A NEWLY REVISED *POST* PERPETUITIES REFORM RAP APPLICABILITY FLOWCHART FOR PROPERTY SUBJECT TO MICHIGAN LAW

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Editor's synopsis: Having developed an earlier version of the perpetuities flowchart that composes Part V of this Article to acquaint readers with perpetuities reform in Michigan, the author has taken the occasion of updating the flowchart (to reflect recent changes in Michigan law concerning "trust decanting") to preface the flowchart with two primers that will be of general interest to practitioners dealing with either state-law perpetuities reform or federal tax aspects of perpetuities rules. The first primer, composing Part II of the Article, is on the common law and uniform statutory rules against perpetuities. The second primer, composing Part III of the Article, is on federal tax aspects of the common law rule, the uniform statutory rule, and the regulatory rule against perpetuities invented by the United States Treasury for purposes of the generation-skipping transfer tax effective date regulations.

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I. INTRODUCTION

An earlier version of the perpetuities flowchart in Part V of this Article was published in 2010 as an appendix to an article about exercises of special powers of appointment over tax advantaged trusts in the atmosphere of perpetuities reform.[1] The flowchart was updated in

1. James P. Spica, *Exercising Special Powers of Appointment over Tax Advantaged Trusts Post Perpetuities Reform Can Be More or Less Hazardous*, MICH. TAX LAW., Fall 2010, at 37, 41-42.

2011 (by the addition of question, or stimulus, 4)[2] to reflect the enactment of Michigan 2011 Public Acts Numbers 11 and 12,[3] the confluence of which made Michigan's Personal Property Trust Perpetuities Act of 2008[4] (PPTPA) more instructive for those wielding special powers of appointment over personal property held in trusts "grandfathered" from federal generation-skipping transfer (GST) tax under the United States Department of the Treasury's GST tax effective date regulations.[5]

The flowchart is newly updated in this Article (by the addition of stimuli 10 through 12) to reflect the enactment of Michigan Public Act 484 of 2012,[6] amending PPTPA to bolster that statute's anti-Delaware-tax-trap provision in light of the possibility that when a trust is created by the exercise of a nonfiduciary special power of appointment, a "decanting" power in the appointive trustee might be viewed as a "second power" for purposes of the so-called Delaware tax trap.[7] Occasion is taken here to preface the flowchart with two primers in light of which, it is hoped, distinctions drawn in the flowchart will be more intelligible to readers not already familiar with the rule against perpetuities (RAP) and its refractions through state-law statutory reform and federal transfer taxation. The first primer, composing Part II of the Article, is on the common law RAP and the uniform statutory rule against perpetuities (USRAP), both of which preceded the reign of PPTPA in Michigan, and the latter of which PPTPA overlies. The second primer, composing Part III of the Article, is on the federal tax aspects of the common law RAP, the USRAP, and the regulatory RAP invented by the United States Treasury for purposes of the GST tax effective date regulations.

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2. James P. Spica, *Revised Post Perpetuities Reform RAP Applicability Flowchart for Property Subject to Michigan Law*, MICH. TAX LAW., Summer 2011, at 45, 46-47.

3. 2011 Mich. Pub. Act Nos. 11, 12 (codified at MICH. COMP. LAWS ANN. §§ 554.75, .94 (West 2011)).

4. 2008 Mich. Pub. Act No. 148 (codified at MICH. COMP. LAWS ANN. §§ 554.91-.94 (West 2008)).

5. Treas. Reg. § 26.2601-1 (2014).

6. 2012 Mich. Pub. Act No. 484.

7. *See generally* 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, 79-81 (2013).

II. A PRIMER ON THE RULE AGAINST PERPETUITIES

A. The Common Law Rule

1. Scope

The standard, one-sentence formulation of the common law RAP, namely John Chipman Gray's,[8] slurs over two important points. Gray says, "No interest [legal or equitable, in realty or personalty] is good, unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[9] This formulation fails to indicate (1) that the RAP applies to powers of appointment[10] (which are not classically regarded as property)[11] and (2) that the rule's application to future interests is only to *transferred* future interests—the common law rule has no application to *retained* future interests, that is, to reversions, possibilities of reverter, and rights of entry.[12] (As to reversions and possibilities of reverter, the conceptual rationale for the RAP's inapplicability is simply that such interests are always vested.[13] As to rights of entry, the conceptual rationale is more fugitive, but the result is no less certain.[14])

It is important to note that though the RAP applies to beneficial *interests* in trusts, that is, to equitable as well as transferred legal interests

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8. *See, e.g.*, JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 885 (8th ed. 2009); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 34-35 (1979).

9. JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201-02, at 191-92 (4th ed. 1942).

10. *See* MAUDSLEY, *supra* note 8, at 35. The common law rule also applied to non-appointive administrative powers. *See id.* at 58. That application was modified to some extent by the advent of statutory administrative powers. *See id.* at 59, 183-84. But more importantly, it has been modified by statutory reform of the RAP itself. Thus, for example, the USRAP, which displaces the common law RAP in the adopting jurisdiction, refers only to "a nonvested property interest or a power of appointment." *See, e.g.*, MICH. COMP. LAWS ANN. § 554.72(1)-(4) (West 2006); *see also infra* notes 34-36 and accompanying text. Statutory RAP reform in England has likewise exempted administrative powers. *See* MAUDSLEY, *supra* note 8, at 183-85.

11. *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 9, § 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).

12. *See* DUKEMINIER ET AL., *supra* note 8, at 889.

13. *See* MAUDSLEY, *supra* note 8, at 13-14, 70; GRAY, *supra* note 9, §§ 41, 113, 205.

14. *See* GRAY, *supra* note 9, §§ 299-310. *See also* BORRON ET AL., *supra* note 11, § 1238, at 190-91.

in realty or personalty,[15] and to powers of appointment, the rule does not apply to *trusts themselves*: trusts are legal relations *in respect of* (or *with relation to*) property, but they are not themselves property (legal or equitable);[16] and trusts may involve fiduciary powers of appointment, but they are not themselves powers of appointment.[17] So, the control over the duration of trusts that the RAP exercises (when it applies) is indirect:[18] what the rule directly requires is only that there be, at some point during the perpetuities testing period, a finite set of determined and identified beneficiaries who collectively hold the totality of equitable interests in the *res*.[19] In England, *at that point*, the inclusive set of those beneficiaries can compel the trust's termination.[20] In the United States, the inclusive set of those beneficiaries may be made to wait if the settlor's "material purposes" entail the trust's "indestructibility," but the beneficiaries cannot be made to wait longer than the perpetuities testing period.[21] Thus, the medium of the RAP's control over the duration of whole trusts (as opposed to discrete equitable interests and powers of appointment over trust assets) is a rule allowing early termination (at some point) at the unanimous instance of the beneficiaries.

2. Paradigms of Compliance and Contravention

As a simple model of compliance with the RAP, suppose:

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15. *See, e.g.*, GRAY, *supra* note 9, §§ 202, 205, 322, 411. *See also id.* § 116 (vesting of equitable interests identical to that of legal interests).

16. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 17-18 (3d ed. 2011); J. E. PENNER, THE IDEA OF PROPERTY IN LAW 133-38, 142 (1997). As to the peculiar nature of the "equitable property" constituting a beneficial interest in a trust, see, for example, F. W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW: TWO COURSES OF LECTURES 17-18 (photo. reprint 1984) (1929); Robert Stevens, *When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?* 92 B.U. L. REV. 919, 921-25 (2012).

17. *See, e.g.*, GARDNER, *supra* note 16, at 149-57; J. E. PENNER, THE LAW OF TRUSTS ¶¶ 3.13-3.17, 50 (8th ed. 2012).

18. *See* DUKEMINIER ET AL., *supra* note 8, at 892.

19. *Id.*

20. *See* PENNER, *supra* note 17, ¶¶ 3.30-3.36, at 57.

21. *See* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. h(1) (2003). *See generally* John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 380-83 (2010) (contrasting the English and American rules on early termination).

EXAMPLE I

T transfers assets in trust "income to *A* for life, on *A*'s death to *A*'s children for their lives, then principal to *B*." At the time of the transfer, *A* has no children, and *B* is living.

