

D R A F T
FOR DISCUSSION ONLY

POWERS OF APPOINTMENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For September 23-25, 2011 Drafting Committee Meeting

With Prefatory Notes and Comments

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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POWERS OF APPOINTMENT ACT

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POWERS OF APPOINTMENT ACT

REPORTER'S GENERAL PREFATORY NOTE

This draft is for review by the Drafting Committee in advance of our first meeting. The draft is divided into eight articles. Article 1 contains general provisions. Article 2 concerns the creation, revocation, and amendment of a power of appointment. Article 3 addresses the exercise of a power of appointment. Article 4 concerns the release or disclaimer of a power of appointment. Article 5 contains provisions on contracts to appoint. Article 6 concerns the rights of the donee's creditors in appointive property. Article 7 addresses the elective-share rights of a surviving spouse. Article 8 contains miscellaneous provisions.

After each section, a preliminary Comment discusses the drafting of the section. The preliminary Comments should be read in conjunction with the proposed statutory text.

1 **POWERS OF APPOINTMENT ACT**

2
3 **[ARTICLE] 1**

4 **GENERAL PROVISIONS**

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

7 **SECTION 102. DEFINITIONS.** In this [act]:

8 (1) “Appointive property” means the property or property interest subject to a power of
9 appointment.

10 (2) “Blanket-exercise clause” means a clause in an instrument which purports to exercise
11 a donee’s power of appointment and is not a specific-exercise clause. The term includes a clause
12 that purports to:

13 (A) exercise “any” power of appointment the donee has;

14 (B) appoint “any” property over which the donee has a power of appointment; or

15 (C) dispose of all property subject to disposition by the donee.

16 (3) “Blending clause” means a clause in an instrument which purports to blend appointive
17 property with the donee’s own property in a common disposition.

18 (4) “Donee” means an individual on whom a donor confers a power of appointment.

19 (5) “Donor” means an individual who creates a power of appointment.

20 (6) “Exclusionary power of appointment” means a power of appointment exercisable in
21 favor of a permissible appointee to the exclusion of any other permissible appointee.

22 (7) “General power of appointment” means a power of appointment exercisable by a
23 donee in favor of the donee, the donee’s estate, a creditor of the donee, or a creditor of the

donee's estate.

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

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

(10) "Nonexclusionary power of appointment" means a power of appointment that is not an exclusionary power of appointment.

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

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

(13) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(14) "Postponed power of appointment" means a power of appointment that is not yet exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time.

(15) "Power of appointment" means a power that enables the donee of the power, acting in a nonfiduciary capacity, to designate a recipient of a beneficial ownership interest in or power of appointment over the appointive property.

(16) "Presently exercisable power of appointment" means a power of appointment exercisable by the donee at the time in question.

(17) "Specific-exercise clause" means a clause in an instrument which purports to exercise and specifically refers to the donee's power of appointment.

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

1 appointment.

2 (19) “Testamentary power of appointment” means a power of appointment exercisable
3 only in the donee’s will.

4 **Comment**

5
6 Subsection (1) defines appointive property as the property or property interest subject to a
7 power of appointment. The effective creation of a power of appointment requires that there be
8 appointive property. See Section 201.
9

10 Subsections (2), (3), and (17) explain the distinctions among blanket-exercise, blending,
11 and specific-exercise clauses. A specific-exercise clause exercises and specifically refers to the
12 donee’s power of appointment, using language such as the following: “I hereby exercise the
13 power of appointment conferred upon me by my father’s will as follows: I appoint [fill in details
14 of appointment].” In contrast, a blanket-exercise clause exercises “any” power of appointment
15 the donee may have or appoints “any” property over which the donee may have a power of
16 appointment. The use of specific-exercise clauses is recommended; the use of blanket-exercise
17 clauses is discouraged. See Section 302 and the accompanying Comment. A blending clause
18 blends appointive property with the donee’s own property in a common disposition. A blending
19 clause can be combined with a specific-exercise clause (“All the residue of my estate, including
20 the property over which I have a power of appointment under my father’s will, I devise as
21 follows”) or with a blanket-exercise clause (“All the residue of my estate, including any property
22 over which I may have a power of appointment, I devise as follows”).
23

24 Subsections (4) and (5) define the donor and donee. The donee is the individual on whom
25 the power of appointment was conferred or in whom the power was reserved. The donor is the
26 individual who created or reserved the power of appointment. In the law of powers of
27 appointment, the terms “donor” and “donee” have a long pedigree. See Restatement of Property
28 § 319 (1940); Restatement Second of Property: Donative Transfers § 11.2 (1986). In the case of
29 a reserved power, the same individual is both the donor and the donee. If a donee exercises a
30 power of appointment by creating another power of appointment, the donee of the first power is
31 the donor of the second power, and the donee of the second power is an appointee of the first
32 power.
33

34 Subsections (6) and (10) explain the distinction between exclusionary and
35 nonexclusionary powers of appointment. An exclusionary power is one in which the donor has
36 authorized the donee to appoint to any permissible appointee to the exclusion of others. A
37 nonexclusionary power is one in which the donor has specified that the donee cannot make an
38 appointment excluding any, or a specified, permissible appointee. The donee of a
39 nonexclusionary power is not under a duty to exercise the power; but, if the donee does exercise
40 the power, the donee’s appointment must abide by the power’s nonexclusionary nature. See
41 Sections 307 and 308. Only a power of appointment whose permissible appointees are “defined
42 and limited” can be nonexclusionary. For elaboration of the well-worn term of art “defined and
43 limited,” see Section 105 and the accompanying Comment.
44

Subsections (7) and (11) explain the distinction between general and nongeneral powers of appointment. A general power of appointment enables the donee to exercise the power 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. A nongeneral power of appointment cannot be exercised in favor of the donee, the donee's estate, or the creditors of either. Language creating a power of appointment is construed as creating a general power unless the language expressly prohibits exercise in favor of the donee, the donee's estate, and the creditors of either. See Section 103. A power to revoke, amend, or withdraw is a general power of appointment if it is exercisable in favor of the donee, the donee's estate, or the creditors of either. If the settlor of a trust empowers a trustee or a trust protector to change a donee's power of appointment from a general power into a nongeneral power, or vice versa, the donee's power is either general or nongeneral depending on the scope of the power at any particular time.

Subsection (8) 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.

Subsections (9) and (12) explain the distinction between impermissible and permissible appointees. The permissible appointees of a power of appointment may be narrowly defined (for example, "to such of the donee's descendants as the donee may select"), broadly defined (for example, "to such persons as the donee may select, except the donee, the donee's estate, the donee's creditors, or the creditors of the donee's estate"), or unlimited (for example, "to such persons as the donee may select"). A permissible appointee of a power of appointment does not have a property interest that he or she can transfer to another in order to make the transferee a permissible appointee of the power. Were it 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 be made to an impermissible appointee. See Section 310.

Subsection (13) contains the definition of a person. This is a standard definition approved by the Uniform Law Commission.

Subsections (14), (16), and (19) explain the distinctions among presently exercisable, postponed, and testamentary powers of appointment.

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. Typically, a presently exercisable power of appointment is exercisable at the time in question during the donee's life and also exercisable by the donee's will. Thus, a power of appointment that is exercisable "by deed or will" is a presently exercisable power.

A power of appointment is presently exercisable even though, at the time in question, the donee 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 donee for life, then to distribute the principal by representation to the donee's descendants who survive the donee. The trust further provides that, if the donee leaves no descendants who survive the donee, the principal is to be distributed "to such individuals as the donee shall appoint." The donee has a presently

1 exercisable power of appointment, but the appointive property is a remainder interest that is
2 conditioned on the donee leaving no surviving descendants.

3
4 A power is a postponed power (sometimes known as a deferred power) if it is not yet
5 exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard,
6 or the passage of a specified time. A postponed power becomes presently exercisable upon the
7 occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of
8 the specified time.

9
10 A power is testamentary if it is exercisable only in the donee's will.

11
12 Subsection (15) defines a power of appointment. A power of appointment is a power
13 enabling the donee, acting in a nonfiduciary capacity, to designate recipients of beneficial
14 ownership interests in or powers of appointment over the appointive property.

15 A power to revoke or amend a trust or a power to withdraw income or principal from a
16 trust is a power of appointment, whether the power is reserved by the transferor or conferred on
17 another. See Restatement Third of Trusts § 56, Comment b. A power to withdraw income or
18 principal subject to an ascertainable standard is a postponed power, exercisable upon the
19 satisfaction of the ascertainable standard. See subsection (14).

20
21 A power to direct a trustee to distribute income or principal to another is a power of
22 appointment.

23
24 In this act, a fiduciary distributive power is not a power of appointment. Fiduciary
25 distributive powers include a trustee's power to distribute principal to or for the benefit of an
26 income beneficiary, or for some other individual, or to pay income or principal to a designated
27 beneficiary, or to distribute income or principal among a defined group of beneficiaries. Unlike
28 the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject
29 to fiduciary standards. Unlike a power of appointment, a fiduciary distributive power does not
30 lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a
31 fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of
32 or for the benefit of someone who is not a permissible appointee.

33
34 A power over the management of property, sometimes called an administrative power, is
35 not a power of appointment. For example, a power of sale coupled with a power to invest the
36 proceeds of the sale, as commonly held by a trustee of a trust, is not a power of appointment but
37 is an administrative power. A power of sale merely authorizes the power holder to substitute
38 money for the property sold but does not authorize the holder of the power of sale to alter the
39 beneficial interests in the substituted property.

40
41 A power to designate or replace a trustee or other fiduciary is not a power of
42 appointment. A power to designate or replace a trustee or other fiduciary involves property
43 management and is a power to designate only the nonbeneficial holder of property.

44
45 In this act, the term "power of appointment" refers to a power of appointment regarding
46 which the donee of the power is under no duty to exercise the power. In colloquial usage, the

terms “imperative power,” “mandatory power,” or “power in trust” are sometimes used to refer to a nongeneral power in which there is an implied gift in default of appointment to the permissible appointees of the power. The terms “imperative power,” “mandatory power,” or “power in trust” are misleading and are not used in this act or in the Restatement Third of Property: Wills and Other Donative Transfers to refer to a power in which there is such an implied gift in default. Likewise, the Restatement Third of Trusts, in §§ 45 and 46, does not use the term “imperative power,” “mandatory power,” or “power in trust” in referring to a power of selection that the trustee is under a duty to exercise.

