

DRAFT
FOR DISCUSSION ONLY

POWERS OF APPOINTMENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For the October 27-28, 2012
Meeting of the Drafting Committee

With Prefatory Notes and Comments

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ON UNIFORM STATE LAWS

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August 29, 2012

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POWERS OF APPOINTMENT ACT

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POWERS OF APPOINTMENT ACT

REPORTER'S GENERAL PREFATORY NOTE

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

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

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

In 2010, the membership of the American Law Institute approved chapters 17-23 of the Restatement (Third) of Property: Wills and Other Donative Transfers, covering the law of powers of appointment. The final version of these chapters was published by the ALI in 2011.

The drafting committee for the Powers of Appointment Act held its first two committee meetings on September 23-24, 2011, and March 23-24, 2012. This draft incorporates revisions suggested by members of the drafting committee at those meetings. This draft also incorporates suggestions made by the Joint Editorial Board for Uniform Trust and Estate Acts at its December 2-3, 2011, meeting in New Orleans. In addition, the draft incorporates revisions from the January 26-29, 2012, and April 26-29, 2012, meetings of the Committee on Style, and from the Act's first reading at the Uniform Law Commission's annual meeting in July 18, 2012.

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

After each section, a preliminary Comment discusses the drafting of the section. The preliminary Comments should be read in conjunction with the draft of the black letter.

1 **POWERS OF APPOINTMENT ACT**

2 **[ARTICLE] 1**

3 **GENERAL PROVISIONS**

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

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

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

9 (2) “Blanket-exercise clause” means a clause in an instrument which exercises a power of
10 appointment and is not a specific-exercise clause. The term includes a clause that:

11 (A) expressly exercises “any” power of appointment the powerholder has;

12 (B) expressly appoints “any” property over which the powerholder has a power of
13 appointment; or

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

15 (3) “Donor” means a person that creates a power of appointment.

16 (4) “Exclusionary power of appointment” means a power of appointment exercisable in
17 favor of any one or more of the permissible appointees to the exclusion of the other permissible
18 appointees.

19 (5) “General power of appointment” means a power of appointment exercisable in favor
20 of the powerholder, the powerholder’s estate, a creditor of the powerholder, or a creditor of the
21 powerholder’s estate.

22 (6) “Gift-in-default clause” means a clause identifying a taker in default of appointment.

23 (7) “Impermissible appointee” means a person that is not a permissible appointee.

24 (8) “Instrument” includes the terms of an oral trust.

(9) “Nongeneral power of appointment” means a power of appointment that is not a general power of appointment.

(10) “Permissible appointee” means a person in whose favor a powerholder may exercise a power of appointment.

(11) “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.

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

(13) “Powerholder” means an individual in whom a donor creates a power of appointment.

(14) “Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the time in question. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after the occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of the specified time. The term does not include a power exercisable only at the powerholder’s death.

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

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

(17) “Terms of an instrument” means the manifestation of the intent of the maker of the

instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.

Comment

Paragraph (1) defines appointive property as the property or property interest subject to a power of appointment. The effective creation of a power of appointment requires that there be appointive property. See Section 201.

Paragraphs (2) and (15) introduce the distinction between blanket-exercise and specific-exercise clauses. A specific-exercise clause exercises and specifically refers to the particular power of appointment in question, using language such as the following: "I hereby exercise the power of appointment conferred upon me by my father's will as follows: I appoint [fill in details of appointment]." In contrast, a blanket-exercise clause exercises "any" power of appointment the powerholder may have, appoints "any" property over which the powerholder may have a power of appointment, or disposes of all property subject to disposition by the powerholder. The use of specific-exercise clauses is encouraged; the use of blanket-exercise clauses is discouraged. See Section 301 and the accompanying Comment.

Paragraphs (3) and (13) define the donor and the powerholder. The donor is the person who created or reserved the power of appointment. The powerholder is the individual on whom the power of appointment was conferred or in whom the power was reserved. The traditional, but potentially confusing, term for powerholder is "donee." See Restatement of Property § 319 (1940); Restatement Second of Property: Donative Transfers § 11.2 (1986); Restatement Third of Property: Wills and Other Donative Transfers § 17.2 (2011). In the case of a reserved power, the same individual is both the donor and the powerholder.

Paragraph (4) introduces the distinction between exclusionary and nonexclusionary powers of appointment. An exclusionary power is one in which the donor has authorized the powerholder to appoint to any one or more of the permissible appointees to the exclusion of the others. A nonexclusionary power is one in which the powerholder cannot make an appointment that excludes any permissible appointee, or one or more designated permissible appointees, from a share of the appointive property. An instrument creating a power of appointment is construed as creating an exclusionary power unless the terms of the instrument manifest a contrary intent. See Section 203. And in fact, the typical power of appointment is exclusionary. For example, a power to appoint "to such of my descendants as the powerholder may select" is exclusionary, because the powerholder may appoint to any one of the donor's descendants to the exclusion of all the others. In contrast, an example of a nonexclusionary power would be a power "to appoint to all and every one of my children in such shares and proportions as the powerholder shall select." In this latter case, the powerholder is not under a duty to exercise the power; but, if the powerholder does exercise the power, the appointment must abide by the power's nonexclusionary nature. See Sections 301 and 305. Only a power of appointment whose permissible appointees are "defined and limited" can be nonexclusionary. For elaboration of the well-accepted term of art "defined and limited," see Section 204 and the accompanying Comment.

Paragraphs (5) and (9) explain the distinction between general and nongeneral powers of appointment. A general power of appointment enables the powerholder to exercise the power in favor of the powerholder, the powerholder's estate, or the creditors of either, regardless of whether the power is also exercisable in favor of others. A nongeneral power of appointment (sometimes called a "special" power of appointment) cannot be exercised in favor of the powerholder, the powerholder's estate, or the creditors of either. Estate planners often classify nongeneral powers as being either "broad" or "limited," depending on the range of permissible appointees. A power to appoint to anyone in the world except the powerholder, the powerholder's estate, and the creditors of either would be an example of a broad nongeneral power. In contrast, a power in the donor's spouse to appoint among the donor's descendants would be an example of a limited nongeneral power.

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

Paragraph (6) defines the gift-in-default clause. In an instrument creating a power of appointment, the clause that identifies the taker in default is called the gift-in-default clause. A gift-in-default clause is not mandatory but is included in a well-drafted instrument.

Paragraphs (7) and (10) explain the distinction between impermissible and permissible appointees. The permissible appointees (known at common law as the "objects") of a power of appointment may be narrowly defined (for example, "to such of the powerholder's descendants as the powerholder may select"), broadly defined (for example, "to such persons as the powerholder may select, except the powerholder, the powerholder's estate, the powerholder's creditors, or the creditors of the powerholder's estate"), or unlimited (for example, "to such persons as the powerholder may select"). A permissible appointee of a power of appointment does not, in that capacity, have a property interest that can be transferred to another. Otherwise, a permissible appointee could transform an impermissible appointee into a permissible appointee, exceeding the intended scope of the power and thereby violating the donor's intent. An appointment cannot benefit an impermissible appointee. See Section 307.

Paragraph (8) defines the term "instrument" to include the terms of an oral trust. Some jurisdictions authorize oral trusts, as does the Uniform Trust Code. See Uniform Trust Code § 407. Note that there is no Uniform Law definition of "instrument" other than in a commercial context. See Uniform Commercial Code §§ 3-104(b), 9-102(a)(47). The term is used without definition in, for example, the Uniform Probate Code, the Uniform Trust Code, and the Uniform Power of Attorney Act.

Paragraph (11) contains the definition of "person." This is a standard definition approved by the Uniform Law Commission.

Paragraph (12) defines a power of appointment. A power of appointment is a power enabling the powerholder to designate recipients of ownership interests in or powers of

1 appointment over the appointive property.

2 A power to revoke or amend a trust or a power to withdraw income or principal from a
3 trust is a power of appointment, whether the power is reserved by the transferor or conferred on
4 another. See Restatement Third of Trusts § 56, Comment b. A power to withdraw income or
5 principal subject to an ascertainable standard is a postponed power, exercisable upon the
6 satisfaction of the ascertainable standard. See the Comment to paragraph (14), below.

7
8 A power to direct a trustee to distribute income or principal to another is a power of
9 appointment.

10
11 In this act, a fiduciary distributive power is not a power of appointment. Fiduciary
12 distributive powers include a trustee's power to distribute principal to or for the benefit of an
13 income beneficiary, or for some other individual, or to pay income or principal to a designated
14 beneficiary, or to distribute income or principal among a defined group of beneficiaries. Unlike
15 the exercise of a power of appointment, the exercise of a fiduciary distributive power is subject
16 to fiduciary standards. Unlike a power of appointment, a fiduciary distributive power does not
17 lapse upon the death of the fiduciary, but survives in a successor fiduciary. Nevertheless, a
18 fiduciary distributive power, like a power of appointment, cannot be validly exercised in favor of
19 or for the benefit of someone who is not a permissible appointee.

