

**Take-Away:** Michigan's version of the Statutory Rule Against Perpetuities provides for a 90-year wait-and-see duration for a future contingent interest to vest, but the Personal Property in Trust Act extends that duration to 360 years.

**Background:** The rule against perpetuities at common-law succinctly stated is that no contingent future interest is good, or is valid, unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. The principal effect of this rule was to limit the duration of trusts.

**First Restatement of Property:** This common-law judge-made rule was best summarized in the First Restatement of Property, Section 370 as:

*The limitations of a future interest in favor of one other than the conveyor is **invalid** when, under the language and circumstances of such limitation, such future interest may continue to be subject to an unfulfilled condition precedent for longer than the maximum period described in section 374.*

Section 374 of the First Restatement of Property provided:

*The maximum period allowed under the rule against perpetuities is:*

- a. *Lives of persons who are (i) in being at the commencement of such period, and (ii) neither so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain; and*
- b. **Twenty-one years; and**
- c. *Any period or periods of gestation involved in the situation to which the limitation applies.*

Accordingly, a contingent future interest in a trust is invalid from the start if there is a possibility that the interest might not vest in that prescribed period; in short, the contingent or beneficial future interest is *void ab initio*.

**Second Restatement of Property: Donative Transfers:** The Second Restatement of Property- Donative Transfers(Section 1.4) adopted the same perpetuity period as the First Restatement, but it **added a *wait-and-see* feature** to the rule, which validated a contingent future interest in trust if it did, in fact, vest within the perpetuity period. That period is defined in the Second Restatement as “*21 years after lives in being (the measuring lives) at the time the period of the rule begins to run.*” Thus, the decision as to the invalidity of the contingent future interest in the trust was postponed until the period finally expired.

**Uniform Statutory Rule Against Perpetuities:** This model law was created by the Uniform Law Commission. It first appeared in 1986. Its goal was to simplify the common law Rule Against Perpetuities, since the states were ‘all over the map’ with their common law rules against perpetuities, and its goal was to provide some uniformity among the states. It provided that for dispositions that fail the common-law rule, it provided a **wait-and-see period of a flat 90 years**. This Uniform law provided that : “*A nonvested property interest is invalid unless.... (2)the interest either vests or fails within 90 years after its creation.*”

The underlying reason for choosing 90 years rather than some other number of years was to fix a period that approximates the average period that traditionally would be allowed by the wait-and-see perpetuities doctrine as developed under prior judicial decisions. Thus, , the Uniform Statutory Rule’s 90-year period was designed to approximate the duration of trusts under a wait-and-see version of the common-law rule. Its purpose was not, however, to extend that perpetuity period limit.

Michigan adopted this Uniform Statutory Rule Against Perpetuities in 1988 at MCL 554.51-53, replacing its 1948 rule against perpetuity statute which sought to codify the common law rule.

**Personal Property Perpetuities Act:** In the decades that followed the Uniform Statutory Perpetuities Act, states around the country began to abandon, or greatly extend, their respective perpetuity statutes. This was primarily due to the creation of the federal generation skipping transfer tax. If the settlor's assets could be held in trust for extended periods of time, benefiting multiple generations of trust beneficiaries, then both the federal estate tax, and the federal generation skipping transfer tax regimes could be completely avoided on the deaths of the settlor's highly remote descendants. Thus began the 'race to the bottom' according to some, of states competing for trust business by enacting more and more favorable laws to attract trust 'business.' Examples of this 'race' include: (i) trust decanting statutes; (ii) directed trust statutes; (iii) domestic asset protection trusts; (iv) undisclosed trusts; (v) purpose trusts; and the list goes on, but it all seemed to start with a handful of states that extended their rules against perpetuities to attract business for dynasty trusts that were created to avoid federal transfer taxes for generations.

**Michigan:** Michigan was one of many states that modified its statutory rule against perpetuities, by which it extended its perpetuity period of personal property to **360 years**. [MCL 554.91-554.94.] MCL 554.93 provides:

- 1. Except as provided in section 2, and interest in, or power of appointment over, personal property held in trust is not invalidated by a rule against any of the following: (a) perpetuities; (b) suspension of absolute ownership; (c) suspension of the power of alienation; (d) accumulation of income.*
- 2. Except as provided in section 2, all of the following may be indefinitely suspended, postponed, or allowed to go on with respect to personal property held in trust: (a) the vesting of a future interest; (b) the satisfaction of a condition precedent to the exercise of a general power of appointment; (c) the exercise of a non-general or testamentary power of appointment; (d) absolute ownership; (e) the power of alienation; (f) accumulation of income.*

Accordingly, in Michigan, an irrevocable trust can exist for 360 years if it holds

personal property interests. If real estate is to be held in the trust, the trustee can transfer the real estate to a single member LLC, which has the effect of ‘converting’ that real estate interest to a personal property interest thus availing the trust of the 360-year rule against perpetuities.