On the authority of the donee to create a power of appointment over the appointive property, see Sections 307 and 308. If a donee exercises a power by creating another power, the donee of the first power is the donor of the second power, and the donee of the second power is an appointee of the first power.

Subsection (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.

The definitions in this Section are 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. PRESUMPTION OF UNLIMITED AUTHORITY. Unless the language creating a power of appointment expressly provides otherwise, and except as otherwise provided in Sections 104 and 105, the power of appointment is:

- (1) general;
- (2) presently exercisable; and
- (3) exclusionary.

Comment

In determining which type of power of appointment is created, the general principle of construction is that a power falls into the category giving the donee the maximum discretionary authority, except to the extent that the language creating the power specifically restricts the donee’s authority. Maximum discretion confers on the donee 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 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

1 takes effect at some later time. A power is exclusionary unless the language specifies that a
2 permissible appointee must receive a certain amount or portion of the appointive assets if the
3 power is exercised.

4
5 The rule of this Section is consistent with, and this Comment draws on, Restatement Third
6 of Property: Wills and Other Donative Transfers §§ 17.3 to 17.5 and the accompanying
7 Introductory Note and Commentary.

8
9 **SECTION 104. POWER HELD JOINTLY WITH ADVERSE PARTY IS**
10 **NONGENERAL.**

11 (a) For purposes of this Section, “adverse party” means an individual who has a substantial
12 beneficial interest in property which would be adversely affected by a donee’s exercise or
13 nonexercise of a power of appointment in favor of the donee, the donee’s estate, a creditor of the
14 donee, or a creditor of the donee’s estate.

15 (b) If a donee may only exercise a power of appointment jointly with an adverse party, the
16 power of appointment is nongeneral.

17 **Comment**

18
19 If a power can only be exercised with the joinder of an adverse party, the power is not a
20 general power. An adverse party is an individual who has a substantial beneficial interest in the
21 trust or other property arrangement that would be adversely affected by the exercise or nonexercise
22 of the power in favor of the donee, the donee’s estate, or the creditors of either.

23
24 The rule of this Section is consistent with, and this Comment draws on, the Restatement
25 Third of Property: Wills and Other Donative Transfers § 17.3, Comment e.

26
27 **SECTION 105. POWER OF APPOINTMENT EXCLUSIONARY IF**
28 **PERMISSIBLE APPOINTEES NOT DEFINED AND LIMITED.** A power of appointment is
29 exclusionary if the permissible appointees are not defined and limited.

30 **Comment**

31
32 Only a power of appointment whose permissible appointees are defined and limited can be
33 nonexclusionary. “Defined and limited” in this context is a well-worn term of art. For elaboration
34 and examples, see Restatement Third of Property: Wills and Other Donative Transfers § 17.5,
35 Comment c. In general, permissible appointees are “defined and limited” if they are defined and
36 limited to a reasonable number. Typically, permissible appointees who are defined and limited are

1 described in class-gift terms: a single-generation class such as “children,” “grandchildren,”
2 “brothers and sisters,” or “nieces and nephews,” or a multiple-generation class such as “issue” or
3 “descendants” or “heirs.” Permissible appointees need not be described in class-gift terms to be
4 defined and limited, however. The permissible appointees are also defined and limited if one or
5 more permissible appointees are designated by name or otherwise individually identified.
6

7 If the permissible appointees are not defined and limited, the power is exclusionary
8 irrespective of the donor’s intent. A power exercisable, for example, in favor of “such person or
9 persons other than the donee, the donee’s estate, the creditors of the donee, and the creditors of the
10 donee’s estate” is an exclusionary power. An attempt by the donor to require the donee in
11 connection with any exercise of the power to appoint at least \$X to each permissible appointee of
12 the power is ineffective, because the permissible appointees of the power are so numerous that it
13 would be administratively impossible to carry out the donor’s expressed intent. The donor’s
14 expressed restriction is disregarded, and the donee may exclude any one or more of the permissible
15 appointees in exercising the power.
16

17 In contrast, a power to appoint only to the donee’s creditors or to the creditors of the
18 donee’s estate is a power in favor of a defined and limited class. Such a power could be
19 nonexclusionary if, for example, the language creating the power provided that the donee’s power
20 is a power to appoint “to such of the donee’s estate creditors as the donee shall by will appoint, but
21 if the donee exercises the power, the donee must appoint \$X to a designated estate creditor or must
22 appoint in full satisfaction of the donee’s debt to a designated estate creditor.”
23

24 If a power is determined to be nonexclusionary because its terms provide that an
25 appointment must benefit each permissible appointee, it is to be inferred that the donor intends to
26 require an appointment to confer a reasonable benefit upon each permissible appointee. An
27 appointment under which a permissible appointee receives nothing, or only a nominal sum,
28 violates this requirement and is forbidden. This doctrine is known as the doctrine forbidding
29 illusory appointments. For elaboration, see Restatement Third of Property: Wills and Other
30 Donative Transfers § 17.5, Comment j.
31

32 The language creating a power sometimes provides that no appointee shall receive any
33 share in default of appointment unless the appointee consents to allow the amount of the
34 appointment to be taken into account in calculating the fund to be distributed in default of
35 appointment. This “hotchpot” language is used to minimize unintended inequalities of
36 distribution among permissible appointees. Such a clause does not make the power
37 nonexclusionary, because the terms do not prevent the donee from making an appointment that
38 excludes a permissible appointee.
39

40 The rule of this Section is consistent with, and this Comment draws on, Restatement
41 Third of Property: Wills and Other Donative Transfers § 17.5 and the accompanying
42 Commentary.
43

44 **SECTION 106. POWER OF APPOINTMENT NOT TRANSFERABLE.** A power
45 of appointment is not transferable.

1 **Comment**

2
3 A donee of a power of appointment may not transfer the power to another. If the donee
4 dies without exercising the power, the power lapses. The power does not pass through the
5 donee's estate to the donee's successors in interest.
6

7 Although a donee may not transfer the donee's power of appointment to another, the
8 donee may, in many circumstances, exercise the power by conferring on an appointee *another*
9 power of appointment over the appointive property. See Sections 307 and 308.
10

11 The rule of this Section is consistent with, and this Comment draws on, the Restatement
12 Third of Property: Wills and Other Donative Transfers § 17.1, Comment b.
13

14 **SECTION 107. SUPPLEMENTATION OF ACT BY COMMON LAW AND**
15 **PRINCIPLES OF EQUITY.** The common law of powers of appointment and principles of
16 equity supplement this [act], except to the extent modified by this [act] or another statute of this
17 [state].

18 **Comment**

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

27 The statutory text of the act is also supplemented by these Comments, which, like the
28 Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v.*
29 *Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform
30 Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993)
31 (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, *Statutory*
32 *Construction* § 52.05 (6th ed. 2000); Jack Davies, *Legislative Law and Process in a Nutshell* §
33 55-4 (2d ed. 1986).

34 The text of and Comment to this Section are based on Uniform Trust Code § 106 and its
35 accompanying Comment.
36

1 [ARTICLE] 2

2 CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT

3 SECTION 201. CREATION OF POWER OF APPOINTMENT.

4 (a) A power of appointment is created only if the donor manifests, in an otherwise
5 effective instrument of transfer, an intent to create in a donee a power of appointment,
6 exercisable in favor of a permissible appointee, over appointive property.

7 (b) A power of appointment may not be created in a deceased donee.

8 (c) A power of appointment may be created in an unborn or unascertained donee, subject
9 to any applicable rule against perpetuities.

10 Comment

11
12 An instrument of transfer can only create a power of appointment if the instrument itself
13 is effective. In order for an instrument to be effective, it must, among other things, be properly
14 executed. Thus, for example, a will creating a power of appointment must be executed in
15 accordance with the requisite statutory formalities for wills. In addition, an instrument of transfer
16 is effective only if the transferor has the capacity to execute the instrument and is free from
17 undue influence and other wrongdoing. On questions of capacity, see Restatement Third of
18 Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On
19 freedom from undue influence and other wrongdoing, see Restatement Third of Property §§ 8.3
20 (Undue Influence, Duress, or Fraud) and 8.4 (Homicide — the Slayer Rule).

21
22 On the ability of an agent under a durable power of attorney to create a power of
23 appointment on behalf of an incapacitated principal, see the Uniform Power of Attorney Act.

24
25 If the instrument is otherwise effective, the instrument must also manifest the intent to
26 create in one or more donees a power of appointment over appointive property. This manifestation
27 of intent does not require the use of particular words or phrases, but careful drafting should leave
28 no doubt about the transferor's intent.

29
30 Sometimes the instrument is poorly drafted, raising the question of whether the donor
31 intended to create a power of appointment. In such a case, determining the donor's intent is a
32 process of construction. On construction generally, see Chapters 10, 11, and 12 of the
33 Restatement Third of Property: Wills and Other Donative Transfers. See also, more specifically,
34 Restatement Third of Property: Wills and Other Donative Transfers § 18.1, Comments b-g,
35 containing many illustrations of language ambiguous about whether a power of appointment was
36 intended and, for each illustration, offering guidance about how to construe the language.

1 The creation of a power of appointment requires that there be a donor, a donee (who may
2 be the same as the donor), and appointive property. There must also be one or more permissible
3 appointees, though these need not be restricted; a donee can be authorized to appoint to anyone.
4 A donor is not required to designate a taker in default of appointment, although a well-drafted
5 instrument will specify one or more takers in default.

6
7 Subsection (b) states the well-accepted rule that a power of appointment cannot be
8 created in a donee who is deceased. If the donee dies before the effective date of an instrument
9 purporting to confer on the donee a power of appointment, the power is not created, and an
10 attempted exercise of the power is ineffective. For example, the effective date of a power of
11 appointment created in a donor's will is the donor's death, not when the donor executes the will.
12 If the donee does not survive the donor, the power of appointment is not created, and an attempt
13 by the donee to exercise the power is ineffective.