20
21 A power over the management of property, sometimes called an administrative power, is
22 not a power of appointment. For example, a power of sale coupled with a power to invest the
23 proceeds of the sale, as commonly held by a trustee of a trust, is not a power of appointment but
24 is an administrative power. A power of sale merely authorizes the person to substitute money for
25 the property sold but does not authorize the person to alter the beneficial interests in the
26 substituted property.

27
28 A power to designate or replace a trustee or other fiduciary is not a power of
29 appointment. A power to designate or replace a trustee or other fiduciary involves property
30 management and is a power to designate only the nonbeneficial holder of property.

31
32 A power of attorney is not a power of appointment. See Restatement of Property § 318,
33 Comment h: "A power of attorney, in the commonest sense of that term, creates the relationship
34 of principal and agent ... and is terminated by the death of the [principal]. In both of these
35 characteristics such a power differs from a power of appointment. The latter does not create an
36 agency relationship and, except in the case of a power reserved in the donor, it is usually
37 expected that it will be exercised after the donor's death." The distinction is carried forward in
38 Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment j. See also
39 Uniform Power of Attorney Act §§ 102(7) (defining the holder of a power of attorney as an
40 agent), 110(a)(1) (providing that the principal's death terminates a power of attorney).

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

1 Paragraph (14) introduces the distinctions among powers of appointment based upon
2 when the power is exercisable. There are three categories here: a power of appointment is
3 presently exercisable, postponed, or testamentary.
4

5 A power of appointment is presently exercisable if it is exercisable at the time in
6 question. Typically, a presently exercisable power of appointment is exercisable at the time in
7 question during the powerholder's life and also at the powerholder's death, e.g., by the
8 powerholder's will. Thus, a power of appointment that is exercisable "by deed or will" is a
9 presently exercisable power. To take another example, a power of appointment exercisable by
10 the powerholder's last unrevoked instrument in writing is a presently exercisable power, because
11 the powerholder can make a present exercise irrevocable by explicitly so providing in the
12 instrument exercising the power. See Restatement Third of Property: Wills and Other Donative
13 Transfers § 17.4, Comment a.
14

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

23 A power is a postponed power (sometimes known as a deferred power) if it is not yet
24 exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard,
25 or the passage of a specified time. A postponed power becomes presently exercisable upon the
26 occurrence of the specified event, the satisfaction of the ascertainable standard, or the passage of
27 the specified time. The second sentence in paragraph (14) is taken directly from the Uniform
28 Power of Attorney Act §102(8).
29

30 A power is testamentary if it is not exercisable during the powerholder's life but only in
31 the powerholder's will or in a nontestamentary instrument that is functionally similar to the
32 powerholder's will, such as the powerholder's revocable trust that remains revocable until the
33 powerholder's death. On the ability of a powerholder to exercise a testamentary power of
34 appointment in such a revocable trust, see Section 304 and the accompanying Comment. See also
35 Restatement Third of Property: Wills and Other Donative Transfers § 19.9, Comment b.
36

37 Paragraph (16) defines a taker in default of appointment. A taker in default of
38 appointment (often called the "taker in default") has a property interest that can be transferred to
39 another. If a taker in default transfers the interest to another, the transferee becomes a taker in
40 default.
41

42 Paragraph (17) defines the "terms of an instrument" as the manifestation of the intent of
43 the maker of the instrument regarding the instrument's provisions as expressed in the instrument
44 or as may be established by other evidence that would be admissible in a legal proceeding. The
45 maker of an instrument creating a power of appointment is the donor. The maker of an
46 instrument exercising a power of appointment is the powerholder. This definition is a slightly
47 modified version of the definition of "terms of a trust" in Uniform Trust Code § 103(18).

1
2 The definitions in this Section are substantially consistent with, and this Comment draws
3 on, Restatement Third of Property: Wills and Other Donative Transfers §§ 17.1 to 17.5 and the
4 accompanying Commentary.

5
6 **SECTION 103. GOVERNING LAW.** Unless the terms of the instrument creating a
7 power of appointment manifest a contrary intent:

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

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

12 **Comment**

13
14 This Section provides default rules for determining the law governing the creation and
15 exercise of, and related matters concerning, a power of appointment. Unless the terms of the
16 instrument creating the power provide otherwise, the actions of the donor—the creation,
17 revocation, or amendment of the power—are governed by the law of the donor's domicile; and
18 the actions of the powerholder—the exercise, release, or disclaimer, or the revocation or
19 amendment thereof—are governed by the law of the powerholder's domicile. In each case, the
20 domicile is determined at the relevant time—for example, unless the terms of the instrument
21 creating the power manifest a contrary intent, the donor's amendment of the power is governed
22 by the law of the donor's domicile at the time of the amendment.

23
24 See generally, Restatement Third of Property: Wills and Other Donative Transfers § 19.1,
25 Comment e; Restatement Second of Conflict of Laws § 275, Comment c.

26
27 **SECTION 104. SUPPLEMENTATION BY COMMON LAW AND PRINCIPLES**
28 **OF EQUITY.** The common law of powers of appointment and principles of equity supplement
29 this [act], except to the extent modified by this [act] or law of this state other than this [act].

30 **Comment**

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

1
2 The statutory text of the act is also supplemented by these Comments, which, like the
3 Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v.*
4 *Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform
5 Commercial Code); *Yale University v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993)
6 (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, Statutory
7 Construction § 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell §
8 59-4 (3d ed. 2007).

9
10 The text of and Comment to this Section are based on Uniform Trust Code § 106 and its
11 accompanying Comment.
12

13 [ARTICLE] 2

14 CREATION, REVOCATION, AND AMENDMENT OF POWER OF APPOINTMENT

15 SECTION 201. CREATION OF POWER OF APPOINTMENT.

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

17 (1) the instrument creating the power:

18 (A) is valid under the law of this state; and

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

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

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

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

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

29 Comment

30
31 An instrument can only create a power of appointment if the instrument itself is valid.
32 Thus, for example, a *will* creating a power of appointment must be valid under the law—

1 including choice of law (see Section 103)—applicable to wills. An *inter vivos trust* creating a
2 power of appointment must be valid under the law—including choice of law (see Section 103)—
3 applicable to inter vivos trusts. In part, this requirement of validity means that the instrument
4 must be properly executed to the extent that other law imposes requirements of execution. In
5 addition, the creator of the instrument must have the capacity to execute the instrument and be
6 free from undue influence and other wrongdoing. On questions of capacity, see Restatement
7 Third of Property: Wills and Other Donative Transfers §§ 8.1 (Mental Capacity) and 8.2
8 (Minority). On freedom from undue influence and other wrongdoing, see, e.g., Restatement
9 Third of Property §§ 8.3 (Undue Influence, Duress, or Fraud). The ability of an agent or guardian
10 to make a power of appointment on behalf of a principal or ward is determined by other law,
11 such as the Uniform Power of Attorney Act or the Uniform Guardianship and Protective
12 Proceedings Act.

13
14 In addition to being valid, an instrument creating a power of appointment must transfer the
15 appointive property. The creation of a power of appointment—unlike the creation of a power of
16 attorney—requires a transfer. See Restatement Third of Property: Wills and Other Donative
17 Transfers § 18.1 (“A power of appointment is created by a transfer that manifests an intent to
18 create a power of appointment.”). The term “transfer” includes a declaration by an owner of
19 property that the owner holds the property as trustee. Such a declaration necessarily entails a
20 transfer of legal title from the owner-as-owner to the owner-as-trustee; it also entails a transfer of
21 all or some of the equitable interests in the property from the owner to the trust’s beneficiaries. See
22 Restatement Third of Property: Wills and Other Donative Transfers § 7.1, Comment a. The one
23 exception to the requirement of a transfer is stated in subsection (b): by necessity, the requirement
24 of a transfer does not apply to the creation of a power of appointment by the exercise of a power of
25 appointment. On the ability of a powerholder to exercise the power by creating a new power of
26 appointment, see Section 305.

27
28 In addition to the aforementioned requirements, an instrument creating a power of
29 appointment must manifest the donor’s intent to create in one or more powerholders a power of
30 appointment over appointive property. This manifestation of intent does not require the use of
31 particular words or phrases (such as “power of appointment”), but careful drafting should leave no
32 doubt about the transferor’s intent.

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

41
42 The creation of a power of appointment requires that there be a donor, a powerholder
43 (who may be the same as the donor), and appointive property. There must also be one or more
44 permissible appointees, though these need not be restricted; a powerholder can be authorized to
45 appoint to anyone. A donor is not required to designate a taker in default of appointment,
46 although a well-drafted instrument will specify one or more takers in default.

