

DIVISION VI

POWERS OF APPOINTMENT

Scope of Division VI. Division VI addresses powers of appointment.

Historical development. In the history of English law, powers of appointment were primarily the outgrowth of efforts to circumvent the rule that many of the most important types of interests in land could not be devised. Despite this rule, which was not firmly abrogated until the second half of the 17th century, it became possible for an owner to achieve the practical equivalent of a devise by granting the property in the owners's lifetime upon uses to be appointed by the owner's will. The exercise of the power was effective, although a devise would have been void.

Modern use of powers of appointment. The modern use of powers of appointment is not to circumvent any rule of law, but to serve worthy family and tax purposes. Powers of appointment are used routinely in modern estate-planning practice. They are created in trusts to build flexibility into the estate plan and to achieve or avoid certain tax consequences.

Relationship to Division V. Division VI is related to Division V on class gifts, for the permissible appointees and the appointees of a power of appointment are often expressed in class-gift terms.

CHAPTER 17
INTRODUCTION TO POWERS OF APPOINTMENT:
TERMINOLOGY AND DEFINITIONS

Introductory Note

Section

Part A. Definitions

- 17.1 Power of Appointment Defined
- 17.2 Terminology Associated with a Power of Appointment

Part B. Categories of Powers of Appointment

- 17.3 General Power; Nongeneral Power
- 17.4 Power Presently Exercisable; Testamentary Power; Postponed Power
- 17.5 Whether Power Is Exclusionary or Nonexclusionary

Part A. Definitions

§ 17.1 Power of Appointment Defined

A power of appointment is a power that enables the donee of the power, acting in a nonfiduciary capacity, to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property.

§ 17.2 Terminology Associated with a Power of Appointment

(a) “Donor.” The “donor” (“creator”) is the person who created or reserved the power of appointment. Before creating the power, the donor was either the owner of the appointive property or the donee of a power of appointment with respect to the appointive property.

(b) “Donee.” The “donee” (“power holder”) is the person on whom the power of appointment was conferred or in whom the power was reserved. If the donor reserved the power in himself or herself, the donor is also the donee, and

the term “Donor-Donee” is sometimes used to refer to such a person.

(c) “Permissible Appointees.” The “permissible appointees” (“objects”) are the persons to whom an appointment is authorized.

(d) “Impermissible Appointee.” An impermissible appointee (“nonobject”) is anyone who is not a permissible appointee.

(e) “Appointee.” An “appointee” is a person to whom an appointment has been made.

(f) “Taker in default of appointment.” A “taker in default of appointment” (“taker-in-default”) is a person who takes part or all of the appointive property to the extent that the power is not effectively exercised. The clause that identifies the taker- or takers-in-default is called the gift-in-default clause. The gift-in-default clause often identifies the takers-in-default as a class (i.e., a class gift).

(g) “Appointive property.” The “appointive property” is the property or property interest that is subject to a power of appointment.

Part B. Categories of Powers of Appointment

Introductory Note: Powers of appointment are divided into different categories, depending on who are the permissible appointees (general versus nongeneral power), when and by what type of document the power can be exercised (presently exercisable versus testamentary versus postponed), and by whether a permissible appointee must receive a share of the appointive assets (exclusionary versus nonexclusionary power).

In determining which type of power is created, the general principle of construction is that a power falls into the category that gives the donee the maximum discretionary authority, except to the extent that the language creating the power specifically restricts the donee’s authority. Thus, for example, a power is general unless the language specifies that the donee cannot exercise the power in favor of the donee, the donee’s estate, or the creditors of either. A power is presently exercisable unless the language specifies 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 language specifies that a permissible appointee must receive a certain amount or portion of the appointive assets if the power is exercised.

§ 17.3 General Power; Nongeneral Power

(a) A power of appointment is general to the extent that the power is exercisable in favor of the donee, the donee's estate, or the creditors of either, regardless of whether the power is also exercisable in favor of others.

(b) A power of appointment that is not general is a nongeneral power.

§ 17.4 Power Presently Exercisable; Testamentary Power; Postponed Power

(a) A power of appointment is presently exercisable if it is exercisable by the donee at the time in question, whether or not it is also exercisable by will.

