *See id.* at 23.

[117] *See supra* Part IV.5.3.

[118] *N.b.*, in creating a vested remainder on the Ultimate Date in the hypothetical, Section 5.3 (of the hypothetical Distribution Trust declaration) contradicts, and by contradicting *disarms*, Michigan's anti-lapse statute, according to which, "a future interest under the terms of a trust is contingent on the beneficiary [sic] surviving the distribution date." MICH. COMP. LAWS § 700.2714(1) (2015). Contradiction disarms the anti-lapse statute, because the statute is a rule of construction. *See id.* § 700.2701.

[119] *See*, *e.g.*, MAUDSLEY, *supra* note 97, at 13; GRAY, *supra* note 107, §§ 112.1, 258; BORRON ET AL., *supra* note 108, § 113; HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 61 (Jill E. Martin ed., 13th ed. 1989).

[120] On the one hand, "remainder“ is used here in its technical sense to mean any interest or estate (including an income interest or life estate) that succeeds a given "particular estate." *See* GRAY, *supra* note 107, § 8 at 5. So, if two successive life estates precede a remainder in fee, then with respect to the first of the life estates, both the

pointment other than a presently exercisable general power,[121] and the Regulatory RAP involved the same conception of vesting, there would be no need to terminate such powers before the Ultimate Date, as Section 5.4 does, in order to satisfy the vesting requirements of the Regulatory RAP. But at common law, the RAP constrained powers of appointment, not only by invalidating offending interests created by their *exercise*, but also by sometimes invalidating the powers themselves: excepting presently exercisable general powers, a power of appointment was invalid at common law unless it could only be exercised (if at all) within the perpetuities testing period.[122] (That is why perpetuities reform statutes refer to powers of appointment as well as "interests.")[123]

This particular aspect of the common law RAP's control, that is, the prescription of the period during which a valid testamentary general or special power of appointment must be exercised (if at all), technically cannot be formulated in terms of *the power's* "vesting." To be *vested* (or *not*; that is, *contingent*) is an attribute of a certain kind of *property*,[124] *viz*., future interests,[125] and, again, powers of appointment are not classically regarded as property.[126] On the other hand, the Regulatory RAP speaks only in terms of the postponement of *vesting* (or suspension of absolute ownership or the power of alienation).[127] So, on a technical reading, the Regulatory RAP might be supposed to be indifferent to the period during which a power of appointment (over grandfathered as-

secondary life estate and the fee are "remainders." On the other hand, the term is used loosely here to refer to certain future interests in personalty as well as real estate, though "the idea of a vested remainder is peculiar to the English law of real estate . . . and is not strictly applicable to personal property." *Id.* § 971. "For purposes of the rule against perpetuities, at least, a limitation which would be a vested remainder in the case of realty is treated as a vested remainder." *Id.*

[121] It must be remembered that Section 5.3 (of the hypothetical Distribution Trust declaration) has no application to assets subject, on the Ultimate Date, to any presently exercisable general power of appointment. That leaves special powers, testamentary general powers, and nontestamentary general powers subject to unsatisfied conditions precedent for the Section 5.4 to control. *See*, *e.g*., MAUDSLEY, *supra* note 97, at 60-61; DUKEMINIER ET AL., *supra* note 68, at 803-05 (8th ed. 2009).

[122] *See*, *e.g*., MAUDSLEY, *supra* note 97, at 60-61; *see also* DUKEMINIER ET AL., *supra* note 68, at 922 (8th ed. 2009).

[123] *See*, *e.g*., MICH. COMP. LAWS §§ 554.72(2)-(3) (2015) (Michigan's USRAP), 554.93(2)(b)-(c) (2015) (PPTPA).

[124] "Property" is used here in the strict sense in which the term refers to legal interests in determinate things, not to the things themselves. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 28-29 (photo. reprint 1978) (1929).

[125] *See*, *e.g*., MAUDSLEY, *supra* note 97, at 7-10; GRAY, *supra* note 107, §§ 101 (vesting of legal interests), 116 (vesting of equitable interests identical to that of legal interests).

[126] *See supra* note 108.

[127] *See supra* note 9.

sets) may be exercised *provided* the power cannot delay the vesting of future interests in the affected (grandfathered) assets. It would seem more prudent, however, to suppose that the Regulatory RAP simply reflects an imperfect appreciation of the RAP's traditional, twofold application to powers of appointment and that it is, therefore, liable to be interpreted[128] as having, *mutatis mutandis*, as broad a concern with vesting as the common law rule has.

That, in any case, is the interpretation of the Regulatory RAP that informs the forced-vesting provisions of the hypothetical Distribution Trust: Section 5.4 forces any power of appointment, other than a presently exercisable general power, over assets still being administered under the Distribution Trust declaration as of the day before the Ultimate Date, the "Penultimate Date," to lapse as of the last discernable moment of the Penultimate Date.[129] The upshot is (1) that each testamentary general or special power of appointment over assets of the Distribution Trust must be exercised (if at all) within the testing period prescribed by the Regulatory RAP, (2) that every condition precedent to the exercise of a nontestamentary general power over assets of the Distribution Trust must be satisfied (if at all) within the Regulatory testing period, and (3) that no remainder vested on the Ultimate Date by operation of Section 5.3 is subject to a special power of appointment, a testamentary general power, or a nontestamentary general power subject to an unsatisfied condition precedent.

Of course, to achieve those results, Section 5.4 has to include Trustee's discretionary distribution power among the special powers of appointment that the Section terminates.[130] This means that Trustee's ability to avert the automatic effects of Article V terminates in the last discernable moment of the Penultimate Date.[131] Before that moment, Trustee can circumvent Article V by creating a sufficient number of vested interests, by granting a sufficient number of presently exercisable general powers of appointment, or by decanting.

3. *Trustee's Ability to Avert Article V by Granting Presently Exercisable General Powers of Appointment*

Granting presently exercisable general powers of appointment will circumvent Article V for the same reason creating vested interests will: again, the granting of a presently exercisable general power of appoint-

[128] Perhaps according to the view described parenthetically *supra* in note 108.

[129] See *supra* Part IV.5.4.

[130] *See supra* note 68 and accompanying text (trustee's discretionary distribution power is a special power of appointment).

[131] *See supra* note 129 and accompanying text.

ment is as good as a distribution outright for purposes of vesting.[132] Hence Article V does not apply to assets that are subject, on the Ultimate Date, to a presently exercisable general power of appointment.[133] As with the power to decant under the Children's Trust instrument, we must assume here that the Distribution Trust declaration does not explicitly *rule out* Trustee's granting presently exercisable general powers of appointment.[134] But we need not suppose that the declaration explicitly authorizes it, for the same common law authorities that infer a presumptive power to decant from a trustee's broad discretion to make distributions[135] likewise infer a presumptive power to create powers of appointment in, or for the exclusive benefit of, permissible distributees.[136]

Trustee may have various reasons for granting a beneficiary a presently exercisable general power of appointment, but it bears mentioning here that one reason may be the GST tax. Suppose, for instance, that the Penultimate Date is approaching; *PB* is the Primary Beneficiary of a trust that is still being administered under the provisions of the Distribution Trust declaration; none of the assets of the trust is subject either to a vested interest in someone other than *PB* or to a presently exercisable general power of appointment (in anyone); *PB* has one child, *PBC*, and a grandchild, *PBGC*, who is *PBC*'s daughter; *PB* expects that the most advantageous distributions from the trust during the remainder of *PB*'s lifetime will be made infrequently to *PB* herself, occasionally to *PBC*, and regularly to *PBGC*; *PB* has already made gifts in excess of the exclusion amount of the unified credit,[137] and *PB*'s GST exemption is allocated elsewhere.

In that case, Trustee may consider whether it would be in the best interests of *PB* and her descendants if *PBGC* should be granted a presently exercisable general power of appointment over the trust. If Trustee does nothing, the assets of the trust will be distributed outright to *PB* on the Ultimate Date (pursuant to Section 5.2),[138] and *PB* will become the "transferor" of those assets for GST tax purposes.[139] That will make *PB*'s pre-planning preference for regular transfers to *PBGC* expensive. But granting *PBGC* a presently exercisable general power of appoint-

[132] *See supra* note 107.

[133] *See supra* Part IV.5.1-5.4.

[134] *See supra* note 66 and accompanying text.

[135] *See supra* notes 68-69 and accompanying text.

[136] *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 19.14 (2011); *See* Restatement (Second) of Prop.: Donative Transfers §§ 19.3 cmt. a illus. 2, 19.4 (1986).

[137] I.e., the credit described in I.R.C. § 2010.

[138] *See supra* Part IV.5.2.

[139] *See* I.R.C. § 2652(a)(1) (defining "transferor" for GST tax purposes).

ment will make GST tax irrelevant, and gift tax tangential, to that preference: transfers of the assets (whether by *PBGC* or Trustee) to *PB* and *PBC* will be subject to federal gift tax (payable by *PBGC*),[140] but *PBGC* will be the "transferor" for GST tax purposes,[141] and transfers of the assets by Trustee to *PBGC* will be transfer-tax nonevents.