1 Subsection (c) states the well-accepted rule that a power of appointment cannot be
2 created in a powerholder who is deceased. If the powerholder dies before the effective date of an
3 instrument purporting to confer a power of appointment, the power is not created, and an
4 attempted exercise of the power is ineffective. (The effective date of a power of appointment
5 created in a donor's will is the donor's death, not when the donor executes the will. The effective
6 date of a power of appointment created in a donor's inter vivos trust is the date the trust is
7 established, even if the trust is revocable. See Restatement Third of Property: Wills and Other
8 Donative Transfers § 19.11, Comments b and c.)
9

10 Nor is a power of appointment created if all the possible permissible appointees of the
11 power are deceased when the transfer that is intended to create the power becomes legally
12 operative. If all the possible permissible appointees of a power die after the power is created and
13 before the powerholder exercises the power, the power terminates.
14

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

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

28 The rules of this Section are consistent with, and this Comment draws on, Restatement
29 Third of Property: Wills and Other Donative Transfers §§ 18.1 and 19.9 and the accompanying
30 Commentary.
31

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

34 **Comment**

35

36 A power of appointment is nontransferable. The powerholder may not transfer the power
37 to another person. (On the ability of the powerholder to exercise the power by conferring on a
38 permissible appointee a new power of appointment over the appointive property, see Section
39 305.) If the powerholder dies without exercising or releasing the power, the power lapses. The
40 power does not pass through the powerholder's estate to the powerholder's successors in interest.
41

42 The ability of an agent or guardian to make, revoke, exercise, or revoke the exercise of a
43 power of appointment on behalf of a principal or ward is determined by other law, such as the
44 Uniform Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.
45

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

1 the Restatement Third of Property: Wills and Other Donative Transfers § 17.1, Comment b.

2
3 **SECTION 203. PRESUMPTION OF UNLIMITED AUTHORITY; EXCEPTION.**

4 Unless the terms of the instrument creating a power of appointment manifest a contrary intent,
5 and subject to Section 204:

6 (1) the power is:

7 (A) presently exercisable;

8 (B) exclusionary; and

9 (C) except as otherwise provided in paragraph (2), general; and

10
11 (2) the power is nongeneral if:

12 (A) the powerholder is the donor's child;

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

14 (C) the permissible appointees of the power are described as the donor's
15 "descendants" or "issue."

16 **Comment**

17
18 In determining which type of power of appointment is created, the general principle of
19 construction, articulated in paragraph (1), is that a power falls into the category giving the
20 powerholder the maximum discretionary authority except to the extent that the terms of the
21 instrument creating the power restrict the powerholder's authority. Maximum discretion confers on
22 the powerholder the flexibility to alter the donor's disposition in response to changing conditions.

23
24 In accordance with this presumption of unlimited authority, a power is general unless the
25 terms of the creating instrument specify that the powerholder cannot exercise the power in favor of
26 the powerholder, the powerholder's estate, or the creditors of either. A power is presently
27 exercisable unless the terms of the creating instrument specify that the power can only be exercised
28 at some later time or in some document such as a will that only takes effect at some later time. A
29 power is exclusionary unless the terms of the creating instrument specify that a permissible
30 appointee must receive a certain amount or portion of the appointive assets if the power is
31 exercised.

32
33 This general principle of construction applies, unless the terms of the instrument creating
34 the power of appointment provide otherwise. A well-drafted instrument intended to create a
35 nongeneral or testamentary or nonexclusionary power will use clear language to achieve the
36 desired objective. Not all instruments are well-drafted, however. A court may have to construe the
37 terms of the instrument to discern the donor's intent. For principles of construction applicable to

1 the creation of a power of appointment, see Restatement Third of Property: Wills and Other
2 Donative Transfers Chapters 17 and 18, and the accompanying Commentary, containing some
3 examples.

4
5 Paragraph (2) is designed to remedy a recurring drafting mistake. Scriveners sometimes
6 forget that X's "descendants" include X's children. A testamentary power of appointment created
7 in the donor's child to appoint among the donor's "descendants" or "issue" is usually intended to
8 be a nongeneral power. See, for example, PLR 201229005 (stating the ruling of the Internal
9 Revenue Service that a testamentary power of appointment in the donor's son, exercisable in favor
10 of the donor's "issue," is a nongeneral power for purposes of 26 U.S.C. § 2041).

11 12 **SECTION 204. MANDATORY RULES OF CLASSIFICATION.**

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

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

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

21 **Comment**

22
23 Subsection (b) states a well-accepted exception to the presumption of unlimited authority.
24 If a power of appointment can be exercised only with the consent or joinder of an adverse party,
25 the power is not a general power. An adverse party is an individual who has a substantial
26 beneficial interest in the trust or other property arrangement that would be adversely affected by
27 the exercise or nonexercise of the power in favor of the powerholder, the powerholder's estate, or
28 the creditors of either. Consider the following examples.

29
30 *Example 1.* D transferred property in trust, directing the trustee "to pay the income to D's
31 son S for life, remainder in corpus to such person or persons as S, with the joinder of X, shall
32 appoint; in default of appointment, remainder to X." S's power is not a general power because X is
33 an adverse party.

34
35 *Example 2.* Same facts as Example 1, except that S's power is exercisable with the joinder
36 of Y rather than with the joinder of X. Y has no property interest that could be adversely affected
37 by the exercise of the power. Because Y is not an adverse party, S's power is general.

38
39 Whether the party whose consent or joinder is required is adverse or not is determined at

1 the time in question. Consider the following example.

2
3 *Example 3.* Same facts as Example 2, except that, one month after D's creation of the trust,
4 X transfers the remainder interest to Y. Before the transfer, Y is not an adverse party and S's
5 power is general. After the transfer, Y is an adverse party and S's power is nongeneral.
6

7 Subsection (c) also states a well-accepted rule. Only a power of appointment whose
8 permissible appointees are defined and limited can be nonexclusionary. "Defined and limited" in
9 this context is a well-accepted term of art. For elaboration and examples, see Restatement Third of
10 Property: Wills and Other Donative Transfers § 17.5, Comment c. In general, permissible
11 appointees are "defined and limited" if they are defined and limited to a reasonable number.
12 Typically, permissible appointees who are defined and limited are described in class-gift terms: a
13 single-generation class such as "children," "grandchildren," "brothers and sisters," or "nieces and
14 nephews," or a multiple-generation class such as "issue" or "descendants" or "heirs." Permissible
15 appointees need not be described in class-gift terms to be defined and limited, however. The
16 permissible appointees are also defined and limited if one or more permissible appointees are
17 designated by name or otherwise individually identified.
18

19 If the permissible appointees are not defined and limited, the power is exclusionary
20 irrespective of the donor's intent. A power exercisable, for example, in favor of "such person or
21 persons other than the powerholder, the powerholder's estate, the creditors of the powerholder, and
22 the creditors of the powerholder's estate" is an exclusionary power. An attempt by the donor to
23 require the powerholder to appoint at least \$X to each permissible appointee of the power is
24 ineffective, because the permissible appointees of the power are so numerous that it would be
25 administratively impossible to carry out the donor's expressed intent. The donor's expressed
26 restriction is disregarded, and the powerholder may exclude any one or more of the permissible
27 appointees in exercising the power.
28

29 In contrast, a power to appoint only to the powerholder's creditors or to the creditors of the
30 powerholder's estate is a power in favor of a defined and limited class. Such a power could be
31 nonexclusionary if, for example, the terms of the instrument creating the power provided that the
32 power is a power to appoint "to such of the powerholder's estate creditors as the powerholder shall
33 by will appoint, but if the powerholder exercises the power, the powerholder must appoint \$X to a
34 designated estate creditor or must appoint in full satisfaction of the powerholder's debt to a
35 designated estate creditor."
36

37 If a power is determined to be nonexclusionary because its terms provide that an
38 appointment must benefit each permissible appointee, it is to be inferred that the donor intends to
39 require an appointment to confer a reasonable benefit upon each permissible appointee. An
40 appointment under which a permissible appointee receives nothing, or only a nominal sum,
41 violates this requirement and is forbidden. This doctrine is known as the doctrine forbidding
42 illusory appointments. For elaboration, see Restatement Third of Property: Wills and Other
43 Donative Transfers § 17.5, Comment j.
44

45 The terms of the instrument creating a power of appointment sometimes provide that no
46 appointee shall receive any share in default of appointment unless the appointee consents to
47 allow the amount of the appointment to be taken into account in calculating the fund to be
48 distributed in default of appointment. This "hotchpot" language is used to minimize unintended

1 inequalities of distribution among permissible appointees. Such a clause does not make the
2 power nonexclusionary, because the terms do not prevent the powerholder from making an
3 appointment that excludes a permissible appointee.

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

8
9 **SECTION 205. POWER TO REVOKE OR AMEND.** A donor may revoke or amend
10 a power of appointment only to the extent that:

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

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

14 **Comment**

15
16 The donor of a power of appointment has the authority to revoke or amend the power
17 only to the extent that the instrument creating the power is revocable by the donor or the donor
18 reserves a power of revocation or amendment in the instrument creating the power.