(b) A power of appointment is testamentary if it is exercisable only in the donee's will.

(c) A power of appointment is postponed if it is not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified period of 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 period of time.

§ 17.5 Whether Power Is Exclusionary or Nonexclusionary

A power of appointment whose permissible appointees are defined and limited is either exclusionary or nonexclusionary. An exclusionary power is one in which the donor has authorized the donee to appoint to any one or more of the permissible appointees, to the exclusion of the others. A nonexclusionary power is one in which the donor has specified that the donee cannot make an appointment that excludes any permissible appointee or one or more designated permissible appointees from a share of the appointive property. In determining whether a power is exclusionary or nonexclusionary, the power is exclusionary unless the terms of the power expressly provide that an appointment must benefit each permissible appointee or one or more designated permissible appointees.

CHAPTER 18

CREATION OF A POWER OF APPOINTMENT

Introductory Note

Section

18.1 Power of Appointment: How Created

18.2 Donor's Authority to Revoke or Amend Power

Introductory Note: Chapter 18 covers two topics. Section 18.1 addresses how a power of appointment is created, and § 18.2 addresses the authority of the donor to revoke or amend a power after the power has been created.

§ 18.1 Power of Appointment: How Created

A power of appointment is created by a transfer that manifests an intent to create a power of appointment.

§ 18.2 Donor's Authority to Revoke or Amend Power

The donor of a power of appointment lacks the authority to revoke or amend the power, except to the extent that the donor reserved a power of revocation or amendment when creating the power.

CHAPTER 19

EXERCISE OF A POWER OF APPOINTMENT

Introductory Note

Section

19.1 Requisites for Exercise of a Power of Appointment

Part A. Intent to Exercise

19.2 Determining the Donee's Intent to Exercise

19.3 Disposition of Appointive Property

19.4 Donee's Residuary Clause

19.5 Other Circumstances Indicating That Donee Intended to Exercise Power

19.6 Testamentary Exercise of After-Acquired Powers

19.7 Donee's Authority to Revoke or Amend Exercise

Part B. Effectiveness of Donee's Attempted Exercise

19.8 Capacity of Donee to Exercise a Power of Appointment; Freedom from Wrongdoing

19.9 Formal Requirements of an Appointment

19.10 Substantial Compliance with Donor-Imposed Formal Requirements

19.11 Death of Donee Before Power Created

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Part C. Permissible Appointments

19.13 General Power — Permissible Appointments

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19.22 Disposition of Unappointed Property Under Lapsed General Power

19.23 Disposition of Unappointed Property Under Lapsed Nongeneral Power

Part H. Effect of Appointment to Taker in Default

19.24 Partial Appointment to Taker in Default — Disposition of Unappointed Property

19.25 Appointment to Taker in Default — Appointee Takes as Taker in Default Rather than as Appointee

Introductory Note: Chapter 19 covers aspects of the donee's exercise of a power of appointment, including the effectiveness of an attempted exercise and the consequences of an ineffective exercise or of a failure to exercise the power.

§ 19.1 Requisites for Exercise of a Power of Appointment

A power of appointment is exercised to the extent that:

- (1) the donee manifests an intent to exercise the power in an otherwise effective document;**
- (2) the donee's expression of an intent to appoint satisfies the formal requirements of exercise imposed by the donor and by applicable law; and**
- (3) the donee's appointment constitutes a permissible exercise of the power.**

Part A. Intent to Exercise

§ 19.2 Determining the Donee's Intent to Exercise

Whether or not the donee has manifested an intent to exercise a power of appointment is a question of construction.

§ 19.3 Disposition of Appointive Property

A disposition by the donee of property over which the donee has a power of appointment manifests an intent to exercise the donee's power over that property.

§ 19.4 Donee's Residuary Clause

A residuary clause in the donee's will or revocable trust does not manifest an intent to exercise any of the donee's power(s) of appointment, unless the power in question is a general power and the donor did not provide for takers in default or the gift-in-default clause is ineffective.

§ 19.5 Other Circumstances Indicating That Donee Intended to Exercise Power

A disposition manifests an intent to exercise a power of appointment if the disposition, read with reference to the property that the donee owned and other relevant evidence of intent, indicates that the donee understood that he or she was disposing of property covered by the power.