14
15 Nor is a power of appointment created if all the possible permissible appointees of the
16 power are deceased when the transfer that is intended to create the power becomes legally
17 operative. If all the possible permissible appointees of a power die after the power is created and
18 before the donee exercises the power, the power terminates.

19
20 A power of appointment is not created if the permissible appointees are so indefinite that it
21 is impossible to identify any person to whom the donee can appoint. If the description of the
22 permissible appointees is such that one or more persons are identifiable, but it is not possible to
23 determine whether other persons are within the description, the power is validly created, but an
24 appointment can only be made to persons who can be identified as within the description of the
25 permissible appointees.

26
27 Subsection (c) explains that a power of appointment can be conferred on an unborn or
28 unascertained donee, subject to any applicable rule against perpetuities. This is a postponed power.
29 The power arises on the donee's birth or ascertainment. The language creating the power as well as
30 other factors such as the donee's capacity under applicable law determine whether the power is
31 then presently exercisable, postponed, or testamentary.

32
33 The rules of this Section are consistent with, and this Comment draws on, Restatement
34 Third of Property: Wills and Other Donative Transfers §§ 18.1 and 19.9 and the accompanying
35 Commentary.

36
37 **SECTION 202. POWER TO REVOKE OR AMEND.** A donor may revoke or amend
38 a power of appointment only to the extent that the donor reserves a power of revocation or
39 amendment in the instrument creating the power of appointment.

40 **Comment**

41
42 The donor of a power of appointment has the authority to revoke or amend the power
43 only to the extent that the donor reserves a power of revocation or amendment in the instrument
44 creating the power.

1
2 The donor's power to revoke or amend a revocable inter vivos trust carries with it the
3 authority to revoke or amend any power of appointment created in the trust. However, to the
4 extent that an irrevocable exercise of the power by the donee removes appointive property from
5 the trust, the donor's authority to revoke or amend the power is eliminated, unless the donor
6 expressly reserved authority to revoke or amend any transfer from the trust after the transfer is
7 completed.

8
9 If an irrevocable inter vivos trust confers a presently exercisable power on someone who
10 is not the settlor of the trust (the settlor being the donor of the power), the donor of the power of
11 appointment lacks authority to revoke or amend the donee's power, except to the extent that the
12 donor expressly reserved the authority to do so. If the donor did reserve the authority to revoke
13 or amend the donee's power, that authority is only effective until the time that the donee
14 irrevocably exercises the power.

15
16 If the same individual is both the donor and the donee of a power of appointment, the
17 donor in his or her capacity as donee can indirectly revoke or amend the power by a partial or
18 total release of the power. See Section 401. After the power has been irrevocably exercised,
19 however, the donor as donor is in no different position in regard to revoking or amending the
20 exercise of the power than the donor would be if the donor and donee were different individuals.

21
22 The rule of this Section is consistent with, and this Comment draws on, Restatement
23 Third of Property: Wills and Other Donative Transfers § 18.2 and the accompanying
24 Commentary.

25 26 [ARTICLE] 3

27 EXERCISE OF POWER OF APPOINTMENT

28 **SECTION 301. REQUISITES FOR EXERCISE OF POWER OF**
29 **APPOINTMENT.** A power of appointment is exercised by a donee if:

30 (1) the donee manifests an intent to exercise the power of appointment in an otherwise
31 effective instrument;

32 (2) the donee's expression of an intent to appoint satisfies the requirements of exercise
33 imposed by law and, subject to Section 306, the donor; and

34 (3) the donee's appointment constitutes a permissible exercise of the power of
35 appointment.

36 Comment

1 In order for a power of appointment to be exercised, subsection (1) requires the donee to
2 manifest an intent to exercise the power. On whether the donee has manifested such an intent,
3 see Sections 302 to 305.

4
5 Subsection (1) also requires the instrument purporting to exercise the power of
6 appointment to be otherwise effective. This means, among other things, that the instrument must
7 be properly executed. Thus, for example, a will exercising a power of appointment must be
8 executed in accordance with the requisite statutory formalities for wills. In addition, the donee
9 must have the capacity to execute the instrument and be free from undue influence and other
10 wrongdoing. On questions of capacity, see Restatement Third of Property: Wills and Other
11 Donative Transfers §§ 8.1 (Mental Capacity) and 8.2 (Minority). On freedom from undue
12 influence and other wrongdoing, see Restatement Third of Property §§ 8.3 (Undue Influence,
13 Duress, or Fraud) and 8.4 (Homicide — the Slayer Rule). On the ability of an agent under a
14 durable power of attorney to exercise a power of appointment on behalf of an incapacitated
15 principal, see the Uniform Power of Attorney Act.

16
17 Subsection (2) requires that the donee's expression of intent to appoint must comply with
18 the requirements of exercise imposed by law and, subject to Section 306, the donor.

19
20 Subsection (3) requires the donee's appointment to constitute a permissible exercise of
21 the power. On permissible exercise, see Sections 307 to 311.

22
23 The law of the donee's domicile governs whether the donee has effectively exercised a
24 power of appointment, unless the instrument creating the power expresses a different intent. See
25 Restatement Second of Conflict of Laws § 275, Comment c.

26
27 The rule of this Section is consistent with, and this Comment draws on, Restatement
28 Third of Property: Wills and Other Donative Transfers §§ 19.1, 19.8, and 19.9 and the
29 accompanying Commentary.

30 31 **SECTION 302. INTENT TO EXERCISE: QUESTION OF CONSTRUCTION.**

32 Whether a donee has manifested an intent to exercise a power of appointment is a question of
33 construction.

34 **Comment**

35
36 Determining whether a donee has manifested an intent to exercise a power of
37 appointment is a process of construction. On the principles for determining donative intent, see
38 Chapters 10, 11, and 12 of the Restatement Third of Property: Wills and Other Donative
39 Transfers.

40
41 Capable drafting leaves no doubt regarding the donee's intent to appoint or not to
42 appoint. Ideally, the donee or the donee's lawyer will have the instrument creating the power of
43 appointment at hand and will formulate the language intended to express the donee's intent in
44 light of the creating instrument.

1
2 Language expressing an intent to exercise a power is clearest if it makes a specific
3 reference to the creating instrument and exercises the power in unequivocal terms and with
4 careful attention to the requirements of exercise, if any, imposed by the donor.
5

6 The recommended method for exercising a power of appointment is by a specific-
7 exercise clause, using language such as the following: “I hereby exercise the power of
8 appointment conferred upon me by [my father’s will] as follows: I appoint [fill in details of
9 appointment].”
10

11 Not recommended is a blanket-exercise clause, which purports to exercise “any power of
12 appointment” the donee may have, using language such as the following: “I hereby exercise any
13 power of appointment I may have as follows: I appoint [fill in details of appointment].” Although
14 a blanket-exercise clause does manifest the donee’s intent to exercise any power of appointment
15 the donee may have, such a clause raises the often-litigated question of whether it satisfies the
16 requirement of specific reference imposed by the donor in the document creating the power.
17

18 A blending clause purports to blend the appointive property with the donee’s own
19 property in a common disposition. The exercise portion of a blending clause can take the form of
20 a specific exercise or, more commonly, a blanket exercise. For example, a clause providing “All
21 the residue of my estate, including the property over which I have a power of appointment under
22 my mother’s will, I devise as follows” is a blending clause with a specific exercise. A clause
23 providing “All the residue of my estate, including any property over which I may have a power
24 of appointment, I devise as follows” is a blending clause with a blanket exercise.
25

26 This act aims to eliminate any significance attached to the use of a blending clause. A
27 blending clause has traditionally been regarded as significant in the application of the doctrines
28 of “selective allocation” and “capture.” This act eliminates the significance of such a clause
29 under those doctrines. See Sections 312 (selective allocation) and 313 (capture). The use of a
30 blending clause is more likely to be the product of the forms used by the donee’s lawyer than a
31 deliberate decision by the donee to facilitate the application of the doctrines of selective
32 allocation or capture.
33

34 If the donee decides not to exercise a specific power or any power that the donee might
35 have, it is important for the donee to consider whether to depend on mere silence to produce a
36 nonexercise or to take definitive action to assure a nonexercise. Definitive action can take the
37 form of a release during life (see Section 401) or a nonexercise clause in the donee’s will or other
38 relevant instrument. A nonexercise clause can take the form of a specific-nonexercise clause (for
39 example, “I hereby do not exercise the power of appointment conferred on me by my father’s
40 trust”) or the form of a blanket-nonexercise clause (for example, “I hereby do not exercise any
41 power of appointment I might have”).
42

43 In certain circumstances, different consequences depend on the donee’s choice. Under
44 Section 304, a residuary clause in the donee’s will is treated as manifesting an intent to exercise a
45 general power in certain limited circumstances if the donee silently failed to exercise the power,
46 but not if the donee released the power or expressly refrained from exercising it. Under Section
47 314, unappointed property passes to the donee’s estate in certain limited circumstances if the

donee silently failed to exercise a general power, but passes to the donor or to the donor's successors in interest if the donee released the power or expressly refrained from exercising it.

The rule of this Section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.2 and the accompanying Commentary.

SECTION 303. INTENT TO EXERCISE: DISPOSITION OF APPOINTIVE

PROPERTY WITHOUT REFERENCE TO POWER OF APPOINTMENT. If a donee makes a disposition of appointive property without referring to a power of appointment, the disposition manifests the donee's intent to exercise the power of appointment if the disposition, read with reference to the property that the donee owns and other relevant evidence of intent, indicates that the donee understands that the donee is disposing of appointive property.

Comment

The rule of this Section is that a disposition by the donee of property over which the donee has a power of appointment may manifest an intent to exercise the donee's power over that property, even though the donee's instrument of transfer does not refer to the power. The rationale of this rule is that *if* the donee's objective is to cause the designated recipient to receive the appointive property, the means by which that objective is achieved is secondary.

The rule of this Section is consistent with, and this Comment draws on, Restatement Third of Property: Wills and Other Donative Transfers § 19.3 and the accompanying Commentary.