19
20 For example, the donor's power to revoke or amend a will or a revocable inter vivos trust
21 carries with it the authority to revoke or amend any power of appointment created in the will or
22 trust. However, to the extent that an exercise of the power removes appointive property from a
23 trust, the donor's authority to revoke or amend the power is eliminated, unless the donor
24 expressly reserved authority to revoke or amend any transfer from the trust after the transfer is
25 completed.

26
27 If an irrevocable inter vivos trust confers a presently exercisable power on someone who
28 is not the settlor of the trust (the settlor being the donor of the power), the donor lacks authority
29 to revoke or amend the power, except to the extent that the donor reserved the authority to do so.
30 If the donor did reserve the authority to revoke or amend the power, that authority is only
31 effective until the powerholder irrevocably exercises the power.

32
33 If the same individual is both the donor and the powerholder, the donor in his or her
34 capacity as powerholder can indirectly revoke or amend the power by a partial or total release of
35 the power. See Section 402. After the power has been irrevocably exercised, however, the donor
36 as donor is in no different position in regard to revoking or amending the exercise of the power
37 than the donor would be if the donor and powerholder were different individuals.

38
39 The ability of an agent or guardian to revoke or amend a power of appointment on behalf
40 of a principal or ward is determined by other law, such as the Uniform Power of Attorney Act or
41 the Uniform Guardianship and Protective Proceedings Act.

42
43 The rule of this Section is consistent with, and this Comment draws on, Restatement

1 Third of Property: Wills and Other Donative Transfers § 18.2 and the accompanying
2 Commentary.

3
4 **[ARTICLE] 3**

5 **EXERCISE OF POWER OF APPOINTMENT**

6 **SECTION 301. REQUISITES FOR EXERCISE OF POWER OF**

7 **APPOINTMENT.** A power of appointment is exercised only:

8 (1) if the instrument exercising the power is valid under the law of this state;

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

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

11 (B) subject to Section 304, satisfy the requirements of exercise, if any, imposed

12 by the donor; and

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

14 **Comment**

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

29
30 Paragraph (2) requires the terms of the instrument exercising the power of appointment to
31 manifest the powerholder's intent to exercise the power of appointment. Whether a powerholder
32 has manifested an intent to exercise a power of appointment is a question of construction. See
33 generally Restatement Third of Property: Wills and Other Donative Transfers § 19.2. For
34 example, a powerholder's disposition of appointive property may manifest an intent to exercise
35 the power even though the powerholder does not refer to the power. See Restatement Third of
36 Property: Wills and Other Donative Transfers § 19.3. Paragraph (2) also requires that the terms
37 of the instrument exercising the power must, subject to Section 304, satisfy the requirements of

1 exercise, if any, imposed by the donor.

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

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

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

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

26
27 This act aims to eliminate any significance attached to the use of a blending clause. A
28 blending clause has traditionally been regarded as significant in the application of the doctrines
29 of “selective allocation” and “capture.” This act eliminates the significance of such a clause
30 under those doctrines. See Sections 308 (selective allocation) and 309 (capture). The use of a
31 blending clause is more likely to be the product of the forms used by the powerholder’s lawyer
32 than a deliberate decision by the powerholder to facilitate the application of the doctrines of
33 selective allocation or capture.

34
35 If the powerholder decides not to exercise a specific power or any power that the
36 powerholder might have, it is important to consider whether to depend on mere silence to
37 produce a nonexercise or to take definitive action to assure a nonexercise. Definitive action can
38 take the form of a release during life (see Section 402) or a nonexercise clause in the
39 powerholder’s will or other relevant instrument. A nonexercise clause can take the form of a
40 specific-nonexercise clause (for example, “I hereby do not exercise the power of appointment
41 conferred on me by my father’s trust”) or the form of a blanket-nonexercise clause (for example,
42 “I hereby do not exercise any power of appointment I may have”).

43
44 In certain circumstances, different consequences depend on the powerholder’s choice.
45 Under Section 302, a residuary clause in the powerholder’s will is treated as manifesting an
46 intent to exercise a general power in certain limited circumstances if the powerholder silently
47 failed to exercise the power, but not if the powerholder released the power or refrained in a

1 record from exercising it. Under Section 310, unappointed property passes to the powerholder's
2 estate in certain limited circumstances if the powerholder silently failed to exercise a general
3 power, but passes to the donor or to the donor's successors in interest if the powerholder released
4 the power.

5
6 Paragraph (3) provides that the exercise is only valid to the extent that the exercise is
7 permissible. On permissible and impermissible exercise, see Sections 305 to 307.

8
9 The rule of this Section is consistent with, and this Comment draws on, Restatement
10 Third of Property: Wills and Other Donative Transfers §§ 19.1, 19.8, and 19.9 and the
11 accompanying Commentary.

12 **SECTION 302. INTENT TO EXERCISE: DETERMINING INTENT FROM** 13 **RESIDUARY CLAUSE.**

14 (a) In this section:

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

17 (2) "Will" includes a codicil and a testamentary instrument that merely revokes or
18 revises another will.

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

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

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

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

25 (4) the powerholder did not release the power.

26 **Comment**

27
28 This Section addresses a question arising under Section 301(2)(A)—namely, whether the
29 powerholder's intent to exercise a power of appointment is manifested by a garden-variety
30 residuary clause, such as "All the residue of my estate, I devise to ..." or "All of my estate, I
31 devise to" This Section does not address the effect of a residuary clause that contains a
32 blanket exercise or a specific exercise of a power of appointment. On blanket-exercise and
33 specific-exercise clauses, see the Comment to Section 301.

1
2 The rule of this Section is that a garden-variety residuary clause manifests an intent to
3 exercise a power of appointment only if (1) the terms of the instrument containing the residuary
4 clause do not manifest a contrary intent, (2) the power in question is a general power exercisable
5 in favor of the powerholder's estate, (3) there is no gift-in-default clause or it is ineffective, and
6 (4) the powerholder did not release the power.

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

21
22 A gift-in-default clause can be ineffective or partially ineffective for a variety of reasons.
23 The clause might cover only part of the appointive property. The clause might be invalid because
24 it violates a rule against perpetuities or some other rule, or it might be ineffective because it
25 conditioned the interest of the takers in default on an uncertain event that did not happen, the
26 most common of which is an unsatisfied condition of survival.

27
28 Under no circumstance does a residuary clause manifest an intent to exercise a
29 *nongeneral* power. A residuary clause disposes of the powerholder's own property, and a
30 *nongeneral* power is not an ownership-equivalent power.

31
32 The rule of this Section is consistent with, and this Comment draws on, Restatement
33 Third of Property: Wills and Other Donative Transfers § 19.4 and the accompanying
34 Commentary.

35
36 **SECTION 303. INTENT TO EXERCISE: AFTER-ACQUIRED POWER.** Unless
37 the terms of the instrument exercising a power of appointment manifest a contrary intent:

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

40 (2) if the powerholder is also the donor of the power, the clause does not extend to the
41 power unless there is no gift-in-default clause or it is ineffective.

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Comment

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

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

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

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

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

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

**SECTION 304. SUBSTANTIAL COMPLIANCE WITH FORMAL DONOR-
IMPOSED REQUIREMENT.** A powerholder’s substantial compliance with a formal

1 requirement of an appointment imposed by the donor, including a requirement that the
2 instrument of exercise make reference or specific reference to the power of appointment, is
3 sufficient if:

- 4 (1) the powerholder knows of and intends to exercise the power; and
5 (2) the powerholder's manner of attempted exercise does not impair a material purpose of
6 the donor in imposing the requirement.

7 **Comment**

8
9 This Section adopts a substantial-compliance rule for donor-imposed formal
10 requirements. This Section only applies to formal requirements imposed *by the donor*. It does not
11 apply to formal requirements imposed by law, such as the requirement that a will must be signed
12 and attested. The Section also does not apply to *substantive* requirements imposed by the donor,
13 for example a requirement that the powerholder attain a certain age before the power is
14 exercisable.

15
16 Whenever the donor imposes formal requirements with respect to the instrument of
17 appointment that exceed the requirements imposed by law, the donor's purpose in imposing the
18 additional requirements is relevant to whether the powerholder's attempted exercise satisfies the
19 rule of this Section. To the extent that the powerholder's failure to comply with the additional
20 requirements will not impair the accomplishment of a material purpose of the donor, the
21 powerholder's attempted appointment in a manner that substantially complies with a donor-
22 imposed requirement does not fail for lack of perfect compliance with that requirement.

23
24 For example, a donor's formal requirement that the power of appointment is exercisable
25 "by will" may be satisfied by the powerholder's attempted exercise in a nontestamentary
26 instrument that is functionally similar to a will, such as the powerholder's revocable trust that
27 remains revocable until the powerholder's death. See Restatement Third of Property: Wills and
28 Other Donative Transfers § 19.9, Comment b ("Because a revocable trust operates in substance
29 as a will, a power of appointment exercisable "by will" can be exercised in a revocable-trust
30 document, as long as the revocable trust remained revocable at the [powerholder]'s death.").