§ 19.6 Exercise of After-Acquired Power

Unless the language or circumstances indicate that the donee had a different intention, a blanket-exercise clause extends to a power of appointment acquired by the donee after the donee executed the document that contains the blanket-exercise clause.

§ 19.7 Donee's Authority to Revoke or Amend Exercise

The donee of a power of appointment lacks the authority to revoke or amend an exercise of the power, except to the extent that the donee reserved a power of revocation or amendment when exercising the power, and the terms of the power do not prohibit the reservation.

Part B. Effectiveness of Donee's Attempted Exercise

Introductory Note: Part B considers factors that may prevent an intended appointment from being effective. The donee may lack the capacity to exercise a power or may be the victim of wrongdoing (§ 19.8). The formal requisites for an appointment may not be satisfied (§ 19.9), although donor-imposed formalities may be satisfied by substantial compliance (§ 19.10). An attempt may be made to exercise a power created after the donee's death (§ 19.11). The consequences of an appointment to a deceased appointee are also examined (§ 19.12).

§ 19.8 Capacity of Donee to Exercise a Power of Appointment; Freedom from Wrongdoing

(a) In order for an attempted exercise of a power of appointment to be effective, the donee must have capacity to exercise the power. The donee has capacity to exercise the power if the donee has capacity to make a similar transfer of owned property.

(b) In order for an attempted exercise of a power of appointment to be effective, the donee must be free from undue influence and other wrongdoing.

§ 19.9 Formal Requirements of an Appointment

In order for an attempted exercise of a power of appointment to be effective, the document purporting to exercise the power must be executed in compliance with (i) the formalities required by law for the transfer by the donee of owned property of a similar type and (ii), except as provided in § 19.10, any additional formalities required by the donor.

§ 19.10 Substantial Compliance with Donor-Imposed Formal Requirements

Substantial compliance with formal requirements of an appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power, is sufficient if (i) the donee knew of and intended to exercise the power, and (ii) the donee's manner of attempted exercise did not impair a material purpose of the donor in imposing the requirement.

§ 19.11 Death of Donee Before Power Created

If the donee dies before the effective date of a document purporting to confer on the donee a power of appointment, the power is not created, and any attempted exercise of the power is ineffective.

**§ 19.12 Appointment to Deceased Appointee or Permissible Appointee's Descendants;
Application of Antilapse Statute**

(a) An appointment to a deceased appointee is ineffective, but an applicable antilapse statute may apply to pass the appointed property to the deceased appointee's descendants or other substitute takers.

(b) Even when the applicable antilapse statute does not expressly address an appointment to a deceased appointee, its purpose and policy should apply to an appointment to a deceased appointee (i) as if the appointed property were owned by either the donor or the donee, and (ii) so that the substituted takers are treated as permissible appointees of the power.

(c) The donee of a nongeneral power is authorized to appoint to the descendants of a deceased permissible appointee, whether or not the permissible appointee's descendants are included within the description of the permissible appointees, but not if the deceased permissible appointee died before the execution of the instrument that created the power. This subsection does not apply if the donor specifically prohibited an appointment to the descendants of a deceased permissible appointee.

Part C. Permissible Appointments

Introductory Note: Part C addresses the permissible appointments that the donee of a general power has the authority to make (§ 19.13) and those that the donee of a nongeneral power has the authority to make (§ 19.14).

§ 19.13 General Power — Permissible Appointments

(a) The donee of a general power that permits appointment to the donee or to the donee’s estate is authorized to make any appointment, including one in trust and one that creates a power of appointment in another, that the donee could make by appointing to the donee or to the donee’s estate and then disposing of the appointive assets as owned property.

(b) The donee of a general power that permits appointment only to the donee’s creditors or to the creditors of the donee’s estate is restricted to appointing to those creditors.

§ 19.14 Nongeneral Power — Permissible Appointments

Except to the extent that the donor has manifested a contrary intention, the donee of a nongeneral power is authorized to make an appointment in any form, including one in trust and one that creates a power of appointment in another, that only benefits permissible appointees of the power.

Part D. Impermissible Appointments

Introductory Note: Part D deals with impermissible appointments — appointments that attempt to frustrate the donor’s direction that the appointive property be devoted exclusively to permissible appointees (objects) or pass in default.

