SENATE JUDICIARY
Exhibit No. 3
Date: 2/17/15
Bill No. SB 253

UNIFORM POWERS OF APPOINTMENT ACT

With Comments by Unif. Law's Comm'rs

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SECOND YEAR
BOSTON, MASSACHUSETTS
JULY 6 - JULY 12, 2013

WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 24, 2013

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UNIFORM POWERS OF APPOINTMENT ACT

TABLE OF CONTENTS

PREFATORY NOTE....1

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE....2
SECTION 102. DEFINITIONS....2
SECTION 103. GOVERNING LAW....9
SECTION 104. COMMON LAW AND PRINCIPLES OF EQUITY....10

[ARTICLE] 2

CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT

SECTION 201. CREATION OF POWER OF APPOINTMENT....11
SECTION 202. NONTRANSFERABILITY....13
SECTION 203. PRESUMPTION OF UNLIMITED AUTHORITY....14
SECTION 204. EXCEPTION TO PRESUMPTION OF UNLIMITED AUTHORITY....15
SECTION 205. RULES OF CLASSIFICATION....15
SECTION 206. POWER TO REVOKE OR AMEND....17

[ARTICLE] 3

EXERCISE OF POWER OF APPOINTMENT

SECTION 301. REQUISITES FOR EXERCISE OF POWER OF APPOINTMENT....18
SECTION 302. INTENT TO EXERCISE: DETERMINING INTENT FROM RESIDUARY CLAUSE....21
SECTION 303. INTENT TO EXERCISE: AFTER-ACQUIRED POWER....22
SECTION 304. SUBSTANTIAL COMPLIANCE WITH DONOR-IMPOSED FORMAL REQUIREMENT....24
SECTION 305. PERMISSIBLE APPOINTMENT....25
SECTION 306. APPOINTMENT TO DECEASED APPOINTEE OR PERMISSIBLE APPOINTEE'S DESCENDANT....28
SECTION 307. IMPERMISSIBLE APPOINTMENT....29
SECTION 308. SELECTIVE ALLOCATION DOCTRINE....30
SECTION 309. CAPTURE DOCTRINE: DISPOSITION OF INEFFECTIVELY APPOINTED PROPERTY UNDER GENERAL POWER....32
SECTION 310. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED GENERAL POWER....34
SECTION 311. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED NONGENERAL POWER....35
SECTION 312. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL APPOINTMENT TO TAKER IN DEFAULT....37

SECTION 313. APPOINTMENT TO TAKER IN DEFAULT 38
SECTION 314. POWERHOLDER'S AUTHORITY TO REVOKE OR AMEND EXERCISE. 38

[ARTICLE] 4

DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT.

SECTION 401. DISCLAIMER 39
SECTION 402. AUTHORITY TO RELEASE 40
SECTION 403. METHOD OF RELEASE 41
SECTION 404. REVOCATION OR AMENDMENT OF RELEASE 42
SECTION 405. POWER TO CONTRACT: PRESENTLY EXERCISABLE POWER OF APPOINTMENT 43
SECTION 406. POWER TO CONTRACT: POWER OF APPOINTMENT NOT PRESENTLY EXERCISABLE 44
SECTION 407. REMEDY FOR BREACH OF CONTRACT TO APPOINT OR NOT TO APPOINT 44

[ARTICLE] 5

RIGHTS OF POWERHOLDER'S CREDITORS IN APPOINTIVE PROPERTY

SECTION 501. CREDITOR CLAIM: GENERAL POWER CREATED BY POWERHOLDER 45
SECTION 502. CREDITOR CLAIM: GENERAL POWER NOT CREATED BY POWERHOLDER 47
SECTION 503. POWER TO WITHDRAW 48
SECTION 504. CREDITOR CLAIM: NONGENERAL POWER. 49

[ARTICLE] 6

MISCELLANEOUS PROVISIONS

SECTION 601. UNIFORMITY OF APPLICATION AND CONSTRUCTION 50
SECTION 602. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT 50
SECTION 603. APPLICATION TO EXISTING RELATIONSHIPS. 50
SECTION 604. REPEALS; CONFORMING AMENDMENTS. 52
SECTION 605. EFFECTIVE DATE 52

UNIFORM POWERS OF APPOINTMENT ACT

PREFATORY NOTE

Professor W. Barton Leach described the power of appointment as "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." 24 A.B.A. J. 807 (1938). Powers of appointment are routinely included in trusts to add flexibility to the arrangement.

A power of appointment is the authority, acting in a nonfiduciary capacity, to designate recipients of beneficial ownership interests in, or powers of appointment over, the appointive property. An owner, of course, has this authority with respect to the owner's property. By creating a power of appointment, the owner typically confers this authority on someone else.

The power of appointment is a staple of modern estate-planning practice. However, many jurisdictions within the United States have very little statutory or case law on powers of appointment.

A comprehensive restatement of the law of powers of appointment was approved in 2010 and published in 2011 by the American Law Institute. See chapters 17-23 of the Restatement Third of Property: Wills and Other Donative Transfers.

This act draws heavily on that Restatement. The aim of this act is to codify the law of powers of appointment, or at least the portions of the law that are most amenable to codification.

The act is divided into six articles. Article 1 contains general provisions. Article 2 contains provisions concerning the creation, revocation, and amendment of a power of appointment. Article 3 addresses the exercise of a power of appointment. Article 4 contains provisions on the disclaimer or release of a power of appointment and on contracts to appoint or not to appoint. Article 5 concerns the rights of the powerholder's creditors in appointive property. Article 6 contains miscellaneous provisions.

After each section, there is a detailed Comment. The Comments explain, and should be read in conjunction with, the statutory text. The Comments also provide information and guidance about best practices in creating and exercising powers of appointment.

UNIFORM POWERS OF APPOINTMENT ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Powers of Appointment Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Appointee" means a person to which a powerholder makes an appointment of appointive property.

(2) "Appointive property" means the property or property interest subject to a power of appointment.

(3) "Blanket-exercise clause" means a clause in an instrument which exercises a power of appointment and is not a specific-exercise clause. The term includes a clause that:

(A) expressly uses the words "any power" in exercising any power of appointment the powerholder has;

(B) expressly uses the words "any property" in appointing any property over which the powerholder has a power of appointment; or

(C) disposes of all property subject to disposition by the powerholder.

(4) "Donor" means a person that creates a power of appointment.

(5) "Exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees.

(6) "General power of appointment" means a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the

powerholder's estate.

(7) "Gift-in-default clause" means a clause identifying a taker in default of appointment.

(8) "Impermissible appointee" means a person that is not a permissible appointee.

(9) "Instrument" means a [writing][record].

(10) "Nongeneral power of appointment" means a power of appointment that is not a general power of appointment.

(11) "Permissible appointee" means a person in whose favor a powerholder may exercise a power of appointment.

(12) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(13) "Power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. The term does not include a power of attorney.

(14) "Powerholder" means a person in which a donor creates a power of appointment.

(15) "Presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. The term:

(A) includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(i) the occurrence of the specified event;

(ii) the satisfaction of the ascertainable standard; or

(iii) the passage of the specified time; and

(B) does not include a power exercisable only at the powerholder's death.

(16) ["Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.]

(17) "Specific-exercise clause" means a clause in an instrument which specifically refers to and exercises a particular power of appointment.

(18) "Taker in default of appointment" means a person that takes all or part of the appointive property to the extent the powerholder does not effectively exercise the power of appointment.

(19) "Terms of the instrument" means the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.

Legislative Note: *A state should choose in paragraph (9) whether to define "instrument" as a writing or as a record. The choice will determine what kind of instruments may be used to create, revoke, amend, or exercise a power of appointment. If a state defines "instrument" as a record, the state should include the definition of "record" as paragraph (16).*

Comment

Paragraph (1) defines an appointee as the person to which a powerholder makes an appointment of appointive property. For the definition of the related term, "permissible appointee," see paragraph 11.

Paragraph (2) defines appointive property as the property or property interest subject to a power of appointment. The effective creation of a power of appointment requires that there be appointive property. See Section 201.

Paragraphs (3) and (17) introduce the distinction between blanket-exercise and specific-exercise clauses. A specific-exercise clause exercises and specifically refers to the particular power of appointment in question, using language such as the following: "I exercise the power of appointment conferred upon me by my father's will as follows: I appoint [fill in details of appointment]." In contrast, a blanket-exercise clause exercises "any" power of appointment the powerholder may have, appoints "any" property over which the powerholder may have a power of appointment, or disposes of all property subject to disposition by the powerholder. The use of specific-exercise clauses is encouraged; the use of blanket-exercise clauses is discouraged. See Section 301 and the accompanying Comment.

Paragraphs (4) and (14) define the donor and the powerholder. The donor is the person who created the power of appointment. The powerholder is the person in whom the power of appointment was conferred or in whom the power was reserved. The traditional, but potentially confusing, term for powerholder is "donee." See Restatement of Property § 319 (1940); Restatement Second of Property: Donative Transfers § 11.2 (1986); Restatement Third of Property: Wills and Other Donative Transfers § 17.2 (2011). In the case of a reserved power, the same person is both the donor and the powerholder.

Paragraph (5) introduces the distinction between exclusionary and nonexclusionary powers of appointment. An exclusionary power is one in which the donor has authorized the powerholder to appoint to any one or more of the permissible appointees to the exclusion of the other permissible appointees. For example, a power to appoint "to such of my descendants as the powerholder may select" is exclusionary, because the powerholder may appoint to any one or more of the donor's descendants to the exclusion of the other descendants. In contrast, a nonexclusionary power is one in which the powerholder cannot make an appointment that excludes any permissible appointee, or one or more designated permissible appointees, from a share of the appointive property. An example of a nonexclusionary power is a power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select." Here, the powerholder is not under a duty to exercise the power; but, if the powerholder does exercise the power, the appointment must abide by the power's nonexclusionary nature. See Sections 301 and 305. An instrument creating a power of appointment is construed as creating an exclusionary power unless the terms of the instrument manifest a contrary intent. See Section 203. The typical power of appointment is exclusionary. And in fact, only a power of appointment whose permissible appointees are "defined and limited" can be nonexclusionary. For elaboration of the well-accepted term of art "defined and limited," see Section 205 and the accompanying Comment.

Paragraphs (6) and (10) explain the distinction between general and nongeneral powers of appointment. A general power of appointment enables the powerholder to exercise the power in favor of one or more of the following: the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate, regardless of whether the power is also exercisable in favor of others. A nongeneral power of appointment—sometimes called a "special" power of appointment—cannot be exercised in favor of the powerholder, the powerholder's estate, the creditors of the powerholder, or the creditors of the powerholder's estate. Estate planners often classify nongeneral powers as being either "broad" or "limited," depending on the range of permissible appointees. A power to appoint to anyone in the world except the powerholder, the powerholder's estate, and the creditors of either would be an example of a broad nongeneral power. In contrast, a power in the donor's spouse to appoint among the donor's descendants would be an example of a limited nongeneral power.

An instrument creating a power of appointment is construed as creating a general power unless the terms of the instrument manifest a contrary intent. See Section 203. A power to revoke, amend, or withdraw is a general power of appointment if it is exercisable in favor of the powerholder, the powerholder's estate, or the creditors of either. If the settlor of a trust empowers a trustee or another person to change a power of appointment from a general power into a nongeneral power, or vice versa, the power is either general or nongeneral depending on

the scope of the power at any particular time.

Paragraph (7) defines the gift-in-default clause. In an instrument creating a power of appointment, the clause that identifies the taker in default is called the gift-in-default clause. A gift-in-default clause is not mandatory but is included in a well-drafted instrument.