SECTION 304. INTENT TO EXERCISE: DETERMINING INTENT FROM RESIDUARY CLAUSE.

(a) For purposes of this Section, "residuary clause" means a residuary clause purporting to dispose only of the donee's own property.

(b) Unless the language or circumstances indicate that a donee has a different intent, a residuary clause in the donee's will or revocable trust manifests the donee's intent to exercise a power of appointment only if:

(1) the power of appointment is a general power of appointment;

(2) (A) there is no taker in default of appointment, or (B) the gift-in-default clause is ineffective; and

(3) the donee has not released or expressly refrained from exercising the power of appointment.

Comment

This Section provides that a residuary clause purporting to dispose only of the donee's own estate (such as "All the residue of my estate, I devise to . . ." or "All of my estate, I devise to . . .") in the donee's will or revocable trust manifests an intent to exercise a power of appointment only if (1) the power in question is a general power; (2) the donor did not provide for takers in default or the gift-in-default clause is ineffective; and (3) the donee did not release or expressly refrain from exercising the power.

The rule stated in this Section applies to a residuary clause that disposes *only* of the donee's own estate. This is a garden-variety residuary clause. In contrast, a residuary clause that disposes of all property that is *subject to disposition* by the donee is a blanket-exercise clause. See Section 102(2)(C).

In a well-planned estate, a power of appointment, whether general or nongeneral, is accompanied by a gift in default. In a poorly 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 that 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 donee the intent to exercise a general power in favor of the donee's residuary devisees. The principal benefit of attributing to the donee the intent to exercise a general power is that it allows the property to pass under the donee's will instead of as part of the donor's estate. Because the donor's death would normally have occurred before the donee died, some of the donor's successors might themselves have predeceased the donee. It is more efficient to avoid tracing the interest through multiple estates to determine who are the present successors. Moreover, to the extent that the donor did not provide for takers in default, it is also more in accord with the donor's probable intent for the donee'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 only cover 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 *nongeneral* power. A residuary clause disposes of the donee's own property, and a nongeneral power is not an ownership-equivalent power.

The rule of this Section is consistent with, and this Comment draws on, Restatement

1 Third of Property: Wills and Other Donative Transfers § 19.4 and the accompanying
2 Commentary.

3
4 **SECTION 305. INTENT TO EXERCISE: AFTER-ACQUIRED POWER.** Unless
5 the language or circumstances indicate that a donee has a different intent:

6 (a) Except as otherwise provided in subsection (b), a blanket-exercise clause extends to a
7 power of appointment acquired by the donee after the donee executed the instrument containing
8 the blanket-exercise clause.

9 (b) If the donee and the donor of the power of appointment are the same individual, the
10 rebuttable presumption in subsection (a) is reversed, unless:

11 (1) the donor did not provide for a taker in default of appointment, or

12 (2) the gift-in-default clause is ineffective.

13 **Comment**

14
15 Nothing in the law prevents a donee from exercising a power of appointment in an
16 instrument executed before the donee acquired the power. The only question is one of
17 construction: whether the donee intended to exercise the after-acquired power. (The term “after-
18 acquired power” in this Section refers to a power acquired on or before the donee’s death. A
19 power of appointment cannot be conferred on a donee who is deceased. See Section 201.)
20

21 If the donee’s instrument of exercise specifically identifies the power that the donee is
22 exercising, the donee’s exercise clause unambiguously expresses an intent to exercise that power,
23 whether the power is an after-acquired power or not. A blanket-exercise clause, however, raises a
24 question of construction.
25

26 The rule of subsection (a) is that, unless the language or circumstances indicate that the
27 donee had a different intent, a blanket-exercise clause extends to a power of appointment
28 acquired by the donee after the donee executed the instrument containing the blanket-exercise
29 clause. General references to then-present circumstances, such as “all the powers I have” or
30 similar expressions, are not a sufficient indication of an intent to exclude an after-acquired
31 power. In contrast, more precise language, such as “all powers I have at the date of execution of
32 this will,” does indicate an intent to exclude an after-acquired power.
33

34 It is important to remember that even if the donee manifests an intent to exercise an after-
35 acquired power, the donee’s intent may be ineffective if the donor’s instrument creating the
36 power expressly precludes such an exercise. See Sections 301 and 304. In the absence of an
37 indication to the contrary, however, it is inferred that the time of the execution of the donee’s
38 exercising instrument is immaterial to the donor. Even if the donor declares that the property

1 shall pass to such persons as the donee “shall” or “may” appoint, these terms do not suffice to
2 indicate an intent to exclude exercise by an instrument previously executed, because these words
3 may be construed to refer to the time when the exercising document becomes effective.
4

5 Subsection (b) states an exception to the general rule of subsection (a). If the donor and
6 donee are the same individual, a blanket-exercise clause in the donor-donee’s preexisting
7 instrument is rebuttably presumed *not* to manifest an intent to exercise a power that the donor
8 later reserved in another donative transfer, unless the donor did not provide for a taker in default
9 of appointment or the gift-in-default clause is ineffective.
10

11 The rules of this Section are consistent with, and this Comment draws on, Restatement
12 Third of Property: Wills and Other Donative Transfers § 19.6 and the accompanying
13 Commentary.
14

15 **SECTION 306. SUBSTANTIAL COMPLIANCE WITH FORMAL DONOR-**
16 **IMPOSED REQUIREMENTS.** A donee’s substantial compliance with the formal
17 requirements of an appointment imposed by the donor, including a requirement that the
18 instrument of exercise make reference or specific reference to the power of appointment, is
19 sufficient if:

- 20 (1) the donee knows of and intends to exercise the power of appointment; and
21 (2) the donee’s manner of attempted exercise does not impair a material purpose of the
22 donor in imposing the requirement.

23 **Comment**

24

25 This Section adopts a substantial-compliance rule for donor-imposed formal
26 requirements. This Section only applies to formal requirements imposed *by the donor*. It does not
27 apply to formal requirements imposed by law, such as the requirement that a will must be signed
28 and attested.
29

30 Whenever the donor imposes formal requirements with respect to the instrument of
31 appointment that exceed the requirements imposed by law, the donor’s purpose in imposing the
32 additional requirements is relevant to whether the donee’s attempted exercise satisfies the rule of
33 this Section. To the extent that the donee’s failure to comply with the additional requirements
34 will not impair the accomplishment of a material purpose of the donor, the donee’s attempted
35 appointment in a manner that substantially complies with a donor-imposed requirement does not
36 fail for lack of compliance with that requirement.
37

38 A formal requirement commonly imposed by the donor is that, in order to be effective,
39 the donee’s attempted exercise must make specific reference to the power. Specific-reference

1 clauses were a pre-1942 invention designed to prevent an inadvertent exercise of a general
2 power. The federal estate tax law then provided that the value of property subject to a general
3 power was included in the donee's gross estate if the general power was exercised. The idea of
4 requiring specific reference was designed to thwart unintended exercise and, hence, unnecessary
5 estate taxation.

6
7 The federal estate tax law has changed. An inadvertent exercise of a general power
8 created after October 21, 1942, no longer has adverse estate tax consequences.

9
10 Nevertheless, donors continue to impose specific-reference requirements. Because the
11 original purpose of the specific-reference requirement was to prevent an inadvertent exercise of
12 the power, it seems reasonable to presume that that this is still the donor's purpose in doing so.
13 Consequently, a specific-reference requirement still overrides any applicable state law that
14 presumes that an ordinary residuary clause was intended to exercise a general power. Put
15 differently: An ordinary residuary clause may manifest the donee's *intent to exercise* (under
16 Section 304 and Section 301(1)) but does not satisfy the *requirements of exercise* if the donor
17 imposed a specific-reference requirement (this Section and Section 301(2)).

18
19 A more difficult question is whether a *blanket-exercise clause* satisfies a specific-
20 reference requirement. If it could be shown that the donee had knowledge of and intended to
21 exercise the power, the blanket-exercise clause would be sufficient to exercise the power, unless
22 it could be shown that the donor's intent was not merely to prevent an inadvertent exercise of the
23 power but instead that the donor had a material purpose in insisting on the specific-reference
24 requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805 or
25 Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the donee's
26 attempted appointment to insert the required specific reference should be explored.

27
28 This rule of this Section is consistent with, but an elaboration of, Uniform Probate Code §
29 2-704: "If a governing instrument creating a power of appointment expressly requires that the
30 power be exercised by a reference, an express reference, or a specific reference, to the power or
31 its source, it is presumed that the donor's intent, in requiring that the donee exercise the power by
32 making reference to the particular power or to the creating instrument, was to prevent an
33 inadvertent exercise of the power."

34
35 The rule of this Section is consistent with, and this Comment draws on, Restatement
36 Third of Property: Wills and Other Donative Transfers § 19.10 and the accompanying
37 Commentary.

38 39 **SECTION 307. PERMISSIBLE APPOINTMENTS: GENERAL POWER.**

40 (a) A donee of a general power of appointment that permits appointment to the donee or
41 the donee's estate may make any appointment, in any form, that the donee could make by
42 appointing to the donee or the donee's estate and then treating the appointive property as owned
43 property.

(b) A donee of a general power of appointment that permits appointment only to a creditor of the donee or of the donee's estate is restricted to appointing to that creditor.

Comment

When a donor creates a general power under which an appointment can be made outright to the donee or the donee's estate, the necessary implication is that the donee may accomplish by an appointment to others whatever the donee 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 donee (even though it says "and to no one else") does not prevent the donee from exercising the power in favor of others. There is no reason to require the donee 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 donee'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 donee 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 donee 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 donee or to the donee'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 donee or to the donee's estate may purport to forbid the donee 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 donee's creditors or the creditors of the donee's estate permits an appointment only to those creditors.

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 the accompanying Commentary.

SECTION 308. PERMISSIBLE APPOINTMENTS: NONGENERAL POWER.

Unless the donor has expressly manifested a contrary intent in the instrument creating the power of appointment, the donee of a nongeneral power of appointment may make an appointment, in any form, in favor of a permissible appointee.