31
32 A formal requirement commonly imposed by the donor is that, in order to be effective,
33 the powerholder's attempted exercise must make specific reference to the power. Specific-
34 reference clauses were a pre-1942 invention designed to prevent an inadvertent exercise of a
35 general power. The federal estate tax law then provided that the value of property subject to a
36 general power was included in the powerholder's gross estate if the general power was exercised.
37 The idea of requiring specific reference was designed to thwart unintended exercise and, hence,
38 estate taxation.

39
40 The federal estate tax law has changed. An inadvertent exercise of a general power
41 created after October 21, 1942, no longer has adverse estate tax consequences.
42

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

9
10 A more difficult question is whether a *blanket-exercise clause* satisfies a specific-
11 reference requirement. If it could be shown that the powerholder had knowledge of and intended
12 to exercise the power, the blanket-exercise clause would be sufficient to exercise the power,
13 unless it could be shown that the donor's intent was not merely to prevent an inadvertent exercise
14 of the power but instead that the donor had a material purpose in insisting on the specific-
15 reference requirement. In such a case, the possibility of applying Uniform Probate Code § 2-805
16 or Restatement Third of Property: Wills and Other Donative Transfers § 12.1 to reform the
17 powerholder's attempted appointment to insert the required specific reference should be
18 explored.

19
20 This rule of this Section is consistent with, but an elaboration of, Uniform Probate Code §
21 2-704: "If a governing instrument creating a power of appointment expressly requires that the
22 power be exercised by a reference, an express reference, or a specific reference, to the power or
23 its source, it is presumed that the donor's intent, in requiring that the [powerholder] exercise the
24 power by making reference to the particular power or to the creating instrument, was to prevent
25 an inadvertent exercise of the power."

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 § 19.10 and the accompanying
29 Commentary.

30 **SECTION 305. PERMISSIBLE APPOINTMENT.**

31
32 (a) A powerholder of a general power of appointment that permits appointment to the
33 powerholder or the powerholder's estate may make an appointment in any form, including an
34 appointment in trust or creating a new power of appointment, that the powerholder could make
35 of the powerholder's own property.

36 (b) A powerholder of a general power of appointment that permits appointment only to
37 the creditors of the powerholder or of the powerholder's estate is restricted to appointing to those
38 creditors.

39 (c) Unless the terms of the instrument creating a power of appointment manifest a

contrary intent, the powerholder of a nongeneral power may:

- (1) make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;
- (2) create a general or nongeneral power in a permissible appointee; or
- (3) create a nongeneral power in an impermissible appointee to appoint to one or more of the permissible appointees of the original nongeneral power.

Comment

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

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

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

An additional example will drive home the point. A general power to appoint to the powerholder or to the powerholder's estate may purport to forbid the powerholder from imposing conditions on the enjoyment of the property by the appointee. Such a restriction is ineffective and does not prevent an appointment subject to such conditions.

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

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

1
2 Thus, unless the terms of the instrument creating the power manifest a contrary intent, the
3 powerholder of a nongeneral power has the authority to exercise the power by an appointment in
4 trust. In order to manifest a contrary intent, the terms of the instrument creating the power must
5 specifically prohibit an appointment in trust. So, for example, a power to appoint “to” the
6 powerholder’s descendants includes the authority to appoint in trust for the benefit of one or
7 more of those descendants.
8

9 Similarly, unless the terms of the instrument creating the power manifest a contrary
10 intent, the powerholder of a nongeneral power has the authority to exercise the power by creating
11 a general or nongeneral power in a permissible appointee. The rationale for this rule is a
12 straightforward application of the maxim that the greater includes the lesser. A powerholder of a
13 nongeneral power may appoint outright to a permissible appointee, so the powerholder may
14 instead create in a permissible appointee a general power or a nongeneral power. If the
15 powerholder does the latter—creates a new nongeneral power in a permissible appointee—the
16 permissible appointees of the second power may be broader than the permissible appointees of
17 the first power. For example, the powerholder of a nongeneral power to appoint among the
18 donor’s “descendants” may exercise the power by creating a nongeneral power in the donor’s
19 child to appoint to anyone in the world except the donor’s child, the estate of the donor’s child,
20 or the creditors of either. Of course, these are default rules that apply unless the donor manifests
21 a contrary intent. But in order to manifest a contrary intent, the terms of the instrument creating
22 the power must prohibit the creation of new powers. Language merely conferring the power of
23 appointment on the powerholder does not suffice.
24

25 And finally, unless the terms of the donor’s instrument creating the power manifest a
26 contrary intent, the powerholder of a nongeneral power may exercise the power by creating a
27 new nongeneral power in *any* individual to appoint to some or all of the permissible appointees
28 of the original nongeneral power. In order to manifest a contrary intent, the terms of the
29 instrument creating the power must prohibit the creation of such powers. Language merely
30 conferring the power of appointment on the powerholder does not suffice.
31

32 With one exception, the rules of this Section are consistent with, and this Comment draws
33 on, Restatement Third of Property: Wills and Other Donative Transfers §§ 19.13 and 19.14 and
34 the accompanying Commentary. The exception is that the Restatement allows a powerholder of a
35 nongeneral power to create a new nongeneral power in a permissible appointee only if the
36 permissible appointees of the new power are permissible appointees of the original power. See
37 Restatement Third of Property: Wills and Other Donative Transfers § 19.14 and *id.*, Comment
38 g(3). But this limitation is unsound. The powerholder could have given the permissible appointee
39 the property outright or a general power; so the powerholder should be able to give the
40 permissible appointee a broad nongeneral power.
41

42 **SECTION 306. APPOINTMENT TO DECEASED APPOINTEE OR**
43 **PERMISSIBLE APPOINTEE’S DESCENDANT.**

44 (a) Subject to [refer to state law on antilapse, if any, such as Sections 2-603 and 2-707 of
45 the Uniform Probate Code], an appointment to a deceased appointee is ineffective.

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

Comment

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

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

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

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

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

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

1 permissible appointee.

2
3 The rule of this Section is consistent with, and this Comment draws on, Restatement
4 Third of Property: Wills and Other Donative Transfers § 19.12 and the accompanying
5 Commentary.

6
7 **SECTION 307. IMPERMISSIBLE APPOINTMENT.**

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

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

12 **Comment**

13
14 The rules of this Section apply only to the extent the powerholder attempts to confer a
15 beneficial interest in the appointive property on an impermissible appointee. For example, a
16 nongeneral power may not be exercised in favor of the powerholder. And a nongeneral power in
17 favor of the donor's descendants may not be exercised in favor of the donor's spouse (assuming
18 the usual scenario wherein the spouse is not also a descendant).

19
20 The rules of this Section do not apply to an appointment of a *nonbeneficial* interest—for
21 example, the appointment of legal title to a trustee—if the beneficial interest is held by
22 permissible appointees.

23
24 Nor do the rules of this Section prohibit beneficial appointment to an impermissible
25 appointee if the intent to benefit the impermissible appointee is not the powerholder's but rather
26 is the intent of a permissible appointee in whose favor the powerholder has decided to exercise
27 the power. In other words, if the powerholder makes a decision to exercise the power in favor of
28 a permissible appointee, the permissible appointee may request the powerholder to transfer the
29 appointive assets directly to an impermissible appointee. The appointment directly to the
30 impermissible appointee in this situation is effective, being treated for all purposes as an
31 appointment first to the permissible appointee followed by a transfer by the permissible
32 appointee to the impermissible appointee.

33
34 The donor of a power of appointment sets the range of permissible appointees by
35 designating the permissible appointees of the power. The rule of this Section is concerned with
36 attempts by the powerholder to exceed that authority. Such an attempt is called a fraud on the
37 power and is ineffective. The term "fraud on the power" is a well-accepted term of art. See
38 Restatement Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16.

39
40 Among the most common devices employed to commit a fraud on the power are: an
41 appointment conditioned on the appointee conferring a benefit on an impermissible appointee; an
42 appointment subject to a charge in favor of an impermissible appointee; an appointment upon a
43 trust for the benefit of an impermissible appointee; an appointment in consideration of a benefit

1 to an impermissible appointee; and an appointment primarily for the benefit of the permissible
2 appointee's creditor if the creditor is an impermissible appointee. Each of these appointments is
3 impermissible and ineffective.

4
5 The rules of this Section are consistent with, and this Comment draws on, Restatement
6 Third of Property: Wills and Other Donative Transfers §§ 19.15 and 19.16 and the
7 accompanying Commentary.

8
9 **SECTION 308. SELECTIVE ALLOCATION DOCTRINE.** If a powerholder
10 exercises a power of appointment in a disposition that also disposes of owned property, the
11 owned and appointive property must be allocated in the permissible manner that best carries out
12 the powerholder's intent.