Section 19.15 considers the consequences when the donee attempts to benefit an impermissible appointee by a direct appointment to an impermissible appointee, including an appointment partly to an impermissible appointee and partly to a permissible appointee. Such an appointment is frequently referred to as a “fraud on the power.”

Section 19.16 covers various situations in which the appointment is made to a permissible appointee, but with the purpose and expectation that some or all of the appointed property or some collateral benefit will pass to an impermissible appointee. An attempt to benefit an impermissible appointee through the appointment to a permissible appointee is also frequently referred to as a “fraud on the power.”

The term “fraud on the power” is not necessarily descriptive, for the donee might reasonably believe that the exercise is authorized, even though the permissible appointee to whom the appointment is made and the impermissible appointee sought to be benefitted are unaware of the existence of the power, the making of the appointment, or the result that the donee desires to accomplish.

Section 19.17 deals with the case of the fiduciary who distributes appointed property pursuant to the terms of the wrongful exercise of the power.

Section 19.18 deals with the case of the bona fide purchaser of the appointed assets. The common issue these situations present is the extent to which the improper purpose of benefiting an impermissible appointee adversely affects the fiduciary or the bona fide purchaser.

§ 19.15 Appointment to Impermissible Appointee — “Fraud on the Power”
An appointment that benefits an impermissible appointee is ineffective.

§ 19.16 Appointment to Permissible Appointee for Benefit of Impermissible Appointee — “Fraud on the Power”

An appointment to a permissible appointee is ineffective to the extent that it was (i) conditioned on the appointee conferring a benefit on an impermissible appointee, (ii) subject to a charge in favor of an impermissible appointee, (iii) upon a trust for the benefit of an impermissible appointee, (iv) in consideration of a benefit conferred upon or promised to an impermissible appointee, (v) primarily for the benefit of the appointee’s creditor, if that creditor is an impermissible appointee, or (vi) motivated in any other way to be for the benefit of an impermissible appointee.

§ 19.17 Liability of Fiduciary Who Transfers Property Pursuant to an Ineffective Appointment

(a) A fiduciary who transfers property pursuant to a direct appointment to an impermissible appointee commits a breach of trust.

(b) A fiduciary who transfers property pursuant to an appointment to a permissible appointee commits no breach of trust, unless the fiduciary knows or has reason to know that the appointment was in violation of the donee's scope of authority under § 19.16.

§ 19.18 Purchaser for Value Without Notice

If an appointee of an ineffective appointment transfers the appointive assets to a purchaser for value, the purchaser is protected from liability, unless the purchaser knows or has reason to know that the appointment was in violation of the donee's scope of authority.

Part E. Selective Allocation of Owned and Appointive Assets to Achieve Maximum Effectiveness of Donee's Intent

Introductory Note: Part E propounds rules of construction that deal with the allocation of appointive assets when a dispositive instrument serves the combined purpose of disposing of owned property and exercising a power of appointment. The rules of construction in Part E are based on the constructional preference for the construction that renders the document more effective than other plausible constructions (see § 11.3(c)(2)) and, in certain cases, on the constructional preference for favorable tax consequences (see § 11.3(c)(4)). Under these rules of construction, appointive property is, to the extent possible, allocated in a way that validates the exercise of the power of appointment and produces favorable tax consequences.

Selective allocation is restricted to cases in which the donee exercises a power of appointment and disposes of owned property in the same document. The document that usually does so is the donee's will, but might be a revocable trust created by the donee. The donee's will might appoint the appointive assets to the revocable trust. It is somewhat unusual, although possible, for a donee of a presently exercisable power to combine in one inter vivos instrument the exercise of the power and the transfer of owned property.

One situation that often calls for the selective allocation of owned and appointive assets is when the donee of a general testamentary power or a nongeneral power creates a trust that would run into perpetuity problems if appointive assets are allocated to the trust but would not do so if owned assets are allocated to the trust. See § 27.1, Comments *j*, *j(1)*, *j(2)*, and *j(3)*.

Another situation that can call for selective allocation is when the donee 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.