This analysis tacitly relies on a principle that we should make explicit in light of the possibility that Trustee will seek releases from *PB* and *PBC* if she decides to grant *PBGC* a presently exercisable general power of appointment. The principle is that a potential taker in default of the exercise of a special power of appointment is *not* treated as a donor, for gift tax purposes, when the special power is exercised.[142] That means *PB* will *not* be treated as having made a gift to *PBGC*, at the time Trustee grants *PBGC* the general power, notwithstanding that if Trustee had instead done nothing, the assets of the trust would have been distributed outright to *PB* on the Ultimate Date. This comports with the fact that, before the last discernable moment of the Penultimate Date, *PB* has no enforceable right to any distribution from the trust[143]—before the last discernable moment of the Penultimate Date, *PB*'s equitable interest is liable to be completely cut off if Trustee exercises her special power of appointment in favor of one of *PB*'s descendants.[144]

For the same reason, Trustee's asking *PB* or *PBC* for a release before granting *PBGC* the presently exercisable general power should be indifferent. Trustee is not conferring, by that request or otherwise, a general power of appointment on *PB* or *PBC*. She is merely inquiring about their current dispositions to criticize or applaud Trustee's intended course of action (in light of the relevant tax planning and nontax considerations) and asking them, in case their dispositions are favorable, to be bound (and to bind those the law allows them to represent) by

[140] *See* TAM 9535008 (May 8, 1995). We should note too that *PBGC* will be the owner of the trust's assets for federal income tax purposes. *See* I.R.C. § 678(a).

[141] *See id.* § 2514(b) (indicating that the holder of a general power of appointment is treated, for gift tax purposes, as the donor of assets subject to the power); *see also id.* § 2652(a)(1) (indicating that in case of property subject to gift tax, "transferor" means donor).

[142] *See*, *e.g.*, Treas. Reg. § 25.2514-3(e) ex. 3 (indicating that when a special power of appointment is exercised, the taker in default of exercise is not treated, for gift tax purposes, as the donor of a gift); *see also supra* note 68 and accompanying text (identifying a trustee's power to make discretionary distributions as a fiduciary special power of appointment); *see also supra* note 136 and accompanying text (indicating that an implied power to create powers of appointment will be inferred from a trustee's broad power to make discretionary distributions).

[143] *See* MICH. COMP. LAWS § 700.7505 (2015) (creditor of discretionary trust beneficiary has no right to trust income or principal that may be distributed only in the exercise of the trustee's discretion).

[144] *See supra* note 27.

their current dispositions. Neither *PB* nor *PBC* can compel Trustee to do anything merely by granting or withholding the proffered release; neither of them can appropriate Trustee's discretion merely by virtue of having been consulted in this way.

Our analysis of the *PB-PBC-PBGC* hypothetical also tacitly relies on another principle we should make explicit, *viz*., that Trustee's exercise of her discretionary distribution power to create a presently exercisable general power of appointment will not cause the assets subject to the created power to be included in *Trustee's* transfer tax base by the Trap. Again, the Trap provides that assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) transfer tax base (gift tax base or gross estate depending on whether the triggering exercise is effectively testamentary) to the extent *H exercises* the power by creating a second power (over the assets in question) that "under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[145]

Now, Trustee's discretionary distribution power is a power of appointment.[146] And the Distribution Trust is a new trust created as of the time the Junior Transferor Trust is decanted,[147] which means that to the extent the Distribution Trust holds personal property, PPTPA applies.[148] And *that* means any presently exercisable general power of appointment Trustee creates over the Trust's assets will be capable of postponing the vesting of future interests in those assets for a period *without end*,[149] a period that would, therefore, be "ascertainable," if at all, "without regard to the date of creation of [Trustee's] power."[150] If PPTPA's anti-Trap provision applied, it would limit the period during which vesting could be postponed by the exercise of the created presently exercisable general power to a finite period (of 360 years) measured from the date Trustee's power was created.[151] But because Trap springing can sometimes be beneficial for tax purposes,[152] PPTPA's

[145] *See supra* note 2.

[146] *See supra* note 68 and accompanying text.

[147] *See supra* note 38 and text accompanying notes 38-39.

[148] *See supra* note 38 and text accompanying notes 38-39.

[149] *See* MICH. COMP. LAWS § 554.93 (2015).

[150] I.R.C. § 2041(a)(3); *see supra* text accompanying note 145.

[151] *See* MICH. COMP. LAWS §§ 554.93(3) (PPTPA provision), 554.75(2) (ancillary USRAP provision extending standard 90-year "wait-and-see" period to 360 years for anti-Trap purpose).

[152] E.g., when a special power holder's death would otherwise be a "taxable termination" within the meaning of the GST tax and the attributable GST tax would be more than the attributable estate tax under the Trap. *See generally* James P. Spica, *A Practical*

anti-Trap provision does *not* apply whenever a special power is exercised so as to create a presently exercisable general power[153]—thus making Trap springing by the creation of such powers elective.[154]

What is important for our purposes here, however, is that assuming the Children's Trust was not created or augmented by the exercise of a nonfiduciary special power of appointment, PPTPA's anti-Trap provision *also* does not apply when a presently exercisable general power of appointment is created by Trustee's discretionary distribution power for the independent reason that Trustee's discretionary distribution power is a *fiduciary* power of appointment[155] and legislative history indicates that the Trap was not intended to apply to exercises of purely fiduciary powers like a trustee's discretionary power to invade principal.[156]

That explains the relevant contour of the anti-Trap provision: since such a provision cannot usefully be triggered in circumstances that do not trigger the Trap, PPTPA's anti-Trap provision does not apply to *any* power of appointment created by a trustee's discretionary distribution power unless the distribution power was itself created by the exercise of a nonfiduciary special power of appointment.[157] It also explains why Trustee's creation of a presently exercisable general power of appointment over assets of the Distribution Trust will not cause those assets to be included in *Trustee's* transfer tax base under the Trap: the Trap does apply to exercises of purely fiduciary powers of appointment.

4. *Trustee's Ability to Avert Article V by Decanting*

Decanting can circumvent Article V because (1) Article V applies only to assets that are still being administered, as of the Ultimate Date, under the provisions of the Distribution Trust declaration,[158] and (2) Section 5.5 provides that a distinct trust whose terms differ in any way from those of the Distribution Trust and to which Distribution Trust assets are transferred by the exercise of a power of appointment (includ-

Look at Springing the Delaware Tax Trap to Avert Generation Skipping Transfer Tax, 41 REAL PROP. PROB. & TR. J. 165 (2006); Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes*, 68 J. TAX'N 242 (1988).

[153] *See* MICH. COMP. LAWS § 554.93(3) (2015) (PPTPA anti-Trap provision); *see also id.* § 554.92(e) (defining 'second power' for purposes of section 554.93(3)).

[154] *See* Spica, *supra* note 1, at 683 n.49.

[155] *See* MICH. COMP. LAWS §§ 554.92; 554.93(3). The assumption (in the text) that the Children's Trust was not created by the exercise of a nonfiduciary special power of appointment averts the complexity of "second-order fiduciary powers" within the meaning of PPTPA's anti-Trap provision, concerning which see *id.* § 554.92(d). *See also* Spica, *supra* note 14, at 79-81.

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

[157] *See* MICH. COMP. LAWS §§ 554.92; 554.93(3).

[158] *See supra* Part IV.5.1-5.4.

ing Trustee's discretionary power to make distributions) is *not* a trust administered under the provisions of the Distribution Trust declaration for purposes of Article V.[159] Of course, Trustee may have various reasons to decant.[160] But, as we shall see, the provisions in Article VI of the hypothetical Distribution Trust declaration may allow Trustee to decant in a way that will extend the period during which the vesting of future interests in the Distribution Trust's assets may be postponed *without* violating the Regulatory RAP.[161]

Suppose, for example, that sometime before the last discernable moment of the Penultimate Date, Trustee decants a trust, T_1, that is then being administered under the provisions of the Distribution Trust declaration into a new trust, T_2, whose provisions are identical to those of T_1 except that the measuring lives specified on the "Schedule B" attached to the T_2 trust instrument are different (though all were in being as of the Children's Trust's irrevocability, they are, perhaps, on average, younger, better educated, more geographically dispersed, more diversified professionally, or more numerous) than those on the Schedule B attached to the Distribution Trust declaration. In that case, the latest permissible time for the vesting of future interests in the assets of T_2 will be effectively dictated by Article VI of the Distribution Trust declaration, rather than by Article V, for, again, Article V applies only to assets that are still being administered, as of the Ultimate Date, under the provisions of the Distribution Trust declaration, and Section 5.5 provides that a decanting receptacle whose terms differ in any way from those of the Distribution Trust is *not* a trust administered under the provisions of the Distribution Trust declaration, "even if some of the provisions of [the Distribution Trust declaration] are incorporated in the [receptacle's] governing instrument."[162]

B. Article VI

1. *Equitable Interests Created by a "Subject Power"*

Article VI of the hypothetical Distribution Trust declaration prevents the decanting of T_1 into T_2 (in the example above) from violating the Regulatory RAP—something decanting might otherwise do because, again, the applicability of PPTPA is a function of the vintages of trusts subject to Michigan law, and T_2 will be viewed (under Michigan law) as a new trust created as of the time of the decanting.[163] Section 6.1 pegs the "Vesting Date" as the remotest time for the vesting of future

[159] *See supra* Part IV.5.5.
[160] *See, e.g.*, Culp & Mellen, *supra* note 12, at 13-16.
[161] *See infra* text accompanying notes 166-68.
[162] *See supra* Part IV.5.5.
[163] *See supra* note 38 and text accompanying notes 38-39.

interests created by the exercise of a "Subject Power," which is any power of appointment (including Trustee's discretionary distribution power) that is expressly created by the Distribution Trust declaration.[164] Thus, because T_2 was created by the exercise of a Subject Power, interests in T_2's assets must either indefeasibly vest or fail on or before a specified date that qualifies as a Vesting Date within the meaning of Section 6.1. To the extent the provisions of T_2 fail to enforce this requirement, Trustee's attempted exercise of her discretionary distribution power (in settling T_2) will be ineffective.[165]

A Vesting Date is determined by adding the margin of the common law perpetuities testing period (twenty-one years) to the remaining life (as of the time the Subject Power in question is exercised) of "any specified person, regardless of relation to [Senior's] family or any other circumstance having to do with the Subject Power's creation," who was living on the date the Children's Trust became irrevocable.[166] Thus, the measuring lives specified on the Schedule B attached to the T_2 trust instrument must have been in existence when the Children's Trust became irrevocable, but, otherwise, they need not have any connection at all with Senior, the Children's Trust, or the Schedule B attached to the Distribution Trust declaration.[167] So, if Trustee thinks the survivor of the measuring lives on the Schedule B attached to the Distribution Trust declaration is likely to die before the survivor of an alternative, identifiable, and manageable[168] pool, she can substitute (or add) the alternative pool—thereby substituting the entailed Article VI Vesting Date for the Article V Ultimate Date—by decanting.[169]

[164] *See supra* Part IV.6.1.