Paragraphs (8) and (11) explain the distinction between impermissible and permissible appointees. The permissible appointees—known at common law as the "objects" —of a power of appointment may be narrowly defined (for example, "to such of the powerholder's descendants as the powerholder may select"), broadly defined (for example, "to such persons as the powerholder may select, except the powerholder, the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate"), or unlimited (for example, "to such persons as the powerholder may select"). A permissible appointee of a power of appointment does not, in that capacity, have a property interest that can be transferred to another. Otherwise, a permissible appointee could transform an impermissible appointee into a permissible appointee, exceeding the intended scope of the power and thereby violating the donor's intent. An appointment cannot benefit an impermissible appointee. See Section 307.

Paragraph (9) defines the term "instrument" as either a writing or a record, depending on the choice made by the enacting jurisdiction. The drafting committee had no clear preference between the two options. Interestingly, there is no pre-existing Uniform Law definition of "instrument" outside the commercial context. See Uniform Commercial Code §§ 3-104(b), 9-102(a)(47). The term is used without definition in, for example, the Uniform Probate Code, the Uniform Trust Code, and the Uniform Power of Attorney Act.

Paragraphs (12) and (16) contain the definitions of "person" and "record". With one exception, these are standard definitions approved by the Uniform Law Commission. The exception is that the word "trust" has been added to the definition of "person". Trust law in the United States is moving in the direction of viewing the trust as an entity, see Restatement Third of Trusts Introductory Note to Chapter 21, but does not yet do so.

Paragraph (13) defines a power of appointment. A power of appointment is a power enabling the powerholder, acting in a nonfiduciary capacity, to designate recipients of ownership interests in or powers of appointment over the appointive property. (Powers held in a fiduciary capacity, such a trustee's power to "decant" property from one trust to another, are the subject of other uniform legislation.)

A power to revoke or amend a trust or a power to withdraw income or principal from a trust is a power of appointment, whether the power is reserved by the transferor or conferred on another. See Restatement Third of Trusts § 56, Comment b. A power to withdraw income or principal subject to an ascertainable standard is a postponed power, exercisable upon the satisfaction of the ascertainable standard. See the Comment to paragraph (15), below.

A power to direct a trustee to distribute income or principal to another is a power of appointment.

In this act, a fiduciary distributive power is not a power of appointment. Fiduciary distributive powers include a trustee's power to distribute principal to or for the benefit of an income beneficiary, or for some other individual, or to pay income or principal to a designated beneficiary, or to distribute income or principal among a defined group of beneficiaries. Unlike the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject to fiduciary standards. Unlike a power of appointment, a fiduciary distributive power does not lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of or for the benefit of someone who is not a permissible appointee.

A power over the management of property, sometimes called an administrative power, is not a power of appointment. For example, a power of sale coupled with a power to invest the proceeds of the sale, as commonly held by a trustee of a trust, is not a power of appointment but is an administrative power. A power of sale merely authorizes the person to substitute money for the property sold but does not authorize the person to alter the beneficial interests in the substituted property.

A power to designate or replace a trustee or other fiduciary is not a power of appointment. A power to designate or replace a trustee or other fiduciary involves property management and is a power to designate only the nonbeneficial holder of property.

A power of attorney is not a power of appointment. See Restatement of Property § 318, Comment h: "A power of attorney, in the commonest sense of that term, creates the relationship of principal and agent ... and is terminated by the death of the [principal]. In both of these characteristics such a power differs from a power of appointment. The latter does not create an agency relationship and, except in the case of a power reserved in the donor, it is usually expected that it will be exercised after the donor's death." The distinction is carried forward in Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment j. See also Uniform Power of Attorney Act §§ 102(7) (defining the holder of a power of attorney as an agent), 110(a)(1) (providing that the principal's death terminates a power of attorney).

A power to create or amend a beneficiary designation, for example with respect to the proceeds of a life insurance policy or of a pension plan, is not a power of appointment. An instrument creating a power of appointment must, among other things, transfer the appointive property. See Section 201; Restatement Third of Property: Wills and Other Donative Transfers § 18.1.

On the authority of a powerholder to exercise the power of appointment by creating a new power of appointment, see Section 305. If a powerholder exercises a power by creating another power, the powerholder of the first power is the donor of the second power, and the powerholder of the second power is the appointee of the first power.

Paragraph (15) introduces the distinctions among powers of appointment based upon when the power can be exercised. (A power is exercised when the instrument of exercise is effective. Thus, a power exercised by deed is exercised when the deed is effective. The law of deeds typically requires, among other things, intent, delivery, and acceptance. A power exercised

by will is exercised when the will is effective—at the testator's death, not when the will is executed.)

There are three categories here: a power of appointment is presently exercisable, postponed, or testamentary.

A power of appointment is presently exercisable if it is exercisable at the time in question. Typically, a presently exercisable power of appointment is exercisable at the time in question during the powerholder's life and also at the powerholder's death, e.g., by the powerholder's will. Thus, a power of appointment that is exercisable "by deed or will" is a presently exercisable power. To take another example, a power of appointment exercisable by the powerholder's last unrevoked instrument in writing is a presently exercisable power, because the powerholder can make a present exercise irrevocable by explicitly so providing in the instrument exercising the power. See Restatement Third of Property: Wills and Other Donative Transfers § 17.4, Comment a.

A power of appointment is presently exercisable even though, at the time in question, the powerholder can only appoint an *interest* that is revocable or subject to a condition. For example, suppose that a trust directs the trustee to pay the income to the powerholder for life, then to distribute the principal by representation to the powerholder's surviving descendants. The trust further provides that, if the powerholder leaves no surviving descendants, the principal is to be distributed "to such individuals as the powerholder shall appoint." The powerholder has a presently exercisable power of appointment, but the appointive property is a remainder interest that is conditioned on the powerholder leaving no surviving descendants.

A power is a postponed power—sometimes known as a deferred power—if it is not yet exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time. A postponed power becomes presently exercisable upon the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified time. The second sentence in paragraph (15) is modeled on Uniform Power of Attorney Act § 102(8).

A power is testamentary if it is not exercisable during the powerholder's life but only in the powerholder's will or in a nontestamentary instrument that is functionally similar to the powerholder's will, such as the powerholder's revocable trust that remains revocable until the powerholder's death. On the ability of a powerholder to exercise a testamentary power of appointment in such a revocable trust, see Section 304 and the accompanying Comment. See also Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b.

Paragraph (18) defines a taker in default of appointment. A taker in default of appointment—often called the "taker in default" —has a property interest that can be transferred to another. If a taker in default transfers the interest to another, the transferee becomes a taker in default.

Paragraph (19) defines the "terms of the instrument" as the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument

or as may be established by other evidence that would be admissible in a legal proceeding. The maker of an instrument creating a power of appointment is the donor. The maker of an instrument exercising a power of appointment is the powerholder. This definition is a slightly modified version of the definition of "terms of a trust" in Uniform Trust Code § 103(18).

The definitions in this section are substantially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.1 to 17.5 and the accompanying Commentary.

SECTION 103. GOVERNING LAW. Unless the terms of the instrument creating a power of appointment manifest a contrary intent:

(1) the creation, revocation, or amendment of the power is governed by the law of the donor's domicile at the relevant time; and

(2) the exercise, release, or disclaimer of the power, or the revocation or amendment of the exercise, release, or disclaimer of the power, is governed by the law of the powerholder's domicile at the relevant time.

Comment

This section provides default rules for determining the law governing the creation and exercise of, and related matters concerning, a power of appointment.

Unless the terms of the instrument creating the power provide otherwise, the actions of the donor—the creation, revocation, or amendment of the power—are governed by the law of the donor's domicile; and the actions of the powerholder—the exercise, release, or disclaimer, or the revocation or amendment thereof—are governed by the law of the powerholder's domicile.

In each case, the domicile is determined *at the relevant time*. For example, a donor's creation of a power is governed by the law of the donor's domicile at the time of the power's creation; and a donor's amendment of a power is governed by the law of the donor's domicile at the time of the amendment. Similarly, a powerholder's exercise of a power is governed by the law of the powerholder's domicile at the time of the exercise.

The standard "public policy" rules of choice of law naturally continue to apply. See, for example, Restatement Second of Conflict of Laws § 187.

Paragraph (2) is a departure from older law. The older position was that the law of the donor's domicile governs acts both of the donor (such as the creation of the power) and of the powerholder (such as the exercise of the power). *See, e.g., Beals v. State Street Bank & Trust Co.*, 326 N.E.2d 896 (Mass. 1975); *Bank of New York v. Black*, 139 A.2d 393 (N.J. 1958).

Paragraph (2) adopts the modern view that acts of the powerholder should be governed by the law of the powerholder's domicile, because that is the law the powerholder (or the powerholder's lawyer) is likely to know. This approach is supported by Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment e; Restatement Second of Conflict of Laws § 275, Comment c. It is also supported by *Estate of McMullin*, 417 A.2d 152 (Pa. 1980); *White v. United States*, 680 F.2d 1156 (7th Cir. 1982).

See generally, Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment e; Restatement Second of Conflict of Laws § 275, Comment c.

SECTION 104. COMMON LAW AND PRINCIPLES OF EQUITY. The common law and principles of equity supplement this [act], except to the extent modified by this [act] or law of this state other than this [act].

Comment

This act codifies those portions of the law of powers of appointment that are most amenable to codification. The act is supplemented by the common law and principles of equity. To determine the common law and principles of equity in a particular state, a court might look first to prior case law in the state and to more general sources, such as the Restatement Third of Property: Wills and Other Donative Transfers. The common law is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the act in no way restricts.

The statutory text of the act is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Stern Oil Co. v. Brown*, 817 N.W.2d 395 (S.D. 2012) (interpreting Uniform Commercial Code); *Isbell v. Commercial Investment Associates, Inc.*, 644 S.E.2d 72 (Va. 2007) (interpreting Uniform Residential Landlord Tenant Act); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); *GMAC v. Anaya*, 703 P.2d 169, 172 (N.M. 1985) (interpreting Uniform Commercial Code and describing the Comments as "persuasive" though "not binding"); Jack Davies, Legislative Law and Process in a Nutshell § 59-4 (3d ed. 2007).

The text of and Comment to this section are based on Uniform Trust Code § 106 and its accompanying Comment.

[ARTICLE] 2

CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT

SECTION 201. CREATION OF POWER OF APPOINTMENT.

(a) A power of appointment is created only if:

(1) the instrument creating the power:

(A) is valid under applicable law; and

(B) except as otherwise provided in subsection (b), transfers the appointive property; and

(2) the terms of the instrument creating the power manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

(b) Subsection (a)(1)(B) does not apply to the creation of a power of appointment by the exercise of a power of appointment.

(c) A power of appointment may not be created in a deceased individual.

(d) Subject to an applicable rule against perpetuities, a power of appointment may be created in an unborn or unascertained powerholder.

Comment

An instrument can only create a power of appointment if, under applicable law, the instrument itself is valid (or partially valid, see the next paragraph). Thus, for example, a *will* creating a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable to wills. An *inter vivos trust* creating a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable to inter vivos trusts. In part, this requirement of validity means that the instrument must be properly executed to the extent other law imposes requirements of execution. In addition, the creator of the instrument must have the capacity to execute the instrument and be free from undue influence and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement Third of Property §§ 8.3 (Undue Influence, Duress, or Fraud). The ability of an agent or guardian to create a power of

appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The instrument need not be entirely valid. A partially valid instrument creates a power of appointment if the provisions creating the power are valid.

In addition to being valid in the relevant provisions, an instrument creating a power of appointment must transfer the appointive property. The creation of a power of appointment—unlike the creation of a power of attorney—requires a transfer. See Restatement Third of Property: Wills and Other Donative Transfers § 18.1 ("A power of appointment is created by a transfer that manifests an intent to create a power of appointment."). The term "transfer" includes a declaration by an owner of property that the owner holds the property as trustee. Such a declaration necessarily entails a transfer of legal title from the owner-as-owner to the owner-as-trustee; it also entails a transfer of all or some of the equitable interests in the property from the owner to the trust's beneficiaries. See Restatement Third of Property: Wills and Other Donative Transfers § 7.1, Comment a.