At common law,[22] *A*'s "particular estate"[23] and *B*'s remainder are both vested upon creation[24] and so are unoffending.[25] (Those are the results *at common law*: it is important to note the potential effect of anti-lapse legislation on the analysis of *B*'s remainder as vested upon creation.)[26] The remainder to *A*'s children, though obviously not vested (since *A* has no children at the time of the transfer), is nevertheless valid under the RAP because the class of *A*'s children will be determined (according to the common law conception of what is possible in the way of posthumous birth), at the latest, on the expiration of a period of actual gestation beginning on the date of *A*'s death.[27]

As a simple model of contravention of the RAP, suppose:

EXAMPLE II

T transfers assets in trust "income to *A* for life, on *A*'s death to *A*'s children for their lives, then principal to *A*'s living descendants." *A* has no children at the time of the transfer.

A's income interest and the remainder to *A*'s children (if *A* should have children) are both valid for the reasons given above (apropos of Example I).[28] But in light of the possibility that the survivor of *A*'s

22. Throughout this Article, the term "common law" is used without regard to the former separation of the jurisdictions of the King's (or Queen's) Bench, on the one hand, and the Court of Chancery, on the other. As used here, the term refers to the confluence of judge-made rules and principles, legal and equitable, applicable in common-law jurisdictions since the statutory unification of law and equity in England at the end of the nineteenth century. *See generally* PENNER, *supra* note 17, ¶¶ 1.10-1.15, at 5-7 (discussing the unification of the jurisdictions in England); *see also* MAITLAND, *supra* note 16, 15-20.

23. This is Gray's terminology. Gray uses the term "particular estate" to refer to the (legal) life estate preceding any given (legal) remainder. *See* GRAY, *supra* note 9, § 8.

24. *See id.* §§ 101-02 (vested and contingent remainders); *id.* at 116 (vesting of equitable interests determined by same principles applied to legal interests); MAUDSLEY, *supra* note 8, at 7-8 (remainders); *id.* at 10 (same principles as applied to legal interests).

25. *See id.* § 99.

26. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.2714(1) (West 2013) ("[A] future interest under the terms of a trust is contingent on the beneficiary surviving the distribution date."). *See also id.* § 700.2701 (effect of rules of construction in general).

27. *See, e.g.*, GRAY, *supra* note 9, § 220.

28. *See supra* notes 23-27 and accompanying text.

children will have been born after the date of transfer and will live beyond twenty-one years (plus gestation) from the death of *A*, the remainder to *A*'s remoter *descendants* is void *ab initio* at common law.[29]

3. Reversions (Reprise) and Resulting Trusts

We can deduce the RAP's inapplicability to reversions (discussed above[30]) by altering our "model of contravention of the RAP"[31] so that the interests created by *T* are legal interests rather than equitable ones. If we then ask what will happen, at common law, on the death of the survivor of *A*'s children (or on *A*'s death if *A* has no children), the undoubted answer, namely that *T* has an implied reversion,[32] implies a proof: by hypothesis, *T*'s reversion may become possessory sometime later than the end of the perpetuities testing period; therefore, to play its role as presumptive substitute for an interest that is invalid *ab initio*, the reversion must be vested *in interest* as of the time of *T*'s transfer. The same model as originally stated, that is, with hypothesized equitable interests rather than legal ones, yields an analogous proof of the RAP's inapplicability to so-called "resulting trusts," which are the equitable analogues of implied legal reversions.[33]

B. Creatures of Statute

1. The Uniform Statutory Rule

In many states, the common law RAP is supplanted by the USRAP. The USRAP sets out two alternative tests for validity, one to be satisfied, if at all, at the time a contingent future interest is transferred or a power of appointment is created, and one to be satisfied, if necessary, anytime within ninety years thereafter.[34] Adoption of the USRAP displaces the common law RAP in the adopting jurisdiction.[35] The common law

29. *See* DUKEMINIER ET AL., *supra* note 8, at 892.

30. *See supra* notes 12-13 and accompanying text.

31. *See supra* Example II.

32. *See, e.g.*, BORRON ET AL., *supra* note 11, § 442.

33. *See* RESTATEMENT (THIRD) OF TRUSTS § 7 (2003); GRAY, *supra* note 8, §§ 116, 327.1, 414; BORRON ET AL., *supra* note 11, § 1240; PENNER, *supra* note 17, ¶¶ 5.3, 5.58-5.59.

34. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.72(1) (West 2014).

35. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.53 (West 2014) ("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 ANN. § 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.").

perpetuities *testing period* is still relevant under the USRAP, for an interest that must vest, if at all, within that period is, *for that reason*, valid under the USRAP.[36] But an interest that may vest beyond the common law period is not *invalid* under the USRAP until the relevant "wait-and-see" period elapses, a result that flatly contradicts the common law RAP. Thus, one should not confuse the continued relevance of the common law *testing period* under the USRAP with continued *application* of the common law RAP itself: the USRAP makes use of the former while displacing the latter.

We can illustrate the USRAP's wait-and-see approach by returning to our "model of contravention of the RAP."[37] Again, suppose *T* transfers assets in trust "income to *A* for life, on *A*'s death to *A*'s children for their lives, then principal to *A*'s living descendants." Though the remainder to *A*'s descendants is not sure to vest, if at all, within the common law testing period,[38] it *could* vest within ninety years from the date of the transfer, and if it does, it will be valid under the USRAP. If that remainder does *not* vest within the wait-and-see period, the statute mandates that "[u]pon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates [*T*'s] manifested plan of distribution that is within the [wait-and-see period]."[39]

As to application only to *transferred* future interests, although the USRAP nominally applies to any "nonvested property interest," which would not exclude rights of entry, the USRAP specifically excludes any property "that was not subject to the common-law rule against perpetuities."[40] Again, the common law rule has no application to any *retained* future interest, including a right of entry.[41]

2. RAP-Like Rules Affecting Retained Future Interests

Several states regulate the duration of *retained* future interests by means of separate statutes.[42] Under Michigan's Possibilities of Reverter and Rights of Entry Act of 1968, for example, a retained future interest in, or power over, reality that, by its terms, becomes possessory or exercisable on a specified contingency is made unenforceable, by the statute, after thirty years unless the specified contingency must obtain, if

36. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.72(1).
37. *See supra* Example II.
38. *See supra* notes 28-29 and accompanying text.
39. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.74.
40. *See, e.g.*, *id.* § 554.75(1)(e).
41. *See supra* note 12 and accompanying text.
42. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 554.61-.65 (West 2013); MASS. GEN. LAWS ch. 184A, § 7 (2014); N. Y. REAL PROP. LAW § 345 (McKinney 2014).

at all, within "the period of the rule against perpetuities" (or the property subject to the retained interest or power is held for public, educational, religious, or charitable purposes).[43] It is not clear whether the statute's reference to "the period of the rule against perpetuities" is meant to peg the common law testing period (of a life in being plus twenty-one years) or, alternatively, to import whatever period, if any, would constrain the vesting of a *transferred* future interest in the same reality as of the time the regulated reversion, possibility of reverter, or right of entry is retained. In any case, the statute's effect on the regulated interest or power is more closely analogous to that of the USRAP (on *transferred* interests or powers) than to that of the common law RAP: if the contingency in question is not certain to occur, if at all, within the relevant perpetuities period, the retained interest or power is nevertheless enforceable within a thirty-year wait-and-see period.

3. Rules Against Suspension of Absolute Ownership or the Power of Alienation

The postponement of vesting is the conceptual province of all forms of RAP, whereas suspension of absolute ownership or the power of alienation is the province of a conceptually distinct group of rules.[44] Vesting is irrelevant to rules against suspension of absolute ownership or the power of alienation, under which a suspension occurs when there is no person or group of persons living who can convey absolute ownership of the property in question (as when trust principal is directed to someone yet unknown or unborn).[45] These rules are violated when such a suspension may last longer than the length of time allowable under statute, a period often similar to the common law RAP's testing period of a life in being plus twenty-one years.[46]

We can demonstrate the independence of the rule against suspension of the power of alienation from the common law RAP by adding to our "model of compliance with the RAP"[47] that the trustee is prohibited by the terms of the trust from selling the trust assets and that the trust in question is a "spendthrift" trust. In that case, in light of the possibility that the survivor of *A*'s children will have been born after the date of

43. MICH. COMP. LAWS ANN. §§ 554.64, .64(b)-(c), .61(a).

44. *See, e.g.*, Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, 28 EST. PLAN. 68, 70-71 (2001); GRAY, *supra* note 9, § 119.