Comment

1
2 Except to the extent that the donor has manifested a contrary intent in the instrument
3 creating the power, the donee of a nongeneral power has the same breadth of discretion in
4 appointment to permissible appointees that the donee has in the disposition of the donee's owned
5 property to permissible appointees of the power.
6

7 Thus, unless the donor has manifested a contrary intent, the donee of a nongeneral power
8 has the authority to exercise the power by an appointment in trust. In order to express a contrary
9 intent, the creating language must expressly *prohibit* an appointment in trust. Language merely
10 *authorizing* the donee to make an outright appointment does not suffice.
11

12 Similarly, except to the extent that the donor has manifested a contrary intent, the donee
13 of a nongeneral power has the authority to exercise the power by creating a general power in a
14 permissible appointee of the original nongeneral power or by creating a nongeneral power in any
15 individual to appoint to some or all of the permissible appointees of the original nongeneral
16 power. In order to express a contrary intent, the creating language must expressly prohibit the
17 creation of new powers by the donee. Language merely conferring the power of appointment on
18 the donee does not suffice.
19

20 The rule of this Section is consistent with, and this Comment draws on, Restatement
21 Third of Property: Wills and Other Donative Transfers § 19.14 and the accompanying
22 Commentary.
23

24 **SECTION 309. APPOINTMENT TO DECEASED APPOINTEE OR TO**
25 **PERMISSIBLE APPOINTEE'S DESCENDANTS.**

26 (a) Subject to [cite state statute on antilapse or Sections 2-603 and 2-707 of the Uniform
27 Probate Code], an appointment to a deceased appointee is ineffective.

28 (b) A donee of a nongeneral power of appointment may exercise the power of
29 appointment in favor of a descendant of a deceased permissible appointee whether or not the
30 descendant is described by the donor as a permissible appointee, unless:

31 (1) the deceased permissible appointee dies before the execution of the instrument
32 creating the power of appointment, or

33 (2) the instrument creating the power of appointment specifically prohibits the
34 appointment.

35 **Comment**
36

1 Just as property cannot be transferred to an individual who is deceased (see Restatement
2 Third of Property: Wills and Other Donative Transfers § 1.2), a power of appointment cannot be
3 effectively exercised in favor of a deceased appointee.
4

5 However, an antilapse statute may apply to trigger the substitution of the deceased
6 appointee's descendants (or other substitute takers), unless the donor or donee expresses a
7 contrary intent.
8

9 When an antilapse statute does not expressly address the exercise of a power of
10 appointment, a court could (and should) nevertheless construe it to apply to such an exercise. See
11 Restatement Third of Property: Wills and Other Donative Transfers § 5.5, Comment *l*. The
12 rationale underlying antilapse statutes, that of presumptively attributing to the testator the intent
13 to substitute the descendants of a predeceased devisee, applies equally to the exercise of a power
14 of appointment.
15

16 The substitute takers provided by an antilapse statute (typically the descendants of the
17 deceased appointee) are treated as permissible appointees even if the description of permissible
18 appointees provided by the donor does not expressly cover them. This rule corresponds to the
19 rule applying antilapse statutes to class gifts. Antilapse statutes substitute the descendants of
20 deceased class members, even if the class member's descendants are not members of the class.
21 See Restatement Third of Property: Wills and Other Donative Transfers § 19.12, Comment *e*.
22

23 The donor of a power, general or nongeneral, can prohibit the application of an antilapse
24 statute to the donee's appointment and, in the case of a nongeneral power, can prohibit an
25 appointment to the descendants of a deceased permissible appointee, but must do so expressly. A
26 traditional gift-in-default clause does not express a contrary intent in either case, unless the
27 clause expressly provides that it is to take effect instead of the descendants of a deceased
28 permissible appointee.
29

30 Subsection (b) provides that the descendants of a deceased permissible appointee are
31 treated as permissible appointees of a nongeneral power of appointment, but only if the deceased
32 permissible appointee is alive when the power was created or was born thereafter. This rule is a
33 logical extension of the application of antilapse statutes to appointments. If an antilapse statute
34 can substitute the descendants of a deceased appointee, the donee of the power should be allowed
35 to make a direct appointment to one or more descendants of a deceased permissible appointee.
36

37 The rule of this Section is consistent with, and this Comment draws on, Restatement
38 Third of Property: Wills and Other Donative Transfers § 19.12 and the accompanying
39 Commentary.
40

41 **SECTION 310. IMPERMISSIBLE APPOINTMENT: APPOINTMENT TO**
42 **IMPERMISSIBLE APPOINTEE.** Except as otherwise provided in Section 309, an
43 appointment to an impermissible appointee is ineffective.
44

Comment

1
2 The donor of a power of appointment sets the range of permissible appointees by
3 designating the permissible appointees of the power. An attempt by the donee to exceed that
4 authority by an appointment to an impermissible appointee is a fraud on the power and is
5 ineffective.

6
7 A general power under which the donee is free to appoint to himself or to his estate has
8 no impermissible appointee. Even if the instrument creating such a general power expressly
9 excludes certain persons as permissible appointees of the power, the donee can make a direct
10 appointment of a beneficial interest in favor of such excluded persons, because the donee could
11 have achieved the same result by exercising the power in favor of the donee or the donee's estate
12 and then disposing of it inter vivos or by will to the excluded persons. A general power under
13 which the donee is only authorized to appoint to the donee's creditors or the creditors of the
14 donee's estate can only be exercised in favor of those creditors. See Section 307.

15
16 The donee of a nongeneral power can make a valid appointment only to a permissible
17 appointee as defined by the donor or, in the case of a deceased permissible appointee with a
18 surviving descendant, as expanded by Section 309. An attempted appointment to an
19 impermissible appointee is a fraud on the power and ineffective.

20
21 The rule of this Section is consistent with, and this Comment draws on, Restatement
22 Third of Property: Wills and Other Donative Transfers § 19.15 and the accompanying
23 Commentary.

24
25 **SECTION 311. IMPERMISSIBLE APPOINTMENT: APPOINTMENT TO**
26 **PERMISSIBLE APPOINTEE FOR BENEFIT OF IMPERMISSIBLE APPOINTEE. A**
27 donee's appointment to a permissible appointee is ineffective to the extent the donee intends the
28 appointment to benefit an impermissible appointee.

29 **Comment**

30 If, in making an appointment to a permissible appointee, the donee's purpose is
31 essentially to circumvent the donee's scope of authority by benefiting an impermissible
32 appointee, the donee has acted impermissibly. Thus, to the extent that the appointment to the
33 permissible appointee is induced by such a purpose, the appointment is ineffective.

34
35 Intending to benefit an impermissible appointee is a fraud on the power. Among the most
36 common devices employed to commit such a fraud on the power are: an appointment
37 conditioned on the appointee conferring a benefit on an impermissible appointee; an appointment
38 subject to a charge in favor of an impermissible appointee; an appointment upon a trust for the
39 benefit of an impermissible appointee; an appointment in consideration of a benefit to an
40 impermissible appointee; and an appointment primarily for the benefit of the permissible
41 appointee's creditor if the creditor is an impermissible appointee. Each of these appointments is
42 impermissible and ineffective.

1
2 The rule of this Section applies only when the donee attempts to confer a benefit on an
3 impermissible appointee. The rule of this Section does not invalidate an appointment to a
4 permissible appointee for the purpose of conferring a benefit on another permissible appointee.
5 Nor does the rule of this Section prohibit appointment to an impermissible appointee if the intent
6 to benefit the impermissible appointee is not the donee's but rather is the intent of a permissible
7 appointee in whose favor the donee has decided to exercise the power. In other words, if the
8 donee makes a decision to exercise the power in favor of a permissible appointee, the permissible
9 appointee may request the donee to transfer the appointive assets directly to an impermissible
10 appointee. The appointment directly to the impermissible appointee in this situation is effective,
11 being treated for all purposes as an appointment first to the permissible appointee, followed by a
12 transfer by the permissible appointee to the impermissible appointee.

13
14 The rule of this Section is consistent with, and this Comment draws on, Restatement
15 Third of Property: Wills and Other Donative Transfers § 19.16 and the accompanying
16 Commentary.

17
18 **SECTION 312. DOCTRINE OF SELECTIVE ALLOCATION.** If a donee exercises
19 a power of appointment in an instrument that also disposes of owned property, the owned and
20 appointive property are deemed to be allocated in the manner that best carries out the donee's
21 intent.

22 **Comment**

23
24 The rule of this Section is commonly known as the doctrine of selective allocation. This
25 doctrine applies if the donee uses the same instrument to exercise a power of appointment and to
26 dispose of property the donee owns. For purposes of this Section, the donee's will, any codicils
27 to the donee's will, and any revocable trust created by the donee that did not become irrevocable
28 before the donee's death are treated as the same instrument.

29
30 The doctrine of selective allocation provides that the owned and appointive property are
31 deemed to be allocated in the manner that best carries out the donee's intent.

32
33 One situation that often calls for selective allocation is when the donee disposes of
34 property to permissible and impermissible appointees. By allocating owned assets to the
35 dispositions favoring impermissible appointees and allocating appointive assets to permissible
36 appointees, the appointment is rendered effective.

37
38 The result of applying selective allocation is always one that the donee could have
39 provided for in specific language, and one that the donee most probably would have provided for
40 had he or she been aware of the difficulties inherent in the dispositive scheme. By the rule of
41 selective allocation, courts undertake to prevent the dispositive plan from being frustrated by the
42 ineptness of the donee or the donee's lawyer. For an early case adopting selective allocation, see
43 *Roe v. Tranmer*, 2 Wils. 75, 95 Eng. Rep. 694 (1757).

1
2 The rule of this Section is consistent with, and this Comment draws on, Restatement
3 Third of Property: Wills and Other Donative Transfers § 19.19 and the accompanying
4 Commentary, containing a full discussion of the doctrine of selective allocation.
5

6 **SECTION 313. CAPTURE DOCTRINE: DISPOSITION OF INEFFECTIVELY**
7 **APPOINTED PROPERTY UNDER GENERAL POWER.**

8 (a) For purposes of this Section, “general power of appointment” does not include a
9 power of revocation, amendment, or withdrawal.

