

To: Committee on Scope and Program
From: David English, JEB-UTEA
Date: 12/5/2010
Re: Powers of Appointment

JEB-UTEA recommends the appointment of a drafting committee to draft a Uniform Powers of Appointment Act. The Act would likely be patterned closely after the power of appointment provisions of the Restatement (Third) of Property, approved in 2006. There is precedence for this approach. The Uniform Prudent Investor Act (2004) was closely patterned after the Restatement (Third) of Trusts: Prudent Investor Rule (2002).

In recent years, the use of long-term trusts has greatly increased and trust drafting has in general become more sophisticated. The result is a significant increase in the use of powers of appointment. In the study accompanying this memo, Tom Gallanis briefly surveys current state law on powers of appointment. There isn't much. Let me mention the situation in Missouri, a typical state. In Missouri, there are few cases and no statutes, meaning practitioners must rely on cases from other jurisdictions where the situation isn't much better. I predict that any uniform act patterned after the Restatement would be enthusiastically supported by the Probate and Trust Committee of the Missouri Bar and quickly enacted. Missouri is not alone. The idea of drafting a Uniform Act on Powers of Appointment has been discussed at meetings of both the American College and Trust Counsel (ACTEC) and the ABA Section of Real Property Trust and Estate Law. The reception by both groups was very positive.

There is no need to appoint a study committee to identify issues. As Tom Gallanis' memo amply demonstrates, the Restatement provides a detailed roadmap. The key advisory groups that would need to be consulted are ACTEC, the ABA RPTE Section and the Trust Division of the American Bankers Association. Because powers of appointment are also increasingly being used in special needs planning, there should also be consultation with groups such as the National Academy of Elder Law Attorneys (NAELA) and the Special Needs Alliance (SNA).

Given the completeness of the Restatement model, the drafting of a power of appointment act should be no more than a two-year project.

Future Interests Classification

As discussed in a separate memo, JEB-UTEA does not view the drafting of a uniform act on future interests classification as a priority. But JEB-UTEA is not opposed to such an effort. The drafting of an act on future interests classification could easily be combined with the powers of appointment project. The subjects are closely related. Accompanying this memo is a separate memo by Tom Gallanis sketching out what such a uniform act might contain. Like the powers of appointment project, the future interests act would likely be patterned after the corresponding provisions of the Restatement (Third) of Property.