The requirement of a transfer presupposes that the donor has the right to transfer the property. An ordinary individual cannot create a power of appointment over the Brooklyn Bridge. Less fancifully, a donor cannot create a power of appointment if doing so would circumvent a valid restriction on the transfer of the property. For example, interests in unincorporated business organizations may have transfer restrictions arising from statute, contract, or both. A donor cannot use the creation of a power of appointment to circumvent a valid restriction on transfer.

The one exception to the requirement of a transfer is stated in subsection (b): by necessity, the requirement of a transfer does not apply to the creation of a power of appointment by the exercise of a power of appointment. On the ability of a powerholder to exercise the power by creating a new power of appointment, see Section 305.

In addition to the aforementioned requirements, an instrument creating a power of appointment must manifest the donor's intent to create in one or more powerholders a power of appointment over appointive property. This manifestation of intent does not require the use of particular words or phrases (such as "power of appointment"), but careful drafting should leave no doubt about the transferor's intent.

Sometimes the instrument is poorly drafted, raising the question whether the donor intended to create a power of appointment. In such a case, determining the donor's intent is a process of construction. On construction generally, see Chapters 10, 11, and 12 of the Restatement Third of Property: Wills and Other Donative Transfers. See also, more specifically, Restatement Third of Property: Wills and Other Donative Transfers § 18.1, Comments b-g, containing many illustrations of language ambiguous about whether a power of appointment was intended and, for each illustration, offering guidance about how to construe the language.

The creation of a power of appointment requires that there be a donor, a powerholder (who may be the same as the donor), and appointive property. There must also be one or more permissible appointees, though these need not be restricted; a powerholder can be authorized to

appoint to anyone. A donor is not required to designate a taker in default of appointment, although a well-drafted instrument will specify one or more takers in default.

Subsection (c) states the well-accepted rule that a power of appointment cannot be created in an individual who is deceased. If the powerholder dies before the effective date of an instrument purporting to confer a power of appointment, the power is not created, and an attempted exercise of the power is ineffective. (The effective date of a power of appointment created in a donor's will is the donor's death, not when the donor executes the will. The effective date of a power of appointment created in a donor's inter vivos trust is the date the trust is established, even if the trust is revocable. See Restatement Third of Property: Wills and Other Donative Transfers § 19.11, Comments b and c.)

Nor is a power of appointment created if all the possible permissible appointees of the power are deceased when the transfer that is intended to create the power becomes legally operative. If all the possible permissible appointees of a power die after the power is created and before the powerholder exercises the power, the power terminates.

A power of appointment is not created if the permissible appointees are so indefinite that it is impossible to identify any person to whom the powerholder can appoint. If the description of the permissible appointees is such that one or more persons are identifiable, but it is not possible to determine whether other persons are within the description, the power is validly created, but an appointment can only be made to persons who can be identified as within the description of the permissible appointees.

Subsection (d) explains that a power of appointment can be conferred on an unborn or unascertained powerholder, subject to any applicable rule against perpetuities. This is a postponed power. The power arises on the powerholder's birth or ascertainment. The language creating the power as well as other factors such as the powerholder's capacity under applicable law determine whether the power is then presently exercisable, postponed, or testamentary.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 18.1 and 19.9 and the accompanying Commentary.

SECTION 202. NONTRANSFERABILITY. A powerholder may not transfer a power of appointment. If a powerholder dies without exercising or releasing a power, the power lapses.

Comment

A power of appointment is nontransferable. The powerholder may not transfer the power to another person. (On the ability of the powerholder to exercise the power by conferring on a permissible appointee a new power of appointment over the appointive property, see Section 305.) If the powerholder dies without exercising or releasing the power, the power lapses. (If a power is held by multiple powerholders, which is rare, on the death of one powerholder that individual's power lapses but the power continues to be held by the surviving powerholders.) If

the powerholder partially releases the power and dies without exercising the remaining part, the unexercised part of the power lapses. The power does not pass through the powerholder's estate to the powerholder's successors in interest.

The ability of an agent or guardian to create, revoke, exercise, or revoke the exercise of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, the Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment b.

SECTION 203. PRESUMPTION OF UNLIMITED AUTHORITY. Subject to Section 205, and unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is:

(1) presently exercisable;

(2) exclusionary; and

(3) except as otherwise provided in Section 204, general.

Comment

In determining which type of power of appointment is created, the general principle of construction, articulated in this section, is that a power falls into the category giving the powerholder the maximum discretionary authority except to the extent the terms of the instrument creating the power restrict the powerholder's authority. Maximum discretion confers on the powerholder the flexibility to alter the donor's disposition in response to changing conditions.

In accordance with this presumption of unlimited authority, a power is general unless the terms of the creating instrument specify that the powerholder cannot exercise the power in favor of the powerholder, the powerholder's estate, or the creditors of either. A power is presently exercisable unless the terms of the creating instrument specify that the power can only be exercised at some later time or in some document such as a will that only takes effect at some later time. A power is exclusionary unless the terms of the creating instrument specify that a permissible appointee must receive a certain amount or portion of the appointive assets if the power is exercised.

This general principle of construction applies, unless the terms of the instrument creating the power of appointment provide otherwise. A well-drafted instrument intended to create a nongeneral or testamentary or nonexclusionary power will use clear language to achieve the desired objective. Not all instruments are well-drafted, however. A court may have to construe the terms of the instrument to discern the donor's intent. For principles of construction applicable to the creation of a power of appointment, see Restatement Third of Property: Wills and Other

Donative Transfers Chapters 17 and 18, and the accompanying Commentary, containing many examples.

SECTION 204. EXCEPTION TO PRESUMPTION OF UNLIMITED AUTHORITY.

Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

(1) the power is exercisable only at the powerholder's death; and

(2) the permissible appointees of the power are a defined and limited class that does not include the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate.

Comment

This section is designed to remedy a recurring drafting mistake. A testamentary power of appointment created in a defined and limited class that happens to include the powerholder is usually intended to be a nongeneral power. For example, a testamentary power created in one of the donor's descendants (such as the donor's child or grandchild) to appoint among the donor's "descendants" or "issue" is typically intended to be a nongeneral power. See, for example, PLR 201229005 (stating the ruling of the Internal Revenue Service that a testamentary power of appointment in the donor's son, exercisable in favor of the donor's "issue," is a nongeneral power for purposes of 26 U.S.C. § 2041). Accordingly, the presumption of this Section is that such a power is nongeneral.

On the meaning of the well-accepted term of art "defined and limited," see the Comment to Section 205. See also Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c.

SECTION 205. RULES OF CLASSIFICATION.

(a) In this section, "adverse party" means a person with a substantial beneficial interest in property which would be affected adversely by a powerholder's exercise or nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the powerholder, or a creditor of the powerholder's estate.

(b) If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

(c) If the permissible appointees of a power of appointment are not defined and limited, the power is exclusionary.

Comment

Subsection (b) states a well-accepted and mandatory exception to the presumption of unlimited authority articulated in Section 203. If a power of appointment can be exercised only with the consent or joinder of an adverse party, the power is not a general power. An adverse party is an individual who has a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power in favor of the powerholder, the powerholder's estate, or the creditors of either. In this context, the word "substantial" is not subject to precise definition but must be determined in light of all the facts and circumstances. Consider the following examples.

Example 1. D transferred property in trust, directing the trustee "to pay the income to D's son S for life, remainder in corpus to such person or persons as S, with the joinder of X, shall appoint; in default of appointment, remainder to X." S's power is not a general power because X meets the definition of an adverse party.

Example 2. Same facts as Example 1, except that S's power is exercisable with the joinder of Y rather than with the joinder of X. Y has no property interest that could be adversely affected by the exercise of the power. Because Y is not an adverse party, S's power is general.

Whether the party whose consent or joinder is required is adverse or not is determined at the time in question. Consider the following example.

Example 3. Same facts as Example 2, except that, one month after D's creation of the trust, X transfers the remainder interest to Y. Before the transfer, Y is not an adverse party and S's power is general. After the transfer, Y is an adverse party and S's power is nongeneral.

Subsection (c) also states a longstanding mandatory rule. Only a power of appointment whose permissible appointees are defined and limited can be nonexclusionary. "Defined and limited" in this context is a well-accepted term of art. For elaboration and examples, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment c. In general, permissible appointees are "defined and limited" if they are defined and limited to a reasonable number. Typically, permissible appointees who are defined and limited are described in class-gift terms: a single-generation class such as "children," "grandchildren," "brothers and sisters," or "nieces and nephews," or a multiple-generation class such as "issue" or "descendants" or "heirs." Permissible appointees need not be described in class-gift terms to be defined and limited, however. The permissible appointees are also defined and limited if one or more permissible appointees are designated by name or otherwise individually identified.

If the permissible appointees are not defined and limited, the power is exclusionary irrespective of the donor's intent. A power exercisable, for example, in favor of "such person or persons other than the powerholder, the powerholder's estate, the creditors of the powerholder, and

the creditors of the powerholder's estate" is an exclusionary power. An attempt by the donor to require the powerholder to appoint at least $X to each permissible appointee of the power is ineffective, because the permissible appointees of the power are so numerous that it would be administratively impossible to carry out the donor's expressed intent. The donor's expressed restriction is disregarded, and the powerholder may exclude any one or more of the permissible appointees in exercising the power.

In contrast, a power to appoint only to the powerholder's creditors or to the creditors of the powerholder's estate is a power in favor of a defined and limited class. Such a power could be nonexclusionary if, for example, the terms of the instrument creating the power provide that the power is a power to appoint "to such of the powerholder's estate creditors as the powerholder shall by will appoint, but if the powerholder exercises the power, the powerholder must appoint $X to a designated estate creditor or must appoint in full satisfaction of the powerholder's debt to a designated estate creditor."

If a power is determined to be nonexclusionary, it is to be inferred that the donor intends to require an appointment to confer a reasonable benefit upon each mandatory appointee. An appointment under which a mandatory appointee receives nothing, or only a nominal sum, violates this requirement and is forbidden. This doctrine is known as the doctrine forbidding illusory appointments. For elaboration, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment j.

The terms of the instrument creating a power of appointment sometimes provide that no appointee shall receive any share in default of appointment unless the appointee consents to allow the amount of the appointment to be taken into account in calculating the fund to be distributed in default of appointment. This "hotchpot" language is used to minimize unintended inequalities of distribution among permissible appointees. Such a clause does not make the power nonexclusionary, because the terms do not prevent the powerholder from making an appointment that excludes a permissible appointee. See Restatement Third of Property: Wills and Other Donative Transfers § 17.5, Comment k.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.3 to 17.5 and the accompanying Introductory Note and Commentary.

SECTION 206. POWER TO REVOKE OR AMEND. A donor may revoke or amend a power of appointment only to the extent that:

(1) the instrument creating the power is revocable by the donor; or

(2) the donor reserves a power of revocation or amendment in the instrument creating the power of appointment.

Comment

The donor of a power of appointment has the authority to revoke or amend the power only to the extent the instrument creating the power is revocable by the donor or the donor reserves a power of revocation or amendment in the instrument creating the power.

For example, the donor's power to revoke or amend a revocable inter vivos trust carries with it the authority to revoke or amend any power of appointment created in the trust. However, to the extent an exercise of the power removes appointive property from the trust, the donor's authority to revoke or amend the power is eliminated, unless the donor expressly reserved authority to revoke or amend any transfer from the trust after the transfer is completed.