[165] *See supra* note 66.

[166] *See supra* Part IV.6.1.

[167] Again, for purposes of the Regulatory RAP, the measuring lives may be extraneous. *See supra* note 82 and accompanying text.

[168] *See supra* note 97.

[169] Note that under Michigan law, the question whether Trustee has a *duty* to consider decanting for the purpose described in the text (or any other purpose) will depend on whether there is anything in the Distribution Trust declaration to overcome the presumption in section 7815 of the Michigan Trust Code (MTC), according to which, "[u]nless the trust instrument *expressly provides otherwise*, a trustee is not liable to a beneficiary for failure to exercise the power described in . . . section 5a of the powers of appointment act." MICH. COMP. LAWS § 700.7815(2) (2015) (emphasis added); *see id.* § 556.115a(1)-(2)(a) (codifying common law decanting power).

Of course, the discretionary distribution power is subject to Trustee's general fiduciary duties. *See id.* § 700.7815(1); *see also* RESTATEMENT (THIRD) OF TRUSTS § 86 cmt. b (2007). But the standard for judicial supervision of discretionary powers is abuse of discretion. *See* MICH. COMP. LAWS § 700.7815(1); *see also* RESTATEMENT (THIRD) OF TRUSTS § 87. This author is not aware of a case in which a court has held that a trustee abused her discretion by deciding *not* to exercise her discretionary distribution power to make a distribution *in trust* (or, for that matter, to grant a power of appointment). *See*,

2. *Legal Interests*

Section 6.1 applies to legal as well as equitable interests created by exercise of a Subject Power. But in most circumstances, the Section is not actually needed, under Michigan law, to prevent a violation of the Regulatory RAP when a Subject Power is exercised to appoint assets free of trust. Suppose, for example, that instead of decanting the assets of T_1 into T_2 (in the example above), Trustee distributes those assets to *PB* for life, then to *PBC* for life, remainder to *PB*'s descendants living at the time of *PBC*'s death. For GST tax purposes, this distribution is equivalent to a decanting, for it creates an "arrangement [ ] which, although not a trust, has substantially the same effect as a trust" within the meaning of Code section 2652.[170] And the distribution might be liable to violate the Regulatory RAP if, for instance, *PB* was born after the Children's Trust became irrevocable, for in that case, the remainders to *PBC* and *PB*'s remoter descendants[171] would violate the common law RAP.[172]

e.g., Blattmachr et al., *supra* note 53, at 159 ("An abuse of discretion or breach of trust presumably would occur only if the decanting power is exercised beyond its scope"); Culp & Mellen, *supra* note 12, at 48 (discussing "fiduciary issues" of decanting in terms of "a trustee's decision to decant," but without regard to a trustee's decision *not* to decant). Yet, it is possible, in principle, for a *failure* to exercise *any* trustee power to constitute an abuse. *See* Restatement (Third) of Trusts § 87 cmt. at 256 (reporter's "examples of nonexercise of discretion").

As applied to the decanting power, that possibility is presumptively foreclosed by MTC section 7815. Thus, the settlor of a trust subject to Michigan law is presumed to intend the decanting power to be a fiduciary "privilege" in the Hohfeldian sense, that is, as a power the trustee *may*, but is not obligated, to exercise. *See* Hohfeld, *supra* note 124, at 38-42. And this is true when the settlor of the trust in question created that trust while acting in a fiduciary capacity as the trustee of another trust. *See* Mich. Comp. Laws § 700.7103(i) ("settlor" defined for MTC purposes to include a trustee who creates a trust). So, a Distribution Trust beneficiary will be heard to allege that a particular instance of decanting involved a breach of fiduciary duty, but unless the Distribution Trust declaration expressly directs Trustee to decant when Trustee considers decanting to be in the best interests of the beneficiary, the beneficiary will not be heard to allege that Trustee's *failure* to decant constitutes a breach.

[170] *See* I.R.C. § 2652(b)(1); *see also* Treas. Reg. § 26.2652-1(b).

[171] *See supra* note 120.

[172] Because Trustee's discretionary distribution power is a special power of appointment (*see supra* note 68 and accompanying text), the common law perpetuities testing period runs from the creation of Trustee's power, and because Trustee's power was created by a succession of special powers, its creation is "related back" to the date on which the Children's Trust became irrevocable (assuming the Children's Trust was not itself created by the exercise of a testamentary general or special power of appointment). *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.4 cmt. f (2011); Maudsley, *supra* note 97, at 62; Gray, *supra* note 107, §§ 514-15. (For an example of codification of the common law rule on this point, see Mich. Comp. Laws § 556.124(1).) Thus, in light of the possibility that *PB* will live beyond twenty-one years

In fact, though, the common law RAP was supplanted in Michigan by the adoption of the USRAP,[173] which PPTPA overlies: under the Michigan perpetuities regime as reformed by PPTPA, the USRAP continues to apply to real property (however held) and to personal property not held in trust.[174] So, in our example, because the hypothesized distribution is not *actually* in trust, the USRAP governs the validity of *PBC*'s and *PB*'s remoter descendants' remainders.

The common law perpetuities testing period is still relevant under the USRAP because an interest that must vest, if at all, within that period is, for that reason, valid under the USRAP.[175] But an interest that may vest beyond the common law testing period is not *invalid* under the USRAP until the ninety-year "wait-and-see" period elapses.[176] For future interests created by the exercise of a testamentary general or special power of appointment, the USRAP's testing and wait-and-see periods both run from the time the power is created.[177] So, because Trustee's discretionary distribution power is a special power of appointment,[178] the USRAP's testing and wait-and-see periods both run from the time Trustee's power was created; and because Trustee's power was created through a succession of special powers, its creation is "related back" to the date on which the Children's Trust became irrevocable (assuming the Children's Trust was not itself created by the exercise of a testamentary general or special power of appointment).[179]

To be valid under Michigan law, then, *PBC*'s and *PB*'s remoter descendants' remainders (in our last example above) must either (1) be bound, as of the time of Trustee's distribution to *PB*, to vest or fail within twenty-one years from the death of some life in being on the date the Children's Trust became irrevocable or (2) actually vest or fail within ninety years from that date of irrevocability. Section 6.1 ensures that the first of these tests will be met.[180] But if Section 6.1 did not apply

from the death of any life in being when the Children's Trust became irrevocable, the remainders to *PBC* and *PB*'s remoter descendants would both be void *ab initio* at common law. *See*, *e.g.*, Dukeminier et al., *supra* note 68, at 892 (8th ed. 2009).

[173] *See* Mich. Comp. Laws § 554.53 ("Unless as otherwise provided by statute, this act [i.e., 1948 Mich. Pub. Act No. 38 (effective September 23, 1949) (codified at Mich. Comp. Laws § 554.51) (making the common law RAP applicable to real and personal property)] shall not apply to nonvested property interests created on or after the effective date of the uniform statutory rule against perpetuities.").

[174] *See* Mich. Comp. Laws § 554.94; *see generally* Spica, *supra* note 7, at 1372, 1375-76.

[175] *See* Mich. Comp. Laws § 554.72(1) (2015).

[176] See *id.*; *see also* Spica, *supra* note 7, at 1353-54.

[177] *See* Mich. Comp. Laws § 556.124(1).

[178] *See supra* note 68 and accompanying text.

[179] *See* Mich. Comp. Laws §§ 554.72(1), 556.124(1), 556.125.

[180] *See supra* notes 166-67 and accompanying text.

to legal as well as equitable interests created by a Subject Power, the Regulatory RAP would still be satisfied in our example because, as a matter of Michigan law, any legal future interest created by Trustee that is *not* bound, as of the time the interest is created, to vest or fail within twenty-one years from the death of some life in being on the date the Children's Trust became irrevocable *must* either vest or fail within ninety years of that date of irrevocability.[181] If such an interest does not actually vest (by chance or reformation)[182] within that period, the USRAP invalidates it.[183]

There is one way, however, in which Trustee could go wrong in creating legal future interests in beneficiaries. We have already seen that a certain later-of-two-periods specification of the Ultimate Date would violate the Regulatory RAP.[184] So, it is not surprising that in this context, a similar specification will disarm the USRAP's protection. Suppose that *PB* (in the example above) was born after the Children's Trust became irrevocable, and Trustee specifies that the remainder in *PB*'s remoter descendants will become possessory only if *PBC* dies before *the later of* the ninetieth anniversary of the Children's Trust's irrevocability *or* the twenty-first anniversary of the death of the last survivor of the measuring lives on the Schedule B attached to the Distribution Trust declaration; if *PBC* is alive on the later of those anniversaries, she takes the property "in fee."[185]

In that case, the remainders are *valid* under Michigan law because (1) the alternative contingencies doctrine—part of the common law RAP[186]—treats a transfer under a later-of-two-events provision as being made on two separate conditions, each to be evaluated separately,[187] and (2) the alternative contingencies doctrine is expressly incorporated in the USRAP.[188] Thus, on the one hand, if the period based on the measuring lives included on Schedule B turns out to be the longer of the two periods specified by Trustee, the USRAP will have validated the remainders by reference to the common law testing period.[189] If, on the

[181] *See* MICH. COMP. LAWS § 554.72 (2015).