45. *See* Ira Mark Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation Skipping Taxation*, 45 ALB. L. REV. 260, 267-69 (1981).

46. *See id.* at 268.

47. *See supra* Example I.

transfer and will live beyond twenty-one years (plus gestation) from the death of *A*, given that meanwhile, neither the trustee nor the inclusive set of beneficiaries can convey ownership of the trust assets, the remainder to *A*'s children may be void *ab initio* in a jurisdiction with a rule against suspension of the power of alienation.[48] And this is true notwithstanding that the remainder to *A*'s children is *valid* under the common law RAP.[49]

The common law RAP was partly superseded in Michigan from 1847 to 1949 by statutory provisions limiting suspension of the power of alienation.[50] Those provisions applied only to real property.[51] Later amendments repealed the provisions and restored the applicability of the common law RAP to real property, "thereby making uniform the rule as to perpetuities applicable to real and personal property."[52] There was no rule against suspension of absolute ownership or the power of alienation at common law[53]—though, of course, in saying this, we must be careful to distinguish the rule against suspension of the power of alienation from prohibitions against direct restraints on alienation that the law makes ineffective *per se*, without regard to their duration.[54]

C. Rule Against Accumulation of Income

Although its durational limit is that of the common law RAP testing period, the rule against accumulation of income is a common law rule independent of the RAP and is recognized as such in the United States.[55] We can demonstrate the rule against accumulation and its independence from the RAP by adding to our "model of compliance with the RAP"[56] that by the terms of the trust, income payments to *A*'s children are entirely discretionary for twenty-one years after *A*'s death, income thereafter to be accumulated until the death of the survivor of *A*'s

48. *See id.*

49. *See supra* note 27 and accompanying text.

50. *See* Lantis v. Cook, 342 Mich. 347; 69 N.W.2d 849 (1955). *See also* GRAY, *supra* note 9, § 751.1.

51. Rodney v. Stotz, 280 Mich. 90; 273 N.W. 404 (1937).

52. 1948 Mich. Pub. Act No. 38 (effective September 23, 1949) (codified at MICH. COMP. LAWS ANN. § 554.51 (West 2013)).

53. *See* GRAY, *supra* note 9, §§ 3, 278.1-.4, 736-73, 743-44, 747-752.1.

54. *See* Greer, *supra* note 44, at 70.

55. *See* Gertman v. Burdick, 123 F.2d 924 (D.C. Cir. 1941). *See generally* BORRON ET AL., *supra* note 11, § 1466; Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 503-07 (2006). Prior to 1953, Michigan had a statutory rule against accumulation of income applicable to real property. *See* 1952 Mich. Pub. Act Nos. 6, 7 (repealing MICH. COMP. LAWS ANN. §§ 554.37-.40).

56. *See supra* Example I.

children.[57] In light of the possibility that the survivor of *A*'s children will have been born after the date of transfer and will live beyond twenty-one years (plus gestation) from the death of *A* and that income may be accumulated over the duration, the directed accumulation beginning twenty-one years after *A*'s death may be void in a jurisdiction that recognizes the common law rule against accumulation of income.[58] This is true notwithstanding that the remainder to *A*'s children is *valid* under the common law RAP.[59]

Thus, in a jurisdiction that has enacted RAP reform, the reform's effect on the rule against accumulation of income may be an interesting question—if the reform legislation does not expressly refer to the rule against accumulation (and there is not authoritative case law in the jurisdiction that mistakenly identifies that rule with the RAP). The best reform statutes specifically refer to the rule against accumulation.[60]

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57. It is tempting to suppose that we could illustrate the independence of the rule against accumulation of income from the RAP simply by adding to our "model of compliance with the RAP" that income payments to *A*'s children (after *A*'s death) are entirely discretionary. Indeed, one commentator has succumbed to that temptation. *See* Sitkoff, *supra* note 55, at 507. It is true that a discretionary power to accumulate income (which is necessarily implied in the discretion to distribute income *or not*) is sufficient to offend the rule against accumulation. *See, e.g.*, MAUDSLEY, *supra* note 8, at 198-99, 203. The trouble is that the discretionary power (on the distribution side) is a special power of appointment. *See infra* notes 64-66. As we have said, powers of appointment are subject to the common law RAP. *See supra* notes 10-11 and accompanying text. And, as we shall see, a special power violates the RAP if it may be exercised beyond the perpetuities testing period. *See infra* note 70 and accompanying text. Thus, "simply" adding to our model of compliance with the RAP that income payments to *A*'s children are entirely discretionary involves adding a *violation* of the RAP. Our aim, however, is partly to illustrate the *independence* of the rule against accumulation, and that requires a case in which there is a violation of the rule against accumulation *without* a violation of the RAP. Hence the more contrived hypothetical described in the text. Furthermore, to make the hypothesized violation of the rule against accumulation practically significant, we can add to our hypothetical that the trustee has discretion to distribute principal to *A*'s children for certain likely purposes for as long as any of those children is living. This will provide *A*'s children standing to oppose (and an economic incentive to veto) *B*'s attempt to have the trust terminated at the end of the perpetuities testing period. *See supra* note 21 and accompanying text.

58. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2 reporter's note 1 (1986) (stating that violation of the rule wholly voids accumulations in some common law jurisdictions; in others, violation voids accumulations only to the extent they may exceed the perpetuities testing period); BORRON ET AL., *supra* note 11, § 1469.

59. *See supra* note 27 and accompanying text.

60. *See, e.g.*, DEL. CODE ANN. tit. 25, § 506 (West 2014); MICH. COMP. LAWS ANN. § 554.93(1)(d) (West 2012).

D. Applications of the RAP to Powers of Appointment

As already noted, the common law RAP applies to powers of appointment as well as to transferred future interests,[61] and this is true too of the USRAP.[62] As applied to a power of appointment, the rule concerns both the validity of the power itself and the validity of interests (and powers of appointment) created by *exercise* of the power.[63]

1. Fiduciary and Nonfiduciary Powers of Appointment

A trustee's discretionary power to distribute trust assets, if it is discretion to decide whether to make certain trust distributions *or not*, is a special power of appointment within the meaning of most states' powers of appointment laws[64] and is so classified by the Restatement (Second) of Property: Donative Transfers (Restatement (Second)) and the Restatement (Third) of Property: Wills and Other Donative Transfers (Restatement (Third)).[65] This is textbook knowledge on the classification of special powers of appointment.

> To be absolutely accurate, we should point out that a power of appointment may be created in a trustee, a beneficiary of a trust, a person with a legal interest not held in trust, or in a person who has no other interest in the property. . . . A trustee who has discretion to pay income or principal to a named beneficiary, or discretion to spray income among a group of beneficiaries, has a special power of appointment.[66]

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61. *See supra* notes 10-11 and accompanying text.

62. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.72 (West 2008).

63. *See, e.g.*, GRAY, *supra* note 9, § 473.

64. *See, e.g.*, MICH. COMP. LAWS ANN. § 556.112(c), .112(i) (West 2012). *See also, e.g.*, *id.* § 556.118(2) (stating that a special power of appointment exercisable by a trustee is presumptively nonreleasable). A "special power" is a power whose permissible appointees do not include the donee, his or her estate, his or her creditors, or the creditors of his or her estate. *See, e.g.*, *id.* § 556.112(i).

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

66. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 591 (7th ed. 2005). *See also* GARDNER, *supra* note 16, at 153-55; Penner, *supra* note 17, ¶¶ 3.16-3.17.