If an irrevocable inter vivos trust confers a presently exercisable power on someone who is not the settlor of the trust (the settlor being the donor of the power), the donor lacks authority to revoke or amend the power, except to the extent the donor reserved the authority to do so. If the donor did reserve the authority to revoke or amend the power, that authority is only effective until the powerholder irrevocably exercises the power.

If the same individual is both the donor and the powerholder, the donor in his or her capacity as powerholder can indirectly revoke or amend the power by a partial or total release of the power. See Section 402. After the power has been irrevocably exercised, however, the donor as donor is in no different position in regard to revoking or amending the exercise of the power than the donor would be if the donor and powerholder were different individuals.

The ability of an agent or guardian to revoke or amend a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805; Uniform Trust Code § 415.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 18.2 and the accompanying Commentary.

[ARTICLE] 3

EXERCISE OF POWER OF APPOINTMENT

SECTION 301. REQUISITES FOR EXERCISE OF POWER OF APPOINTMENT. A power of appointment is exercised only:

(1) if the instrument exercising the power is valid under applicable law;

(2) if the terms of the instrument exercising the power:

(A) manifest the powerholder's intent to exercise the power; and

(B) subject to Section 304, satisfy the requirements of exercise, if any, imposed by the donor; and

(3) to the extent the appointment is a permissible exercise of the power.

Comment

Paragraph (1) states the fundamental principle that an instrument can only exercise a power of appointment if the instrument, under applicable law, is valid (or partially valid, see the next paragraph). Thus, for example, a *will* exercising a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable to wills. An *inter vivos trust* exercising a power of appointment must be valid under the law—including choice of law (see Section 103)—applicable to inter vivos trusts. In part, this means that the instrument must be properly executed to the extent other law imposes requirements of execution. In addition, the creator of the instrument must have the capacity to execute the instrument and be free from undue influence and other wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement Third of Property §§ 8.3 (Undue Influence, Duress, or Fraud). The ability of an agent or guardian to exercise a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The instrument need not be entirely valid. A partially valid instrument can exercise a power of appointment if the provisions exercising the power are valid.

Paragraph (2) requires the terms of the instrument exercising the power of appointment to manifest the powerholder's intent to exercise the power of appointment. Whether a powerholder has manifested an intent to exercise a power of appointment is a question of construction. See generally Restatement Third of Property: Wills and Other Donative Transfers § 19.2. For example, a powerholder's disposition of appointive property may manifest an intent to exercise the power even though the powerholder does not refer to the power. See Restatement Third of Property: Wills and Other Donative Transfers § 19.3. Paragraph (2) also requires that the terms of the instrument exercising the power must, subject to Section 304, satisfy the requirements of exercise, if any, imposed by the donor.

Language expressing an intent to exercise a power is clearest if it makes a specific reference to the creating instrument and exercises the power in unequivocal terms and with careful attention to the requirements of exercise, if any, imposed by the donor.

The recommended method for exercising a power of appointment is by a specific-exercise clause, using language such as the following: "I exercise the power of appointment conferred upon me by [my father's will] as follows: I appoint [fill in details of appointment]."

Not recommended is a blanket-exercise clause, which purports to exercise "any" power of appointment the powerholder may have, using language such as the following: "I exercise any power of appointment I may have as follows: I appoint [fill in details of appointment]." Although a blanket-exercise clause does manifest an intent to exercise any power of appointment the powerholder may have, such a clause raises the often-litigated question of whether it satisfies the requirement of specific reference imposed by the donor in the instrument creating the power.

A blending clause purports to blend the appointive property with the powerholder's own property in a common disposition. The exercise portion of a blending clause can take the form of a specific exercise or, more commonly, a blanket exercise. For example, a clause providing "All the residue of my estate, including the property over which I have a power of appointment under my mother's will, I devise as follows" is a blending clause with a specific exercise. A clause providing "All the residue of my estate, including any property over which I may have a power of appointment, I devise as follows" is a blending clause with a blanket exercise.

This act aims to eliminate any significance attached to the use of a blending clause. A blending clause has traditionally been regarded as significant in the application of the doctrines of "selective allocation" and "capture." This act eliminates the significance of such a clause under those doctrines. See Sections 308 (selective allocation) and 309 (capture). The use of a blending clause is more likely to be the product of the forms used by the powerholder's lawyer than a deliberate decision by the powerholder to facilitate the application of the doctrines of selective allocation or capture.

If the powerholder decides not to exercise a specific power or any power that the powerholder might have, it is important to consider whether to depend on mere silence to produce a nonexercise or to take definitive action to assure a nonexercise. Definitive action can take the form of a release during life (see Section 402) or a nonexercise clause in the powerholder's will or other relevant instrument. A nonexercise clause can take the form of a specific-nonexercise clause (for example, "I do not exercise the power of appointment conferred on me by my father's trust") or the form of a blanket-nonexercise clause (for example, "I do not exercise any power of appointment I may have").

In certain circumstances, different consequences depend on the powerholder's choice. Under Section 302, a residuary clause in the powerholder's will is treated as manifesting an intent to exercise a general power in certain limited circumstances if the powerholder silently failed to exercise the power, but not if the powerholder released the power or refrained in a record from exercising it. Under Section 310, unappointed property passes to the powerholder's estate in certain limited circumstances if the powerholder silently failed to exercise a general power, but passes to the donor or to the donor's successors in interest if the powerholder released the power.

Paragraph (3) provides that the exercise is valid only to the extent the exercise is permissible. On permissible and impermissible exercise, see Sections 305 to 307.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.1, 19.8, and 19.9 and the

accompanying Commentary.

SECTION 302. INTENT TO EXERCISE: DETERMINING INTENT FROM RESIDUARY CLAUSE.

(a) In this section:

(1) "Residuary clause" does not include a residuary clause containing a blanket-exercise clause or a specific-exercise clause.

(2) "Will" includes a codicil and a testamentary instrument that revises another will.

(b) A residuary clause in a powerholder's will, or a comparable clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a power of appointment only if:

(1) the terms of the instrument containing the residuary clause do not manifest a contrary intent;

(2) the power is a general power exercisable in favor of the powerholder's estate;

(3) there is no gift-in-default clause or the clause is ineffective; and

(4) the powerholder did not release the power.

Comment

This section addresses a question arising under Section 301(2)(A)—namely, whether the powerholder's intent to exercise a power of appointment is manifested by a garden-variety residuary clause such as "All the residue of my estate, I devise to ..." or "All of my estate, I devise to ...." (The section also applies to a comparable provision in the powerholder's revocable trust, such as a provision providing for the distribution of the trust corpus.) This section does not address the effect of a residuary clause that contains a blanket exercise or a specific exercise of a power of appointment. On blanket-exercise and specific-exercise clauses, see the Comment to Section 301.

The rule of this section is that *in most circumstances* a garden-variety residuary clause does *not* manifest an intent to exercise a power of appointment.

Such a clause manifests an intent to exercise a power of appointment only in the rare circumstance when (1) the terms of the instrument containing the residuary clause do not manifest a contrary intent, (2) the power in question is a general power exercisable in favor of the powerholder's estate, (3) there is no gift-in-default clause or it is ineffective, and (4) the powerholder did not release the power.

In a well-planned estate, a power of appointment, whether general or nongeneral, is accompanied by a gift in default. In a less carefully planned estate, on the other hand, there may be no gift-in-default clause. Or, if there is such a clause, the clause may be wholly or partly ineffective. To the extent the donor did not provide for takers in default or the gift-in-default clause is ineffective, it is more efficient to attribute to the powerholder the intent to exercise a general power in favor of the powerholder's residuary devisees. The principal benefit of attributing to the powerholder the intent to exercise a general power is that it allows the property to pass under the powerholder's will instead of as part of the donor's estate. Because the donor's death would normally have occurred before the powerholder died, some of the donor's successors might themselves have predeceased the powerholder. It is more efficient to avoid tracing the interest through multiple estates to determine who are the present successors. Moreover, to the extent the donor did not provide for takers in default, it is also more in accord with the donor's probable intent for the powerholder's residuary clause to be treated as exercising the power.

A gift-in-default clause can be ineffective or partially ineffective for a variety of reasons. The clause might cover only part of the appointive property. The clause might be invalid because it violates a rule against perpetuities or some other rule, or it might be ineffective because it conditioned the interest of the takers in default on an uncertain event that did not happen, the most common of which is an unsatisfied condition of survival.

Under no circumstance does a residuary clause manifest an intent to exercise a *non*general power. A residuary clause disposes of the powerholder's own property, and a nongeneral power is not an ownership-equivalent power. Similarly, a residuary clause does not manifest an intent to exercise a general power which is general only because it is exercisable in favor of the creditors of the powerholder or the creditors of the powerholder's estate.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.4 and the accompanying Commentary.

SECTION 303. INTENT TO EXERCISE: AFTER-ACQUIRED POWER. Unless the terms of the instrument exercising a power of appointment manifest a contrary intent:

(1) except as otherwise provided in paragraph (2), a blanket-exercise clause extends to a power acquired by the powerholder after executing the instrument containing the clause; and

(2) if the powerholder is also the donor of the power, the clause does not extend to the

power unless there is no gift-in-default clause or the gift-in-default clause is ineffective.

Comment

Nothing in the law prevents a powerholder from exercising an after-acquired power—in other words, from exercising a power in an instrument executed before acquiring the power. The only question is one of construction: whether the powerholder *intended* by the earlier instrument to exercise the after-acquired power. (The term "after-acquired power" in this section refers only to an after-acquired power acquired before the powerholder's death. A power of appointment cannot be conferred on a deceased powerholder. See Section 201.)

If the instrument of exercise specifically identifies the power to be exercised, then the question of construction is readily answered: the specific-exercise clause expresses an intent to exercise the power, whether the power is after-acquired or not. However, if the instrument of exercise uses only a *blanket*-exercise clause, the question of whether the powerholder intended to exercise an after-acquired power is often harder to answer. The presumptions in this section provide default rules of construction on the powerholder's likely intent.

Paragraph (1) states the general rule of this section. Unless the terms of the instrument indicate that the powerholder had a different intent, a blanket-exercise clause extends to a power of appointment acquired after the powerholder executed the instrument containing the blanket-exercise clause. General references to then-present circumstances, such as "all the powers I have" or similar expressions, are not a sufficient indication of an intent to exclude an after-acquired power. In contrast, more precise language, such as "all powers I have at the date of execution of this will," does indicate an intent to exclude an after-acquired power.

It is important to remember that even if the terms of the instrument manifest an intent to exercise an after-acquired power, the intent may be ineffective, for example if the terms of the *donor's* instrument creating the power manifest an intent to preclude such an exercise. In the absence of an indication to the contrary, however, it is inferred that the time of the execution of the powerholder's exercising instrument is immaterial to the donor. Even if the donor declares that the property shall pass to such persons as the powerholder "shall" or "may" appoint, these terms do not suffice to indicate an intent to exclude exercise by an instrument previously executed, because these words may be construed to refer to the time when the exercising document becomes effective.

Paragraph (2) states an exception to the general rule of paragraph (1). If the powerholder is also the donor, a blanket-exercise clause in a preexisting instrument is rebuttably presumed *not* to manifest an intent to exercise a power later reserved in another donative transfer, unless the donor/powerholder did not provide for a taker in default of appointment or the gift-in-default clause is ineffective.

The black-letter of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.6 and the accompanying Commentary.

SECTION 304. SUBSTANTIAL COMPLIANCE WITH DONOR-IMPOSED FORMAL REQUIREMENT. A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

(1) the powerholder knows of and intends to exercise the power; and

(2) the powerholder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.

Comment

This section adopts a substantial-compliance rule for donor-imposed formal requirements. This section only applies to formal requirements imposed *by the donor*. It does not apply to formal requirements imposed by law, such as the requirement that a will must be signed and attested. The section also does not apply to *substantive* requirements imposed by the donor, for example a requirement that the powerholder attain a certain age before the power is exercisable.