[182] Reformation may remedy or avert invalidity under the USRAP, but such reformation must always yield vesting *within* the wait-and-see period. *See id.* § 554.74.

[183] S*ee id.* § 554.72(1).

[184] *See supra* note 101 and accompanying text.

[185] That is, in that case, *PBC* becomes the absolute owner. *See* GRAY, *supra* note 107, § 971 n.3 (concerning the resolution of a "vested remainder" in personalty). Concerning the use generally, for purposes of the RAP, of terminology borrowed from the English law of real estate, see *supra* note 120.

[186] *See*, *e.g.*, MAUDSLEY, *supra* note 97, at 66-67.

[187] *See*, *e.g.*, GRAY, *supra* note 107, § 341; BORRON ET AL., *supra* note 108, § 1257; Dukeminier, *supra* note 9, at 190-91.

[188] *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 cmt. H (2014).

[189] *See* MICH. COMP. LAWS § 554.72(1)(a) (2015); *see also id.* §§ 556.124(1), 556.125.

other hand, the ninety-year period turns out to be the longer of the two, the USRAP will validate the remainders by reference to the wait-and-see period.[190]

If it applied, section 1(e) of the USRAP might cause Trustee's contingent use of the ninety-year term to be disregarded in this context.[191] But Michigan's version of section 1(e) of the uniform act applies only to alternative-contingencies provisions that measure periods from the creation of trusts (or other property arrangements) that are actually eligible *by vintage* to be grandfathered under the GST tax effective date regulations, that is, from the creation of trusts (or other arrangements) that were irrevocable on September 25, 1985.[192] If the Children's Trust were *actually* grandfathered under the effective date regulations, Michigan's version of section 1(e) would prevent Trustee's contingency provision for the vesting of *PBC*'s and *PB*'s remoter descendants' remainders from violating the Regulatory RAP by reading the alternative ninety-year term out of that provision.[193] But the Children's Trust is too new actually to be grandfathered.[194] So, Michigan's version of section 1(e) is inapplicable.

The upshot is that Trustee has created (in our example) an arrangement of legal interests in *PB* and her descendants that is valid under Michigan law, is a trust for GST tax purposes,[195] and violates the Regulatory RAP. It violates the Regulatory RAP because, again, *as of the time of Trustee's exercise of her discretionary distribution power*, it is possible (1) that vesting will be postponed for longer than twenty-one years from the death of some life in being at the time the Children's Trust became irrevocable (in case all of the measuring lives included on Schedule B terminate prematurely) *and* (2) that postponement will continue beyond the ninetieth anniversary of that irrevocability (in case any of the measuring lives on Schedule B demonstrates pronounced longevity).[196]

The possibility of Trustee's unwarily subjecting legal interests in distributed trust property to a later-of-two-events vesting provision is one reason for making Section 6.1 applicable to legal as well as equitable interests. Another is the possibility of a change of governing law. If, for example, the Distribution Trust or one of its scions should migrate so as to become subject, for purposes of determining the meaning and effect

[190] *See id.* § 554.72(1)(b).

[191] *See* Unif. Statutory Rule Against Perpetuities § 1(e); s*ee also* Dukeminier, *supra* note 9, at 191-94, 197-202.

[192] *See* Mich. Comp. Laws § 554.72(5); s*ee also* Treas. Reg. § 26.2601-1(b)(1).

[193] *See* Mich. Comp. Laws § 554.72(5).

[194] *See supra* text accompanying note 26.

[195] S*ee supra* note 170 and accompanying text.

[196] *See supra* notes 100-01 and accompanying text.

of its terms, to the law of a jurisdiction that has no RAP for personal property *regardless* of how such property is held, then Trustee's creation of legal interests in distributed trust property would be liable to violate the Regulatory RAP *regardless* of alternative contingencies.[197]

But the best reason for making Section 6.1 applicable to legal as well as equitable interests is perspicuity: without any inkling of the general benignity (apart from alternative contingencies) of the USRAP's application in Michigan to legal interests in personalty not held in trust, a trustee (or Service examiner) can see from Section 6.1 itself that any effective exercise of a Subject Power to create a future interest (whether in personalty held in trust, personalty otherwise held, or in realty) cannot violate the Regulatory RAP.

3. *"Derivative Powers"*

Section 6.2 makes the "transitivity" of the requirements of Article VI of the Distribution Trust declaration a condition for the effective exercise of any Subject Power, including Trustee's discretionary distribution power,[198] to the extent the exercise attempts to create a "Derivative Power," which is any power of appointment, other than a presently exercisable general power.[199] Thus, for example, if Trustee decants a trust, T_1, that is then being administered under the provisions of the Distribution Trust declaration into a new trust, T_2, and the terms of T_2 purport to grant beneficiaries testamentary general or special powers of appointment over assets of T_2, the terms of T_2 must subject those Derivative Powers to all of the Derivative Powers requirements of Article VI of the Distribution Trust declaration. Otherwise, Trustee will simply have failed to create the Derivative Powers in question.[200]

The Derivative Powers requirements of Article VI are threefold. Section 6.3 requires that any interest created by the exercise of a Derivative Power must vest or fail no later than some specified Vesting Date[201]—no later, that is, than a particular date that (1) qualifies as a Vesting Date within the meaning of Section 6.1 and (2) is specified at the time the Derivative Power is created.[202] Thus, the requirement for the vesting of future interests created by the exercise of a Subject Power cannot be evaded by the holder's creation of a testamentary general or

[197] *See*, *e.g.*, Treas. Reg. § 26.2601-1(b)(4)(i)(E) ex. 4 (describing one circumstance in which change of trust situs could result in loss of grandfathered status).

[198] *See supra* Part IV.6.1.

[199] *See supra* Part IV.6.2.

[200] *See supra* note 66.

[201] *See supra* Part IV.6.3.

[202] *See supra* Part IV.6.1, 6.3.

special power of appointment rather than an interest.[203] Section 6.3 also requires that any Derivative Power must be exercised, if at all, no later than the Vesting Date.[204] This comports with the common law prescription that a power of appointment other than a presently exercisable general power is invalid unless it can only be exercised (if at all) within the perpetuities testing period[205] and the assumption that the Regulatory RAP should be interpreted as having, *mutatis mutandis*, as broad a concern with vesting as the common law rule has.[206]

Finally, Section 6.3 requires that in order to be effective in creating any power of appointment other than a presently exercisable general power (Secondary Derivative Power), the instrument exercising a Derivative Power must subject the Secondary Derivative Power to all of the Derivative Powers requirements of Article VI.[207] And, of course, this requirement will ramify with powers of appointment other than presently exercisable general powers created by the exercise of a Secondary Derivative Power (Tertiary Derivative Powers), powers other than presently exercisable general powers created by the exercise of a Tertiary Derivative Power (Quaternary Derivative Powers), and so on.

Suppose, for example, Trustee decants a trust, T_1, that is then being administered under the provisions of the Distribution Trust declaration into a new trust, T_2, and the terms of T_2 effectively grant beneficiary B_1 a special power of appointment over the assets of T_2; B_1 effectively exercises her special power to appoint the assets of T_2 to a new trust, T_3, and the terms of T_3 effectively grant the trustee of T_3, TR_3, a fully discretionary distribution power; TR_3 decants T_3 into a new trust, T_4, and the terms of T_4 effectively grant beneficiary B_2 a special power of appointment over the assets of T_4; B_2 effectively exercises her special power to appoint the assets of T_4 . . . TR_{n-1} decants T_{n-1} into a new trust, T_n, and the terms of T_n effectively grant beneficiary $B_{n/2}$ a special power of appointment over the assets of T_n. Let us assume too that neither the Ultimate Date nor any Vesting Date referred to in the Distribution Trust declaration has occurred, that none of the trusts involved has been modified judicially, and that none of them is "administered under the provisions of [the Distribution Trust declaration]" for purposes of Article V.[208]

In that case, no matter how large the number *n* is, we know (1) that any interest created by the exercise of $B_{n/2}$'s special power of appoint-

[203] *See supra* note 164 and accompanying text.

[204] *See supra* Part IV.6.1, 6.3.

[205] *See supra* note 122 and accompanying text.

[206] *See supra* text accompanying notes 128-29.

[207] *See supra* Part IV.6.3.

[208] *See supra* Part IV.5.5; *see also supra* text accompanying notes 158-62.

ment must vest or fail no later than a specified date that qualifies as a Vesting Date within the meaning of Section 6.1;[209] (2) that $B_{n/2}$'s special power itself must be exercised, if at all, no later than such a Vesting Date;[210] and (3) that in order to be effective in creating any power of appointment other than a presently exercisable general power, an instrument exercising $B_{n/2}$'s special power must subject the created power to all of the Derivative Powers requirements of Article VI of the Distribution Trust declaration.[211] That is to say, we know that an exercise of $B_{n/2}$'s special power of appointment cannot violate the Regulatory RAP.