2. Validity of the Power Itself is Patent When a Nonfiduciary Power of Appointment Is Created in a Living Person

Whenever a nonfiduciary power of appointment is created in a person living at the time of the power's creation, we know that that power must be exercised (and for so-called "nonimperative" powers, we must add, *if at all*) within twenty-one years of the death of a life in being at the time the power was created, namely the life of the power holder herself, for a power of appointment is not transmissible.[67] Therefore, the power of appointment must be exercised, if at all, by the "donee" of the power (or, in the case of so-called "imperative" powers or "powers in trust," by a court in default of the donee's exercise).[68]

3. Paradigmatic Invalidity of the Power Itself

We can illustrate invalidity of a power of appointment itself by adding to our "model of compliance with the RAP"[69] that *T* grants "the survivor of *A*'s children" a power to appoint the assets of the trust among *A*'s remoter descendants, and that *B*'s remainder is "in default" of exercise of the power. In that case, in light of the possibility that the penultimate survivor of *A*'s children will have been born after the date of transfer and will live beyond twenty-one years (plus gestation) from the death of *A*, the power of appointment is too remote under the common law rule: to be valid, the power must be sure to become exercisable, if at all, within the perpetuities testing period and, furthermore, because it is a special power, the power hypothesized here must be exercisable *only* within that period.[70] (Note that at common law, the existence of a valid power of appointment by which *B*'s remainder in default might be destroyed would *not* render *B*'s remainder contingent,[71] and, therefore, the invalidity of the power in our example here merely removes a threat of divestment from *B*'s vested interest.[72])

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67. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. b (2011). *See also* GRAY, *supra* note 9, § 476; BORRON ET AL., *supra* note 11, § 1272; MAUDSLEY, *supra* note 8, at 59.

68. *See, e.g.*, BORRON ET AL., *supra* note 11, § 877 (discussing the distinction between imperative and nonimperative powers of appointment); PENNER, *supra* note 17, ¶ 5.13 (same).

69. *See supra* Example I.

70. *See, e.g.*, MAUDSLEY, *supra* note 8, at 58-62; DUKEMINIER ET AL., *supra* note 8, at 921-22.

71. *See* GRAY, *supra* note 9, § 112(3); BORRON ET AL., *supra* note 11, § 113.

72. *See* GRAY, *supra* note 9, § 258; MAUDSLEY, *supra* note 8, at 13.

4. Validity of Interests Created by Exercise of a Power of Appointment

At common law, in the case of any power of appointment *other than* a presently exercisable general power,[73] the maximum period for which exercise of the power can postpone vesting of a future interest is measured from the time the power is created; in the case of a presently exercisable general power, the period is measured from the time the power is exercised.[74] This feature of the common law is unaffected by adoption of the USRAP. Thus, for example, if *H* has a power of appointment over reality subject to Michigan law, interests created by *H*'s exercise of the power will be subject to Michigan's USRAP,[75] but the relevant testing period, that is, the common law period or the ninety-year wait-and-see period,[76] will be measured either from the time *H* exercises the power or from the time the power was created, depending on whether the power is a presently exercisable general power or is otherwise.[77]

The State of Delaware is peculiar in applying the date-of-exercise convention, which the common law applies only to the exercise of a presently exercisable general power, to the exercise of *any* power of appointment: under Delaware statutory law, the period for which exercise of a testamentary general or special power of appointment can postpone vesting of a future interest is measured from the time the power is exercised, not from the time the power was created.[78]

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73. A "general power" 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 ANN. § 556.112(h) (West 2013). 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*).

74. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f (2011). *See also* GRAY, *supra* note 9, §§ 514-15. For an example of codification of the common law rule on this point, see MICH. COMP. LAWS ANN. § 556.124(1) (West 2012).

75. *See* MICH. COMP. LAWS ANN. § 554.93 (West 2012) (stating that PPTPA, Michigan's *post*-USRAP perpetuities reform statute, is applicable only to *personal property* held in trust).

76. *See supra* notes 34-39 and accompanying text.

77. *See* MICH. COMP. LAWS ANN. § 556.124 (West 2012).

78. *See* DEL. CODE ANN. tit. 25, § 501 (West 2014). As to the uniqueness (among common law jurisdictions with a RAP) of Delaware's eschewal of the common law rule on this point, see, for example, GRAY, *supra* note 9, § 514 n.1.

E. Saving Clauses

A RAP "saving clause" is a provision in a trust (or other governing instrument) that forces interests either to vest or terminate within the relevant perpetuities testing period, thereby preventing affected interests from violating the RAP. If a saving clause stipulates what the drafter takes to be the relevant testing period, the clause may have application regardless of whether any RAP is actually implicated at the time of the saving clause's application. A trust provision, for instance, that simply vests, in the trust's then-current discretionary distributees, all nonvested interests "twenty-one years after the death of the survivor of [certain people] living at the time of the trust's creation" is liable to have that effect *regardless* of whether any form of RAP is (or need be) applicable at the time the provision operates.

Therefore, it is important to note, apropos of perpetuities reform in general, and for purposes of the flowchart in Part V of this Article in particular, that saving clauses vest or terminate interests; they do not *invalidate* them. To say that in a given jurisdiction (*post* perpetuities reform) the RAP is irrelevant to a given interest's *validity* says nothing about whether the interest is liable to be convulsed by the effect of a saving clause in the trust (or other governing) instrument.

It is also important to remember that the object of a saving clause that forces vesting—as opposed to terminating nonvested interests—is *vesting*; and vesting *in possession* is just one (and not necessarily the most advantageous) form of vesting.[79] If the longevity of tax advantages, like a GST tax exemption, is at stake, for instance, a saving distribution of trust principal to the then-current discretionary distributee may be suboptimal. A discretionary, fiduciary power to create a presently exercisable general power of appointment in that distributee's *descendants* may yield a far better result given the actuarially expected order of deaths. The point is that the granting of a presently exercisable general power of appointment is as good as a trust distribution for purposes of vesting: a presently exercisable general power of appointment vests all interests subject to the power in the power holder, for "a general power of appointment presently exercisable is, for perpetuities purposes, treated as absolute ownership in the donee [of the power]."[80]

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79. *See, e.g.*, MAUDSLEY, *supra* note 8, at 11-13.

80. Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1669 (1985). *See also, e.g.*, GRAY, *supra* note 9, § 474.2, at 467.

F. The Alternative Contingencies Doctrine

Under the alternative contingencies doctrine, part of the common law RAP, a transfer under a later-of-two-events provision is made on two separate conditions for perpetuities purposes, and each of the conditions is evaluated separately.[81] This is of special importance for some GST tax planning purposes in jurisdictions that have adopted the USRAP, for the alternative contingencies doctrine is expressly incorporated in the uniform act[82] and, as discussed below, it can cause problems under the Treasury's GST tax effective date regulations.[83]

III. A PRIMER ON TAX ASPECTS OF THE RULE AGAINST PERPETUITIES

A. The 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 of the power is effectively testamentary) to the extent *H exercises* the power by creating another power (over the assets in question) that "under the applicable local law can be validly exercised so as to postpone the vesting of [interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power."[84]

Though the Code is not explicit on the point, legislative history indicates that the Trap was not intended to apply to purely fiduciary powers of appointment, a trustee's discretionary power to invade principal, for example.[85] And though the Trap refers to postponement of vesting and suspension of absolute ownership or the power of alienation in the *disjunctive*, it has been interpreted so that the Trap is sprung (that is, causes inclusion in the relevant transfer tax base) only if under the

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81. *See, e.g.*, GRAY, *supra* note 9, § 341; BORRON ET AL., *supra* note 11, § 1257; 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, 190-91 (1995).

82. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 cmt. H, 8B U.L.A. 352 (1990).

83. *See infra* notes 97-102 and accompanying text.

84. I.R.C. § 2041(a)(3) (West 2005) (estate tax version of Trap). *See also id.* § 2514(d) (gift tax version).

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

applicable local law *both* the period during which vesting may be postponed by exercise of the second power of appointment (the power created by *H*'s exercise of the first power) *and* the period during which absolute ownership or the power of alienation may be suspended by exercise of the second power can be ascertained without regard to the date of the first power's creation.[86]

So, in a jurisdiction without a RAP, a relation-back (-to-the-time-of-the-creation-of-the-"first-power") rule in conjunction with a rule against suspension of absolute ownership or the power of alienation may prevent the Trap from being sprung (if the instrument creating the second power—by exercising the first—does not itself avert the Trap—by effectively placing one of the relevant limitations on exercise of the second power).[87] And, contrariwise, in a jurisdiction without a rule against suspension of absolute ownership or the power of alienation, a relation-back rule in conjunction with an applicable RAP may disarm the Trap.[88]

In a jurisdiction that has a finite perpetuities testing period[89] and no rule against suspension of absolute ownership or the power of alienation, what prevents the Trap from springing (when the instrument of exercise does not itself do that) is, again, that at common law, in the case of any power other than a presently exercisable general power, the maximum period for which exercise of the power can postpone vesting of a future interest is measured from the time the power is created; in the case of a presently exercisable general power, the period is measured from the time the power is exercised.[90] So, in a jurisdiction in which *that* is true (that is, in any common law jurisdiction with a RAP, excepting

86. Estate of Murphy v. Comm'r, 71 T.C. 671 (1979), *acq*. 1979-2 C.B. 2.

87. As to special powers of appointment over assets held in trust, see, for example, N.C. GEN. STAT. ANN. § 41-32 (West 2007). (The constitutionality of the provision just cited, which substitutes a rule against suspension of the power of alienation for the RAP as to property held in trust, is not free from doubt, because of the North Carolina constitution's deprecation of "perpetuities" as "contrary to the genius of a free state." N.C. CONST. art. 1, § 34. *See* Brown Bros. Harriman Trust Co., N.A. v. Benson, 688 S.E.2d 752 (N.C. Ct. App. 2010); John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399 (2009)).

88. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.93(3) (West 2012) (Michigan's *post*-USRAP perpetuities reform statute's anti-Trap provision).

89. In a jurisdiction that is *without* a finite perpetuities testing period and has no rule against suspension of absolute ownership or the power of alienation, a relation-back provision will not prevent the Trap from springing. *See* James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 REAL PROP. TR. & EST. L.J. 673 *passim* (2009).

90. *See supra* note 74.

Delaware),[91] inadvertent Trap springing (when it is not simply caused by ignorance of the Trap) is a matter of inadvertently creating a presently exercisable general power of appointment.

On the other hand, in such a jurisdiction, creating a presently exercisable general power of appointment can sometimes be beneficial for tax purposes, as when, for instance, a nonfiduciary 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.[92] In that case, the Trap may be sprung on purpose—by the power holder's *knowingly* creating a presently exercisable general power.

B. The GST Tax Effective Date Regulations[93]

1. The Department of Treasury's Own, Regulatory RAP

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 that the trust is not tampered with in any of several prohibited ways.[94] One mode of tampering to which the effective date regulations devote elaborate attention involves post-GST-tax-effective-date exercises of fiduciary and nonfiduciary powers of appointment over grandfathered trusts. For purposes of determining the effect of such exercises on grandfathered status, the Treasury regulations impose a rule against perpetuities of their very own, one completely independent of state law perpetuities rules (Regulatory RAP). The Regulatory RAP period is twenty-one years 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),[95] though in a nod to the USRAP, the regulations grant that

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91. *See supra* notes 73-78 and accompanying text.

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

93. Portions of the material under subheadings B and C of this Part of the Article appeared previously in Spica, *supra* note 7, at 62-65, 73-75.

94. *See* Treas. Reg. § 26.2601-1(b)(1) (2014). A fuller description of the applicable rules 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).

95. *See id.* § 26.2601-1(b)(4)(i)(A)(2).

> 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 the original trust became irrevocable [or for purposes of some of the regulations, the time the grandfathered trust was created]) will not be considered an exercise that postpones or suspends vesting, absolute ownership, or power of alienation beyond the [regulatory] perpetuities period.[96]

2. The Treasury's Unwillingness to Wait and See

It is important to notice 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. Whereas the USRAP sets out two alternative tests for validity, one to be satisfied, if at all, at the time a contingent future interest is transferred or a power of appointment is created, and one to be satisfied (if necessary) anytime within ninety years thereafter,[97] the effective date regulations set out two alternative tests, one or the other of which must be satisfied *at the time of exercise* of a special power of appointment over assets of a grandfathered trust. Thus, an exercise of a special power may be unoffending under the regulations if either (i) it cannot cause postponement or suspension of vesting, absolute ownership, or the power of alienation beyond twenty-one years from the death of some life in being at the time the grandfathered trust became irrevocable—or, in some cases, at the time of the grandfathered trust's creation—(plus gestation) or (ii) it cannot cause postponement or suspension of vesting, absolute ownership, or the power of alienation beyond ninety years from that date.[98]

It follows that the exercise of a power so as to postpone or suspend vesting, absolute ownership or the power of alienation for whichever of the testing periods (the common law period or ninety years) turns out to be the *longer* will satisfy *neither* of the regulatory tests, for *as of the time of exercise*, it is possible (i) that vesting, absolute ownership or the power of alienation will be postponed or suspended for longer than twenty-one years from the death of some life in being at the time the grandfathered trust became irrevocable—or was created—(in case all of the measuring

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96. *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). *See generally* Dukeminier, *supra* note 81, at 189-90.

97. *See supra* note 34.

98. *See supra* notes 95-96 and accompanying text.

lives terminate prematurely) *and* (ii) that postponement or suspension will continue for longer than ninety years from that date (in case any of the measuring lives demonstrates pronounced longevity).[99]

As noted above, however, the alternative contingencies doctrine is expressly incorporated in the USRAP.[100] So, a longer-of-the-two-testing-periods disposition may be valid in a jurisdiction that has adopted the uniform statutory rule, notwithstanding that such a disposition is liable to violate the Regulatory RAP as to assets grandfathered from GST tax. Section 1(e) of the USRAP prevents certain longer-of-the-two-testing-periods dispositions from violating the Regulatory RAP by generally causing any stated term-certain alternative to a period specified by measuring lives in conjunction with a tack-on number of years (for example, twenty-one years from the death of some life in being at some time) to be ignored.[101] But in a state that has adopted the USRAP without enacting section 1(e), or in circumstances to which the enacted version of section 1(e) does not apply, a longer-of-two-periods disposition may be valid under the USRAP; and if such a disposition is of GST tax grandfathered assets, it may threaten grandfathered status by violating the Regulatory RAP.[102]

3. Beneficial Special Powers of Appointment over Grandfathered Assets

The effective date regulations provide that if a nonfiduciary special power of appointment is exercised in such a way that the vesting, absolute ownership or power of alienation of an interest in assets of a grandfathered trust may be postponed or suspended beyond the Regulatory RAP period, the assets subject to the exercise may lose exempt status, thence forward being fully subject to GST tax.[103] On the other hand, the regulations contemplate that the exempt status of assets subject to a trust that was irrevocable on September 25, 1985 may survive the assets' being appointed to a new trust, provided that the appointment may not postpone or suspend the vesting, absolute

99. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(D) (ex. 6).

100. *See supra* note 82.

101. *See, e.g.*, MICH. COMP. LAWS ANN. § 554.72(5) (West 2009) (Michigan's version of USRAP section 1(e)).

102. *See generally* Dukeminier, *supra* note 81 *passim*.

103. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(B). The precise effect of loss of "grandfathered" status is not spelled out in the effective date regulations, and the Internal Revenue Service has taken inconsistent positions in private letter rulings. *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).

ownership, or power of alienation of an interest in the assets beyond the Regulatory RAP period.[104]

Though the effective date regulations preclude a tax-advantaged perpetuity, the Regulatory RAP offers some scope for longevity planning, for it authorizes a testing period of ninety years or one measured by "*any* life in being at the date the original trust became irrevocable plus a period of 21 years."[105] And the regulations adopt the common law conception of the commensurability of lives affecting vesting by expressly permitting the use of *extraneous* measuring lives.[106] So, if a grandfathered trust is set, by its terms, to terminate on the death of the survivor of the settlor's prolific but now elderly children, each of whom was in her thirties when the grandfathered trust was created, and the trust instrument provides a beneficiary a special power of appointment, then we can imagine an appointment to a new receptacle trust set to terminate twenty-one years after the death of the survivor of a pool of measuring lives comprising people who bid fair to achieve longevity, all of whom were born on (or, perhaps, up to a few years before) the date on which the trust was created.

4. "Decanting" Grandfathered Assets

The Regulatory RAP's common law alternative authorizes the use of extraneous measuring lives for the exercise of *fiduciary* special powers of appointment as well as beneficial ones.[107] So, if a grandfathered trust is set, by its terms, to terminate on the death of the survivor of the settlor's prolific but now elderly children, each of whom was in her thirties when the grandfathered trust became irrevocable, and the trust instrument does *not* provide any beneficial special power of appointment, but also does not rule out use of the trustee's discretionary distribution power to "decant" (that is, to make discretionary distributions in further trust), then we can imagine a decanting to a new receptacle trust set to terminate twenty-one years after the death of the survivor of a pool of measuring lives comprising people who bid fair to achieve longevity, all of whom were born on (or, perhaps, up to a few years before) the date on which (in this case) the trust became irrevocable.