Whenever the donor imposes formal requirements with respect to the instrument of appointment that exceed the requirements imposed by law, the donor's purpose in imposing the additional requirements is relevant to whether the powerholder's attempted exercise satisfies the rule of this section. To the extent the powerholder's failure to comply with the additional requirements will not impair the accomplishment of a material purpose of the donor, the powerholder's attempted appointment in a manner that substantially complies with a donor-imposed requirement does not fail for lack of perfect compliance with that requirement.

For example, a donor's formal requirement that the power of appointment is exercisable "by will" may be satisfied by the powerholder's attempted exercise in a nontestamentary instrument that is functionally similar to a will, such as the powerholder's revocable trust that remains revocable until the powerholder's death. See Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b ("Because a revocable trust operates in substance as a will, a power of appointment exercisable "by will" can be exercised in a revocable-trust document, as long as the revocable trust remained revocable at the [powerholder]'s death.").

A formal requirement commonly imposed by the donor is that, in order to be effective, the powerholder's attempted exercise must make specific reference to the power. Specific-reference clauses were a pre-1942 invention designed to prevent an inadvertent exercise of a general power. The federal estate tax law then provided that the value of property subject to a general power was included in the powerholder's gross estate if the general power was exercised.

The idea of requiring specific reference was designed to thwart unintended exercise and, hence, estate taxation.

The federal estate tax law has changed. For a general power created after October 21, 1942, estate tax consequences do not depend on whether the power is exercised.

Nevertheless, donors continue to impose specific-reference requirements. Because the original purpose of the specific-reference requirement was to prevent an inadvertent exercise of the power, it seems reasonable to presume that that this is still the donor's purpose in doing so. Consequently, a specific-reference requirement still overrides any applicable state law that presumes that an ordinary residuary clause was intended to exercise a general power. Put differently: An ordinary residuary clause may manifest the powerholder's *intent to exercise* (under Section 301(2)(A)) but does not satisfy the *requirements of exercise* if the donor imposed a specific-reference requirement (this section and Section 301(2)(B)).

A more difficult question is whether a *blanket-exercise clause* satisfies a specific-reference requirement. If it could be shown that the powerholder had knowledge of and intended to exercise the power, the blanket-exercise clause would be sufficient to exercise the power, unless it could be shown that the donor's intent was not merely to prevent an inadvertent exercise of the power but instead that the donor had a material purpose in insisting on the specific-reference requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805 or Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the powerholder's attempted appointment to insert the required specific reference should be explored.

This rule of this section is consistent with, but an elaboration of, Uniform Probate Code § 2-704: "If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intent, in requiring that the [powerholder] exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power."

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.10 and the accompanying Commentary.

SECTION 305. PERMISSIBLE APPOINTMENT.

(a) A powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder's estate may make any appointment, including an appointment in trust or creating a new power of appointment, that the powerholder could make in disposing of the powerholder's own property.

(b) A powerholder of a general power of appointment that permits appointment only to the creditors of the powerholder or of the powerholder's estate may appoint only to those creditors.

(c) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the powerholder of a nongeneral power may:

(1) make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;

(2) create a general power in a permissible appointee; or

(3) create a nongeneral power in any person to appoint to one or more of the permissible appointees of the original nongeneral power.

Comment

When a donor creates a general power under which an appointment can be made outright to the powerholder or the powerholder's estate, the necessary implication is that the powerholder may accomplish by an appointment to others whatever the powerholder could accomplish by first appointing to himself and then disposing of the property, including a disposition in trust or in the creation of a further power of appointment.

A general power to appoint only to the powerholder (even though it says "and to no one else") does not prevent the powerholder from exercising the power in favor of others. There is no reason to require the powerholder to transform the appointive assets into owned property and then, in a second step, to dispose of the owned property. Likewise, a general power to appoint only to the powerholder's estate (even though it says "and to no one else") does not prevent an exercise of the power by will in favor of others. There is no reason to require the powerholder to transform the appointive assets into estate property and then, in a second step, to dispose of the estate property by will.

Similarly, a general power to appoint to the powerholder may purport to allow only one exercise of the power, but such a restriction is ineffective and does not prevent multiple partial exercises of the power. To take another example, a general power to appoint to the powerholder or to the powerholder's estate may purport to restrict appointment to outright interests not in trust, but such a restriction is ineffective and does not prevent an appointment in trust.

An additional example will drive home the point. A general power to appoint to the powerholder or to the powerholder's estate may purport to forbid the powerholder from imposing conditions on the enjoyment of the property by the appointee. Such a restriction is

ineffective and does not prevent an appointment subject to such conditions.

As stated in subsection (b), however, a general power to appoint only to the powerholder's creditors or the creditors of the powerholder's estate permits an appointment only to those creditors.

Except to the extent the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the same breadth of discretion in appointment to permissible appointees that the powerholder has in the disposition of the powerholder's owned property to permissible appointees of the power.

Thus, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the authority to exercise the power by an appointment in trust. In order to manifest a contrary intent, the terms of the instrument creating the power must specifically prohibit an appointment in trust. So, for example, a power to appoint "to" the powerholder's descendants includes the authority to appoint in trust for the benefit of one or more of those descendants.

Similarly, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power has the authority to exercise the power by creating a general power in a permissible appointee. The rationale for this rule is a straightforward application of the maxim that the greater includes the lesser. A powerholder of a nongeneral power may appoint outright to a permissible appointee, so the powerholder may instead create in a permissible appointee a general power.

And finally, unless the terms of the instrument creating the power manifest a contrary intent, the powerholder of a nongeneral power may exercise the power by creating a new nongeneral power in *any* person, whether or not a permissible appointee, to appoint to some or all of the permissible appointees of the original nongeneral power. In order to manifest a contrary intent, the terms of the instrument creating the power must prohibit the creation of such powers. Language merely conferring the power of appointment on the powerholder does not suffice.

The rules of subsection (c) are default rules. The terms of the instrument creating the power may manifest a contrary intent. For example, a donor may choose to loosen the restriction in subsection (c)(3) by authorizing the powerholder of a nongeneral power to create a new nongeneral power with broader permissible appointees. Consider the following examples.

Example 1. D creates a nongeneral power in D's child, P1, to appoint among D's descendants. Under the default rule of subsection (c)(3), P1 may exercise this power to create a new nongeneral power in D's child, P2. Unless the terms of D's instrument manifest a contrary intent, however, the permissible appointees of P2's nongeneral power cannot be broader than the permissible appointees of P1's nongeneral power.

Example 2. Same facts as in Example 1, except that D's instrument states: "The nongeneral power of appointment granted to P1 may be exercised to create in one or more of my descendants a new nongeneral power. This new nongeneral power may have permissible

appointees as broad as P1 sees fit." On these facts, the default rule of subsection (c)(3) is overridden by the terms of D's instrument. The permissible appointees of P2's nongeneral power may be broader than the permissible appointees of P1's nongeneral power.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.13 and 19.14 and the accompanying Commentary.

SECTION 306. APPOINTMENT TO DECEASED APPOINTEE OR PERMISSIBLE APPOINTEE'S DESCENDANT.

(a) [Subject to [refer to state law on antilapse], an] [An] appointment to a deceased appointee is ineffective.

(b) Unless the terms of the instrument creating a power of appointment manifest a contrary intent, a powerholder of a nongeneral power may exercise the power in favor of, or create a new power of appointment in, a descendant of a deceased permissible appointee whether or not the descendant is described by the donor as a permissible appointee.

Legislative Note: *A state that has extended antilapse protection to appointees should include the opening clause of subsection (a) ("Subject to..."). A state that has not extended antilapse protection to appointees is strongly encouraged to do so. See, e.g., Uniform Probate Code Sections 2-603(a)(5), 2-603(a)(6), and 2-707(a)(7).*

Comment

Just as property cannot be transferred to an individual who is deceased (see Restatement Third of Property: Wills and Other Donative Transfers § 1.2), a power of appointment cannot be effectively exercised in favor of a deceased appointee.

However, an antilapse statute may apply to trigger the substitution of the deceased appointee's descendants (or other substitute takers), unless the terms of the instrument creating or exercising the power of appointment manifest a contrary intent. Antilapse statutes typically provide, as a default rule of construction, that devises to certain relatives who predecease the testator pass instead to specified substitute takers, usually the descendants of the predeceased devisee who survive the testator. See generally Restatement Third of Property: Wills and Other Donative Transfers § 5.5.

When an antilapse statute does not expressly address whether it applies to the exercise of a power of appointment, a court should construe it to apply to such an exercise. See Restatement Third of Property: Wills and Other Donative Transfers § 5.5, Comment *l*. The rationale

underlying antilapse statutes, that of presumptively attributing to the testator the intent to substitute the descendants of a predeceased devisee, applies equally to the exercise of a power of appointment.

The substitute takers provided by an antilapse statute (typically the descendants of the deceased appointee) are treated as permissible appointees even if the description of permissible appointees provided by the donor does not expressly cover them. This rule corresponds to the rule applying antilapse statutes to class gifts. Antilapse statutes substitute the descendants of deceased class members, even if the class member's descendants are not members of the class. See Restatement Third of Property: Wills and Other Donative Transfers § 19.12, Comment e.

The donor of a power, general or nongeneral, can prohibit the application of an antilapse statute to the powerholder's appointment and, in the case of a nongeneral power, can prohibit an appointment to the descendants of a deceased permissible appointee, but must manifest an intent to do so in the terms of the instrument creating the power of appointment. A traditional gift-in-default clause does not manifest a contrary intent in either case, unless the clause provides that it is to take effect instead of the descendants of a deceased permissible appointee.

Subsection (b) provides that the descendants of a deceased permissible appointee are treated as permissible appointees of a nongeneral power of appointment. This rule is a logical extension of the application of antilapse statutes to appointments. If an antilapse statute can substitute the descendants of a deceased appointee, the powerholder should be allowed to appoint in favor of, or to create a new power of appointment in, a descendant (meaning, one or more descendants; the Uniform Law Commission uses the singular to include the plural) of a deceased permissible appointee.

Who qualifies as a "descendant" is defined by state law. See, for example, Uniform Probate Code §§ 1-201(9), 2-103, 2-115 to 2-122, 2-705.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.12 and the accompanying Commentary.

SECTION 307. IMPERMISSIBLE APPOINTMENT.

(a) Except as otherwise provided in Section 306, an exercise of a power of appointment in favor of an impermissible appointee is ineffective.

(b) An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent the appointment is a fraud on the power.

Comment

The rules of this section apply to the extent the powerholder attempts to confer a

beneficial interest in the appointive property on an impermissible appointee. For example, a nongeneral power may not be exercised in favor of the powerholder. And a nongeneral power in favor of the donor's descendants may not be exercised in favor of the donor's spouse (assuming the usual scenario wherein the spouse is not also a descendant).

To the extent an appointment is ineffective, it is invalid. But it bears emphasizing that an appointment that is partially valid remains partially valid. Partial invalidity does not doom the entire appointment.

The rules of this section do not apply to an appointment of a *non*beneficial interest—for example, the appointment of legal title to a trustee—if the beneficial interest is held by permissible appointees.

Nor do the rules of this section prohibit beneficial appointment to an impermissible appointee if the intent to benefit the impermissible appointee is not the powerholder's but rather is the intent of a permissible appointee in whose favor the powerholder has decided to exercise the power. In other words, if the powerholder makes a decision to exercise the power in favor of a permissible appointee, the permissible appointee may request the powerholder to transfer the appointive assets directly to an impermissible appointee. The appointment directly to the impermissible appointee in this situation is effective, being treated for all purposes as an appointment first to the permissible appointee followed by a transfer by the permissible appointee to the impermissible appointee.