We know these things because in order effectively to create B_1's Derivative Power over the assets of T_2, the instrument exercising Trustee's Subject Power over the assets of T_1 (the T_2 trust instrument) had to subject the Derivative Power to the requirements of Article VI of the Distribution Trust declaration;[212] and in order effectively to create TR_3's Secondary Derivative Power over the assets of T_3, the instrument exercising B_1's Derivative Power over the assets of T_2 had to subject the Secondary Derivative Power to the requirements of Article VI;[213] and in order effectively to create B_2's Tertiary Derivative Power over the assets of T_4, the instrument exercising TR_3's Secondary Derivative Power over the assets of T_3 had to subject the Tertiary Derivative Power to the requirements of Article VI; and so on. Thus, the assumption that the creation of each successive special power of appointment in the example is *effective* entails the transitivity of Article VI's guarantee that the Regulatory RAP will not be violated by the exercise of any power descended from a Subject Power.

We must return, however, to the assumption that none of the trusts in the series T_2, T_3, T_4, . . . T_n is "administered under the provisions of [the Distribution Trust declaration]" for purposes of Article V.[214] That assumption is arbitrary. It does not follow from the stipulation that each trust is a "new" trust created by the exercise of a special power held by one of the power holders in the series Trustee, B_1, TR_3, B_2 . . . TR_{n-1}, for any trust whose terms do not differ from those of the Distribution Trust may constitute a "Trust administered under the provisions of [the Distribution Trust declaration]" for purposes of Article V.[215] Suppose, for instance, that B_1 (in the example above) exercises her special power of appointment over the assets of T_3 by means of an instrument that simply

[209] *See supra* note 201 and accompanying text.

[210] *See supra* note 203 and accompanying text.

[211] *See supra* note 207 and accompanying text.

[212] *See supra* Part IV.6.2.

[213] *See supra* Part IV.6.3.

[214] *See supra* text accompanying note 208.

[215] *See supra* note 159 and accompanying text.

incorporates by reference all of the terms of an attached copy of the Distribution Trust declaration (including the Distribution Trust's Schedules) and directs that for purposes of T_3, a name for T_3 should be read for each occurrence in the attachment of 'Distribution Trust,' the name of B_1's intended beneficiary for each occurrence of the name of the Distribution Trust's initial Primary Beneficiary, TR_3's name for each occurrence of the name of the Distribution Trust's initial Trustee, etc.

That would be a case of the exercise of a Derivative Power (B_1's special power over the assets of T_3) to create a Secondary Derivative Power (TR_3's discretionary distribution power)[216] over a new trust administered under the provisions of the Distribution Trust declaration. It would also be a case to which Section 6.4 applies. Section 6.4 provides that any Derivative Power, Secondary Derivative Power, Tertiary Derivative Power, etc. over assets of a trust administered under the provisions of the Distribution Trust declaration is subject, on the Penultimate Date[217] (assuming the trust in question is still being administered on that Date), to the provisions of Article V. Article V's direct application to powers of appointment is in Section 5.4, which terminates, in the last discernable moment of the Penultimate Date, any special power over assets that are then being administered under the Distribution Trust declaration.[218] So, in our last example, TR_3's discretionary distribution power has to be exercised, if at all, on or before the last discernable moment of the Penultimate Date[219] because, by hypothesis, the assets subject to TR_3's distribution power (the assets of T_3) are subject to the provisions of Section 5.4 (of the T_3 trust instrument).

Of course, the requirement of Article VI of the Distribution Trust that TR_3's special power of appointment has to be exercised, if at all, on or before a specified date that qualifies as a Vesting Date within the meaning of Section 6.1[220] will be satisfied in our example: since the relevant lives included on the Schedule B attached to the Distribution Trust declaration are all lives that were in existence when the Children's Trust became irrevocable,[221] the Ultimate Date specified in Article V by reference to that Schedule is bound to qualify as a 'Vesting Date' within the meaning of Section 6.1.[222] The requirement of Section 6.4 merely coordinates the Article VI requirement for the period of exercise of a Derivative Power, Secondary Derivative Power, etc. with the lapse-of-

[216] *See supra* note 207 and accompanying text.

[217] *See supra* note 129 and accompanying text.

[218] *See supra* note 129 and accompanying text.

[219] *See supra* Part IV.6.4; *see also supra* Part IV.5.4.

[220] *See supra* note 203 and accompanying text.

[221] *See supra* Part IV.5.1.

[222] *See supra* notes 166-67 and accompanying text.

power provision of Section 5.4 for the special situation in which such a power governs assets of a trust that is subject to Article V on the Penultimate Date.

That situation can arise in various ways. The example we just gave involves a complete incorporation of the Distribution Trust's terms into the instrument governing a new trust created by the exercise of a Derivative Power. But a Subject Power, Derivative Power, Secondary Derivative Power, etc. that can be exercised to appoint assets *in trust* can be exercised in favor of an existing trust as well as a new one.[223] Suppose, for example, that Trustee grants a special power of appointment to *PB*, the Primary Beneficiary of a trust that is being administered under the provisions of the Distribution Trust declaration and whose express terms do not themselves provide *PB* a power of appointment. That would be a case of the exercise of a Subject Power (Trustee's discretionary distribution power)[224] to create a Derivative Power over assets of a trust administered under the provisions of the Distribution Trust declaration, and Section 6.4 would apply. Thus, *PB*'s special power of appointment would have to be exercised, if at all, on or before the last discernable moment of the Penultimate Date.[225]

Another example would be if (1) $B_{n/2}$ (in our earlier example above) in addition to being a permissible distributee of T_{n-1}, happens to be a beneficiary of an existing trust T_n that is being administered under the provisions of the Distribution Trust declaration and whose express terms provide $B_{n/2}$ a special power of appointment, and (2) TR_{n-1} effectively decants T_{n-1} into T_n. Now, to the extent an exercise of a power of appointment *p2* newly subjects assets to a preexisting power of appointment *p1*, *p1* has been *created*, for purposes of state law,[226] federal taxation,[227] and Article VI of the Distribution Trust declaration,[228] by the exercise of *p2*. Thus, when TR_{n-1} decants the assets of T_{n-1} into T_n, thereby subjecting those assets to $B_{n/2}$'s power of appointment, $B_{n/2}$'s power over the newly contributed assets of T_{n-1} is *created* (for all of the purposes just mentioned) by the decanting exercise of TR_{n-1}'s discretionary distribution power.

[223] *See*, *e.g.*, MICH. COMP. LAWS § 556.115a(1) (2015) (codifying common law decanting power as a power to distribute assets from one trust to another).

[224] *See supra* note 198 and accompanying text.

[225] *See supra* note 219 and accompanying text.

[226] See, *e.g.*, MICH. COMP. LAWS § 554.93(3) (PPTPA anti-Trap exception for case in which a nonfiduciary special power of appointment over personal property held in trust is exercised *to subject property to*, or to create, another nonfiduciary power of appointment other than a presently exercisable general power).

[227] *See*, *e.g.*, Spica, *supra* note 152, at 178.

[228] *See supra* Part IV.6.2.

The confluence of that analysis and our assumption that TR_{n-1}'s decanting of T_{n-1} into T_n *effectively* gives $B_{n/2}$ a special power of appointment over the newly contributed assets of T_{n-1} is that by virtue of Section 6.4, $B_{n/2}$'s special power of appointment has to be exercised, if at all, on or before the last discernable moment of the Penultimate Date.[229] We should note, however, that in this case, Section 6.4 and the other requirements of Article VI are met even if the instrument exercising *TR_{n-1}'s* discretionary distribution power says no more than:

> I, [TR_{n-1}], hereby exercise the discretionary distribution power described in Section [such and such] of the [T_{n-1}] trust instrument by appointing all of the assets of [T_{n-1}] to the trustee(s) of [T_n], in trust, to be administered and distributed in accordance with the provisions of the [T_n] trust instrument.

In that case, any interest in the assets of T_{n-1} "created" by the exercise of TR_{n-1}'s special power of appointment (that is, by the decanting of T_{n-1} into T_n) must vest or fail no later than a specified date that qualifies as a Vesting Date within the meaning of Section 6.1, because those assets have become part of T_n, which, by hypothesis, is subject to Article V of the Distribution Trust declaration,[230] and, again, the Ultimate Date specified in Article V is bound to qualify as a Vesting Date within the meaning of Section 6.1.[231] Any interest created by the exercise of $B_{n/2}$'s special power of appointment must vest or fail no later than a specified date that qualifies as a Vesting Date within the meaning of Section 6.1,[232] because, by hypothesis, $B_{n/2}$'s special power is already subject to Article VI of the Distribution Trust declaration. For the same reason, $B_{n/2}$'s special power itself must be exercised, if at all, no later than a specified date that qualifies as a Vesting Date within the meaning of Section 6.1.[233] And in order to be effective in creating any power of appointment other than a presently exercisable general power, an instrument exercising $B_{n/2}$'s special power must subject the created power to the Derivative Powers requirements of Article VI.[234]

Thus, all of the substantive requirements imposed on TR_{n-1}'s discretionary distribution power by the transitivity of Article VI's application through the series T_2, T_3, T_4, . . . T_{n-1} are *met* if TR_{n-1} decants T_{n-1} into T_n by means of the one-sentence declaration hypothesized above. And that declaration satisfies the *formal* requirements of Article VI as well, for Section 6.5 provides that an instrument exercising a power of appoint-

[229] *See supra* note 219 and accompanying text.

[230] *See supra* Part IV.5.1-5.3.

[231] *See supra* note 222 and accompanying text.

[232] *See supra* note 201 and accompanying text.

[233] *See supra* note 203 and accompanying text.