The result of applying selective allocation is always one that the donee could have provided for in specific language, and one that the donee most probably would have provided for had he or she been aware of the difficulties inherent in the dispositive scheme. By these rules of selective allocation, the courts undertake to prevent the dispositive plan from being frustrated by the ineptness of the donee or the donee's counsel. The result desired by the donee is reached by a route which, though never actually contemplated, is nevertheless not excluded by the language used — a judicial approach adopted as early as *Roe v. Tranmer*, 2 Wils. 75, 95 Eng. Rep. 694 (1757).

The process of selective allocation of owned and appointive assets is sometimes referred to as “marshalling.” The term “marshalling” is not used in this Part to describe the process of allocation based on the assumed intent of the donee, because that term more commonly applies to situations in which the rights of two or more creditors of a common debtor are at issue. When one creditor is entitled to obtain satisfaction out of two funds and another creditor out of only one fund, a court applying equitable principles normally adjusts the matter so that the claim of the former creditor is satisfied so far as possible out of the fund to which the latter creditor does not have access. This process of “marshalling” as between creditors is an outgrowth of general equitable principles and differs from the rules stated in this Part, which are rules of construction.

§ 19.19 Allocation of Property Appointed in Document That Also Disposes of Owned Property

If the donee of a power of appointment exercises the power in a document that also disposes of owned property, the owned and appointive property are deemed to be allocated in the manner that best carries out the donee's intent.

Part F. Consequences of Ineffective or Partially Ineffective Appointments

Introductory Note: Part F addresses the consequences of an ineffective or a partially ineffective exercise of a general or a nongeneral power of appointment. In the case of a partially ineffective appointment, the question addressed in § 19.20 is whether the effective part of the appointment stands or is also rendered ineffective.

Section 19.21 deals with a question that is raised only with respect to an ineffective or a partially ineffective exercise of a general power — whether the ineffective part of the appointment is captured for the donee’s estate under the so-called capture doctrine.

§ 19.20 Effect of Partially Ineffective Appointment on Otherwise Effective Portion of Appointment

If part of an appointment is ineffective and another part, if standing alone, would be effective, the effective part is given effect, except to the extent that the donee’s scheme of disposition is more closely approximated by concluding that some or all of the otherwise effective part should be treated as ineffective.

§ 19.21 Disposition of Ineffectively Appointed Property Under General Power

(a) To the extent that the donee of a general power makes an ineffective appointment, the gift-in-default clause controls the disposition of the ineffectively appointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the ineffectively appointed property passes to the donee or to the donee’s estate rather than under a reversionary interest to the donor or to the donor’s transferees or successors in interest.

Part G. Disposition of Unappointed Property

Introductory Note: Part G addresses the disposition of appointive property when the donee allows a power to lapse. A power of appointment is personal to the donee. If the donee dies without exercising the power, the power lapses at the donee’s death if it has not lapsed earlier. Upon the donee’s death, an unexercised power is not and cannot be passed to the donee’s successors in interest.

When the donee of a power of appointment fails to exercise the power, completely releases the power, or expressly refrains from exercising the power, in whole or in part, the question is: what disposition is to be made of the unappointed appointive property?

Section 19.22 deals with the disposition of unappointed property when the donee had a general power. Section 19.23 deals with the disposition of unappointed property when the donee had a nongeneral power.

§ 19.22 Disposition of Unappointed Property Under Lapsed General Power

(a) To the extent that the donee of a general power fails to exercise the power, completely releases the power, or expressly refrains from exercising the power, the gift-in-default clause controls the disposition of the unappointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes to the donee or to the donee's estate if the donee merely failed to exercise the power, but if the donee released the power or expressly refrained from exercising the power, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

§ 19.23 Disposition of Unappointed Property Under Lapsed Nongeneral Power

(a) To the extent that the donee of a nongeneral power fails to exercise the power, completely releases the power, or expressly refrains from exercising the power, the gift-in-default clause controls the disposition of unappointed property to the extent that the gift-in-default clause is effective.

(b) To the extent that the donor did not provide for takers in default or the gift-in-default clause is ineffective, the unappointed property passes under an implied gift in default to the permissible appointees of the power (including those who are substituted for permissible appointees under an antilapse statute) living when the power lapses, if:

- (1) the permissible appointees are a defined and limited class and**
- (2) the donor has not manifested an intent that the permissible appointees shall receive the appointive property only so far as the donee elects to**

appoint it to them.