The donor of a power of appointment sets the range of permissible appointees by designating the permissible appointees of the power. The rules of this section are concerned with attempts by the powerholder to exceed that authority. Such an attempt is called a fraud on the power and is ineffective. The term "fraud on the power" is a well-accepted term of art. See Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16.

Among the most common devices employed to commit a fraud on the power are: an appointment conditioned on the appointee conferring a benefit on an impermissible appointee; an appointment subject to a charge in favor of an impermissible appointee; an appointment upon a trust for the benefit of an impermissible appointee; an appointment in consideration of a benefit to an impermissible appointee; and an appointment primarily for the benefit of the permissible appointee's creditor if the creditor is an impermissible appointee. Each of these appointments is impermissible and ineffective.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16 and the accompanying Commentary.

SECTION 308. SELECTIVE ALLOCATION DOCTRINE. If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property must be allocated in the permissible

manner that best carries out the powerholder's intent.

Comment

The rule of this section is commonly known as the doctrine of selective allocation. This doctrine applies if the powerholder uses the same instrument to exercise a power of appointment and to dispose of property that the powerholder owns. For purposes of this section, the powerholder's will, any codicils to the powerholder's will, and any revocable trust created by the powerholder that did not become irrevocable before the powerholder's death are treated as the same instrument.

The doctrine of selective allocation provides that the owned property and the appointive property shall be allocated in the permissible manner that best carries out the powerholder's intent.

One situation that often calls for selective allocation is when the powerholder disposes of property to permissible and impermissible appointees. By allocating owned assets to the dispositions favoring impermissible appointees and allocating appointive assets to permissible appointees, the appointment is rendered effective. Consider the following example, drawn from the Restatement Third of Property: Wills and Other Donative Transfers.

Example. D died, leaving a will that devised property worth $100,000 to T in trust. T is directed to pay the net income to S (Donor's son) for life and then "to pay the principal to S's descendants as S shall by will appoint, and in default of appointment to pay the principal by representation to S's descendants then living, and if no descendant of S is then living, to pay the principal to X-Charity." S dies. The property over which S has the nongeneral power is worth $200,000 at his death. S's owned property at his death is worth $800,000. S's will provides as follows: "All property I own or over which I have any power of appointment shall be used first to pay my debts, expenses of administration, and death taxes, and the balance I give outright to my daughters." S's debts plus the death taxes payable on S's death plus the expenses of administering S's estate total $200,000. If S's owned property is allocated ratably to the payment of such $200,000, one-fifth of the $200,000 would be an ineffective appointment, because it would be to impermissible appointees. That one-fifth of $200,000 ($40,000 of the appointive assets) would pass in default of appointment, and the owned property would have to pick up the full payment of the debts, taxes, and expenses of administration. A selective allocation in the first instance of owned assets to the payment of debts, taxes, and expenses of administration leaves the appointive assets appointed only to permissible appointees of the nongeneral power and nothing passes in default of appointment.

The result of applying selective allocation is always one that the powerholder could have provided for in specific language, and one that the powerholder most probably would have provided for had he or she been aware of the difficulties inherent in the dispositive scheme. By the rule of selective allocation, courts undertake to prevent the dispositive plan from being frustrated by the ineptness of the powerholder or the powerholder's lawyer. For an early case adopting selective allocation, see Roe v. Tranmer, 2 Wils. 75, 95 Eng. Rep. 694 (C.P. 1757).

For further discussion of selective allocation, and illustrations of its application to various fact-patterns, see Restatement Third of Property: Wills and Other Donative Transfers § 19.19 and the accompanying Commentary. This rule of this Section is consistent with, and this Comment draws on, that Restatement.

On the distinction between selective allocation (a rule of construction based on the assumed intent of the powerholder) and the process sometimes known as "marshaling" (an outgrowth of general equitable principles), see the Restatement Second of Property: Donative Transfers, especially the Introductory Note to Chapter 22.

SECTION 309. CAPTURE DOCTRINE: DISPOSITION OF INEFFECTIVELY APPOINTED PROPERTY UNDER GENERAL POWER. To the extent a powerholder of a general power of appointment, other than a power to withdraw property from, revoke, or amend a trust, makes an ineffective appointment:

(1) the gift-in-default clause controls the disposition of the ineffectively appointed property; or

(2) if there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed property:

(A) passes to:

(i) the powerholder if the powerholder is a permissible appointee and living; or

(ii) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(B) if there is no taker under subparagraph (A), passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

Comment

This section applies when the powerholder of a general power makes an ineffective appointment. This section does not apply when the powerholder of a general power fails to exercise or releases the power. (On such fact-patterns, see instead Section 310.)

Nor does this section apply to an ineffective exercise of a power of revocation, amendment, or withdrawal—in each case, a power pertaining to a trust. To the extent a powerholder of one of these types of powers makes an ineffective appointment, the ineffectively appointed property remains in the trust.

The central rule of this section—in paragraph (1) and subparagraph (2)(A)—is a modern variation of the so-called "capture doctrine" adopted by a small body of case law and followed in Restatement Second of Property: Donative Transfers § 23.2. Under that doctrine, the ineffectively appointed property passed to the powerholder or the powerholder's estate, but only if the ineffective appointment manifested an intent to assume control of the appointive property "for all purposes" and not merely for the limited purpose of giving effect to the attempted appointment. If the ineffective appointment manifested such an intent, the ineffective appointment was treated as an implied alternative appointment to the powerholder or the powerholder's estate, and thus took effect even if the donor provided for takers in default and one or more of the takers in default were otherwise entitled to take.

The capture doctrine was developed at a time when the donor's gift-in-default clause was considered an afterthought, inserted just in case the powerholder failed to exercise the power. Today, the donor's gift-in-default clause is typically carefully drafted and intended to take effect, unless circumstances change that would cause the powerholder to exercise the power. Consequently, if the powerholder exercises the power effectively, the exercise divests the interest of the takers in default. But if the powerholder makes an ineffective appointment, the powerholder's intent regarding the disposition of the ineffectively appointed property is problematic.

Whether or not the ineffective appointment manifested an intent to assume control of the appointive property "for all purposes" often depended on nothing more than whether the ineffective appointment was contained in a blending clause. The use of a blending clause rather than a direct-exercise clause, however, is typically the product of the drafting lawyer's forms rather than a deliberate choice of the powerholder.

This section alters the traditional capture doctrine in two ways: (1) the gift-in-default clause takes precedence over any implied alternative appointment to the powerholder or the powerholder's estate deduced from the use of a blending clause or otherwise; and (2) the ineffectively appointed property passes to the powerholder or the powerholder's estate only if there is no gift-in-default clause or to the extent the gift-in-default clause is ineffective. Nothing turns on whether the powerholder used a blending clause or somehow otherwise manifested an intent to assume control of the appointive property "for all purposes."

Subparagraph (2)(B) addresses the special case of a power of appointment that is general only because it is exercisable in favor of creditors, but not exercisable in favor of the powerholder or the powerholder's estate. This type of general power is sometimes used in generation-skipping transfer tax planning. However, this type of general power should not trigger the capture doctrine, because the powerholder and the powerholder's estate are impermissible appointees. Instead, ineffectively appointed property should pass under the gift-in-default clause (paragraph (1)) or, if there is no gift-in-default clause or it is ineffective, under a reversionary

interest to the donor or the donor's transferee or successor in interest (subparagraph (2)(B)).

The rule of this section is essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.21 and the accompanying Commentary.

SECTION 310. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED GENERAL POWER. To the extent a powerholder releases or fails to exercise a general power of appointment other than a power to withdraw property from, revoke, or amend a trust:

(1) the gift-in-default clause controls the disposition of the unappointed property; or

(2) if there is no gift-in-default clause or to the extent the clause is ineffective:

(A) except as otherwise provided in subparagraph (B), the unappointed property passes to:

(i) the powerholder if the powerholder is a permissible appointee and living; or

(ii) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(B) to the extent the powerholder released the power, or if there is no taker under subparagraph (A), the unappointed property passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

Comment

The rules of this section apply to unappointed property under a general power of appointment. The rules do *not* apply to unappointed property under a power of revocation, amendment, or withdrawal—powers pertaining to a trust. If the powerholder releases or dies without exercising a power of revocation or amendment, the power to revoke expires and, unless someone else continues to have a power of revocation or amendment, the trust becomes irrevocable and unamendable. If the powerholder releases or dies without exercising a power to withdraw principal of a trust, the principal that the powerholder could have withdrawn, but did not, remains part of the trust.

The rationale for the rules of this section runs as follows. The gift-in-default clause controls the disposition of unappointed property to the extent the clause is effective. To the extent the gift-in-default clause is nonexistent or ineffective, the disposition of the unappointed property depends on whether the powerholder merely failed to exercise the power or whether the powerholder released the power. If the powerholder merely *failed to exercise* the power, the unappointed property passes to the powerholder or to the powerholder's estate (if these are permissible appointees). The rationale is the same as when the powerholder makes an ineffective appointment. If, however, the powerholder *released* the power, the powerholder has affirmatively chosen to reject the opportunity to gain ownership of the property, hence the unappointed property passes under a reversionary interest to the donor or to the donor's transferee or successor in interest.

These rules are illustrated by the following examples.

Example 1. D transfers property to T in trust, directing T to pay the income to S (D's son) for life, with a general testamentary power in S to appoint the principal of the trust, and in default of appointment the principal is to be distributed "to S's descendants who survive S, by representation, and if none, to X-Charity." S dies leaving a will that does not exercise the power. The principal passes under the gift-in-default clause to S's descendants who survive S, by representation.

Example 2. Same facts as Example 1, except that D's gift-in-default clause covered only half of the principal, and S died intestate. Half of the principal passes under the gift-in-default clause. The other half of the principal passes to S's estate for distribution to S's intestate heirs.

Example 3. Same facts as Example 2, except that S released the power before dying intestate. Half of the principal passes under the gift-in-default clause. The other half of the principal passes to D or to D's transferee or successor in interest.

In addition to governing a released general power, subparagraph (2)(B) also applies to the special case of an unexercised general power that is general only because it is exercisable in favor of creditors, but not exercisable in favor of the powerholder or the powerholder's estate. This type of general power is sometimes used in generation-skipping transfer tax planning. In such a case, unappointed property passes under the gift-in-default clause (paragraph (1)) or, if there is no gift-in-default clause or to the extent it is ineffective, under a reversionary interest to the donor or the donor's transferee or successor in interest (subparagraph (2)(B)).

The rules of this section are essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.22 and the accompanying Commentary.

SECTION 311. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED NONGENERAL POWER. To the extent a powerholder releases, ineffectively exercises, or fails to exercise a nongeneral power of appointment:

(1) the gift-in-default clause controls the disposition of the unappointed property; or

(2) if there is no gift-in-default clause or to the extent the clause is ineffective, the unappointed property:

(A) passes to the permissible appointees if:

(i) the permissible appointees are defined and limited; and

(ii) the terms of the instrument creating the power do not manifest a contrary intent; or

(B) if there is no taker under subparagraph (A), passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

Comment

To the extent the powerholder of a nongeneral power releases, ineffectively exercises, or fails to exercise the power, thus causing the power to lapse, the gift-in-default clause controls the disposition of the unappointed property to the extent the gift-in-default clause is effective.

To the extent the gift-in-default clause is nonexistent or ineffective, the unappointed property passes to the permissible appointees of the power—including those who are substituted for permissible appointees under an antilapse statute (see Section 306)—if the permissible appointees are "defined and limited" (on the meaning of this term of art, see the Comment to Section 205) and the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the powerholder elects to appoint it to them. This rule of construction is based on the assumption that the donor intends the permissible appointees of the power to have the benefit of the property. The donor focused on transmitting the appointive property to the permissible appointees through an appointment, but if the powerholder fails to carry out this particular method of transfer, the donor's underlying intent to pass the appointive property to the defined and limited class of permissible appointees should be carried out. Subparagraph (2)(A) effectuates the donor's underlying intent by implying a gift in default of appointment to the defined and limited class of permissible appointees.