[234] *See supra* note 207 and accompanying text.

ment to create or subject property to another power need not reproduce or expressly advert to Article VI's vesting and exercise requirements. "As long as the instrument's express provisions entail that any effective exercise of the created or availed of power will necessarily comply with all of [Article VI's] vesting and exercise requirements, it is irrelevant whether the instrument expressly refers to those requirements or sets them out."[235]

VI. Adapting the Provisions for Other Contexts

A. Nonfiduciary Special Powers of Appointment

The Regulatory RAP testing period runs from ostensibly different dates for purposes of determining the effects (on grandfathered status) of exercises of *fiduciary* special powers of appointment, on the one hand, and of *nonfiduciary* special powers, on the other. Whereas the testing period for determining the effect of the exercise of a trustee's discretionary distribution power runs from the date the grandfathered trust in question became irrevocable,[236] the testing period for determining the effect of an exercise of a nonfiduciary special power of appointment runs from the date the grandfathered trust was *created*.[237] As applied to many trusts, these will be two different descriptions of the same date. But as applied to a trust that was revocable for a period before the settlor's death, for instance, the different descriptions raise the interpretive question whether their difference is supposed to be significant.

The difference is probably due merely to the vagaries of federal rulemaking. The two regulations were proposed at different times. When the regulation regarding nonfiduciary special powers was proposed in 1992,[238] the usual request for comments during the rulemaking process evidently did not elicit any concern about measuring the testing period "from the date of creation of the trust."[239] So, that provision was unchanged when the regulation was finalized in 1995.[240] But when the regulation regarding fiduciary special powers was proposed, in 1999,[241] the same language drew public comments indicating that the Regulatory RAP testing period should be measured from the date the trust became

[235] *Supra* Part IV.6.5.

[236] *See* Treas. Reg. § 26.2601-1(b)(4)(i)(A)(2).

[237] *See id.* § 26.2601-1(b)(1)(v)(B)(2).

[238] *See* 57 Fed. Reg. 61356 (proposed Dec. 24, 1992) (codified at 26 C.F.R. pts. 26 and 301).

[239] *See* T.D. 8644, 1996-1 C.B. 200 (final regulations with preamble).

[240] *See id*.

[241] *See* 64 Fed. Reg. 62997 (proposed Nov. 18, 1999) (codified at 26 C.F.R. pt 26).

irrevocable.[242] The fiduciary powers regulation was revised accordingly,[243] but the Treasury did not revisit the counterpart regulation pertaining to nonfiduciary powers.[244]

It seems clear (1) that there is no principled basis for treating fiduciary and nonfiduciary special powers of appointment differently for this purpose[245] and (2) that for state law purposes, the period during which the vesting of future interests in the assets of a trust can be postponed by the exercise of a power of appointment begins when the trust in question becomes irrevocable,[246] not when the trust instrument begins to govern a *res*.[247] So, the regulation pertaining to fiduciary special powers would seem to provide the better rule. And there may be some recognition of this in the many private letter rulings involving *nonfiduciary* special powers of appointment in which the Service speaks of the testing period as running from the date on which the grandfathered trust in question became *irrevocable* (albeit without distinguishing the date of the trust's creation).[248]

Still, the point of the decision to play safe with GST-exemption-sheltered assets is *to play safe*: if we are to posit a hypothetical holder of a nonfiduciary special power of appointment over the Exempt Portion, we must assume that she is as risk-averse as our hypothetical trustee of the Junior Transferor Trust. Her risk-aversion suggests that for purposes of "protectively" forcing vesting, she would likely plump for the date on which the Children's Trust was *created* in any case in which that date is earlier than the date on which the Children's Trust became irrevocable—the date of the Trust's creation is, after all, the date from which the applicable Treasury regulation[249] *says* the Regulatory RAP testing period runs. In that case, our hypothetical holder of a nonfiduciary special

[242] *See* T.D. 8912, 2001-1 C.B. 452.

[243] "The comments noted that the perpetuities period is properly measured from the date the trust became irrevocable, which is not always the date the trust was created (the date referenced in the proposed regulations). The regulations have been revised accordingly." *Id.* at 453.

[244] *See supra* note 237.

[245] *See supra* note 68 and accompanying text (trustee's discretionary distribution power is a special power of appointment).

[246] *See*, *e.g.*, MICH. COMP. LAWS § 556.125 (2015).

[247] *See*, *e.g.*, GRAY, *supra* note 107, § 524.1; MAUDSLEY, *supra* note 97, at 38.

[248] *See* PLR 200242033 (Jul 19, 2002) (exercises of both fiduciary *and nonfiduciary* powers found to be unoffending under the Regulatory RAP where single measuring life was born *after the grandfathered trust was created* but before that trust became irrevocable); *see also* PLR 200242034 (July 19, 2002); PLR 200242031 (July 19, 2002); PLR 200252069 (Sept. 12, 2002); PLR 200024019 (Mar 13, 2000); PLR 9511039 (Dec. 20, 1994); PLR 9414024 (Jan. 6, 1994).

[249] I.e., Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2). *See supra* text accompanying note 237.

power of appointment over the Exempt Portion will make sure that the Ultimate Date in Section 5.1 and the Vesting Date in Section 6.1[250] of the forced-vesting provisions are both specified by reference to the date on which the Children's Trust was created, rather than the date of the Trust's irrevocability. Otherwise, her use of the forced-vesting provisions will be the same as that of a decanting trustee.

B. Exercising Powers over GST Tax Grandfathered Assets

The trustee's "playing safe" with GST-exemption-sheltered assets as described in Parts IV and V of the Article consists merely in her *pretending* that the Exempt Portion of the Junior Transferor Trust is grandfathered under the GST tax effective date regulations and then being careful not to forfeit that (imagined) status when decanting. If the Children's Trust had been irrevocable on September 25, 1985 and, therefore, *actually* grandfathered,[251] the trustee of the Transferor Trust would do nothing differently except dispense with the make-believe. In that case, Section 1.3 of the hypothetical Distribution Trust declaration[252] would read

> 1.3 This Declaration is intended to ensure, among other things, that the vesting and exercise requirements of Treasury regulation section 26.2601-1(b)(4)(i)(A)(2) ("Regulatory RAP") are observed as fully as is necessary to preserve the Trust assets' exemption from federal generation-skipping transfer tax in light of the Children's Trust's having been irrevocable on September 25, 1985. The settlor [of the Distribution Trust, *viz*., the trustee of the Junior Transferor Trust] intends that all interests in the Distribution Trust and all powers of appointment over the Distribution Trust's assets shall be so constrained by the provisions of this Declaration as fully to comply with the vesting and exercise requirements of the Regulatory RAP.

It is true (1) that grandfathered assets are not subject to PPTPA,[253] which means decanting (or, for that matter, the exercise of a *nonfiduciary* special power to appoint *in trust*) does not pose the same threat, under Michigan law, to mandated compliance with the Regulatory RAP that decanting (or another appointment *in trust*) of GST-exemption-sheltered assets poses to *feigned* compliance (for purposes of playing

[250] *See supra* Part IV.5.1, 6.1.

[251] *See supra* note 5.

[252] *See supra* Part IV.1.3.

[253] *See* MICH. COMP. LAWS § 554.94 (2015); *see also supra* text accompanying note 34; *see generally* Spica, supra note 7, at 1372, 1375-76.

safe);[254] and (2) that as to grandfathered assets, the threat to mandated compliance with the Regulatory RAP posed, under the USRAP, by certain later-of-two-events vesting provisions[255] is disarmed by Michigan's version of USRAP section 1(e).[256] But the possibility of a change of governing law[257] and the virtue of perspicuity both recommend the use of forced-vesting provisions in this context, the benignity of Michigan's USRAP notwithstanding.

C. Avoiding the Delaware Tax Trap

As noted above, the Trap provides that assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) transfer tax base (gift tax base or gross estate depending on whether the triggering exercise is effectively testamentary) to the extent *H exercises* the power by creating a second power (over the assets in question) that "under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[258] Thus, the tax rule against perpetuities imposed by the Trap is not the Regulatory RAP, but rather the requirement that however long the perpetuities testing period made relevant by local law or the governing instrument may be,[259] that period must be measured, if the Trap

[254] *See supra* notes 37-39 and accompanying text

[255] *See supra* notes 186-96 and accompanying text.

[256] *See* MICH. COMP. LAWS § 554.72(5); *see also supra* text accompanying notes 192-93.

[257] *See supra* note 197 and accompanying text.

[258] *See supra* note 2.

[259] Though it is tangential to the topic of forced vesting, it is interesting to note that an interpretive question raised by both the Regulatory RAP and the Trap has been answered regarding the Trap. Whereas the Regulatory RAP and the Trap both refer to postponement of vesting and suspension of absolute ownership or the power of alienation in the *disjunctive* (*see supra* text accompanying note 2), in the case of the Trap, the disjunction has been interpreted as a reference to the particular vesting or alienation requirements imposed by local law. *See* Estate of Murphy v. Comm'r, 71 T.C. 671 (1979), *acq*. 1979-2 C.B. 2; *see also* Greer, *supra* note 1, at 71-72.