(c) If subsection (b) is inapplicable, the unappointed property passes under a reversionary interest to the donor or to the donor's transferees or successors in interest.

Part H. Effect of Appointment to Taker in Default

Introductory Note: Part H addresses the effect of an appointment to takers in default. An appointment to a taker in default raises two potential questions. The situation addressed in § 19.24 is what happens if the donee appoints part of the appointive assets to a taker in default, and leaves the other assets unappointed. Does the appointee share equally with the other takers in default with respect to so much of the appointive assets as pass in default of appointment?

Section 19.25 considers this question: if the appointment made by the donee is to all of the takers in default of appointment, do the takers in default take under the appointment or under the gift in default of appointment?

§ 19.24 Partial Appointment to Taker in Default — Disposition of Unappointed Property
If the donee of a power of appointment makes a valid partial appointment to a taker in default, the taker in default-appointee also takes his or her full share of any unappointed property as taker in default, unless the donor or the donee manifests a contrary intent.

§ 19.25 Appointment to Taker in Default — Appointee Takes as Taker in Default Rather than as Appointee

To the extent that an appointee would have taken the appointed property as a taker in default of appointment had the appointment not been made, the appointee takes under the gift in default of appointment and not under the appointment.

CHAPTER 20

RELEASE AND DISCLAIMER OF A POWER OF APPOINTMENT

Introductory Note

Section

- 20.1 Release of General Power
- 20.2 Release of Nongeneral Power
- 20.3 Methods of Releasing a Releasable Power
- 20.4 Disclaimer of Power by Donee

Introductory Note: Chapter 20 addresses the validity of a release and of a disclaimer of a power of appointment. A complete release and a valid disclaimer assure that the power of appointment will never be exercised, but the difference is that a disclaimer operates as a nonacceptance, whereas a complete release causes a power that was not disclaimed to lapse. Because both a complete release and a disclaimer are irrevocable, they produce certainty that the appointive property will be distributed as unappointed property, as provided in Chapter 19, Part G (§§ 19.22, 19.23).

A partial release operates differently. A partial release does not cause the power to lapse, but alters the terms and nature of the power. A partial release can be used to convert a general power into a nongeneral power.

Chapter 20 develops the release and disclaimer of powers of appointment in four sections. Section 20.1 discusses the release of a general power, regardless of whether it is presently exercisable or not.

Section 20.2 considers the release of a nongeneral power, which can be a power whose permissible appointees are almost as inclusive as a general power or whose permissible appointees form a defined and limited class of persons. This section examines the releasability of a nongeneral power, whether it is presently exercisable or not, and whether it is a power that the donor has mandated shall be exercised.

Section 20.3 deals with the question of what constitutes a release of a power of appointment.

Section 20.4 deals with disclaimers. The law applicable to disclaimers is largely statutory.

§ 20.1 Release of General Power

The donee of a general power of appointment can release the power, in whole or in part, except to the extent that the donor effectively manifested an intent that the power not be releasable. A release is irrevocable unless the donee expressly reserved a power to revoke or amend the release.

§ 20.2 Release of Nongeneral Power

The donee of a nongeneral power of appointment can release the power, in whole or in part, except to the extent that the donor effectively manifested an intent that the power not be releasable. A release is irrevocable unless the donee expressly reserved a power to revoke or amend the release.

§ 20.3 Methods of Releasing a Releasable Power

The donee of a releasable power can release the power, in whole or in part, by:

(1) delivering a writing declaring the extent to which the power is released to a person 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 property that is subject to the power, in which case the power is released to the extent that a subsequent exercise of the power would defeat the interest transferred;

(3) contracting with a person 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 that a subsequent exercise of the power would violate the terms of the contract;

(4) communicating in any other appropriate manner an intent to release the power, in which case the power is released to the extent that a subsequent exercise of the power would be contrary to manifested intent; or

(5) utilizing any method authorized by the donor or by applicable statute.

§ 20.4 Disclaimer of Power by Donee

A person who would otherwise be a donee of a power of appointment can, by a disclaimer, avoid acquiring the power or any part of it.