The regulations explicitly permit decanting without loss of grandfathered status provided (1) that the Regulatory RAP is not violated

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104. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(D) (ex. 4) (especially the last sentence).

105. *Id.* § 26.2601-1(b)(1)(v)(B)(2) (emphasis added).

106. *See id.* § 26.2601-1(b)(1)(v)(D) (ex. 4). As to the common law conception, see Dukeminier, *supra* note 80, at 1654 n.14, 1660-63.

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

and (2) 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 . . . without the consent or approval of any beneficiary or court."[108] There is no scope for longevity planning at all in the regulations' alternative "safe harbor" for the exercise of a fiduciary special power of appointment, the safe harbor for decantings that do not shift beneficial interests to younger generations of beneficiaries, for that alternative requires that the exercise not "extend the time for vesting of any beneficial interest in the trust beyond the period provided for *in the original trust*."[109] So, although the regulations provide two safe-harbor rules for trust decanting, it is only the one that refers to the vintage of the trustee's decanting authority—under the terms of the grandfathered trust or state law *"at the time the [grandfathered] trust became irrevocable*"—that will avail for longevity planning.

Now, as already noted, a grandfathered trust (in most cases) is one that was irrevocable on September 25, 1985.[110] And the first decanting statute in the country, New York's original decanting statute, was enacted in 1992.[111] So, the scope for trust longevity planning by means of a fiduciary special power of appointment (used to subject grandfathered assets to more favorable trust-termination provisions) depends in *every* common-law jurisdiction, *regardless* of the enactment of a decanting statute, on the plausibility of the claim that given the terms of the grandfathered trust in question, the common law, at the time the trust became irrevocable, authorized the trustee to make distributions in trust for the benefit of permissible distributees.

Of course, the trust instrument itself can explicitly authorize the trustee to decant, in which case the trustee has all the facility she needs for this purpose.[112] On the other hand, the trust instrument can explicitly forbid decanting, in which case the longevity planning in question is simply not on.[113] The interesting case, for our purposes, is the one in

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108. *Id.* § 26.2601-1(b)(4)(i)(A) (emphasis added).

109. *Id.* § 26.2601-1(b)(4)(i)(D) (emphasis added).

110. *See supra* note 94.

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

112. *See, e.g.*, *In re* Estate of Resiman, 266 Mich. App. 522, 529; 702 N.W.2d 658, 664 (2005), discussed *infra* in the text accompanying notes 120-21.

113. *See, e.g.*, MICH. COMP. LAWS ANN. § 556.112(c) (West 2014) (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]"); *id.* § 556.115(2) (requiring that an exercise comply "with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise 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).

which the grandfathered trust instrument (which, by hypothesis, does *not* provide any *beneficial* special power of appointment) neither expressly authorizes nor expressly rules out use of the trustee's discretionary distribution power to decant. This brings us back to the point that at a certain pitch of discretion, at least, a trustee's discretionary power of distribution is a special power of appointment.[114]

The Restatements (Second) and (Third) both support the proposition that as a special power of appointment, a trustee's power to make discretionary distributions entails the power to make distributions *in trust* for permissible distributees unless the trust instrument that created the discretionary distribution power manifests a contrary intent.[115] In Florida, the proposition thus supported by the Restatements (namely that at common law, a discretionary power to distribute trust property presumptively implies the power to decant) is strongly supported by *Phipps v. Palm Beach Trust Company*,[116] in which the Florida Supreme Court 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.[117] There are similar cases (discussing *Phipps*) in a couple of other states.[118] And in New Jersey, a common law basis for decanting was fairly *implied* when the appellate division of the superior court examined a decanting exercise of a trustee's "absolute and uncontrolled discretion" to distribute trust assets for the beneficiary's best interests as a question of abuse of discretion.[119]

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*,[120] 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

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114. See *supra* notes 64-66.

115. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 (2011); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.3 cmt. a, illus. 2 (1986).

116. Phipps v. Palm Beach Trust Co., 196 So. 299 (Fla. 1940).

117. *See id.* at 300.

118. *See In re* Estate of Spencer, 232 N.W.2d 491, 494-95 (Iowa 1975); Morse v. Kraft, 922 N.E.2d 1021 (Mass. 2013).

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

120. *In re* Estate of Resiman, 266 Mich. App. 522; 702 N.W.2d 658 (2005).

authorized appointment in trust.[121] Nevertheless, the mere absence of binding case authority in a jurisdiction cannot establish the absence of a common law basis for decanting there, since the method of common law adjudication obviously cannot be deduced from the doctrine of precedent alone.[122] The *Phipps* case, for example, was not wrongly decided by the Florida Supreme Court just because, at the time *Phipps* was decided, 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.[123]

Thus, for example, 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[124] did not prevent the Ohio legislature from asserting that its decanting statute is partly declarative of Ohio common law applicable prior to enactment.[125] And Michigan's recent trust decanting legislation expressly provides that the description of the decanting power contained in Michigan's Powers of Appointment Act of 1967 as amended by the decanting legislation is intended to be a codification of Michigan common law in effect prior to enactment.[126]

C. The Emperor's Nakedness (or The Irrelevance of the Regulatory RAP to Trusts Having a "Zero Inclusion Ratio" for GST Tax Purposes)

There is nothing in the effective date regulations that has anything to do with the "GST exemption" described in Code section 2631.[127] Thus, the Regulatory RAP has nothing to do with trusts having a "zero inclusion ratio" for GST tax purposes because of an allocation of the GST exemption.[128] It is true that the Internal Revenue Service (Service) regularly rules that there is no threat to GST-exemption-sheltered status in circumstances in which there would be no threat to GST-tax-

121. *See id.* at 664.

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

123. *See, e.g.*, NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 120-21, 155-56 (1979).

124. *See* William J. McGraw III, *Report of the Estate Planning, Trust and Probate Law Section*, OHIO ST. B. ASS'N 66-67, http://www.ohiobar.org/General%20Resources-/pubs/councilfiles/EstPlanComReport.pdf (last visited May 6, 2014) (explaining a proposal to enact section 5808.18 of the Ohio Trust Code authorizing decanting).

125. *See* OHIO REV. CODE ANN. § 5808.18(O)(1) (West 2012).

126. *See* MICH. COMP. LAWS ANN. § 556.115a(8) (West 2012).

127. *See* Treas. Reg. § 26.2601-1(b)(1), (b)(4) (as amended in 2004). *See also* I.R.C. § 2631 (West 2011).

128. *See, e.g.*, Culp & Mellen, *supra* note 103, at 23.

"grandfathered" status.[129] But it is a patent example of the logical fallacy of "denying the antecedent"[130] to argue that because there is no threat to GST-exemption-sheltered status in circumstances in which there is no threat to GST-tax-grandfathered status (assuming this is true), there *would be* a threat to GST-exemption-sheltered status in circumstances in which there would be a threat to GST-tax-grandfathered status. The Service's penchant for adverting to the effective date regulations apropos of situations to which they do not apply lends no credence whatsoever to the idea that the Regulatory RAP applies to exercises of special powers of appointment (whether fiduciary or nonfiduciary) over assets to which GST exemption has been allocated.

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

> 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 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.[131]

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129. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 07-43-028 (May 29, 2007); I.R.S. Priv. Ltr. Rul. 09-19-008 (May 8, 2009).

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

131. 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).

But a subsequent amendment to the proposed regulation deleted this provision,[132] leaving no trace of the Treasury's faint-hearted attempt to extend the application of the Regulatory RAP beyond the effective date provisions.

