HB5883

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97TH GENERAL ASSEMBLY

State of Illinois

2011 and 2012

HB5883

Introduced 2/16/2012, by Rep. Jim Durkin

SYNOPSIS AS INTRODUCED:

765 ILCS 305/3.5 new	
765 ILCS 305/4	from Ch. 30, par. 194
765 ILCS 305/5	from Ch. 30, par. 195

Amends the Statute Concerning Perpetuities. Provides that a qualified perpetual trust is created by specified express terms. Provides that qualified perpetual trusts are not subject to the rule against perpetuities with respect to the vesting of interests in property. Provides that a trustee of a qualified perpetual trust shall have the unrestricted power and right to sell or convey the interest in the property after the end of the period of the rule against perpetuities and the power to sell property is not limited and the power of alienation is not suspended while the trustee or other person in being can convey the property. Provides that there is no time period in which the interests in property of a qualified perpetual trust are required to vest. Provides that language in a governing instrument of a trust which is not a qualified perpetual trust that is exempt from generation-skipping transfer tax seeks to (1) disallow the vesting or termination of an interests or trust beyond, (2) postpone the vesting or termination of an interest or trust until, or (3) operate in effect in a similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

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A BILL FOR

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Statute Concerning Perpetuities is amended by changing Sections 4 and 5 and adding Section 3.5 as follows:

(765 ILCS 305/3.5 new)

Sec. 3.5. Characteristics of and creation of qualified perpetual trusts.

(a) A qualified perpetual trust, as defined in subsection (a-5) of Section 3, may, without limitation, be created by (i) specific reference in the terms governing the trust to subsection (a-5) of Section 3, (ii) the express terms governing the trust stating that the rule against perpetuities does not apply, or (iii) the express terms governing the trust demonstrating an intent to establish a qualified perpetual trust or stating that the provisions of subsection (a-5) apply to the trust.

(b) Notwithstanding any contrary provision in the instrument governing a qualified perpetual trust, the following apply to the qualified perpetual trust:

(1) the rule against perpetuities with respect to the vesting of interest in property does not apply;

(2) a trustee's power of alienation over any interest

in property is not suspended for a period beyond the period of the rule against perpetuities;

(3) a trust provision that, but for this subparagraph (3), would (A) limit the power of the trustee (or other person to whom the power is properly granted or delegated) to sell property beyond the period of the rule against perpetuities or (B) suspend the power of alienation over any interest in property beyond the period of the rule against perpetuities shall be invalid to the extent such limitation or suspension extends beyond the period of the rule against perpetuities, and, instead, the trustee shall have the unrestricted power and right to sell or convey the interest in that property after the end of the period of the rule against perpetuities; and

(4) the power to sell is not limited and the power of alienation is not suspended while the trustee or any other person in being can, alone or in combination with others, convey absolute fee in possession of real property, or full ownership of personal property.

(765 ILCS 305/4) (from Ch. 30, par. 194)

Sec. 4. Application of the Rule Against Perpetuities.

(a) The rule against perpetuities shall not apply:

(1) to any disposition of property or interest therein which, at the effective date of this Act, does not violate, or is exempted by statute from the operation of, the common

law rule against perpetuities;

(2) to powers of a trustee to sell, lease or mortgage property or to powers which relate to the administration or management of trust assets, including, without limitation, discretionary powers of a trustee to determine what receipts constitute principal and what receipts constitute income and powers to appoint a successor trustee;

(3) to mandatory powers of a trustee to distribute income, or to discretionary powers of a trustee to distribute principal prior to termination of a trust, to a beneficiary having an interest in the principal which is irrevocably vested in quality and quantity;

(4) to discretionary powers of a trustee to allocate income and principal among beneficiaries, but no exercise of any such power after the expiration of the period of the rule against perpetuities is valid;

(5) to leases to commence in the future or upon the happening of a future event, but no such lease shall be valid unless the term thereof actually commences in possession within 40 years from the date of execution of the lease;

(6) to commitments (A) by a lessor to enter into a lease with a subtenant or with the holder of a leasehold mortgage or (B) by a lessee or sublessee to enter into a lease with the holder of a mortgage;

(7) to options in gross or to preemptive rights in the

nature of a right of first refusal, but no option in gross shall be valid for more than 40 years from the date of its creation; or

(8) to qualified perpetual trusts as defined in Section 3 of this Act.

(b) The period of the rule against perpetuities shall not commence to run in connection with any disposition of property or interest therein, and no instrument shall be regarded as becoming effective for purposes of the rule against perpetuities, and no interest or power shall be deemed to be created for purposes of the rule against perpetuities as long as, by the terms of the instrument, the maker of the instrument has the power to revoke the instrument or to transfer or direct to be transferred to himself the entire legal and equitable ownership of the property or interest therein.