If the defined and limited class of permissible appointees is a multigenerational class, such as "descendants," "issue," "heirs," or "relatives," the default rule of construction is that they take by representation. See Restatement Third of Property: Wills and Other Donative Transfers § 14.3, Comment b. If the defined and limited class is a single-generation class, the default rule of construction is that the eligible class members take equally. See Restatement Third of Property: Wills and Other Donative Transfers § 14.2.

No implied gift in default of appointment to the permissible appointees arises if the

permissible appointees are identified in such broad and inclusive terms that they are not defined and limited. In such an event, the donor has no underlying intent to pass the appointive property to such permissible appointees. Similarly, if the donor manifests an intent that the defined and limited class of permissible appointees is to receive the appointive property only by appointment, the donor's manifestation of intent eliminates any implied gift in default to the permissible appointees. Subparagraph (2)(B) responds to these possibilities by providing for a reversionary interest to the donor or the donor's transferee or successor in interest.

The rules are illustrated by the following examples.

Example 1. D died, leaving a will devising property to T in trust. T is directed to pay the income to S (D's son) for life, and then to pay the principal "to such of S's descendants who survive S as S may appoint by will." D's will contains no gift-in-default clause. S dies without exercising the nongeneral power. The permissible appointees of the power constitute a defined and limited class. Accordingly, the principal of the trust passes at S's death to S's descendants who survive S, by representation.

Example 2. Same facts as Example 1, except that the permissible appointees of S's power of appointment are "such one or more persons, other than S, S's estate, S's creditors, or creditors of S's estate." The permissible appointees do not constitute a defined and limited class. Accordingly, the principal of the trust passes, at S's death, under a reversionary interest to D or D's transferee or successor in interest.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.23 and the accompanying Commentary.

SECTION 312. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL APPOINTMENT TO TAKER IN DEFAULT. Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

Comment

If a powerholder makes a valid partial appointment to a taker in default, leaving some propery unappointed, there is a question about whether that taker in default may also fully share in the unappointed property. In the first instance, the intent of the *donor* controls. In the absence of any indication of the donor's intent, it is assumed that the donor intends that the taker can take in both capacities. This rule presupposes that the donor contemplated that the taker in default who is an appointee could receive more of the appointive assets than a taker in default who is not an appointee. The donor can defeat this rule by manifesting a contrary intent in the instrument

creating the power of appointment, thereby restricting the powerholder's freedom to benefit an appointee who is also a taker in default in both capacities. If the donor has not so manifested a contrary intent, the *powerholder* is free to exercise the power in favor of a taker in default who is a permissible appointee. Unless the powerholder manifests a contrary intent in the terms of the instrument exercising the power, it is assumed that the powerholder does not intend to affect in any way the disposition of any unappointed property.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.24 and the accompanying Commentary.

SECTION 313. APPOINTMENT TO TAKER IN DEFAULT. If a powerholder makes an appointment to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause had the property not been appointed, the power of appointment is deemed not to have been exercised and the appointee takes under the clause.

Comment

This section articulates the rule that, to the extent an appointee would have taken appointed property as a taker in default, the appointee takes under the gift-in-default clause rather than under the appointment.

Takers in default have future interests that may be defeated by an exercise of the power of appointment. To whatever extent the powerholder purports to appoint an interest already held in default of appointment, the powerholder does not exercise the power to alter the donor's disposition but merely declares an intent not to alter it. To the extent, however, that the appointed property *is different from* (e.g., is a lesser estate) or *exceeds the total of* the property the appointee would receive as a taker in default, the property passes under the appointment.

Usually it makes no difference whether the appointee takes as appointee or as taker in default. The principal difference arises in jurisdictions that follow the rule that the estate creditors of the powerholder of a general testamentary power that was conferred on the powerholder by another have no claim on the appointive property unless the powerholder has exercised the power. Although this act does not follow that rule regarding creditors' rights (see Section 502), some jurisdictions do.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.25 and the accompanying Commentary.

SECTION 314. POWERHOLDER'S AUTHORITY TO REVOKE OR AMEND EXERCISE. A powerholder may revoke or amend an exercise of a power of appointment only

to the extent that:

(1) the powerholder reserves a power of revocation or amendment in the instrument exercising the power of appointment and, if the power is nongeneral, the terms of the instrument creating the power of appointment do not prohibit the reservation; or

(2) the terms of the instrument creating the power of appointment provide that the exercise is revocable or amendable.

Comment

This section recognizes that a powerholder lacks the authority to revoke or amend an exercise of the power of appointment, except to the extent (1) the powerholder reserved a power of revocation or amendment in the instrument exercising the power of appointment and the terms of the instrument creating the power of appointment do not effectively prohibit the reservation, or (2) the donor provided that the exercise is revocable or amendable.

A powerholder who exercises a power of appointment is like any other transferor of property in regard to authority to revoke or amend the transfer. Hence, unless the powerholder (or the donor) in some appropriate manner manifests an intent that an appointment is revocable or amendable, the appointment is irrevocable.

The ability of an agent or guardian to revoke or amend the exercise of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805; Uniform Trust Code § 415.

The rule of this section is essentially consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.7 and the accompanying Commentary.

[ARTICLE] 4

DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT.

SECTION 401. DISCLAIMER. As provided by [cite state law on disclaimer or the Uniform Disclaimer of Property Interests Act]:

(1) A powerholder may disclaim all or part of a power of appointment.

(2) A permissible appointee, appointee, or taker in default of appointment may disclaim all or part of an interest in appointive property.

Comment

A prospective powerholder cannot be compelled to accept the power of appointment, just as the prospective donee of a gift cannot be compelled to accept the gift.

A disclaimer is to be contrasted with a release. A release occurs after the powerholder accepts the power. A disclaimer prevents acquisition of the power, and consequently a powerholder who has accepted a power can no longer disclaim.

Disclaimer statutes frequently specify the time within which a disclaimer must be made. The Uniform Disclaimer of Property Interests Act (1999) (UDPIA) does not specify a time limit, but allows a disclaimer until a disclaimer is barred (see UDPIA § 13).

Disclaimer statutes customarily specify the methods for filing a disclaimer. UDPIA § 12 provides that the statutory methods must be followed. In the absence of such a requirement, statutory formalities for making a disclaimer of a power are not construed as exclusive, and any manifestation of the powerholder's intent not to accept the power may also suffice.

A partial disclaimer of a power of appointment leaves the powerholder possessed of the part of the power not disclaimed.

Just as an individual who would otherwise be a powerholder can avoid acquiring the power by disclaiming it, a person who otherwise would be a permissible appointee, appointee, or taker in default of appointment can avoid acquiring that status by disclaiming it.

The ability of an agent or guardian to disclaim on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 20.4 and the accompanying Commentary.

SECTION 402. AUTHORITY TO RELEASE. A powerholder may release a power of appointment, in whole or in part, except to the extent the terms of the instrument creating the power prevent the release.

Comment

Whether a power of appointment is general or nongeneral, presently exercisable or testamentary, the powerholder has the authority to release the power in whole or in part, in the

absence of an effective restriction on release imposed by the donor. A partial release is a release that narrows the freedom of choice otherwise available to the powerholder but does not eliminate the power. A partial release may relate either to the manner of exercising the power or to the persons in whose favor the power may be exercised.

If the powerholder did not create the power, so that the powerholder and donor are different individuals, the donor can effectively impose a restraint on release, but the donor must manifest an intent in the terms of the creating instrument to impose such a restraint.

If the powerholder created the power, so that the powerholder is also the donor, the donor/powerholder cannot effectively impose a restraint on release. A self-imposed restraint on release resembles a self-imposed restraint on alienation, which is ineffective. See, for example, Restatement Third of Trusts § 58.

If the exercise of a power of appointment requires the action of two or more individuals, each powerholder has a power of appointment. If one but not the other joint powerholder releases the power, the power survives in the hands of the nonreleasing powerholder, unless the continuation of the power is inconsistent with the donor's purpose in creating the joint power. See Restatement Third of Property: Wills and Other Donative Transfers § 20.1, Comment f.

The ability of an agent or guardian to release a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying Commentary.

SECTION 403. METHOD OF RELEASE.

[(a) In this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(b)] A powerholder of a releasable power of appointment may release the power in whole or in part:

(1) by substantial compliance with a method provided in the terms of the instrument creating the power; or

(2) if the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive, by a record

manifesting the powerholder's intent by clear and convincing evidence.

Legislative Note: A state that defines "record" in Section 102 should delete the bracketed material in this section.

Comment

A powerholder may release the power of appointment by substantial compliance with the method specified in the terms of the instrument creating the power or any other method manifesting clear and convincing evidence of the powerholder's intent. Only if the method specified in the terms of the creating instrument is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the creating instrument is otherwise substantial.

Examples of methods manifesting clear and convincing evidence of the powerholder's intent to release include: (1) delivering (by the same method of delivery that would make an instrument of transfer effective, see Restatement Third of Property: Wills and Other Donative Transfers § 20.3, Comment b) an instrument declaring the extent to which the power is released to an individual who could be adversely affected by an exercise of the power; (2) joining with some or all of the takers in default in making an otherwise effective transfer of an interest in the appointive property, in which case the power is released to the extent a subsequent exercise of the power would defeat the interest transferred; (3) contracting with an individual who could be adversely affected by an exercise of the power not to exercise the power, in which case the power is released to the extent a subsequent exercise of the power would violate the terms of the contract; and (4) communicating in a record an intent to release the power, in which case the power is released to the extent a subsequent exercise of the power would be contrary to manifested intent.

The black-letter of this section is based on Uniform Trust Code § 602(c). The rule of this section is fundamentally consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 20.3 and the accompanying Commentary.

SECTION 404. REVOCATION OR AMENDMENT OF RELEASE. A powerholder may revoke or amend a release of a power of appointment only to the extent that:

(1) the instrument of release is revocable by the powerholder; or

(2) the powerholder reserves a power of revocation or amendment in the instrument of release.

Comment

A release is typically irrevocable. If a powerholder wishes to retain the power to revoke

or amend the release, the powerholder should so indicate in the instrument executing the release.

The ability of an agent or guardian to revoke or amend the release of a power of appointment on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

Other law of the state may permit the reformation of an otherwise irrevocable instrument. See, for example, Uniform Probate Code § 2-805; Uniform Trust Code § 415.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying Commentary.

SECTION 405. POWER TO CONTRACT: PRESENTLY EXERCISABLE POWER OF APPOINTMENT. A powerholder of a presently exercisable power of appointment may contract:

(1) not to exercise the power; or

(2) to exercise the power if the contract when made does not confer a benefit on an impermissible appointee.

Comment

A powerholder of a presently exercisable power may contract to make, or not to make, an appointment if the contract does not confer a benefit on an impermissible appointee. The rationale is that the power is presently exercisable, so the powerholder can presently enter into a contract concerning the appointment.

The contract may not confer a benefit on an impermissible appointee. Recall that a general power presently exercisable in favor of the powerholder or the powerholder's estate has no impermissible appointees. See Section 305(a). In contrast, a presently exercisable nongeneral power, or a general power presently exercisable only in favor of one or more of the creditors of the powerholder or the powerholder's estate, does have impermissible appointees. See Section 305(b)-(c).

A contract *not* to appoint assures that the appointive property will pass to the taker in default. A contract to appoint to a taker in default, if enforceable, has the same effect as a contract not to appoint.

The ability of an agent or guardian to contract on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 21.1 and the accompanying Commentary.

SECTION 406. POWER TO CONTRACT: POWER OF APPOINTMENT NOT PRESENTLY EXERCISABLE. A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power only if the powerholder:

(1) is also the donor of the power; and

(2) has reserved the power in a revocable trust.