The upshot is that there is no GST tax prohibition against extending, by the exercise of a fiduciary or nonfiduciary special power of appointment, the period during which GST-exemption-sheltered assets will be held in trust.[133]

IV. MICHIGAN PERPETUITIES REFORM

The common law RAP was supplanted by the USRAP in Michigan in 1988.[134] Except for certain personal property previously held in trusts that were irrevocable on September 25, 1985, Michigan's *post*-USRAP perpetuities reform, PPTPA, applies to interests in personal property held in any trust that was revocable on or created after May 28, 2008.[135] PPTPA generally makes the RAP and all similar rules affecting the duration of trusts (including the rule against accumulation of income) inapplicable to personal property held in trusts of the required vintage.[136] But PPTPA provides an exception for the case in which a nonfiduciary special power of appointment over personal property held in trust (first power) is exercised so as to subject property to, or to create, another nonfiduciary power of appointment other than a presently exercisable general power (second power): in that case, the period during which the vesting of a future interest in the property may be postponed by the exercise of the *second* power is determined under a modified (360-year

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132. Treas. Reg. § 26.2652-1.

133. *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 103, 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). *See also* DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2012 REVENUE PROPOSALS 129-30 (2011) (same proposal).

134. 1988 Mich. Pub. Act No. 418 (codified at MICH. COMP. LAWS ANN. §§ 554.71-.78 (West 1988)).

135. *See* MICH. COMP. LAWS ANN. § 554.94 (West 2011). Like Delaware's, Michigan's general exemption from the RAP and similar rules does not pertain to real property, regardless of whether such property is held in trust. *See* DEL. CODE ANN. tit. 25, § 503 (West 1995).

136. *See* MICH. COMP. LAWS ANN. § 554.93(1)-(2) (West 2012).

wait-and-see) USRAP by reference to the date the first power was created.[137] This exception was Michigan's original *post*-RAP-reform anti-Delaware-tax-trap provision.[138]

In 2012, PPTPA was amended[139] to bolster that statute's anti-Delaware-tax-trap provision in light of the possibility that when a trust is created by the exercise of a nonfiduciary special power of appointment, a decanting power in the appointive trustee might be viewed as a "second power" for purposes of the Trap.[140] The effect of the amendment is that the exercise of a "first power," within the meaning of PPTPA (that is, a nonfiduciary special power of appointment over personal property held in trust),[141] so as to create a new trust will not allow a decanting of the new trust to suspend vesting for a period that can be determined without regard to the date of creation of the first power.[142] That will prevent the possibility of decanting under Michigan law from causing the trust assets to be included, under the Trap, in the transfer tax base of the holder of the first power when she exercises that power so as to create a trust that does not by its terms rule out decanting.[143]

PPTPA's anti-Delaware-tax-trap provision accounts for stimuli 6 through 12 in the flowchart below.

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137. *See id.* § 554.93(3) (PPTPA provision); *id.* § 554.75(2) (ancillary USRAP provision). For this purpose, a power is "nonfiduciary" if it is not held by a trustee in a fiduciary capacity. *See id.* § 554.92(c) (PPTPA definition); *id.* § 554.75(3) (coordinating USRAP reference to PPTPA definition). *See also id.* § 554.75(2) (stating that standard 90-year "wait-and-see" period is extended to 360 years).

138. *See generally* Spica, *supra* note 89, at 678-79.

139. *See supra* note 6.

140. What motivated the amendment was that the assurance we have, in legislative history, that the Trap will not be sprung by the exercise of a fiduciary power of appointment (*see supra* note 85) 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 the assurance seems to be only that, in that case, the Trap will not cause assets to be included in the *fiduciary's* transfer tax base. *See* Spica, *supra* note 7, at 79-80.

141. *See* MICH. COMP. LAWS ANN. § 554.92(b).

142. *See id.* § 554.93(3).

143. *See supra* note 84 and accompanying text.

V. A NEWLY REVISED *POST* PERPETUITIES REFORM RAP APPLICABILITY FLOWCHART FOR PROPERTY AND POWERS OF APPOINTMENT SUBJECT TO MICHIGAN LAW

A. Special Flowchart Nomenclature

Having duly noted that powers of appointment are not classically regarded as property,[144] it will be convenient for us to affect to ignore this punctilio of knowledge for purposes of the flowchart below and to adopt the single tag "instant interest" to refer (in the flowchart) to either a transferred future interest or a power of appointment. It will also be convenient for us to stipulate to a special sense of the term "create" in connection with powers of appointment: for purposes of the flowchart, a preexisting power of appointment *p1* is "created" by another power *p2* to the extent that an exercise of *p2* newly subjects assets to *p1*. Thus, for example, if a power holder *H* exercises her power to appoint asset *A* by adding *A* to a preexisting trust over which a beneficiary *B* has a power of appointment, then (for purposes of the flowchart) *B*'s power over *A* is *created* by the exercise of *H*'s power.

In order to keep responses to the flowchart's stimuli binary (that is, "Yes" or "No," but not both), we have to adopt a separate-share rule at stimulus 4: if a trust comprises both (a) assets described in question (4) and (b) other assets, the respective shares are treated as separate trusts for purposes of the flowchart. For the share that comprises assets described in question (4), the answer to question (4) is, "Yes"; for the share that comprises other assets, the answer to question (4) is, "No."

The terms "fiduciary power of appointment" and "nonfiduciary power of appointment" mean within in the flowchart what they mean within PPTPA, that is, they refer, respectively, to powers of appointment that are, and are not, held by a trustee in a fiduciary capacity.[145] And the flowchart's references to the "RAP" in the statement, "The RAP is irrelevant to the instant interest's validity," comprehend both the common law rule and the USRAP.

Terms coined in the flowchart itself are parenthetically introduced (there) in italics; the first instance in the flowchart of each term specially defined in this Section appears in quotation marks.