13 **Comment**

14
15 The rule of this Section is commonly known as the doctrine of selective allocation. This
16 doctrine applies if the powerholder uses the same instrument to exercise a power of appointment
17 and to dispose of property that the powerholder owns. For purposes of this Section, the
18 powerholder's will, any codicils to the powerholder's will, and any revocable trust created by the
19 powerholder that did not become irrevocable before the powerholder's death are treated as the
20 same instrument.

21
22 The doctrine of selective allocation provides that the owned and appointive property shall
23 be allocated in the permissible manner that best carries out the powerholder's intent.

24 One situation that often calls for selective allocation is when the powerholder disposes of
25 property to permissible and impermissible appointees. By allocating owned assets to the
26 dispositions favoring impermissible appointees and allocating appointive assets to permissible
27 appointees, the appointment is rendered effective.

28
29 The result of applying selective allocation is always one that the powerholder could have
30 provided for in specific language, and one that the powerholder most probably would have
31 provided for had he or she been aware of the difficulties inherent in the dispositive scheme. By
32 the rule of selective allocation, courts undertake to prevent the dispositive plan from being
33 frustrated by the ineptness of the powerholder or the powerholder's lawyer. For an early case
34 adopting selective allocation, see *Roe v. Tranmer*, 2 Wils. 75, 95 Eng. Rep. 694 (C.P. 1757).

35
36 For further discussion of selective allocation, and illustrations of its application to various
37 fact-patterns, see Restatement Third of Property: Wills and Other Donative Transfers § 19.19
38 and the accompanying Commentary. This rule of this Section is consistent with, and this
39 Comment draws on, that Restatement.

40
41 On the distinction between selective allocation (a rule of construction based on the
42 assumed intent of the powerholder) and the process sometimes known as "marshaling" (an
43 outgrowth of general equitable principles), see the Restatement Second of Property: Donative

Transfers, especially the Introductory Note to Chapter 22.

SECTION 309. CAPTURE DOCTRINE: DISPOSITION OF INEFFECTIVELY

APPOINTED PROPERTY UNDER GENERAL POWER. If a powerholder of a general power of appointment other than a power to revoke, amend, or withdraw property from a trust makes an ineffective appointment:

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

(2) if there is no gift-in-default clause or it is ineffective, the ineffectively appointed property passes to the powerholder if living or, if the powerholder is not living, to the powerholder's estate.

Comment

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

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

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

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

1 of the takers in default. But if the powerholder makes an ineffective appointment, the
2 powerholder's intent regarding the disposition of the ineffectively appointed property is
3 problematic.
4

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

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

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

22 **SECTION 310. DISPOSITION OF UNAPPOINTED PROPERTY UNDER**
23 **RELEASED OR UNEXERCISED GENERAL POWER.** If a powerholder releases or fails to
24 exercise a general power of appointment other than a power to revoke, amend, or withdraw
25 property from a trust:

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

27 (2) if there is no gift-in-default clause or it is ineffective:

28 (A) except as otherwise provided in subparagraph (B), the unappointed property
29 passes to the powerholder if the powerholder is living or, if the powerholder is not living, the
30 powerholder's estate; or

31 (B) if the powerholder released the power, the unappointed property passes under
32 a reversionary interest to the donor or the donor's transferee or successor in interest.

33 **Comment**

34

35 The rules of this Section apply to unappointed property under a general power of
36 appointment. The rules do *not* apply to unappointed property under a power of revocation,

1 amendment, or withdrawal—powers pertaining to a trust. If the powerholder releases or dies
2 without exercising a power of revocation or amendment, the power to revoke expires and, unless
3 someone else continues to have a power of revocation or amendment, the trust becomes
4 irrevocable and unamendable. If the powerholder releases or dies without exercising a power to
5 withdraw principal of a trust, the principal that the powerholder could have withdrawn, but did
6 not, remains part of the trust.

7
8 The rationale for the rules of this Section is as follows. The gift-in-default clause controls
9 the disposition of unappointed property to the extent that the clause is effective. To the extent
10 that the gift-in-default clause is nonexistent or ineffective, the disposition of the unappointed
11 property depends on whether the powerholder merely failed to exercise the power or whether the
12 powerholder released the power. If the powerholder merely failed to exercise the power, the
13 unappointed property passes to the powerholder or to the powerholder's estate. The rationale is
14 the same as when the powerholder makes an ineffective appointment. If, however, the
15 powerholder released the power, the powerholder has affirmatively chosen to reject the
16 opportunity to gain ownership of the property, hence the unappointed property passes under a
17 reversionary interest to the donor or to the donor's transferee or successor in interest.

18
19 These rules are illustrated by the following examples.

20
21 *Example 1.* D transfers property to T in trust, directing T to pay the income to S (D's son)
22 for life, with a general testamentary power in S to appoint the principal of the trust, and in default
23 of appointment the principal is to be distributed "to S's descendants who survive S, by
24 representation, and if none, to X charity." S dies leaving a will that does not exercise the power.
25 The principal passes under the gift-in-default clause to S's descendants who survive S, by
26 representation.

27
28 *Example 2.* Same facts as Example 1, except that D's gift-in-default clause covered only
29 half of the principal, and S died intestate. Half of the principal passes under the gift-in-default
30 clause. The other half of the principal passes to S's estate for distribution to S's intestate heirs.

31
32 *Example 3.* Same facts as Example 2, except that S released the power before dying
33 intestate. Half of the principal passes under the gift-in-default clause. The other half of the
34 principal passes to D or to D's transferee or successor in interest.

35
36 The rules of this Section are consistent with, and this Comment draws on, Restatement
37 Third of Property: Wills and Other Donative Transfers § 19.22 and the accompanying
38 Commentary.

39
40 **SECTION 311. DISPOSITION OF UNAPPOINTED PROPERTY UNDER**
41 **RELEASED OR UNEXERCISED NONGENERAL POWER.** If a powerholder releases or
42 fails to exercise a nongeneral power of appointment:

- 43 (1) the gift-in-default clause controls the disposition of the unappointed property; or
44 (2) if there is no gift-in-default clause or it is ineffective, the unappointed property:

1 (A) passes to the permissible appointees, if:

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

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

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

7 **Comment**
8

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

13 To the extent that the gift-in-default clause is nonexistent or ineffective, the unappointed
14 property passes to the permissible appointees of the power (including those who are substituted
15 for permissible appointees under an antilapse statute), if the permissible appointees are "defined
16 and limited" (on the meaning of this term of art, see the Comment to Section 204) and the donor
17 has not manifested an intent that the permissible appointees shall receive the appointive property
18 only so far as the powerholder elects to appoint it to them. This rule of construction is based on
19 the assumption that the donor intends the permissible appointees of the power to have the benefit
20 of the property. The donor focused on transmitting the appointive property to the permissible
21 appointees through an appointment, but if the powerholder fails to carry out this particular
22 method of transfer, the donor's underlying intent to pass the appointive property to the defined
23 and limited class of permissible appointees should be carried out. Subparagraph (2)(A)
24 effectuates the donor's underlying intent by implying a gift in default of appointment to the
25 defined and limited class of permissible appointees.
26

27 If the defined and limited class of permissible appointees is a multigenerational class,
28 such as "descendants," "issue," "heirs," or "relatives," the default rule of construction is that they
29 take by representation. See Restatement Third of Property: Wills and Other Donative Transfers §
30 14.3, Comment b. If the defined and limited class is a single-generation class, the default rule of
31 construction is that the eligible class members take equally. See Restatement Third of Property:
32 Wills and Other Donative Transfers § 14.2.
33

34 No implied gift in default of appointment to the permissible appointees arises if the
35 permissible appointees are identified in such broad and inclusive terms that they are not defined
36 and limited. In such an event, the donor has no underlying intent to pass the appointive property
37 to such permissible appointees. Similarly, if the donor manifests an intent that the defined and
38 limited class of permissible appointees is to receive the appointive property only by appointment,
39 the donor's manifestation of intent eliminates any implied gift in default to the permissible
40 appointees. Subparagraph (2)(B) responds to these possibilities by providing for a reversionary
41 interest to the donor or the donor's transferee or successor in interest.
42

1 The rules are illustrated by the following examples.

2
3 *Example 1.* D died, leaving a will devising property to T in trust. T is directed to pay the
4 income to S (D's son) for life, and then to pay the principal "to such of S's descendants who
5 survive S as S may appoint by will." D's will contains no gift-in-default clause. S dies without
6 exercising the nongeneral power. The permissible appointees of the power constitute a defined
7 and limited class. Accordingly, the principal of the trust passes at S's death to S's descendants
8 who survive S, by representation.

9
10 *Example 2.* Same facts as Example 1, except that the permissible appointees of S's power
11 of appointment are "such one or more persons, other than S, S's estate, S's creditors, or creditors
12 of S's estate." The permissible appointees do not constitute a defined and limited class.
13 Accordingly, the principal of the trust passes, at S's death, under a reversionary interest to D or
14 D's transferee or successor in interest.