So, in a jurisdiction that has a rule against suspension of absolute ownership or the power of alienation, but not a RAP, the Trap is sprung (that is, causes inclusion in the relevant transfer tax base) only if under the applicable local law, the period during which absolute ownership or the power of alienation may be suspended by exercise of the second power can be ascertained without regard to the date of the first power's creation. *See*, *e.g.*, N.C. GEN. STAT. § 41-32 (2015). And in a jurisdiction that has a RAP, but not a rule against suspension of absolute ownership or the power of alienation, the Trap is sprung only if the period during which vesting may be postponed by exercise of the second power can be ascertained without regard to the date of the first power's creation. *See*, *e.g.*, MICH. COMP. LAWS § 554.93(3) (2015) (Michigan's *post*-USRAP perpetuities is not to be sprung, from the time the first power is created. This entails that the relevant period must be finite, but the period's duration is literally indifferent under the Trap.[260]

As we have also noted, legislative history indicates that the Trap was not intended to apply to exercises of fiduciary powers of appointment.[261] That means the Trap does not apply when the trustee of the Junior Transferor Trust creates the Distribution Trust. And it means we cannot use a decanting situation to motivate use of the forced-vesting provisions (in Part IV of the Article) for Trap avoidance. To motivate *that* use of the provisions, we have to imagine a nonfiduciary special power like the ones held by B_1, B_2, B_3, . . . $B_{n/2}$ in the hypothetical case described above (in Part V) apropos of Section 6.3.[262] Let us, therefore, return to that hypothetical chain of events and focus on the link in which B_1 exercises her special power of appointment over the assets of trust T_2 by creating a new trust T_3 and effectively granting the trustee of T_3, TR_3, a fully discretionary distribution power.[263]

In that case, the *prima facie* condition for the application of the Trap is met: B_1 has exercised her nonfiduciary power of appointment so as to create another power of appointment, TR_3's discretionary distribution power. It is true that TR_3's power is a fiduciary power, but the assurance we have, in legislative history, that the Trap does not apply to exercises of fiduciary powers of appointment[264] is probably limited to 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, in any case, the assurance seems to be only that the Trap will not cause assets to be included in the *fiduciary's* transfer tax base.[265] So, it is well to ask whether the Trap will include the assets of T_3 in B_1's transfer tax base if TR_3's discretionary distribution power is viewed as a "second power" for purposes of the Trap.

The answer is that it will not, because for purposes of determining the period during which the vesting of future interests can be postponed by an exercise of B_1's special power: B_1's power is deemed to have been created when the special power that created *it*, Trustee's discretionary distribution power, was created; Trustee's discretionary distribution power is deemed to have been created when the power that created *it*,

reform statute's anti-Trap provision). As to the distinction between a RAP and a rule against suspension of absolute ownership or the power of alienation, see, e.g., Spica, *supra* note 7, at 1355-56.

[260] *See* Spica, *supra* note 1, at 680-82.

[261] *See supra* note 156.

[262] *See supra* notes 198-206 and accompanying text.

[263] *See supra* notes 198-206 and accompanying text.

[264] *See supra* note 156.

[265] *See* Spica, *supra* note 14, at 79-80.

the discretionary distribution power of the trustee of the Junior Transferor Trust, was created;[266] the discretionary distribution power of the trustee of the Junior Transferor Trust is deemed to have been created when the Children's Trust became irrevocable (assuming, again, that the Children's Trust was not itself created by the exercise of a testamentary general or special power of appointment);[267] and the date of the Children's Trust's irrevocability is the qualifying date for any measuring life that may affect the Vesting Date described in Article VI of the forced-vesting provisions.[268]

It follows from the assumption that B_1's creation of TR_3's Secondary Derivative Power over the assets of T_3 is *effective* that the instrument exercising B_1's Derivative Power over the assets of T_2 had to subject TR_3's Secondary Derivative Power to all of the Derivative Powers requirements of Article VI of the forced-vesting provisions,[269] which means that an exercise of TR_3's power cannot violate the Regulatory RAP.[270] Since (1) compliance with the Regulatory RAP requires any interest created by TR_3's power to vest within a finite period measured from the date the Children's Trust became irrevocable[271] and (2) B_1's special power is deemed to have been created on the date the Children's Trust became irrevocable (assuming that the Children's Trust was not itself created by the exercise of a testamentary general or special power of appointment),[272] TR_3's power cannot "be validly exercised so as to postpone the vesting of [future interests in the assets of T_3] . . . for a period ascertainable without regard to the date of creation of [B_1's] power."[273] Thus, the Trap is not sprung when B_1 creates T_3.[274]

Of course, if we assume, for a change, that the assets of T_2 are neither GST tax grandfathered nor GST exemption sheltered, B_1 has no motivation to comply with the Regulatory RAP. Her motivation, in that case, assuming she wishes to avoid the Trap, is merely to ensure that future interests created by exercises of TR_3's discretionary distribution power (or any other special power of appointment created by exercise of B_1's special power) must vest within a finite period measured from the deemed creation of B_1's special power,[275] that is, from the date on

[266] *See* MICH. COMP. LAWS § 556.124(1) (2015).

[267] *See id.* § 556.125.

[268] *See supra* Part IV.6.1.

[269] *See supra* Part IV.6.3; *see also supra* text accompanying notes 209-13.

[270] *See supra* Part IV.6.3; *see also supra* text accompanying notes 209-13.

[271] *See supra* notes 8-9 and accompanying text.

[272] *See supra* notes 266-68 and accompanying text.

[273] I.R.C. § 2041(a)(3) (estate tax version of Trap); *see also id.* § 2514(d) (gift tax version).

[274] *See supra* notes 258-60 and accompanying text.

[275] *See supra* notes 258-260 and accompanying text.

which the Children's Trust became irrevocable (assuming the Children's Trust was not itself created by the exercise of a testamentary general or special power of appointment).[276]

As we have seen, the assumption that Michigan law governs *B_1*'s power entails that to the extent *T_3* comprises personal property, PPTPA's anti-Trap provision automatically prevents an exercise of *B_1*'s power from springing the Trap unless the exercise creates a presently exercisable general power of appointment.[277] But in the case in which the assets of *T_2* are neither GST tax grandfathered nor GST exemption sheltered, if the law of a state other than Michigan governs *B_1*'s power, or if *B_1* considers that the possibility of a change of governing law or the virtue of perspicuity warrants use of forced-vesting provisions,[278] she can adapt the provisions in Part IV of the Article by simply defining the Ultimate Date[279] and the Vesting Date[280] as a specified anniversary of the date on which the Children's Trust became irrevocable.

The three-hundredth anniversary, for example, would do. In that case, any future interest created by the exercise of *TR_3*'s discretionary distribution power will have to vest by the date in 2307 that is three-hundred years from the date on which the Children's Trust became irrevocable. Since the date of the Children's Trust's irrevocability is the date on which *B_1*'s special power is deemed to have been created (assuming the Children's Trust was not itself created by the exercise of a testamentary general or special power of appointment),[281] the terminus of the period during which vesting can be postponed by an exercise of *TR_3*'s power (*viz*., the three-hundredth anniversary of the Children's Trust's irrevocability) cannot be determined without regard to the date of creation of *B_1*'s special power. And so, again, the Trap is not sprung when *B_1* creates *T_3*.

VII. Conclusion

We have motivated and elucidated the forced-vesting provisions set out in Part IV of this Article primarily in the context of the third and most general of the three planning situations with which we began, the GST Exemption Situation, in which the holder of a special power of appointment—we treated first of a fiduciary power and then, in Part VI,

[276] *See supra* note 267 and accompanying text.

[277] *See supra* notes 151-54 and accompanying text. The result is exactly the same under Michigan law, though the analysis is different, to the extent *T_3* comprises realty. *See* Spica, *supra* note 1, at 679-81.

[278] *See supra* note 257 and accompanying text.

[279] *See supra* Part IV.5.1.

[280] *See supra* Part IV.6.1.

[281] *See supra* note 267 and accompanying text.

of a nonfiduciary one—wants to play safe with assets of a pre-perpetuities-reform trust to which GST exemption has been allocated in a jurisdiction in which, *apart* from any exclusion for GST tax grandfathered assets, it is possible to appoint *into* the reformed perpetuities regime.[282] But we have seen that the same provisions can be adapted for use in the Grandfathered Assets Situation, when a special power is being exercised over GST tax grandfathered assets in a jurisdiction whose perpetuities reform does not expressly exclude such assets, and in the Trap Situation, when a nonfiduciary special power (first power) is being exercised to create, or newly subject property to, another power of appointment (second power)[283] in a jurisdiction whose perpetuities reform creates a need for, but does not provide, an anti-Trap provision.

The risk that the forced-vesting provisions disarm in the GST Exemption Situation and the Grandfathered Assets Situation is that local perpetuities reform will have made the period during which the vesting of future interests can be postponed by the exercise of a (fiduciary or nonfiduciary) special power of appointment longer than the Regulatory RAP testing period. The risk that the forced-vesting provisions disarm in the Trap Situation is that perpetuities reform will have made the period during which vesting can be postponed by an exercise of a second power *infinite* (or will otherwise have made the precise vintage of the first power irrelevant to the time for the vesting of future interests created by excise of the second).

[282] *See supra* text accompanying notes 15-20.

[283] *See supra* note 2.

Appendix A: Qualified Severance

The question relegated to this appendix is whether the isolation of the Exempt Portion of the Junior Transferor Trust, so as to create a separate trust having a GST tax inclusion ratio of zero, must either precede, rather than follow, or follow, rather than precede, the intended decanting.[284] Must the order be "qualified severance" of the Exempt Portion followed by a decanting of the resulting isolation trust (GSTT Exempt Junior Transferor Trust) into the Distribution Trust? Must the order be the reverse, decanting the Junior Transferor Trust into the Distribution Trust followed by a qualified severance of the Exempt Portion from the Distribution Trust?

By hypothesis, the GST-exemption-sheltered status of a trust having an inclusion ratio of zero will survive a decanting in circumstances in which grandfathered status would survive if the decanted trust were grandfathered from GST tax, and the trustee is in a position to decant either the Exempt Portion or the entire Junior Transferor Trust in such a way that GST-tax-grandfathered status would survive if the Junior Transferor Trust were grandfathered.[285] So, as far as the posited analogy to the effective date regulations[286] is concerned, a decanting that would preserve the zero inclusion ratio of the GSTT Exempt Junior Transferor Trust could take place *after* a qualified severance of the Junior Transferor Trust. The question, then, is only whether the *qualified severance rules* require either that the decanting precede the qualified severance or that the qualified severances precede the decanting.