10 (b) If a donee of a general power of appointment makes an ineffective disposition:

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

13 (2) if the gift-in-default clause is nonexistent or ineffective, the ineffectively
14 appointed property passes to the donee if living or, if the donee is not living, to the donee’s
15 estate.

16 **Comment**
17

18 The rule of this Section applies when the donee of a general power makes an ineffective
19 appointment. The rule of this Section does not apply when the donee of a general power fails to
20 exercise the power, releases the power, or expressly refrains from exercising the power. (On such
21 fact-patterns, see instead Section 314.)
22

23 Nor does the rule of this Section apply to an ineffective exercise of a power of
24 revocation, amendment, or withdrawal — in each case, a power pertaining to a trust. To the
25 extent that the donee of one of these types of powers makes an ineffective appointment, the
26 ineffectively appointed property remains in the trust.
27

28 The rule of this Section is a modern variation of the so-called “capture doctrine” adopted
29 by a small body of case law and followed in Restatement Second of Property: Donative
30 Transfers § 23.2. Under that doctrine, the ineffectively appointed property passed to the donee or
31 the donee’s estate, but only if the donee’s ineffective appointment manifested an intent to assume
32 control of the appointive property “for all purposes” and not merely for the limited purpose of
33 giving effect to the attempted appointment. If the donee’s ineffective appointment manifested
34 such an intent, the donee’s ineffective appointment was treated as an implied alternative
35 appointment to the donee or the donee’s estate, and thus took effect even if the donor provided
36 for takers in default and one or more of the takers in default were otherwise entitled to take.
37

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

8
9 Whether or not the donee's ineffective appointment manifested an intent to assume
10 control of the appointive property "for all purposes" often depended on nothing more than
11 whether the donee's ineffective appointment was contained in a blending clause. The use of a
12 blending clause rather than a direct-exercise clause, however, is typically the product of the
13 drafting lawyer's forms rather than a deliberate choice of the donee.

14
15 The rule of this Section alters the traditional capture doctrine in two ways: (1) the gift-in-
16 default clause takes precedence over any implied alternative appointment to the donee or the
17 donee's estate deduced from the use of a blending clause or otherwise; and (2) the ineffectively
18 appointed property passes to the donee or the donee's estate only if there is no gift-in-default
19 clause or the gift-in-default clause is ineffective. Nothing turns on whether the donee used a
20 blending clause or somehow otherwise manifested an intent to assume control of the appointive
21 property "for all purposes."

22
23 The rule of this Section is consistent with, and this Comment draws on, Restatement
24 Third of Property: Wills and Other Donative Transfers § 19.21 and the accompanying
25 Commentary.

26
27 **SECTION 314. DISPOSITION OF UNAPPOINTED PROPERTY UNDER**
28 **LAPSED GENERAL POWER.**

29 (a) For purposes of this Section, "general power of appointment" does not include a
30 power of revocation, amendment, or withdrawal.

31 (b) If a donee fails to exercise, releases, or expressly refrains from exercising a general
32 power of appointment:

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

35 (2) if the gift-in-default clause is nonexistent or ineffective, the unappointed
36 property passes to:

37 (A) if the donee failed to exercise the power, the donee if the donee is

1 living or, if the donee is not living, the donee's estate; or

2 (B) if the donee released or expressly refrained from exercising the power,
3 the donor if the donor is living or, if the donor is not living, the donor's living successor in
4 interest.

5 **Comment**

6
7 The rule of this Section applies to a case in which the donee of a general power of
8 appointment does not exercise the power. The rule does *not* apply to a donee's release or failure
9 to exercise a power of revocation, amendment, or withdrawal — powers pertaining to a trust. If
10 the donee releases or dies without exercising a power of revocation or amendment, the power to
11 revoke expires and, unless someone else continues to have a power of revocation or amendment,
12 the trust becomes irrevocable and unamendable. If the donee releases or dies without exercising
13 a power to withdraw principal of a trust, the principal that the donee could have withdrawn, but
14 did not, remains part of the trust.

15
16 The rationale for the rule of this Section is as follows. To the extent that the donee of a
17 general power fails to exercise the power, releases the power, or expressly refrains from
18 exercising the power, thus causing the power to lapse, the gift-in-default clause controls the
19 disposition of the unappointed property, to the extent that the gift-in-default clause is effective.
20 To the extent that the donor did not provide for takers in default or the gift-in-default clause is
21 ineffective, the disposition of the unappointed property depends on whether the donee merely
22 failed to exercise the power or whether the donee released the power or expressly refrained from
23 exercising it by, for example, using a nonexercise clause. If the donee merely failed to exercise
24 the power, the unappointed property passes to the donee or to the donee's estate. The rationale is
25 the same as when the donee makes an ineffective appointment. If, however, the donee released
26 the power or expressly refrained from exercising it, the donee has affirmatively chosen to reject
27 the opportunity to gain ownership of the property, and the unappointed property passes under a
28 reversionary interest to the donor or to the donor's transferees or successors in interest.

29
30 The rule of this Section is consistent with, and this Comment draws on, Restatement
31 Third of Property: Wills and Other Donative Transfers § 19.22 and the accompanying
32 Commentary.

33 **SECTION 315. DISPOSITION OF UNAPPOINTED PROPERTY UNDER**

34
35 **LAPSED NONGENERAL POWER.** If a donee fails to exercise, releases, or expressly refrains
36 from exercising a nongeneral power of appointment:

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

38 (b) if the gift-in-default clause is nonexistent or ineffective, the unappointed property

1 passes to:

2 (1) the permissible appointees, if:

3 (A) the permissible appointees are defined and limited; and

4 (B) the donor has not manifested an intent that permissible appointees
5 should receive appointive property only if the donee elects; or

6 (2) the donor if the donor is living or, if the donor is not living, the donor's living
7 successor in interest.

8 **Comment**

9
10 To the extent that the donee of a nongeneral power fails to exercise the power, releases
11 the power, or expressly refrains from exercising the power, thus causing the power to lapse, the
12 gift-in-default clause controls the disposition of the unappointed property, to the extent that the
13 gift-in-default clause is effective.

14
15 To the extent that the donor did not provide for takers in default or the gift-in-default
16 clause is ineffective, the unappointed property passes to the permissible appointees of the power
17 (including those who are substituted for permissible appointees under an antilapse statute) living
18 when the power lapses, if the permissible appointees are "defined and limited" (on the meaning
19 of this term of art, see the Comment to Section 105) and the donor has not manifested an intent
20 that the permissible appointees shall receive the appointive property only so far as the donee
21 elects to appoint it to them. This rule of construction is based on the assumption that the donor
22 intends the permissible appointees of the power to have the benefit of the property. The donor
23 focused on transmitting the appointive property to the permissible appointees through an
24 appointment, but if the donee fails to carry out this particular method of transfer, the donor's
25 underlying intent to pass the appointive property to the defined and limited class of permissible
26 appointees should be carried out. Subsection (b)(1) effectuates the donor's underlying intent by
27 implying a gift in default of appointment to the defined and limited class of permissible
28 appointees who are living when power lapses.

29
30 No implied gift in default of appointment to the permissible appointees arises if the
31 permissible appointees are identified in such broad and inclusive terms that they are not defined
32 and limited. In such an event, the donor has no underlying intent to pass the appointive property
33 to such permissible appointees. Similarly, if the donor manifests an intent that the defined and
34 limited class of permissible appointees are to receive the appointive property only by
35 appointment, the donor's manifestation of intent eliminates any implied gift in default to the
36 permissible appointees. Subsection (b)(2) responds to these possibilities by providing for a
37 reversion to the donor or the donor's successor in interest.

38
39 The rule of this Section is consistent with, and this Comment draws on, Restatement
40 Third of Property: Wills and Other Donative Transfers § 19.23 and the accompanying

Commentary.

SECTION 316. DISPOSITION OF UNAPPOINTED PROPERTY WHEN

PARTIAL APPOINTMENT TO TAKER IN DEFAULT. Unless the donor or donee of a power of appointment manifests a contrary intent, if the donee makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment remains entitled to a full share of unappointed property.

Comment

If the donee of a power of appointment makes a valid partial appointment to a taker in default, leaving some property 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, thereby restricting the donee's freedom to benefit an appointee who is also a taker in default in both capacities. If the donor has not manifested a contrary intent, the *donee* is free to exercise the power in favor of a taker in default who is a permissible appointee. Unless the donee manifests a contrary intent in the terms of the appointment, it is assumed that the donee 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 317. APPOINTMENT TO TAKER IN DEFAULT. If a donee makes an appointment to a taker in default of appointment and the appointee would have taken the property under the gift-in-default clause had the property not been appointed, the appointee takes under the gift-in-default clause, not under the appointment.

Comment

This Section articulates the rule that, to the extent that 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

1 of appointment. To whatever extent the donee purports to appoint an interest already held in
2 default of appointment, the donee does not exercise the power to alter the donor's disposition but
3 merely declares an intent not to alter it. To the extent, however, that the appointed property *is*
4 *different from* (e.g., is a lesser estate) or *exceeds the total of* the property the appointee would
5 receive as a taker in default, the property passes under the appointment.

6
7 Usually it makes no difference whether the appointee takes as appointee or as taker in
8 default. The principal difference arises in jurisdictions that follow the rule that the estate
9 creditors of the donee of a general testamentary power that was conferred on the donee by
10 another have no claim on the appointive property unless the donee has exercised the power.
11 Although this act does not follow that rule regarding creditor's rights (see Section 603), some
12 jurisdictions do.

13
14 The rule of this Section is consistent with, and this Comment draws on, Restatement
15 Third of Property: Wills and Other Donative Transfers § 19.25 and the accompanying
16 Commentary.

17 18 **SECTION 318. DONEE'S AUTHORITY TO REVOKE OR AMEND EXERCISE.**

19 A donee of a power of appointment may revoke or amend an exercise of the power of
20 appointment only to the extent that:

21 (1) the donee reserves a power of revocation or amendment in the instrument exercising
22 the power of appointment; and

23 (2) the terms of the power of appointment do not prohibit the reservation.