15
16 The rules of this Section are consistent with, and this Comment draws on, Restatement
17 Third of Property: Wills and Other Donative Transfers § 19.23 and the accompanying
18 Commentary.

19 20 **SECTION 312. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL**

21 **APPOINTMENT TO TAKER IN DEFAULT.** Unless the terms of the instrument creating or
22 exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid
23 partial appointment to a taker in default of appointment, the taker in default of appointment may
24 share fully in unappointed property.

25 **Comment**

26
27 If a powerholder makes a valid partial appointment to a taker in default, leaving some
28 property unappointed, there is a question about whether that taker-in-default may also fully share
29 in the unappointed property. In the first instance, the intent of the *donor* controls. In the absence
30 of any indication of the donor's intent, it is assumed that the donor intends that the taker can take
31 in both capacities. This rule presupposes that the donor contemplated that the taker in default
32 who is an appointee could receive more of the appointive assets than a taker in default who is not
33 an appointee. The donor can defeat this rule by manifesting a contrary intent in the instrument
34 creating the power of appointment, thereby restricting the powerholder's freedom to benefit an
35 appointee who is also a taker in default in both capacities. If the donor has not so manifested a
36 contrary intent, the *powerholder* is free to exercise the power in favor of a taker in default who is
37 a permissible appointee. Unless the powerholder manifests a contrary intent in the terms of the
38 instrument exercising the power, it is assumed that the powerholder does not intend to affect in
39 any way the disposition of any unappointed property.

40
41 The rule of this Section is consistent with, and this Comment draws on, Restatement
42 Third of Property: Wills and Other Donative Transfers § 19.24 and the accompanying
43 Commentary.

SECTION 313. APPOINTMENT TO TAKER IN DEFAULT. If a powerholder

makes an appointment to a taker in default of appointment and the appointee would have taken the property under the gift-in-default clause had the property not been appointed, the power of appointment is deemed not to have been exercised, and the appointee takes under the clause.

Comment

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

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

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

SECTION 314. POWERHOLDER'S AUTHORITY TO REVOKE OR AMEND

EXERCISE. A powerholder may revoke or amend an exercise of a power of appointment only to the extent that:

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

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

1 **Comment**

2
3 This Section recognizes that a powerholder lacks the authority to revoke or amend an
4 exercise of the power of appointment, except to the extent that (1) the powerholder reserved a
5 power of revocation or amendment in the instrument exercising the power of appointment and
6 the terms of the instrument creating the power of appointment do not effectively prohibit the
7 reservation, or (2) the donor provided that the exercise is revocable or amendable.
8

9 A powerholder who exercises a power of appointment is like any other transferor of
10 property in regard to authority to revoke or amend the transfer. Hence, unless the powerholder
11 (or the donor) in some appropriate manner manifests an intent that an appointment is revocable
12 or amendable, the appointment is irrevocable.
13

14 The ability of an agent or guardian to revoke or amend the exercise of a power of
15 appointment on behalf of a principal or ward is determined by other law, such as the Uniform
16 Power of Attorney Act or the Uniform Guardianship and Protective Proceedings Act.
17

18 The rule of this Section is essentially consistent with, and this Comment draws on,
19 Restatement Third of Property: Wills and Other Donative Transfers § 19.7 and the
20 accompanying Commentary.
21

22 **[ARTICLE] 4**

23 **DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT**

24 **SECTION 401. DISCLAIMER.**

25 (a) In this section, “appointee” means a person to which a powerholder makes an
26 appointment of appointive property.

27 (b) As provided by [cite state law on disclaimer or the Uniform Disclaimer of Property
28 Interests Act]:

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

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

32 **Comment**

33
34 A prospective powerholder cannot be compelled to accept the power of appointment, just
35 as the prospective donee of a gift cannot be compelled to accept the gift.
36

37 A disclaimer is to be contrasted with a release. A release occurs after the powerholder
38 accepts the power. A disclaimer prevents acquisition of the power, and consequently a

1 powerholder who has accepted a power can no longer disclaim.

2
3 Disclaimer statutes frequently specify the time within which a disclaimer must be made.
4 The Uniform Disclaimer of Property Interests Act (1999) (UDPIA) does not specify a time limit,
5 but allows a disclaimer until a disclaimer is barred (see UDPIA § 13).
6

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

12 A partial disclaimer of a power of appointment leaves the powerholder possessed of the
13 part of the power not disclaimed.
14

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

19 The ability of an agent or guardian to disclaim on behalf of a principal or ward is
20 determined by other law, such as the Uniform Power of Attorney Act or the Uniform
21 Guardianship and Protective Proceedings Act.
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 **SECTION 402. AUTHORITY TO RELEASE.** A powerholder may release a power
28 of appointment, in whole or in part, except to the extent that the terms of the instrument creating
29 the power prevent the release.

30 **Comment**

31
32 Whether a power of appointment is general or nongeneral, presently exercisable or
33 testamentary, the powerholder has the authority to release the power in whole or in part, in the
34 absence of an effective restriction on release imposed by the donor. A partial release is a release
35 that narrows the freedom of choice otherwise available to the powerholder but does not eliminate
36 the power. A partial release may relate either to the manner of exercising the power or to the
37 persons in whose favor the power may be exercised.
38

39 If the powerholder did not create the power, so that the powerholder and donor are
40 different individuals, the donor can effectively impose a restraint on release, but the donor must
41 manifest an intent in the terms of the creating instrument to impose such a restraint.
42

43 If the powerholder created the power, so that the powerholder is also the donor, the
44 donor/powerholder cannot effectively impose a restraint on release. A self-imposed restraint on

1 release resembles a self-imposed restraint on alienation, which is ineffective. See, for example,
2 Restatement Third of Trusts § 58.

3
4 If the exercise of a power of appointment requires the action of two or more individuals,
5 each powerholder has a power of appointment. If one but not the other joint powerholder releases
6 the power, the power survives in the hands of the nonreleasing powerholder, unless the
7 continuation of the power is inconsistent with the donor's purpose in creating the joint power.
8 See Restatement Third of Property: Wills and Other Donative Transfers § 20.1, Comment f.

9
10 The ability of an agent or guardian to release a power of appointment on behalf of a
11 principal or ward is determined by other law, such as the Uniform Power of Attorney Act or the
12 Uniform Guardianship and Protective Proceedings Act.

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 §§ 20.1 and 20.2 and the accompanying
16 Commentary.

17 18 **SECTION 403. METHOD OF RELEASE.**

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

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

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

25 (2) if the terms of the instrument creating the power do not provide a method or
26 the method provided in the terms of the instrument is not expressly made exclusive, by a record
27 manifesting clear and convincing evidence of the powerholder's intent.

28 **Comment**

29
30 A powerholder may release the power of appointment by substantial compliance with the
31 method specified in the terms of the instrument creating the power or any other method
32 manifesting clear and convincing evidence of the powerholder's intent. Only if the method
33 specified in the terms of the creating instrument is made exclusive is use of the other methods
34 prohibited. Even then, a failure to comply with a technical requirement, such as required
35 notarization, may be excused as long as compliance with the method specified in the terms of the
36 creating instrument is otherwise substantial.

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

12
13 The text of this Section is based on Uniform Trust Code § 602(c). The rule of this Section
14 is fundamentally consistent with, and this Comment draws on, Restatement Third of Property:
15 Wills and Other Donative Transfers § 20.3 and the accompanying Commentary.

16 17 **SECTION 404. REVOCATION OR AMENDMENT OF RELEASE. A**

18 powerholder may revoke or amend a release of a power of appointment only to the extent that:

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

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

22 **Comment**

23 A release is typically irrevocable. If a powerholder wishes to retain the power to revoke
24 or amend the release, the powerholder should so indicate in the instrument executing the release.

25
26 The ability of an agent to revoke or amend the release of a power of appointment on
27 behalf of a principal is determined by other law, such as the Uniform Power of Attorney Act.

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 §§ 20.1 and 20.2 and the accompanying
31 Commentary.

32 33 **SECTION 405. POWER TO CONTRACT: PRESENTLY EXERCISABLE**

34 **POWER OF APPOINTMENT.** A powerholder of a presently exercisable power of
35 appointment may contract:

36 (1) not to exercise the power; or

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

impermissible appointee.

Comment

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

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

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

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

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

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

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

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

Comment

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

1 have amended the trust to change the power onto one that is presently exercisable.

2
3 In all other cases, the donor of a power not presently exercisable has manifested an intent
4 that the selection of the appointees and the determination of the interests they are to receive are
5 to be made in the light of the circumstances that exist on the date that the power becomes
6 exercisable. Were a contract to be enforceable, the donor's intent would be defeated.