The one provision of the qualified severance rules that might seem clearly to indicate the decanting-first-then-severance order (that is, that decanting must *precede* a qualified severance) has to do with the time for making a qualified severance:

> A qualified severance of a trust may occur at any time prior to the termination of the trust. Thus, *provided that the separate resulting trusts continue in existence after the severance*, a qualified severance may occur either before or after . . . GST tax [sic] exemption has been allocated to the trust.[287]

If it were a condition of qualified severance that the trusts immediately resulting from the severance had to "continue in existence," then the

[284] *See supra* text accompanying notes 42-44.

[285] *See supra* note 20 and accompanying text; *see also supra* text accompanying notes 48-54.

[286] I.e., the notion that what is said in the effective date regulations about grandfathered trusts may also pertain to the treatment of a trust having a zero inclusion ratio. *See supra* note 20 and accompanying text.

[287] Treas. Reg. § 26.2642-6(f)(1)(i) (emphasis added).

Junior Transferor Trust would have to be decanted into the Distribution Trust first—before the Exempt Portion could be isolated by severance—because, on the alternative severance-first-then-decanting tack, decanting the GSTT Exempt Junior Transferor Trust would be a matter (under Michigan law) of *terminating* that trust by distributing all of its assets to a new Distribution Trust.[288]

It does not seem reasonable, however, to interpret the language quoted above (When Regulation) as making the continued existence of the resulting trusts a condition of qualified severance. If resulting trusts had to "continue in existence after the severance" *indefinitely*, the qualified severance rules would apply only to so-called "dynasty trusts," a restriction of which there is no hint in the Code.[289] And the When Regulation does not attempt to specify any more definite period for continuance: it does *not* say, for example, "continue in existence for a considerable time." So, the second sentence of the When Regulation is probably best interpreted as merely enforcing the requirement of the first sentence, that a qualified severance cannot be made after a trust has terminated—there have to be trusts in existence that are affected by a qualified severance after that qualified severance is done. That the second sentence begins with the adverb 'thus' tends to support this interpretation, on which the When Regulation is not inconsistent with the alternative severance-first-then-decanting tack.

And, indeed, the following provision of the qualified severance rules may seem to indicate that the decanting should *follow* the qualified severance:

> In the case of a qualified severance occurring after GST tax [sic] exemption has been allocated to *the trust* (whether by an affirmative allocation, a deemed allocation, or an automatic allocation pursuant to the rules contained in section 2632), if *the trust* has an inclusion ratio as defined in § 26.2642-1 that is greater than zero and less than one, then . . . *[t]he trust* [under the first of two alternatives, must be] severed initially into only two resulting trusts. One resulting trust must receive that fractional share of the total value of *the original trust as of the date of severance* . . . .[290]

It seems clear that the references in this provision (Which-Trust Regulation) to "the trust" and "the original trust" are references to one and the

[288] *See supra* note 38 and accompanying text.

[289] *See* I.R.C. § 2642(a)(3).

[290] Treas. Reg. § 26.2642-6(d)(7)(i)-(ii) (emphasis added). *See also id.* § 26.2642-6(d) (7) (iii) (alternative requirements in case "original trust" is severed initially into more than two resulting trusts).

same trust and that that trust is both the trust to be severed *and the trust to which at least part of the GST exemption was previously allocated*.

The Junior Transferor Trust fits the latter description, but the Distribution Trust would not. The automatic allocation of GST exemption on Junior's death was to the Junior Portion of the Sibling Trust.[291] When the Junior Portion of the Sibling Trust was actually divided to form a separate Junior Transferor Trust (pursuant to state law,[292] as sanctioned by the Treasury regulations under Code section 2654[293]), the division was along a line already recognized for GST tax purposes under the Treasury regulations.[294] So, for GST tax purposes, the Junior Transferor Trust is identified with the Junior Portion of the Sibling Trust.[295] This means that *for GST tax purposes*, the Junior Transferor Trust *is* the trust to which GST exemption was automatically allocated at the time of Junior's death.

But, again, the Distribution Trust will necessarily be distinct from the Junior Transferor Trust when the former is created by decanting the latter.[296] So, on the decanting-first-then-severance tack, the Distribution Trust created at the first step (that is, the decanting) cannot accurately be described as the trust to which GST exemption was previously allocated for purposes of the Which-Trust Regulation. Furthermore, on the decanting-first-then-severance tack, the trust to which the Which-Trust Regulation arguably refers (the Junior Transferor Trust) will have been *terminated* at the first step,[297] which brings the decanting-first-then-severance tack under the prohibition of the When Regulation as interpreted above—again, a qualified severance cannot be made after the "original trust" has terminated,[298] and the trust arguably picked out by the Which-Trust Regulation as "original" for this purpose—(the Junior Transferor Trust) will have been emptied by decanting.

In conclusion, then, the most plausible readings of the When and Which-Trust Regulations seem to indicate that if the GSTT Exempt Junior Transferor Trust is severed from the Junior Transferor Trust *before* the Exempt Transferor Trust is decanted into a Distribution Trust, the severance may constitute a qualified severance for GST tax purposes and the Distribution Trust containing the Exempt Portion may, there-

[291] *See supra* text accompanying notes 28-29.

[292] *See supra* note 30 and accompanying text.

[293] *See* Treas. Reg. § 26.2654-1(a)(3) ("may be divided at any time").

[294] *See id*. § 26.2654-1(a)(2); *see also supra* text accompanying note 30.

[295] *N.b.*, the posited identification assumes that the funding of the Junior Transferor Trust was consistent with the applicable Treasury regulations. *See* Treas. Reg. § 26.2654-1(a)(3), (b)(1)(ii)(C).

[296] *See supra* note 38 and accompanying text.

[297] *See supra* note 38 and accompanying text.

[298] *See supra* note 287.

fore, have a GST tax inclusion ratio of zero. Those regulations perhaps also indicate that if the Junior Transferor Trust is decanted into the Distribution Trust *before* the Exempt Portion is isolated by severance, that severance, when it occurs, will *not* constitute a qualified severance, in which case each of the resulting, post-severance trusts will have the same, blended inclusion ratio with which the Distribution Trust (on this decanting-first-then-severance tack) will have begun.[299] So, the Treasury regulations arguably endorse the severance-first-then-decanting tack uniquely.

[299] *See* Treas. Reg. § 26.2642-6(h) (treatment of trusts resulting from a severance that is not a qualified severance).

Appendix B: The Delaware Tax Trap and Springing Presently Exercisable General Powers of Appointment

The question relegated to this appendix is why automatic creation of a presently exercisable general power of appointment over the assets subject to Section 5.2 of the forced-vesting provisions could cause a problem under the Trap if someone were to exercise a nonfiduciary special power of appointment so as to subject assets to the provisions of the Distribution Trust.[300] To answer that question, we have only to draw together three threads already woven into the fabric of the main argument of the Article.

The first thread is that of the Trap itself: assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) transfer tax base (gift tax base or gross estate depending on whether the triggering exercise is effectively testamentary) to the extent *H exercises* the power by creating a second power (over the assets in question) that "under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[301] The second thread is that the exercise of a special power of appointment that is subject to Michigan law so as to create a presently exercisable general power of appointment will spring the Trap.[302] And the third thread is that to the extent an exercise of a power of appointment *p2* newly subjects assets to a preexisting power of appointment *p1*, *p1* has been *created*, for purposes of state law and federal taxation, by the exercise of *p2*.[303] (It will be convenient for us to tag this third thread "Subjection-Creation Principle.")

Let us suppose, then, that instead of forcing vesting (as it does) by transfer of possession, Section 5.2 of the forced-vesting provisions of the Distribution Trust declaration simply provides the "Primary Beneficiary" of the separate trust in question a presently exercisable general power of appointment over the affected assets.[304] Let us suppose too that B_1 in the hypothetical case described above apropos of Section 6.3 of the forced-vesting provisions,[305] exercises her nonfiduciary special power of appointment over the assets of T_3 by means of an instrument that simply appoints those assets, in trust, to the trustee of an existing

[300] *See supra* text accompanying notes 109-11.

[301] *See supra* note 2.

[302] *See supra* notes 151-54, 277 and accompanying text.

[303] *See supra* notes 226-28 and accompanying text.

[304] *Cf. supra* Part IV.5.2.

[305] *See supra* notes 198-206 and accompanying text.

trust that is being administered under the provisions of the Distribution Trust for the benefit of a certain Primary Beneficiary *PB*.

The problem, in that case, is that although the presently exercisable general power granted *PB* or a remoter beneficiary by Section 5.2 (on our latest assumptions) would not become effective until the Ultimate Date, an application of the Subjection-Creation Principle as of the time of the exercise of B_1's special power would make the (newly hypothesized) springing Section 5.2 presently exercisable general power a "second power" for purposes of the Trap, one that "under the applicable local law can be validly exercised [once it becomes effective] so as to postpone the vesting of [future interests in the assets added from T_3 by the exercise of B_1's power] . . . for a period ascertainable without regard to the date of creation of [B_1's] power."[306] On that construction, B_1's "creation" of the springing Section 5.2 presently exercisable general power would spring the Trap, and the assets of T_3 would be included in B_1's transfer tax base.

That is why Section 5.2 of the forced-vesting provisions eschews springing presently exercisable general powers of appointment in favor of a combination of mandatory distributions (pursuant to Section 5.2 itself) and springing vested interests (pursuant to Section 5.3).[307]

[306] *See supra* text accompanying notes 301-03.
[307] *See supra* text accompanying notes 111-12.