**Perpetuities and Powers of Appointment:** This extension of Michigan’s rule against perpetuities to 360 years has also impacted its 1967 Powers of Appointment Act, specifically MCL 556.124. This section deals with the exercise of a trust-created power of appointment, by which the exercise creates a second trust to hold the original trust’s assets, effectively extending the period that assets will be held in an irrevocable trust.

**Relation Back Doctrine:** Recall that at common law the *doctrine of relation back* applies when the holder of a power of appointment exercises that power to create a new trust to hold the original trust’s assets. The *relation back* doctrine treats the ‘new’ trust as having been created by the settlor of the original trust, i.e., the interest created by the power’s exercised will be deemed to have been created when the original trust was first created. Another way to look at the *relation back* doctrine is that the power holder who exercises the power of appointment acts as the agent for the original trust’s settlor. As such, it is possible that an exercised power of appointment to transfer trust assets to a ‘new’ or second trust could possibly conflict with the rule against perpetuities. Hence the need to amend the Michigan Powers of Appointment Act.

**Suspension or Postponement of Vesting of Future Interests:** The Michigan Powers of Appointment Act was amended to add MCL 556.124(1) and (2) to provide that the period during which the vesting of a future interest may be suspended or postponed by an instrument that exercises a power of appointment begins on the effective date of the instrument of exercise **in the case of a general power that is presently exercisable**, and in all other situations, at the time of the creation of the power. This means that the *relation back* doctrine does not apply in the case of the exercise of a general power of appointment, which is a bit different than what the common law provided in many

states. With the exercise of a non-general power of appointment, the ‘old’ *relation back* rule still applies, and the suspension or postponement of a future interest will be measured from the date of the trust that created the non-general power of appointment initially.

**Uniform Statutory Perpetuities Statute:** Earlier this year Michigan’s Uniform Statutory Rule Against Perpetuities was amended to reflect the recent changes to the Michigan Power of Appointment Act pertaining to the exercise of powers of appointment, by converting the 90-year period in the Uniform Statutory Rule Against Perpetuities to 360 years when there is the exercise of a ‘second power of appointment.’ [MCL 554.75(2).]

**Practical Observation:** Most thoughtfully drafted trusts do not run up against the Rule Against Perpetuities these days. Not so much because estate planning attorneys have mastered the nuances of the Rule; rather most still break out in hives when the Rule is even mentioned. Rather, it is because most trusts these days use a ‘perpetuity savings clause.’

**Example *Perpetuity Savings Clause:*** “ *The trust so created shall terminate in any event not later than 21 years after the death of the last survivor of my descendants who are in being at the time this Trust becomes effective, and unless sooner terminated by its terms, the trustee shall, at the termination of such period make distributions to the persons then entitled to the income of this Trust, and in the same shares and proportions as they are so entitled.*”

This savings clause has two components: (i) a perpetuity-period component, and (ii) a gift-over component. Obviously, such a provision would not be used in conjunction with a dynasty-type trust that intends to exploit Michigan’s 360-year rule against perpetuities.

Another option to consider if 90 years is too short a period for a trust would be to opt for a remedy of judicial reformation, based on a suggestion mentioned in

the Second Restatement, which would effectively terminate the trust within the perpetuity period. The Restatement (Second) of Donative Transfers, Section 1.5 Comments state:

*“If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property shall be disposed of in the manner which most closely effectuates the transferor’s manifested plan of distribution and which is within the limits of the rule against perpetuities.”*

A comparable statement of intent could be included by the settlor in the material purposes of the trust instrument, which would be helpful if the trustee sought to reform the trust to avoid the trust violating the rule against perpetuities.

**Conclusion:** Most trusts are not too concerned about the Rule Against Perpetuities these days due to the flat 90-year, wait-and-see components. Only dynasty-type trusts expected to be administered for multiple generations should be attentive to the rule and use perpetuity savings clauses.