7
8 The ability of an agent or guardian to contract on behalf of a principal or ward is
9 determined by other law, such as the Uniform Power of Attorney Act or the Uniform
10 Guardianship and Protective Proceedings Act.

11
12 The rule of this Section is consistent with, and this Comment draws on, Restatement
13 Third of Property: Wills and Other Donative Transfers § 21.2 and the accompanying
14 Commentary.

15
16 **SECTION 407. REMEDY FOR BREACH OF CONTRACT TO APPOINT OR**
17 **NOT TO APPOINT.** The remedy for a powerholder's breach of an enforceable contract to
18 appoint or not to appoint is limited to damages payable out of the appointive property or, if
19 appropriate, specific performance of the contract.

20 **Comment**

21 This Section sets forth a rule on remedy. The remedy for a powerholder's breach of an
22 enforceable contract to appoint, or not to appoint, is limited to damages payable out of the
23 appointive property or, if appropriate, specific performance. The powerholder's owned assets are
24 not available to satisfy a judgment for damages. For elaboration and discussion, see Restatement
25 Third of Property: Wills and Other Donative Transfers §§ 21.1 and 21.2, and especially id., §
26 21.1, Comments c and d. This Section does not address the *amount* of damages, which is
27 determined by other law of the state, such as contract law.

28
29 **[ARTICLE] 5**

30 **RIGHTS OF POWERHOLDER'S CREDITORS IN APPOINTIVE PROPERTY**

31 **SECTION 501. GENERAL POWER CREATED BY POWERHOLDER.**

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

35 (b) Subject to subsections (c) and (d), and notwithstanding the presence of a spendthrift
36 provision or whether the claim arose before or after the creation of the power of appointment,

1 appointive property subject to a general power of appointment created by the powerholder is
2 subject to a claim of a creditor of:

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

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

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

12 (d) A creditor of a powerholder or the powerholder's estate may reach appointive
13 property subject to a general power of appointment created by the powerholder to the extent
14 provided in [cite state law on fraudulent transfers or the Uniform Fraudulent Transfers Act].

15 **Comment**

16
17 Subsection (b) states the basic rules of this Section. If an individual retains a presently
18 exercisable general power of appointment over property the individual owned, public policy does
19 not allow this formal change in the control of the property to put the property beyond the reach
20 of the donor/powerholder's creditors. Thus, appointive property subject to a presently
21 exercisable general power of appointment created by the powerholder is subject to a claim of—
22 and is reachable by—a creditor of the powerholder to the same extent as if the powerholder
23 owned the appointive property. If the powerholder retains a general power of appointment
24 exercisable at death, the appointive property is subject to a claim of—and is reachable by—a
25 creditor of the donor/powerholder's estate to the extent the estate is insufficient, subject to the
26 decedent's right to direct the source from which liabilities are paid. For the same rules in the
27 context of a retained power to revoke a revocable trust, see Uniform Trust Code § 505(a).

28
29 The application of these rules is not affected by the presence of a spendthrift provision
30 nor by whether the claim arose before or after the creation of the power of appointment. See
31 Restatement Third of Property: Wills and Other Donative Transfers § 22.2, Comment a.

32
33 Subsection (a) enables the rule of subsection (b) to apply even if the general power was
34 not created in a transfer made by the powerholder. The rule will apply to the extent the

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

4
5 *Example 1.* D purchases Blackacre from A. Pursuant to D's request, A transfers Blackacre
6 "to D for life, then to such person as D may by will appoint." The rule of subsection (b) applies to
7 D's general testamentary power, though in form A created the power.

8
9 *Example 2.* A by will transfers Blackacre "to D for life, then to such persons as D may by
10 will appoint." Blackacre is subject to mortgage indebtedness in favor of X in the amount of
11 \$10,000. The value of Blackacre is \$20,000. D pays the mortgage indebtedness. The rule of
12 subsection (b) applies to half of the value of Blackacre, though in form A's will creates the general
13 power in D.

14
15 *Example 3.* D, an heir of A, contests A's will on the ground of undue influence on A by the
16 principal beneficiary under A's will. The contest is settled by transferring part of A's estate to
17 Trustee in trust. Under the trust, Trustee is directed "to pay the net income to D for life and, on D's
18 death, the principal to such persons as D shall by will appoint." The rule of subsection (b) applies
19 to the transfer in trust, though in form D did not create the general power.

20
21 Subsection (c) states an important exception. An irrevocable exercise of the general
22 power by the donor/powerholder in favor of someone other than the powerholder or the
23 powerholder's estate eliminates the applicability of the rule of subsection (b) to the extent of the
24 appointive assets appointed by the exercise of the power. The rule relating to fraudulent transfers
25 (subsection (d)), however, remains applicable to the exercise of the power.

26 With one exception, the provisions of this Section are consistent with, and this Comment
27 draws on, Restatement Third of Property: Wills and Other Donative Transfers § 22.2 and the
28 accompanying Commentary. The exception is that this Section provides that creditors may
29 pursue claims against the estate only to the extent the estate is insufficient and subject to the
30 decedent's right to direct the source from which liabilities are paid. These provisions are
31 designed to be consistent with Uniform Trust Code § 505(a).

32 33 **SECTION 502. GENERAL POWER NOT CREATED BY POWERHOLDER.**

34 (a) In this section, "ascertainable standard" means a standard relating to an individual's
35 health, education, support, or maintenance within the meaning of 26 U.S.C. Section
36 2041(b)(1)(A) or 26 U.S.C. Section 2514(c)(1), [on the effective date of this [act]] [as amended].

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

40 (1) the powerholder, to the extent the powerholder's property is insufficient, if the

1 power is presently exercisable; and

2 (2) the powerholder's estate, to the extent the estate is insufficient, if the power is
3 exercisable at death.

4 (c) Subject to Section 504(c), a power of appointment created by a person other than the
5 powerholder subject to an ascertainable standard is treated for purposes of this [article] as a
6 nongeneral power.

7 **Comment**

8
9 Subsection (b) reaffirms the fundamental principle that a presently exercisable general
10 power of appointment is an ownership-equivalent power. Consequently, subsection (b) provides
11 that property subject to a presently exercisable general power of appointment is subject to the
12 claims of the powerholder's creditors, to the extent that the powerholder's property is
13 insufficient. Furthermore, upon the powerholder's death, property subject to a general power of
14 appointment exercisable by the powerholder at death (e.g., in the powerholder's will) is subject
15 to creditors' claims against the powerholder's estate to the extent that the estate is insufficient. In
16 each case, whether the powerholder has or has not purported to exercise the power is immaterial.

17
18 Subsection (c) states an important exception. If the power is subject to an ascertainable
19 standard, the power is treated for purposes this article as a nongeneral power, and the rights of
20 the powerholder's creditors in the appointive property are governed by Sections 504(a) and (b).

21 22 **SECTION 503. POWER TO WITHDRAW.**

23 (a) For purposes of this [article], a power to withdraw property from a trust is treated,
24 during the time the power may be exercised, as a presently exercisable general power of
25 appointment to the extent of the property subject to the power to withdraw.

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

1 **Comment**

2
3 Subsection (a) treats a power of withdrawal as the equivalent of a presently exercisable
4 general power of appointment, because the two are ownership-equivalent powers. Upon the
5 lapse, release, or waiver of the power of withdrawal, subsection (b) follows the lead of Uniform
6 Trust Code § 505(b)(2) in creating an exception for property subject to a Crummey or five and
7 five power: the holder of the power of withdrawal is treated as a powerholder of a presently
8 exercisable general power of appointment only to the extent that the value of the property
9 affected by the lapse, release, or waiver exceeds the greater of the amount specified in Internal
10 Revenue Code §§ 2041(b)(2) and 2514(e) [greater of 5% or \$5,000] or § 2503(b) [\$13,000 in
11 2012].
12

13 **SECTION 504. NONGENERAL POWER.**

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

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

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

24 **Comment**

25
26 Subsection (a) states the general rule of this Section. Appointive property subject to a
27 nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the
28 powerholder's estate. The rationale for this general rule is that a nongeneral power of
29 appointment is not an ownership-equivalent power, so the powerholder's creditors have no claim
30 to the appointive assets.
31

32 Subsection (b) addresses an important exception: the fraudulent transfer. A fraudulent
33 transfer arises if the powerholder formerly owned the appointive property covered by the
34 nongeneral power and transferred the property in fraud of creditors, reserving the nongeneral
35 power. In such a case, the creditors can reach the appointive property under the rules relating to
36 fraudulent transfers.
37

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

6
7 The rules of this Section are consistent with, and this Comment draws on, Restatement
8 Third of Property: Wills and Other Donative Transfers § 22.1 and the accompanying
9 Commentary.

10 11 **[ARTICLE] 6**

12 **MISCELLANEOUS PROVISIONS**

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

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

22 **SECTION 603. REPEALS.** The following are repealed:

23 **SECTION 604. EFFECTIVE DATE.** This [act] takes effect