24 **Comment**

25
26 This Section recognizes that the donee of a power of appointment lacks the authority to
27 revoke or amend an exercise of the power, except to the extent that the donee reserved a power
28 of revocation or amendment in the instrument exercising the power of appointment, and to the
29 extent that the terms of the power of appointment do not prohibit the reservation.

30
31 A donee of a power of appointment who exercises the power is like any other transferor
32 of property in regard to authority to revoke or amend the transfer. Hence, unless the donee in
33 some appropriate manner manifests an intent that an appointment is revocable or amendable, the
34 appointment is irrevocable.

35
36 If the donor of a power of appointment manifests an intent that any exercise of the power
37 is irrevocable, the effect differs with respect to a general power and a nongeneral power. Such a
38 manifestation will never be found in a testamentary power of appointment, because when the
39 will takes effect the donee will not be alive to revoke or amend the exercise of the power. In the
40 case of a general power presently exercisable, a provision that a revocable or amendable
41 appointment cannot be made has no effect, because the donee can simply appoint the appointive

1 assets to himself and then make a revocable or amendable transfer of the then-owned property.
2 Any appointment contrary to a prohibition against a revocable or amendable exercise of a
3 general power presently exercisable is construed as an appointment to the donee followed by a
4 transfer by the donee of the then-owned property.
5

6 The donee of a presently exercisable *nongeneral* power cannot appoint the appointive
7 assets to himself. Hence, if the donor prohibits the donee from making a revocable or amendable
8 appointment, the donor's manifested intent is effective. In such a case, the donee can only make
9 an irrevocable and unamendable appointment, and any effort by the donee to retain a power to
10 revoke or amend an exercise is ineffective.
11

12 If the same individual is both the donor and the donee, a provision that an exercise of the
13 power cannot be revoked or amended is ineffective, because the donor can release the donee
14 from the prohibition. When the same individual is both the donor and donee, a revocable or
15 amendable exercise of the power by the donee is treated as including a release by the donor of
16 the prohibition against a revocable or amendable exercise.
17

18 If the donee is not prohibited by the donor from making a revocable or amendable
19 exercise of a power of appointment and the donee makes such an exercise, the donee may
20 specify the manner of revoking or amending the exercise. In the absence of such a specification,
21 the requirements imposed by the donor that must be met to exercise the power are applicable.
22 There may also be formalities imposed by statute in regard to the revocation or amendment of an
23 exercise of a power relating to certain property (e.g., real property).
24

25 An effective revocation of the exercise of a power of appointment restores the donee's
26 options to what they were before the power was exercised. If the power would be exercisable had
27 there never been an exercise followed by a revocation of it, the power is exercisable to the same
28 extent after the revocation.
29

30 The rule of this Section is consistent with, and this Comment draws on, Restatement
31 Third of Property: Wills and Other Donative Transfers § 19.7 and the accompanying
32 Commentary.
33

34 [ARTICLE] 4

35 RELEASE OR DISCLAIMER

36 **SECTION 401. AUTHORITY TO RELEASE.** A donee may release a power of
37 appointment, in whole or in part, except to the extent that the donor effectively manifests an
38 intent that the power of appointment not be releasable.

39 Comment

40
41 The donee of a power of appointment, whether general or nongeneral, presently
42 exercisable or testamentary, has the authority to release the power in whole or in part, in the

1 absence of a valid restriction on release imposed by the donor. A partial release is a release that
2 narrows the freedom of choice otherwise available to the donee but does not eliminate the
3 donee's power. A partial release may relate either to the manner of exercising the power or to the
4 persons in whose favor the power may be exercised.

5
6 If the donee did not create the power, so that the donee and donor are different
7 individuals, the donor can effectively impose a restraint on release, but the donor must
8 affirmatively manifest an intent to impose such a restraint.

9
10 If the donee created the power, so that the donee is also the donor, the donor-donee
11 cannot effectively impose a restraint on release. A self-imposed restraint on release resembles a
12 self-imposed restraint on alienation, which is ineffective. See, e.g., Restatement Third of Trusts §
13 58.

14
15 If the exercise of a power of appointment requires the action of two or more individuals,
16 each donee has a power of appointment. If one but not the other joint donee releases the power,
17 the power survives in the hands of the nonreleasing donee, unless the continuation of the power
18 is inconsistent with the donor's purpose in creating the joint power. See Restatement Third of
19 Property: Wills and Other Donative Transfers § 20.1, Comment f.

20
21 The rule of this Section is consistent with, and this Comment draws on, Restatement
22 Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying
23 Commentary.

24
25 **SECTION 402. METHODS OF RELEASE.** A donee of a releasable power of
26 appointment may release the power in whole or in part:

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

29 (2) if the instrument creating the power of appointment does not provide a method or the
30 method provided in the instrument is not expressly made exclusive, by any method manifesting
31 clear and convincing evidence of the donee's intent.

32 **Comment**

33
34 The donee may release a power of appointment by substantial compliance with the
35 method specified in the instrument creating the power or any other method manifesting clear and
36 convincing evidence of the donee's intent. Only if the method specified in the instrument
37 creating the power is made exclusive is use of the other methods prohibited. Even then, a failure
38 to comply with a technical requirement, such as required notarization, may be excused as long as
39 compliance with the method specified in the instrument creating the power is otherwise

1 substantial.

2
3 Examples of methods manifesting clear and convincing evidence of the donee's intent to
4 release include: (1) delivering an instrument declaring the extent to which the power is released
5 to an individual who could be adversely affected by an exercise of the power; (2) joining with
6 some or all of the takers in default in making an otherwise effective transfer of an interest in the
7 appointive property, in which case the power is released to the extent that a subsequent exercise
8 of the power would defeat the interest transferred; (3) contracting with an individual who could
9 be adversely affected by an exercise of the power not to exercise the power, in which case the
10 power is released to the extent that a subsequent exercise of the power would violate the terms of
11 the contract; and (4) communicating in any other appropriate manner an intent to release the
12 power, in which case the power is released to the extent that a subsequent exercise of the power
13 would be contrary to manifested intent.

14
15 The text of this Section is based on Uniform Trust Code § 602(c). The rule of this Section
16 is fundamentally consistent with, and this Comment draws on, Restatement Third of Property:
17 Wills and Other Donative Transfers § 20.3 and the accompanying Commentary.

18
19 **SECTION 403. REVOCATION OR AMENDMENT OF RELEASE.** A release is
20 irrevocable unless the donee reserves a power of revocation or amendment in the instrument
21 executing the release.

22 **Comment**

23 A release is generally irrevocable. If a donee wishes to retain the power to revoke or
24 amend the release, the donee must so indicate in the instrument executing the release.

25
26 The rule of this Section is consistent with, and this Comment draws on, Restatement
27 Third of Property: Wills and Other Donative Transfers §§ 20.1 and 20.2 and the accompanying
28 Commentary.

29
30 **SECTION 404. DISCLAIMER.** As provided by [cite state statute or the Uniform
31 Disclaimer of Property Interests Act]:

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

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

35 **Comment**

36
37 A prospective donee of a power of appointment cannot be compelled to accept the power,
38 just as the prospective donee of a gift cannot be compelled to accept the gift.

1
2 A disclaimer is to be contrasted with a release of a power of appointment by the donee. A
3 release occurs after the donee accepts the power. A disclaimer prevents acquisition of the power,
4 and consequently a donee who has accepted a power can no longer disclaim.

5
6 Disclaimer statutes frequently specify the time within which a disclaimer must be made.
7 The Uniform Disclaimer of Property Interests Act (1999) (UDPIA) does not specify a time limit,
8 but allows a disclaimer until a disclaimer is barred (see UDPIA § 13).

9
10 Disclaimer statutes customarily specify the methods for filing a disclaimer. UDPIA § 12
11 provides that the statutory methods must be followed. In the absence of such a requirement,
12 statutory formalities for making a disclaimer of a power are not construed as exclusive, and any
13 manifestation of the donee's intent not to accept the power may also suffice.

14
15 A partial disclaimer of a power of appointment leaves the donee possessed of the part of
16 the power not disclaimed.

17
18 Just as an individual who would otherwise be a donee of a power of appointment can
19 avoid acquiring the power by disclaiming it, a person who otherwise would be a permissible
20 appointee, appointee, or taker in default of appointment can avoid acquiring that status by
21 disclaiming it.

22
23 The rule of this Section is consistent with, and this Comment draws on, Restatement
24 Third of Property: Wills and Other Donative Transfers § 20.4 and the accompanying
25 Commentary.

26 27 **[ARTICLE] 5**

28 **CONTRACT TO APPOINT**

29 **SECTION 501. POWER TO CONTRACT: PRESENTLY EXERCISABLE** 30 **POWER OF APPOINTMENT.**

31 (a) A donee of a presently exercisable general power of appointment may contract to
32 make, or not to make, an appointment.

33 (b) A donee of a presently exercisable nongeneral power of appointment may contract to
34 make, or not to make, an appointment only if the contract does not confer a benefit upon an
35 impermissible appointee.

36 **Comment**

37
38 A donee of a presently exercisable general power may contract to make an appointment,

1 because the donee of such a power has the authority to make the promised appointment —
2 whatever it is — currently.

3
4 A donee of a presently exercisable nongeneral power may contract to make an
5 appointment if the donee has the authority to make the promised appointment currently.
6 Consequently, the enforceability of a contract to exercise a presently exercisable nongeneral
7 power depends on whether the contract confers a benefit upon a person who is not a permissible
8 appointee.

9
10 A contract not to appoint assures that the appointive property will pass to the taker in
11 default. A contract to appoint to a taker in default, if enforceable, has the same effect as a
12 contract not to appoint.

13
14 The rule of this Section is consistent with, and this Comment draws on, Restatement
15 Third of Property: Wills and Other Donative Transfers § 21.1 and the accompanying
16 Commentary.