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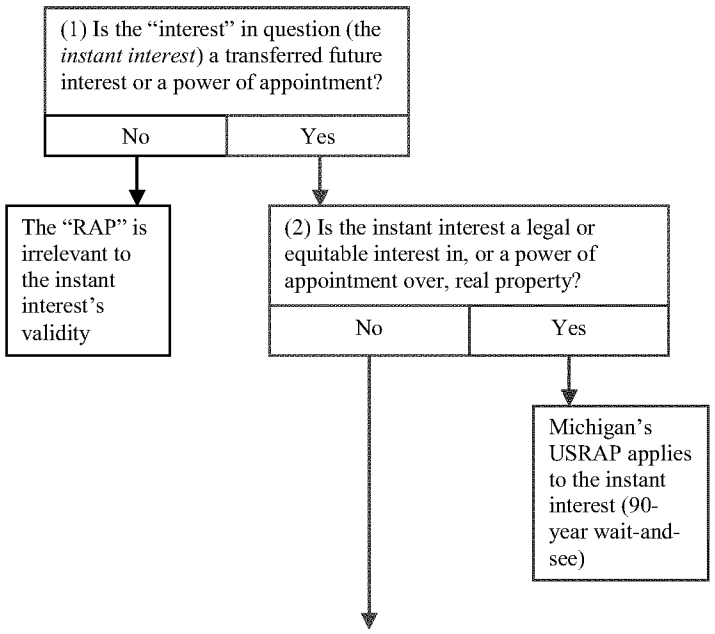
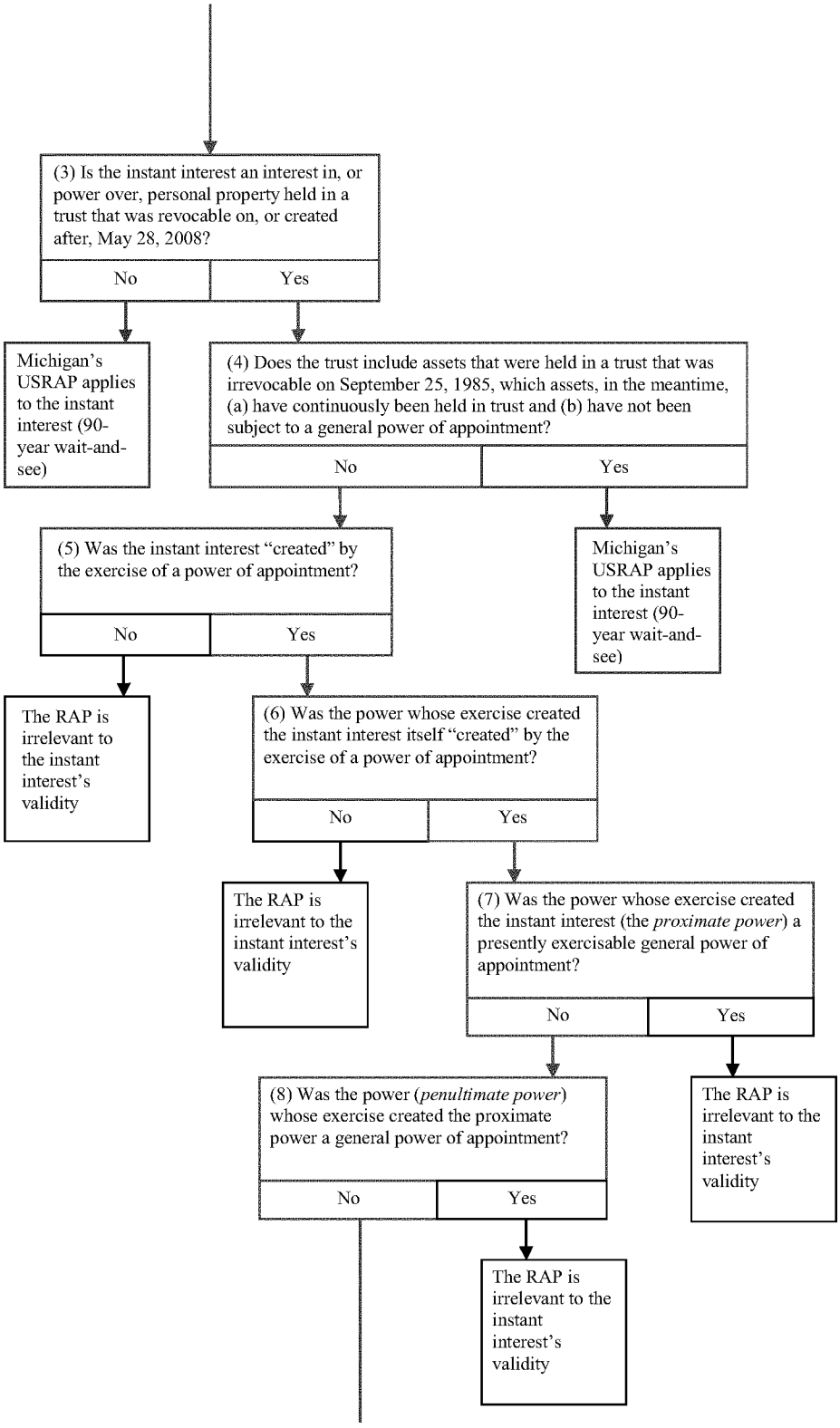
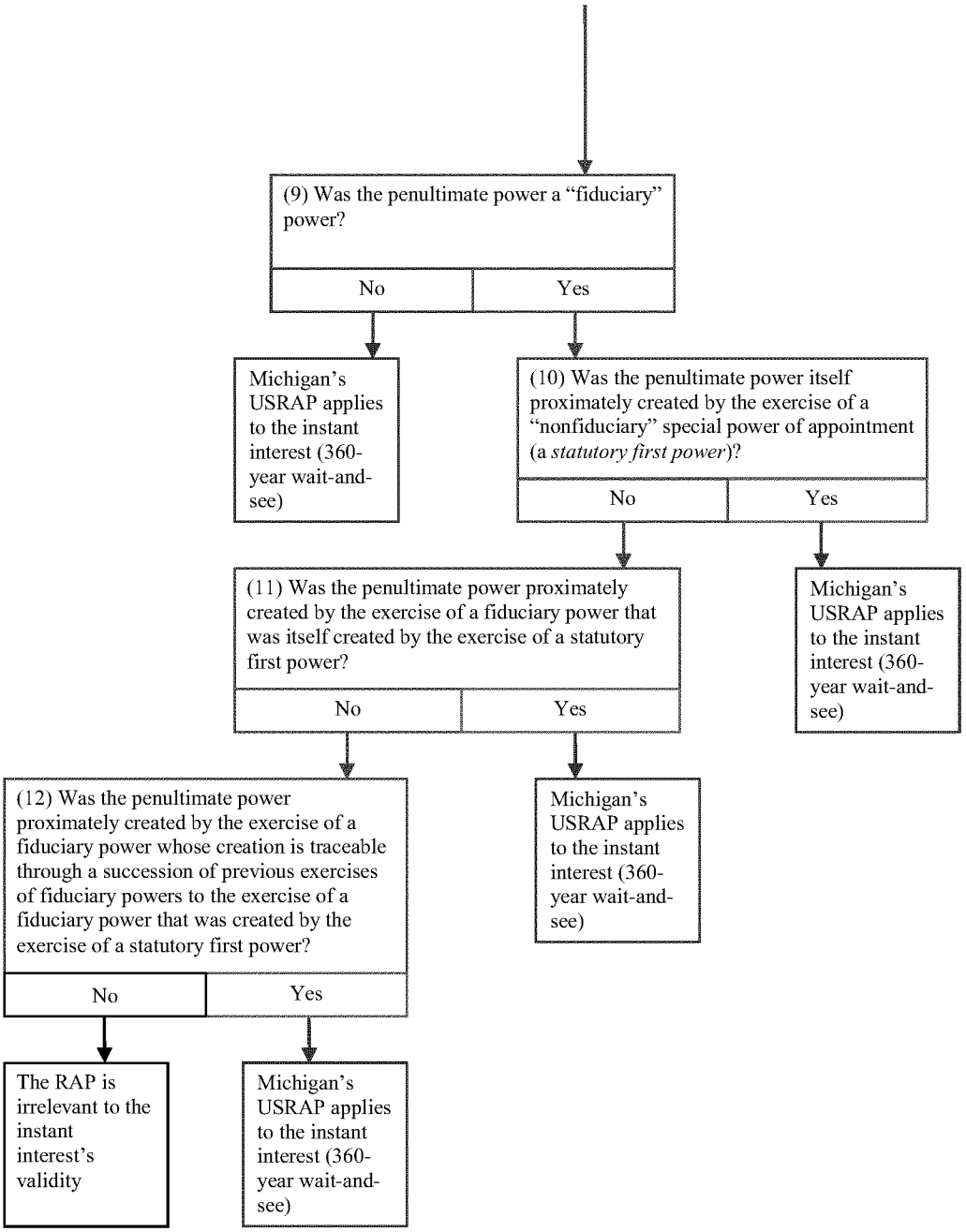
144. *See supra* note 11.

145. *See* MICH. COMP. LAWS ANN. § 554.92(a).

B. The Flowchart




(3) Is the instant interest an interest in, or power over, personal property held in a trust that was revocable on, or created after, May 28, 2008?
No
Yes
Michigan's USRAP applies to the instant interest (90-year wait-and-see)
(4) Does the trust include assets that were held in a trust that was irrevocable on September 25, 1985, which assets, in the meantime, (a) have continuously been held in trust and (b) have not been subject to a general power of appointment?
No
Yes
(5) Was the instant interest "created" by the exercise of a power of appointment?
No
Yes
Michigan's USRAP applies to the instant interest (90-year wait-and-see)
The RAP is irrelevant to the instant interest's validity
(6) Was the power whose exercise created the instant interest itself "created" by the exercise of a power of appointment?
No
Yes
The RAP is irrelevant to the instant interest's validity
(7) Was the power whose exercise created the instant interest (the *proximate power*) a presently exercisable general power of appointment?
No
Yes
(8) Was the power (*penultimate power*) whose exercise created the proximate power a general power of appointment?
No
Yes
The RAP is irrelevant to the instant interest's validity
The RAP is irrelevant to the instant interest's validity


(9) Was the penultimate power a "fiduciary" power?
No
Yes
Michigan's USRAP applies to the instant interest (360-year wait-and-see)
(10) Was the penultimate power itself proximately created by the exercise of a "nonfiduciary" special power of appointment (a *statutory first power*)?
No
Yes
Michigan's USRAP applies to the instant interest (360-year wait-and-see)
(11) Was the penultimate power proximately created by the exercise of a fiduciary power that was itself created by the exercise of a statutory first power?
No
Yes
Michigan's USRAP applies to the instant interest (360-year wait-and-see)
(12) Was the penultimate power proximately created by the exercise of a fiduciary power whose creation is traceable through a succession of previous exercises of fiduciary powers to the exercise of a fiduciary power that was created by the exercise of a statutory first power?
No
Yes
The RAP is irrelevant to the instant interest's validity
Michigan's USRAP applies to the instant interest (360-year wait-and-see)