CHAPTER 21

CONTRACTS TO APPOINT

Introductory Note

Section

21.1 Enforceability of Contract to Appoint a Presently Exercisable Power

21.2 Enforceability of Contract to Appoint a Power Not Presently Exercisable

Introductory Note: Chapter 21 addresses the enforceability of a contract to appoint. A contract to exercise a power of appointment in a certain way in the future is enforceable if the donee has the authority currently to make the promised appointment. Section 21.1 addresses the enforceability of a contract to appoint a presently exercisable power. Section 21.2 addresses the enforceability of a contract to appoint a power that is not presently exercisable.

§ 21.1 Enforceability of Contract to Appoint a Presently Exercisable Power

(a) If the donee of a presently exercisable general power of appointment contracts to make an appointment, the contract is enforceable.

(b) If the donee of a presently exercisable nongeneral power of appointment contracts to make an appointment, the contract is enforceable, unless the contract or the promised appointment confers a benefit upon an impermissible appointee.

§ 21.2 Enforceability of Contract to Appoint a Power Not Presently Exercisable

(a) Except as provided in subsection (b), a contract to exercise a power that is not presently exercisable is unenforceable. Though the promisee cannot obtain damages or the specific property if the promise is not performed, the promisee is entitled to restitution of value that the promisee gave in exchange for the promise.

(b) A contract to exercise a power that is not presently exercisable is enforceable if the donee was also the donor of the power and reserved the power in a revocable inter vivos trust.

CHAPTER 22

RIGHTS OF THE DONEE'S CREDITORS IN APPOINTIVE ASSETS

Introductory Note

Section

- 22.1 Creditors of the Donee — Nongeneral Power
- 22.2 Creditors of the Donee — General Power Created by Donee
- 22.3 Creditors of the Donee — General Power Created by Someone Other than the Donee

Introductory Note: Chapter 22 deals with situations in which the creditors of the donee, seeking to satisfy claims, undertake to reach appointive assets. Section 22.1 addresses creditors' rights regarding a nongeneral power. Sections 22.2 and 22.3 address creditors' rights regarding a general power.

§ 22.1 Creditors of the Donee — Nongeneral Power

Property subject to a nongeneral power of appointment is exempt from claims of the donee's creditors and from liability for expenses of administering the donee's estate.

§ 22.2 Creditors of the Donee — General Power Created by Donee

Property subject to a general power of appointment that was created by the donee is subject to the payment of the claims of the donee's creditors to the same extent that it would be subject to those claims if the property were owned by the donee.

§ 22.3 Creditors of the Donee — General Power Created by Someone Other than the Donee

(a) To the extent that the property owned by the donee is insufficient to satisfy the claims of the donee's creditors, property subject to a presently exercisable general power of appointment that was created by someone other than the donee is subject to those claims to the same extent that it would be subject to those claims if the property were owned by the donee.

(b) Upon the death of the donee, to the extent that the donee's estate is

insufficient to satisfy the claims of creditors of the donee's estate, property subject to a general power of appointment that was created by someone other than the donee and that was exercisable by the donee's will is subject to those claims and expenses to the same extent that it would be subject to those claims and expenses if the property had been owned by the donee.

CHAPTER 23
ELECTIVE-SHARE RIGHTS OF THE DONEE'S
SURVIVING SPOUSE IN APPOINTIVE ASSETS

Introductory Note

Section

23.1 Elective-Share Rights of the Donee's Surviving Spouse in Appointive Assets

Introductory Note: The elective share of the surviving spouse is a statutory provision common to most probate codes in non-community-property states. Elective-share statutes protect a decedent's surviving spouse against disinheritance. The subject is discussed comprehensively in Chapter 9. This Chapter, Chapter 23, addresses a narrow question concerning the elective share: In what circumstances does the donee's surviving spouse have a right to take an elective share in appointive assets?

§ 23.1 Elective-Share Rights of the Donee's Surviving Spouse in Appointive Assets

For the purpose of determining the elective-share rights of the donee's surviving spouse, property is treated as owned by the donee at death to the extent that the property is subject to:

(1) a presently exercisable general power of appointment exercisable by the donee immediately before death; or

(2) a general testamentary power of appointment exercisable by the donee if the donee was also the donor of the power.