(c) In determining whether an interest violates the rule against perpetuities:

(1) it shall be presumed (A) that the interest was intended to be valid, (B) in the case of an interest conditioned upon the probate of a will, the appointment of an executor, administrator or trustee, the completion of the administration of an estate, the payment of debts, the sale or distribution of property, the determination of federal or state tax liabilities or the happening of any administrative contingency, that the contingency must occur, if at all, within the period of the rule against

perpetuities, and (C) where the instrument creates an interest in the "widow", "widower", or "spouse" of another person, that the maker of the instrument intended to refer to a person who was living at the date that the period of the rule against perpetuities commences to run;

(2) where any interest, but for this subparagraph (c) (2), would be invalid because it is made to depend upon any person attaining or failing to attain an age in excess of 21 years, the age specified shall be reduced to 21 years as to every person to whom the age contingency applies;

(3) if, notwithstanding the provisions of subparagraphs (c) (1) and (2) of this Section, the validity of any interest depends upon the possibility of the birth or adoption of a child, (A) no person shall be deemed capable of having a child until he has attained the age of 13 years, (B) any person who has attained the age of 65 years shall be deemed incapable of having a child, (C) evidence shall be admissible as to the incapacity of having a child by a living person who has not attained the age of 65 years, and (D) the possibility of having a child or more remote descendant by adoption shall be disregarded.

(c-5) There is no time period in which the interests in property of a qualified perpetual trust, as defined in Section 3 of this Act, are required to vest. The exercise of a power of appointment over any part or all of a qualified perpetual trust (or any trust created therefrom), including an exercise that creates one or more successor powers of appointment, does not postpone the vesting of any estate or interest in property subject to such exercise.

(d) Subparagraphs (a) (2), (3) and (6) and paragraph (b) of this Section shall be deemed to be declaratory of the law prevailing in this State at the effective date of this Act.

(Source: P.A. 90-472, eff. 8-17-97; 90-796, eff. 12-15-98.)

(765 ILCS 305/5) (from Ch. 30, par. 195)

Sec. 5. Trusts.

(a) Subject to the provisions of paragraphs (e) and (f) of this Section a trust containing any limitation which, but for this paragraph (a), would violate the rule against perpetuities (as modified by Section 4) shall terminate at the expiration of a period of (A) 21 years after the death of the last to die of all of the beneficiaries of the instrument who were living at the date when the period of the rule against perpetuities commenced to run or (B) 21 years after that date if no beneficiary of the instrument was then living, unless events occur which cause an earlier termination in accordance with the terms of the instrument and then the principal shall be distributed as provided by the instrument. If, in measuring a period from the creation of a trust or other property arrangement which is not a qualified perpetual trust as defined in Section 3 of this Act, language in a governing instrument of a trust which is not a qualified perpetual trust as defined in

Section 3 of this Act that is exempt from generation-skipping transfer tax (i) seeks to disallow the vesting or termination of any interests or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

(b) Subject to the provisions of paragraphs (c), (d) and (e) of this Section when a trust terminates because of the application of paragraph (a) of this Section, the trustee shall distribute the principal to those persons who would be the heirs at law of the maker of the instrument if he died at the expiration of the period specified in paragraph (a) of this Section and in the proportions then specified by statute, unless the trust was created by the exercise of a power of appointment and then the principal shall be distributed to the person who would have received it if the power had not been exercised.

(c) Before any distribution of principal is made pursuant to paragraph (b) of this Section, the trustee shall distribute, out of principal, to each living beneficiary who, but for termination of the trust because of the application of paragraph (a) of this Section, would have been entitled to be paid income after the expiration of the period specified in paragraph (a) of this Section, an amount equal to the present value (determined as provided in paragraph (d) of this Section of the income which the beneficiary would have been entitled to be paid after the expiration of that period.

(d) In determining the present value of income for purposes of any distribution to a beneficiary pursuant to paragraph (c) of this Section:

(1) when income payments would have been subject in whole or in part to any discretionary power, it shall be assumed (A) that the income which would have been paid to an individual income beneficiary would have been the maximum amount of income which could have been paid to him in the exercise of the power, (B) if the income would or might have been payable to more than one beneficiary, that (except as hereinafter provided) each beneficiary would have received an equal share of the income, unless the instrument specifies less than an equal share as the maximum amount or proportion of income which would have been paid to any beneficiary in the exercise of the power, in which event the maximum specified shall control, and (C) if the income would or might have been payable to the descendants of the maker of the instrument or of another person, that, unless

the instrument provides otherwise, the descendants would have received the income per stirpes;

(2) (A) present value shall be computed on an actuarial basis and there shall be assumed a return of 5%, at simple interest, on the value of the principal from which the beneficiary would have been entitled to receive income, and (B) where the interest in income was to be for the life of the beneficiary or for the life of another, the computation shall be made on the expectancy set forth in the most recently published American Experience Tables of Mortality and no other evidence of duration or expectancy shall be considered;

(3) if the trustee cannot determine the present value of any income interest in accordance with the provisions of the instrument and the foregoing rules concerning income payments, the present value of the interest shall be deemed to be zero.

(e) This Section applies only when a trust would violate the rule against perpetuities as modified by Section 4 and does not apply to any trust which would have been valid apart from this Act.

(f) This Section does not apply when a trust violates the rule against perpetuities because the trust estate may not vest in the trustee within the period of the rule.

(Source: P.A. 76-1428.)