Comment

Except in the case of a power reserved by the donor in a revocable inter vivos trust, a contract to exercise, or not to exercise, a power of appointment that is not presently exercisable is unenforceable, because the powerholder does not have the authority to make a current appointment. If the powerholder was also the donor of the power and created the power in a revocable inter vivos trust, however, a contract to appoint is enforceable, because the donor-powerholder could have revoked the trust and recaptured ownership of the trust assets or could have amended the trust to change the power onto one that is presently exercisable.

In all other cases, the donor of a power not presently exercisable has manifested an intent that the selection of the appointees and the determination of the interests they are to receive are to be made in the light of the circumstances that exist on the date that the power becomes exercisable. Were a contract to be enforceable, the donor's intent would be defeated.

The ability of an agent or guardian to contract on behalf of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.

The rule of this section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 21.2 and the accompanying Commentary.

SECTION 407. REMEDY FOR BREACH OF CONTRACT TO APPOINT OR NOT TO APPOINT. The remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

Comment

This section sets forth a rule on remedy. The remedy for a powerholder's breach of an enforceable contract to appoint, or not to appoint, is limited to damages payable out of the appointive property or, if appropriate, specific performance. The powerholder's owned assets are not available to satisfy a judgment for damages. For elaboration and discussion, see Restatement Third of Property: Wills and Other Donative Transfers §§ 21.1 and 21.2, and especially id., § 21.1, Comments c and d. This section does not address the *amount* of damages, which is determined by other law of the state, such as contract law.

[ARTICLE] 5

RIGHTS OF POWERHOLDER'S CREDITORS IN APPOINTIVE PROPERTY

SECTION 501. CREDITOR CLAIM: GENERAL POWER CREATED BY POWERHOLDER.

(a) In this section, "power of appointment created by the powerholder" includes a power of appointment created in a transfer by another person to the extent the powerholder contributed value to the transfer.

(b) Appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate to the extent provided in [cite state law on fraudulent transfers or the Uniform Fraudulent Transfers Act].

(c) Subject to subsection (b), appointive property subject to a general power of appointment created by the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent the powerholder irrevocably appointed the property in favor of a person other than the powerholder or the powerholder's estate.

(d) Subject to subsections (b) and (c), and notwithstanding the presence of a spendthrift provision or whether the claim arose before or after the creation of the power of appointment, appointive property subject to a general power of appointment created by the powerholder is

subject to a claim of a creditor of:

(1) the powerholder, to the same extent as if the powerholder owned the appointive property, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent the estate is insufficient to satisfy the claim and subject to the right of a decedent to direct the source from which liabilities are paid, if the power is exercisable at the powerholder's death.

Comment

Subsection (b) states a well-settled rule: a donor of a power of appointment cannot use a fraudulent transfer to avoid creditors. If a donor fraudulently transfers appointive property, retaining a power of appointment, the donor/powerholder's creditors and the creditors of the donor/powerholder's estate may reach the appointive property as provided in the law of fraudulent transfers.

Subsection (c) also states a well-settled rule: if there is no fraudulent transfer, and the donor/powerholder has made an irrevocable appointment to a third party of the appointive property, the appointed property is beyond the reach of the donor/powerholder's creditors or the creditors of the donor/powerholder's estate. In other words, an irrevocable and nonfraudulent exercise of the general power by the donor/powerholder in favor of someone other than the powerholder or the powerholder's estate eliminates the ability of the powerholder's creditors or the creditors of the powerholder's estate to reach those assets.

Subsection (d) establishes rules governing the remaining fact-pattern: the donor has retained a general power of appointment but has made neither a fraudulent transfer nor an irrevocable appointment. In such a case, the following rules apply. If the donor retains a presently exercisable general power of appointment, the appointive property is subject to a claim of—and is reachable by—a creditor of the powerholder to the same extent as if the powerholder owned the appointive property. If the donor retains a general power of appointment exercisable at death, the appointive property is subject to a claim of—and is reachable by—a creditor of the donor/powerholder's estate (defined with reference to other law, but including costs of administration, expenses of the funeral and disposal of remains, and statutory allowances to the surviving spouse and children) to the extent the estate is insufficient, subject to the decedent's right to direct the source from which liabilities are paid. For the same rules in the context of a retained power to revoke a revocable trust, see Uniform Trust Code § 505(a). The application of these rules is not affected by the presence of a spendthrift provision or by whether the claim arose before or after the creation of the power of appointment. See Restatement Third of Property: Wills and Other Donative Transfers § 22.2, Comment a.

Subsection (a) enables all of these rules to apply even if the general power was not created in a transfer made by the powerholder. The rules will apply to the extent the powerholder

contributed value to the transfer. See Restatement Third of Property: Wills and Other Donative Transfers § 22.2, Comment d. Consider the following examples, drawn from the Restatement.

Example 1. D purchases Blackacre from A. Pursuant to D's request, A transfers Blackacre "to D for life, then to such person as D may by will appoint." The rule of subsection (d) applies to D's general testamentary power, though in form A created the power.

Example 2. A by will transfers Blackacre "to D for life, then to such persons as D may by will appoint." Blackacre is subject to mortgage indebtedness in favor of X in the amount of $10,000. The value of Blackacre is $20,000. D pays the mortgage indebtedness. The rule of subsection (d) applies to half of the value of Blackacre, though in form A's will creates the general power in D.

Example 3. D, an heir of A, contests A's will on the ground of undue influence on A by the principal beneficiary under A's will. The contest is settled by transferring part of A's estate to Trustee in trust. Under the trust, Trustee is directed "to pay the net income to D for life and, on D's death, the principal to such persons as D shall by will appoint." The rule of subsection (d) applies to the transfer in trust, though in form D did not create the general power.

The provisions of this section are designed to be consistent with Uniform Trust Code § 505(a). The provisions and this Comment also rely in part on Restatement Third of Property: Wills and Other Donative Transfers § 22.2 and the accompanying Commentary.

SECTION 502. CREDITOR CLAIM: GENERAL POWER NOT CREATED BY POWERHOLDER.

(a) Except as otherwise provided in subsection (b), appointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of:

(1) the powerholder, to the extent the powerholder's property is insufficient, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid.

(b) Subject to Section 504(c), a power of appointment created by a person other than the powerholder which is subject to an ascertainable standard relating to an individual's health, education, support, or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A) or 26

U.S.C. Section 2514(c)(1), [on the effective date of this [act]][as amended], is treated for purposes of this [article] as a nongeneral power.

Legislative Note: *In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b).*

Comment

Subsection (a) reaffirms the fundamental principle that a presently exercisable general power of appointment is an ownership-equivalent power. Consequently, subsection (b) provides that property subject to a presently exercisable general power of appointment is subject to the claims of the powerholder's creditors, to the extent the powerholder's property is insufficient. Furthermore, upon the powerholder's death, property subject to a general power of appointment is subject to creditors' claims against the powerholder's estate (defined with reference to other law, but including costs of administration, expenses of the funeral and disposal of remains, and statutory allowances to the surviving spouse and children) to the extent the estate is insufficient, subject to the decedent's right to direct the source from which liabilities are paid. In each case, whether the powerholder has or has not purported to exercise the power is immaterial.

Subsection (b) states an important exception. If the power is subject to an ascertainable standard within the meaning of 26 U.S.C. § 2041(b)(1)(A) or 26 U.S.C. § 2514(c)(1), the power is treated for purposes of this article as a nongeneral power, and the rights of the powerholder's creditors in the appointive property are governed by Sections 504(a) and (b).

SECTION 503. POWER TO WITHDRAW.

(a) For purposes of this [article], and except as otherwise provided in subsection (b), a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw.

(b) On the lapse, release, or waiver of a power to withdraw property from a trust, the power is treated as a presently exercisable general power of appointment only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in 26 U.S.C. Section 2041(b)(2) and 26 U.S.C. Section 2514(e) or the amount specified in 26 U.S.C. Section 2503(b), [on the effective date of this [act]][as amended].

Legislative Note: *In states in which the constitution, or other law, does not permit the phrase "as amended" when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b).*

Comment

Subsection (a) treats a power of withdrawal as the equivalent of a presently exercisable general power of appointment, because the two are ownership-equivalent powers. Upon the lapse, release, or waiver of the power of withdrawal, subsection (b) follows the lead of Uniform Trust Code § 505(b)(2) in creating an exception for property subject to a Crummey or five and five power: the holder of the power of withdrawal is treated as a powerholder of a presently exercisable general power of appointment only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Internal Revenue Code §§ 2041(b)(2) and 2514(e) [greater of 5% or $5,000] or § 2503(b) [$13,000 in 2012].

SECTION 504. CREDITOR CLAIM: NONGENERAL POWER.

(a) Except as otherwise provided in subsections (b) and (c), appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate.

(b) Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent that the powerholder owned the property and, reserving the nongeneral power, transferred the property in violation of [cite state statute on fraudulent transfers or the Uniform Fraudulent Transfers Act].

(c) If the initial gift in default of appointment is to the powerholder or the powerholder's estate, a nongeneral power of appointment is treated for purposes of this [article] as a general power.

Comment

Subsection (a) states the general rule of this section. Appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate. The rationale for this general rule is that a nongeneral power of appointment is not an ownership-equivalent power, so the powerholder's creditors have no claim to the appointive assets.

Subsection (b) addresses an important exception: the fraudulent transfer. A fraudulent

transfer arises if the powerholder formerly owned the appointive property covered by the nongeneral power and transferred the property in fraud of creditors, reserving the nongeneral power. In such a case, the creditors can reach the appointive property under the rules relating to fraudulent transfers.

Subsection (c) also addresses an important exception, arising when the initial gift in default of appointment is to the powerholder or the powerholder's estate. In such a case, the power of appointment, though in form a nongeneral power, is in substance a general power, and the rights of the powerholder's creditors in the appointive property are governed by Sections 501 and 502.

The rules of this section are consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 22.1 and the accompanying Commentary.

[ARTICLE] 6

MISCELLANEOUS PROVISIONS

SECTION 601. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 602. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 603. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Except as otherwise provided in this [act], on and after [the effective date of this [act]]:

(1) this [act] applies to a power of appointment created before, on, or after [the effective date of this [act]];

(2) this [act] applies to a judicial proceeding concerning a power of appointment commenced on or after [the effective date of this [act]];

(3) this [act] applies to a judicial proceeding concerning a power of appointment commenced before [the effective date of this [act]] unless the court finds that application of a particular provision of this [act] would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of this [act] does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in this [act] applies to an instrument executed before [the effective date of this [act]] unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) except as otherwise provided in paragraphs (1) through (4), an action done before [the effective date of this [act]] is not affected by this [act].

(b) If a right is acquired, extinguished, or barred on the expiration of a prescribed period that commenced under law of this state other than this [act] before [the effective date of this [act]], the law continues to apply to the right.

Comment

This act is intended to have the widest possible effect within constitutional limitations. Specifically, the act applies to all powers of appointment whenever created, to judicial proceedings concerning powers of appointment commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the act apply to preexisting instruments unless there is a clear indication of a contrary intent in the instruments's terms. By applying the act to preexisting instruments, the need to know two bodies of law will quickly lessen.

This legislation cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights that became irrevocable prior to the effective date. Also, rights already barred under former law are not revived by a possibly more liberal rule under this act. Nor, except as otherwise provided in paragraphs (1) through (4) of subsection (a), is an action done before the effective date of the act affected by the act's enactment.

For comparable Uniform Law provisions, see Uniform Trust Code § 1106 and Uniform Probate Code § 8-101.

SECTION 604. REPEALS; CONFORMING AMENDMENTS.

(a) ....

(b) ....

(c) ....

SECTION 605. EFFECTIVE DATE. This [act] takes effect ....