17
18 **SECTION 502. POWER TO CONTRACT: POWER OF APPOINTMENT NOT**

19 **PRESENTLY EXERCISABLE.** A donee of a power of appointment that is not a presently
20 exercisable power of appointment may contract to make, or not to make, an appointment only if:

21 (1) the contract does not confer a benefit on an impermissible appointee; and

22 (2) the donee:

23 (A) is also the donor of the power of appointment; and

24 (B) has reserved the power of appointment in a revocable inter vivos trust.

25 **Comment**

26
27 Except in the case of a power reserved by the donor in a revocable inter vivos trust, a
28 contract to exercise, or not to exercise, a power of appointment that is not presently exercisable is
29 unenforceable, because the donee of such a power does not have the authority to make a current
30 appointment. If the donee was also the donor of the power and created the power in a revocable
31 inter vivos trust, however, a contract to appoint is enforceable, because the donor-donee could
32 have revoked the trust and recaptured ownership of the trust assets or could have amended the
33 trust to change the power onto one that is presently exercisable.

34
35 In all other cases, the donor of a power not presently exercisable has manifested an intent
36 that the selection of the appointees and the determination of the interests they are to receive is to
37 be made in the light of the circumstances that exist on the date that the power becomes
38 exercisable. Were a contract to be enforceable, the donor's intent would be defeated.

39
40 The rule of this Section is consistent with, and this Comment draws on, Restatement

1 Third of Property: Wills and Other Donative Transfers § 21.2 and the accompanying
2 Commentary.
3

4 **[ARTICLE] 6**

5 **RIGHTS OF DONEE'S CREDITORS IN APPOINTIVE PROPERTY**

6 **SECTION 601. NONGENERAL POWER.**

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

10 (b) A creditor of the donee or the donee's estate may reach the appointive property to the
11 extent provided in [cite state statute or Uniform Fraudulent Transfers Act].

12 (c) If the gift in default of appointment is to the donee or the donee's estate, a nongeneral
13 power of appointment is treated for purposes of this [article] as a general power of appointment,
14 and rights in the appointive property are governed by Sections 602 and 603.

15 **Comment**
16

17 A nongeneral power of appointment is not an ownership-equivalent power, so in the
18 typical case the donee's creditors have no claim to the appointive assets, irrespective of whether
19 or not the donee exercises the power.
20

21 If the donee formerly owned the appointive property covered by the nongeneral power
22 and transferred the property in fraud of the donee's creditors, reserving the nongeneral power,
23 the creditors can reach the appointive property under the rules relating to fraudulent transfers.
24

25 If the gift in default of appointment is to the donee or the donee's estate, the donee's
26 power, though in form a nongeneral power, is in substance a general power, and the rights of the
27 donee's creditors are governed by Sections 602 and 603.
28

29 The rule of this Section is consistent with, and this Comment draws on, Restatement
30 Third of Property: Wills and Other Donative Transfers § 22.1 and the accompanying
31 Commentary.
32

33 **SECTION 602. GENERAL POWER CREATED BY DONEE.**

34 (a) Except as otherwise provided in subsections (b) and (c), appointive property subject to

1 a general power of appointment created by the donee is subject to a claim of a creditor of the
2 donee or the donee's estate to the extent that the donee's property is insufficient to satisfy that
3 claim. For purposes of this subsection, a power of appointment "created by the donee" includes a
4 power of appointment created in a transfer by another individual to the extent that the donee
5 contributed value to the transfer.

6 (b) Except as otherwise provided in subsection (c), appointive property is not subject to a
7 claim of a creditor of the donee or the donee's estate to the extent that the donee irrevocably
8 appointed the property in favor of a person other than the donee or the donee's estate.

9 (c) A creditor of the donee or the donee's estate may reach the appointive property to the
10 extent provided in [cite state statute or Uniform Fraudulent Transfers Act].

11 **Comment**

12
13 Subsection (a) states the basic rule of this Section: If an individual makes a transfer but
14 retains a general power of appointment over the transferred property, public policy does not
15 allow this formal change in the control of the transferred property to put the property beyond the
16 reach of the donor-donee's creditors.

17
18 The rule of subsection (a) can apply even if the general power was not created in a
19 transfer made by the donee. It is sufficient if the donee paid the purchase price for the transfer,
20 for example, or otherwise contributed value to the transfer. Consider the following examples.

21
22 *Example 1.* Donor-Donee purchases Blackacre from A. Pursuant to Donor-Donee's request,
23 A transfers Blackacre "to Donor-Donee for life, then to such person as Donor-Donee may by will
24 appoint." The rule of subsection (a) applies to Donor-Donee's general testamentary power, though
25 in form A created the power.

26
27 *Example 2.* A by will transfers Blackacre "to Donee for life, then to such persons as Donee
28 may by will appoint." Blackacre is subject to a mortgage indebtedness in favor of X in the amount
29 of \$10,000. The value of Blackacre is \$20,000. Donee pays the mortgage indebtedness. The rule of
30 subsection (a) applies to half of the value of Blackacre, though in form A's will creates the general
31 power in Donee.

32
33 *Example 3.* Donee, an heir of A, contests A's will on the ground of undue influence on A
34 by the principal beneficiary under A's will. The contest is settled by transferring part of A's estate
35 to Trustee in trust. Under the trust, Trustee is directed "to pay the net income to Donee for life; and
36 on Donee's death, principal to such persons as Donee shall by will appoint." The rule of subsection
37 (a) applies to the transfer in trust, though in form Donee did not create the general power.

1
2 Subsection (b) states an important exception. An irrevocable exercise of the general
3 power by the transferor-donee in favor of someone other than the donee or the donee's estate
4 eliminates the applicability of the rule of subsection (a) to the extent of the appointive assets
5 appointed by the exercise of the power. The rules relating to fraudulent transfers (subsection (c)),
6 however, are applicable to the exercise of the power.
7

8 The rules of this Section are consistent with, and this Comment draws on, Restatement
9 Third of Property: Wills and Other Donative Transfers § 22.2 and the accompanying
10 Commentary.
11

12 **SECTION 603. GENERAL POWER NOT CREATED BY DONEE.**

13 (a) For purposes of this Section, "general power of appointment" excludes a postponed
14 power of appointment.

15 (b) Appointive property subject to a presently exercisable general power of appointment
16 created by an individual other than the donee is subject to a claim of a creditor of the donee or
17 the donee's estate to the extent that the donee's property is insufficient to satisfy that claim.

18 (c) On the donee's death, appointive property subject to a testamentary general power of
19 appointment created by an individual other than the donee is subject to a claim of a creditor of
20 the donee's estate to the extent that the donee's property is insufficient to satisfy that claim.

21 **Comment**

22
23 A presently exercisable general power of appointment is an ownership-equivalent power.
24 Consequently, property subject to a presently exercisable general power of appointment is
25 subject to the claims of the donee's creditors, to the extent that the property owned by the donee
26 is insufficient to satisfy those claims. Furthermore, upon the donee's death, property subject to a
27 general power of appointment that was exercisable by the donee's will is subject to creditors'
28 claims to the extent that the donee's estate is insufficient. Whether the donee has or has not
29 purported to exercise the power is immaterial.
30

31 A general power of appointment is not subject to the rules of this Section if it is a
32 postponed power.
33

34 The rules of this Section are consistent with, and this Comment draws on, Restatement
35 Third of Property: Wills and Other Donative Transfers § 22.3 and the accompanying
36 Commentary.
37
38

1 [ARTICLE] 7

2 ELECTIVE-SHARE RIGHTS OF SURVIVING SPOUSE

3 SECTION 701. ELECTIVE-SHARE RIGHTS OF SURVIVING SPOUSE IN
4 APPOINTIVE PROPERTY.

5 Alternative A

6 A surviving spouse has elective-share rights in appointive property to the extent provided
7 in [cite state statute or Section 2-205 of the Uniform Probate Code].

8 Alternative B

9 For the purpose of determining the elective-share rights of a decedent's surviving spouse,
10 appointive property is treated as owned by the decedent at death to the extent that the appointive
11 property is subject to:

12 (1) a presently exercisable general power of appointment exercisable by the decedent
13 alone, immediately before death; or

14 (2) a testamentary power of appointment created by the decedent during the marriage and
15 exercisable, in favor of the decedent, the decedent's estate, a creditor of the decedent, or a
16 creditor of the decedent's estate, by:

17 (A) the decedent alone or in conjunction with another individual; or

18 (B) an individual without a substantial beneficial interest in property that would
19 be adversely affected by the exercise or nonexercise of the power of appointment in favor of the
20 decedent, the decedent's estate, a creditor of the decedent, or a creditor of the decedent's estate.

21 End of Alternatives

22 Comment

23 Elective-share statutes based on the Uniform Probate Code expressly provide that property
24 subject to a presently exercisable general power of appointment is subject to the elective share of
25 the surviving spouse. See Uniform Probate Code § 2-205(a)(1). The rationale is that a presently

1 exercisable general power of appointment is an ownership-equivalent power.

2
3 A testamentary power created by the decedent during the marriage is treated akin to an
4 ownership-equivalent power for purposes of the elective share in some circumstances. See
5 Uniform Probate Code § 2-205(2)(B). A general testamentary power reserved by the decedent
6 during the marriage is treated as an ownership-equivalent power, because the appointive power is
7 property that was once owned by the decedent and can still be appointed for the decedent's benefit.
8 Similarly, a testamentary power created, during the marriage, by the decedent in a nonadverse
9 party, exercisable in favor of the decedent, the decedent's estate, or the creditors of either, is
10 treated akin to an ownership-equivalent power, because the property was once owned by the
11 decedent and can still be appointed for the decedent's benefit.

12
13 The rule of this Section (Alternative B) is consistent with Uniform Probate Code § 2-205.
14

15 [ARTICLE] 8

16 MISCELLANEOUS PROVISIONS

17 SECTION 801. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In

18 applying and construing this uniform act, consideration must be given to the need to promote
19 uniformity of the law with respect to its subject matter among the states that enact it.

20 SECTION 802. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
21 AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal
22 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq.,
23 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
24 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
25 U.S.C. Section 7003(b).

26 SECTION 803. REPEALS. The following are repealed:

27 SECTION 804. EFFECTIVE DATE. This [act] takes effect