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REPRESENTATIVE STEVE THOMPSON

DISTRICT 10

MEMORANDUM

To: Representative Kurt Olson, Chair
House Labor & Commerce Committee

From: Representative Steve Thompson

Date: March 7, 2012

Re: Legal memo on HB292 re: Contract Clause

The question has been raised about whether the applicability of certain provisions of the bill to existing retirement accounts, IRAs, trusts, and Uniform Transfers to Minors Accounts might violate the Contracts Clause of the United States Constitution. Analysis indicates that these provisions do not violate that clause.

The Constitution prohibits the states from "impairing" contractual obligations. See U.S. Const. art. 1, § 10, cl. 1. Thus, unless a contractual obligation is impaired, there can be no violation of the Contracts Clause. The proposed legislation with respect to IRAs does not impair or restrict any contract right. To the contrary, it expands the rights of an IRA participant/owner in that it authorizes the assignment of an interest in the plan. Since the owner/participant could, prior to the proposed legislation, freely withdraw all of the money from the plan, enacting legislation that permits an assignment, as well as maintaining the right of withdrawal, cannot be viewed as an impairment. It is instead a permissible expansion of rights that does not constitute an impairment of rights within the meaning of the constitutional provision.

Similarly, the provision in the proposed legislation that would provide expanded creditor protection for an inherited IRA or retirement interest does not effect an impairment of contract rights. The only people whose rights are constrained by this provision are creditors. But a creditor has no contract right to enforce a claim against the IRA or retirement interest. Thus, the legislation does not effect an impairment of contract rights. So, for example, when Congress amended the Bankruptcy Code in 2005 to provide expanded creditor protection for existing IRAs, no concern was raised about its constitutional validity. See section 522 of the Bankruptcy

Code. So, too, here, the expansion of creditor protection does not implicate the Contracts Clause.

The ability of a trustee to modify a trust, pursuant to the amendments provided by sections 6 through 8 of the bill, does not raise Contract Clause issues. Many modifications are to administrative provisions. It is well established that changes that are administrative in nature do not implicate the Contract Clause. With respect to dispositive changes, if the existing trust provides for a limited standard, then the standard and beneficiaries cannot be changed. With respect to the ability of a trustee to “extend” the duration of a trust, it appears that the authority to invade trust principal by paying to another trust of longer duration is provided by common law. In the 1940 case of *Phipps*, the Supreme Court of Florida held the trustee had such power under common law. It relied on the RESTATEMENT OF PROPERTY. When New York, in 1991, enacted the country’s first “decanting” statute (EPTL 10-6.6), the legislature stated it was declaratory of existing common law. Both Florida and New York have recently substantially amended their “decanting” statutes. Both of these states applied their amendments to existing trusts.

The changes to the Uniform Transfers to Minors Accounts provisions which allow for extension of the custodial period do not impair contract obligations of the minor. These changes allow the minor to compel distributions at the present statutory age (18 years or 21 years, depending on the existing provision), or at the beginning of an already extended period. Only if the minor consents, can the age be extended.

In summary, none of the provisions in the bill which apply to existing retirement accounts, IRAs, trusts, and Uniform Transfers to Minors Accounts violate the Contract Clause of the United States Constitution.